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Prevention is Better than Cure: Rethinking Court Behaviour and Design

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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.

1) Introduction

Yaniv Roznai offers a rich and ultimately hopeful account of judicial power when democracy undergoes a stress test. His anti-bully theory consists of two interconnected prescriptions. First, from a constitutional design perspective, Roznai advocates the grant of judicial review power over constitutional amendments. The existence of such a power should reduce the ability of populist leaders to use formal legal means to emaciate the judiciary, while simultaneously boost the court's constitutional guardianship role. Secondly, and from a conceptual perspective, Roznai engages with the social dynamics at play in relationships, be it of the personal or the institutional kind. His focus is on situations evincing (the threat of) democratic erosion. As these involve a reshuffle of the power deck, he suggests that it would be profitable to rely on insights from social psychology to analyse the unfolding relationship between populist leaders and courts. Likening the pressure that the former can bring to bear on the latter to bullying, Roznai identifies three behavioural models that courts might accept in the face of intimidation: they can yield, remain unflappable or engage in a confrontation. The middle option is favoured for its superior signalling ability: continuing to exercise judicial power as per normal highlights to populist leaders that their actions will not be endowed with constitutional legitimacy, while judgments along these lines simultaneously encourage the general public to oppose backsliding in ways that courts cannot. It is this mixture of sufficiently capacious judicial review powers and behavioural sensibilities that should enable courts to withstand assault by anti-democratic political forces.

In this commentary, I offer a couple of suggestions for the further development of Roznai's anti-bullying thesis. I commence by outlining an additional behavioural strategy that could aid courts in withstanding and possibly even anticipating victimization. I shall then offer some comments on the constitutional mandate of courts, notably those of the Kelsenian variety, and its relation to the risk of political domination.

2) The art of constitutional advocacy

Roznai acknowledges that the effectiveness of his preferred anti-bullying strategy of "business-as-usual" is not entirely within the court's control, as the survival of democracy is ultimately in the hands of 'the people' who must be persuaded that it is worth preserving. To help cultivate this mindset, Roznai envisages that "through its judgments, the court can also explain and educate about the possible problems a specific legislation or an amendment poses to democracy".[1] To my mind, the idea of a partnership between the court and the people for the benefit of the constitutional project can be taken further, and the court's possible educational role should manifest itself also beyond the judgments it delivers.

Research has shown a strong correlation between the presence of social support and exposure to bullying victimization.[2] Social support can come in various shapes and sizes. Social support from peers are effective as a preventive bully-strategy. The same is true for relational support that traverse social hierarchies: think of teachers in a school setting or an office worker's boss. A potential bully's

[1] Yaniv Roznai, *Who Wil Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WILLIAM & MARY BILL OF RIGHTS JOURNAL 1, 33 (2020).

[2] Faye Mishna et al, *The Contribution of Social Support to Children and Adolescents' Self-Perception* (2016) 63 CHILDREN AND YOUTH SERVICES REVIEW 120 (2016).

foreknowledge that a victim can count on others who will come to her aid significantly reduces her chances of remaining or even becoming a target. There is thus considerable utility in building one's social capital, beyond the benefits that friendship brings in terms of greater happiness and better health.[3] In the present context, applied to the problem of a possible political backlash, a bellicose government or parliament may think twice before moving against the court if it is clear to all that the court has broad public support. Even in the event that such backing would not prevent mischievous behaviour, it may make such behaviour less invasive. At the very least, it would fortify a court to follow the "business-as-usual" approach.

For present purposes, what is therefore important is *how* to create the conditions for widespread social support. As a preliminary point, it should be noted that social support, as a psychological concept, is distinct from the social legitimacy that an institution enjoys at any given point. A court is socially legitimate when perceived by its interlocutors,[4] ranging from politicians to the media to the people, to act with authority. As a matter of fact, its existence and behaviour are accorded respect, also when one or more interlocutors had preferred a particular case to have been decided differently. Social legitimacy thus accentuates the ability of an institution to achieve its mandated objectives. At the same time, social legitimacy does not engender expectations that one's interlocutor – like the general public – steps in in defence of an institution when its authority is being challenged by another. In contrast, social support *does* suppose intervention in some manner or form. As noted in anti-bullying literature, when bystanders remain passive onlookers, their disengagement can inadvertently reinforce intimating behaviour and victimization.[5] More recent studies hence focus on identifying effective strategies that can transform individuals from bystanders to defenders who actively offer support.

Investment in constitutional literacy is one strategy that promises a potentially stronger supporting relationship between the people and the court. This denotes the ability to make sense of and properly give effect to the Constitution.[6] In the US, the Annenberg Public Policy Center conducts a yearly survey in which participants are asked, amongst others, about the desirability of Congress circumscribing the Supreme Court's jurisdiction or abolishing the Supreme Court altogether if many of its decisions would rub Congress or the general public the wrong way. The 2018 survey found a statistically significant connection between knowledge of the Constitution and a desire to protect the Supreme Court's status and independence.[7] As the Center's Director pointed out, "One is unlikely to appreciate or defend constitutional prerogatives or rights one does not understand."[8] In a similar vein, Germany's *Bundesverfassungsgericht* has long been held in notable popular esteem, an achievement that has been attributed to the German public's knowledge of the fundamental rights enshrined in the

[3] Aristotle, THE NICOMACHEAN ETHICS; Meliksah Demir, Ayça Özen & Amanda Procsal, *Friendship and Happiness*, in Alex C. Michalos (Ed.), ENCYCLOPEDIA OF QUALITY OF LIFE AND WELL-BEING RESEARCH (2004).
[4] Cf. Tom Ginsburg and Nuno Garoupa, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUMBIA J. TRANS. L. 451 (2008), who speak of a court's "external audiences".
[5] Christina Salmivalli, Kristi Lagerspetz, Kaj Björkqvist, Karin Österman & Ari Kaukianen, *Bullying as a group process: Participant roles and their relations to social status within the group*, 22(1) AGGRESSIVE BEHAVIOR 1 (1996).
[6] See also CHRISTOPHER DREISBACH, CONSTITUTIONAL LITERACY: A TWENTY-FIRST CENTURY IMPERATIVE (2016).
[7] Annenberg Public Policy Center, *Civics Knowledge Predicts Willingness to Protect Supreme Court*, September 13, 2018, https://www.annenbergpublicpolicycenter.org/civics-knowledge-survey-willingness-protect-supreme-court/.
[8] *Ibid.*

Basic Law, including their right to ultimately appeal alleged violations thereof by a public authority to the *Bundesverfassungsgericht*.[9]

This brings up two related questions: what should be the object of literacy efforts geared towards strengthening a protective stance vis-à-vis the court and secondly, what could be the role of the courts in cultivating such literacy? It is not possible here to explore these issues in depth, but some tentative responses can be provided. An obvious topic for a court-centric literacy agenda concerns the judicial role in championing rights and, by extension, the content of the bill of rights portion in the Constitution. For many, there seems to be a natural link between courts and rights.[10] Renowned constitutional theorists have underscored this feature of the judicial role in their defence of the practice of constitutional adjudication. Their argument is that courts are able to reinforce democratic life and alleviate the threat of unbridled majoritarianism through their work in protecting rights, be it of those of a substantive nature[11] or those pertaining to the functioning of the political process.[12] Some of the protagonists too emphasize this conception in materials aimed at the general public. The welcome message in the brochure of the Constitutional Court of Korea proclaims that its "primary mission is to justly instil, in the people's everyday lives, the universal constitutional values of human dignity, freedom, and equality". A pact is envisaged under which the Court upholds these values in line with contemporary public expectations, with the people in return pledging their "continued support and encouragement" for the Court's work. In a similar vein, of the five FAQ categories on the website of the Constitutional Court of South Africa, the only substantive topic is entitled 'Your rights and the law', where we can read, in response to the question "How can the Constitutional Court help me protect my rights?", that "The Constitutional Court is the ultimate defender of the human rights laid down in the Bill of Rights." Finally, focusing literacy efforts on the role of courts in enforcing rights is also an attractive proposition from the perspective of ordinary individuals who are illiterate in constitutional thought and text. The bill of rights is arguably one of the more accessible portions of a constitution,[13] and its subject matter will seem more immediately relevant and worthy of being understood than say, the constitutional scheme of federalism or how amendments can come about. At the same time, we should realize that literacy efforts along a courts-rights narrative foreground the court's counter-majoritarian character. This might compromise their effectiveness in convincing members of the public who do not identify with, or care about, weaker and vulnerable segments to show support for the court's institutional well-being.

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[9] Jutta Limbach, *The Role of the Federal Constitutional Court*, 53 S.M.U. L. REV. 429, 429 (2000) (arguing that this was in large part due to the Federal Constitutional Court "tirelessly exercis[ing] the constitutional alphabet with them"); Andreas Voßkuhle, *Foreword*, in FEDERAL CONSTITUTIONAL COURT – ANNUAL STATISTICS 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2019.pdf?__blob=publicationFile&v=3. An excellent historical account is offered by JUSTIN COLLINS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001 (2015).

[10] *See e.g.* Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25(1) WEST EUR. POLITICS 77 (2002), EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), THE ROLE OF THE CONSTITUTIONAL COURT IN THE CONSOLIDATION OF THE RULE OF LAW (1994).

[11] Cf. RONALD DWORKIN, A MATTER OF PRINCIPLE ((1986).

[12] Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST – A THEORY OF JUDICIAL REVIEW (1981).

[13] This should not be taken as a suggestion that the language used in the bill of rights is free from ambiguity or does not contain obscure expressions; rather, the fact that key concepts such as 'equality', 'expression' are part of everyday language lowers the linguistic barrier to entry.

In this connection, there is a second topic that might profitably be included in court-centric literacy efforts: the place of the court within the separation of powers and its associated attributes. To return to the Annenberg Public Policy Center survey, the type of knowledge that was helpful in inspiring a protective stance vis-à-vis the US Supreme Court concerned the configuration of the trias politica rather than the design of the State-citizen relationship. This included knowing the names of all the branches of government (a feat managed by only one-third of the respondents!); the legal effect of a 5-4 split decision; that Congress can break a presidential veto; and the nomination process for Supreme Court justices. To empower the citizenry at large to become court-defenders, it thus seems useful to impart information that extends beyond the competences exercised by the court for their particular benefit to the underlying logic and operation of a country's system of checks and balances. This should include explanations of the need for the court to be an independent institution[14] and key features of this trait, including the extent to which these are guaranteed under the constitution.[15] Indeed, as Roznai underscores, academic accounts of recent democratic backsliding seem widely agreed that judicial independence and the separation of powers paradigm are among the first casualties of executive self-aggrandizement.[16] In the current climate of growing populist sentiments, it might even be prudent to prioritize boosting literacy regarding the design of constitutional government so that citizens are duly sensitized and ready to support the court at a time when their doing so will matter most.

This brings us to the question of how courts could help achieve constitutional literacy of the kind just described.[17] The most obvious instrument at their disposal are judgments in which courts can articulate, with as much clarity and force as they can muster, why a new political initiative does not sit well with the prescriptions of constitutional democracy. Roznai discusses various examples of judgments in which courts have called out authoritarian initiatives to amend the constitution, several of which have helped preserve the country's democratic health. It is not clear to what extent these mobilized the public or whether the political elites decided to heed the court's counsel for reasons other than the people siding with the judges. There seems to me to be complicating factors in relying on judgments as a court's foremost tool in calling the public to arms. Their length can discourage readership, and thereby a good understanding of the court's opinion. The landmark Ugandan judgment in which the constitutional court accepted the basic structure doctrine and struck down an amendment that would have extended MPs' term of office by two years ran to 814 pages. Slovakia's constitutional court required more than 100 pages to explain its historical decision that the constitution contains an implied substantive core, which was violated by the proposed amendment purporting to change the security clearance for judges and judicial candidates. Moreover, judgments tend to be

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[14] *See e.g.* Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129 (2006); Christopher M Larkins, *Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

[15] *See e.g.* Mia Swart, *Independence of the Judiciary*, in RAINER GROTE, FRAUKE LACHENMANN AND RÜDIGER WOLFRUM (EDS.), MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (2019).

[16] See e.g. Anna Sledzínska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transitio*n, 19(7) GERMAN L. J. 1839 (2018); David Kosar and Katarína Sipulová, *How To Fight Court-Packing?*, 6 CONSTITUTIONAL STUDIES 133 (2020);

Douglas M. Gibler and Kirk A. Randazzo, *Testing the Effectiveness of Independent Judiciaries on the Likelihood of Democratic Backsliding* 55(3) AM. J. POL. SC. 696 (2011) (finding empirical support that circumscribing judicial independence facilitates the ascendency of authoritarianism).

[17] I believe that courts have a part to play in this regard, although (legitimate) concerns have been expressed about the State, more particularly the government of the day, monopolizing the delivery of literacy-boosting information. See e.g. Mark Tushnet, *Constitutional Design As If Civic Education Mattered*, 41(2) J. SOCIAL PHILOSOPHY 2010.

replete with legal-technical jargon, compounding accessibility for members of the public who have not been inducted into the law. As Jakab, Dyevre and Itzcovich have explained, this approach to judgment-writing is a deliberate and rational choice as courts "need to confirm to prevalent conceptions of what constitutes acceptable judicial behaviour. Judges must sound like judges rather than like legislators or cabinet members."[18] The problem, however, is that this judicial decorum can put courts on the back foot when confronted with populist leaders spouting catchy messages about judges being out of touch, technocrats and members of a reactionary institution.

We might therefore need to adjust our behavioural expectations of courts to accommodate a bigger toolbox to meet the need for popular constitutional literacy. It is noteworthy that some courts have embarked on outreach efforts that would have been scarcely imaginable a few decades ago. The Colombian constitutional court has a Facebook page, through which its more than 125,000 subscribers receive updates about the latest developments, as well as its own YouTube channel, where everyone with an internet connection can watch the court's president explain significant decisions in less than two minutes. The German *Bundesverfassungsgericht* has recorded a series of informative videos to introduce the public to its role in the overall constitutional set-up, its history and landmark decisions, while the Korean constitutional court has even created cartoons to convey a sense of its work and relevance. Other strategies that courts have begun to embrace include tours, public speaking engagements and the streaming of proceedings. The initiatives canvassed just now appear to have struck a chord with the general public, maybe exactly because the medium is an important part of the message that the court is hoping to convey.

Thinking about the relevance and optimal design of public relations strategies for courts beyond judicial opinion-writing has acquired a sense of urgency in the current climate of popular distrust of government.[19] When a court invests in boosting citizens' literacy about its decisions and the merits of its place within the constitutional constellation, it might just have added another string to its bow in the face of political pressure. Perhaps the most important advantage of a literacy campaign is that it can be implemented before talking of court-packing and the like is brought into the mainstream. It seems preferable for courts to take a proactive stance when their independence and constitutional guardianship abilities are (still) secure, rather than waiting and reacting once unsavoury political developments are in the offing. Another 'anti-bully' strategy with an even stronger pre-emptive character invites us to consider another aspect of constitutional design: the set-up for constitutional adjudication. This is discussed in the next section.

3) Strength in numbers: rethinking the design of checks and balances

Looking at the interaction between courts and the political branches through the lens of anti-bullying should also lead us to reflect on *why* the former may need to have recourse to the strategies canvassed by Roznai. The short answer points to the court's "ability to function as guardians of the democratic order".[20] When performed with gusto, as many courts have been wont to do, the corollary is high visibility and the impression that courts are the ultimate protectors of all things constitutional – a view

[18] András Jakab, Arthur Dyevre and Giulo Itzcovich, *Introduction: Comparing Constitutional reasoning with Quantitative and Qualitative Methods*, in ANDRÁS JAKAB, ARTHUR DYEVRE AND GIULO ITZCOVICH (EDS), COMPARATIVE CONSTITUTIONAL REASONING (2017) 19.
[19] *See e.g.* OECD, *Confidence in Institutions*, in SOCIETY AT A GLANCE IN 2019: OECD SOCIAL INDICATORS (2019).
[20] ROZNAI, *supra* note 1, at 8.

that several of the protagonists stress in their judgments and other public communications. Analogising this to the real-life social setting in which bullying occurs, the court is akin to a gifted student or, when it is set up as a Kelsenian constitutional court, one with a distinctive appearance.

The longer answer considers the choices made in the design of the arrangements for constitutional interpretation and enforcement. It is well-known that there has been an explosion in judicial power from the second half of the twentieth century onwards.[21] The decision to entrust courts with review powers has been linked to the desire to showcase a country's (re)new(ed) commitment to the Rule of Law and fundamental rights associated with democratization processes.[22] In many cases, the old paradigm of self-regulation by political elites had been shown to be defective, in that laws at odds with basic constitutional values had been enacted. If the new world should be one in which the domestic citizenry and international actors can trust that constitutional supremacy means something, then another institution should have the final word on what the constitution means and allows. Their independence and impartiality made courts particularly attractive candidates for this position. Several international organizations have aligned themselves with or otherwise endorsed this line of reasoning.[23] Works inspired by political science insights have explained the turn to the courts as serving the interest of political elites in the face of uncertainty that they can retain control of the parliamentary floor and hence determine the content of new legislation.[24] On either view, it would appear attractive to vest the court with a broad set of responsibilities and make invoking its jurisdiction easy.

Roznai's argument to grant courts the competence to vet the procedural and substantial validity of constitutional amendments fits these popular narratives of judicial guardianship. Their ability to do so would furthermore produce "freedom [for a court] to primarily decide cases according to its own policy preferences rather than search for second-best solutions considering possible overrides and backlashes."[25] While amendment review can be a boon for democracy and constitutionalism, as the examples of Taiwan or Columbia attest, I have some reservations about the strength of the general case for such review. Once courts are explicitly authorized to scrutinize amendments, they will be expected to exercise this power when asked: avoidance, often recognised as a useful strategy in controversial cases, would no longer be a viable option. This could amplify a court's vulnerability, all the more so when we bear in mind that a judicial veto of a constitutional amendment does not necessarily mean that the court has the last word. The political branches may still have means at their

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[21] *See notably* Ran Hirschl, TOWARDS JURISTOCRACY – THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Carlo Guarneri & Patrizia Pederzoli, FROM DEMOCRACY TO JURISTOCRACY? THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002); CN TATE & T VALLINDER (EDS.), THE GLOBAL EXPANSION OF JUDICIAL POWER: THE JUDICIALISATION OF POLITICS (1995).

[22] See e.g. Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99(4) GEO. L. J. 961 (2012); TOM GERALD DALY, THE ALCHEMISTS – QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017) ch. 2.

[23] *See e.g.* UNDP GUIDANCE NOTE ON CONSTITUTION-MAKING SUPPORT (2014); László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 INT. SOCIOLOGY 133 (2003) (arguing that the Council of Europe encouraged the creation of constitutional courts); RADOSLAV PROCHÁZKA, MISSION ACCOMPLISHED – ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE (2002) (making a similar argument in relation to the EU). More critical about the EU's anticipatory influence: WOJCIECH SADURSKI, RIGHTS BEFORE COURTS – A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005) at 40-58.

[24] See Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30(3) J. L. ECON. & ORGANIZATION 587 (2014); HIRSCHL, *supra* note 21.

[25] ROZNAI, *supra* note 1, at 32.

disposal to push their policy agenda,[26] including by re-doing the process and thereby rectify any earlier procedural irregularities; changing the text of the constitutional provisions that the court based its decision on; or inserting an ouster clause into the constitution.[27] In other words, the risk of retaliation, or rebuttal remains, which means that a court might be neither free from "worry" about such an occurrence nor "release[d] from strategic calculations".[28] As such, Roznai's argument nudges us to consider, empirically, the precise conditions under which the power to judicially review amendments is likely to benefit the overall health of the constitutional order and the court's place in it.

Even without amendment review powers, there may be good reasons to re-look at the design of constitutional adjudication. This is particularly true for separate constitutional courts, located outside the ordinary court system and with their own terms of reference. Hans Kelsen originally conceived of such courts as 'negative legislatures': their only role was to adjudicate claims that a particular law was unconstitutional at the request of the government or a regular judge and if so, annul the offending law with *ex nunc* effect.[29] Many modern-day 'Kelsenian' courts have a far busier schedule, and this is notably true for those plying their trade in post-transition contexts. Alongside keeping the legislature in check, they can also provide protection for the fundamental rights of individuals in final instance; resolve competence disputes; and ensure the integrity of political office and processes by supervising the propriety of elections and referendums, deciding whether political parties can particulate in the political life of a country and whether high office holders have abided by expected standards of conduct.[30] Moreover, direct access to constitutional courts is typically no longer restricted to governments, but a host of other public institutions and sometimes even private individuals can similarly invoke its jurisdiction. The corollary is that the court becomes front and centre in the constitutional enterprise, and as such, susceptible to becoming embroiled in the type of politically contentious cases that could trigger political institutions to begin to think about 'striking back', while simultaneously bringing with it the risk of reduced popular support as decisions in electoral, party-banning or impeachment cases may be perceived as partisan rather than the outcome of a strictly legal exercise. This begs the question whether we, even if only subconsciously, expect courts to act as our modern-day Atlas, the Titan in Greek mythology who was made to carry the weight of the heavens on his shoulders.

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[26] Cf. David S. Law & Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan*, in DAVID S. LAW (ED.), CONSTITUTIONALISM IN CONTEXT (forthcoming 2020).

[27] The extent to which any or all of these options are available largely depends on the defect that the amendment was found to suffer from by the court as well as the available political support to persist with the policy choice encapsulated in the invalidated amendment.

[28] ROZNAI, *supra* note 1, at 32.

[29] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4(2) THE JOURNAL OF POLITICS 183 (1942). He was further of the view that constitutional courts should not be asked to vet laws for compatibility with value-laden concepts such as 'justice' or fundamental rights.

[30] *See* MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE – A COMPARATIVE ANALYSIS (2014); ALBERT CHEN & ANDREW HARDING (EDS.), CONSTITUTIONAL COURTS IN ASIA – A COMPARATIVE PERSPECTIVE (2018); Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America*, in GRETCHEN HELMKE & JULIO RÍOS-FIGUEROA (EDS.), COURTS IN LATIN AMERICA (2011).

It might thus be worthwhile to consider redacting the list of tasks given to constitutional courts, and divesting responsibility for some activities to other institutions.[31] Mark Tushnet and Bruce Ackerman have each made a compelling case for rethinking the triadic separation of powers scheme and explicitly add in a branch (which may comprise multiple institutions) responsible for preserving the integrity of constitutional democracy.[32] Their reasoning points to the need to take this function seriously and its distinct character vis-à-vis the other classic functions. As Tushnet has remarked, upholding the constitution as the nation's supreme law and protecting constitutional democracy itself call for different blends of expertise and politics, and would accordingly be best performed by distinct institutions.[33]

There are important questions of design that must be considered in taking such suggestions forward.[34] First is the number and type of constitutional democracy-supporting institutions that should be created. We might contend that a larger group is beneficial for signalling and protective purposes. However, when more players enter the field, the allocation of powers scheme becomes more complex, making the constitutional literacy problem that I mentioned earlier more acute as well as more difficult to address. Second is the protection of the democracy-supporting institution's political neutrality and independence. While we can agree that these should be constitutive attributes, should we prioritize legal safeguards regarding the composition of these institutions or pay more attention to the availability of resources? Where should the balance be struck between independence and accountability, to avoid generating a perception among politicians and the electorate that democracy has been waylaid by technocracy? These questions deserve our utmost attention as we are engaged in a collective scholarly enterprise to shore up the resilience of constitutional democracy.

Relating this to Roznai's bullying analogy, having a group of 'democracy-protecting institutions' would mean that court lose some of their distinctiveness and shares their giftedness, understood as the skill to uphold constitutional values, with others. For potential political bullies, such an institutional reality would call for a multi-pronged approach to victimization, and it stands to reason that, all things being equal, this could compromise the speed and effectiveness with which such victimization can be achieved.

4) Conclusion

Looking at the interplay between courts and politicians through the lens of social psychology, as Roznai has done, can fuel our imagination regarding the toolkit that the former might use when coming up against undue pressure. Employing such a frame gives prominence to the power dynamics in relationships and how these shape behaviours. In the particular sub-set of the literature that studies bullying, there has been a reckoning to include bystanders in the relational analysis and focus on empowerment of this group as well as of the (tentative) victim herself. In a similar way, it is worthwhile to rethink the relational dynamics as far as courts conducting judicial review are concerned. We should

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[31] *See also* Pablo Castillo-Ortiz, *The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions*, 39 LAW AND PHILOSOPHY 1 (2020).
[32] Mark Tushnet, *Fifth-Branch Institutions*, in LAW, *supra* note 29; Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).
[33] *Ibid.*
[34] *See generally*, International IDEA, INDEPENDENT REGULATORY AND OVERSIGHT (FOURTH-BRANCH) INSTITUTIONS, https://www.idea.int/publications/catalogue/independent-regulatory-and-oversight-fourth-branch-institutions.

pay more attention to empowering the general public to provide meaningful support for courts through constitutional literacy efforts, while simultaneously studying whether and how to expand the range of institutions responsible for safeguarding constitutional democracy. The combined effect of such an enterprise should stand courts in good stead to practice their guardianship role to the best of their ability: a savoury outcome that should be pleasing to the palate of many a constitutionalist.