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HERCULES, NO LONESOME HERO—RESPONSIVE COURTS AND THEIR ACTIVE AUDIENCE

—Markus Kotzur

I. HYPOTHECIAL HEROES IN OPEN SOCIETIES: AN INTRODUCTION BRINGING ROSALIND DIXON AND PETER HÄBERLE TOGETHER

“Hard cases” challenge courts. Knowing this phenomenon, Ronald Dworkin in a so-entitled 1975 paper introduced the ultimate hero to meet these challenges: Judge Hercules.¹ The name says it all. Dworkin’s hypothetical if not fictitious ideal is the superhuman judge, who is omniscient, possessing infinite intelligence, competence, and resourcefulness.² A good ten years later, Hercules became the main protagonist in Dworkin’s seminal *Law’s Empire* and has since developed into a classic figure in legal theory. The literary reception is mixed. Some have painted Hercules as the “loner” who “converses with no one” and whose “narrative constructions are monologues”.³ Such a judge would do the opposite of acting responsively. Others have framed Hercules as a re-incarnation of Noam Chomsky’s “ideal speaker-hearer”.⁴ Responsiveness would be such a judge’s preferred up of tea. Hercules, however, remains a fiction and is rather unlikely to evolve into a role model for real judges in real case scenarios.⁵ Otherwise, they would precisely know if, when, and where their heroic alter-ego should stay in chains or could be unleashed: judicial activism versus judicial restraint. They would be perfectly able to counter various dys- or malfunctions of a given democracy without illegitimately substituting democratic decision-making processes by an allegedly undemocratic “gouvernement de

¹ R Dworkin, ‘Hard Cases’ (1975) 88 *Harvard LR* 1057, 1083.

² *ibid.* See also A Rai, ‘Dworkin’s Hercules as a Model for Judges’ (2017) 58 *Manchester Rev L Crime & Ethics* 58, 58; also quoted by A Rai, ‘Dworkin’s Hercules as a model for judges, *Manchester Rev L Crime & Ethics* 58 (2017), pp. 58 at 58.

³ F I Michelman, ‘Foreword: Traces of Self-Government’ (1986) 100 *Harvard LR* 76.

⁴ Ch Hutton, *Language, Meaning and the Law* (Edinburgh University Pres 2009) 151; also quoted by A Rai, ‘Dworkin’s Hercules as a Model for Judges’ (2017) 58 *Manchester Rev L Crime & Ethics* 58, 58.

⁵ See also B Holzner, *Reality Construction in Society* (Schenkman 1968).

judges". They would certainly be capable of accurately applying John Hart Ely's "representation-reinforcing approach" to judicial review.⁶

Real-world judges, however, are much less heroic and all-wise; they are much more limited in their capacities, and—most importantly—much more biased when torn between strong and weak judicial review. Their "we ought to do something" gut feeling, driven by the urgencies of the day (e.g. from preventing climate change to fighting authoritarian tendencies in democratic governance, from saving future generations to guaranteeing a minimum livelihood for the present one), will not necessarily provide the most reliable advice. Neither will excessive caution to leave all needs of reinforcing representative democracy to the political process while simply ignoring that it is exactly the shortcomings of this process that have caused the (urgent) need for reinforcement. Consequently, any ambitious theory of judicial review, if not generally opposed to judicial activism,⁷ aims at providing more rational criteria for the fragile balance between more proactive and self-restrained types of "doing justice".⁸ In that light, responsiveness might be an adequate means to rationalise the standards, scope, and intensity of judicial review. This holds all the more true since a functioning democracy, to a great extent, depends on a connection that places responsiveness and accountability between the legitimising subject and the "rulers". Those who, as members of the legislature, the executive, or the judiciary, exercise the sovereignty of the people and thus—at least to a certain extent—depend on input-legitimacy by the people should be aware of and respond to the ideas, needs, concerns, anxieties, hopes, and fears of "We, the People"—particularly if they want to act for the people.⁹ Responsiveness and responsibility are not merely semantic twins.

⁶ J H Ely, *Democracy and Distrust. A Theory of Judicial Review*.

⁷ Often originalists or textualists are portrayed as advocates of judicial restraint. With the appointment of Justices Gorsuch and Kavanaugh to the US Supreme Court, textualism and originalism in the tradition of Scalia might have become more prominent than ever before. Originalists often insist that intentionalists, going beyond the mere text of a constitution, would neglect the constitution, as such, at the of the day. Keeping the insights of modern critical hermeneutics in mind, the contrary seems to be true. Not only intentionalists but also textualists and originalists rely on unwritten understandings that shape their reading of the Constitution's wording; see G Thomas, *The (Un)Written Constitution* (Oxford University Press 2021).

⁸ The boundaries between legitimate and illegitimate forms of judicial activism, as exercised by a Court that sees itself as "motor of the integration", are in particular discussed in EU law, eg FW Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks and others (eds), *Governance in the European Union* (SAGE 1996) 15: He differentiates between "positive integration" through the enactment of secondary legislation in the relevant legislative procedures and "negative integration" through ECJ jurisprudence without the involvement of the legislative bodies.

⁹ The hint to Abraham Lincoln's famous 'Gettysburg Address' from his *Speeches and Writings 1859–1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations* (The Library of America 1989) 536 is not completely unintentional: "government of the people, by the people, and for the people".

When Peter Häberle, an internationally renowned German constitutionalist, shaped his model of an “open society of constitutional interpreters” in the 1970s,¹⁰ he addressed exactly this problem taking an opposite track from Rosalind Dixon’s approach some fifty years later in contouring his early version of “responsive judicial review”. Häberle, never expressly speaking of responsiveness, started with the addressee of judgements while complaining that the standard theory of constitutional interpretation was too fixated on a “closed society” of professional constitutional interpreters, that is to say the judges. His main argument is as simple as it is provocative: Judges are not the only ones who interpret the constitution but are accompanied by everybody who is concerned with constitutional matters and/or brings a case to the courts. This idea encompasses, as Häberle puts it, “potentially all state entities, all public entities, all citizens and groups”.¹¹ He goes on to observe,

“There is no *numerus clausus* of constitutional interpreters! Currently, constitutional interpretation is, more in perception than reality, an issue for a ‘closed society’ of professional, legal constitutional interpreters, the ones formally participating in the constitutional process. In reality, this is a task much more suited to an open society, that is to say, of all—in a sense substantively involved—public participants, as constitutional interpretation both always (co-)constitutes an open society anew, and is itself constituted through the same open society”.¹²

As a consequence of this theory, the criteria for judicial review are “as open as a society is pluralistic”.¹³ This is a challenge where Rosalind Dixon’s excellent new book can offer urgently needed guidance. Häberle and Dixon come from the same starting point—a kind of comparative political process theory. However, whereas Häberle wanted to open new horizons for German constitutional thought and did not primarily care how comfortable judges might feel when “lost in pluralism”¹⁴, Dixon’s responsive theory of judicial review offers much more precise guidance for “courts as they seek to construe a democratic

¹⁰ P Häberle, “‘The open society of constitutional interpreters’—A contribution to a pluralistic and “procedural” constitutional interpretation” in M Kotzur (ed), *Peter Häberle on Constitutional Theory* (Hart Publisher 2018) 129.

¹¹ *ibid* 130.

¹² *ibid*.

¹³ *ibid* 130–31.

¹⁴ See A Sethi, ‘Towards a Pluralistic Conception of Judicial Role’ (2021) 90 UMKC Law Review 69, 71: “This Article will illustrate how a normative conception of judicial role would be pluralistic in character—with different individual roles of varying importance that would have to be performed in a constantly changing an evolving manner. The most vital of this individual roles would be democratic protectionism, i.e., protecting democracy from eroding to, to which constitutional courts should devote the bulk of their institutional capacity”.

constitution, namely, that in exercising constructional choice under a democratic constitution”.¹⁵

II. WHAT MAKES A RESPONSIVE APPROACH SO SPECIFIC? RESPONSIVENESS “IN CONTEXT”

Both Dixon and Häberle know very well how little real-world judges resemble Dworkin’s Hercules or Montesquieu’s “bouche de la loi”. All modes of judicial review, as Hans-Georg Gadamer and Josef Esser famously pointed out, depend on a judge’s “Vorverständnis” and thus can never be completely “freed” from manifold biases and subjective moments, such as social backgrounds or individual preferences, and from the sub-texts of political power and policy interests.¹⁶ Judicial review is as much “work in context”¹⁷ as law is always “law in context”,¹⁸ meaning that law gains its power from shared basic social understandings, social practices, and the cultural ambiance¹⁹ in which it is embedded. Thus, even context-ignorant courts act both sub-consciously and sub-textually when responding to respectively corresponding with contexts, whereas context-aware courts consciously want to reveal their context-dependent stance (or contextuality) and tend to be deliberately responsive to these contexts—in particular, democratic structures and processes. Thus, Rosalind Dixon refers to a “socially informed account of judicial representation-reinforcement”.²⁰

¹⁵ R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter 9.

¹⁶ Both are already classics in German hermeneutics and legal and constitutional thought: H-G Gadamer, *Wahrheit und Methode* (Mohr Siebeck 1960); J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum Fischer 1972); see also Ch Jolls, CR Sunstein, and R Thaler, ‘A Behavioural Approach to Law and Economics’ (1997–1998) 50 *Stan L Rev* 1471.

¹⁷ Or, as Rosalind Dixon puts it: “How courts approach the process of constitutional construction will depend on the legal and political context for judicial review” (R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter 4).

¹⁸ W Twining, *Law in Context. Enlarging a Discipline* (Publisher 1997); W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Oxford University Press 2009); D Nelken, *Beyond Law in Context—Developing a Sociological Understanding of Law* (Routledge 2009). From a German perspective: P Häberle, *Kommentierte Verfassungsrechtsprechung* (Athenäum Fischer 1979) 44; A Voßkuhle and Th Wischmeyer, ‘Der Jurist im Kontext. Peter Häberle zum 80. Geburtstag’ (2015) 63 *JöR* 401. See also AG Amsterdam and J Bruner, *Minding the Law* (Harvard UP 2000).

¹⁹ P Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, Duncker & Humblot 1998). This concept is, in particular, pursued in the field of human rights law, as well; see F Lenzerini, *The Culturalization of Human Rights Law* (Publisher 2014); see also U Baxi, *The Future of Human Rights* (Oxford University Press India 2012); U Baxi, *Human Rights in a Posthuman World* (Oxford University Press 2007).

²⁰ R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), introduction.

Being “socially informed” in a globalised world with its myriads of overlapping contexts requires the context-based approach to satisfy a global perspective and develop a “comparative understanding of courts’ role in democracy protection and promotion”.²¹ Ran Hirschl sees comparative constitutional law moving towards “comparative constitutional studies”²² and favours nothing less than a holistic approach, arguing “that for historical, analytical, and methodological reasons, maintaining the disciplinary divide between comparative constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena” would “artificially and unnecessarily” limit our horizons.²³ For Hirschl, “comparative constitutional inquiries are as much a political enterprise as they are a scholarly or jurisprudential one.”²⁴ Rosalind Dixon’s notion of reflective and dynamic comparison points in the same direction.²⁵

Hardly anyone could be further from these points of view than Antonin Scalia. “If there was any thought absolutely foreign to the founders of our country”, begins his harsh critique,

“surely it was the notion that we Americans should be governed the way Europeans are...What reason is there to believe that other dispositions of a foreign country are so obviously suitable to the morals and manners of our people that they can be judicially imposed through constitutional adjudication?”²⁶

Scalia, however, draws a rather distorted picture of the comparative lawyer whose task is neither to impose “morals and manners” of the “others” on “us” nor to simply select rules from a “foreign” legal system that could be one-to-one applied to “ours”. Law comparison proves itself to be a more complex and reflective toolkit for “finding the law” in global contexts.²⁷ The comparative lawyer is in a permanent search for a matrix that allows her or him to weigh, to probe, and to critically reconsider her or his own arguments against the background of experiences that others have made or solutions that others have

²¹ R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), introduction. In general, R Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014); M Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 Yale LJ 1225, 1281.

²² R Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 151.

²³ *ibid* 13.

²⁴ *ibid* 7.

²⁵ R Dixon, ‘A Democratic Theory of Constitutional Law’ (2008) 56 Am J Comp L 947.

²⁶ A Scalia, ‘Foreign Legal Authority in the Federal Courts’, Keynote address to the Annual Meeting of the American Society of International Law (March 31 to April 3, 2004), in: 98 AM. SOC’Y INT’L L. PROC. 305 (2004), S. 310.

²⁷ B Markesinis (ed), *Law Making, Law Finding and Law Shaping* (Oxford University Press 1997).

found.²⁸ Meaningful comparative work “in context” may not limit itself to the idea of comparing “the laws” (that is to say written norms, legal texts or judgments²⁹) but it must, in a broader sense, encompass a sensitive comparison of cultures.³⁰

Thus, we are compelled to return to Rosalind Dixon’s “socially informed account of judicial representation-reinforcement”. Replacing “socially” by either “culturally” or “holistically informed” reveals that Dixon, Häberle, and Hirschl, to some extent, speak the same language. When it comes to democracy in general, democracies at risk in particular and, most importantly, the core question of democratic legitimacy, these three authors are likely to agree “that actual legitimacy should be understood as an amalgam of legal and political sources of legitimacy, or as a cumulative concept that includes elements of both legal and political legitimacy”³¹—thus, legal and political responsiveness. Without this kind of responsiveness, democracies would “become vulnerable to a high risk of erosion. Conversely, responsive democracies are capable of realising both thin and thick understandings of a commitment to self-government”³² (p. 64). Responsive democracies are in a better position to effectively protect their constitutional commitments to liberalism,³³ secularism, and (electoral and institutional) pluralism—and pluralism, indeed, qualifies as an essential structure of modern democracies.³⁴

Courts, in a responsive way, must take this pluralism into account. Expressing concurring and dissenting opinions demonstrates that there is no “one truth” or “one right outcome”.³⁵ Amicus curiae briefs make more voices

²⁸ Constitutionalism in Europa, the Americas or in Asia should thus be engaged in a permanent dialogue on constitutionalism; for an Asian example, see AHY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Bloomsbury Publishing 2014).

²⁹ See also in this context MP Singh, *German Administrative Law in a Common Law Perspective* (Springer 1985).

³⁰ A classic of such an approach is P Häberle, *Verfassungslehre als Kulturwissenschaft* (1st edn, Duncker & Humblot 1982) p. 33, (2nd edn, Duncker & Humblot 1998) p. 463 f.; later R Wahl, *Verfassungsvergleich als Kulturvergleichung*, FS H. Quaritsch, 2000, pp. 163, 173 ff; furthermore C Varga (ed), *Comparative Legal Culture* (Aldershot 1992); HW Ehrmann, *Comparative Legal Cultures* (Prentice Hall 1976).

³¹ As suggested by R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter 4, A.

³² *ibid.*

³³ PW Khan, *Putting Liberalism at its Place* (Princeton UP 2004).

³⁴ E Fraenkel, ‘Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie, Verhandlungen des 45’ (1965) Deutschen Juristentags, Bd. 2 B; P Häberle, *Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft* (Athäneum 1980); *Verfassungslehre als Kulturwissenschaft* (2nd edn, Duncker & Humblot 1998) 134; G McLennan, *Pluralism* (University of Minnesota Press 1995); recently, J Williams (ed), *Ethics, Diversity, and World Politics. Saving Pluralism from Itself* (Oxford University Press 2015).

³⁵ William J Brennan Jr, ‘In Defense of Dissents’ (1985) 37 Hastings LJ 427; Ruth Bader Ginsburg, ‘Remarks on Writing Separately’ (1990) 65 Wash L Rev 133, 143; Greg Goelzhauser, ‘Silent Concurrences’ (2016) 31 Const Comment 351.

audible to the court than the ones raised by the parties to the trial.³⁶ In obiter dicta courts can provide answers to questions they have never been asked.³⁷ Weighing approaches and proportionality tests give specific responses to the different (legal) interests determining a case. In a rather categorical way, the US Supreme Court has developed three “tiers” or levels of scrutiny for assessing the constitutionality of legislation which limits or has an impact on constitutional guarantees in particular human rights: strict scrutiny, intermediate scrutiny, and the rational basis review.³⁸ European Courts tend to apply a more flexibly structured proportionality approach: they look for the legitimate purpose of the impugned law, ask whether the measure taken is suitable for reaching the purpose or whether the impairment is minimal and constitutionality *stricto sensu* is given.³⁹ Both the European and the American proportionality concept leave ample scope for courts to calibrate the ultimate intensity of review.⁴⁰

III. THE RESPONSIVE STORYTELLER

Courts are storytellers. Legal scholarship has long acknowledged that the creation of normative,⁴¹—in particular, constitutional—meaning depends on an underlying epic.⁴² In its most general sense, this “story” tells how, why, and to which end political communities constitute themselves and create a certain legal order.⁴³ Accordingly, courts need to be able und ready to tell their stories (which, in Rosalind Dixon’s case, includes detecting democratic dysfunction). This ability and readiness require both the institutional capacity of the courts and personal capacity of the judges. Furthermore, institutional capacity depends on the type of cases that courts can hear, on their composition, on the

³⁶ U Kühne, *Amicus Curiae: Richterliche Informationsbeschaffung durch Beteiligung Dritter* (Nomos 2015); A Orr Larsen and N Devins, ‘The Amicus Curiae Machine’ (2016) 102 Va L Rev 1901; A Wiik, *Amicus Curiae before International Courts and Tribunals* (Nomos 2018).

³⁷ L Schulz, ‘Funktionen des obiter dictum’ in *Zeitschrift für Internationale Strafrechtsdogmatik* 13 (2018), pp. 403.

³⁸ A Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ 23 *Melb UL Rev* 668 (1999).

³⁹ G Huscroft, BW Miller, and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge UP 2014); VC Jackson, ‘Constitutional Law in the Age of Proportionality’ (2014) 124 *Yale LJ* 3094; A Barak, *Constitutional Rights and Their Limitations* (Cambridge UP 2013); J Bombhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse* (Cambridge UP 2013); M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford UP 2012).

⁴⁰ R Dixon, ‘Calibrated Proportionality’ (2020) 48 *Fed L Rev* 92.

⁴¹ J Haage, ‘The Method of a Truly Normative Legal Science’ in M van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011).

⁴² SD Fraade, ‘Nomos and Narrative Before Nomos and Narrative’ (2005) 17 *Yale Journal of Law and the Humanities* 81–96; D Bell, ‘The Power of Narrative’ (1999) 23 *Legal Studies Forum* 315–48; RM Cover, ‘The Supreme Court 1982 Term. Foreword: Nomos and Narrative’ (1983–84) 97 *Harvard Law Review* 4–68.

⁴³ S Ranganathan, ‘The Value of Narratives: The India USA Nuclear Deal in Terms of Fragmentation, Pluralism, Constitutionalization, and Global Administrative Law’ (2013) 6 *Erasmus Law Review* 16–30.

case load they must carry, and on the rules of procedure they have to follow, as well as on the period of tenure granted to the judges. Of equal importance is the question of whether they must hear all admissible cases or can exercise largely discretionary appellate jurisdiction (including the so-called political question doctrine).⁴⁴ Styles for writing a judgement vary. Lastly, the litigation support structure, legal aid, and options for pro bono legal presentation come into play. Meanwhile, personal capacity depends, among other factors, on the judges' backgrounds, upbringing, education, training, specialisation, and legislative and academic backgrounds. Along these lines, Rosalind Dixon defines judicial capacity as the "actual capacity for courts effectively to protect the democratic process"⁴⁵ and demands that "individual judges must be skilled in orthodox forms of legal reasoning, but equally capable of adopting a sensitive and responsive judicial voice".⁴⁶

Courts are responsive storytellers, and this function is not limited to when they speak through judgements. They engage in various dialogues with other courts,⁴⁷ nationally and internationally, with the other branches of government, with the sciences, and with civil society as such (imagine, eg, a Supreme Court Judge participating in a scientific conference, speaking as a guest on a talk show, or delivering a commencement speech). Judges develop their own modes of storytelling. Originalists want to tell the story of the author/the framers and not rephrase them out of respect for the constitution's quasi-sacred text. Living constitutionalists, in contrast, dare to engage in a deconstructionist reading of the constitution and do not feel themselves bound by textual limits.⁴⁸ Both want to be persuasive. Persuasiveness and responsiveness go together like "love and marriage" and "horse and carriage" in the famous song: one cannot live, cannot be, cannot exist without the other.

⁴⁴ *Luther v Borden*, 48 US 1 (1849) at 46; MJ Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* (Cambridge UP 2017); R Hodder-Williams, *The Politics of the US Supreme Court* (Allen & Unwin 1980).

⁴⁵ R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter 5.

⁴⁶ *ibid.*

⁴⁷ See F Merli, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte*, VVDStRL 66 (2007), pp. 392 ff.

⁴⁸ According to Rosalind Dixon, some decisions involve a "degree of judicial creativity in connecting express guarantees of human dignity to implied structural principles defined by the notion of an "unconstitutional state of affairs". "In a responsive approach, however", she continues, "it will be important to consider the degree to which decisions of this kind respond to blind spots or burdens of inertia and serious and irreversible harm to individual dignity" (R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter C, 4).

IV. THE ACTIVE AUDIENCE

Storytellers speak to an audience. Responsive storytellers know that they need public as well as elite support; hence, in order to win this support, they also give the audience a voice. Responsive courts can engage in this kind of speaker-hearer-communication while enjoying a great deal of freedom and independence since they are not subject to immediate electoral pressure.⁴⁹ Using this freedom and independence, courts should be responsive to their own role, as well. That means (a) Courts should directly speak to the party losing the case; (b) the narrative they rely on should combine “global” and “local” elements; (c) and their reasoning, as argued earlier, should not only pay particular respect to the losing party⁵⁰ but should also show overall “respect for the dignity of those adversely affected by a decision”.⁵¹ These adverse effects are definitely not limited to the parties, and courts do not only speak to the parties but to the political community as such. Therefore full-text versions of high and, especially, constitutional courts’ decisions are published (and sometimes even translated into foreign languages). To a very limited extent, responsive courts can be teachers; nevertheless, they must never become preachers and should strictly avoid playing the role of a final moral arbiter. As stated above, dissenting and concurring opinions will help them to do so. Different remedies that courts provide (declaratory and coercive ones⁵²) will finally make differentiated responses possible.

The audience of responsive courts is not homogeneous but is pluralistically diverse. Courts must therefore take into account (and might even profit from) not only contestatory practices by epistemic communities⁵³ but democratic and therefore political contestation as such.⁵⁴ This argument brings us back to the relationship between courts and civil society actors in general and, hence, to Peter Häberle’s vision of an open society of constitutional interpreters. For him, constitutional interpretation in a narrow sense (understood to mean only a conscious and purposeful action towards understanding and construing a norm (or text)) is only one side of the coin. He wants to “conduct a more

⁴⁹ *ibid* chapter 6 A.

⁵⁰ *ibid* 8 A.

⁵¹ *ibid*.

⁵² R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter D, 3.

⁵³ PM Haas, ‘Epistemic Communities’ in D Bodansky, J Brunée, and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford UP 2007) 791–806; E Adler and PM Haas, ‘Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program’ (1992) 46 *International Organization* 367–90; MK Davis Cross, ‘Rethinking Epistemic Communities Twenty Years Later’ (2013) 39 *Review of International Studies* 137–60; C Dunlop, ‘Epistemic Communities’ in E Araral and others (eds), *Routledge Handbook of Public Policy* (Routledge 2012).

⁵⁴ Antje Wiener, *A Theory of Contestation* (Springer 2014).

realistic investigation”⁵⁵ and advocates for “a wider understanding of interpretation(...): citizens and groups, state entities and the public are productive powers of interpretation” and thus qualify as “constitutional interpreters in a wider sense”.⁵⁶

V. CONCLUDING WITH A HÄBERLARIAN EYE ON DIXON

Undeniably, the ultimate responsibility to interpret the constitution rests with the judiciary. This understanding, however, may not disregard the necessary “democratisation of constitutional interpretation”, as, in general, “interpretation theory must be safeguarded through democratic theory and vice versa”.⁵⁷ This kind of interpretation theory is exactly what Rosalind Dixon’s responsive judicial review has in mind. Where Häberle argues that there “can be no interpretation of constitutions without the above-mentioned active citizens and public participants”,⁵⁸ Dixon’s concerns address the judicial authorship, narrative, and tone of responsive courts.⁵⁹ Reading both authors’ views together will advance theoretical reflections on judicial review⁶⁰—being compatible with democracy despite all counter-majoritarian difficulties—and may help make democracies more resilient.⁶¹ It’s certainly worth a try.

⁵⁵ P Häberle, “The Open Society of Constitutional Interpreters”—A Contribution to a Pluralistic and “Procedural” Constitutional Interpretation’ in M Kotzur (ed), *Peter Häberle on Constitutional Theory* (Hart Publishing 2018) 129, 130/131.

⁵⁶ *ibid* 131.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

⁵⁹ R Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author), chapter E, 9.

⁶⁰ See A Sethi, ‘Towards a Pluralistic Conception of Judicial Role’ (2021) 90 UMKC Law Review 69, 124.

⁶¹ Keeping A Sethi (*ibid*, 125) in mind: “Constitutional courts cannot answer every question. They also cannot be the sole answer to the decline of democracy. At best, constitutional courts can act as speedbumps”.