

DEMOCRATIC EROSION, POPULIST CONSTITUTIONALISM AND THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS DOCTRINE

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I. Introduction

In recent years, the world is experiencing the crisis of constitutional democracies. Populist leaders are abusing constitutional mechanisms, such as formal procedures of constitutional change, in order to erode the democratic order. The changes, are very often, gradual, incremental and subtle. Each constitutional change, on its own, may not necessarily amount to a serious violation of essential democratic values. However, when examined in the context of an ongoing process, such constitutional changes may prove to be part of the incremental, gradual process of democratic erosion in which *the whole is greater than the sum of its parts*.

The question we explore in this article is how, if at all, can courts respond to such constitutional changes. In section II we review the phenomenon of populist abuse of constitutional mechanism bringing about a democratic erosion. In section III we examine how the doctrine of ‘un-constitutional constitutional amendments (UCA) may be useful in the context of democratic erosion and what are its limits. In section IV we contrast conflicting notions of popular sovereignty which populist leaders and the doctrine of UCA claim to express. In section V we propose a new theory of judicial review of constitutional amendments within the context of democratic erosion and abusive constitutionalism.

II. DEMOCRATIC EROSION, POPULISM AND ABUSIVE CONSTITUTIONALISM

Political theorists are debating, in recent years, how to characterize and explain the rise and growing success of anti-liberal political parties

across the world. These parties are often referred to as “populist”.¹ While the term has been criticized for both overuse and misuse,² it is nonetheless helpful in capturing and analyzing the shared characteristics of such parties and regimes, and in understanding the means and methods by which they operate.

Jan Werner Müller defines populism as “a particular moralistic imagination of politics...people against elites who are deemed corrupt or in some way morally inferior”.³ A key feature of populism is that populists pertain to speak in the name of “the people”,⁴ envisioned as an organic, single entity. The will and interests of “the people”, not as an aggregation of those of individuals but rather as those of a unitary entity, are both of ultimate moral importance, and, allegedly, the only legitimate basis for political action and law-making. Populist leaders claim to authentically represent “the people’s will” and reject any other positions as negating such will. Accordingly, they often reject what they argue to be unnecessary intermediaries between the people and themselves and depict institutions that serve as intermediaries as illegitimate barriers controlled by elites, the role of which is to sustain and preserve the latter’s power.

As many scholars have noted, in contrast to authoritarian leaders of the past, who established their autocratic power by force, often through coups, the recent wave of populist, authoritarian or semi-authoritarian leaders employ an array of means to erode democracy in a legal, gradual and incremental process. Elected in democratic elections, often following divisive campaigns that portray them as the only genuine representatives of the people and all others as enemies, populist leaders, once in power, begin to dismantle the institutional checks on their power in all areas.⁵

Tom Ginsburg and Aziz Z. Huq explain that democratic erosion is a slow version of democratic decay.⁶ They define it as a “process of

¹There is extensive scholarly writing on populism in recent years. A very non-exhaustive list includes JAN WERNER MÜLLER, *WHAT IS POPULISM* (2016), Nadia Urbinati, *Democracy and Populism*, 5(1) *CONSTELLATIONS* 110 (1998), Paul Blocker, *Populism as a Constitutional Project*, *INT’L J. CONS.T L.* (forthcoming).

²See, for example, Robert Howse, *Populism and Its Enemies*, available at: <https://www.dropbox.com/s/9xmrqay2ga1f5e9/Populismfinalrevised.pdf?dl=0>

³ MÜLLER, *supra* note 1, at 20.

⁴ MÜLLER, *supra* note 1. שגיאה! הסימניה אינה מוגדרת. ; Paul Blocker, *Populist Constitutionalism*, *INT’L J. CONS.T L. BLOG* (May 4, 2017), <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>

⁵ For discussion of this process see, for example, Andrea Kendall-Taylor and Erica Frantz, *How Democracies Die: Why Populism is a Pathway to Autocracy*, 5 *FOREIGN AFFAIRS* (2016), Nancy Bermeo, *On Democratic Backsliding*, 27(1) *J. DEMOCRACY* 5 (2016).

⁶ TOM GINSBURG AND AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 45 (2018).

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”.⁷ They explain that “typically, it does not result in full-blown authoritarianism. Instead, its outcome is some form of competitive authoritarianism, in which elections of a sort still occur, where liberal rights to speech and association are not wholly stifled, and where there is some semblance of the rule of law”.⁸ Hungary,⁹ Turkey,¹⁰ Poland¹¹ and Venezuela¹² are examples of countries in which such processes took place.

The typical process is not only gradual and incremental, but also includes measures that may appear to be contradictory but are, in fact, supplementary. Thus, for example, populist leaders often limit the power of the judiciary, but, at the same time, engage in court-packing and appoint loyalists as judges. A similar approach -- placing limits on the one hand, while, at the same time, seeking control -- is applied to the media.¹³ These acts derive from the gradual way in which populists establish their power. Limiting the power of democratic institutions is needed in order to neutralize them until populists are able to control them. Once the transition has been complete, and populists have taken over, these institutions can then be used to strengthen, legitimize, and reinforce the populists’ rule.

Of the various measures employed by current populist regimes to erode democracy, constitutional change is notable. Paul Blokker argues that, while authoritarian leaders were, in the past, assumed to be hostile towards constitutionalism, which was perceived as limiting their power, the relationship of current populist regimes with constitutionalism is more complex. “Populists in power”, he explains, “engage in intense reform (and abuse) of the existing constitutional arrangements, in contrast

⁷ Id.

⁸ Id.

⁹ See for elaboration, among others, Jacques Rupnik, *Hungary’s Illiberal Turn: How Things Went Wrong*, 23(3) J. DEMOCRACY 132 (2012), Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, 23(3) J. DEMOCRACY 138 (2012).

¹⁰ See Ozan O. Varol, *Stealth Authoritarianism in Turkey*, in MARK A. GRABER, SANFORD LEVINSON, AND MARK TUSHNET (EDS.), CONSTITUTIONAL DEMOCRACY IN CRISIS? Chapter 20 (2018).

¹¹ See e.g. Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (January 17, 2018) SYDNEY LAW SCHOOL RESEARCH PAPER NO. 18/01, available at: <https://ssrn.com/abstract=3103491>

¹² See e.g. David E. Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, in GRABER, SANFORD AND TUSHNET, *supra* note 10, at chapter 10.

¹³ MÜLLER, *supra* note 3, at 53.

to the idea that populism consists of a merely oppositional, anti-political phenomenon”.¹⁴

The phenomenon of populist regimes using constitutional law to advance their goals has been described as “constitutional capture”,¹⁵ “constitutional retrogression”,¹⁶ “abusive constitutionalism”,¹⁷ “autocratic legalism”¹⁸ or “populist constitutionalism”.¹⁹ The exact content of each of these terms varies, but they are all based on the observation that one of the characteristics of the “new populism” is the manner in which populists, once in power, employ mechanisms of constitutional change to erode the democratic order.²⁰

While all anti-democratic measures taken by populist regimes contribute to democratic erosion, and should, thus, be alarming, abusive constitutionalism poses a special threat to democracy and human rights. First, in constitutional democracies, constitutional law establishes the central restraint on the government’s power and the ultimate safeguards against violations of human rights by both the government and the legislator. Abusive constitutionalism erodes these protections by targeting both the institutions that restraint power, such as courts,²¹ and the state’s democratic values, in particular, freedom of expression. Second, abusive constitutionalism not only erodes existing protections, but positively entrenches anti-democratic structures as constitutional norms. Once anti-democratic values have been granted constitutional status, attempts to counter them through actions and rules of a lower normative hierarchy may actually be blocked. This may, in turn, have grave effects on civil society, and hinder the conditions necessary in order to facilitate a move towards a regime-change. Abusive constitutionalism can thus be used by semi-autocratic leaders to entrench their authority constitutionally by

¹⁴ Blokker, *supra* note 4.

¹⁵ Blokker, *supra* note 4., PAUL BLOKKER, NEW DEMOCRACIES IN CRISIS? A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA (2013). Jan Werner Müller, *Rising to the Challenge of Constitutional Capture*, EUROZINE (March 21, 2017), <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>

¹⁶ Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

¹⁷ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

¹⁸ Kim Lane Scheppele, *Autocratic Legalism*, 85 UNI. CHI. L. REV. 545 (2018).

¹⁹ Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK ON GLOBAL POPULISM (forthcoming); Gabor Halmai, *Is There Such Thing as ‘Populist Constitutionalism’? The Case of Hungary*, FUDAN J. HUM. SOC. SCI. (forthcoming 2018).

²⁰ Landau, *supra* note 17, at 189.

²¹ For the claim that constitutional change takes place when institutions are weak or weakened see David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 87(2) UC IRVINE J. INT’L TRANS’L COMP. L. (2017).

removing issues that may challenge it outside of the realm of regular politics.

Especially with relatively flexible amendment process, controlled by a dominant party or the government, abusive constitutionalism becomes attractive. For example, what allowed the weakening checks and balances and the protection of rights in Hungary, effectively turning it into an illiberal state,²² that fails “to comply with minimum standards of constitutionalism,”²³ was the Fidesz party’s possession of a two-thirds majority in parliament, which it abused to unilaterally amend and replace the constitution in pursuit of partisan goals.²⁴

Abusive constitutionalism is not always part of populist democratic erosion.²⁵ However, when it is used, it can be an extremely effective tool for expediting the erosion process. In their book *How to Save a Constitutional Democracy*, Ginsburg and Huq note that a central mechanism at the service of those leading the process is formal constitutional amendments: “the first and perhaps most obviously available pathway to democratic erosion uses formal constitutional amendment as a tool to disadvantage or marginalize political opposition and deliberative pluralism.”²⁶

For example, returning to Hungary, the passing of the new Hungarian constitution, on April 25, 2011, which replaced the Communist-era constitution (which was amended in 1989 into a liberal-democratic one), facilitated Fidesz in strengthening and establishing its control in Hungary. The new constitution served as the basis for an array of measures that allowed Fidesz to pack the Constitutional Court, control the judiciary in various other ways, and curb criticism.²⁷ In Ecuador and Bolivia,

²² Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, EUR. YEARBOOK HUM. RTS. 497, 512 (2014).

²³ Renáta Uitz, *Can You Tell When an Illiberal Democracy is in the Making?*, 13 INT’L J. CONST. L. 279, 280-81 (2015).

²⁴ See GARY JEFFREY JACOBSON & YANIV ROZNAI, CONSTITUTIONAL REVOLUTION Chapter 3 (forthcoming 2019); Yaniv Roznai, *Constitutional Transformations: The Case of Hungary*, in DAVID LAW (ED.), CONSTITUTIONALISM IN CONTEXT (forthcoming 2019).

²⁵ Ginsburg and Huq note that in Poland, for example, the difficulty of constitutional amendment rendered it an unavailable tool to populists. GINSBURG & HUQ, *supra* note 6, at 93.

²⁶ *Id.*, at 91.

²⁷ See e.g. Kriszta Kovács and Gábor Attila Tóth, *Hungary’s Constitutional Transformation*, 7 EUR. CONST. L. REV. 183 (2011); Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in von BOGDANDY AND SONNEVEND (EDS.), CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA – THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111 (Hart Publishing, 2015); Sonja Priebe, *Hungary*, in ANNA FRUHSTORFER AND MICHAEL HEIN (EDS.), CONSTITUTIONAL POLITICS IN CENTRAL AND EASTERN EUROPE 101 (2016);

constitutional amendments were the initial maneuver for a course of democratic erosion, and in Venezuela, the establishment of a constitutional assembly, which, later on, facilitated the passing of a new constitution was among the first measures Chavez initiated to solidify his control.²⁸ In Turkey, the 2017 constitutional changes initiated by Erdogan are considered as granting him unprecedented power.²⁹

The examples above illustrate the power of abusive constitutionalism in facilitating sweeping measures that negatively affect democracy. However, as formal constitutional amendments are used – or abused – as a tool by the populist leader, the doctrine of ‘unconstitutional constitutional amendments’, which sets various limits to formal constitutional change, may *prima facie* function as a useful tool to block or hinder such attempts of abusive constitutionalism. Is it?

III. THE UCA DOCTRINE’S UTILITY AGAINST DEMOCRATIC EROSION AND ITS LIMITS

A. The UCA Doctrine and its Protection against Abusive Constitutionalism

One feature of modern constitutionalism that is especially relevant for constitutional change is that of constitutional unamendability. Constitutional Unamendability refers to the limitations or restrictions imposed upon constitutional amendment powers from amending certain constitutional rules, values or institutions.³⁰ Unamendability may appear in the form of an explicit unamendable constitutional provision that, as Richard Albert describes, is “impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities”.³¹ Unamendability may also be judicially-imposed, when the court derives

²⁸ GINSBURG & HUQ, *supra* note 6, at 93-5. For elaboration on Venezuela see Allan R. Brewer-Carías, *Transition from Democracy to Tranny Through the Fraudulent Use of Democratic Institutions: The Case of Venezuela*, <https://allanbrewercarias.com/wp-content/uploads/2018/09/1218.-Brewer.-conf.-Transitiion-Democracy-to-Tyranny.-B.C.-2018.pdf>

²⁹ See e.g. Erdoğan clinches victory in Turkish constitutional referendum, THE GUARDIAN (April 16, 2017), <https://www.theguardian.com/world/2017/apr/16/erdogan-claims-victory-in-turkish-constitutional-referendum>

³⁰ See Oran Doyle, *Constraints on Constitutional Amendment Powers*, in RICHARD ALBERT, XENOPHON CONTIADES, AND ALKMINI FOTIADOU (EDS.), *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT* (2017).

³¹ Richard Albert, *Constitutional Handcuffs*, 42 ARIZ ST. L.J. 663, 666 (2010).

such limitations implicitly from the constitution, declaring that certain constitutional changes are strictly prohibited.³² Unamendability, explicit or implicit, usually aims to protect to core values of the constitution that express in a way its constitutional identity.³³ In both cases, courts may enforce these limits by a substantive judicial review of constitutional amendments that confirms the amendment's compatibility with those constitutional values or provisions regarded as unamendable. If a constitutional amendment is regarded as incompatible with values or provisions protected by constitutional unamendability, the court may declare the constitutional amendment as unconstitutional and void.³⁴ This is, in a nutshell, the UCA doctrine.

In various places, the UCA has proven to be a useful 'stop sign' or 'a speed bump' against constitutional amendments by political leaders aiming to erode the democratic order.³⁵ In India, the UCA doctrine was famously used during Indira Gandhi's declared state of 'emergency', and was applied to strike down constitutional amendments seeking to shield from judicial supervision various matters such as expropriation claim, nationalizations, electoral disputes and constitutional amendments themselves. The application of the UCA doctrine (or in its Indian term 'basic structure doctrine') was useful in a struggle against governmental attempts to weaken checks and balances institutions (such as the Supreme Court) and to restrict electoral opposition (as in the case of electoral

³² See e.g. Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in MALIK LOKENDRA (ED.), *JUDICIAL ACTIVISM IN INDIA— A Festschrift in Honour of Justice V. R. Krishna Iyer* 240 (2012).

³³ Yaniv Roznai, *Unamendability and The Genetic Code of The Constitution*, 27(2) *EUR. REV. PUB. L.* 775 (2015).

³⁴ See e.g. Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61(3) *AM. J. COM. L.* 657 (2013); Gábor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective*, 50(4) *WAKE FOREST L. REV.* 951 (2015).

³⁵ See Rosalind Dixon and David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13(3) *INT'L J. CONST. L.* 606 (2015); Yaniv Roznai, *The Uses and Misuses of Constitutional Unamendability*, in XENOPHON CONTIADES AND ALKMENE FOTIADOU (EDS.), *THE ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE* (forthcoming 2019).

fraud).³⁶ The Indian experience proved that the UCA doctrine may prevent unauthorized abuse of power and preserve democracy.³⁷

Other examples also demonstrate the utility of the UCA doctrine against abusive constitutionalism. In Taiwan, in 1999, the Third National Assembly adopted the Fifth Amendment to the Constitution according to which the Fourth National Assembly shall be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election. It also extended the National Assembly term to two additional years. After the constitutionality of the amendment was challenged before the Council of Grand Justices (‘the Council’), in 2000, the Council announced Interpretation No. 499 in which it declared the amendment unconstitutional on the grounds that it violated “some of the most critical and fundamental tenets of the Constitution as a whole”, as people’s sovereignty and check and balance of governmental powers.³⁸ Through this judicial exercises of the UCA doctrine, the Taiwanese court took a vital role in preserving the democratic constitutional order against erosion.

More recently, in July 2018, the Ugandan Constitutional Court has delivered a landmark, 814-page long, judgment embracing and incorporating the Indian ‘basic structure doctrine’ and holding that parliament has limited amendment powers. Although the majority of the court upheld provisions of a constitutional amendment that removed presidential age limits, all judges held that the amendment’s provision extending the term of office for Members of Parliament from five to seven years is unconstitutional and void.³⁹ Again, it was the Court that managed to stop,

³⁶ See *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461; *Indira Nehru Gandhi v. Shri Raj Narain*, (1975) 2 S.C.C. 159; *Minerva Mills v. Union of India*, (1980) 4 S.C.C. 222. On the Indian doctrine, see generally SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2010).

³⁷ Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J. L. & SOC. PROBS. 251, 273 (1995-6).

³⁸ J.Y. Interpretation No. 499 (24 March 2000). See a recent translation of the case by Ming-Sung Kuo and Hui-Wen Chen in, *LEADING CASES OF THE TAIWAN CONSTITUTIONAL COURT* 15-41 (Judicial Yuan, 2018).

³⁹ Constitutional Petition No. 49/2017 (delivered on 26.07.2018), https://judiciary.go.ug/.../AgeLimitJudgment_Mbale20180726.pdf; Justice Kakuru, who declared the entire amendment to be unconstitutional, wrote that the idea that parliament has absolute amendment powers “is a fiction based on a legal misconception.” If this was the case, the MPs “can abolish Republic of Uganda or make themselves MPs for life. Parliament can abolish the Republic of Uganda and introduce a monarchy ... the argument that you can vote to amend any article of the Constitution by simple majority is misguided.”

even partially, constitutional changes that were to damage the democratic order.

Indeed, when courts declare a constitutional amendment that would significantly harm the democratic constitutional order as unconstitutional, such declaration can slow-down authoritarian initiatives up until other political actors gain power,⁴⁰ or even completely stop such initiatives. Consider, the term-limits saga in Colombia.

In 2002, Alvaro Uribe was elected as President, and turned to be a very popular one. As the constitution limited presidential term, Uribe sought to amend the constitution in a way that would allow him to run for a second term. In 2005, the Constitutional Court examined the constitutionality of the amendment, deciding that it is a valid constitutional change.⁴¹ After another successful term, Uribe sought for another amendment that would allow him to seek a third consecutive term in office. This time, the Constitutional Court held that a third consecutive presidential term would concentrate executive power, cause severe damage to institutional checks on the president, and force the political opposition to compete on a greatly tilted playing field. Rather than a constitutional amendment, this would be an unconstitutional “constitutional replacement” of the constitutional order.⁴² After this dramatic ruling, President Uribe left power in a peaceful manner and, again, through the use of the UCA doctrine, the judiciary played an important role again democratic erosion.⁴³

A final example is from Israel. In recent years, Israel is beginning to experience a process of constitutional retrogression one. It is in advanced stages, as in Hungary, for example, yet, there are various multiple political attempts to weaken checks institutions, to limits court’s competences, to silence criticism against the government and to consolidate political power within the executive at the expense of the legislature.⁴⁴ One

⁴⁰ Dixon & Landau, *supra* note 35.

⁴¹ Corte Constitucional [C.C.], October 19, 2005, Sentencia C-1040/05, §§ 7.10.4.1–7.10.4.2, Gaceta de la Corte Constitucional [G.C.C.].

⁴² Corte Constitucional [C.C.], February 26, 2010, Sentencia C-141/10, pt. VI, Gaceta de la Corte Constitucional [G.C.C.]. On the constitutional replacement doctrine in Colombia, see more generally Carlos Bernal-Pulido, *Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine*, 11(2) INT’L J. CONST. L. 339 (2013).

⁴³ Rosalind Dixon and David Landau, *Democracy and the Constitutional Minimum Core*, in TOM GINSBURG AND AZIZ HUG (EDS), *ASSESSING CONSTITUTIONAL PERFORMANCE* 268–76 (2016).

⁴⁴ On these processes see e.g. Gila Stopler, *Constitutional Capture in Israel*, INT’L J. CONST. L. BLOG (21 August 2017), <http://www.icconnectblog.com/2017/08/constitutional-capture-israel/>; Nadiv Mordechay and Yaniv Roznai, *Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77(1) MARYLAND L. REV. 244 (2017); Yaniv Roznai,

attempt for such consolidation of power within the executive, successfully blocked by the court, surrounded the biennial budget. The established constitutional rule in Israel was that one a year the government submits the budget for the approval of the Knesset (Israeli Parliament), and if the budget is not approved – the Knesset is dissolved. Accordingly, the budget approval is a significant supervision mechanism of the executive by the legislature. However, in 2009 the government established a biennial budget, as a temporary measure to handle the global economic crisis. This temporary measure was since prolonged four additional times (until 2018). Taken together with the constructive vote of no confidence, which exists from 2014, the biennial biannual budget further limited the oversight capacity of the legislature. In 2017, the Israeli High Court of Justice (HCJ) said, ‘no more’ and issued a nullification notice to a temporary Basic Law that established a biennial budget rule instead of the annual one, for the fifth time in a row. According to the HCJ this was a “misuse of constituent power”.⁴⁵ The HCJ did not invalidate the Basic Law but issued a “nullification notice” according to which a future temporary amendment of the basic law establishing a biennial budget will be struck down. Through this judgment, the court issued a ‘warning sign’ not to abuse the parliament’s constituent powers.

All these examples show the utility of the UCA doctrine against attempts to change the constitutional in a way that would damage the democratic order. True, UCA doctrine is not a perfect mechanism. As one of us wrote, “no constitutional schemes, even those that expressly attempt to, can hinder the sway of real forces in public life for long, or can absolutely block extra- constitutional activity..”; however, “in normal times, unamendability can be a useful red light before certain ‘unconstitutional’ constitutional changes, and it can stand firm in the normal development of political momentum.”⁴⁶ Nonetheless, as we shall argue, in an era of populist constitutionalism, the doctrine has several inherent weaknesses.

B. Incrementalism and the Limits of the UCA Doctrine

Israel – A Crisis of Liberal Democracy?, in MARK A. GRABER, SANFORD LEVINSON AND MARK TUSHNET (EDS.), *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 355 (2018).

⁴⁵ HCJ 8260/16 Academic Center of Law and Business v. Knesset (September 6, 2017). On this case see Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, 51(3) *VRÜ* (forthcoming 2018).

⁴⁶ YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS – THE LIMITS OF AMENDMENT POWER* 134-5 (2017).

As we noted in section II, nowadays, democratic breakdowns occur not by an immediate break—a sudden suspension or destruction of the constitution following a coup d'état, but by elected governments using, abusing, and subverting the democratic institutions themselves. Analyzing how charismatic leaders utilize electoral mandates to consolidate power and eliminate effective opposition, Kim Lane Scheppele emphasized the use of subtle legal means that ultimately dismantle the constitutional system. “To the casual visitor who doesn’t pay close attention,” she notes, “a country in the grip of an autocratic legalist looks perfectly normal. There are, after all, no tanks in the streets.”⁴⁷ Indeed, Ginsburg and Huq demonstrate how one of prime elements of democratic erosion is its incrementalism: “democratic erosion is typically aggregative process made up of many smaller increments. But those measures are rarely frontal assaults on one of the three institutional predicates of liberal constitutional democracy, of the kind that might be associated with an overly totalitarian or fascist regime.”⁴⁸ This is why it is very difficult to spot democratic erosion through abusive constitutionalism.⁴⁹

As there is no direct assault on the on the constitution’s fundamental principles, the utility of the UCA doctrine is fairly limited. The doctrine, as we noted earlier, aims to preserve the core identity of the constitutional order and its foundational values.⁵⁰ It allows small-scale infringements even of protected constitutional rights and principles as long as the constitutional amendment does not *fundamentally abandon* the protected values. In other words, “only an extraordinary infringement of unamendable principles, or a constitutional change that ‘fundamentally abandons’ them, would allow judicial annulment of constitutional amendments.”⁵¹ Accordingly, the UCA doctrine will be of no use concerning minor

⁴⁷ Scheppele, *supra* note 18, at 575.

⁴⁸ GINSBURG & HUQ, *supra* note 6, at 90-91.

⁴⁹ Landau, *supra* note 17, at 193.

⁵⁰ See the *Klass* decision by the German Constitutional Court: The purpose of [the unamendable provision] ... is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment ... and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not ‘affected’ as ‘principles’ if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character ... Restriction on the legislator’s amending the Constitution ... must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner”; 30 BVerfGE 1, 24 (1970), English translation from WALTER F. MURPHY AND JOSEPH TANENHAUS (EDS), *COMPARATIVE CONSTITUTIONAL LAW—CASES AND COMMENTARIES* 659, 661–2 (1977).

⁵¹ ROZNAI, *supra* note 46, at 223.

constitutional changes that deviate from or contradict unamendable principles, and which preserve the State's constitutional identity. The UCA doctrine's primary function is to preserve the constitutional order and protect it against revolutionary changes. Unamendable principles or features, in the words of the Pakistani Supreme Court, are not "forbidden fruits" that Parliament cannot amend them. What is prohibited is to "substantively alter i.e. to significantly affect" their "essential nature."⁵²

The doctrine of UCA allows for an incremental, gradual crumbling of the constitutional order brought about bit by bit by constitutional amendments. Accordingly, it is almost useless against democratic erosion that is virtually unnoticeable in the eyes of the doctrine. As Steven Levitsky and Daniel Ziblatt write, the assassins of democracy use legally, subtle and gradual means to kill it.⁵³ And the UCA doctrine helplessly stands aside, witnessing this assassination

C. Constitutional Replacement and the UCA Doctrine

The UCA is the result of the limits of constitutional amendment powers, or more accurately, it is the result of the judicial enforcement of these limits. But what if the constitutional change is brought about not through the exercise of the limited amendment authorities but that of the primary (or 'original') constituent power? In other words, what if abusive constitutionalism is taking place not in the sphere of constitutional amendments but that of a completely new constitution?

The UCA doctrine rests on the distinction between primary and secondary constituent power. It protects the people's constituent power, expressed in the constitutional fundamental decisions, vis-à-vis the more limited amendment power of the constituted organs. While the doctrine limits the latter it does not – and conceptually cannot – limit the exercise of the primary constituent power making a new constitution, that is regarded as having extra-constitutional characteristics.⁵⁴

⁵² District Bar Association, Rawalpindi and Others v. Federation of Pakistan and Others (5 August 2015), 267.

⁵³ STEVEN LEVITSKY AND DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

⁵⁴ See Yaniv Roznai, *Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers*, 18 *JUS POLITICUM – REVUE DE DROIT POLITIQUE* 5 (2017).

This is not to say that constituent power is omnipotent and that ‘everything goes’;⁵⁵ it is only to say that leaders may circumvent the doctrine by completely replacing the constitution with a new one. So, for example, in theory at least, the Hungarian Constitutional Court would have been able to review and even invalidate constitutional amendments to the 1989 Constitution,⁵⁶ it could not review and invalidate the new 2011 Fundamental Law. The Constitutional Court did review the transitional provisions of that Fundamental Law and invalidated parts thereof (and rightly so!),⁵⁷ yet it is hard to imagine the court invalidating part of the original constitution and easier to imagine the political consequences that would have followed such a judicial intervention.

The problem is, as David Landau puts it, “that constitutional replacement is also part of the toolkit of abusive constitutional regimes — by controlling the processes that trigger replacement or the process of constitution-making itself, powerful figures and movements can reshape the constitutional order efficiently in a way that suits their interests. The examples drawn from Venezuela, Ecuador, and Hungary show that constitutional amendment and constitutional replacement are viewed by would-be authoritarian actors as complementary mechanisms.”⁵⁸ But constitutional replacement remains largely unregulated in practice and regarded in theory as unlimited, which makes it easy to abuse by political leaders acting in the name of the people. In other words, constitutional replacement remains “part of the toolkit of would-be autocrats”, that allow them to overcome the UCA doctrine.⁵⁹ Limits to constitutional amendments may be useful against abusive formal constitutional amendments but not to complete wholesale replacement of the old constitution with a new one, pretending to represent the constituent power of the people which is inherently unlimited by existing constitutional forms and procedures.

⁵⁵ It is our belief that even constitution-making powers are not boundless. This point is for another project that is in the making.

⁵⁶ We are aware of the fact that the Hungarian Constitution was actually amendments to the 1949 constitution, but for the sake of convenience we call it the ‘1989 constitution’.

⁵⁷ Hungarian Constitutional Court, Decision 45/2012 (XII. 29) on the unconstitutionality and annulment of certain provisions of the Transitional Provisions of the Fundamental Law of Hungary, available at http://hunconcourt.hu/letoltesek/en_0045_2012.pdf

⁵⁸ Landau, *supra* note 17, at 243.

⁵⁹ David Landau, *Should the Unconstitutional Constitutional Amendments Doctrine be Part of the Canon?*, INT’L J. CONST. L. BLOG (10 June 2013), <http://www.iconnectblog.com/2013/06/should-the-unconstitutional-constitutional-amendments-doctrine-be-part-of-the-canon/>

D. Attacking and Packing the Court

The UCA doctrine shift the locus of constitutional change from the political authorities to the judiciary. This is part of its strengths. But it is also part of its weaknesses. In an era of populism and democratic erosion, when politicians realize that the ultimate decision regarding constitutional change rests with the judges then, “courts are packed or threatened in ways that make the doctrine impossible to deploy.”⁶⁰ In Venezuela, the constitution-making process allowed Chávez to remove and pack opposition-held institutions, and in Turkey a set of constitutional amendments were used by the ruling party to expand the size of the Supreme Council of Judges and its constitutional court, enabling their packing.⁶¹ In Hungary, constitutional amendments expanded the size of the court, ousted the President of the Supreme Court, disempowered the existing judicial council and created the new institution with power over ordinary judicial appointments,⁶² whereas in Poland, the Constitutional Tribunal was packed with handpicked judges and was reorganized through legislative means.⁶³ Accordingly, even if in theory, the UCA may be a useful tool against abusive constitutionalism, the ability to pack the court and control it severely undermines the utility of the doctrine.

As Ginsburg and Huq correctly claim: “judges in a remarkably wide range of contexts...have stepped up to block majorities from enacting rules that violate core principles of the constitutional order. But judges provide no fail-safe. The central role played by the courts can perversely raise the stakes in political battles over who controls the courts. This is not a contest that advocates of democracy can be insulated from immediate political interference, constitutional provisions on judicial appointments, removal, and salaries, are rarely immunized from constitutional amendments. Hence, it is typically fairly easy for a would-be autocrat to first gain control of the judicial apparatuses before turning to amending other features of the constitution.”⁶⁴

It is not only that the UCA doctrine in an era of populism is useless – it is worst; as a powerful tool that can override constitutional provisions, with a packed court this powerful judicial mechanism is now at the

⁶⁰ Landau, *supra* note 17, at 194.

⁶¹ David Landau, *Populist Constitutions*, 85 *UNI. CHI. L. REV.* 521, 535 (2018)

⁶² David Kosar and Katarina Sipulova, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 *HAGUE J RULE LAW* 83, 86-89 (2018).

⁶³ Bojan Bugarič and Tom Ginsburg, *The Assault on Postcommunist Courts*, 27(3) *J DEMOCRACY* 69, 73-5 (2016).

⁶⁴ GINSBURG & HUQ, *supra* note 6, at 174.

hands of the political leaders, providing them another powerful tool to perpetuate their stay in power. Consider for example, recent events in Latin America where courts have used to UCA doctrine not to limit presidential terms or hinder attempts to prolong them – as in Colombia, but in fact removed presidential term limits at the service of the leaders.⁶⁵ Thus, in Nicaragua, the Constitutional Chamber of the Supreme Court declared in 2009 that the presidential term limit, which was added to the 1987 constitution as an amendment in 1995, violates core principles of the original constitution and was accordingly void,⁶⁶ thereby allowing Daniel Ortega, sought potential reelection. Or, the 2017 Bolivian Constitutional Court decision holding the terms limits in its 2009 Constitution to be unconstitutional.⁶⁷ Likewise, a packed Constitutional Chamber of the Supreme Court in Honduras, ruled in 2015 that the constitutional single presidential term limit, the eternity clause preventing it from being changed, and constitutional clauses prohibiting attempts to remove the term limits to be unconstitutional and inapplicable, thereby allowing President Juan Orlando Hernandez to be re-elected.⁶⁸

What is most striking in these cases, is that the leaders were able to achieve their goal through judicial decisions that they could not otherwise have attained. It was the UCA doctrine which provided them with the legal tools to override constitutional limitations on their power. Abusing the doctrine allowed them to overcome such legal restrictions. These examples demonstrate how a misuse of the doctrine or its abuse may not only fail to block constitutional changes that threaten liberal democratic constitutionalism but in fact may even promote such changes.⁶⁹

⁶⁵ See David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*, in ALEXANDER BATURO AND ROBERT ELGIE (EDS.), *POLITICS OF PRESIDENTIAL TERM LIMITS* (forthcoming 2019).

⁶⁶ Decision 504 of 2009, Oct. 19, 2009.

⁶⁷ Tribunal Constitucional Plurinacional, Sentencia Constitucional N. 84 of 2017, Nov. 28, 2017.

⁶⁸ See David Landau, Rosalind Dixon and Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, *GLOBAL CONSTITUTIONALISM* (forthcoming 2018).

⁶⁹ David Landau, 12(2) *Law Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine* L. & ETH. HUM. RTS. 225 (2018).

III. WHO'S PEOPLE WILL? POPULISM V. CONSTITUTIONAL UNAMENDABILITY

As indicated in section II above, one of the defining features of populism is that populists claim to be the sole authentic representatives of the “people’s will”. This claim can actually be broken down to two different questions: the first is who belongs to the people. The second is how the people’s will is to be identified, represented, and executed in terms of policy.

The populist response to the first question is somewhat circular: populists claim to represent the “people’s will”. “The people”, in turn, include those who do not challenge this representation. Populist rhetoric is based, to a large extent, on a Schmittian friend-enemy distinction.⁷⁰ Enemies may be internal: Nadia Urbinati describes populism as “collective resentment against the domestic enemies of the people”.⁷¹ U.S. President Donald Trump has repeatedly referred to both his political opponents and the media as “enemies”.⁷² In Israel, Prime Minister Benjamin Netanyahu urged his supporters to vote in the 2015, warning them that Arab voters were “flowing to the polls”.⁷³ Netanyahu’s coalition has since initiated a series of “loyalty” bills, which assert to distinguish between those who are loyal to the state and those who are not loyal to it, denouncing the latter as illegitimate.⁷⁴

However, populists’ enemies may also be external: in Europe, populist leaders turn their wrath against the European Union, calling for the protection of “national sovereignty” and “national interests” against “foreign intervention” representing “foreign interests”.⁷⁵ In other countries,

⁷⁰ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (Expanded edition, 1996).

⁷¹ Nadia Urbinati, *Democracy and Populism*, 5(1) *CONSTELLATIONS* 110 (1998).

⁷² Kevin Breuninger, *Trump Slams the Media as the “true Enemy of the People” days after CNN was targeted with mail bombs*, CNBC (October 29, 2018) <https://www.cnbc.com/2018/10/29/trump-slams-media-as-true-enemy-of-the-people-days-after-cnn-targeted.html>

⁷³ Mordechai and Roznai, *supra* note 44.

⁷⁴ Tamar Hostovsky Brandes, *Law, Citizenship and Social Solidarity: Israel’s “Loyalty-Citizenship” Laws as a Test Case*, *POLITICS, GROUPS AND IDENTITIES* (2018); Alon Harel and Noam Kolt, *Constitutionalism in the Shadow of Populist Rhetoric* (unpublished manuscript, copy with authors).

⁷⁵The public debate regarding Brexit is an obvious example. More recently, Hungary’s Viktor Orban’s Government spokesperson accused Brussels of infringing upon Hungary’s sovereignty, stating that “Brexit should be a lesson”. Hungary Ready to Fight European Commission, DW (October 4, 2017), <http://www.dw.com/en/hungary-ready-to-fight-european-commission/a-40805133>. Another example is the series of clashes between the EU and Poland since the Law and Justice party came into power in Poland over issues such as court reform threatening the rule and the migration crisis

populist leaders have targeted international institutions and international law as threatening the interests of “the people”.⁷⁶ These attacks serve to further strengthen the notion of “the people” as an organic, identifiable entity, with easily identifiable interests.

The delineation of the boundaries of “the people” is not always only a symbolic, political act aimed at delegitimizing opposition, but may also have feasible repercussions. In Hungary, the introduction of a lenient naturalization process for ethnic Hungarians, together with the granting of extra-territorial voting rights to those naturalized through such process, considerably changed the boundaries of the political community. Perhaps not surprisingly, these changes coincided with the interests of the Fidesz-KDNP party.⁷⁷ In Israel, changes to the qualifying threshold required for a party in order to enter the Knesset were introduced in 2014, in an attempt, which did not succeed, to limit the political representation of Arab-Palestinian parties.⁷⁸

Once the boundaries of “the people” have been established, both symbolically and in practice, the question of whether and how populists identify, represent and execute the will of the people arises. One of central characteristics of populists, Müller explains, is the claim that “they, and they alone, represent the people”.⁷⁹ Populists reject the traditional institutions of representative democracy as elitist means of preventing the people’s will from being revealed, rather than as institutions representing it. Instead, they offer a unitary, organic notion of “the people”, and argue

and Polish Prime Minister Szydło’s critique of “the elites in Brussels”. James Shotter, Polish PM hails Pushbacks Against Deeper European Integration, FINANCIAL TIMES (November 13, 2017), <https://www.ft.com/content/05942108-c55c-11e7-a1d2-6786f39ef675>

⁷⁶ Posner argues that “An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War”. Eric A. Posner, *Liberal Nationalism and the Populist Backlash*, CHICAGO UNBOUND <http://chicago-unbound.uchicago.edu/cgi/viewcontent.cgi?article=2071&context=public-law-and-legal-theory>. Crawford also identifies a “rhetoric of skepticism” towards international law. James Crawford, *The Current Political Discourse Concerning International Law*, 81(1) M.L.R. 22 (2017). See also Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of populism*, INT’L J. CONST. L. (forthcoming 2019).

⁷⁷ Balázs Majitényi, Aliz Nagy and Péter Kállai, “Only Fidesz” – *Minority Electoral Law in Hungary*, VERFASSUNGSBLOG (March 31, 2018), <https://verfassungsblog.de/only-fidesz-electoral-law-in-hungary/>

⁷⁸ On March 11, 2014, the qualifying threshold was increased from 2% of the votes to 3.25% of the votes. See the Knesset website: https://knesset.gov.il/lexicon/eng/ElectoralThreshold_eng.htm. However, the Arab-Palestinian parties decided to run together, circumventing the potential negative effect of the increase on representation of the Arab-Palestinian minority.

⁷⁹ MÜLLER, *supra* note 1.

to embody it. Since the populist leader is, allegedly, the authentic representative of “the people”, no process is necessary in order to identify the “people’s will”- the populist leader claims to simply know what it is.⁸⁰

There are a number of possible challenges to this claim. First, as indicated above, the current populist leaders were elected through democratic elections, and often enjoy wide popular support. In addition, while populist undermine democratic institutions, they often turn directly to the people in course of executing their agenda, commonly, through referenda. This appears to contradict the above-discussed claims. After all, referenda subject populists’ policies to the people’s vote, and the people – in the aggregated sense, not the “natural” one – allegedly have the power to reject such policies.⁸¹

Indeed, populist often claim that they, rather than the “old” establishment, are those who are truly committed to democracy.⁸² The depiction of domestic elected representatives as self-serving elites, detached from the needs and interests of the ordinary people, is a central characteristic of populist discourse.⁸³ The reason that this claim is effective, from a public opinion perspective, is that it builds on real weaknesses and failures of representative democracy,⁸⁴ most importantly, the ability of the people to rule,⁸⁵ and on the gap the inevitably exists between the “ordinary people” and the law.

The populist alleged commitment to democracy, however, can easily be dismantled. In addition to anti-institutionalism, the rejection of pluralism is an essential element of populism.⁸⁶ Populists reject pluralism because, under the friend/enemy distinction, there is no room for opinions competing with those presented. There is thus no need for a “marketplace of ideas”, or a process of deliberation in which different opinions and views are pitted against each other in order to reveal and form the

⁸⁰ Ginsburg and Huq discuss the example of Erdogan, who, after 2010, frequently asked his critics “we are the people, who are you?” *supra* note 6, at 79. Similar rhetoric is used by other populist leaders.

⁸¹ Yaniv Roznai, *The Newest-Oldest Separation of Powers*, 14(2) EUR. CONST. L. REV. 430 (2018).

⁸² See discussion in Bojan Bugarič, *The Right to Democracy in a Populist Era*, 112 AJIL UNBOUND 79 (2018); Blocker, *supra* note 1.

⁸³ Although not everyone who is critical of elites is, of course, a populist. See MÜLLER, *supra* note 1, 101.

⁸⁴ Müller refers to these as “the broken promises of democracy”. See MÜLLER, *supra* note 3, at 101.

⁸⁵ *Id.*, at 76.

⁸⁶ *Id.* Marc F. Plattner, *Populism, Pluralism and Liberal Democracy*, 21(1) J. DEMOCRACY 81 (2010)

“people’s will”.⁸⁷ With respect to referenda, for example, Müller explains that for populists, “a referendum isn’t meant to start an open-ended process of deliberation among actual citizens to generate a range of well-considered popular judgement; rather, the referendum serves to verify what the populist leader has already discerned to be the genuine popular interest as a matter of identity”.⁸⁸ Paul Blocker concludes that while populist constitutionalism “criticizes liberal or legal constitutionalism on similar grounds as (radical-)democratic approaches to constitutionalism”, it “failed to deliver on its own promise of democracy”.⁸⁹

The notion of the “people’s will” is central to the UCA doctrine, under which courts appear to override not only the regular political will, but the normatively-higher “people’s will” exercised through constituent power. However, the UCA doctrine is actually *based* on the primary constituent power of the people.⁹⁰ In exercising the review of amendments, one of us has argued, courts “are not acting in a completely counter-majoritarian manner, for they have the support of the high authority of the primary constituent power”.⁹¹ Under the UCA, when courts exercise judicial review over constitutional amendments, they have to decide “between the supra-temporal will of ‘the people’, as expressed in the basic principles of the constitution, and the temporary will of ‘the people’, as expressed in a constitutional amendment”.⁹²

The question whether the courts have the institutional capacity to decide between these two notions of “the people’s will”, and, in particular, what allows them to “determine the ‘spirit’, ‘basic structure’, or ‘basic principles’ of the constitutions”⁹³ arises in all situations in which the UCA

⁸⁷ The association of pluralism with liberal democracy is widely recognized in the literature. Marc F. Plattner explains that “although the authors of the Federalist do not use this word, pluralism would clearly seem to fit the concept of liberal-democratic politics they advocate”. Plattner, *supra* note 86, at 89. Under Madison’s model, he explains, pluralism is a safeguard against the tyranny of the majority. Pluralism is also a central feature of deliberative theories of democracy: Joshua Cohen lists pluralism as one of the five elements of deliberative democracy. See Joshua Cohen, *Deliberation and Democratic Legitimacy*, <http://philosophyfaculty.ucsd.edu/faculty/rarneson/JCOHENDELIBERATIVE%20DEM.pdf>. Robert A. Dahl famously argued that “organizational pluralism is ordinarily a concomitant, both cause and effect, of the liberalization and democratization of hegemonic regimes”. Robert A. Dahl, *Pluralism Revisited*, 10(2) COMPARATIVE POLITICS 191, 197 (1978).

⁸⁸ MÜLLER, *Supra* note 3, at 36.

⁸⁹ Blocker, *supra* note 1.

⁹⁰ ROZNAI, *supra* note 34. See also Po Jen Yap, *The Conundrum of Unconstitutional Constitutional Amendments*, 4(1) GLOBAL CONSTITUTIONALISM 114 (2015).

⁹¹ *Id.*, at 193.

⁹² *Id.*

⁹³ *Id.*

doctrine is applied. The answer to this question determines, to a large extent, the legitimacy of applying the doctrine.

This question is especially acute in a populist setting. The UCA doctrine is grounded, as indicated above, in the notion of primary constituent power. However, populists appear to draw on the same power: by weakening representative institutions and turning directly to “the people”, through methods of direct democracy such as referenda, by convening constitutional assemblies, and by adopting all-new constitutions, to replace old ones that, allegedly, did not reflect the people’s will. How, in this context, can judicial power to override constitutional changes be justified as reflecting the people’s will?

In answering this question, we need to distinguish between two types of legitimacy: normative-institutional legitimacy and social legitimacy. The first refers to the question whether an act is justifiable under our normative assumptions regarding the law and its institutions. If one accepts the UCA doctrine and the role of courts in reviewing constitutional amendments, and, in addition, accepts the claims presented above, that is, that what is portrayed by populists as “the people’s will” is actually a distorted version of such will, the claims made by populists have no real bearing on the legitimacy of the application of the UCA doctrine. In fact, the opposite may be correct – precisely *because* of the abusive manner in which populists use the notion of “the people’s will”, court intervention may be warranted to reveal its true nature.

From a social legitimacy perspective, however, the picture may be different. Social legitimacy refers to the question whether an act is perceived as legitimate.⁹⁴ The application of the UCA doctrine to constitutional changes made following a referendum or a decision of a constitutional assembly can easily be portrayed by populist leaders as illegitimate interference with the people’s constituent powers. These claims may appeal to the public and deepen the already-existing backlash against the courts that is characteristic of populist regimes. This, in turn, may serve as a pretext for further curtailment of the courts’ authority.⁹⁵ The ability of courts to resist to such backlash depends on an array of different

⁹⁴ This concept of legitimacy is similar to what Fallon refers to as “sociological legitimacy”, and it draws on the Weberian notion of legitimacy. See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

⁹⁵ Michaela Hailbronner and David Landau observe, in this regard, that “head-on collisions between courts and populist leaders are likely to end badly for courts”. Michaela Hailbronner & David Landau, *Introduction: Constitutional Courts and Populism*, INT’L J. CONST. L. BLOG (Apr. 22, 2017), at: <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/>

factors.⁹⁶ However, for space considerations, whether and to what extent courts should consider such strategic considerations is a question that is beyond the scope of this article.

IV. TOWARDS A NEW UNDERSTANDING OF JUDICIAL ROLE?

Once UCA is understood as a truly democratic mechanism aims to preserve the people's constituent power as manifested in the constitutional fundamentals, and hence a legitimate exercise vis-à-vis the populists' claim to be the sole representatives of the people, it remains to explain how then, should judicial activity concerning formal constitutional changes in populist era be exercise. In what follows, we open a discussion on three possible routes that aim to escape or at least partially overcome the challenges outlined in section III. Each of this, we believe, deserves its own full treatment. However, we think that all three deserve our attention here, in order to grasp the full picture.

A. An Aggregated Judicial Review of Constitutional Amendments

As noted earlier, one of the limits of the UCA doctrine is that it fails to address incremental minor changes to the constitutional order. However, this minor changes have an aggregated effect. As Sadurski writes, the “comprehensive assault upon liberal-democratic constitutionalism produces a cumulative effect, and the sum is greater than the totality of its parts.”⁹⁷ Indeed, even of each of the changes on its own does not transform the constitutional order, the incremental aggregation of events may lead to a wide-ranging risk to the liberal-constitutional order, to an erosion of its democratic institutions, and to a gradual democratic backslide.

It is this danger that the minority judges saw in the German *Klass* case, disagreeing with the majority that the unamendable provision prohibits only a fundamental abandonment of the protected values: “[the unamendable provision] ... limits constitutional amendments. Such an important, far-reaching, and exceptional provision must certainly not be interpreted in an extensive manner. But it would be a complete misunderstanding of its meaning to assume that its main purpose was only to

⁹⁶For example, Andrew Arato notes that “courts will be most successful in opposing populism where they enjoy strong support from civil society initiatives” Arato, Andrew: Populism and the Courts, VERFBLOG (25 April 2017), <http://verfassungsblog.de/populism-and-the-courts/>,

⁹⁷ Sadurski, *supra* note 11.

prevent misuse of the formal legal means of a constitutional amendment to legitimize a totalitarian regime ... Art. 79, par. 3 means more: Certain fundamental decisions of the basic Law makers are inviolable ... The wording and meaning of Art. 79, par. 3, do not merely forbid complete abolition of all or one of the principles. The word ‘affect’ means less ... The constituent elements are also ... to be protected against a gradual process of disintegration...⁹⁸ The unamendable provision, the minority opined, protects also against a gradual process of disintegration. In other words, perhaps in retrospect, the minority opinion in the *Klass* case may be relevant and applicable to a populist constitutional abuse if the amending process.

Put differently, we argue that the time has come to consider an aggregated form of judicial review of constitutional amendments. Let’s assume to ordinary scenario - abusive constitutionalism is made possible due to the introduction of distinct changes in the legal structure; each by itself does not represent a fundamental abandonment of the constitutional order’s fundamental principles and may not be sufficiently problematic. However, incrementally and in a cumulative manner, these changes bring about a fundamental transformation of the constitutional order to an illiberal or semi-authoritarian one. Assuming that the transformation is not yet complete, we may ask ourselves why the court should not take into its considerations all prior constitutional changes in addition to a single constitutional change it is currently reviewing. i.e, what is needed is an aggregated doctrine that would allow courts to review a specific amendment together with the surrounding legal environment with which it would interact.⁹⁹

In fact, we believe that this is precisely what the Israeli HCJ has done in its biennial judgment and the Colombian Constitutional Court in its third term case. In the Israeli case it may be asked why a one-time or two-times biennial budgets were allowed while a fifth was considered to be an unconstitutional abuse of constituent power? likewise, we may ask why Uribe’s attempt to run for a second term was a valid constitutional amendment, but a third time was considered an unconstitutional replacement? It was – we claim – an aggregated review of the constitutional change. “The quantity turned into quality”, as Justice Hanan Melcer explained his support in the majority’s decision in the biennial budget

⁹⁸ 30 BVerfGE 1, 24 (1970); see the English translation in MURPHY & TANENHAUS, *supra* note 50, at 662-4.

⁹⁹ We thank Oren Tamir for this point.

case.¹⁰⁰ The recurring use of the temporary amendment turned the ‘infringement’ of the constitutional rule into its ‘modification’.

While not in the context of judicial review of amendment, the idea of an aggregated review is not novel in legal thinking.¹⁰¹ Pozner and Porat, for example, examine examples of how aggregation might take place in torts, contracts, criminal law, and public law.¹⁰² The problem of aggregation rises when the existing legal doctrine cannot internalize various types of information that may be relevant in order to make a more accurate decision. But it is precisely in the abusive constitutionalism context of incremental encroachments of fundamental principles that such a new thinking is required. According to such a possible new-thinking, the justification to use an aggregated review would be enhanced when between the various amendments that create the aggregated affect there is boosted-combination, i.e. the synergic infringement that is cause by the changes is greater than the collective infringement of the changes if examined separately.¹⁰³

Consider for example constitutional changes to the electoral threshold. A change from 2% to 3.25% may be reasonable or justified on its own. Likewise, a decrease from 3.25% to 2%. However, a frequent change of this threshold towards every election in a way that benefits the governing party may be regarded as abuse of the amendment power and as an unconstitutional constitutional change – through the perspective of an aggregated review. An aggregated review may relax – even if not solve – the challenge posed by the incremental use of subtle constitutional amendments (while simultaneously of course, providing courts with much greater power).¹⁰⁴

B. Review of Constitutional Replacements

¹⁰⁰ HCJ 8260/16, *supra* note 45, Sec. 7 to Justice Melcer’s judgment.

¹⁰¹ See e.g. Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 MINN. L. REV. 261 (2009); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 641–648 (2012).

¹⁰² Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2 (2012)

¹⁰³ See e.g. Zemer Blondheim & Nadiv Mordechay, *Towards a Cumulative Effect Doctrine: Aggregation in Constitutional Judicial Review*, 44(2) MISHPATIM 596, 604 (2014) (Hebrew).

¹⁰⁴ Of course, this doctrine raises various questions, such as what is the aggregation that is measured? Is it only aggregation to a single principle or rule (as in the term limits in Colombia, the biennial budget in Israel or the electoral threshold in the hypothetical scenario, or more generally the aggregated effect of different changes to the constitutional order even if those touch upon different areas? This is a central issue that would have to be further developed.

As noted earlier, constitutional replacement is another tool for abusive constitutionalism which is, at least by established theory, immune from judicial review.

Returning to the Hungarian scenario. Imagine a liberal-democratic constitution, protecting a wide list of fundamental rights, resting upon principles of separation of power, rule of law and judicial independence, as the 1989 constitution did. A constitutional amendment, enacted through the two-thirds amendment provision that fundamentally undermines human dignity or separation of powers, for example, would be subject to judicial review according to the doctrine of UCA, and may even be declared as unconstitutional and invalid by the court. But what if the governing party, effectively ruling the amendment process, uses the exact same amendment procedure of two-third to bring about a completely new constitutional document? (as occurred in Hungary). And imagine that the new constitution is precisely like the old one apart from the sought change to human dignity or separation of powers. Now, because this is a replacement rather than amendment, the change is immune from judicial review. This is an absurd result. A similar process that brings to a similar result, but this time labeled as a ‘replacement’ rather than ‘amendment’ ought to be treated similarly. Such a change should not be immune from judicial review.

We therefore agree, as a matter of principle, with David Landau and Rosalind Dixon that “restrictions on constitutional replacement, like those on constitutional amendment, might be defended on the basis that replacement, like amendment, can in fact be abused in the name of the people in order to undermine democracy.”¹⁰⁵ And such restrictions ought to be enforced by judicial review in court. We do not aim to fully develop here the mechanism or standards for such a review. One practical solution would be ‘Transnational anchoring’; allowing courts to examine transnational constitutional arrangements in order to study whether the particular constitutional arrangements under attack are present in a large number of other constitutional democracies.¹⁰⁶ Another option would be to define a proper or legitimate exercise of the constituent power and through such an exercise to be able to supervise constitution-making/replacement processes and the authenticity of the exercises of constituent power.¹⁰⁷ The primary strength of allowing the judiciary to define the constituent power and examine its exercise is that this approach is most clearly in harmony with the theoretical rational behind constitutional

¹⁰⁵ David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 860 (2015).

¹⁰⁶ *Ibid.*, at 879.

¹⁰⁷ *Ibid.*, at 876.

unamendability. It would also be a tool for the UCA doctrine to express its superiority over a populist fake claim to represent the people's will.

C. A Special Attention to Amendments Affecting Judicial Independence

As noted earlier, one of the challenges of the UCA is that in the populist era, one of the tools is court-packing which in turn weakens any possibility of judicial struggle vis-à-vis democratic erosion. Again, while a first instinct would argue that court should be especially restraint when applying the UCA to issues in which they have their own self interest to reserve their powers, perhaps in a democratic erosion context the contra approach is the correct – courts should be especially aggressive in protecting their independence.

Focusing on uses of the UCA doctrine in India and Bangladesh, Rehan Abeyratne demonstrates how in some cases, the use of the UCA doctrine had a solid constitutional grounding as it was used against amendments that were incompatible with core democratic principles and through these judicial uses of UCA prevented illiberal or authoritarian constitutional changes from going into effect.¹⁰⁸

However, He continues to show, two recent judgments demonstrate the court's institutional selectivity, not to say the abuse of the UCA doctrine for self-interest by the judiciary. The case of *Asaduzzaman Siddiqui v. Bangladesh* (2014) involved a challenge to the constitutionality of the Sixteenth Amendment, which restored a provision that existed in Bangladesh's original 1972 Constitution allowing the President to remove Supreme Court judges with the support of a two-thirds majority in Parliament. The Bangladesh Supreme Court invalidated the amendment on basic structure grounds, finding that it violated judicial independence. Ridwanul Hoque argues that “[T]his decision led to the marginalization,

¹⁰⁸ For example, the *Raj Narain* case of 1975, in which the Supreme Court invalidated the Thirty-Ninth Amendment, which rendered the 1971 general election – in which a High Court convicted Prime Minister Indira Gandhi for election fraud – immune from judicial review. Or the Fifth Amendment Case of 2010 in which the Bangladesh Supreme Court held that an amendment was unconstitutional for extending constitutional protections to the country's first martial law regime (1975–79). This was followed by *Siddique Ahmed v. Bangladesh* (2011), which held the Seventh Amendment unconstitutional for legitimizing the second martial law regime (1982–86). See Rehan Abeyratne, *Giving structure to the basic structure doctrine*, 1(2) INDIAN L. REV. 182, 187 (2017).

indeed defiance, of the founding principles of the Constitution of Bangladesh in regard to judicial removal.”¹⁰⁹

The Indian Supreme Court confronted a similar issue in *Supreme Court Advocates-on Record Association v. Union of India* case of 2015. In that case, Parliament had created a National Judicial Appointments Commission (NJAC) through the Ninety-Ninth Amendment to the Constitution. The NJAC would, among other things, take over appointments to the higher judiciary. Such appointments were originally vested in the President of India, acting on the advice of his cabinet and sitting justices. But over a series of judgments in the 1980s and 90s, the Supreme Court vested final appointment authority in a group of senior justices known as the “collegium”. The NJAC, therefore, much like the Sixteenth Amendment in Bangladesh, arguably restored the judicial appointments process to something approaching its original form. It vested the appointments power between Supreme Court justices, the Union Minister of Law and Justice, and two “eminent persons”. However, the Supreme Court held the NJAC unconstitutional for violating judicial independence which is part of the constitutions ‘basic structure’.¹¹⁰

We are in complete agreement with Abeyratne that this judgment fails to establish how the basic structure of the Constitution is violated by a more deliberative, institutionally independent judicial appointments process. For Abeyratne, “the judgment makes little sense as a matter of law or legal theory and is best explained by the Supreme Court’s institutional prerogative to maintain supremacy vis-à-vis the other branches.”¹¹¹ However, in retrospect and considering what we see in places such as Poland, Hungary and Turkey, perhaps if considered in the context of abusive constitutionalism and democratic erosion, the courts’ aggressive application of the UCA doctrine in cases concerning judicial independence and separation of powers makes more sense.

V. CONCLUSION

Ideally, the main route for protection against abusive constitutionalism is constitutional design. Constitutions ought to be designed in a tiered manner so that those fundamental features that are crucial to the constitutional order to be much more difficult to amend than the ordinary

¹⁰⁹ Ridwanul Hoque, *Can the Court Invalidate an Original Provision of the Constitution?*, (2016) 2 *UNI ASIA PAC J. L. & POL.* 13, 17.

¹¹⁰ See Rehan Abeyratne, ‘Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective’ (2017) 49 *GW International LR* 101.

¹¹¹ Abeyratne, *supra* note 108, at 187-88.

provisions.¹¹² And likewise, constitutional replacement ought to be regulate ex-ante with a complex deliberative, inclusive and time-consuming process that would aim to best reflect the people's will. However, in reality, constitutions are often not designed in a manner that includes sufficient safeguards against abuse. In this paper, we examine the role of the judiciary in responding to abusive constitutionalism, where the preexisting constitutional safeguards were not enough it inhibit it.

As we claim, our basic assumptions must be reconsidered. Instead of using judicial doctrine to protect against a revolutionary constitutional amendment that would establish a fascist regime, we need to adapt the doctrine to exiting constitutional practices that utilize incremental and subtle amendments to dismantle the democratic order. An aggregated judicial review should be developed. We must also rethink the automatic immunity – the result of two hundred years of revolutionary constitutional theory – provided to complete constitutional replacement from constitutional restrictions and scrutiny. Finally, in contrast with the instinct will to be self-restraint concerning judicial changed that concern the judiciary itself, perhaps it is precisely such changes that require the strictest scrutiny. At the end, these are all legal mechanisms with a limited ability to stop political powers. This does not mean we should not constantly consider how should we improve such mechanisms to better safeguard our democratic-constitutional orders.

¹¹² See e.g. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86(2) GEO. WASH. L. REV. 438.