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# Who will Save the Redheads? On Bully Theory of Judicial Review & The Protection of Democracy

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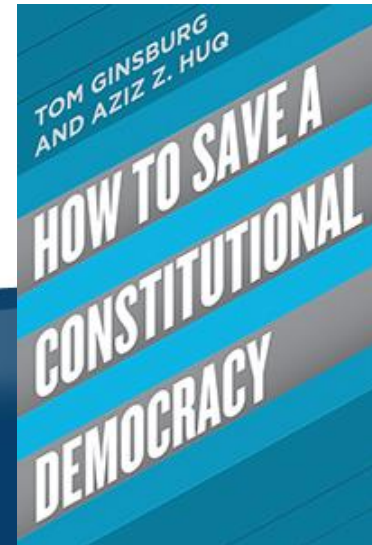
# Three Main Points

- **Protection of Democracy? Which democracy? Liberal v. Illiberal Democracy and Substantive v. Formal Democracy**
- **Who will Save the Redhaired? Or, Can the Court Protect Democracy?**
- **Who can stop the D9? Or, the ‘Bully Theory’ of Judicial Review**

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# Global Context

- Democratic Erosion around the world (e.g. Hungary, Turkey, Poland, Venezuela...)
- “A process of incremental, but ultimately still substantial, decay in three basic predicates of democracy – competitive election, liberal rights to speech and association, and the rule of law”  
(Tom Ginsburg and Aziz Z. Huq).



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# Local Context

- **Israel's Counter Constitutional Revolution: "Israel is in the midst of an intentional legislative and political process which aims to weaken and circumvent democratic checks and balances and liberal-democratic principles" (Gila Stopler)**
- **Manifold Attempts to Limit the Supreme Court's Authority to Conduct Judicial Review (proposals to limit the court's authority to review administrative actions based on reasonableness; non-justiciability of inter-parliamentary proceedings and insertion of an override clause to Basic Law: Human Dignity and Liberty)**



# Protection of (which) Democracy?

- Israel's Former Minister of Justice Ayelet Shaked: “they declared Israel's democracy death so many times, that it seems that not only cats have nine lives, but also our democracy.” In her opinion, “Israeli democracy is as healthy as a bull” and the processes that are taking place strengthen Israel's democratic basis as reflecting majority's will.
- [“Fascism? Smells Like Democracy to me!”](#)



# Protection of (which) Democracy?

- Liberal and substantive notions of democracy are under attack in the name of a purely procedural or majoritarian version of democracy, according to which the political majority represents the sovereign and is thus omnipotent.
- “The fact that Europe’s new authoritarians have come to power through free and fair elections does not lend democratic legitimacy to their efforts to transform entire political systems to their own advantage. Instead of describing them as ‘illiberal’ we should be calling them what they really are: ‘undemocratic.’ (Jan-Werner Müller)
- ‘Procedural Democracy’ includes – and must include – substantive requirements.



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# Who will Save the Redheads?

- Former Justice Minister Shaked: “I don’t accept the presumption as if the court has absolute priority over Parliament in the era of human rights protection. As if Parliament hangs the redheads on electricity poles and the court goes one pole by the other and taking them down. If Parliament would enact a law that says ‘all redheads must be hanged’ – the court will not be able to assist because society has become so corrupted.”
- And elsewhere: “If the Knesset were to pass a law rescinding the voting rights of women or red-haired people...this would signal the collapse of our democracy. In such a case, I don’t think that even the court could save us from ourselves.”



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# Who will Save the Redheads?

- **Prof. Daniel Friedman, former Minister of Justice:** “In contrast with the zero chance that the Knesset [Israeli Parliament] would cancel democracy, if we allow the court to review constitutional norms we would find ourselves open to much greater risks. Whoever thinks that the court would only deal with a Basic Law (no one imagines to enact) to cancel democracy, would realize that the court is dealing with all basic laws and re-writing them.”





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# Who will Save the Redheads?

- **Dr. Gadi Taub (a public intellectual):** “If, God forbid, the majority’s values will cease to be democratic – like the horror scenarios that are thrown to the air in the current discussions, describing how the majority would decide to take away the right to vote of Arabs or redheads – then no court would be able to stop Democracy’s destruction.”



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# Who will Save the Redheads?

- **The False Dichotomy of Democratic Failure: Either we have a perfectly functioning democracy or a complete failure, Weimar style.**



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# Who will Save the Redheads?

- In fact, between these two extremes there is a vast spectrum in which courts can function as a useful stop-sign or a speed-bump against constitutional reforms aiming to undermine or erode the constitutional order.
- E.g.: India, Taiwan, Colombia, Uganda...

False Dichotomy

# Judicial Review & the Sword of Damocles

- Even without actual judicial review of amendments, and even without a clear acknowledgment of such an authority, the mere *possibility* or *threat* of invalidation of a constitutional amendment, carries a *preventative effect* in making sure that proposed constitutional changes align with the constitution's core principles during the legislation process (Georg Vanberg's anticipatory effect of judicial review).
- E.g.: Basic Law: Israel as The Nation State of the Jewish People.



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# Who can stop the D9? Or, the ‘Bully Theory’ of Judicial Review

- **MK Moti Yogev (Jewish Home Party) of the coalition reacting to a High Court decision he did not like:  
“A D9 [bulldozer] shovel should be used against the High Court... We, as the legislatures, will make sure to restrain the judicial rule in this country - the tail that wags the dog.” (29.07.15)**



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# Who can stop the D9? Or, the ‘Bully Theory’ of Judicial Review

- Should (and if so, to what extent) the court consider the political ramifications of its decisions – the ‘political backlash’ – when adjudicating constitutional amendments?
- Better to ‘go down to the shelter’ to survive or to confront the political branches?

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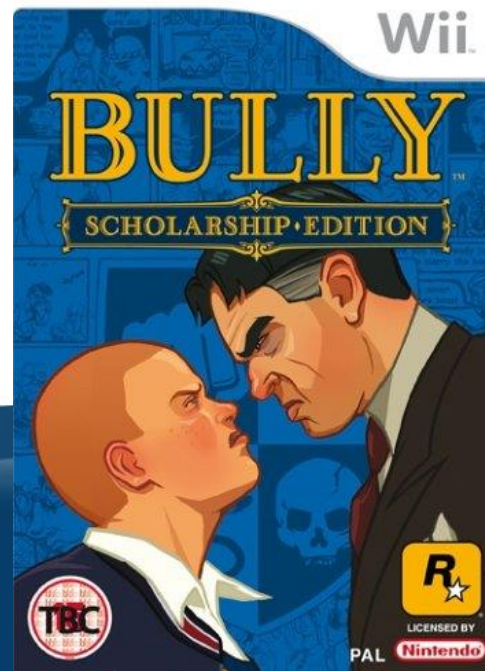
# Who can stop the D9?

- **Mattias Kumm:** “when under pressure from increasingly aggressive executive and legislative branches, the judicial branch’s best option is to stick to its guns and simply do its job as it usually would ... for maintaining democracy, it is important that judges press onward with exercising their authority, even if keeping their heads down to weather the storm might seem like a more attractive option ... courts were not successful” when they tried to “become strategic actors and tried to retrench, back down... and go into a [metaphorical] bunker... to weather the storm.”

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# Who can stop the D9? Or, the ‘Bully Theory’ of Judicial Review

- The ‘Bully Theory’ of Judicial Review
- Law v. Power (Arendt) (Hungary v. India).
- The Court “has no sword”, all it has is its *legitimacy*.





# Conclusion

- This are hypothetical scenarios that would never occur and even if such scenarios occur – the court cannot assist.
- No precisely! Examples from other jurisdictions show that courts can be a useful stop-sign or at least a speed-bump vis-à-vis attempts to undermine the constitutional order.
- The legal debate brings with it a public debate and it is a hindering machinery that allows the people, the politicians and the civil society to reconsider constitutional changes and if needed – to object to them.
- True, the power of the court – like any legal instrument – is limited. This does not mean it should be emptied of power.