

Preface and acknowledgments

Although by the middle of the twentieth century most Western democracies had written constitutions and many of them included a bill of rights, the power to determine the content of these rights belonged to the elected legislature. Since then this power has been transferred in most countries to courts. As Ran Hirschl says, ‘Around the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.’¹ This institutional transition has been accompanied by an intellectual change: today most legal scholars wholeheartedly embrace the aforementioned transfer of power. Although there has always been a couple of constitutional theorists who criticized the judicialization of politics, and some of them put forward sophisticated arguments, their works have had little effect on the general intellectual climate. In many places of the world the belief that majoritarian democracy has to give way to a more enlightened model of government has become so ingrained that conferring sweeping powers on constitutional courts no longer requires justification. The legitimacy of constitutional review, to use John Stuart Mill’s words, is ‘not fully, frequently, and fearlessly discussed’, and, therefore, the belief in the justifiability of constitutional review is held ‘as a dead dogma, not a living truth’.²

I myself was educated in such a country, namely Hungary, and wrote my PhD thesis on the jurisprudence of the Hungarian Constitutional Court.³ Although I criticized many of the court’s decisions – hopefully fully, frequently and fearlessly – I did not have a well-developed theory about the court’s overall legitimacy and accepted it without giving sufficient thought to the issue. This book is the result of a long intellectual journey that led me to the camp of court-sceptics. Its central

¹ Ran Hirschl, ‘The Political Origins of the New Constitutionalism’ (2004) 11 *Indiana Journal of Global Legal Studies* 71, 71.

² John Stuart Mill, *On Liberty. With an Introduction by WL Courtney* (The Walter Scott Publishing Co., Ltd 1901) 64.

³ Tamas Gyorfi, *Az Alkotmánybírászkodás Politikai Karaktere: Értekezés a Magyar Alkotmánybíróság Első Tíz Évéről* (Indok 2001).

thesis is that the reigning paradigm of constitutional thought has shaky foundations. The seeds of scepticism in my mind were sown by the works of political philosophers who have been grappling with the idea of moral disagreement. But it took years for me to link properly the abstract political principles I endorsed to questions of institutional design and constitutional doctrine. My journey has certainly become easier since I started to teach in the United Kingdom, where the sceptics have a much stronger stronghold than in continental Europe.

Although the conclusion of my argument is hardly unique, I hope that I manage to offer a distinctive combination of arguments for the sceptical position. In the United Kingdom, where the advocates of constitutional review are often associated with liberalism⁴ and the sceptical position is dominated by republican,⁵ conservative or left-leaning critics of the Human Rights Act (1998), my scepticism, which is not only compatible with but also rooted in a particular version of liberal political philosophy, fits somewhat uneasily with the existing positions in the 'legal versus political constitutionalism' debate.

My book also aims to contribute to the vibrant global discourse on the different forms of judicial review. The New Commonwealth model, associated with Canada, New Zealand and the United Kingdom, has duly attracted a lot of attention among comparative constitutional lawyers recently as a potential middle ground between the advocates and opponents of judicial review.⁶ My book suggests that the constitutional systems of the Nordic countries also deserve more attention than they hitherto received. I also risk the claim that from the sceptical position that I defend in the book, they strike a more attractive balance between democracy and the effective protection of rights than the Commonwealth model.

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This book makes claims primarily about constitutional models in general and not about particular legal systems. Since many contingent features of the legal systems I discuss in the book are irrelevant for my purposes,

⁴ Thomas Poole, 'Dogmatic Liberalism: T.R.S. Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463.

⁵ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

⁶ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

for sake of convenience, I use some legal terms in a less than precise, generic sense. For instance, in the terminology of this book, the term *constitution* also includes parliamentary bills of rights, like the United Kingdom's Human Rights Act 1998. Similarly, the term *constitutional court* refers not only to the specialized courts of the Kelsenian model, but to all courts with the power of constitutional review. Perhaps most importantly, I will use the term *constitutional review* and *judicial review* interchangeably, although the former is both wider and narrower than the latter: on the one hand, constitutional judicial review is a special case of judicial review, on the other hand, constitutional review is not necessarily judicial. If it is not indicated otherwise, I will also use the terms constitutional rights, human rights and fundamental rights interchangeably.

My book makes many empirical claims about the global spread of judicial review. Although I always indicate the sources of my data in the book, I have also created a website that collects and presents this information in a visual form.⁷

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⁷ <<http://constitutions.silk.co>>.