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Who will Help Judges Save the Redheads?

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A RESPONSE TO

Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy

by Yaniv Roznai

This essay was written as part of a series of responding to Professor Roznai's article published in Volume 29, Issue 2 of the *Bill of Rights Journal*, to continue the academic discussion introduced therein. The series has not been substantively edited by the *Bill of Rights* editorial staff, and the views expressed are solely those of the individual authors.

This contribution is a short comment on the paper by Yaniv Roznai, titled "Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy," forthcoming in the William & Mary Bill of Rights Journal this fall.[1] The contribution first briefly summarises the central thesis of Roznai's paper and then focuses on the part of the paper, where he suggests how courts should respond to political pressure (29-32). Roznai argues that courts should not act strategically, instead they ought to conduct business as usual. Act as they normally do, when they are not under pressure because deference or confrontation lead to adverse outcomes. However, this account of the interaction between courts and recalcitrant political powers is reductive because courts are not unitary actors; they work as a team. The division of labour enables them to combine both models of judicial behaviour: engage in principled decision-making and utilize long- and short-term strategies to increase their effectivity.

1) Anti-Bully Theory of Judicial Review

Roznai develops his anti-bully theory in response to an observed global decline in the quality of democracy, although, it is also partly informed by the local context in Israel, where the embattled Supreme Court has to continuously fend off attempts to limit its powers (4). Democratic decay, erosion, or backsliding has been taking place in many new and established democracies around the world, including Poland,[2] Hungary[3] or the United States.[4]

The central claim of the anti-bully theory is that courts can and should protect democracy at critical junctions (32). The argument is carefully constructed, flows in several steps, and Roznai does a superb job in supplementing each claim along the way with plentiful comparative examples that confirm the general thesis. The democracy that courts must protect, we learn, cannot be reduced to a mere mathematic exercise to determine the will of the majority, or "two wolves and a lamb voting on what to have for lunch" (6). Minorities are, by definition, underrepresented and thus cannot engage in the collective-decision making on equal terms if their rights are not guaranteed. Democracy has a minimal substantive core, which at least includes pre-conditions for its realization, and this core must be defended against undemocratic constitution-making (7).

An exciting feature of Roznai's theory is the integration of the doctrine of constitutional unamendability, which connects the paper to his larger scholarship.[5] The doctrine enables courts to protect democracy because they need not be afraid of an override (32) and has both an immediate application, but also deterrent effect (19-20). Courts can either *actively* invalidate constitutional amendments, stopping a harmful change, that breach the substantive core of the constitution or flag proposed amendments that come close. Made aware of the potential conflict with unamendable principles, amending actors may reconsider the suspect amendment with the benefit of information

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[1] See also, Yaniv Roznai, Towards an Anti-Bully Theory of Judicial Review, INT'L J. CONST. L. BLOG, (21 December 2019) http://www.iconnectblog.com/2019/12/towards-an-anti-bully-theory-of-judicial-review/.

[2] WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[3] ANDRÁS L. PAP, DEMOCRATIC DECLINE IN HUNGARY LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY (2018); and TÍMEA DRINÓCZI, AGNIESZKA BIEŃ-KACAŁA, RULE OF LAW, COMMON VALUES, AND ILLIBERAL CONSTITUTIONALISM POLAND AND HUNGARY WITHIN THE EUROPEAN UNION (2020).

[4] Jack M. Balkin, *Constitutional Rot*, in CASS R. SUNSTEIN (ED.), CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (2018).

[5] See generally, YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2019).

generated through judicial review. Additionally, the doctrine of constitutional unamendability, once founded, may work to *passively* restrain the amending actors at the early stage of the constitution-making. Anticipating a judicial intervention at a later stage, amending actors modify their behaviour to avoid the costs associated with the finding of unconstitutionality.[6] They internalise the limits on constitutional amendment articulated by the court.

Courts can protect democracy in at least four ways (8-10): by securing the integrity of the democratic process; protecting rights, particularly of those who are vulnerable or temporarily out of power; monitoring the boundaries of the functional separation of power; and defending foundational principles of the constitution against bad-faith change. The fact courts are not guaranteed to prevail in a confrontation with undemocratic forces, does not diminish the value of the judicial function. Courts in a democracy can act as stop-signs or speed-bumps, either stopping abusive constitutional change in its tracks or slowing it down (14).[7]

2) Strategic and Principled Courts

But what if recalcitrant political actors do not modify their behaviour and proceed on the collision course with the judiciary? Roznai argues that the best course of action for a court faced with a potentially controversial case is to conduct "business as usual," because conflict and deference strategies lead either to retaliation in the short term or marginalisation of the court over time. If courts defer to abusive political actors, they may squander their reputation for impartiality and independence, because even non-decision can appear as a choice to legitimize controversial policies (29). However, if they exercise their full authority to protect democracy, courts show abusive measures for what they truly are. The judicial review brings problematic measures into focus and generates information that may improve public discourse.

This is a fascinating theory, but it seems overly reductive. Elsewhere in the paper Roznai successfully disproves false dichotomies, but his proposition that courts cannot engage in principled decision-making, while at the same time rely on elements of judicial strategy, also creates a false dichotomy. In the remainder, I take two examples used in Roznai's paper to illustrate what the two courts concerned did exceeding the usual to manage the resolution of a difficult case successfully. In the first case, the Slovak Constitutional Court invalidated a constitutional amendment based on the implicit material core of the Constitution.[8] It took more than four years for the Court to resolve the case, which indicates hesitance and indecision. The Court revised the judgment several times and had to ultimately call on outside help to get access to the requisite knowledge to make the doctrine of unamendability constitutionally fit.

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[6] The anticipatory effect may be reinforced by members of the opposition, or even the governing majority, if they fashion their comments in the parliamentary debate using the vocabulary of constitutional unamendability in order to make the author of modify or drop the contentious proposal.

[7] Or as Roznai argues elsewhere, court decisions that invalidate constitutional amendments also carry symbolic meaning, declaring to the polity, which values form the core of its identity. Yaniv Roznai, *The Uses and Abuses of Constitutional Identity*, in XENOPHON CONTIADES, ALKMENE FOTIADOU (EDS.), ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 179 (2020).

[8] PL. ÚS 21/2014 (30 January 2019) https://www.ustavnysud.sk/documents/10182/0/PL_+US+21_2014.pdf/233a617c-4dfd-4151-8a6b-16d180b27111.

Courts may struggle to resolve a case because of lack of capacity or unavailable normative resources. Normative resources in this context mean, prior case law, doctrine or legal theory that justifies such an assertive exercise of judicial power. The doctrine of constitutional unamendability is a trump card; the ultimate power that makes courts supreme. For they are not genuinely supreme "if their judgments are reversible by a constitutional amendment."[9] However, the doctrine can be rarely posited into a system freestanding, without the necessary institutional history and normative resources that can support it. If there is a short supply of normative resources in a given jurisdiction, courts will struggle to use this power credibly. Additionally, court decisions are knowledge-products, which need to be produced well to work as intended. Inconsistent reasoning or a failure in the construction of an argument may jeopardise their legitimacy. Judges occasionally encounter niche or complex legal problems, which they lack the expertise or time to solve.

The second case concerns the prorogation of the Parliament in the United Kingdom. Roznai uses this example in the paper to illustrate how courts can protect principles of functional separation of power and limited government. In the run-up to the delivery of the judgment, Justices of the UK Supreme Court made their best effort to boost the throughput legitimacy of the decision-making process by, for example, constituting the largest possible panel of 11 Justices. However, it was not only judges working towards the successful resolution of the case. The support staff worked tirelessly in the background to facilitate a smooth processing of the case and clear communication with external actors.

Dispute-resolution is the primary goal of any court, so the scholarship tends to naturally focus on judges, who are the main protagonists of the trial. However, to maximise goal-attainment in adjudication courts may need to pay attention to secondary goals that will help them achieve compliance, such as clear communication. That does not necessarily mean they have to compromise in the exercise of judicial review, because courts are not unitary actors. Adjudication is a team production and judges may delegate specific tasks, such as crisis communication, to the staff with requisite competence.

A) Slovakia

The Constitutional Court of Slovakia recently delivered a historic judgment in which it invalidated a constitutional amendment based on implied limits to the amendment power. As Roznai rightly notes, this was also a historic first for the broader region in Europe (16-17), because no other European court had previously established the doctrine without entrenched express limitation or eternity clauses.[10]

The unconstitutional amendment concerned the security clearance of lower court judges and candidates for judicial appointment. The Court derived the power to review constitutional amendments from the guardianship provision, asserting that its power to protect the Constitution of the Slovak Republic extends across the whole sphere of constitutionality and is unconditional. Despite

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[9] Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 Md. L. Rev. 181, 183 (2017)

[10] Based on the findings of Michel Hein, *The Least Dangerous Branch? Constitutional Review of Constitutional Amendments in Europe*, in MARTIN BELOV (ED.), COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY (2019).

this confident claim to authority, it took the Court five years to decide the case.[11] What was the reason for such prolonged indecision? As one of the judges later explained, when the assigned judge rapporteur first circulated the draft opinion, several of his colleagues considered the reasoning incomplete and lacking. After several plenary sessions and no results, the court president eventually took over and hired external experts to assist in the preparation of the judgment.[12]

In Slovakia, each judge of the Constitutional Court, including the court president, has a right to be assigned at least four judicial advisors, one or more of which can be contracted advisors from outside of the institution. External advisors are usually experts in niche subject matter such as intellectual property or privacy, hired for a limited time and working by the hour. External contracting allows judges to access relevant but unavailable information to facilitate the decision-making of the Court.

What is more interesting, however, and generally unknown even among expert on the Slovak judiciary, the Court sometimes employs as external advisors former Constitutional Court judges.[13] In this specific case, the court president resorted to an unusual move, when she hired not only a former Slovak but also Czech Constitutional Court judge, namely professors Bröstl and Holländer. Both of these scholars are known for their extraordinary scholarship in legal philosophy and writing on the subject of constitutional unamendability. Moreover, Prof Holländer was also the judge rapporteur and lead author of the decision in the Czech Melčák Case.[14] Both were contracted for a month, just before the delivery of the final judgment in the case of judicial security clearances and have contributed to a "considerably better draft opinion with a sound justification," which eventually garnered majority support and made history.[15]

As this extraordinary example shows, the Slovak constitutional court uses the device of external court advisors as a short-term strategy. When grappling with a difficult or niche legal question, the Court relies on knowledge of experts from outside of the institution to improve the quality of its decisions and thus ensure their legitimacy. Even in high-profile cases such as the judicial review of a constitutional amendment.

We often fail to acknowledge that judges may encounter legal questions, which they lack the capacity or resources to resolve, but it does happen. In such cases, the need for external input in the process of decision-making will be a function of the complexity of the requisite knowledge and the resources needed to acquire the knowledge. If the cost is too high, the court may get access to the knowledge

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[11] The litigation was pending since 2014. The Constitutional Court handed down the decision on January 30, 2019. See Šimon Drugda, *Slovak Constitutional Court Strikes Down a Constitutional Amendment—But the Amendment Remains Valid*, INT'L J. CONST. L. BLOG (25 April 2019) http://www.iconnectblog.com/2019/04/slovak-constitutional-court-strikes-down-a-constitutional-amendment—but-the-amendment-remains-valid.

[12] Veronika Prušová, *Bývalý ústavný sudca Mészáros: Ak chcete byť slobodný, musíte byť samotárom*, DENNÍK N (23 February 2019) https://dennikn.sk/1391363/byvaly-ustavny-sudca-meszaros-ak-chcete-byt-slobodny-musite-byt-samotarom/.

[13] Based on contracts in the official state database, the Court had in the past contracted at least four other former Constitutional Court judges in the period 2011-2020. See the Central Register of Contracts in the Slovak Republic, https://www.crz.gov.sk/index.php?ID=114372

[14] ÚS Pl. ÚS 24/09 (10 September 2009) http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-27-09_1

[15] Prušová, *supra* note 9.

necessary for drafting a successful judgment, at a lower cost, from external or even transitional advisors.[16]

B) United Kingdom[17]

The UK referendum on its continued membership in the European Union had taken place on June 16, 2016, but it took almost four years until the country eventually left the EU on January 31, 2020. During that time, the Supreme Court decided twice on questions related to the withdrawal of the UK from the Union. Most recently in a high-profile case, which concerned the legality of prorogation of the Parliament by the PM. The Court determined that the advice of the PM to the Queen to prorogue Parliament was unlawful; a momentous decision for the Court and the country.

Much ink has been spilt on the subject of Brexit, but there is little to no writing on the view from the Court. That is understandable because access to judges is constrained, and they may be prevented to comment on internal deliberations because of the duty of confidentiality. However, we may glean how the UKSC handled the litigation and the general fallout from the meeting minutes of the UK Supreme Court Management Board, which consists of non-judicial and executive staff of the Court. This internal document reveals a facet of the work of the Court is not readily visible on the face of the record.[18] The main challenges posed by the Brexit-related litigation were the reputational risks to the Court and management of workflow.[19] Here I focus on the risks to the Court's reputation.

The Supreme Court has shortly after its establishment invested in the capacity effectively manage, identify, and monitor risks to its operation. The risk management system of the Court is designed to identify and prioritise risk based on their likelihood and their impact. The risks with are then monitored and managed in order of their priority, by members of the Board, who each "own" risks within their areas of direct responsibility.[20] The Board keep and review what is called a Risk Register,[21] which also sets out mitigating actions to specific risks. One such risk is potential damage to the reputation of the Court, which is critical since concerns for judicial reputation and institutional support factor into most aspects of the work of the Court.

[16] There is currently a multitude of non-state actors engaged in the field of transnational constitution-making. These actors specialise in offering advice to new democracies on state-building and constitutional design but may also advise judicial actors. The Venice Commission, for example, advises constitutional and supreme courts through the instrument of *amici curiae*. See GENERALLY GREGORY SHAFFER, TOM GINSBURG, AND TERENCE C. HALLIDAY (EDS.), CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER (2019).

[17] This section is partly based on Šimon Drugda, *Behind the Scenes of Brexit: An Inside Look on the Work of UK Supreme Court,* BREXIT INSTITUTE (3 March 2020) http://dcubrexitinstitute.eu/2020/03/behind-the-scenes-of-brexit-an-inside-look-on-the-work-of-uk-supreme-court/.

[18] Meeting minutes of the UKSC Management Board are available on the website of the Supreme Court, at the subpage on corporate information. The UKSC Management Board minutes are published with a slight delay because minutes of a meeting are usually approved at the beginning of the next scheduled meeting.

[19] Here I focus on the litigation, although the Board also paid close attention to Brexit-related items on party manifestos before the election, and after the publication of the EU Withdrawal Bill established a dedicated internal working group to "monitor the impact of Brexit on the Court." See UKSC MB Minutes (24 July 2017) https://www.supremecourt.uk/docs/management-board-minutes-170724.pdf.

[20] UKSC 2010-2011 Annual Report and Accounts 63 (15 June 2011) https://www.supremecourt.uk/docs/ar_2010_11.pdf.

[21] Unlike MB minutes, the risk register is inaccessible. Items from the register sporadically find their way to the MB minutes, but the precise contents of the risk register are confidential, because it might contain sensitive information including security details.

One of the determinants of the reputation of the Court is the media coverage of its decision-making. When it comes to media coverage, the Court pro-actively monitors and, if necessary, responds to the media coverage about the UKSC and its justices. Second, the Court collaborates with the media for "all judgments and cases of significance."[22] Thus, for example, accredited members of the media occasionally receive an advance copy of the judgment of the Court from the UKSC communications team, to inform the reporting on the case.

In anticipation of the application for judicial review in the prorogation case, the Management Board noted that the communications team needed to "emphasise the Court's constitutional role in enabling the Rule of Law" above all else, to avoid giving off the appearance of an improper overreach into politics.[23] The Court was thus clearly cognizant of the fact that the two Brexit-related cases will become the most high-profile hearings in its, admittedly short history, and reach a far wider audience than the rest of its judicial output. The increased focus on the Court necessitated a more "proactive communication" to safeguard reputation, for negative coverage or any mistake could give the political actors pretext for criticism.[24] An expectation that proved correct, as Roznai notes (26).

As this example shows, the UKSC implements a long-term strategy of monitoring potential risks to avoid damage to its reputation. This allows the Court to contain future challenges proactively. This device does not compromise but enhances the capacity of the Court to engage in sincere and principled adjudication, for judicial reputation is an essential determinant of the effective functioning of any court system. Courts rely on the executive for the implementation of their decisions because they neither wield the sword nor have the power of the purse; "neither force nor will."[25] Judicial review must be ultimately sustained by the institutional actors in complementary roles, and a "high-reputation court is more likely to be complied with than a low-reputation court." [26]

3) Conclusion

As the previous examples show, courts can engage in principled decision-making while also utilizing elements of judicial strategy. The problem of Roznai's anti-bully theory is that he focuses on the moment of the final confrontation. However, similar to democratic erosion, the court response can also be an incremental process.

The danger of conducting business as usual is that courts fail to identify the risk early, and mistakenly act "deferential to anti-democratic forces," contributing to their own marginalization."[27] Courts should, therefore, invest in the capacity that will allow them to monitor and mitigate potential risks ahead of time. Second, there is often a tendency in comparative constitutional studies to focus on courts over their component parts, and the outcome of a case over internal practices that contributed to making the decision a landmark. However, courts are not unitary actors; they work as teams. They

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[22] UKSC 2018-2019 Annual Report and Accounts 76 (6 June 2019) https://www.supremecourt.uk/docs/annual-report-2018-19.pdf.
[23] UKSC MB Minutes (25 March 2019) https://www.supremecourt.uk/docs/management-board-minutes-190325.pdf.
[24] UKSC MB Minutes (30 September 2019) https://www.supremecourt.uk/docs/management-board-minutes-190930.pdf.
[25] Alexander Hamilton, *Federalist No. 78*, in CLINTON ROSSITER (ED.), THE FEDERALIST PAPERS (1961).
[26] SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 11 (2015); TOM GINSBURG AND NUNO GAROUPA, JUDICIAL REPUTATION: A COMPARATIVE THEORY 2 (2015).
[27] Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 DRAKE L. REV. 827 (2018).

can hire high-quality research and support staff that will allow them to incrementally build normative resources providing credible foundations for substantive review of constitutional amendments as well as define their voice in the public sphere.

To understand better what makes courts effective, we must study thoroughly what they *actually* do to ensure compliance with their decisions and make sure that we get the full picture, including "uncourtlike" facets of the judicial function.[28]

[28] MARTIN SHAPIRO, COURTS 1 (1981).