

Judicial review versus populist authoritarianism

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Populist authoritarianism is a common form of democratic backsliding these days. Can courts do anything to prevent or minimize the damage produced by the growth of such political regimes? The awareness that democracy requires judges (among other institutions) to focus on protecting democratic institutions and procedures has been advocated keenly by many comparative constitutional scholars who identify and diagnose democratic backsliding around the world. This article highlights the possibilities for courts to act as protectors of rather than threats to democracy in this age of elected authoritarians. It traces constitutional developments that suggest the need for judges to develop and implement certain skills that hold significant potential for upholding the principles of democracy. The article provides a non-exhaustive catalogue of typical populist violations of liberal constitutionalism and corresponding judicial strategies for dealing with them. These strategies include enforcing unwritten democratic norms, invalidating non-democratic constitutional amendments, insisting on proper legislative (parliamentary) procedures, and protecting democratic standards against majoritarian assaults, especially as far as free and fair elections are concerned (judicial ‘militant democracy’). In the concluding section, the article briefly reflects upon strategies of self-defence available to judiciaries and some unexpected consequences for populist executives of capturing the judicial branch.

Keywords: *Democracy, Populism, Authoritarianism, Judicial review, Constitutional courts, Constitutional amendments, Militant democracy*

INTRODUCTION

The second and third decades of this century mark the emergence and proliferation of ‘elected authoritarians’, that is, leaders of the states that are no longer fully democratic but not yet wholly autocratic.¹ This hybrid regime combines the characteristics of

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1. A number of hybrid regimes, called by a recent V-Dem 2023 report ‘electoral autocracies’ (which come closest to the concept of populist authoritarianism, used in this article) rose to a hefty 44 per cent, up from around 20 to 25 per cent in the first decade of the twenty-first century, see ‘Democracy Report 2023: Defiance in the Face of Autocratization’ (V-Dem Institute, March

democracy, namely, rulers emerge from genuinely free and by-and-large fair elections, with a systematic dismantling of the usual checks and balances and the rule of law. The noun and the adjective in the aggregate concept of ‘elected authoritarians’ correspond to two central features of the states mentioned in the previous sentence, and these states are the focus of my article.

In rendering the category of ‘elected authoritarians’ more precise, the notion of ‘populist authoritarianism’, as used in my book *Pandemic of Populists*, may be helpful. I use the following criteria to identify states matching this characterization: (i) the current leaders came to power as a result of by-and-large free and fair elections; (ii) the state maintains to some extent certain political and civil rights (even if they are limited and protected in a discriminatory fashion), and the degree of state violence is relatively low; (iii) there is still a degree of electoral competitiveness, even if the electoral playing field is heavily skewed to favour the populist incumbents; (iv) there has been a marked decline (backsliding) in democratic standards (mainly, in the separation of powers) and the rule of law, compared to the status quo ante.² As such, my understanding of populist authoritarianism is *institutional* rather than discursive, although I recognize that populists in power almost always use certain characteristic rhetorical devices, such as conspiracy theories of various kinds.³

The range of countries to which my analysis applies is therefore restricted – but it does not follow that the issue of populist authoritarianism is insignificant or trivial. It is certainly not trivial for the *citizens* of the countries properly captured by the label of ‘elected authoritarians’ – including the most populous democracy in the world, India. It may also serve as a memento for countries in which populist authoritarianism has not (yet) taken hold but where populist parties have visibly gained strength (through electoral support) – as is the case in France, Spain, and Germany. Finally, it may serve as an early warning for citizens in countries where populist parties *have* gained power but have not embarked upon systematic dismantlement of the institutions of democracy – as in Italy, the Netherlands, and Slovakia. Current trends demonstrate that populist authoritarianism has the capacity to spread through lesson-learning and model-following across borders. For example, one can notice how some measures adopted in Hungary – to tilt the electoral level playing field to benefit populist incumbents – have been emulated, almost *à la letter*, in Poland.⁴ Hence, the lessons drawn from this restricted phenomenon may assist courts in protecting democracy in states that are not (or not yet) under threat of a populist regime change. As Rosalind Dixon suggested, ‘Courts ... may look to countries facing similar risks of democratic backsliding, or countries that have already experienced more dramatic forms of erosion, in order to understand the path that democratic erosion may take’.⁵

The awareness that democracy requires judges (among other institutions) to focus on protecting democratic institutions and procedures has been advocated keenly by many comparative constitutional scholars who identify and diagnose democratic backsliding

2023), available at <www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf> accessed 18 July 2024.

2. Wojciech Sadurski, *A Pandemic of Populists* (CUP 2022).

3. *ibid* at 143–73.

4. Among many other examples of such imitations, consider a device of merging a biased, agenda-shaping referendum with parliamentary elections in Poland, 15 October 2023 – a trick used by Orban in the 2022 parliamentary elections in Hungary.

5. Rosalind Dixon, *Responsive Judicial Review* (OUP 2023) 144.

around the world.⁶ ‘The goal of constitutional review is not so much jurisprudential as the enabling of democratic self-governance’, proclaimed Samuel Issacharoff emphatically.⁷ Similarly, Aziz Huq and Tom Ginsburg, in an article provocatively titled ‘Democracy without Democrats’, describe a currently frequent state of affairs when ‘nonelected actors, such as judges and bureaucrats, may have both sufficient incentives and the capabilities to take actions to preserve to possibilities of democratic constitution’.⁸ Of course, from an insight that courts and other independent non-elected institutions may protect democratic practices and structures, it does not follow that courts themselves do *not* pose any dangers to democratic life. Just as any counter-majoritarian bodies may *help* democracy, they may *hinder* it by invalidating progressive legislative reforms and guarantees. *Shelby County v Holder*⁹ is a striking case in point – a judgment in which the United States Supreme Court invalidated an important clause of the Voting Rights Act, which had authorized the federal government to pre-emptively scrutinize voting laws in those parts of the country that had a history of racial discrimination in voting (the procedure of so-called preclearance). As Steven Levitsky and Daniel Ziblatt observe in their recent book *Tyranny of the Minority*, ‘not all counter-majoritarian institutions strengthen democracy. We must distinguish clearly between those that protect minorities, *preserving democracy*, and those that privilege minorities by granting them an unfair advantage, thereby *subverting democracy*’.¹⁰ If one highlights (as I shall do in this article) the capacities of the courts to do the former, one must not be myopic as to the instances of the latter phenomenon.

So what *can* courts do, and what *cannot* they do, to arrest or remedy populist assaults on democratic institutions? It depends, among other things, on the stage in the trajectory of populism. They can probably do little in the *post*-populist period, when there is a clear need to rebuild and redesign democratic institutions in such a way as to address the causes for populist ascendance to power in the first place, and these causes include numerous democratic deficits in the pre-populist periods. ‘Back to the drawing board’ may often be a more appropriate slogan than ‘Back to where we were before’; a post-populist reconstruction calls for a mix of restoration and redesign. As Jan-Werner Müller observes in his most recent book, ‘Rebuilding democracy after authoritarian populism does not have to mean more of the same, but can include innovative machinery that is in fact more likely to work in tune with democracy’s underlying principles’.¹¹ Courts are notoriously bad in this regard: judges rarely are institutional innovators.¹² However, as institutional guardians in the pre-populist periods and probably also during populists’ power, they could do a lot to remedy specific constitutional breaches.

6. Samuel Issacharoff, *Fragile Democracies* (CUP 2015).

7. *ibid* at 279.

8. Aziz Z Huq and Tom Ginsburg, ‘Democracy without Democrats’ (2020) 6 *Constitutional Studies* 165, 167.

9. 570 US 529 (2013).

10. Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority* (Crown 2023) 144 (emphases added).

11. Jan-Werner Müller, *Democracy Rules* (Penguin Books 2021) xiv (footnote omitted).

12. The statement is not meant to express any universal truth but applies strictly to the judges in post-populist circumstances; for an extensive argument to that effect, see Michal Bobek, ‘What Role for Courts in Transforming a Society? A Central European Cautionary Tale’ in Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023).

In this article, I provide a non-exhaustive catalogue of typical populist violations of liberal constitutionalism and match them with corresponding judicial strategies for dealing with them. None of these strategies involve any radical innovations; rather, they encapsulate existing legal doctrines, which have been used with higher or lower rates of success in several jurisdictions. They include enforcing unwritten democratic norms (Part 1 of the article), invalidating non-democratic constitutional amendments (Part 2), insisting on proper legislative (parliamentary) procedures and also protecting the rights of parliamentary opposition (Part 3), and protecting democratic standards of free and fair elections (judicial ‘militant democracy’, Part 4). In the concluding section, I reflect upon strategies of self-defence available to judiciaries and upon some unexpected consequences for populist executives of capturing the judicial branch. A general caveat: much of the argument must be country-specific. Depending on the context, judges may have different competencies and institutional resources (as well as constitutional powers) to undertake the tasks outlined in this article. Not every one of the four tasks stipulated below will apply to every judicial system facing an authoritarian-populist challenge.

1 CONSTITUTIONAL CONVENTIONS AND UNWRITTEN NORMS

Authoritarian populists often deny the existence of unwritten constitutional rules and conventions, behaving as if the *text* were all there is to a constitution. For instance, when the Polish ruling party, PiS, introduced in 2017 a statute overhauling the body responsible for judicial appointments – the National Council of the Judiciary (Polish acronym: KRS) (which transferred the power to elect KRS judicial members from the judiciary to the parliament) – while it may have been textually correct (the Constitution does not explicitly state that these members must be elected *by* judges, only that they must *be* judges), the law breached an unwritten norm taken for granted from the beginning of the post-communist history of Poland in 1989 up to 2017. It had been ordained in the founding constitutive document of post-communist Poland, that is, in the agreements of the Round Table of 1989. It is also a generally recognized European standard which Poland, as a member of the Council of Europe and of the European Union, is obligated to comply with, whether stated in its Constitution or not. If we examine the plain meaning of the norm, it also has the advantage of making sense: the judges on the KRS are meant to *represent* all judges, and hence it follows that KRS representatives should be *elected* by those whom they will represent. Hence, there is some discretion for a legislator to regulate the mode of appointment but only in a way that renders the representation meaningful.

The norms breached in the above example were unwritten but considered clear and peremptory – until populists took power and, pretending they did not exist, breached them. Such instances are attempts to use the law against itself: acting within the literal meaning of the rules but disregarding the necessary norms to accomplish the original intent and meaning of the specific legal provisions. As Martin Krygier notes, ‘Many illiberal regimes have aspired to use law for their purposes, but without submitting themselves to it in any ways that matter to them Here a regime might promote law and even fidelity (of officials and citizens) to law, but there are strict limits’.¹³ Those limits arise out of the authoritarian focus on the *letter* and disregard for the *spirit* of the Constitution. However,

13. Martin Krygier, ‘The Spirit of Constitutionalism’ in Jakub Urbanik and Adam Bodnar (eds), *Περιμέρινοντας τους Βαρβάρους. Law in the Days of Constitutional Crisis: Studies Offered to Mirosław Wyrzykowski* (C.H. Beck 2021) 351.

as Issacharoff emphasizes, ‘Constitutionalism has never been exclusively reduced to the written text either in terms of its commands or its interpretation’.¹⁴

Populists manipulate public opinion into believing that if a norm is unwritten, it is not binding (and not really a norm). As a result, unwritten norms are usually the first victims of populist actions that often observe written norms to the letter. However, unwritten norms are equally – perhaps even more – important. In his famous book *America’s Unwritten Constitution* (note the title!), Akhil Reed Amar urges: ‘We must read the Constitution as a whole – between the lines, so to speak’.¹⁵ This is a fine formula – reading the Constitution ‘between the lines’, or as if written ‘in invisible ink’, as Aharon Barak nicely put it¹⁶ – a practice that demands that we not read disparate clauses in isolation from the document as a whole.

The binding force of constitutional conventions is neither falsified by occasional breaches (in this, they are no different from written provisions) nor by the fact that they occasionally become crystallized into written law. The latter case does not deny their peremptory character *before* crystallization. As one instance of such conversion of an unwritten norm into a written one, consider the Twenty-Second Amendment to the US Constitution. The amendment codified the unwritten norm against US presidents serving more than two terms, which President Franklin D. Roosevelt had transgressed. The fact that we may think and speak about presidential transgression suggests that we intuitively adopt a view about their binding force before and independently of textual ratification.

Accordingly, constitutional courts should take it upon themselves to recognize, elucidate, and enforce constitutional conventions. It is not easy because there may be reasonable disagreements about the content and the scope of unwritten norms. However, this task is not beyond the ability and expertise of constitutional judges. In fact, courts (not just *constitutional* courts) *do* routinely interpret and enforce legal conventions and customs. In doing so, they give effect to Justice Barak’s statement: ‘[t]heoretically and as a matter of principle, there exists the possibility that a court in a democratic society declares the invalidity of a law that is contrary to the fundamental principles of the system even if those fundamental principles are not entrenched in a rigid constitution’.¹⁷ Of course, it is no coincidence that such statements tend to be made, in particular, by judges from states with no written constitution – in this case, Israel – or in states where written constitutions are heavily amended (and often in a confusing, partly incoherent condition), as in Hungary after the fall of Communism, thus giving the then-President of the Constitutional Court, László Solyó, an occasion to urge his Court to develop ‘unwritten constitutional principles’ and invest his Court with the task of ‘providing a moral reading of the underlying principles of the Constitution’:¹⁸ a call with a distinctly Dworkinian colour.

As a terminological digression: one *may* draw a distinction between ‘constitutional conventions’ and ‘unwritten constitutional norms’. However, this is a distinction without a difference. ‘Unwritten constitutional norms’ are about a *form* of a standard;

14. Samuel Issacharoff, *Democracy Unmoored* (OUP 2023) 97.

15. Akhil Reed Amar, *America’s Unwritten Constitution* (Basic Books 2012) 47.

16. Aharon Barak, ‘Unconstitutional Constitutional Amendments’ (2011) 44 *Israel Law Review* 321, 337.

17. *La’Or Movement v Knesset Speaker* [1990] IsrSC 44(3) 529, 554, quoted in Iddo Porat, ‘Towering Judges and Global Constitutionalism’ in Rehan Abeyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (CUP 2021) 31.

18. Quoted in 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* (CUP 2021) 260, 263.

‘convention’ is about its *pedigree*. It is often thought that constitutional conventions have their pedigree in the conduct of political branches: parliament and the executive, while unwritten constitutional norms are elucidated by the judiciary. It is a category error to distinguish in this manner. The question of *who* is a legitimate interpreter and elucidator of constitutional meanings is a matter distinct from whether a standard has a textual or unwritten/conventional character. Unwritten constitutional norms may be established by the judiciary, but also by other branches – bound as they are to respect a constitution – and vice versa; conventions may originate in political branches’ conduct but become peremptory if recognized as such by courts. As such, for my purposes, any distinction between unwritten norms and conventions is without significance.

The status of constitutional conventions and the role of courts in enforcing such conventions have been well evidenced and explored in a series of 2019 I*CON journal articles by three prominent scholars, Farrah Ahmed, Richard Albert, and Adam Perry.¹⁹ Writing during the life of the former Monarch, they speculate: ‘[I]f Queen Elizabeth II refuses to appoint as Prime Minister the person who heads a government capable of commanding the confidence of the House of Commons, then a court might legally obligate her to do so’.²⁰ The authors generalize: ‘the legislature might create a statute that makes a convention otiose. It might create a legal regime for decision-making contrary to an existing conventional regime. ... In each of these cases, judges might review the statute and invalidate it. They would treat conventions as though they were an entrenched part of the constitution’.²¹ These hypotheticals are followed by *real* examples from the UK, Canadian, and Indian courts. For instance, the Supreme Court of Canada relied on the convention of political neutrality in the public service to scrutinize a statute regulating civil servants’ involvement in certain political activity.²² The authors also cite a more famous Canadian case in which the issue of conventions was engaged, namely the 1981 *Patriation Reference* case²³ (where the court affirmed that by constitutional convention, amendments to the constitution require a substantial degree of provincial consent) and describe the Supreme Court’s view that conventions are based on precedents established by political institutions rather than by judges and should *not* be enforced against explicit legal rules.²⁴ For its part, the Supreme Court of India went one step further and established constitutional conventions’ binding effect, making them judicially enforceable.²⁵ Under Indian doctrine, the authors show, ‘conventions trump ordinary legislation, and are enforceable by nullification’.²⁶ They add, significantly: ‘Indian judges give every impression of thinking that the enforcement of conventions is neither optional nor the exercise of discretion but what they are duty-bound to do’.²⁷

19. Farrah Ahmed, Richard Albert and Adam Perry, ‘Judging Constitutional Conventions’ (2019) 17 *International Journal of Constitutional Law* 787; Farrah Ahmed, Richard Albert and Adam Perry, ‘Enforcing Constitutional Conventions’ (2019) 17 *International Journal of Constitutional Law* 1146.

20. Ahmed, Albert and Perry, ‘Judging Constitutional Conventions’ (n 19) 792.

21. *ibid* (n 19) 794.

22. *Ontario (Attorney General) v OPSEU* [1987] 2 SCR 2; Ahmed, Albert and Perry, ‘Judging Constitutional Conventions’ (n 19) 797–98.

23. *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753 (*Patriation Reference*); Ahmed, Albert and Perry, ‘Judging Constitutional Conventions’ (n 19) 798–99.

24. Ahmed, Albert and Perry, ‘Judging Constitutional Conventions’ (n 19) 799.

25. *ibid* at 800–1.

26. *ibid* at 801.

27. *ibid* at 805.

The authors briefly gesture towards a possible conceptual dilemma: if conventions originate in political customs, they are not law, but if they have already ‘crystallized’ into legal rules, they are no longer conventions.²⁸ However, the dilemma, so stated, is illusory. What matters is not whether we characterize a given standard as non-legal (yet enforceable by courts) as opposed to ‘truly’ legal, but rather whether the enforcement by par-excellence legal institutions (courts) is viewed as peremptory, non-optional. If that is the case, insisting on the illegality of standards (due to their political pedigree) does not seem to add anything to our drawing of the line between the legal and the non-legal. In other words, if it ‘looks like a duck, swims like a duck, and quacks like a duck ...’ – if a standard is declared by a court, enforced by a court, and if conduct contrary to the standard is viewed as prohibited, it is a law. Interestingly, when discussing the *Patriation Reference* case, a Canadian constitutional scholar observed that when the Supreme Court stated that ‘as a matter of the conventions of the constitution, a substantial degree of provincial consent was required, *the distinction between law and convention quickly faded*’.²⁹

Drawing on this background, in the current era of democratically elected autocrats, constitutional courts should – following the example of courts that, often without much fanfare, enforced constitutional conventions – do the same. This is all the more crucial where a frequent device of constitutional regression by elected authoritarians is the disregard of important constitutional conventions. In such an instance, courts should master the skills of ascertaining and enforcing non-textual norms and conventions. If they do, it is likely that violations of democratic constitutions (within which elected authoritarians operate) will be declared for what they are – constitutional breaches – and consequently invalidated. Although this is far from a simple strategy, it is certainly not beyond the reach of elite courts, such as constitutional courts. When in doubt, courts can take guidance from leading supranational tribunals, such as the European Court of Human Rights (ECtHR), which routinely engages in judicial exercises to ascertain and enforce legal conventions at a supranational level. For example, when the ECtHR determines the ‘margin of appreciation’ to be granted to a member state of the Council of Europe (CoE), it engages in a reading of constitutional conventions at a European level – that is, of the existence (or its absence) of a pan-European convention (note a lower case c) as evidenced by a consensus (or its absence) across member states about the acceptability of a restriction on the Convention right. Such consensus may be demonstrated not only by legal rules but also by political and social *practices*.³⁰

28. *ibid.*

29. Peter C Oliver, ‘Constitutional Conventions in the Canadian Courts’ (UK Constitutional Law Association, 4 November 2011), available at <<https://ukconstitutionallaw.org/2011/11/04/peter-c-oliver-constitutional-conventions-in-the-canadian-courts/>> accessed 1 November 2023 (emphasis added). It is interesting to note that the same Professor Oliver, further in his essay, suggests puzzlingly: ‘If one considers together the conventions and the law of the constitution, the political and legal constitution, then it is clear that judges should respect political means of enforcement rather than use the principles underlying conventions as a means of converting rules of political enforcement into rules of judicial enforcement’. To me, it sounds like a non sequitur: when a judge ‘respects’ political means of enforcement, then she necessarily confers upon it a judicial imprimatur, and the distinction between political and legal constitution is removed.

30. For example, when analyzing the scope of the margin of appreciation in interpreting the right to education under art 2 of Protocol 1 of the Convention, the ECtHR in the (in)famous *Crucifix Case (II)* [*Lautsi & Ors v Italy* App No 30814/06 (ECHR Grand Chamber, 18 March 2011) para 61] announced that the margin in this case is wide because the notion of ‘respect’ for the rights of parents varies considerably from case to case, given *the diversity of the practices* followed and the situations obtained in the Contracting States. As a result, the Contracting States

Whether such a consensus exists at a *national* level (a matter which a national constitutional court should ascertain, in analogy to the ECtHR at a pan-European level) will be easier to establish in some cases than others. It will require scrutiny of political practices over time – and it will inevitably be a matter of a reasonable disagreement about whether some departures from the tradition (which occasionally will no doubt exist) should be treated as *exceptions* (exceptions which, as a cliché has it, ‘confirm the rule’) or as disavowals of an alleged tradition. However, in *some* cases, such a determination of a political tradition (hence, of the existence of a convention) will be easy to establish and difficult to deny; after all, recognizing a convention ‘is a fact-finding activity’³¹ that judges routinely engage in. Consider a hypothetical case mentioned above of a British monarch who refuses to appoint as Prime Minister, the person who heads a government capable of commanding the confidence of the House of Commons. Moving from hypothetical to real cases, consider the already mentioned Polish case of the National Council of Judiciary (KRS) and a convention that its judicial members are selected by the judiciary itself rather than by political branches.³² The fact that, at a certain point, populist authoritarians decided to abandon it by a statute does not prove that a convention was non-existent but rather that, as is often the case, it can be established by its breach.

Suppose someone asks: What about the conventions that support autocratic rather than democratic patterns of conduct within a polity? Isn’t the call for courts to engage more actively with constitutional conventions a double-edged sword? After all, such an active engagement may pose a threat to democracy, especially in those states that established, in the recent past, political traditions of non-democratic actions. Two responses can be offered to this challenge.

First, from the proposition that courts should enforce *some* conventions, it does not follow that they should enforce *all* conventions. As with the doctrine of precedent (*stare decisis*), courts will recognize some earlier cases as authority, disregard others, and – where appropriate – openly overrule others. Democratically oriented judges should give effect to those constitutional conventions, which, in their view, are conducive to democracy. After all, the primary rationale (in this article, at least) for a call for judicial engagement with constitutional conventions is to empower courts with effective instruments to counter democratic backsliding. The *political* purpose of such a call is explicit and candid. The call does not extend to these putative conventions, which would lead to an opposite outcome.

Second, as an empirical matter, it is doubtful whether we can find – in today’s democracies, and in particular in defective democracies (which are the only locus for my reflections here) – many conventions *sensu stricto*, which undermine rather than support democratic governance. This is because the conventions, for their existence, rely upon a significant degree of public acceptance. Conventions may be viewed as a species of ‘social rules’, in HLA Hart’s sense,³³ so for their existence, a degree of general pressure for conformity with rules can be discerned. As Hart explained, ‘[W] here there is such a rule[,] deviations are *generally regarded* as lapses or faults open to

enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (emphasis added).

31. Ahmed, Albert and Perry, ‘Enforcing Constitutional Conventions’ (n 19) 1148.

32. For further detail, see Wojciech Sadurski, *Poland’s Constitutional Breakdown* (OUP 2019) 79–80.

33. For this proposition, see Ahmed, Albert and Perry, ‘Enforcing Constitutional Conventions’ (n 19) 1156–7.

criticism, and threatened deviations meet with pressure for conformity'.³⁴ Moreover, Hart added, '[E]xcept by a minority of hardened offenders, such criticism and demands are generally regarded as legitimate, or made with good reason, both by those who make them and those to whom they are made'.³⁵ It is doubtful that many such consensually endorsed, *non-democratic* conventions can be found in today's failing democracies.

Suppose *arguendo* someone claims that, after 2010 in Hungary, a 'constitutional convention' has emerged and stabilized such that the Prime Minister, his government, and the majority party in the parliament can completely ignore, disregard, and sideline the parliamentary opposition in discussions on any significant new laws and policies, including on constitutional reform. Such a putative 'convention' of governmental unilateralism would certainly be a correct account of political conduct established by Orbán rule in Hungary in a recent decade or so. However, is it really a 'convention'? For it to become a Hartian social rule, a degree of compliance, even if not an open acceptance, would be required on the part of other political actors, including opposition parties and groups. No such compliance can be identified. Their isolation in the political process is a one-way rather than mutual practice. An action of the opposition in parliament in 2013, symbolically and emphatically rejecting the lack of any engagement by the government with the opposition,³⁶ is just one proof of the non-existence of such a hypothetical 'convention'.

2 UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

In some countries, authoritarian populists attempt to replace or amend the constitution, taking advantage of their super-majoritarian status in the parliament, which they want to convert into a *pouvoir constituant*.³⁷ Hungary is a striking example of a country using constitutional amendments and a fully fledged constitutional replacement (followed by further constitutional amendments) to consolidate its illiberal rule. Soon after his 2010 victory (which, due to the peculiarities of the electoral system, converted his 52.7 per cent of raw votes into a constitutional majority of two-thirds in the Parliament), Prime Minister Viktor Orbán enacted a series of constitutional amendments in quick succession (ten in the post-election months of 2010) followed by a brand-new constitution. After having just adopted a new Constitution, the government passed additional amendments through the Parliament – such as the infamous Fourth Amendment of 2013, which filled some gaps in the illiberal constitutional design. The Amendment was a reaction to the Constitutional Court's review of another amendment (of 2011), which ostensibly contained transitional provisions of the fundamental law. The Fourth Amendment (no small feat: a 15-page *amendment* to a 45-page Constitution) 'simply' transferred the non-transitory provisions into the Fundamental Law.

One shrewd strategy used by the Hungarian government was to override the Court's competencies via constitutional amendments: '[A]s a reaction to a disliked decision of the Constitutional Court that declared a provision of a legal act unconstitutional, the Parliament incorporated the rule into the text of the Constitution to exclude the

34. HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 55 (emphasis added).

35. *ibid* at 56.

36. See Part 3 below.

37. See David Landau, 'Abusive Constitutionalism' (2013) 47 *University of California Davis Law Review* 189–260.

possibility of challenging the provision again at the Constitutional Court³⁸ So there was an essential manner in which the Hungarian Constitutional Court, while not fully converted into a wilful enabler (as in Poland), was rendered – more or less – toothless *through constitutional acts*, to the point that a Hungarian legal scholar observed as recently as 2022: '[T]he Constitutional Court is under significant pressure and can barely fulfil its constitutional role'.³⁹ The enfeebled Constitutional Court withdrew from its initial position that it could conduct *both formal and substantive* review of amendments. Under the already-mentioned Fourth Amendment of the Basic Law, which explicitly excluded substantive review of amendments, the Court agreed in a decision of 21 May 2013 that it lacked the authority to conduct a substantive review of constitutional amendments.⁴⁰ In other words, it acceded to an amendment-based annulment of its competence.

In light of such cases, constitutional courts around the world should sharpen their skills to apply a doctrine of 'unconstitutional constitutional amendments' to counter anti-democratic constitutional actions by elected authoritarians – a doctrine that, in the words of David Landau, 'has ... passed from the fringe of constitutional theory towards its centre',⁴¹ partly because 'it is particularly well-suited and well-justified'⁴² by the practices of abusive constitutionalism – that is, the use of constitutional amendments and replacements for anti-democratic purposes. This is particularly useful when constitutions are only weakly entrenched and can be amended with relative ease: ruling politicians will find it hard to resist the temptation to bring about undemocratic changes through an amendment.

Accordingly, constitutional courts should learn how to set aside constitutional amendments, especially in weak-constitutional entrenchment systems. In addition, the doctrine has a particular salience in countries where respect for constitutional and democratic values is of young pedigree and uncertain embeddedness. For example, when Yaniv Roznai wrote that 'especially in post-communist states, the enforceability of explicit unamendability is vital for protecting constitutionalism'.⁴³ He was certainly right, with the proviso that the category of states that need such a doctrine should be extended beyond post-communism to all states in which constitutional fidelity is weak.

The doctrine is easier to apply in cases where a constitution contains explicit 'eternity clauses' (bans on particular constitutional changes, including through a constitutionally mandated amendment process) and where those clauses relate to democratic governance. This includes the constitutions of, inter alia, Czech Republic, Germany, France, Italy, Greece, Belgium, and Portugal.⁴⁴ In addition, some democratic constitutions even specifically provide that *constitutional courts* may decide on the constitutionality of any amendments to the constitution (South Africa),⁴⁵ occasionally restricting this competence to compliance of amendments with procedural requirements

38. Eszter Bodnár, 'Disarming the Guardians – The Transformation of the Hungarian Constitutional Court After 2010' in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (CUP 2022) 254, 264.

39. *ibid* at 288.

40. Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017) 199.

41. Landau (n 37) 232.

42. *ibid* at 234.

43. Roznai (n 40) 206.

44. Constitutions of Czech Republic, art 9(2); Germany, art 79(3); France, art 89(5); Italy, art 139; Greece, art 110(1); Belgium, arts 197, 85 and 106; Portugal, art 288(b).

45. Constitution of South Africa, art 167(4)(d).

only (Turkey, ‘only with regard to their form’).⁴⁶ Incidentally, this Turkish constitutional restriction of judicial review of amendments has not been fully observed by the Constitutional Court, which – in its famous (and controversial) headscarf decision of 5 June 2008 (already under the reign of the 1982 Constitution which contained the mentioned limit) – greatly enlarged the meaning of a ‘formal’ review and scrutinized the abolition of the headscarf ban in universities under the constitutional principle of the secular character of the state.⁴⁷

It has to be added that, on the other side of the spectrum of the recognition of courts’ powers to review amendments, some courts have *declined* jurisdiction in this regard – for example, Slovenia and Georgia.⁴⁸ As such, we have a whole range of institutional designs on the intersection of unamendability and courts: (i) Constitutions with unamendable provisions and with a specific mandate to constitutional courts to conduct a review of amendments; (ii) Constitutions with unamendable provisions, without an explicit mandate for courts, but with courts establishing for themselves such a competence (as is the case in Brazil and the Czech Republic)⁴⁹; (iii) Constitutions with unamendable provisions but with courts declining a review of constitutional amendments (as in Slovenia, Georgia, and Norway⁵⁰); (iv) Constitutions without unamendable provisions but with courts finding an implicit, material core in their constitutions (this applies to Slovakia and India); and, lastly, (v) Constitutions with no unamendable provisions accompanied by courts abstaining from a doctrine of unamendability (this includes the United States,⁵¹ Poland, and Austria). A unique, unusual category is when a constitutional court is expressly called upon to pronounce on a brand-new constitution, as was the case in South Africa, where the Constitutional Court adjudicated, in 1996, on the compatibility of the new draft Constitution with 34 principles of the Interim Constitution⁵² (this led up to the Constitutional Convention revising the constitutional draft to meet the Court’s multiple concerns).

In cases of *express* eternity clauses, the competence of constitutional courts is relatively apparent, but this does not mean that it is easy to apply in specific cases. Often, the provisions establishing unamendability are vague and open to a variety of interpretations (consider the Czech provision about ‘the essential requirements for a democratic state governed by the rule of law’, Article 9(2)). As a result, there is undoubtedly a risk that in exercising this competence, a constitutional court, as a guardian of the

46. Constitution of Turkey, art 148.

47. Roznai (n 40) 200–1; Barak (n 16) 321–42 at 324–25.

48. Roznai (n 40) 203.

49. *ibid* at 204–6.

50. In Norway, no court has ever openly renounced such a competence but neither have there been any cases of judicial review of constitutional amendments in over two hundred years of practice under the 1814 Constitution, see Roznai (n 40) 206.

51. Except for a minor instance of unamendability in Article V *in fine*; after describing a proper amendment procedure, the Constitution adds: ‘provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate’. The first clause has no legal effect today and was meant to ban limits on the slave trade; the second clause (Equal Suffrage Clause) has been a non-issue, politically speaking, even if occasionally various scholars expressed divergent views about its implications, see David E Pozen and Thomas P Schmidt, ‘The Puzzles and Possibilities of Article V’ (2021) 121 *Columbia Law Review* 2317, 2333, 2393–94.

52. *Re Certification of the Constitution of the Republic of South Africa 1996* (4) SALR 744.

Constitution, turns into the *pouvoir constituant* under the guise of constitutional interpretation.⁵³ The whole idea of ‘eternity clauses’ may be read not so much as an absolute ban on certain constitutional changes ‘forever’ (something that is, both politically and conceptually, incoherent in my view: *can* any constitutional provision make itself unamendable, and what about amending a provision which renders other provisions of the same constitution unamendable?),⁵⁴ but rather as an emphatic manner of articulating the paramount *political* or *moral* significance of certain principles, while at the same time disempowering the legislature to the advantage of a constitutional court. This is undeniable. Nonetheless, an exercise of such competence is not radically different from a constitutional interpretation (leading, as the case may be, to invalidation of a statute) under other indeterminate or under-determinate provisions – particularly under constitutional rights. As Roznai puts it, to give effect to some unamendable provisions, ‘the Germans need a theory of human dignity, the French or Italians require a theory of republicanism, and the Norwegians need a theory of the spirit of the Constitution’.⁵⁵ The task, although, is not as colossal as this formula would suggest at first blush. To evaluate whether a proposed amendment is consistent with human dignity or republicanism, a court need not first create a *comprehensive*, positive conception of these ideals but reflect upon whether a *specific* regulation brought about by a proposed amendment is *inconsistent* with the conception of human dignity. In this way, a judicial interpretive challenge is limited and negative and more manageable than a comprehensive and positive articulation of a normative theory would have to be. For example, it is not more challenging than when a court reflects upon whether a particular proposed practice breaches ‘freedom of expression’ or ‘free exercise of religion’. In this regard, judicial review of amendments is not that different from any other form of judicial review.

Express, textual provisions of eternity clauses certainly facilitate the legitimacy of constitutional courts exercising this competence. However, some constitutional courts – for example, in India, Bangladesh, Colombia, and Taiwan – turned out to be equipped with sufficient will and expertise even when such textual mooring of the unamendability doctrine is missing (see category no. iv, above). The most famous (and internationally influential) example is the doctrine of basic democratic constitutional core, or structure, developed by the Supreme Court of India – a country with no textual eternity clauses. (A weaker version of implicit unamendability occurs when a court draws a *hierarchy* of different constitutional provisions and elevates some provisions – considered to be leading principles – to such a status that their amendment requires a much more demanding constitutional *revision* process than other provisions that call for a ‘mere’ amendment).⁵⁶ The unamendable ‘basic structure’ was recognized in the 1973 landmark *Kesavananda Bharati* decision⁵⁷ (despite the absence of the concept

53. See Wolfgang Babeck and Albrecht Weber, *Writing Constitutions, Vol I: Institutions* (Springer 2022) 603.

54. This is an argument made by the authors of the most authoritative French treatise on constitutional law, which claims that in France it is possible to abolish a republican form of government in two stages: first, by removing (by amendment) a ban on changing the republican form clause, and then, second, by reintroducing a monarchy. They conclude – on their discussion of eternity clauses – by stating: ‘*Ces conditions sont donc avant tout des limites morales*’, Francis Hamon, Michel Troper and Georges Burdeau, *Droit Constitutionnel* (27th edn, LGDJ 2001) 41.

55. Roznai (n 40) 212 (reference omitted).

56. This is the case in Austria, see Roznai (n 40) 211; Barak (n 47) 327–28.

57. *Kesavananda Bharati v State of Kerala*, All India Reports 1973 Supreme Court 1461.

from the constitutional text) and has since been reaffirmed in many other cases. In one such case, Chief Justice Sikri catalogued the principles of the ‘basic structure’ as the supremacy of the constitution, republican and democratic form of government, secularism, separation of powers, and federalism.⁵⁸ It has been observed that ‘[o]ver time, the doctrine has ... developed so as to have a more direct focus on concerns about democracy and the rule of law’.⁵⁹

Accordingly, it is clear that the *implied* unamendability is different but not weaker than the *express* unamendability rule in that the former is equally immune to a putative express amendment disallowing review of amendments. As Aharon Barak observed: ‘[i]f the requirement regarding the basic structure ... arises from the language of the entire constitution, then a new constitution is necessary in order to remove the requirement regarding the basic structure’.⁶⁰ A single amendment of the amendment procedures will not do. However, a fully fledged new constitution is a different matter. It *can* be done, and it *can* negate the basic structure of the existing constitution – but not under the guise of an amendment.

As one among many examples of democratic uses of unamendability, we can refer to a well-known decision of the Constitutional Court in Colombia from 2005, which successfully prevented President Alvaro Uribe from amending the Constitution to permit him to run for a third consecutive term of office. (It would have been his second term-limit extension after he had already earlier managed to achieve a second consecutive term of office through the constitutional amendment).⁶¹ In this case, the Court resisted adding a third consecutive term by a constitutional amendment, both on procedural grounds (concerning the financing of this initiative) and, more importantly, on substantive grounds. They ruled that the amendment would amount to a ‘substitution’ (rather than a mere amendment) of the Constitution by creating such a strong presidency that democratic institutions would be significantly weakened.⁶² Such a meaningful change, the Court argued, would have to be introduced by a Constituent Assembly rather than through a constitutional amendment (which in Colombia is relatively easy to produce – an absolute majority in Congress in two consecutive sessions). In this instance, President Uribe complied with the Court’s decision.

In conclusion, the doctrine of unamendability seems well-suited to counter anti-democratic abuses of the constitution. As the German Federal Constitutional Court observed in a 1970 judgment, ‘[t]he purpose of [the unamendable provision] ... is to prevent ... abuse of the Constitution to legalize a totalitarian regime’.⁶³ This, arguably, is not the only purpose of unamendability but the principal one, and it is of particular relevance to this article. Since constitutional amendments are often used for anti-democratic purposes, judicial invalidation of that type of amendment serves pro-democratic ends.⁶⁴

58. *I.R. Coelho v State of Tamil Nadu*, All India Reports 1973 Supreme Court 1461.

59. Rosalind Dixon and David Landau, ‘Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment’ (2015) 13 *International Journal of Constitutional Law* 606, 618; see n 65.

60. Barak (n 47) 335.

61. Landau (n 37) 201. It would have been his second term-limits extension after Uribe had already earlier managed to achieve a second consecutive term of office through the constitutional amendment.

62. *ibid* at 201–3.

63. *Klass* case of 1970, 30 BVerfGE 1, 24 (1970), as quoted by Roznai (n 40) 221.

64. See, similarly, Dixon and Landau (n 59) 636.

However, the argument can be made (by analogy to a similar argument discussed at the end of the previous Part, on unwritten norms) that, in the hands of judges, the doctrine may be a double-edged sword and used for either democratic or anti-democratic purposes. That is, a constitutional court may veto a pro-democratic amendment. However (as briefly outlined above), this is unlikely to occur. When it comes to *explicit* unamendability, the examples of textual eternity clauses seem eminently suited to pro-democratic uses (although occasionally, they may also have anti-democratic potential when, for instance, a constitution contains an eternity clause on official language⁶⁵ or the state territory⁶⁶). Regarding *implicit* unamendability, the anti-democratic usage depends on the construal, by judges, of concepts such as basic democratic structure. In Latin America, the doctrine of unamendability was occasionally used to *remove* presidential term limits – to benefit autocratic presidents, as was the case in Colombia, Nicaragua, and Honduras.⁶⁷ There have also been some cases of judicial uses of the doctrine by seemingly self-interested judges, as in Bangladesh and India, when the top courts invalidated amendments in order to protect judges against new rules concerning – respectively – the removal and appointments of judges.⁶⁸ In the Indian case, Rehan Abeyratne observes that ‘the judgment makes little sense as a matter of law or legal theory and is best explained by the Supreme Court’s institutional prerogative to maintain supremacy vis-à-vis the other branches’.⁶⁹ A similar self-serving motive can also be attributed to the Constitutional Court of Slovakia, which in 2019 invalidated a constitutional amendment providing for security clearance as a condition of appointments to judicial office (and for all judges already holding office), claiming that the amendment violated a ‘material core of the Constitution’ and breached several constitutional principles, including judicial independence. Commenting on this decision, a Slovak legal scholar observed, ‘[i]f this trend of empowerment of the Constitutional Court [to review constitutional amendments] and its judicial activism should continue, we could legitimately ask whether the commitment to democracy is really still being honoured’.⁷⁰

This is a good question, as it suggests that the doctrine of unamendability – like any doctrine of constitutional adjudication – may be used for diverse purposes, including problematic ones. In turn, constitutional amendments may be used for pro-democratic purposes. In their recent book, Steven Levitsky and Daniel Ziblatt trace the impressive, incremental democratization of Norway, a country that evolved since 1814 (the year of adoption of its constitution) from an undemocratic monarchy

65. Constitution of Romania, art 152(1).

66. Constitutions of Portugal, art 288(a) and (n); Germany, art 79(3); Romania, art 152(1).

67. Yaniv Roznai and Tamar Hostovsky Brandes, ‘Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine’ (2020) 14 *Law & Ethics of Human Rights* 19, 32.

68. Rehan Abeyratne, ‘Giving Structure to the Basic Structure Doctrine’ (Book Review) (2017) 1 *Indian Law Review* 182, 187–88. For a nuanced discussion, in which the Bangladeshi decision (among others) is defended while the Indian one is criticized, see Po Yen Yap, ‘Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia’ (2021) 19 *International Journal of Constitutional Law* 127–48.

69. Abeyratne (n 68) 188.

70. Marek Domin, ‘A Part of the Constitution Is Unconstitutional, the Slovak Constitutional Court has Ruled’ (IACL-AIDC Blog, 7 February 2019), available at <<https://blog-iacl-aidc.org/2019-posts/2019/2/5/a-part-of-the-constitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled>> accessed 14 July 2024.

into – two centuries later – ‘one of the most democratic countries on earth’.⁷¹ It was suggested that this transition was the result of adopting – step by step – parliamentary sovereignty, direct elections, universal suffrage, elimination of the upper chamber, expansion of the rights of indigenous minorities, as well as broad social rights.⁷² Most, if not all, of these positive changes were brought about by constitutional amendments, and not once were they invalidated by Norwegian judges (which is, of course, a good thing).

Finally, an important caveat. Whether an amendment has a democratizing character may be a contested matter in itself; hence, a justification of judicial review of amendments based on protecting the law against amendments overriding a rights-related judicial decision must be treated with a dose of scepticism. Claude Klein provided this type of justification: ‘[w]hat if the “amending power” would try to bypass the constitution by amending it in order to allow the adoption of problematic laws, such as those that had already been declared unconstitutional? There thus appears to be a need for “super-protection” or “super-entrenchment”’.⁷³ The question is not a purely theoretical one. Although Klein does not tell his readers, the scenario described here was actually played out in France where, after a 1982 decision by the *Conseil Constitutionnel* invalidating a bill containing a compulsory gender quota requirement on electoral lists,⁷⁴ the parliament – after the 1997 elections with the Socialist Party winning – passed (in 1999) a constitutional amendment about the promotion of ‘women’s and men’s equal access to electoral mandates’. This amendment served as a basis for adopting the law of 2000, virtually identical to that invalidated prior to the amendment and this time approved by the *Conseil* against constitutional challenges.⁷⁵ Therefore, the amendment was a way of overriding a nullification by the *Conseil*. However, whether the new law was indeed ‘problematic’ (to use Klein’s words) – thus also making the amendment problematic, is a matter of substantive disagreement on the subject matter of the law and the amendment. Those who like the new law will find Klein’s argument unconvincing.

Therefore, even when used for democratic purposes, the doctrine of unamendability does not provide a panacea for all (perhaps even for most) autocratic abuses of democracy because many such abuses are performed without the need for constitutional amendments.⁷⁶

3 POLICING OF PARLIAMENTARY PROCEDURES AND THE PROTECTION OF THE OPPOSITION

Populist governments often exploit their majoritarian parliamentary status to deform parliamentary procedures – usually by expediting the lawmaking process

71. Levitsky and Ziblatt (n 10) 202.

72. *ibid* at 200–2.

73. Clause Klein, ‘Introduction’ (2011) 44 *Israel Law Review* 318–19.

74. Decision no 82-146 DC of 18 November 1982; see Alec Stone Sweet, *Governing with Judges* (OUP 2000) 105–6.

75. See Eléonore Lépinard, ‘The Adoption and Diffusion of Gender Quotas in France (1982–2014)’ (2015) EUI Department of Law Research Paper No. 2015/19.

76. In particular, Tamar Hostovsky Brandes and Yaniv Roznai insist on this point in their paper, ‘Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine’ (2020) 14 *Law & Ethics of Human Rights* 19.

and marginalizing the status of the opposition. As Hungarian scholar, Viktor Kazai, points out, ‘the legislative misconduct of the governing majority is strongly related to illiberalism’.⁷⁷

In a book, I have described in detail a case study of Poland that exemplifies a broader trend of fast-tracking the legislative process.⁷⁸ This process involves the ‘bundling’ new laws that effectively hide new rules in broader packages, thus making them largely invisible to the opposition and the general public. In Poland (and elsewhere), one specific method of fast-tracking and avoiding broader deliberation (often *any* deliberation) is by proposing some of the most significant items of legislative changes as private members’ bills rather than governmental initiatives, even if *de facto* they were elaborated and put forward by the government. In this fashion, it is remarkable to note the frantic pace with which some of the most important legislative acts were forced through parliamentary commissions in Poland – and in the plenary debates of both chambers of the Polish parliament – silencing the opposition through the use of devices such as gag rules during ‘deliberations’, placing new items on the agenda without any notice, and speeding up the deliberation, often late into the night or early morning, ignoring critical expert opinions. Similar devices have also been used in many other countries governed by populists.⁷⁹ This is a feature of a broader phenomenon aptly called ‘instantaneous democracy’ by Ming-Sung Kuo. This phenomenon has the impact of ‘displac[ing] the stepwise and deliberative political tempo that is critical to norm translation and internalization in constitutional governance’.⁸⁰ In Samuel Issacharoff’s words, ‘[i]mpetuous populism rejects temporal restraints in the name of the will of the people’.⁸¹

In this vein, it is appropriate to ask whether constitutional and/or supreme courts are capable and willing to protect democratic mechanisms by defending the rights of the opposition and – more broadly speaking – defend the procedural integrity of the legislative process. The outcome is a mixed bag. Consider this example from Hungary in which the Constitutional Court was asked and failed to defend the opposition. On two occasions, in April 2013 and June 2013, several of the opposition MPs – in acts of desperation and in the absence of a level playing field for parliamentary actions and speeches (as Kim Lane Scheppele observes, ‘Opposition MPs are allowed little time to speak, cannot introduce bills or amendments, and have no realistic possibility of even slowing things down’)⁸² – decided to attract public attention by holding anti-Fidesz placards during parliamentary debates. In both cases, the offending MPs were punished with hefty fines. The opposition members decided to challenge the grounds on which the fines were imposed (under the Parliament Act of 2012),⁸³ but the Hungarian

77. Viktor Zoltán Kazai, ‘The Misuse of the Legislative Process as Part of the Illiberal Toolkit, The Case of Hungary’ (2021) 9 *The Theory and Practice of Legislation* 295, 298.

78. See Sadurski, *Poland’s Constitutional Breakdown* (n 32) 133–34.

79. See Sadurski, *A Pandemic of Populists* (n 2) 67–69.

80. Ming-Sung Kuo, ‘Against Instantaneous Democracy’ (2019) 17(2) *International Journal of Constitutional Law* 554, 567–68.

81. Issacharoff, *Democracy Unmoored* (n 14) 90.

82. Kim Lane Scheppele, ‘How Viktor Orbán Wins’ (2022) 33(3) *Journal of Democracy* 45, 59.

83. Disciplining the opposition members of the parliament had been made easier by the 2012 amendments to the Parliament Act that had excluded the Committee on Immunities from disciplinary proceedings. Membership of that Committee had been based on parity and introduced a semblance of independence into disciplinary procedures; after the amendments, fines can be

Court – in its two judgments on 4 November 2013 – dismissed the two parallel constitutional complaints. The Court found, *inter alia*, that ‘the rationale behind regulating MPs’ right to speak was to secure a proper balance between the rights of individual MPs and the guaranteeing of effective parliamentary activity’.⁸⁴ Both these cases were joined and culminated in a judgment by the ECtHR in May 2016.⁸⁵ The European Court unanimously found the breach by Hungary of freedom of expression, Article 10 of ECHR. It is a valuable example of the supranational court filing in the role a national constitutional court should have played. Kazai summarized the outcome well: ‘[T]he very same [Constitutional] Court, which has, for the most part, failed to stop the abusive practices of the governing majority in respect of parliamentary law-making, gives the opposition MPs a lecture on the basics of parliamentary work and decorum’.⁸⁶ Kazai also provides several examples of strong irregularities in Hungarian parliamentary lawmaking, which have led to the formation of crucial statutes where the Constitutional Court abstained from invalidation on procedural grounds.

One way in which authoritarians occasionally persecute the opposition is by using defamation law against it, and here courts may play a vital restraining role. Such a case occurred in India in March 2023, when the leader of the main opposition Congress Party, Rahul Gandhi was sentenced to *two years in jail* by a lower court in Gujarat for allegedly offending Prime Minister Modi in 2019. The offence consisted of a joke during a political speech where Gandhi rhetorically asked: ‘Why are all thieves named Modi?’. Gandhi was duly sued by a certain Nirav Modi, a diamond merchant unrelated to Prime Minister Modi, but the matter became extended upon the alleged defamation of the Prime Minister. The sentence of two years in jail would have meant that Gandhi would be removed from the parliament and ineligible to stand in elections for the next eight years. Happily for Gandhi – and for the state of democracy in India – on 4 August 2023, the Indian Supreme Court stayed the conviction, and Gandhi was duly reinstated in the parliament (and will be able to run in the 2024 elections).⁸⁷

Another strategy employed by the populist government in India is fast-track law-making. Consider one of the most important – and worrying – pieces of legislation. In August 2019, the Modi government introduced a bill to repeal certain provisions of Article 370 of the Constitution to unilaterally remove the special status granted to the state of Jammu and Kashmir at the time of independence in 1947 (‘unilaterally’, because when the bill was introduced and passed in Parliament, the state was governed by a centrally appointed Governor rather than a democratically elected government). Despite the importance of the bill and the peculiarity of the circumstances, the Speaker of the House (who belonged to the ruling party) did not allow any debate or

imposed on MPs by the Parliament at its plenary sessions, where the majority can decide without debate, see *Karáscony and Others v Hungary* App nos 42461/13 and 44357/13 (ECHR Grand Chamber, 17 May 2016), para 87.

84. As summarized in *Karáscony*, para 41.

85. *ibid.*

86. Viktor Z Kazai, ‘Administrative Judicial Reform in Hungary: Who Gives a Fig about Parliamentary Process?’ (Verfassungsblog, 1 May 2019), available at <<https://verfassungsblog.de/administrative-judicial-reform-in-hungary-who-gives-a-fig-about-parliamentary-process/>> accessed 16 July 2024.

87. See Alex Travelli, ‘India’s Top Court Clears Way for Rahul Gandhi’s Return to Parliament’ *New York Times* (New York, 4 August 2023), available at <www.nytimes.com/2023/08/04/world/asia/india-rahul-gandhi-defamation.html> accessed 16 July 2024.

deliberation to take place on the floor. The bill was introduced and passed on the same day without any advance notice to opposition party members.⁸⁸

Modi's legislative practices have triggered a new label: a legislative guillotine. In March 2018, the government effectively bypassed the opposition parties in India's lower house of Parliament to secure the passage of several BJP demands, including the contentious Finance Bill 2017,⁸⁹ appropriation bills, and the proposed budget for 2018. As Tarunabh Khaitan explains: '[I]n order to avoid a parliamentary debate on crucial financial issues, the government passed the Finance Bill and the Appropriation Bill under an extraordinary parliamentary procedure known as the "guillotine," despite several suggested amendments and strong protest by the Opposition. This procedure allows the Speaker of the House to put a bill to vote without any discussion'.⁹⁰

Courts are not powerless when faced with procedural defects of lawmaking. One of the propositions of this article is that courts ought to use these powers more expansively. Often, a judicial review of *procedures* enjoys more legitimacy than a substantive review – for obvious reasons: the usual objections towards the latter (mainly about overriding important value choices of the democratically legitimate legislature by unelected courts) do not apply or apply with much less force, to the latter, namely to procedural scrutiny. Such scrutiny may also be seen as more 'legal' in the sense of lending itself less to contested moral judgments and being subjected more to the issues on which a characteristically legal competence is more relevant (to be sure, it is a difference of *degree*, but this degree matters).

That is why it often makes sense for constitutional and/or supreme court judges to take a purely procedural path in scrutinizing constitutionally questionable laws if they have a choice between a procedural and substantive path. In Poland, for instance, the Constitutional Tribunal (in its 'better times' before 2016) occasionally preferred to take such a prudent path, even if the law was also open to substantive challenges. Consider a 2008 judgment of the Polish Tribunal⁹¹ regarding a highly controversial bill concerning the 'defamation of [the] Polish Nation' by imputing the Polish Nation's participation in and, or responsibility for, Nazi or Communist crimes. The law, adopted on 18 October 2006, was part of a nationalistic offensive by the right-wing government aimed at manifesting its patriotic credentials and harassing those critics – both scholars and public intellectuals – who pointed out alleged or real cases of collaboration by some Poles with Nazis during the Second World War. While the challenge – initiated by the Ombudsman – was mainly based on substantive charges regarding freedom of speech and academic freedom, the Tribunal avoided the merits and focussed solely on legislative procedure. They concluded that since the procedure was unconstitutionally

88. Maansi Verma, 'Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Reorganization Bill' (2019) 54(45) Economic and Political Weekly, available at <www.epw.in/engage/article/diminishing-role-parliament-case-jammu-and-kashmir> accessed 16 July 2024; Shivam Vij, 'No Debate, No Discussion, No Dissent, and the Constitution Is Changed' *The Print* (5 August 2019), available at <<https://theprint.in/opinion/no-debate-no-discussion-no-dissent-and-the-constitution-is-changed/272436/>> accessed 16 July 2024.

89. Sruthi Radhakrishnan, 'The Finance Bill, 2017: The Far-Reaching Consequences of a Lok Sabha Majority' *The Hindu* (25 March 2017), available at <www.thehindu.com/news/national/the-finance-bill-2017-a-brute-majority-and-its-far-reaching-consequences/article17663444.ece> accessed 16 July 2024.

90. Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49, 67.

91. Judgment of Constitutional Tribunal of Poland of 19 September 2008, K 5/07.

faulty, considering merits was pointless because the law was unconstitutional on procedural grounds.⁹² The specific procedural problem that the Tribunal found was that under a bicameral legislative system in Poland, the Senate had overstepped the procedural limits for changing the initial proposal made by the lower chamber (the Sejm) – thus crossing the boundary between amending the bill and a legislative initiative of a new law. The Tribunal objected to the fact that the initial articulation of the offence became enlarged in the Senate’s version and also that the provision migrated from the statute on the Institute of Public Remembrance (where it initially was supposed to be located) to the Penal Code, thus changing the nature of the provision. As such, the Senate’s changes were a ‘normative novelty’ of the sort impermissible in the procedure of the Senate’s intervention in Sejm’s law.⁹³

This was a Solomonic verdict. The law, on its merits, was highly problematic to many people – including a large majority of liberally minded lawyers – but at the same time, could not easily be attacked on its substance due to the spectre of insufficient patriotism (and respect for the ‘reputation and the good name of Polish Nation’) that it might raise. Hence, what some saw as a dirty compromise or issue avoidance was, to others, a wise moderation and avoidance of making a controversial moral choice.

Polish legal scholar Michał Marek Ziółkowski has compiled a catalogue of significant procedural irregularities which, based on the Constitutional Tribunal’s case law, each trigger judgments of unconstitutionality. They include (i) enactment of a law in a procedure that cannot be used for a given subject matter of the law (e.g. in an urgent procedure); (ii) inclusion of an amendment at a late stage of the lawmaking process, which goes beyond the subject matter of the law as featured in the legislative initiative; (iii) failure to seek advice by a constitutional public institution when such advice is constitutionally required; (iv) restriction of the number of parliamentary readings of the bill; and (v) inclusion, by the Senate, of amendment that goes beyond the subject-matter of the law adopted by the lower chamber.⁹⁴ As one can see from this national case study, constitutional courts may equip themselves with an impressive array of constitutional manners of scrutiny.

One constitutional court that may serve as a role model to countries plagued by populist authoritarianism is that of South Africa. The court has been very active in policing parliamentary procedures, to the point that prominent comparative constitutional law scholar Stephen Gardbaum has criticized it for engaging a ‘quintessentially political function’ that ‘typically [would] be viewed as illegitimate overreach’.⁹⁵ In *United Democratic Movement v Speaker of the National Assembly* (‘UDM’),⁹⁶ decided in June 2017, the South African Constitutional Court set aside the Speaker’s ruling that she had no power to call for a secret ballot on a motion of no-confidence in the President. In response to the Speaker’s view that neither the Constitution nor the rules of the National Assembly provide for a secret ballot, the Court held that, as the Constitution does not pronounce on the voting procedures, a secret ballot is permissible, and the National Assembly had – through its Rules – effectively delegated to the Speaker the

92. *ibid* at item 6 of the Reasons for Judgment.

93. *ibid* at item 3.7 of the Reasons for Judgment.

94. Michał Marek Ziółkowski, ‘Standard legalności stanowienia ustawy w orzecznictwie konstytucyjnym’ [Standard of statutes legality in the case law of the Polish Constitutional Tribunal] in P Radziejewicz (ed), *Kontrola legalności ustawy w Sejmie* (Wydawnictwo Sejmowe 2015).

95. Stephen Gardbaum, ‘Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa’ (2019) 9 *Constitutional Court Review* 1, 6.

96. 2017 (5) SA 300 (CC).

decision as to what procedure to use, which included a secret ballot. Further, the Court set out a list of specific factors that the Speaker must consider when deciding how voting must be conducted. Effectively, the Court ‘conferred’ upon the Speaker of the Assembly the power to order a secret ballot in an extremely sensitive case – in this case, the potential impeachment of the President.

A few months later, in *Economic Freedom Fighters II*,⁹⁷ handed down in December 2017, the Constitutional Court took its intervention in the parliamentary procedures to an even higher level. Although the opposition parties had moved to impeach the President, and the motion was debated and defeated on a secret ballot ordered by the Speaker (in the light of *UDM’s outcome*), the Court held that the National Assembly had nonetheless failed to fulfil its implicit constitutional obligation to make rules creating a specially tailored process for impeachment. According to the majority of the Court, the more general ad hoc committee procedure used by the Assembly for the motion was constitutionally insufficient.

Both decisions are controversial. Chief Justice Mogoeng, dissenting in the latter decision, characterized the majority’s approach as ‘a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament’.⁹⁸ Professor Gardbaum, in his comment on both cases, found that ‘the Court seem[ed] to be extending its role’.⁹⁹ Perhaps, this is true. To an external observer, it may even seem that the Court was dealing with technicalities of inner parliamentary procedures, which are best left to the parliament. However, this would be a myopic view. The Court’s activism in both instances should be assessed against the political background in which these decisions were handed down. Both cases concerned procedures related to impeachment – in a state in which subsequent presidents have faced corruption-related charges¹⁰⁰ and where populist forces – including not only the ruling African National Congress but also the Economic Freedom Forces (EFF) – regularly abuse parliamentary procedures.¹⁰¹ The troubling state of parliamentary practices has also been amplified by reports about corruption within the Parliament itself.¹⁰² In such a context, it can be argued that extraordinary interventions by the Court seem fully justified, even necessary.

4 JUDICIAL MILITANT DEMOCRACY

Elections are crucial for populists. Elections provide them with the *only* factor that legally establishes their legitimacy: a claim that they were elected to offices of power by the majority. Their monopoly on legitimacy is a central asset of populists. As

97. 2017 (2) SA 571 (CC).

98. *ibid* at para 254.

99. Gardbaum (n 95) 9.

100. In 2021, South Africa’s former President, Jacob Zuma, was sentenced to 15 months imprisonment for contempt of court in a corruption-related case; in December 2022, President Ramaphosa narrowly dodged an impeachment vote by the parliament following a Constitutional Court judgment, which found him guilty of serious corruption charges.

101. Theunis Roux, ‘Constitutional Populism in South Africa’ in Krygier, Czarnota and Sadurski (n 38) 99, 126–27.

102. Heinz Klug, ‘State Capture or Institutional Resilience: Is There a Crisis of Constitutional Democracy in South Africa?’ in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) 295, 303.

Jan-Werner Müller put it, discussing populist antipathy to civil society groups: ‘For [populists] opposition from within civil society creates a particular moral and symbolic problem: it potentially undermines their right to *exclusive moral representation*’.¹⁰³ ‘Exclusive moral representation’ – these words encapsulate populists’ legitimacy claims. While they *do* enjoy this legitimacy, often the elections that bring them to power are tainted by failures of the electoral system. While celebrating the importance of electoral legitimacy, populist governments do not necessarily protect the integrity of elections – and after their first electoral victory, they often manipulate the system in such a way as to maximize their chances of re-election. As Takis Pappas put it, ‘Once in power, the populists’ new goal is to retain it by democratic means but without necessarily observing the institutions of liberal democracy’.¹⁰⁴ The pattern is usually such that, during the first term in office of populists, the electoral ‘playing field’ gradually becomes tilted – and biased against populists’ opponents. Such instances generate a particular task for courts.

Brazil’s two top courts provide a good example of judicial protection of fairness and integrity of elections: the Federal Supreme Court (STF) and the Electoral Superior Court (TSE), which have undertaken activist legal actions to defend democracy. Together, their actions combine into a form of ‘militant democracy’ paradigm: defending democracy against anti-democrats by taking restrictive actions against them. One such judicial action, led by a judge-rapporteur in the Supreme Court Alexandre de Moraes, concerned the fake news campaign by President Jair Bolsonaro and his supporters. The inquiry involved ‘digital militias’ and the so-called ‘hate cabinet’ – namely, a ‘shadow office to disseminate disinformation on political opponents [of President Bolsonaro] that was allegedly created inside the presidency’ at least since 2019.¹⁰⁵ What became known as the ‘fake news inquiry’, opened by the Supreme Court based on its internal rulings, had – according to some lawyers – questionable legal grounds because it was initiated without previous request from the prosecutor’s office or a police authority (no wonder as both entities were wholly subordinated to the presidency). In response to concerns about the constitutionality of such extraordinary procedure, the Court justified the investigation by pointing to the victim – that is, to itself, as the Court and its members were the primary targets of the attacks. Most fake news campaigns involved threats against the Justices and their relatives. As two Brazilian legal scholars, Thomas Bustamante and Emilio Meyer, observed: ‘From the legal perspective, the procedure ha[d] clay feet; in terms of constitutional politics, however, the enquiry gained force because it was a response to the fact that the authority that should investigate these cases – the Prosecutor-General of the Republic – had been already captured by Bolsonaro’.¹⁰⁶

103. Jan-Werner Müller, ‘Populism and Constitutionalism’ in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds), *Oxford Handbook of Populism* (2017) 590, 597 (emphasis added).

104. Takis Pappas, *Populism and Liberal Democracy* (OUP 2019) 210.

105. Emilio Peluso Neder Meyer, ‘Brazilian Presidential Election Results: Curbing Democratic Erosion?’ (Verfassungsblog, 6 November 2022), available at <<https://verfassungsblog.de/brazilian-presidential-elections-results/>> accessed 16 July 2024.

106. Thomas Bustamante and Emilio Peluso Neder Meyer, ‘The Brazilian Federal Supreme Court’s Reaction to Bolsonaro: Mixed Responses and the Need to Preserve the Court’ (Verfassungsblog, 26 September 2022), available at <<https://verfassungsblog.de/the-brazilian-federal-supreme-courts-reaction-to-bolsonaro/>> accessed 16 July 2024.

Another intense judicial action in defence of democracy – which put the TSE in direct confrontation with the President – was in response to Bolsonaro’s (who clearly had taken his cue from Donald Trump from the US 2020 elections) constant accusations of the alleged malfunction of the electoral electronic system for the 2022 elections. (The system had been in operation since 1996 and was generally credited with overcoming a past electoral fraud that existed with paper voting, and ironically, Bolsonaro had been elected by a large margin using an electronic ballot).¹⁰⁷ The inquiry, led by Justice Roberto Barroso (who at the time was Chief Justice of the Electoral Court), led to the accusation that the President undermined the legitimacy of the elections – a charge that, if convicted, could have resulted in Bolsonaro’s ineligibility.¹⁰⁸ (As a postscript: in June 2023, the TSE banned Bolsonaro from seeking public office until 2030).¹⁰⁹

Judicial actions in Brazil – undertaken at the time of the judicial inquiry by Justice Alexandre de Moraes within STF – had their legislative continuation more recently. In 2023, already under Lula’s presidency, a bill to prevent the dissemination of fake news was being debated in the Chamber of Deputies. In response, Google used its website to criticize the legislative proposal, and the mega-company’s lobby succeeded in preventing the bill from being further debated in the Chamber. It was one of the first major legislative defeats for the new Lula government. Nevertheless, the tireless Justice Moraes found Google’s position to threaten the rule of law (that could be addressed by the fake news inquiry) and subpoenaed Google’s Brazilian CEO to testify before the Federal Police. As Professors Meyer and Bustamante observe: ‘Justice Alexander de Moraes’s ruling mixes legislative and judicial procedures in a controversial way. While the fake news inquiry has played a capital role to respond to the attacks on Brazilian democracy, that does not entail that judicial authority shall be expanded in an uncontrollable way, with the risk of compromising the legitimacy of the court’s constitutional procedures’.¹¹⁰ Meyer and Bustamante’s observation captures the central dilemma of activist courts operating in weak democracies: difficulty in finding a middle ground between the surrender of its responsibility to protect the democratic order and, on the other hand, excessive activism, which may create an impression of actions beyond the limits of courts’ legitimacy.

Older than the Brazilian pedigree is the application of the basic democratic structure doctrine (see Part 2 above) by the Indian Supreme Court to disallow election law reforms from being placed beyond judicial review. In the 1975 *Elections Case*,¹¹¹ the Court invalidated amendments that would empower the Parliament – rather than the independent electoral commission and the courts – to regulate elections. The Court objected to placing the electoral code into the Constitution, which would render the electoral law non-reviewable. Consequently, the Court retained authority over the first

107. Luis Roberto Barroso, ‘Populism, Authoritarianism, and Institutional Resistance: Constitutional Courts in the Game of Power’ (2022) 57 *Texas International Law Journal* 259, 277.

108. Bustamante and Meyer (n 106).

109. Jack Nicas, ‘Brazil Bars Bolsonaro from Office for Election-Fraud Claims’ *New York Times* (New York, 30 June 2023), available at <www.nytimes.com/2023/06/30/world/americas/bolsonaro-brazil-banned-office.html> accessed 16 July 2024.

110. Emilio Peluso Neder Meyer and Thomas Bustamante, ‘Accountability in Brazil: Legal Developments after 8 January 2023’ (Verfassungsblog, 8 May 2023), available at <<https://verfassungsblog.de/accountability-in-brazil/>> accessed 16 July 2024.

111. *Indira Nehru Gandhi v Raj Narain & Anr* [1975] AIR 1590, 1975 SCC (2) 159 (India).

post-emergency rule elections in 1977, which resulted in a sweeping victory for the opposition Janata Alliance – the first time in India’s history that a party other than Congress won.¹¹² Yet another example is Taiwan, where, in 2000, the Constitutional Court struck down the proposed constitutional amendments, which would have restricted the directness of the elections to the National Assembly.¹¹³ In contrast to the Brazilian state of affairs described above, neither of these cases can be strictly described as ‘judicial militant democracy’, as no restrictions on political rights (to protect democracy) were involved. Instead, they belong to the category of judicial protection of elections through a doctrine of unconstitutional amendments.

CONCLUDING REMARKS

The strategies outlined in this article assume that the constitutional and/or supreme courts will *survive* – or at least that they will survive substantially unscathed from authoritarian assaults by governing populists. However, we know that courts are usually the first institutional targets of populists. Such assaults take different forms and range from judicial capture, court-packing with loyalists, erosion of powers and budgets, public vilification and harassment of intransigent judges, and attempts at corruption or political rewards to loyalist judges. A closer analysis of such populist strategies and judicial responses is an interesting topic *per se* and deserves a broader treatment than can be provided here, in the concluding remarks. However, it cannot be left entirely unmentioned when we reflect upon the role of judicial review in democracy protection.

A range of feasible judicial responses is a function of the type of assaults. In the cases of extreme assaults, the courts will engage in what Nick Barber called (in a different context) ‘self-defence for institutions’¹¹⁴ – or as Polish scholars called it, when referring to the Constitutional Tribunal in its crisis year of 2016, ‘existential jurisprudence’.¹¹⁵ It will, at the mildest level of responses, include various forms of passive acquiescence, ‘laying low’, pretending that it is ‘business as usual’ and postponing taking sensitive decisions. Some of these actions may be wise and prudent – mainly when motivated by an attempt to preserve political and institutional capital for ‘better days’ and when it is likely to harm ‘the very existence of the court as a constitutional court, and there is good reason to believe that the threat is temporary’.¹¹⁶ The problem with such strategies, however, is that they may just be a result of self-serving rationalization for apathy or worse, judicial spinelessness.

On the active end of the continuum of responses, there are various open forms of judicial resistance – such as those undertaken by the Polish Constitutional Tribunal in 2015 and 2016 and by many judges of ‘common courts’ – both in and out of

112. See Issacharoff, *Democracy Unmoored* (n 14) 125.

113. *ibid* at 127.

114. Nicholas W Barber, ‘Self-Defence for Institutions’ (2012) Oxford Legal Studies Research Paper 61/2012, available at <<https://ssrn.com/abstract=2162129>> accessed 16 July 2024.

115. Tomasz T Koncewicz, “‘Existential Judicial Review’” in Retrospect, “Subversive Jurisprudence” in Prospect. The Polish Constitutional Court Then, Now and ... Tomorrow’ (Verfassungsblog, 7 October 2018) available at <<https://verfassungsblog.de/existential-judicial-review-in-retrospect-subversive-jurisprudence-in-prospect-the-polish-constitutional-court-then-now-and-tomorrow/>> accessed 16 July 2024.

116. Roni Mann, ‘Non-Ideal Theory of Constitutional Adjudication’ (2018) 7 *Global Constitutionalism* 14, 45.

courtrooms. In my book on constitutional breakdown in Poland, I outline the rather detailed story of this brave resistance when the Polish Tribunal engaged in a head-on conflict with populist rulers.¹¹⁷ In a nutshell: in 2016, the Polish Tribunal systematically invalidated several government bills aimed at disempowering the judiciary. The judgments of the Tribunal – some of which have not been published in the official gazette by the government – present impressive evidence of judicial independence and courage. In the end, in December 2016, when the pro-government loyalists took most judicial seats and the position of Chief Justice, the Tribunal lost. The remaining ‘old’ justices kept recording their objections in dissents in the years to come, but one after another, they were replaced by pro-PiS judges (due to the regular termination of terms of office). As of this writing (May 2024), all 15 Tribunal judges (including the improperly appointed three) have been elected by the PiS parliamentary majority. Until the elections of 15 October 2023, the Tribunal was a firm defender of laws enacted by the ruling populist authoritarian PiS government, and today, it continues to serve as a staunch advocate of the opposition PiS. Unless its composition changes soon, the Tribunal will likely be able to hinder many laws that the new (democratic) government will seek to enact in an attempt to undo the destruction of the judicial system caused between 2015 and 2023.

However, political control over top courts does not come without cost – such that these strategies may signal a Pyrrhic victory for populist authoritarians. In Poland, for example, it had two unintended consequences. First, it effectively ended the possibility for the political power to engage in a ‘blame game’. In any country, several political or legislative decisions must be made, but these decisions will be very unpopular and so politically costly for the parliamentary majority or the executive. So, they are usually dumped on the court, and the court will be forced to decide, thus absolving the ruling executive from political responsibility for these decisions. However, a condition of the blame game is that the court must not only *be* independent but the population must also *believe* that the court is independent: as a citizen, you cannot blame a court that is entirely helpless, and so you will place the blame where the blame is due – with the executive.

Such a failure of the ‘blame game’ took place, for example, when, on 22 October 2020, the ‘captured’ Polish Constitutional Tribunal took a decision that essentially delegitimized abortion. The mass protests that followed were addressed not as much against the Tribunal but against the government (and a *de facto* leader Jarosław Kaczyński) because that is where the public believed the actual decision had taken place. As Tamir Moustafa and Tom Ginsburg put it, considering a hypothetical scenario whereby an authoritarian government wishes to abandon some of its policies that are popular but which it deems too costly: ‘The strategy of “delegation by authoritarian institutions” will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent of the regime’.¹¹⁸ However, when they are *not* seen this way, the blame diversion will be ineffective.

The second unintended consequence of this strategy, also visible in Poland, is that a *de facto* extinguishment of the Constitutional Tribunal has prompted many ‘ordinary’ (non-constitutional) judges to consider and apply a so-called dispersed judicial review,

117. Sadurski, *Poland’s Constitutional Breakdown* (n 32) 61–79.

118. Tamir Moustafa and Tom Ginsburg, ‘Introduction: The Functions of Courts in Authoritarian Politics’ in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008) 1, 13.

US style – something that had been anathema for the designers of democratic Poland after 1989 (or everywhere else in post-communist CEE for that matter).¹¹⁹ This also revived a discussion among lawyers and legal scholars about the virtues of a dispersed review in the absence of an effective centralized, Kelsenian review. In the words of a leading Polish constitutional lawyer, an ex-Justice of the Constitutional Tribunal and an ex-Judge of the ECtHR, Lech Garlicki and Dr Marta Derlatka, ‘a radical shift towards the decentralized model of judicial review might be seen as a more attractive arrangement [than a “revitalization of a constitutional court”]’.¹²⁰ While the elections on 15 October 2023 put an end to populist authoritarian rule in that country, the lesson that all judges are responsible for enacting a directly enforceable constitution may be a good and lasting side effect of an authoritarian assault on a vulnerable constitutional court.

119. I described this debate, at some length, in Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer 2014) 35–43.

120. Lech Garlicki and Marta Derlatka, ‘Constitutional Review in the Abusive Constitutionalism: Continuation, Corruption or Disappearance?’ in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024) 196 (italics removed).