Courts v. the will of the people: the judiciary, democracy, and the populist narrative

*Andreas Marcou

Suggested citation: A. Marcou, 'Courts v. the will of the people: the judiciary, democracy, and the populist narrative' (EU-POP JMMWP 3/2022)

Abstract

For the EU, populist attacks on the judiciary are invariably attacks on the rule of law and part of broader activity that undermines European values. In this working paper, I attempt to evaluate some of the populist claims made in response to European action. In particular, I evaluate the argument that the rule of law is a contested concept and the EU should not seek to impose its conception on Member States. I then proceed to discuss the claim that court reforms in Poland and Hungary are necessary because of various democratic considerations. Discussing various arguments about the scope of the powers of the judiciary, this paper attempts to offer some insight into the proper role of the courts in a democracy.

Introduction

In September 2020, the European Commission published its Rule of Law Report, as part of the European Rule of Law Mechanism.[1] The report was heralded as evidence of the Union's commitment to the 'rule of law…. [as] the foundation of our societies'[2] and a way to '[fill] an important gap in our rule of law toolbox'.[3] Indeed, the Annual Rule of Law Report comes to be added to the various legal tools at the Union's disposal—infringement proceedings, for example, have been used against some member states for actions that violate rule of law

* Lecturer in EU Law and Theory, UCLan Cyprus, E:amarcou@uclan.ac.uk

[1] EU Commission, '2020 Rule of law report - Communication and country chapters', 30 September 2020, available at https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en accessed 10 August 2022

[2] Press Corner, Rule of law: First Annual Report on the Rule of Law situation across the European Union, 30 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1756 accessed 10 August 2022 (comment by the President of the Commission, Ursula Von Der Leyen)

[3] Ibid (comment by the Vice-President for Values and Transparency, Věra Jourová)

principles.[4] Most common culprits, but by no means the sole culprits, are right-wing populist actors in Hungary and Poland.[5] Attacks on the independence of the judiciary, efforts to dictate judicial outcomes, or schemes to discipline judges acting in ways that undermine the government's agenda are only some obvious examples of recalcitrant behaviour.[6] Alongside the other mechanisms the EU has triggered against both countries for these actions, one might also add the 'budgetary rule of law conditionality' instrument, which the Court of Justice recently found to be legal.[7] This instrument, if used, would allow the withholding of funds from countries that undermine the rule of law.

For the EU, populist attacks on the judiciary are invariably attacks on the rule of law and part of broader activity that undermines European values. But populist actors have consistently denied the charge. In this paper, I address two of the responses that one can trace in the statements made by such actors in Poland and Hungary. The first, is that there is nothing wrong about the rule of law in those countries. The second sees those actions as justified efforts to limit the power of an undemocratic body so as to more effectively realise the democratic will of the people. Such claims are common in populist narratives around the globe—they are neither unique to the Hungarian and Polish situation, nor are they limited to the specific type of ethnonationalist populism one encounters in these European countries.[8]

---

[4] See, e.g., cases brought under Art.258 against Poland: C-619/18 European Commission v Republic of Poland [2019] ECLI 531 (lowering retirement age for judges); C-192/18 European Commission v Republic of Poland [2019] ECLI 924 (retirement age male and female judges); C-791/19 European Commission v Republic of Poland [2021] ECLI 596 (disciplinary regime for judges). See also, Jacquelyn Veraldi and Stephanie Laulhé Shaelou, 'The Substantive Requirements of Judicial Independence in the EU: Lessons from Times of Crisis' (EU-POP JMMWP 1/2021) available at https://eupopulism.eu/wp-content/uploads/2021/07/EU-POP-JMMWP-1-of-2021.pdf

[5] For the purposes of this article, 'populism' will refer to the type of right-wing populism that espouses an ethnonationalist ideology.

[6] See e.g., Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies, 3

[7] C-156/21 Hungary v Parliament and Council [2022] ECLI 97; C-157/21 Poland v Parliament and Council [2022] ECLI 98

[8] On the specific brand of ethnonationalism in Central and Eastern Europe see Pech and Scheppele *Illiberalism within* (n.6); Ruth Wodak, Majid KhosraviNik and Brigitte Mral (editors). Right-Wing Populism in Europe: Politics and Discourse. (London: Bloomsbury Academic, 2013); Mark Tushnet, 'Varieties of Populism' (2019) 20 German LJ 382 On populism in general, and on common elements of

Hungary and Poland are, nevertheless, the most conspicuous example of such worrying activity within the EU, not least because of the firm grip in power populist parties in those countries maintain.

Responding to the European Commission's decision in December 2016 to launch an inquiry into the rule of law in Poland, the leader of the ruling PiS party, Jaroslaw Kaszynski proudly declared there 'is nothing going on in Poland that contravenes the rule of law'.[9] The Union's backlash against their reforms, Polish officials have argued, can be traced to its attempts to impose on a Member State specific values it associates with the rule of law.[10] Tempting as it

---

populist parties see indicatively Cass Mudde and Cristóbal Rovira Kaltwasser, Populism: A very short introduction, (Oxford University Press, 2017); Jan-Werner Müller, What is Populism? (Penguin Books, 2017); Benjamin Moffitt, The Global Rise of Populism, (Stanford University Press, 2016)

[9] Pawel Sobczak, Justyna Pawlak 'Poland's Kaczynski calls EU democracy inquiry "an absolute comedy"' (22 December 2016) Reuters, at https://www.reuters.com/article/us-poland-politics-kaczynski-democracy-idUSKBN14B1U5 accessed 10 August 2022 . Other Polish officials have echoed that statement since The First News, 'Poland has no problem with rule of law, PM insists' 21 October 2021, at https://www.thefirstnews.com/article/poland-has-no-problem-with-rule-of-law-pm-insists-25561 accessed 10 August 2022. Hungary and Poland have made similar claims in their submissions before the CJ: the rule of law "cannot be the subject of a uniform definition in EU law" (Hungarian government) and a budgetary-related EU regulation "cannot define the concept of the rule of law or the constituent elements of infringements of the rule of law" (Polish government). See Opinions of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 267 and in Case C-157/21, *Poland v European Parliament and Council*, EU:C:2021:978, para. 17.

[10] France 24, 'EU unconvinced by Polish arguments on judicial changes at end of summit' 22 October 2021 at https://www.france24.com/en/europe/20211022-eu-unconvinced-by-polish-arguments-on-judicial-changes-at-end-of-summit accessed 10 August 2022; Daniel Boffey, ' Imposing 'imaginary' values risks EU collapse, Slovenian PM claims' The Guardian, 4 July 2021, at https://www.theguardian.com/world/2021/jul/04/imposing-imaginary-values-risks-eu-collapse-slovenian-president-claims accessed 10 August 2022 (related argument about LGBTQ rights). In a speech delivered to the European Parliament, Polish PM Mateusz Morawiecki warned of the danger that the EU becomes "centrally administered parastatal organism, whose institutions may force upon its 'provinces' whatever they consider right", 'Statement by Prime Minister Mateusz Morawiecki in the European Parliament' 19 October 2021, at https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament accessed 10 August 2022

may be to dismiss these claims as a rhetorical ploys, they do reveal a deeper issue linked to an adequate understanding of what the rule of law entails. In Section 1, I attempt to conceptualise the rule of law. Even if the rule of law is a contested ideal,[11] I shall argue that there is no account of the rule of law that could be compatible with the actions that undermine judicial independence. Even if there are disagreements about the scope or fundamental purpose of the rule of law, some key principles of judicial independence and impartiality as well as some fundamental procedural elements are necessary for any rule of law model. Without such elements, no rule of law system obtains.[12]

The second section turns to the second rejoinder to accusations of undermining the rule of law, which attempts to justify actions targeting the judiciary with reference to democratic principles. In particular, populist parties maintain that the will of the people, as expressed through the democratic chamber, ought not be thwarted by undemocratic courts.[13] Such an argument brings to the forefront a key question in political theory about the position of courts within constitutional democracies.[14] It is against this background of populist attacks on courts that I suggest we examine some arguments that have in the past emerged within the judicial review debate. Opponents of judicial review have expressed scepticism about the powers courts should have within a democratic state. Measures against the judiciary in Poland and Hungary are often couched in similar terms as those used by opponents of judicial review. It is therefore worth exploring how populist discourses that have gained traction within the EU and around the world relate to classic arguments about the suitability or unsuitability of judicial review. Despite some uneasiness about the role of courts within a democratic system that exists in opponents of judicial review, the populist narratives against the judiciary framed

[11] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 21 Law and Philosophy, 137.

[12] Inspiration for this approach to the question of the rule of law comes from Lon Fuller's discussion on the morality of duty. See Lon Fuller, The Morality of Law (Yale University Press, 1969)

[13] See e.g., 'Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014' 29 July 2014 at https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/ accessed 10 August 2022

[14] I use constitutional democracy broadly to mean a democratic system that incorporate legal mechanisms (this could include a written constitution, entrenched constitutional norms, bill of rights, and so on) to regulate the use of political power. Liberal democracy will similarly refer to such constitutional democracies that guarantee core liberal values, such as individual rights and equality.

in democratic terms are misleading. Against those claims, I shall suggest that there are ways to see judicial review and judicial activity as a valuable exercise that does not necessarily erode democracy.

Section 1: Conceptualising the Rule of Law

Few concepts in legal thought and practice have been interpreted in so many varying ways as the rule of law.[15] In general, the rule of law applies both to the conditions under which laws are made and to the relationship between citizens and their government and community. On the one hand, the rule of law tends to be associated with formal characteristics such as rule-generality, clarity, and transparency in lawmaking. But it is also linked with rights that individual citizens are generally thought to be owed within liberal democracies. For example, requirements that law and justice should be accessible and that every citizen should be able to resort to independent and impartial courts to settle disputes or uphold their rights are core elements of the rule of law. As a result, the courts emerge as the par excellence institutions through which rule of law principles are to be safeguarded.

Two distinct approaches emerge as candidates to conceptualise the rule of law.[16] The first one, dubbed thin conception, conceives of the rule of law as a series of formal or procedural requirements that are necessary to achieve some minimum standard of legality. If we wish to speak of a system based on the rule of law, then laws ought to have some specific characteristics. Lon Fuller famously identifies eight 'principles of legality' that must characterize a legal system if it is to be a rule of law system, including principles such as generality, clarity, non-retroactivity, congruence between laws created and applied, and so forth.[17] And even though, for Fuller, those conditions embody further substantive moral conditions, for Joseph Raz and HLA Hart, who exemplify the thin approach to the rule of

[15] E.g., Brian Tamanaha, *On the rule of law: history, politics, theory* (Cambridge University Press, 2004); Jeremy Waldron, 'The Rule of Law', The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/ accessed 10 August 2022; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467

[16] Waldron identifies three approaches: formal, procedural, and substantive (ibid). Tamanaha adopts the broad classification between thin and thick but identifies a total of six sub-classifications (n.15, p.91)

[17] Lon Fuller, *The Morality of Law* (Yale University Press, 1969)

law, those conditions remain fundamentally formal.[18] They secure specific formal safeguards but cannot ensure that a system maintaining them can consistently produce just outcomes. As Hart puts it, the principles of legality 'are compatible with very great iniquity'.[19] Given its lack of emphasis on substantive issues, the formal approach to the rule of law stresses systems, procedures, and institutions involved in the justice processes, including the courts.

On the other hand, a substantive conception of the rule of law sees the concept as interlinked with other principles and values such as democracy and human rights.[20] Addressing the Razian argument that the rule of law is merely one value among many that systems may demonstrate, and that the rule of law is analytically separated from other values such as democracy or human rights, Lord Bingham suggests that

> '[w]hile … one can recognize the logical force of Professor Raz's contention, I would roundly reject it in favor of a "thick" definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed'.[21]

Bingham's thick conception of the rule of law puts individual human rights and dignity at the heart of the concept. Observing the rule of law necessarily entails protecting human rights. Laws that undermine individual rights, therefore, also threaten the rule of law—even if they are procedurally sound.

Another substantive approach to the rule of law, and the one that I shall adopt for the remainder of this paper, is an interpretation of the rule of law that embodies an intrinsic link with democratic norms. According to this approach, the rule of law is primarily and above all a bulwark against the abuse of political power.[22] Whereas the haphazard, arbitrary, and

---

[18] Joseph Raz, *The Authority of Law*, (OUP, 1979) 210-231; H.L.A. Hart, Essays in Jurisprudence and Philosophy, (Oxford: OUP, 1983) 350-357

[19] H.L.A. Hart, The Concept of Law (OUP, 2nd Ed 1994), 207

[20] See e.g., Waldron, *The Rule of Law* (n.15)

[21] Thomas Bingham, *The Rule of Law* (Allen Lane, 2010), 67

[22] Richard Bellamy, 'The rule of law' in Richard Bellamy & Anthony Mason (eds.), *Political Concepts* (Manchester University Press, 2003), 119-121

unchecked use of political power would lead to serious violations of individual freedom, the rule of law guarantees that all political power is checked.[23] As a guarantee against the abuse of political power and an essential element of individual freedom, the rule of law becomes tightly associated with democratic rule. Aristotle first exemplifies the link between the rule of law, democracy, and the legitimate use of political power. Comparing systems subject to the rule of law to those subject to the rule of human beings, Aristotle firmly supports the former. Leaving the use of political power to the discretion of human beings is like asking 'a wild beast' to rule.[24] Not only are there no guarantees that decisions will cohere with reason, but even if rulers use their discretion correctly, those decisions are not entrenched but may then be reversed; what has been done can just as easily be undone. It is the instability inherent in systems subject simply to the discretion of human beings that tips the scale in favour of the rule of law. Despite some advantages to the rule of human beings, famously emphasised by Plato (e.g., the laws' rigidity and generality may lead to injustice whereas the flexibility of discretionary rule by the most virtuous and well-trained would, presumably, lead to the most just outcomes), Aristotle correctly sees the rule of law as the only entrenched bulwark against the abuse of political power. This element of the rule of law should be identified as its salient characteristic. If the rule of law opposes the arbitrariness of the rule of human beings, it is no surprise that Aristotle considers it synonymous to the rule of reason. Asking law to rule, he explains, is to 'allow God[25] and the understanding (nous) alone to rule'.[26] In fact, a constitution (politeia) that does not submit to the rule of law, does not deserve to be classified as a constitution at all.[27]

Crucially, Aristotle's praise for the rule of law is presented alongside a discussion on the superiority of the rule of the many over the rule of the few.[28] First, the multitude is better suited than the few to reach good decisions in accordance with reason. A feast is much more

[23] E.g., ibid; Philip Pettit, *Republicanism* (OUP, 1997), 36, 75-76

[24] Aristotle, *Politics* (Hackett Publishing, C. D. Reeve, (trans), 1998), 1287a28-32. All subsequent references to the *Politics* are to this edition.

[25] Aristotle's God (theos) embodies reason (logos)

[26] *Politics* 1287a28-32

[27] *Politics* 1292a32

[28] *Politics* 1281a33-1282b10 (rule of many superior to rule of few). The discussion on the superiority of the rule of law over the rule of human beings is picked up at 1286a7-1288a15

enjoyable, he insists, when each participant contributes their own dish.[29] Collective decision-making where many people contribute, presenting their opinions, and deliberating about the best outcome becomes the way in which one could hope that decisions according to reason can emerge.[30] Second, and more crucially, justice requires that in a society of equal persons, political power is shared.[31] For Aristotle, then, it is only fair that citizens rotate in political offices. Ruling and being ruled in turn, a system of participatory democracy, ensures that political abuses are minimised.[32] It is interesting to note that for Aristotle, setting up a scheme of participatory democracy entails some fundamental respect for the rule of law.[33] To be sure, not all types of democracies are systems of the rule of law. Sheer majoritarian regimes where decisions reflect the unmitigated, unconstrained will of the majority are, for Aristotle, worse than tyrannies.[34] By contrast, a democracy that remains subject to the rule of law emerges as a secure guarantee for individual freedom and a concrete protection against abuses of political power. For the remainder of this paper, I shall therefore embrace a substantive approach to the rule of law that embodies intrinsic connections with democracy and the rule of law.

Regardless of the particular conception of the rule of law one adopts, some of the elements typically associated with it are common. As Tamanaha explains, thicker conceptions of the rule of law do not ditch requirements set forth by thinner conceptions—instead they incorporate them and make further demands.[35] A conception of the rule of law that incorporates democratic standards will also insist that the relevant formal/procedural conditions are met (that laws are clear, prospective, non-contradictory, etc.). Even if different

[29] *Politics* 1281a41-45

[30] Aristotle's insight into the importance of collective deliberation has inspired theories of deliberative democracy. James Bohman, The Coming of Age of Deliberative Democracy (1998), 6 *The Journal of Political Philosophy*, 400-425; Joshua Cohen,'Deliberation and Democratic Legitimacy' in James Bohman, & William Rehg (eds.), *Deliberative Democracy* (The MIT Press, 1997) 67-92; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations.* (OUP, 2010)

[31] *Politics* 1287a15-17; 1288a-1-15

[32] As Aristotle explains, democracies without the rule of law are prone to popular leaders who achieve, and abuse, political power, *Politics* 1292a7

[33] *Politics* 1287a18

[34] *Politics* 1292a8-23

[35] Tamanaha (n.15) p.113

conceptions might adopt different justifications as to why these requirements are essential, it remains the case that some components of the rule of law are always associated with the rule of law. For example, unobstructed access to an impartial and independent arbitrator charged with resolving disputes amounts to a necessary component of the rule of law whether you think that it is important to secure procedural guarantees of congruence between laws created and laws applied,[36] or whether you maintain that such a right to access courts is a core component of a human rights system,[37] or whether you consider it a necessary element of a democratic government that grants individuals a right to challenge its decisions.[38] It is therefore unquestionable that any rule of law system will have to secure an independent judiciary. Hart categorises these various components of the rule of law that are always associated with the concept as elements of natural justice. Such are, for example, 'the principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute'.[39] Waldron aptly dubs these components requirements of 'due process'[40]; and indeed, they form part of the rule of law regardless of whether we adopt a thin or thick conception of the term. These requirements amount, one might say, to the lowest common denominator of thin and thick conceptions of the rule of law. In fact, so prevalent are those due process requirements that we have come to wholly identify them with the rule of law. And in turn, we invariably associate them with democracies. We see an independent judiciary as a mark of democracy while we denounce countries with politicised or unfree judiciaries as sham democracies, autocracies, or dictatorships. We would hardly imagine a functional democracy where individual freedoms are served without some sort of judicial mechanism to ensure individuals' rights.

For Tamanaha, there is one version of the rule of law that rejects even those minimal requirements. The thinnest version of the rule of law, he identifies is the 'rule by law' model,

---

[36] See e.g., Joseph Raz, "The Rule of Law and Its Virtue," in Robert L. Cunningham, ed., Liberty and the Rule of Law (College Station: Texas A&M Univ. Press 1979)

[37] Bingham, (n.21)

[38] E.g., T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP, 1994)

[39] Hart, (n.18) Ch.3

[40] Jeremy Waldron 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 New York University Law Review 1135, 1145

whereby all utterances by the sovereign are law, and all power is administered through those utterances.[41] Tamanaha suggests that this remains a rule of law model, albeit terribly thin, because the government acts by law and not by whim.[42] But this is untenable. A system whereby the law-making authority is unconstrained by rules, will always act by whim even if that whim is dubbed 'a sovereign law'. The essence of the rule of law is to impose checks on how political power is administered. Barring such limits, there is no rule of law system in place.

Populist attacks on the judiciary are typically portrayed as recalibrating exercises, seeking to take away power from unelected, unaccountable, judicial experts and entrust such powers to democratically accountable popular assemblies. Even if there might be some room for that recalibration, as the judicial review debate demonstrates, it remains the case that some actions invariably affect some core elements of the rule of law that are necessary to its existence. A law that chips away at the independence of the judiciary will always offend the rule of law, regardless of one's specific interpretation of the latter. In other words, we should understand some elements of the rule of law as minimum conditions—failure to attain these minimum conditions amounts to a failure of the rule of law. Some conditions (an independent judiciary, procedural guarantees on the form of law, formal characteristics of the law) amount to minimum threshold conditions. No system can be classified as a rule of law system if it fails one of these conditions. Any system that provides further or more robust protections of the rule of law will therefore be superior, in that respect, from other systems that only manage to achieve that minimum threshold of rule of law protections. If the rule of law entails some common core elements that ought to obtain irrespective of the specific conception one adopts, then safeguarding and guaranteeing those values should become a priority. To argue, as populist agents tend to do, that the EU's efforts to discipline Hungary and Poland with respect to the rule of law amount to attempts to impose a specific conception of the rule of law is misleading. Even without agreeing on a universal definition of the rule of law, some specific minimum conditions constituting the core of the rule of law ought to be protected. Undermining the independence of the judiciary invariably violates the rule of law on any meaningful conception of the term.

[41] Tamanaha, (n.15) p.91

[42] Ibid 92

Section 2: Democracy, Judicial Review, and the Courts

Justifying their attack on the judiciary, populists often vaunt their democratic credentials while castigating a court's elitist character.[43] Assaults on judicial authority typically emerge as efforts to diminish the power of an undemocratic body. Scepticism about the role of courts in democracies is not, however, exclusive in populist discourse. In fact, theorists have for decades pondered on the appropriate role of the courts in a democracy, the powers they ought to exercise, and their relationship with democratic chambers. I by no means suggest that there is a link between populist claims against the courts and such scepticism. But it might be worth exploring that scepticism, most profoundly emerging in the judicial review debate, in order to gain a better insight into the ways in which one might counter the populist argument that democracy justifies the removal of powers from courts.

One of the most controversial powers that courts have in contemporary democracies is the power to scrutinise executive and (sometimes) legislative decisions. The idea behind judicial review relates to the vision of the rule of law as the bulwark against arbitrary power. Legislatures, parliaments, and executive agents, even when legitimate and democratically elected, may still abuse their power and act in objectionable ways. Guarding against those abuses of power stands, inter alia, judicial review. Judicial review of executive actions is largely uncontroversial. Often dubbed 'weak judicial review', this activity ensures that executive agents exercise their powers according to the law.[44] For Lord Atkins, 'the judges…. stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law'.[45] When these agents transgress the limits of their power, acting ultra vires, courts are there to protect individuals who might suffer as a result. In the UK, judicial review fundamentally refers to this 'weak' type: courts

[43] There are countless examples from countries other than Hungary and Poland. Examples from Donald Trump's presidency are countless: speaking of 'unelected judge' rewriting policy, suggesting that judicial activism (i.e. encroaching into legislative territory) is putting the people in danger, speaking of 'judicial overreach', and that 'the people' wish to see the reform of the judiciary. For a collection of these, see Brennan Centre, In His Own Words: The President's Attacks on the Courts. 14 February 2020, at https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts accessed 10 August 2022

[44] On the distinction between 'weak' and 'strong' discretion see Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346, 1354

[45] Dissenting in Liversidge v Anderson [1942] AC 206

do not adjudicate on the wisdom or substantive quality of a decision but ensure that they cohere with powers delegated by law.[46]

A more provocative function of the court entails the review of legislation created by democratically elected assemblies. In such cases, courts decide whether an assembly's decisions comply with core constitutional principles, typically found in a constitutional document. A court might then resist the democratic chamber's will. If a country's legal system provides for a strike-down power, as is the case in the USA or Germany, a higher court may invalidate the democratic body's decision.[47] The fundamental concern relating to judicial review is whether constitutional democracies should allow courts extensive powers to disapply or strike down democratic decisions. This concern links to the question of legitimacy: which body should have final say on a law's validity. Even in countries without the strike-down power, questions about the role of the judiciary within a democracy persist.

Revisiting the judicial review debate becomes salient amid the current rule of law crisis across Europe. On one hand, proponents of judicial review raise alarm about the power balance between democratic chambers and democratically unaccountable bodies, such as courts, that possess the power to invalidate democratic decisions. On the other hand, populists attacking the judiciary also tout their democratic credentials, castigating judicial actions as a bulwark against popular wishes and desires.[48] Even though populist agents do not typically espouse the careful argumentation found in opponents of judicial review, their hostility towards judicial powers bears some resemblance to the scepticism undergirding attacks on judicial review. My aim in this section is not to draw a connection between opponents of judicial review and populists who attack the courts. I maintain, however, that evaluating the

[46] Courts in the UK sometimes review the substance of decisions, when they raise questions of fundamental rights. According to s.4 of the Human Rights Act 1998, judges can declare the incompatibility of democratic laws to fundamental rights included in the Convention. Even though that declaration is not legally binding, evidence suggests that such declarations invariably leads to the revision of domestic legislation. See the Joint Committee on Human Rights, *Human Rights Judgments* (2015) https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm accessed 10 August 2022.

[47] See discussion in Waldron (n.44) 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346. For a comparative analysis of different constitutional arrangements see Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633

[48] See n.9-10

position of judicial review sceptics can provide ammunition in the struggle against populist attacks on judicial independence.

Judicial Review and Democratic Norms

Jeremy Waldron is one of the most prominent critics of judicial powers to disapply or invalidate democratic decisions. The crux of Waldron's argument is as follows: judicial review bestows on judges, who are neither democratically elected nor accountable to the public, the power to invalidate decisions reached by a democratic assembly when they find the law to contravene principles enshrined in the constitution.[49] This means that the democratic will of the people, as expressed by the appropriate democratic body, is unable to create law. Judicial review is thus a process that inherently offends democracy, even when it manages to produce good outcomes. Some instances of judicial review do result in the protection of individual rights, such as *Roe v. Wade* in the US that established an individual's right to abortion, but they remain decisions by unelected and unaccountable bodies that are an affront to democratic norms.[50] What is more, such decisions are always subject to reversal.[51] In a world where there are bound to be reasonable disagreements about how to legislate about rights, Waldron suggests that the only legitimate way to settle those disagreements and reach a decision that is, at the very least, acceptable to everyone—even if some might still disagree with it—is to make laws according to a democratic process that respects the majority's will.[52]

At first blush, Waldron's argument is powerful. It identifies a clash at the heart of constitutional democracies where important political decisions that have immense impact on individual rights are taken out of the hands of the democratically legitimate law-making body

[49] Waldron, (n.44). See also Richard Bellamy, 'The Democratic Qualities of Courts: A Critical Analysis of Three Arguments', (2013) 49 Representation 333; Michel Troper, 'The Logic of Justification of Judicial Review' (2003) 1 International Journal of Constitutional Law 99; Luc B. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures', (2005) 3 International Journal of Constitutional 617; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7, International Journal of Constitutional Law 2.

[50] Waldron, (n.44) 1346

[51] Recently, Roe v. Wade, which recognised a constitutional right to an abortion was reversed in Dobbs v. Jackson Women's Health Organization, SCUS, (2022) 19-1392, 597

[52] Waldron, (n.44)

and entrusted to apolitical, unaccountable bodies.[53] Richard Bellamy joins Waldron in expressing concern about judicial powers within a democracy.[54] Distinguishing between political constitutionalism and legal constitutionalism, Bellamy explains that the latter entails entrusting the courts with widespread powers of review. But legal constitutionalism ultimately endangers individual freedom and fosters domination. When important decisions are not made with reference to democratic norms but are settled by undemocratic experts, individuals exercise no influence or control over decisions that affect them.[55] Siding with Waldron, Bellamy advocates political constitutionalism, which considers democratic bodies the most suitable institutions to resolve complex questions.

Claims against judicial review should be considered in light of a growing tendency towards depoliticisation.[56] Depoliticisation entails the shifting of issues from democratic arenas to expert forums, including the courts.[57] Proponents of depoliticisation insist that it can be an effective mechanism to boost the efficiency and quality of political decision-making. Not only will democratic assemblies be liberated from mundane tasks and granted more freedom to deliberate and decide on more crucial issues, but depoliticised forums will be able to

[53] Even though judges in many countries are appointed by an executive agent, apolitical, in this context, reflects the independence of the judiciary from the executive and legislative branch. Judiciaries are supposed to be apolitical because they are supposed to carry out their duties without bias and prejudice and without pressure from political or other extra-legal considerations. Legal realism absolutely rejects this suggestion, maintaining that, in general, judicial decisions are always the result of a judge's personal character, biases, prejudices, politics, education, social background, and so forth, see Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy, (Oxford: Oxford University Press, 2007)

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

[55] Ibid

[56] Ran Hirschl identifies a trend of juristocracy, which entails the transfer of power from representative assemblies to the judiciary, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004)

[57] See e.g., Philip Pettit, Depoliticising Democracy (2004) 17 Ratio Juris 52. Pettit's calls to depoliticise democracy are better understood in light of his concern about the discursive dilemma (a paradox whereby it is sometimes impossible to aggregate the opinions of a group into a collective decisions), see Philip Pettit, 'Deliberative democracy and the discursive dilemma' (2001) 11 Philosophical Issues 268.

produce qualitatively superior outcomes.[58] Yet depoliticisation is ultimately rooted in the belief that democratic assemblies are epistemically inferior to forums of skilled experts.[59] Even if some depoliticisation might be necessary for the smooth running of a democratic system, it remains the case that extensive depoliticisation is clearly incompatible with the self-governing character of a democracy.

Populism and opposing judicial review

Given Waldron's argument, one might argue that such scepticism about the role of the judges in a democracy also fuels populist attacks against the judiciary. Emblematic of those attacks was the infamous 'Daily Mail' front page deriding the three Justices who decided the *Miller* case—and by implication the entire judiciary—as 'Enemies of the People'.[60] The populist rhetoric, which posits the ordinary people as engaged in a perpetual struggle against the elite, encourages people to reject the courts as elitist bodies that stand in the way of the people's will.[61] Courts are typical targets for populists as they are taken to represent a body divorced and isolated from ordinary democratic politics, unresponsive to the will of the people. Populists alleging to speak for the people will denounce any obstacles to realising their agenda as an impediment to the satisfaction of popular desires.[62] A court seeking to enforce constitutional provisions, fundamental rights, or other legal principles by standing against objectionable executive or legislative action will therefore be castigated as an undemocratic fetter to popular desires. It is no wonder then, that from the populist perspective, a court that frustrates the perceived popular is, ipso facto, the enemy of the people.

---

[58] E.g., ibid; Pettit, (n. 23) 196-7

[59] John McCormick, *Machiavellian Democracy*. (CUP, 2011) 156

[60] Dubbed 'Nazi propaganda' by the *Independent*, see Rachael Pells, 'Daily Mail's 'Enemies of the People' front page receives more than 1,000 complaints to IPSO' 10 November 2016 *Independent*, https://www.independent.co.uk/news/media/daily-mail-nazi-propaganda-front-page-ipso-complaints-brexit-eu-enemies-of-the-people-a7409836.html accessed 10 August 2022

[61] See Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 Annual Review of Law and Social Science, 79. On populism more generally see Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP, 2017). On courts and populism see David Prendergast 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245. A famous example of populist attempts to undermine judicial authority is Donald Trump's accusations of courts as partisan actors biased against him (and by extension, against the ordinary people), see Brennan Centre (n.43)

[62] Lacey (n. 61) 87-90

It would nevertheless be unfair to Waldron were we to uncritically associate his subtle points with the unscrupulous attacks on the judiciary witnessed in various countries ran by populist parties. First, Waldron admits that his claim is not universal but rests on some assumptions. These assumptions resemble the run-of-the-mill conditions that we tend to associate with western liberal democracies that are broadly functional: a working democratic legislature, an independent judiciary, rudimentary respect for human rights and a culture that sees violations of minority rights as reprehensible. He thus assumes a state with an impartial judiciary that, although lacking democratic credentials and characteristics, maintains its independence from the other branches and is able to dispense its responsibilities unobstructed by political pressures or sectional interests.[63] In that sense, Waldron's attack on judicial review is rooted in deep respect of the rule of law.

Those assumptions, however, are absent in legal systems bedeviled by concerted efforts to undermine judicial independence and solidify executive hold over the judicial branch. In suboptimal conditions, the argument against judicial review is inapplicable. In Hungary and Poland, countries that have for years been under the rule of right-wing populists, some of these conditions do not obtain. As a result, one might suggest that Waldron's argument is principally irrelevant to these countries, pre-empting thus the discussion that follows. But, as I have suggested elsewhere, populist around the world employ similar arguments against the undemocraticness of the courts. It remains crucial, therefore, to evaluate whether extended judicial powers are indeed corrosive of democratic government.

Section 3: Courts and Democracy

This section aims to challenge some key elements of Waldron's argument. Doing so will reveal a way in which judicial review can be reconciled with democratic governance. Against populist attacks on the courts grounded on democracy, one might then respond by highlighting the ways in which the courts can in fact enhance democracy. Waldron's concerns about the powers of a judiciary within a democracy may be justified, but some key parts of his arguments remain unconvincing. His main claim against judicial review rests on two general presuppositions about democracy. The first is one about democratic legitimacy and the second is one about the nature of democratic politics. My claim is that both presuppositions are false. As such, the overall persuasiveness of his thesis is undermined.

[63] Waldron, (n. 44), 1359-1368

Resisting both presuppositions, I maintain, will lead to a much different treatment to the problem of judicial review.

The question of legitimacy is a core issue in political and legal theory. In a world of reasonable disagreements about moral questions that inevitably translate to reasonable and irreconcilable conflicts about law and politics, one cannot help but wonder why they should respect a law they consider fundamentally unjust.[64] Resolving that conundrum entails, for Waldron, the creation of a democratic procedure that respects the core principle of one person-one vote. Assuming that an outcome stems from such a procedure, the outcome is deemed legitimate.[65] Majority voting emerges as the most satisfactory way to resolve disagreements. An individual who had a vote in the democratic process (even through a proxy), ought to respect the outcome of a decision even if this is not what they have (or would have) voted for.

But this account of legitimacy wrongly conflates democracy with majoritarianism, a distinction Aristotle emphasised in his *Politics*. A majoritarian democracy skirts the rule of law and attributes all power to the unmediated will of the people, which makes it nothing but a form of tyranny.[66] Democracy entails a majoritarian component as decisions are taken according to the majority's will, but it is more than that. Democracy is a system that provides for opportunities of political participation.[67] A legitimate system is therefore not simply one that reaches decisions based on what 50%+1 of participants decide, but one that promotes political engagement and secures avenues through which individuals can shape or influence

[64] See in general John Simmons, *Moral Principles and Political Obligations*. (Princeton NJ: Princeton University Press, 1979); Richard Dagger and David Lefkowitz, Political Obligation. (2014). The Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/archives/fall2014/entries/political-obligation/ accessed 15 February 2022

[65] E.g., Jeremy Waldron, *Law and Disagreement* (OUP, 2001)

[66] Politics, *1292a5*

[67] This version of democratic legitimacy draws inspiration from Jean Jacques Rousseau, *The Social Contract* (CUP, V. Gourevitch (Ed.), 2014). For other such accounts of democratic legitimacy see Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP, 2018); Alan Buchanan, 'Political Legitimacy and Democracy'. (2002) 112 Ethics 689. I have elsewhere argued that one can identify such a conception of democratic citizenship in Plato's *Crito*, see Andreas Marcou, 'Obedience and Disobedience in Plato's *Crito* and the *Apology*' (2020) 25 Journal of Ethics 339

laws and political outcomes.[68] Although Waldron treats legitimacy in an all-or-nothing manner, whereby systems and decisions are either legitimate or illegitimate depending on whether they are the result of a majoritarian process, this alternative approach to legitimacy allows us to see legitimacy as a matter of degree. The more opportunities for political engagement afforded, the more legitimate a system becomes. In a similar vein, populist regimes boasting their democratic credentials are not necessarily realising democracy. In fact, Orban's stated desire to achieve an 'illiberal democracy' aspires to a type of a majoritarian illiberalism—within such a system the perceived will of the people (expressed through its leader) is to reign supreme, even if that entails the violation of core democratic (and other) rights of parts of the population.

The second presupposition that Waldron adopts is one that only sees democratic politics in the workings of a democratic assembly voting to make laws. Although Waldron does not explicitly discuss this, his works suggest that political participation in politics entails voting in periodic elections for representatives who then go on to engage in collective deliberations and reach decisions that embody popular wishes.[69] A right to political participation would therefore be limited to the opportunity to vote in elections and, for those elected, to make decisions that represent their constituents' preferences. But this amounts to a restrictive view of democratic politics. When populist parties assault the courts as enemies to democracy, they also assume a restrictive model of democracy. The model of democracy populist agents embrace is, in practice, even narrower as it entails serious limitations of free speech, and by extension a minimisation of public spaces where discourses and opinions can be uttered. Attitudes against free speech and dissent substantiate the impoverished model of democracy populists espouse.

A broader interpretation of democratic politics ought to look beyond formal, institutionalised procedures.[70] Politics should be understood to include both participation in institutionalised

[68] Marcou (n.67)

[69] See e.g., Waldron, *Law and Disagreement* (n.65); Waldron (n.44)

[70] For such broader approaches to democratic politics see Jacques Rancière, *Disagreement: politics and philosophy*. (Minneapolis: Minnesota University Press, J. Rose, (trans), 1998; Jacques Rancière *Hatred of Democracy*. London:Vestro. But see also Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998); Benjamin Barber, *Strong Democracy* (University of California Press,2004)

election/voting procedures, and engagement in other activities ranging from engagement with the judicial system to other non-institutionalised activities such as participation in public discourse, and even unlawful activity such as civil disobedience or other protest.[71] Such a broad interpretation of democratic politics coheres with a rich model of democratic citizenship whereby a citizen can engage in public affairs in a range of ways. When considering democratic politics, I suggest, we ought to escape the narrow belief that this takes place only in parliaments or the voting booth. With this renewed vision of democratic legitimacy and democratic politics in mind, let us consider how judicial review fits with democracy. There are two ways in which we can examine the effect of judicial review of democratic legitimacy. The first considers the effect on the outcomes of judicial review and the second turns to whether the process of judicial review itself enhances democratic legitimacy. These two approaches mirror outcome-based and procedure-based models of legitimacy.[72]

Many theorists have opposed Waldron's suggestion that judicial review is a process that inherently frustrates democracy. For Ronald Dworkin, a core element of democracy is its ability to protect and maintain everyone's individual rights.[73] Unless decisions guarantee equal respect for individual rights, they cannot be legitimate. Decisions that evince contempt or indifference towards their or other people's rights are principally illegitimate and objectionable, violating core conditions of democratic government. A court standing against such decisions is therefore performing a service for democracy. Decisions that ensure extended protections for individual rights, even when they come as a rebuke to decisions of a majoritarian chamber, are entirely legitimate. If protection of rights is a condition for democratic legitimacy, then judicial review is not only morally justified but it is also

[71] Ibid. Also Robin Celikates, 'Rethinking Civil Disobedience as a Practice of Contestation—Beyond the Liberal Paradigm' (2016) 23 Constellations, 37

[72] See in general Fabienne Peter, 'Political Legitimacy', (2017) The Stanford Encyclopedia of Philosophy https://plato.stanford.edu/archives/sum2017/entries/legitimacy/ accessed 10 August 2022

[73] Ronald Dworkin, *Law's Empire*, (Hart Publishing, 1998); Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1986). On how framing issues as human rights issues becomes a way to get courts to decide on political issues, see Nasia Hadjigeorgiou, Conflict resolution in post-violence societies: some guidance for the judiciary, (2021) 25 The International Journal of Human Rights, 695

democratically desirable—it is a mechanism designed to enhance democratic legitimacy.[74] Contra Waldron, Dworkin insists that when a court disapplies a legislature's decision that infringes on some individual right, there is no loss to democracy.[75] In fact, democracy overall is strengthened. Similarly, for Annabel Lever, there is no reason why a court cannot protect democratic values. She sees judicial review that successfully overturns democratic laws that violated individual rights as a manifestation of a community's commitment to individual rights and a representation of a community's commitment to government accountability—both of salient democratic value.[76] Dworkin's and Lever's support of judicial review can help explain its appeal in contemporary democracies. Judicial review emerges as a means to secure individual interests against an encroaching government or legislative decision.

Both arguments ultimately depend on an outcome-based approach to legitimacy—it is the court's ability to reach the correct decision and protect individual rights that enhances overall legitimacy. But to defend judicial review on the basis of its capacity to reach outcomes that protect democracy can only take us so far. No one can guarantee that a court's substantive decisions will invariably enhance democratic legitimacy. Judicial history is fraught with cases that have in fact undermined democratic citizenship for individuals (the *Dred Scott v Sanford* case from the US Supreme Court, which provided that the US Constitution was not supposed to extent US citizenship to individuals of African decent, stands as a horrifying reminder of how destructive of democratic values a judicial decision can be).[77] To consider judicial review as a process compatible with democratic legitimacy, we cannot solely rely on the claim that the courts will produce or are capable of producing outcomes that benefit democracy.

But adopting the alternative interpretations of democratic politics and democratic legitimacy I have previously outlined, we might see judicial review as a process compatible with

---

[74] See also Corey Cory Brettschneider, Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions. (2011) 5 *Journal of Ethics & Social Philosophy* 1; Thomas Christiano, *The Constitution of Equality.* (OUP, 2008)

[75] Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1996) pp. 7, 25, 32-33

[76] Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible' (2009) 7 Perspectives on Politics, 805, 807

[77] Dred Scott v. Sandford, 60 U.S. 393 (1856). For the historical impact of that decision, see, DE Fehrenbacher, The Dred Scott Case, Its Significance in American Law and Politics (Oxford University Press 1978)

democracy and democratic norms. If judicial review is initiated by an individual, then it represents an individual's opportunity to spark a process that checks the majority's will. If political participation extends beyond participation in periodic elections, then contesting and challenging democratically enacted laws in courts can be viewed as an instance of democratic government.[78] The refusal to recognise the democratic credentials of judicial review is rooted in a belief in the democratic sanctity of an assembly's decision.[79] But taking seriously the earlier suggestion that democratic politics is not exhausted through participation in institutionalised mechanisms, entails seeing actions designed to publicly challenge a decision reached by a democratic chamber as a case of democratic participation. On this approach, judicial review emerges as a manifestation of democratic politics through a medium—an individual stands up against a democratic decision, contesting it, challenging it, and in the process actively participating in a political process. Judicial review is therefore compatible with democracy because it enhances opportunities for individuals to contest an authority's decisions.

Bellamy opposes this interpretation of judicial review as democratic activity. Whereas the challenge itself is a democratic action, he insists that the ultimate decision remains in the hands of an expert, a person who is seen as the best capable at delivering justice.[80] Judicial review is always the case of a democratic process—that of challenging a law—culminating in a decision by a non-democratic body. Judicial review, Bellamy concludes, is not a process through which individual citizens take back control or a process through which citizens participate in law-making. It is instead an instance of power being exercised by apolitical actors who, because they lack accountability and democratic control, are themselves liable to act in ways that endanger and threaten individual freedom.[81] Where a law is decided through

[78] This position draws from and expands the republican approach that posits contestation as a core feature of republic citizenship developed by Pettit (see Pettit, *Republicanism* (n.23) and Philip Pettit *On the People's Terms: A Republican Theory and Model of Democracy* (CUP, 2012)

[79] By analogy, see similar accusations of undemocraticness against unconventional avenues of political engagement, such as civil disobedience Daniel Markovits, Democratic Disobedience. (2005) 114 Yale Law Journal, 1897, 1898. Even Ronald Dworkin notes the complex relationship between civil disobedience and democracy, Dworkin, *A Matter of Principle,* 1986 (n.73), 110

[80] Bellamy, *Political Constitutionalism*, (n. 54) pp.28-34, 147-154. Also on this point Waldron, Core Case Against Judicial Review, (n. 44), 1395

[81] Bellamy *Political Constitutionalism*, (n.54) 166-167

legitimate processes, say by a democratic assembly that weighs relevant interests and reaches a decision through collective deliberation, that decision, even if it interferes with a person's life, does not take away their freedom.[82] But when that same decision is reached by an unaccountable agent, such as a judge, freedom becomes endangered irrespective of the decision's substantive merits.

Bellamy correctly identifies the shortcomings of judicial review given that decisions ultimately rest with unaccountable judges. But this does not necessarily mean that judicial review is hostile to democracy. The fact that a court's judgment frustrates a first decision by an assembly coheres with a vision of democratic processes being constantly in flux, always revising and amending previous decisions. Although the change is prompted by an unaccountable agent's decision, it is first instigated by ordinary individuals, manifesting self-government. In fact, many democratic processes are put in motion by agents that are appointed and not democratically elected (e.g., ministers with powers to propose legislation). To view judicial review as an affront to democracy assumes a finality of democratic decisions that is at odds with a democracy that constantly reviews its laws on the basis of fluctuating prevailing positions within the society.

Conclusion

The rise of right-wing populism and the ways in which it has, in various countries, been associated with attacks on judicial powers raises key questions about the scope of the rule of law, and about the role of courts within a democratic system. This paper has sought to evaluate both of these questions.

Even if the rule of law is an essentially contested concept, Section 1 has shown that some elements of the rule of law form a core part of any discussion on the concept. As such, those elements should have priority; protecting the rule of law must focus on those key elements first. In other words, before assessing and remedying the problem of depoliticisation, and before engaging in the valuable exercise of determining the extent of judicial powers and determining whether some of those powers ought to be transferred from the courts to other

[82] This is the classical republican formulation of the relationship between individual freedom and the law. See e.g., James Harrington *The Commonwealth of Oceana* and *A System of Politics.* (Cambridge: Cambridge University Press, J.G.A. Pocock, (ed) 1992) 19-20. This idea originates in Aristotle, *Politics* 1281a-1284a

democratic chambers, the minimum threshold conditions of the rule of law (an impartial and independent; procedural formal law-making conditions; formal characteristics of the law) ought to be secured. Only once those key parts of the rule of law are determined ought we turn to other elements of the question of the courts' position in a democracy.

Concerns posed by opponents of judicial review such as Waldron about the extent of judicial powers within a constitutional democracy are sensible. Allowing significant powers to unelected and unaccountable agents to suspend democratic laws sits uneasily with the core belief of a democratic society that decisions should be ultimately rooted in the will of the people. In that respect, Waldron's warning about placing too much faith in the judiciary as a substitute to decision-making in democratic assemblies is prescient.

Yet his argument against extended judicial powers cannot apply in populist regimes. In a populist system that demonstrates disrespect for minority rights, undermines judicial independence, and seeks to enforce a uniform 'will of the people' that admits to little dissent—which is the very antithesis of democracy—it is incomprehensible to argue for *more* power shifted to majoritarian assemblies. It is fair to suggest then that within the context of a populist regime, some aspects of the rule of law should be prioritised, such as the existence of an independent judiciary, over concerns about the compatibility of certain judicial functions with democratic principles.

Section 3 proceeded to evaluate some key presuppositions opponents of judicial review make. Relying on a richer concept of democratic legitimacy that looks beyond majority voting, and adopting an expansive understanding of democratic politics, I have suggested that judicial review is not necessarily subversive of democratic politics. In fact, we can sometimes see judicial review as an opportunity for individual citizens to participate in politics and influence decision-making. At its core, judicial review is a practice of contestation that is compatible with a rich conception of democracy and democratic citizenship. This criticism of opposition to judicial review becomes relevant in addressing populist attacks on the judiciary. Populist agents also typically rely on impoverished models of democracy (in fact, these are much narrower perceptions of democracy than Waldron's) that reduce it to sheer majoritarianism. As a result, their claims to remove power from courts and place them to legislative chambers because of their 'democratic' credentials ring hollow.

In conclusion, courts are an integral part of contemporary democracies. Attacks against the judiciary, such as those witnessed in Poland, Hungary, and elsewhere are dangerous as they

diminish protections of individual rights. They are incompatible with core principles of democracy and the rule of law, and they are the mark of autocratic regimes that seek to consolidate their power. Safeguarding judicial independence and protecting against encroachments by the executive branch should be the concern of all democratic citizens. When dealing with a regime that suffers heavily from lack of democratic legitimacy (perhaps because they disrespect and undermine crucial democratic norms such as equal political participation and the rule of law), courts might truly be the sole bulwarks standing up for democratic values.[83] Even if one sides with Waldron in thinking that judicial review is at odds with democratic norms, one can still appreciate how within populist regimes, courts can stand as important barriers securing of democratic values.

***Acknowledgments**: Some parts of this paper were presented in the UK-IVR Annual Conference. I thank all participants for their insightful comments. Many thanks also to Stephanie Lauhle-Shaelou and Nasia Hadjigeorgiou for their feedback on earlier versions of this paper.

[83] Prendergast (n. 61)