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Constitutional Review as a Democratic Instrument

Kriszta Kovács¹ and Gábor Attila Tóth²

Rosalind Dixon's *Responsive Judicial Review* is an illuminating book.³ Readers can learn a lot from it about the pressing issues of constitutional review, and it also challenges thinking on judicial engagement in many respects. It is a great virtue of this book that it raises several fundamental issues that have long been the focus of constitutional theorizing – namely, the justification and function of constitutional review – from a new prism, the prism of the recent democratic backsliding. Another important virtue of this book is that it gives the existing institutional variables due regard. In what follows, we will seek to situate the book in constitutional legal literature (Part 1) and engage with its central message by introducing the idea of courts as sites of participatory and representative democracy (Part 2). Finally, we will take the example of the Hungarian Constitutional Court to support the claim that constitutional review can be seen as a democratic instrument (Part 3). We will do this by using the term constitutional review instead of judicial review to emphasize that the focus is on a procedure by which a court can review legislation for its constitutionality and not (or not only) an administrative action of a public body.

1. Constitutional Review in a Well-functioning and a Declining Democracy

Who should be the guardian of the constitution? What institution should have the “final say” in matters of constitutional justice? Is it justified for courts to use constitutional review to safeguard the constitution? These are pressing questions of constitutional theory that have long captured the imagination of legal scholars and philosophers. Although there is agreement among scholars that democratic majority rule is limited by a commitment to fundamental rights, rival theories have revolved around judicial interpretive authority and its mandate to review the constitutionality of legislative acts.

In her book, Rosalind Dixon suggests that John Hart Ely was among the first scholars to offer a justification for constitutional review in his major work *Democracy and Distrust*.⁴ Dixon builds on Ely's political process theory and the idea of representation-reinforcing judicial review, but she introduces a new political process theory. This new theory aims to be comparative, sociologically informed and more fluid with regard to procedural and substantive conceptions of democracy. Dixon calls it a responsive theory of judicial review, that is, a form of constitutional review that promotes democratic responsiveness.

The responsive theory of judicial review aims to combine what Rosalind Dixon has labelled a thin and thick conception of democracy. It suggests that a broader form of judicial review is needed than the restrained and deferential forms suggested by Ely. First, because, according to Dixon, the threat to democracy is much graver today than it was at the time when Ely published his seminal work, so

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³ Rosalind Dixon, *Responsive Judicial Review. Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, 2023).

⁴ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, Mass., 1980).

courts should have greater room for manoeuvre to protect what she calls the democratic minimum core: free and fair multiparty elections, political rights and freedoms, and minimum institutional checks and balances.⁵ Second, the broader form of review is justified by the various malfunctions in constitutional democracies. The author understands constitutional review as an institution aiming to counter democratic backsliding and democratic dysfunction (blockages and pathologies). In this sense, constitutional review aims at safeguarding democracy; hence, according to Dixon, the judicial intervention that safeguards the larger constitutional order can be justified.⁶ In addition, the review is an institution that seeks to improve the functioning and ameliorate the failures of otherwise democratic institutions.

Rosalind Dixon's work demonstrates that every generation must fight the same battle again and again, and old questions need to be re-examined in the search for new approaches. Ely's work is old enough to be considered a classic, while his major and most influential critic, Ronald Dworkin,⁷ is no longer contemporary⁸ but not yet a classic in the way Ely is,⁹ so his influence may not yet be as prominent now as it could be in the future.

The debate between Ely and Dworkin can be described not only in terms of thin and thick conceptions of democracy but also in terms of the dichotomy between procedural and substantive elements of democratic constitutionalism best described using the language of John Rawls: "Ideally a just constitution would be a just procedure arranged to ensure a just outcome. The procedure would be the political process governed by the constitution, the outcome the body of enacted legislation, while the principles of justice would define an independent criterion for both procedure and outcome."¹⁰ In this conceptual sense, Ely is rather a proceduralist believing that a just procedure itself may justify the outcome. Dworkin, by contrast, argues that there are independent moral and legal criteria for the outcome.

Ely understands constitutional review as a representation-reinforcing institution and suggests a process-based constitutional review that focuses on the ordinary democratic decision-making procedure and not on the outcome of the legislative process. In his view, the main task of constitutional judges is to check whether the procedural rules on the legislative authority, competencies, etc. are properly followed during the legislative process. This process-based review safeguards free speech in so far as it ensures that democratic deliberative processes prevail and acts

⁵ Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment," 13(3) *International Journal of Constitutional Law* (2015), 606–638.

⁶ Like in the case of the Colombian Constitutional Court that disapproved a constitutional amendment to permit a three-term president. For more on how constitutional courts can protect the integrity of democratic institutions, see also Samuel Issacharoff, "Courts as Guarantors of Democracy" in *Constitutionalism, New Insights* (eds) Alejandro Linares-Cantillo, Camilo Valdivieso-Leon, Santiago García-Jarmillo (Oxford, Oxford University Press, 2021), 123–135.

⁷ Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, Mass., 1985), 72–103. For another critique see Laurence H Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" 89 *Yale Law Journal* (1980), 1063.

⁸ See, for example, the 2003 special issue of the *International Journal of Constitutional Law* (1)4 dedicated to a debate about Ronald Dworkin's influence on constitutional jurisprudence and Dworkin's responses to the comments. See also Justine Burley (ed), *Dworkin and His Critics: With Replies by Dworkin* (Blackwell Publishing, Malden, Mass., 2004).

⁹ Recently, constitutional scholars have used Ely's theory as a starting point and transplanted it to the global context. For more on this, see Rosalind Dixon and Michaela Hailbronner, "Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On" 19(1) *International Journal of Constitutional Law* (2021), 427.

¹⁰ John Rawls, *A Theory of Justice: Revised Edition* (The Belknap Press of Harvard University, Cambridge, Mass., 1971), 173.

as a guardrail against voter suppression. And the review process protects “discrete and insular minorities” because historical patterns of discrimination can distort the democratic process.

Ronald Dworkin depicts constitutional review differently. For Dworkin, the central question is which institution (the legislature or the court) is better placed to get the constitutional outcome, for instance, issues related to reproductive rights, free speech, religion, and affirmative action, right. He focuses on substantive constitutional matters and claims that constitutional review can deliver better decisions on matters of substantive justice and rights and believes that courts have a comparative advantage (compared to parliamentary majorities) in getting these matters right. In his normative account, Dworkin calls Hercules a model of a perfect judge, who, in deciding hard cases, seeks to consider two interpretive dimensions: what is accepted as settled law (“fit”) and what is in concordance with substantive political morality in a constitutional democracy (“justification”). So, the judge must consider what judgment fits the landscape and what normative theory best justifies the existing law.¹¹ Dworkin asserts that when we look at the institution of the legislature and the institution of a court, the historical evidence, at least in certain liberal democratic jurisdictions, has shown that courts more often get it right on questions involving moral rights. Thus, we have good reason to trust courts more.

Interestingly, Rosalind Dixon, in her book, makes even greater normative, interpretive demands on the judge than Dworkin does. While Rosalind Dixon’s judge cannot escape the Herculean tasks, she faces a further challenge. To determine the breadth or strength of the review, the judge must consider what democracy is and whether democracy is structurally and functionally threatened in a particular place and time or whether the problem is just an unconstitutional norm, an isolated wrong, that needs to be invalidated or corrected. While Rosalind Dixon mentions the name of Hercules in his book, it might be more fruitful to study the dilemma of Siegfried, the metaphorical judge in a non-democratic system.¹²

During the interpretive process, judges (and constitutional scholars) may draw some valuable lessons from historical examples. The need for a justification of constitutional review already emerged in the early 20th century. Constitutional review and constitutional backsliding have their roots in pre-World War II Europe. Austria and Czechoslovakia established the first Constitutional Courts in Europe, and Hans Kelsen, a leading Austrian legal theorist and one of the justices of the Austrian Constitutional Court, offered a legal positivist justification for the constitutional court as the enforcer of the norm hierarchy and the guardian of democracy. During that period, the social and political circumstances in Austria and Germany were much more dramatic than those in the United States after World War II, in which the Ely-Dworkin debate took place.

In 1927, a landmark decision of the Austrian Constitutional Court recognizing special dispensation for impediments to marriage, the only way for Catholics to remarry,¹³ led to severe consequences. The independent Constitutional Court was attacked, packed, and then shut down, the Constitution was changed in an autocratic way, and Kelsen, himself of Jewish origin, was forced to leave the country and move to Germany.

In Weimar-era Germany, in 1932, the President of the Reich issued emergency decrees lifting a variety of bans on the Nazi paramilitary SA and SS groups, a prohibition on state governments from

¹¹ Ronald Dworkin, *Law’s Empire* (The Belknap Press of Harvard University, Cambridge, Mass., 1986), 239ff.

¹² Dworkin, *Ibid.*, 104–107.

¹³ Austrian Constitutional Court: 5 November 1927, VfSlg 878.

restoring the ban, and on a prohibition on the government of the Reich to usurp the anti-Nazi Prussian government's powers. In its fateful judgement,¹⁴ the German Constitutional Court (*Staatsgerichtshof für das Deutsche Reich*), by declaring the latest move constitutional, effectively gave the President and government of the Reich a free hand and was thus instrumental in the destruction of the Weimar Republic.¹⁵

This judgment illustrates the nature and stakes of the famous debate between Hans Kelsen, Hermann Heller, and Carl Schmitt on the guardians of the constitution.¹⁶ Kelsen and Heller had, for many years, been chief targets of Schmitt, who asserted that the head of state was the true guardian of the constitution. Ultimately, Schmitt's concept triumphed; the Führer became the guardian of the constitution, leaving no place for independent institutions like the Constitutional Court, while Kelsen, whose positivism offered no adequate legal tools against a Nazi seizure of power, had to emigrate further to the West.

History teaches us that without a broader form of constitutional review, democracy is more vulnerable. Yet we believe that a broader scope of review can not only be justified by the severe threat to democracy. Notwithstanding the political circumstances in which the court functions, a lawfully established, staffed, accessible, yet reasonably self-restraining constitutional court with the power of procedural and substantive review can be understood as a democratic institution.

2. Democratic Self-government and Constitutional Review

Contemporary constitutionalists endorse collective self-government and understand democracy as collective self-government of free and equal persons. Though they agree that fundamental rights remove certain ways of promoting the collective good, there is a disagreement on who should have the final say on these fundamental rights.

According to Jeremy Waldron, the legislature should adopt acts by the majority of democratically elected representatives, even on substantive fundamental rights. Its power must not be limited by constitutional review; otherwise, the judgment of the non-elected and unaccountable judges who exercise constitutional review would bind the citizenry and not the decisions of the representatives elected by and accountable to the citizens. Given that the community is divided by a good-faith disagreement on the meaning of the good life, when a court invalidates a piece of legislation, it substitutes the value judgment of the majority of the accountable representatives with that of its own. In other words, the voice of the minority cannot be worth more than that of the majority.¹⁷

Not too far from this understanding, Mark Tushnet argues in his book *Taking Back the Constitution* that constitutional review is anti-democratic because courts, as non-representative institutions, are

¹⁴ Preussen contra Reich vor dem Staatsgerichtshof: Stenogrammbereich der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14. und vom 17. Oktober 1932 (Glashütten im Taunus, 1976).

¹⁵ David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford University Press, Oxford, 2003), 28–37.

¹⁶ In the early 20th century, they engaged in a debate on which institutions is best to guardian the constitution. Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit [1927]," in Peter Häberle (ed.), *Verfassungsgerichtsbarkeit* (Wissenschaftliche Buchgesellschaft, Darmstadt, 1976). Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck, Tübingen, 2019). Carl Schmitt, *Der Hüter der Verfassung* (Duncker&Humblot, Berlin, [1931] 1996). Herman Heller, *Gesammelte Schriften* (Mohr Siebeck, Tübingen, 1992).

¹⁷ Jeremy Waldron, *Law and Disagreement* (Clarendon Press, Oxford, 1999); and a partly revisited view, Jeremy Waldron, "The Core of the Case Against Judicial Review," 115(6) *Yale Law Journal* (2006), 1346–1406. This is one approach to the principle of equal dignity.

institutions that infringe upon popular sovereignty. There is a cleavage between the people and the political elite, and Tushnet juxtaposes “popular constitutionalism” with judicial supremacy, which “expresses a commitment to government by elites”.¹⁸

Building on these arguments, Rosalind Dixon likewise does not question the sharp contrast between constitutional review and democracy. She understands courts as non-representative institutions, though she acknowledges in a note that courts can provide an avenue for citizens to have their voices heard through constitutional litigation.¹⁹ And it is this very point, namely that the court is a forum for democratic participation that needs to be amplified.

The assumption underlying the view that understands courts as non-democratic institutions is that the majoritarian principle is at the heart of the definition of democracy. However, building the concept of democracy around the majority premise is not inevitable. As a famous rival approach, one may consider Dworkin’s normative conception of democracy, in which citizens “rule their officials” and see themselves as “a partner in the venture of collective self-government”. In this scheme, treating every person as equal is not just a necessary but also a sufficient condition for collective self-government. And since constitutional review may increase the probability that the laws of the land respect the equal status of all, which is the ultimate aim of any political community, constitutional review may enhance rather than diminish the democratic nature of collective decisions. Dworkin does not say that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. However, he insists that having a constitutional review does not anti-democratic per se.²⁰

János Kis goes even further by presenting the following argument: Representative government subject to constitutional review by a judicial body cannot only be more just for the right-bearing individuals than representative government left to its own devices; it can also be more democratic. And that is because “the competitive character of politics under a representative government gives a reason, from time to time, for legislative majorities to make unfair decision, even if they are firmly committed to the ideal of fairness and equality”.²¹ For instance, when a majority political group in parliament concludes that deferring to mistaken beliefs of the constituency is preferable to an electoral defeat. And as Kis puts it, when such a mistake affects the fundamental rights of even a single citizen, the citizen has a serious complaint with a force to override the incidental collective benefits from the mistaken decision. Because democratic self-government depends on each citizen being treated equally, the self-governance character of the community is, to that extent, compromised.²² Moreover, in modern societies, there are historically dominant groups that have sufficient means to assert their positions. Under these circumstances, it is systematically more difficult to win a majority for issues affecting permanent minority groups. Therefore, members of such groups are only treated equally in the decision-making process if fundamental rights are given special, institutional protection and their regulation is not left to simple majority decision-making.

¹⁸ Mark Tushnet, *Taking Back the Constitution: Activist Judges and the Next Age of American Law* (Yale University Press, New Haven, Ct., 2020).

¹⁹ Dixon, *op.cit.* note 3, Chapter 5 and footnote 83.

²⁰ Ronald Dworkin, “Introduction: The Moral Reading and the Majoritarian Premise,” in Ronald Dworkin, *Freedom’s Law* (Harvard University Press, Cambridge, Mass., 1996), 7. See also Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, Cambridge, Mass., 2011), 483–485.

²¹ János Kis, “Constitutional Precommitment Revisited,” 40(4) *Journal of Social Philosophy* (2009), 570–594, at 589.

²² *Ibid.*, 588.

So, it is the democratic self-government itself that requires institutions with authority over the elected representatives in order to enforce fundamental rights. Kis trusts constitutional review because, not being accountable to the legislature, judges “are free from institutional incentives to defer to the views of the majority of the representatives”²³ and because courts are accessible to individuals in a way representatives are not. It is this second reason that we elaborate on further.

Constitutional courts that are accessible to individual plaintiffs and minority groups can serve as vital *public participatory* tools that give the people the right to play a meaningful role in collective self-governance beyond voting in elections.²⁴ Having a standing for litigation means that the review can be understood as a platform for the people to challenge rules that ought to bind them. The review can allow people to contest and voice their concerns about political decisions based on their beliefs and deep determinations.²⁵ As litigants, they have procedural rights to substantiate their claims, and the burden is on the court to give the public reason for its judgment.

If both the law on constitutional review and the body exercising the review are based on these ideas and treat each person with equal concern and respect, constitutional review can actually serve as a democratic institution. And if we think about constitutional review this way, giving the people the right to challenge political decisions before the courts is a way of including them in democratic self-government.

Contemporary societies are complex, so perhaps a complex institutional setting and not just one *representative* institution can serve these societies better.²⁶ Collective self-government cannot be identified with a single representative institution. Although in a slightly different manner than the legislature, the court can also be seen as a representative body. Mattias Kumm points out that courts are volitionally representative since they “derive their authority from a chain of legitimation that is ultimately anchored in ‘the people’”.²⁷ He also contends that courts can claim argumentative representativeness in virtue of the arguments they justify their judgments and vicarious representativeness, which concerns their embeddedness in the constitutional system, specifically, the various constitutional mechanisms that allow political branches to challenge court decisions.²⁸

Of course, legislatures and courts focus on different issues. Legislatures may make decisions that involve balancing fundamental rights, and the function of courts is to review whether the legislature acted within the boundaries of reasonable interpretations of those rights. The task of the courts is

²³ *Ibid.*, 589.

²⁴ In this endeavour, Jürgen Habermas can lend us a helping hand with his model of discourse between judicial and representative bodies: Jürgen Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, Berlin, 1992).

²⁵ In a similar vein, Mattias Kumm argues that the right to contest in constitutional review settings is at least as empowering as the right to vote. Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,” 4(2) *Law and Ethics of Human Rights* (2010), 140–175, at 168. Mattias Kumm, “Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review” 1(2) *European Journal of Legal Studies* (2007), 1–32.

²⁶ Albeit from a different angle, Avihay Dorfman and Alon Harel also suggest that a plurality of institutions can protect individual freedoms and sustain democracy better than a single-institution system of representative governance. Avihay Dorfman and Alon Harel, *Reclaiming the Public* (Cambridge University Press, Cambridge, forthcoming 2024) Chapter 3. The manuscript is on file with the authors.

²⁷ Mattias Kumm, “On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence” in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, Cambridge, 2019) 281–291.

²⁸ *Ibid.*, 287–291. Please note that Kumm also holds courts identarian representative as long as various social groups are represented on the bench.

to assess whether the acts undertaken by the legislature were done within their legitimate authority, given fundamental rights as their constraints. The following section gives an example to support the claim that courts can be participatory and representative institutions and that constitutional review can be a democratic instrument.

3. Public Access to Constitutional Court: The Case of Hungary

We offer an example from East-Central Europe, where democratization coincided with the birth of accessible constitutional review and where, recently, the decay of democracy has been accompanied by the decline of constitutional review. The example of the Hungarian Constitutional Court may demonstrate that a constitutional court can serve as a democratic institution and gain sociological legitimacy²⁹ if it is accessible to the public and exercises broad constitutional review. By the same measure, court can lose public support if there is no reasonable and effective public access to constitutional review and the court opts not to engage in meaningful constitutional review and not to protect the individuals' human rights.

As a member of the third generation of European constitutional courts, the Hungarian institution followed the modern constitutional model of democratic change. Famously, the Austrian, German, and Italian constitutional courts were (re)established after the fall of totalitarian regimes in the late 1940s and the early 1950s; the Spanish and Portuguese courts were set up after the fall of the regimes of Franco and Salazar in the late 1970s. These were followed by the constitutional courts of post-Soviet democracies, along with — among others — the post-autocratic Constitutional Court of Korea and the post-apartheid South African Constitutional Court, from the early 1990s. Finally, after the bloody breakup of Yugoslavia, the newly independent states established their own constitutional institutions, including constitutional courts.³⁰

Judicial protection of the constitution in Hungary and elsewhere in the region was closer to the centralized German model than to the US judicial review.³¹ This meant that under the first Hungarian democratic constitution adopted in 1989–1990, the Constitutional Court was institutionally separated from the ordinary court system and had unique *erga omnes* constitutional interpretative authority. The most frequently used competence of the Constitutional Court was the abstract ex post constitutional review of legal rules. Anyone was entitled to bring an action without limitation; there were no deadlines to be observed, nor was the applicant required to show any impact or other legally protected interest (*actio popularis*). Moreover, the Constitutional Court could review individual petitions alleging that the court had applied an unconstitutional law during the proceeding. Thus, in a concrete dispute ending in a judicial decision, the law applied could be reviewed but not the judicial decision itself (normative constitutional complaint). The case might be re-opened if the Constitutional Court concluded that an unconstitutional law had been applied.

²⁹ The sociological sense of legitimacy based upon the works of Max Weber emphasizes that a significant part of the population should deem the power—in this case, the power exercised by the Constitutional Court—to be justified. Kriszta Kovács, “Changing Constitutional Identity via Amendment” in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (Routledge, London, 2018), 199–216, 209.

³⁰ Originally, Favoreu distinguished “three waves” of constitutional justice. Louis Favoreu, *Les Cours Constitutionnelles* (Presses Universitaires de France, Paris, 1986). See also Louis Favoreu and Wanda Mastor, *Les cours constitutionnelles. Connaissance du droit* (Dalloz, Paris, 2011) As for the first three generations of constitutional courts, see László Sólyom, “The Role of Constitutional Courts in the Transition of Democracy: With Special Reference to Hungary” 18 *International Sociology* (2003), 133–161, at 135.

³¹ From a theoretical and a critical point of view, see Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of central and Eastern Europe* (Springer, Berlin, 2005). See also Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, Chicago, IL, 2000).

There were various factors involved in the rise of constitutional justice in Hungary. One of those factors was that the Constitutional Court was the main force of constitutional consolidation because it imported the standards of both apex courts from mature liberal democracies and international human rights institutions. Another crucial factor was that the Constitutional Court became one of the sites of participatory democracy. Following the initial landmark judgements, people started to trust this new institution and frequently turned to the Constitutional Court. The vast majority of Constitutional Court proceedings fell into the *actio popularis* category.³² The participation of public watchdog institutions and non-governmental organizations through constitutional review also played an important role in transforming the legal system.

Through *actio popularis*, the constitutional review became an accessible and essential means to undo or replace Soviet-type autocratic institutional norms and laws violating fundamental rights.³³ *Actio popularis* served as a vehicle for the participation of the economically or socially vulnerable or of insular minorities. But it was also a mechanism for systemic review: The mechanism made it possible to address structural problems in the legal order. Among other actions, the Constitutional Court abolished the death penalty, extended freedom of expression, introduced civil partnership for same sex couples, pushed legislation favouring vigorous personal data protection, and deemed an economic austerity package unconstitutional in the name of the rule of law.³⁴ The early decisions interpreting the constitution also restructured the separation of powers by curtailing the powers of the President of the Republic, maintaining that the constitution provided a pure parliamentary system and that the government was the sole executive branch.³⁵

Though the court maintained that it had the final say in constitutional matters, it would be a gross simplification to call the adjudication of the Constitutional Court elite driven. It was, in fact, the public initiatives of the electorate and its organizations, and the interplay between the legislature and the constitutional court that shaped Hungary's constitutional democratic order. Despite all its shortcomings and flaws, it was deliberative democracy in action.

A radical shift happened in 2010 when the then-opposition party Fidesz won a landslide majority. Popular support and a disproportionate electoral structure had ensured the new government two-thirds of the seats in the parliament. It was a parliamentary majority that was large enough to amend Hungary's democratic constitution. In the first few months of its term, the two-thirds majority adopted a range of amendments to the constitution pertaining to issues like the representative bodies, the judiciary and civil liberties. The Constitutional Court was also among the first subjects of the rapid transformation. The parliamentary majority reformed the nomination and election process so that it alone would choose candidates. It enlarged the Court's membership from eleven to fifteen, adding up to four justices to the bench—in sum, seven new justices were elected within one year due to vacancies. It also limited the competence of the court by banning it from striking down unconstitutional financial and tax measures.³⁶

³² Section 21(2) of the Act XXXII of 1989 on the Constitutional Court. László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor, Michigan, 2000), 81.

³³ Kriszta Kovács and Gábor Attila Tóth, "Hungary's Constitutional Transformation" 7(2) *European Constitutional Law Review* (2010) 183–203, at 201.

³⁴ Decisions 23/1990, 15/1991, 36/1994, 14/1995 and 43/1995.

³⁵ Decision 48/1991 delivered based on an abstract interpretation of the constitution upon request of certain constitutional organs in a case or controversy.

³⁶ For a detailed report, see: Kovács and Tóth, *op.cit.* note 31.

In 2011, on the first anniversary of the election victory, a brand-new constitution officially named the Fundamental Law, was promulgated. Since our focus is on the constitutional judiciary, in what follows, we briefly sketch how the Fundamental Law affected the independence and the competencies of the Constitutional Court.

First, since the previously changed rules concerning the members of the Court were maintained, the two-thirds majority, therefore, had the absolute freedom to nominate and elect judges. Second, the Fundamental law restricted the *ex post* review of the unconstitutionality of legislation by abolishing the *actio popularis*. Only certain state officials, the government, the Supreme Court President, the Prosecutor General, the Commissioner for Fundamental Rights (Ombudsperson), and one quarter of the Members of Parliament can turn to the Constitutional Court.³⁷ But the government is unlikely to ask for a review of its own legal acts, and the current Supreme Court President, the Prosecutor General and the Ombudsperson were all chosen by the prime minister from among the party allies without a transparent process. And since the parliamentary opposition is divided almost equally between fragmented parties of the left and a party of the far right, it is extremely rare for one-quarter of the MPs to agree on constitutional challenges.³⁸ While abstract review petitions were once the most common form of constitutional proceeding, in 2022, less than 1 per cent of the Constitutional Court's caseload (6 cases out of 595) were based on abstract review petitions.³⁹ Thus, abstract *ex post* review virtually disappeared from the court's docket.

Third, the Fundamental Law shifted the focus of the constitutional review from the law itself to its application. It introduced a new type of constitutional complaint, making it possible to appeal against the violation of a fundamental right through a court decision.⁴⁰ In 2022, the overwhelming majority of the petitions before the Constitutional Court (565 out of 595) were challenges to ordinary court decisions but not challenges of the law itself.⁴¹ With another change in the rules in 2019, even governmental authorities can submit constitutional complaints to the Constitutional Court if, in their view, a judicial decision violates their fundamental rights (!) or curtails their powers under the Fundamental Law.⁴² Over the past years, public authorities have challenged some final judgments by ordinary courts that affected them before the Constitutional Court.⁴³ This possibility

³⁷ Section 24(1) of Act CLI of 2011 on the Constitutional Court.

³⁸ Kriszta Kovács and Kim Lane Scheppele, "The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union", 51(3) *Communist and Post-Communist Studies* (2018) 189–200.

³⁹ Alkotmánybíróság [Constitutional Court], "Összefoglaló a 2022. Évi statisztikai és ügyforgalmi adatokról" [Summary of Statistical Data for 2022] (31.12.2022), available at <https://alkotmanybirosag.hu/osszefoglalo-a-2022-evi-statisztikai-es-ugyforgalmi-adatokrol/>.

⁴⁰ Section 27 of Act CLI of 2021 on the Constitutional Court.

⁴¹ Alkotmánybíróság [Constitutional Court], "Összefoglaló a 2022. Évi statisztikai és ügyforgalmi adatokról" [Summary of Statistical Data for 2022] (31.12.2022), available at <https://alkotmanybirosag.hu/osszefoglalo-a-2022-evi-statisztikai-es-ugyforgalmi-adatokrol/>.

⁴² Section 27(3) of Act CLI of 2011 on the Constitutional Court.

⁴³ By way of illustration, let us look at the case that concerned an "information letter" the Government Information Centre sent citizens prior to the 2022 general elections. The letter suggested that if the opposition won, they would send Hungarian soldiers and weapons to Ukraine. This action was challenged before the ordinary court, and it determined that the letter was considered campaign material rather than government information. As a result, it violated election laws. The Government Information Centre then requested the Constitutional Court to annul this court's decision. It claimed that the court decision infringed upon its rights to provide information to the public and to a fair trial (!). The Constitutional Court annulled the court decision and stated that the government's obligation to provide information was interpreted unfairly by the ordinary court, violating the Centre's right to a fair trial (!). Decision 3151/2022.

of review raises questions as regards legal certainty.⁴⁴ Moreover, it is deeply problematic that public authorities have much better chances of winning against individuals than vice versa. Thus, a constitutional complaint is no longer a tool for protecting individuals' rights against state power but rather a tool of state institutions to violate fundamental rights "officially", rubberstamped by the Constitutional Court.

The case of Hungary demonstrates that public access to the court is an important precondition to recognizing constitutional review as a meaningful democratic instrument. Another precondition, transparency, can also increase the trust in the constitutional judiciary and simultaneously facilitate citizens' access to constitutional remedies. Transparency, in this instance, refers to openness and publicity in selecting judges and in the constitutional legal proceedings. Although the early Hungarian constitutional adjudication was deficient in the sense that it did not meet all these conditions, the recent Hungarian constitutional adjudication exhibits even greater deficiencies in that it completely fails to account for participatory democratic concerns.

Today, the Constitutional Court plays a power legitimizing role instead of fulfilling the task of a guardian of fundamental rights. Decisions of the constitutional justices, elected according to the will of the autocratic leader, contribute to the reinforcement of the regime. Hungary is following Russia, where President Putin deployed constitutional review to help centralize and consolidate his autocratic power.⁴⁵ A characteristic of modern autocracy is that institutions of the constitutional judiciary are not abolished, as autocrats in the old times would have done, but neutralized in a seemingly democratic way.⁴⁶

An autocratic transformation of the constitutional judiciary, supported by much new scholarship, is hijacking the theoretical conceptions of Richard Bellamy,⁴⁷ Ran Hirschl,⁴⁸ Mark Tushnet,⁴⁹ and Jeremy Waldron,⁵⁰ suggesting that parliament as an elected, representative body—and, tentatively, some direct participatory forms of democracy—provide a superior kind of democratic deliberation than constitutional review by unelected judges. The new system reportedly introduces "political constitutionalism" instead of "legal constitutionalism" and ostensibly replaces "juristocracy" with "parliamentary sovereignty".⁵¹

⁴⁴ 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, at 18. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, at 24. 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, at 27–28.

⁴⁵ For a comparison, see: Anna Zotééva and Martin Kragh, "From Constitutional Identity to the Identity of the Constitution: Solving the Balance of Law and Politics in Russia" 54(1–2) *Communist and Post-Communist Studies* (2021) 176–195.

⁴⁶ Gábor Attila Tóth, "Constitutional Markers of Authoritarianism" 11(1) *Hague Journal on the Rule of Law* (2019), 37–61.

⁴⁷ Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007).

⁴⁸ Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, Mass., 2007).

⁴⁹ Tushnet, *op.cit.* note 16.

⁵⁰ Waldron, *op.cit.* note 15.

⁵¹ Note that the US Supreme Court, when overruling *Roe v Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, expressed Elyan arguments, namely that the representatives and the people, and not the court, should decide on women's reproductive rights. The US Supreme Court judges even quoted Ely that *Roe v. Wade* was "not constitutional law", but they failed to acknowledge that since 1973, it has in fact been considered a part of constitutional law. *Dobbs v. Jackson Women's Health Organization* 597 US ___ (2022). See also Bryan Dennis G. Tiojanco, "John Hart Ely Would Disown All Of Us, His Intellectual Heirs (Or Maybe Not)" (2023) Manuscript on file with the authors.

The new system also invokes the “we the people” to limit the role of the constitutional judiciary. In its understanding, the people exist in their ethnic and cultural “oneness”⁵² in a society with a certain degree of internal homogeneity that is present prior to any constitutional order and has existed since time immemorial.⁵³ It is the will of these people⁵⁴ that autocrats invoke to undercut the role of the constitutional judiciary and other democratic institutions: the representative institutions and public deliberation. Thus, autocracy emerges at the expense of both constitutional review and democratic participation.⁵⁵

As many examples from around the world in Rosalind Dixon’s book reveal, this is not the whole picture. The chances of success of constitutional democracies depend significantly on extra-legal causes. Many cases of democratic decline prove that a constitutional democracy may become an autocracy by unfavourable extra-legal circumstances. Extra-legal causes may include economic depression, internal threats from political extremists and failed cooperation between moderate political parties. Of all of the views, the one we, as authors of this article, share is that the destruction of constitutional democracy is most typically a direct result of the anti-democrats’ efforts to subvert democratic institutions at every opportunity.⁵⁶

Yet constitutional justices can always have a choice. They can contribute to an autocratic transformation through a narrow understanding of their powers or a restrictive interpretation of the constitution. They can tacitly or explicitly approve the undemocratic seizure of power by the executive, like the German courts did in 1932 or the Hungarian Constitutional Court did in the recent past. Alternatively, as Rosalind Dixon suggests, they can invent and follow a form of responsive judicial review. They can resist the autocratic government, as Kelsen’s Austrian Constitutional Court once did, and the Polish Constitutional Court did quite recently. Even if the court’s resistance does not have much direct effect under the given circumstances,⁵⁷ it is by no means meaningless. Such a Herculean effort may be an expression of democracy’s capacity to defend itself even against a temporarily more potent force. As Ronald Dworkin expressed: “When the spirit of liberty still lives in the hearts of men and women, then law, courts, and constitution are the indispensable oxygen, indispensable to keep that flame of liberty still alive.”⁵⁸

⁵² Ulrich K Preuss, “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution” in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Durham, Duke University Press, 1994), 143–164. Note that the recent Hungarian Constitutional Court’s view on dignity is based on ethnic and cultural homogeneity (e.g., decision 32/2021).

⁵³ Those who advocate such a view follow Carl Schmitt, *The crisis of parliamentary democracy* (The MIT Press, Cambridge, Mass., 2000, translated by E Kennedy).

⁵⁴ Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press, Philadelphia, PA, 2016).

⁵⁵ Gábor Attila Tóth, “Chief Justice Sólyom and the Paradox of ‘Revolution under the Rule of Law’”, in Rehan Abeyratne and Iddo Porat (eds.), *Towering Judges: A Comparative Study of Constitutional Judges* (Cambridge University Press, Cambridge, 2021), 255–274, 274.

⁵⁶ Dyzenhaus, *op.cit.* note 13, 17.

⁵⁷ For instance, despite the heroic efforts of the former presidents of the Supreme Court and the Polish Constitutional Tribunal, both courts were captured by the PiS government and disciplinary charges were pressed against the previous chief justice. Mariusz Jąłoszewski, “Scandalous repression of former Supreme Court President Gersdorf. Ziobro’s man is prosecuting her for a historic Supreme Court resolution” (8.12.2022), available at <https://ruleoflaw.pl/repression-gersdorf-supreme-court/>.

⁵⁸ Ronald Dworkin, “What is Democracy?” in Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (Central University Press, Budapest/New York, 2012), 25–34, 34.