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Who will save the Readheads?

a reply to Yaniv Roznai's Anti-Bully Theory

by Schnutz Rudolf Dürr

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.

1) Introduction[1]

From the viewpoint of politics, courts really can be a nuisance, bickering on minor legal points that block the successful implementation of grand political projects because of some legal formalities, insisting on far-fetched interpretations of human rights or an abstract idea of separation of powers that is too remote from political reality. Should the plans for reform, for real changes in the country be abandoned just because a few non-elected judges oppose them? We have won the elections, we represent the people, the power of the nation has been conferred on us. We have overcome our political opponents; we will overcome these judges as well!

This may be the reasoning – or rather the feeling – of politicians who set out to bully judges. This may be the logic of politicians who believe in their project, believe that they will advance the country, that in the end the country will be better off. There may be other politicians, more cynical, who see politics as a means to obtain advantages for themselves and their close followers. And there may be combinations of these two ways of thinking, at various degrees. Whatever the reasoning, these politicians may see judges, notably constitutional or supreme court judges as opponents who they will fight.

Such attacks are nothing new, but we can see a worrying trend that that they become ever more dangerous, especially when they happen in several countries at the same time. In this paper, I will briefly[2] refer to various techniques that are employed to "bully" judges. In doing so I will refer to reactions of the Council of Europe' Venice Commission[3], resisting such attacks in its Member States.

In his paper, Yaniv Roznai refers to substantive values that are required for a democracy, even in the formal sense. Without freedom of speech, freedom of association, equality, rule of law and the separation of powers, there is no "democracy". The term "illiberal democracy" is nonsensical.

Roznai not only wants to save the judges from bullying but he attributes them a formidable role: it is the judges who should prevent authoritarianism and their ultimate tool to perform this mission are "unconstitutional constitutional amendments" (UCA) judgments.

Therefore, this paper will refer to the UCA phenomenon, which is spreading to world-wide. However, what should be done if it is used by "bad" judges who may not merit being saved from

[1] Head of Constitutional Justice Division of the Secretariat of the Venice Commission, Secretary General of the World Conference on Constitutional Justice. This paper was prepared by the author strictly in his personal capacity and does not necessarily reflect the official position of the Venice Commission or the Council of Europe.

[2] For a more detailed survey, see Dürr, Schnutz Rudolf, Constitutional Courts: an endangered species?, in Rousseau, Dominique, ed., Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés ?, LGDJ, Lextenso, Issy-les-Moulineaux (2019), pp. 111-136.

[3] The European Commission for Democracy through Law or "Venice Commission" is an advisory body of the Council of Europe (not the EU), which gives opinions on issues of constitutional law (Buquicchio, Gianni / Granata-Menghini, Simona, Conseil de l'Europe - Commission de Venise, Rép. eur. dalloz, avril 2014, p. 1-14; Dürr, Schnutz, The Venice Commission, in Kleinsorge, Tanja, Council of Europe, in Wouters, J., International Encylopaedia of International Laws: Intergovernmental Organizations, Alphen aan den Rijn 2010, pp. 151-163). It has 62 Member States, in Europe, Africa, the Americas and Asia. The individual members are appointed by the governments but they are independent. The Commission prepares country specific opinions on (draft) constitutions and legislation, as well as reports (studies) on general topics. The Commission supports constitutional and supreme courts by facilitating exchanges between them, including through the World Conference on Constitutional Justice and runs the case-law database www.CODICES.CoE.int and on-line 'Venice Forum' for courts.

"bullying" because they already succumbed to pressure or were bribed into compliance? This paper will conclude by trying to offer some ideas on that problem.

2) A typology of "bullying" of constitutional courts

In a democracy respecting the rule of law, judgments of constitutional and supreme courts[4] can be criticised but they have to be executed. Unfortunately, this is not the case for every constitutional court. Not only do judgments remain non-implemented, the court's budget is cut, the procedures of the court are changed to make them dysfunctional, no new judges are appointed to "starve" the court of new judges or the court is packed with judges close to the government majority. Some courts are even threatened with outright abolition and this really happened to a few of them. Of course, these dire methods do not affect all courts and not all these measures are taken in combination against the same court, but we will see that all these methods are being used in practice.

A) Packing the court

Court packing means appointing new 'friendly' judges deemed to be close to the views of the government. This is possible when judges can be appointed by the governing majority alone. Therefore, the Venice Commission systematically recommends that when constitutional judges are elected by Parliament, this be done with a qualified majority (typically two thirds) in Parliament.[5] This should lead to a composition which gives the court sufficient legitimacy for its important tasks. In political life, the requirement of a qualified majority can lead to deadlocks and therefore anti-deadlock mechanisms[6] should be added and it should be ensured that judges retire only when their successor takes up office[7].

The good thing about court packing is that it does not always work. This happened for instance in Hungary, when Parliament appointed judges deemed close to the majority, but – at least for some time - the President of the Court still managed to obtain majorities within the Court that were ready to invalidate unconstitutional legislation. Once appointed, judges often take seriously the oath which they have given and they will – to the surprise of those who have appointed them – strike down laws adopted by those who have elected the judges. These judges develop what is called the "duty of ingratitude" for their appointment. What helps them is the collegiality in the court. As a group, they can more easily withstand the expectations from political players.

B) Non-appointment of judges

The opposite of court packing is the "starving" of the Court from judges by not appointing new judges, to replace those who retire. Such a non-appointment can be the result of a complicated

[4] The Austrian scholar Hans Kelsen proposed the establishment of specialised constitutional courts in order to overcome the "counter-majoritarian problem" of unelected judges annulling laws that were adopted by Parliament representing the sovereign people. These specialised constitutional courts should have a balanced composition reflecting the tendencies in society and enjoy a special constitutional legitimacy because they are established for the very purpose of judicial review of legislation (CDL-STD(1997)020 – all documents with reference numbers starting with CDL are available on the site of the Venice Commission www.Venice.CoE.int). Even though in many countries, such as the in USA, supreme courts perform judicial review, this paper refers to both specialised constitutional courts and supreme courts exercising such powers under the term constitutional courts.

[5] CDL-PI(2020)004.

[6] CDL-PI(2018)003.

[7] E.g. Montenegro: CDL-AD(2013)028, paras. 5-8; Moldova: CDL-AD(2004)043, paras. 18-19 and CDL-AD(2008)030, para. 19, Turkey: CDL-AD(2011)040, para. 24.

political situation in which no qualified majority can be obtained but it can also be directed against the constitutional court, as a weapon.

In 2005, the Ukrainian Parliament not only did not appoint its quota (one third) of the Constitutional Court judges but it even refused accepting the oath from the other two appointing authorities (the President and the Congress of Judges).[8] Therefore, after a series of retirements, the Court no longer had a quorum and could not sit for a year and a half, until a political compromise was found.[9]

A less drastic case (without deliberate "starving" of the Court) is that of Slovakia, where the President refused appointing judge candidates who were proposed to him by Parliament. He considered that they were not sufficiently qualified.[10] The rejected candidates appealed to the Constitutional Court, which decided against the President. However, the President did not follow this chamber judgment because he referred to an earlier plenary judgment on the appointment of the prosecutor general by analogy. Following a public declaration by the Venice Commission[11], the President requested the Commission's opinion. The Commission recommended[12] improving the appointment procedure and insisted that the chamber judgment be executed. Following another judgment, the President finally appointed the judges.

C) Non-execution of judgments

A major problem for a number of constitutional courts is the non-execution of their judgments.[13] Following the murder of the investigative journalist Daphne Caruna Galicia, the Venice Commission *inter alia* recommended to Malta make Constitutional Court judgments finding a legal provision directly applicable, instead of leaving it to Parliament to repeal or not that provision[14] When that recommendation was not followed, the Commission insisted that at least Parliament should be obliged to amend the law within a fixed deadline.[15]

A new technique to avoid execution is being discussed in Israel but is has happily not yet been implemented - the "override clause" that would allow Parliament by a qualified majority to annul judgments of the Supreme Court.[16]

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[8] Venice Commission declaration http://www.venice.coe.int/files/2005_12_17_ukr_declaration_appointment_cc_judges_E.htm - all links in this paper were accessed in August 2020.
[9] CDL-AD(2006)016.
[10] See http://spectator.sme.sk/c/20135805/constitutional-court-pushes-on-president-judges-refuse-cases.html.
[11] http://www.venice.coe.int/webforms/events/?id=2193.
[12] CDL-AD(2017)001.
[13] See for instance: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2008)051syn-e and related papers.
[14] CDL-AD(2018)028.
[15] CDL-AD(2020)006.
[16] https://www.timesofisrael.com/netanyahu-consults-with-ex-supreme-court-president-over-high-court-override-bill/.

D) (Threatening the) dissolution of the Court

A radical way to solve the problem of unwanted judgments by constitutional courts is to threaten the Court with it abolition or to really do it, as happened to the Constitutional Court of the Russian Federation in 1993.[17]

When in 2014 the Constitutional Court of Turkey adopted judgements on access to blocked internet sites (Twitter, Facebook)[18], the Court was accused of giving 'unpatriotic' judgments. The President of the Venice Commission made a statement[19] supporting the Court. In 2016, the plenary session of the Commission condemned a statement of the President of Turkey who had threatened the Court with outright abolition after it had decided that the arrest of two journalists had been unconstitutional.[20]

E) (Threats of) Criminal prosecution

Protracted criminal investigations can be a powerful means to bully judges and to keep leverage against them. Following a revolution in Kyrgyzstan in 2010, the Prosecutor General started criminal proceedings against the judges of the previous Constitutional Court, which had been dissolved. The President of the Venice Commission wrote to the President of Kyrgyzstan referring to applicable international standards on judicial independence. The prosecution was later discontinued.

Since the Maidan revolution in Ukraine, the Prosecutor General of that country investigated against the judges of the Constitutional Court who had decided in 2010 that constitutional amendments of 2004 had been adopted unconstitutionally. It its opinion[21], the Venice Commission strongly criticised the Ukrainian judgment (see further below). Nonetheless, the President of the Venice Commission insisted with the Prosecutor General that judges can be prosecuted but protracted investigation in the absence of proof could amount to interference into the work of the Court.

In October 2017, when the President of the Republic of Moldova called a judgment of the Constitutional Court an usurpation of state power for which the judges will be held liable, the

the President of the Venice Commission made a statement recalling that criticism of constitutional court decisions is permissible but that the holders of public office must show restraint in their criticism.[22]

Indeed, when judges, including constitutional judges, are corrupt they must be liable, including crimes linked to adjudication. Any immunity must be lifted when there is evidence for such a criminal act.[23] However, judges must able to take decisions that displease politics, without any fear of criminal prosecution for their judgments.

F) (threats of) judges's dismissals

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[17] Fogelklou, Anders, Interpretation and Accomodation in the Russian Constitutional Court, in Feldbrugge, Ferdinand, ed., Russia, Europe and the Rule of Law, Leiden (2007).
[18] CODICES: TUR-2014-2-002.
[19] http://www.venice.coe.int/webforms/events/?id=1858.
[20] http://www.venice.coe.int/webforms/events/?id=2193.
[21] CDL-AD(2010)044.
[22] http://www.venice.coe.int/webforms/events/?id=2466.
[23] CDL-AD(2013)014.

When in 2013 the Constitutional Court of Moldova adopted a judgment preventing the reappointment of a Prime Minister dismissed for corruption,[24] Parliament adopted amendments to the law on the Constitutional Court in three readings within a single day, providing that a simple majority in Parliament could dismiss a constitutional judge for a loss of trust. The same day, the President of the Venice Commission made an urgent statement[25] denouncing that independent judges cannot be made subject of the "trust" of Parliament. Due to a strong international reaction[26], the President of Moldova did not enact the law, which was later found unconstitutional by the Court itself.

We can see that sometimes Parliaments can move very fast when they are bullying judges. The national and international reaction to such acts must come very rapidly as well in order to prevent the bullying from succeeding.

G) Reduction of the jurisdiction of the Court

An inventive way to bully constitutional courts is restricting their jurisdiction. With reduced competences, they can no longer decide cases that are deemed important for the political majority.

Following elections in 2011, the Hungarian government enjoyed a two-thirds majority in Parliament and was able easily first to make amendments to the existing constitution and then to adopt a completely new constitution. While most of the changes affected the ordinary judiciary[27], the Constitutional Court was severely affected as well.[28]

Following a judgment finding unconstitutional punitive taxes of the salaries of the outgoing government, the Hungarian Parliament amended the Constitution excluding all budgetary and financial laws from the jurisdiction of the Court, unless they affected some specific rights. In March 2011, the Venice Commission expressed its concern about this amendment[29]. However, this restriction of jurisdiction remains in force to date. Only in a few cases, the Constitutional Court was able to strike down financial laws because it established that they contradicted human dignity.[30]

In summer 2012, the Romanian Government amended the law on the Constitutional Court by emergency ordinance removing the Court's competence to control the constitutionality of resolutions of Parliament. The purpose of that change was to prevent the review of the suspension of the President of Romania who had been suspended by such a resolution.[31] The President of the Venice Commission made two public declarations[32] and the Commission gave a very critical opinion on these events.[33] Later, the Court was able to declare unconstitutional the amendments to its own law.[34]

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[24] CODICES: MDA-2013-1-001.
[25] http://www.venice.coe.int/webforms/events/?id=1703.
[26] http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137004.pdf.
[27] See CDL-AD(2013)012, CDL-AD(2012)001, CDL-AD(2012)001, CDL-AD(2012)001.
[28] CDL-AD(2012)009.
[29] Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, CDL-AD(2011)001, paras. 9 and 54.
[30] Deák, Daniel, Pioneering Decision of the Constitutional Court of Hungary to Invoke the Protection of Human Dignity in Tax Matters, Intertax, Vol. 39, No. 11, pp. 534-542, 2011.
[31] Parliament also dismissed the Ombudsman who was the only institution that could bring abstract appeals to the Constitutional Court against emergency ordinances once they had entered into force.
[32] Statements of 4.7.2012 and 7.8.2012, http://www.venice.coe.int/webforms/events/?id=1544 and http://www.venice.coe.int/webforms/events/?id=1557.
[33] CDL-AD(2012)026.
[34] Decision no. 727/2012 of 09.07.2012, CODICES: ROM-2012-2-004.

H) Reducing the budget of the court

Another means to put pressure on a constitutional court is reducing its budget.[35] In 1998, the Constitutional Court of Ukraine was faced with serious budget cuts. Upon the Court's request, the Venice Commission organised a seminar on the budget of the Constitutional Court where speakers from other constitutional courts explained that a similar drastic reduction of the budget would be unthinkable in their country. The seminar showed to the authorities and the public that such reductions were at least 'unusual' in other democracies. As a result, the budget was still reduced but less than announced. In 2004, the Commission repeated such an exercise with the Constitutional Court of Bosnia and Herzegovina.[36]

We can see that in defending a constitutional court we sometimes have to live with compromises but achieving only part is much better than not trying at all.

I) Changes to the procedure to block the work of the Constitutional Court

A dire means of limiting unwanted activity of a constitutional court can be to make its procedure so complicated that it can no longer adopt decisions within a reasonable time. That prevents possibly unconstitutional legislation from being invalidated.

Against the background of a dispute concerning overlapping appointments of judges of the Constitutional Tribunal of Poland by the outgoing and the incoming parliamentary majorities, the latter tried to paralyse the activity of the Tribunal by changing the Act on the Tribunal. The amendments to the Act terminated the tenure of the Tribunal's President and Vice-President but the Tribunal struck out these amendments before they entered into force.[37]

Parliament then adopted new amendments to the Act providing that plenary judgments had to be taken in the presence of 13 out of the Tribunal's 15 judges and they had to be adopted by a two-thirds majority of the judges. The Tribunal was also obliged to hold its hearings strictly in the order of the registration of the cases. These amendments entered into force immediately.

When they were challenged before the Tribunal, it had to decide whether it would apply the amendments that were in force already. Due to the earlier problem of overlapping appointments the Tribunal had only 12 sitting judges but for a plenary decision plenary 13 judges were now required. In addition, the Tribunal could not have dealt with the case in time because the amendments obliged it to terminate before all other plenary cases on the docket.

However, the Tribunal decided that it would decide directly on the basis of the Constitution, without applying the amendments in this very case. The Tribunal found the amendments unconstitutional[38] but the Government did not publish this judgment and all its following judgments. An opinion of the Venice Commission concluded that the amendments would have rendered the Constitutional Tribunal ineffective.[39]

In summer 2016, the Polish Parliament adopted a completely new Act on the Tribunal which again was found unconstitutional by the Tribunal because it would have blocked the work of the

[35] Sometimes, the "punishment" can also be in kind. When the Constitutional Court of Croatia delivered a judgment that significantly increased pensions, the government excluded the Court from access to the official government planes and the judges had to use regular flights for their business trips.
[36] http://www.venice.coe.int/webforms/events/default.aspx?id=17.
[37] CODICES: POL-2016-1-002.
[38] CODICES: POL-2016-1-003. In its new composition, the Tribunal later removed this judgment from its web-site.
[39] CDL-AD(2016)001

Tribunal as well.[40] That judgment was not published either. In another opinion, the Venice Commission concluded that the amendments were clearly unconstitutional as they would have blocked the Tribunal and undermined its independence.[41]

However, when the mandate of the President of the Tribunal expired in December 2016 and its Vice-President was sent into forced vacation, the majority in the Tribunal shifted and a new President was elected, in an irregular procedure.[42]

Only slightly less dramatic was the situation in Georgia in 2016, where the Venice Commission acted as a "constitutional fire brigade".[43] It received a request from the President of Georgia to provide an urgent opinion on amendments to the legislation on the Constitutional Court. The President had only 10 days to decide whether to enact the amendments or veto them. The amendments shifted a series of important matters from the chambers to the plenary session and provided that plenary decisions could be deliberated only in the presence of seven out of the nine judges and that for adoption a two thirds majority of the judges was necessary. As can be seen, there were a number of similarities to the Polish case, and the Georgian Parliament's explanatory note even referred to the Venice Commission's Poland opinion[44] to explain why the Georgian case would be different.

The Venice Commission was able to provide its urgent preliminary opinion[45] within seven days. The President's veto effectively blocked the amendment, which later was found unconstitutional by the Court.

3) Unconstitutional Constitutional Amendments

A) Doctrine

When Yaniv Roznai sees the bullying of judges as a threat to democracy, he refers to their role in defending the supremacy of the constitution, specifically to prevent any amendments to the constitution that go against its identity by annulling unconstitutional constitutional amendments. This is a very bold task. Ordinary judges usually only apply the law but they do not look into its constitutionality. On occasion ordinary judges may find a legal provision unconstitutional and will not apply it or will refer it to a specialised constitutional court for decision. Unconstitutional constitutional amendments (UCA) is a concept that goes much further. Here, the judges invalidate not ordinary law but constitutional law because the constitutional amendments contradict written or even unwritten basic principles underpinning the constitution.

UCA was applied first in the 1973 Keshavananda Bharati case of the Supreme Court of India (basic structure doctrine)[46]. Since then, the question whether a constitutional amendment can be unconstitutional has been the topic of much discussion in academia world-wide.[47]

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[40] CODICES: POL-2016-2-006.
[41] CDL-AD(2016)026, paras. 126-128.
[42] https://www.venice.coe.int/webforms/events/default.aspx?id=2352&lang=en
[43] Dürr, Rudolf Schnutz, The Venice Commission, in Kleinsorge, Tanja, Council of Europe, in Wouters, J., International Encylopaedia of International Laws: Intergovernmental Organizations, Alphen aan den Rijn (2010), pp. 151-163, § 379.
[44] See CDL-REF(2016)038.
[45] CDL-PI(2016)005 and CDL-AD(2016)017.
[46] His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.
[47] Albert, Richard, Four Unconstitutional Constitutions and their Democratic Foundations, 50 Cornell Int'l L.J. (2017) 169-198; Ragone, Sabrina, El Control Judicial de la Reforma Constitucional, Aspectos teóricos y comparativos, Mexico (2012); Sijoria, Siddharth, Unconstitutional Constitutional Amendment: Limiting Amendment Power in India,

While the discussion of UCA was mostly related to specific constitutions, Roznai makes the point that all[48] constitutions contain limits to the power of amendment and that the courts are competent to control amendments in the light of the constitution's basic principles or rather its constitutional identity.[49]

He distinguishes between the original constituent power and the delegated constituent power, which has to follow the amendment rules established in the constitution. Due to its delegated nature, the amending power is limited by the identity of the original constitution, which cannot validly be changed. The doctrinal basis for the establishment of such jurisdiction is derived from the principles of separation of powers and the nature of courts as well as effectiveness. Thus, the main purpose of the amending power is its limitation.

Roznai sees judicial review of constitutional amendments as a means to protect human rights and democracy[50] and as a means to prevent their misuse.[51]

In 2010, the Venice Commission had dealt with the question of constitutional amendments and adopted a Report on Constitutional Amendment[52] that laid the emphasis on procedural limitations but did not argue in favour of substantive limitations to the amending power. The Venice Commission considered that substantive judicial review of constitutional amendments should only be exercised in countries where it follows from clear and established national doctrine.[53] Even in these countries, the courts should exercise it with care, leaving a margin of appreciation to the constitutional legislator.[54] However, the Commission has no objection against and even strongly supports formal control of the amendment procedure.[55]

The Commission's Report finds that radical changes to the Constitution may be warranted when the original constitution has some defects because it was adopted by an undemocratic regime (e.g. communist constitutions in Eastern Europe, Turkey constitution adopted under military regime).

Elsewhere[56], I welcomed Roznai's bold approach but I also expressed hesitations as to the scope of UCA, insisting that the limitations to the amending power cannot be derived from the original

Colombia and Benin, Central European University , 6 April 2018; Ramírez-Cleves, Gonzalo, The Substitution of the Constitution Doctrine in Colombia and the Basic Structure of the Constitution of India: a form of migration of constitutional ideas and contextualized reception (forthcoming); Degifie, Zelalem Eshetu, Unconstitutional Constitutional Amendments in Ethiopia: the Practice under Veil and devoid of a Watchdog, Haramaya Law Review, vol 4, No 1 (2015).

[48] Stone, Adrienne, Unconstitutional Constitutional Amendments: between Contradiction and Necessity, Melbourne Legal Studies Research Paper, no. 786, 19 July 2018 and Albert, Richard, I-CONnect Symposium–Contemporary Discussions in Constitutional Law–Part IV: The Formalist Resistance to Unconstitutional Constitutional Amendments, Int'l J. Const. L. Blog, Nov. 3, 2018 argue that the delegation of powers by the original constituent power can give rise to the *possibility* of limitations but whether there are such limitations has to be shown in each case.

[49] Roznai, Yaniv, Unconstitutional Constitutional Amendments, Oxford (2017) [Kindle citations below].

[50] "Judicial review of amendments is a useful mechanism not only for preventing human rights abuses but also for protecting democracy", ibid., Kindle loc. 6667.

[51] "Judicial review of amendments was developed precisely because of the fear of misuse of the amendment power and the recognition that ordinary judicial review was insufficient.", ibid., Kindle loc. 6670.

[52] CDL-AD(2010)001, §223.

[53] See also, more recent, CDL-AD(2018)010, § 130.

[54] CDL-AD(2010)001, § 235

[55] CDL-AD(2010)001, § 237; Ragone, 2012, 207, argues that procedural and substantive cannot be distinguished in practice because by violating basic principles Parliament substitutes the existing constitution and exceeds its amendment competence thus committing a procedural fault.

[56] Dürr, Schnutz Rudolf, Elements of basic structure doctrine in the case-law of European constitutional courts – the Venice Commission Report on Constitutional Amendment, Conference on Origins, Migration and Influence of the Basic Structure Doctrine, Jindal Global Law School, Delhi, 21-22 March 2019, forthcoming.

Constitution but they must also have a basis in international law and principles, including comparative law only. [57] Constitutional identity cannot be a static original concept but it has to develop together with the Constitution and its amendments. The national identity of a constitution may be too narrow and might not even be 'worthy' of being protected.

The concept of basic principles at the origin of UCA necessarily leads to a concept of a tiered constitution, which has an inner hierarchy that can be identified in various ways, explicitly and possibly implicitly.[58] The clearest and explicit manner to establish such a hierarchy are unamendable or "eternal" provisions of the constitution. This is also referred to as absolute entrenchment. In this case, a provision of the constitution explicitly designates certain articles or principles of the constitution as unamendable. Other constitutions do allow for amendments of parts of the constitution or specific principles but establish a higher procedural threshold for their amendment. The identification of an implicit hierarchy can be difficult to establish and may refer to textual anchors such as the preamble of the constitution.

In such a tiered system, the justification for the control of constitutional amendments is that as the top level of norms the basic principles must not remain *lex imperfecta* but should have a concrete normative force if the Constitution is to be more than a 'sham'.

As a consequence, only constitutional norms that are sufficiently concrete – or can be rendered sufficiently concrete by a court – should be covered by UCA in the constitutional top tier and thus be protected against abusive amendment.

In practice, we have to look at the danger in practice that a wide application of UCA can create for the Court that exercises it. Unless substantive review of constitutional amendments is explicitly provided for in the constitution, constitutional courts and supreme courts exercising constitutional control have to be very careful in establishing it on the basis of interpretation. In such a case, the court is faced with a strong political majority which has already overcome the procedural barriers for amendment. A court needs a very strong legitimacy to rule against an amendment that was supported by a qualified majority.

A particular problem are constitutional amendments already adopted by referendum, which confers the legitimacy of the sovereignty of the people. Ragone excludes the control of such amendments, when the referendum was foreseen by the Constitution.[59] Consequently, she rightly argues in favour of preventive control, before the referendum takes place[60].

Practice

While the courts in some countries rejected constitutional review (e.g. France or Hungary) others embraced it, either because the Constitution itself explicitly provides for such control or because the courts encountered an inner hierarchy within the constitution and found themselves competent to exercise review according to the higher tier. In this paper I can mention only a few outstanding cases where constitutional amendments were invalidated by the courts.

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[57] Insisting on the original constitutional identity alone to limit constitutional amendments might push autocratic leaders to completely replacing the constitution rather than to be limited in amending it.

[58] Pfersmann, Otto, Unconstitutional Constitutional Amendments, a Normativist Approach (2012) 67 ZÖR 81 is of the opinion that there may be several layers of constitutional law above statutory law but he insists that they can be identified by their means of production (this might rule out an implicit hierarchy); Ragone, 2012, 200, insists that the "ultimate" constitutional parameters have to be the essential content, which has to be interpreted restrictively.

[59] Ragone, 2012, 214.

[60] Ragone, 2012, 216

1. Preventive control

Preventive control of constitutional amendments avoids the problem of the constitutional court acting against the will of a qualified majority in Parliament. The Constitution of Kosovo for instance provides for such preventive control (i.e. before Parliament adopts the amendment) of all constitutional amendments[61]. The Constitutional Court examines[62] both the procedure of adoption and the compatibility of the amendment with binding international agreements.

Such preventive control exists also in the Republic of Moldova where the Constitutional Court has an explicit competence to do so. In its judgment no. 57 of 3 November 1999 the Court held that constitutional amendments may only be tabled in Parliament after the Constitutional Court approved it with the vote of at least four of the six judges and this applies when the President of the Republic initiates the procedure for amending the Constitution by referendum. The President cannot avoid this by directly calling a referendum.[63]

In Romania, the Constitutional Court has not only have an explicit mandate to control constitutional amendments but even a right to decide to act *ex officio*[64]. In addition, there is an inner hierarchy in the Constitution which provides that fundamental rights must not by suppressed by constitutional amendments. However, an *ex officio* initiation of review risks being seen as a political move. An automatic review of all draft amendments, such as in Moldova or Kosovo avoids that issue.

2. *Ex post* control upon request with an explicit inner constitutional hierarchy

By providing for different amendment procedures[65] for ordinary amendments and amendments relating to fundamental principles, the Austrian Constitution establishes an inner hierarchy but it does not attribute to the Constitutional Court an explicit competence to control constitutional amendments. The Constitutional Court used[66] these provisions to establish its competence to judge in substance whether a constitutional amendment lived up to the unnamed principles[67] for which the special amendment procedure was foreseen.

The Bulgarian Constitution too establishes an inner hierarchy. According to Article 153 of Constitution it is the 'ordinary' National Assembly which can amend the Constitution with the exception of those provisions which are in the competence of the Grand National Assembly (GNA), which is specifically elected for major constitutional amendments and terminates its mandate when these tasks are performed. The GNA is competent to adopt a new Constitution, change the territory, decide on "matters concerning changes in the form of state organization and

[61] See Articles 113 and 144 of the Constitution.
[62] E.g. on gender equality, CODICES: KOS-2015-1-005.
[63] See also the Venice Commission's opinion CDL-AD(2017)014.
[64] Article 146.a of the Constitution.
[65] In addition to adoption by two thirds-majority in Parliament, amendment relating to fundamental principles have to be confirmed by referendum.
[66] For instance, in its judgment G 12/00, G 48-51/00 of 11 October 2001, the Court found an amendment to Article 126a of the Federal Procurement Law with constitutional rank, stipulating that all statutes of the federal *Länder* in force on 1 January 2001 on the organisation and jurisdiction of organs established to review the awards of public contracts are to be considered as not contrary to Federal constitutional law.
[67] Article 44(3) of the Austrian Constitution: doctrine refers to democracy, the republican principle, federalism the rule of law and liberty (human rights).

in the form of government"[68]. On the basis of these provisions, the Constitutional Court invalidated constitutional amendments at several occasions.[69]

The Constitutional Court of the Czech Republic annulled[70] a constitutional amendment on shortening the term of office of the Chamber of Deputies. The amendment was found to retroactively affect active and passive voting rights and to violate the principle of generality of legislation as a "one-off" constitutional act. In the Czech case, the Constitution explicitly creates an inner hierarchy because it excludes any changes to the essential requirements for a democratic state governed by the rule.[71]

3. *A posteriori* control without an explicit constitutional hierarchy

While the Czech Constitutional Court used the avenue of considering the amendment as a law which it could review, the Slovak Constitutional Court went much further. In January 2019, the Court annulled a constitutional amendment of 2014 that established a mandatory vetting procedure for serving judges and candidates for judicial office by the National Security Authority.[72] Referring extensively to doctrine and judicial practice, the Court noted that the Slovak Constitution did not contain any explicit eternity clauses but it was value based and contained an "implicit substantive core" consisting of unamendable supreme principles of the rule of law, including judicial independence, legal certainty and non-retroactivity of law. The existence of any areas of the Constitution that were deprived of this protection would entail the denial of substantive rule of law. Therefore, the competence of the Constitutional Court to review the constitutionality of laws must include the power to review the compliance of constitutional amendments with this constitutional substantive core.

On the merits, the Court found that integrity assessments of candidate judges are permissible, whereas sitting judges can be held accountable only in ordinary criminal, civil and disciplinary proceedings.

The numerous references to doctrine and foreign case-law in the Slovak judgment show the strong influence of comparative constitutional law on national constitutional law in the field of UCA.

4) What to do with courts that do not merit being defended against bullying?

When judges come under pressure, we may think that the independent judges are the "good ones" and the politicians are the "bad ones", the bullies. Reality is sometimes much more complex and the roles can even be reversed. An incoming, democratically minded, transparent government can be faced with judges who were corrupted under the previous regime or appointed for the very purpose to do the government's bidding.

Such a situation can be very problematic because these judges are protected under the very rules of judicial independence and impartiality that they flouted, and that the incoming government vowed to respect. Short of a revolution, removing the old regime, including its judges, there is no clear-cut solution. Even following something that can be considered a "genuine" revolution, the

[68] In addition to the amendment of articles on the direct effect of the Constitution, the precedence of international treaties over domestic legislation, the inalienability of citizen's rights, the protection of rights under state of war or emergency, and changes to the chapter on constitutional amendments.
[69] E.g. judgments 07/05 of 1 September 2005 and no. 06/06 of 13 September 2006.
[70] Judgment no. Pl. US 27/09 of 10 September 2009.
[71] Article 9 (2) of the Constitution.
[72] I. ÚS 21/2014.

new leaders sometimes prefer to remain within the boundaries of amendments of the existing constitution, rather than risking a constitutional break.

The application of UCA by compromised courts could even run counter to democratic improvements. In their paper[73], Landau, Roznai and Dixon present a case where the abolition of presidential term limits was based on UCA arguments.

Following the velvet revolution in Serbia, ousting the regime of Slobodan Milošević, the revolutionary movement led by Vojislav Koštunica accepted the validity of the Serbian Constitution that was widely considered undemocratic.[74] The attempt to reappoint (and vet) all judges at a later stage proved to be a failure.[75] When the Constitutional Court of Serbia annulled the dismissal of the judges, the country had far too many judges, as 632 dismissed judges had to be re-integrated.[76]

When in 2010, the Constitutional Court of Ukraine annulled the 2004 constitutional reform, bringing back into force the 1996 constitution lacking some checks and balances, the Venice Commission heavily criticised this judgement: "the Venice Commission observed a certain inconsistency in the case-law of the CCU" and "As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law." "In the Venice Commission's opinion, the jurisprudence of a Constitutional Court has to be consistent and based on convincing arguments in order to be accepted by the people. Changes in the case-law have to be well-founded and explained in order not to undermine legal certainty."[77]

After the fall of the Yanukovych government in the Maidan revolution, allegations that the judges had been corrupted in 2010 were published.[78] Criminal investigations were started against the judges but never brought to an end (see above). However, what is important from the viewpoint of what to do when a court seems to go astray, is to denounce that and to document it. Public discussion of the lack of valid arguments in the judgments(s) is essential to have a documented basis for corrections under a later, more democratic regime.

A dramatic situation arose in the Republic of Moldova in 2019. Following elections, in a rapid series of judgments between 7 and 9 June 2019 the Constitutional Court first decided[79] that the President had to dissolve Parliament because the deadline for forming a new government had expired. When the President did not dissolve Parliament, the Constitutional Court decided that the President had deliberately not fulfilled his functions, the Court declared the incumbent acting Prime Minister as the interim President in charge of dissolving Parliament.

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[73] Landau / David, Roznai, Yaniv / Dixon, Rosalind, Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, forthcoming, in: Baturo, Alexander / Elgie, Robert, eds., Politics of Presidential Term Limits (Oxford University Press), FSU College of Law, Public Law Research Paper No. 887, 26 July 2018.

[74] N. Dimitrijević, The Paradoxes of Constitutional Continuity in the Context of Contested Statehood, in I. Spasić, Milan Subotić, Revolution and Order - Serbia after October 2000, Belgrade (2001), pp. 275-282.

[75] See also CDL-AD(2007)004; Violeta Beširević, "Governing without judges": The politics of the Constitutional Court in Serbia, International Journal of Constitutional Law, Vol. 12/4, 2014, pp. 954–979.

[76] Multi Donor Trust Fund for Justice Sector Support, Serbia - Judicial Functional Review (2014), footnote 200, http://www.mdtfjss.org.rs/en.

[77] CDL-AD(2010)044.

[78] https://www.kyivpost.com/ukraine-politics/new-sordid-details-emerge-from-yanukovychs-ledger-421693.html?cn-reloaded=1

[79] For a detailed chronology, see CDL-AD(2019)012.

Following a rare agreement of political views between the West and Russia, the oligarch backing the Prime Minister fled the country and on 15 June, the Constitutional Court cancelled its earlier decisions.

Upon request by the Secretary General of the Council of Europe, the Venice Commission adopted an opinion on 20 June 2019.[80] The Commission criticised the Constitutional Court in no uncertain terms. As concerns procedure: "... the procedural rights of both the President and of parliament have been severely affected by the number (five) and the extreme speed, and even rush (one day or two days during the weekend) with which the Court decided these extremely sensitive cases...", "...the crisis deepened and instability was rather brought about by the coordinated action at lightning speed of the Democratic Party and the Constitutional Court as of 7 June." On substance: "... strong reasons exist for the view that the Constitutional Court's decision on the temporary suspension of the President and the installation of the Prime Minister as an interim office holder is not grounded in the Constitution of the Republic of Moldova." The same day the President of the Court resigned, followed by the resignation of the other five judges on 26 June.[81]

The Venice Commission would not usually criticise a Constitutional Court in such terms. It explained that it would not normally assess judgments of constitutional courts "lest the robustness of State Institutions in the country in line with the Constitution be seriously undermined and the democratic functioning of state institutions be irreparably compromised."

5) Conclusion

When Yaniv Roznai recommends courts that are being bullied to go on with "business as usual", he gives good advice to the judges. Inaction, being frozen by the look of the snake only shows the bully that the pressure works. Court presidents can speak out when there is a direct threat, but defensive overreaction can too easily be denounced as a political move.

This paper provides an unfortunately quite long list of techniques that bullies can use against courts. This typology shows that governments and parliamentary majorities have been very creative when they bully courts to ensure that the judges cannot prevent them from implementing their plans.

The typology is not intended as a recipe book for government on how to muzzle their courts – unfortunately they learn quickly from each other anyway – but it is intended as guidance to recognise such attempts and to enable the courts themselves but also opposition, civil society and the international community to recognise such acts as what they are – authoritarian machinations that are intended to do away with checks and balances, the cornerstone of constitutionalism.

The doctrine of unconstitutional constitutional amendments to which Roznai refers in his paper gains ground and it is thanks to his ground-breaking book that this movement has a theoretical underpinning spanning constitutional systems. We have seen that UCA is a powerful tool but it should be used very carefully only. It is stronger when it builds on an explicit inner hierarchy between ordinary constitutional law and unamendable provisions or basic principles that are the core of constitutional identity. UCA benefits from a foundation in international law, including comparative law.

[80] *Ibid.*

[81] https://balkaninsight.com/2019/06/26/moldovas-constitutional-court-judges-resign-over-political-bias/

UCA is such a strong tool that constitutional courts should use it only very sparingly, when a constitutional amendment seriously endangers democracy, the protection of human rights or the rule of law.

Finally, this paper, looks into the dilemma of what to do with courts or judges who are not worthy of being defended, courts that went astray and either succumbed to financial or political corruption or both. These courts exploit the protections established for independent and unbiased judges and they abuse these protections. As for all judgments, in general, public discussion of the judges' arguments is important and the absence of valid arguments must be exposed, in order to at least document abuse to be remedied at a later, better future.