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The Democratic Self-Defence of Constitutional Courts

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Abstract: Courts around the world are under attack. They are being captured, packed, threatened, and their authority and powers are being limited by governments that seek to undermine the democratic constitutional order. Once courts are weakened or captured, it is easier for these governments to undermine other democratic institutions and even set courts themselves against democracy. Accordingly, using the rationale of 'militant democracy', this article proposes the theory of democratic self-defence of constitutional courts. According to this theory, constitutional courts (including apex courts with constitutional review powers) should declare the unconstitutionality of reforms to their institutional design when these are instrumental to a process of democratic decay. Not only that they should do so, but they must do so – as a duty – when the viability of the democratic system of government is at stake. The aim of this self-defence is not the self-interest preservation of institutional powers but the protection of democracy itself. In order to be able to protect democracy, courts must be able to protect themselves.

Keywords: democratic decay; courts; democracy; militant democracy; court capture; unconstitutional constitutional amendments

1 Introduction: Protecting Democracy Through Constitutional Court Self-Defence

A paradox emerges in contemporary attempts to reform institutions endowed with powers of constitutional review, particularly in the context of judicial appointments. The United States has witnessed passionate debates surrounding the composition of the Supreme Court, prompting suggestions of 'expanding' or 'packing' the court to

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address the political crisis surrounding the institution.[1] Ironically, however, court-packing, once deemed a strategy followed by illiberal governments, has been observed in countries like Poland to exert control over constitutional courts.[2]

The unexpected parallels between debates on the politics of judicial appointments in the US and Poland highlight a broader challenge in reforming these institutions: it becomes challenging to perceive a legitimate reform of a constitutional court, acceptable from a democratic perspective, from an illiberal attack on constitutional review demending counteraction. While these theoretical and comparative dimensions warrent academic discussion,[3] the issue transcends theoretical and scholarly considerations, manifesting a clear practical dimension. For institutions primarily designed to safeguard democracy, such as courts (constitutional or supreme), the potential risk to democracy posed by reforms to their own institutional design should matter.[4]

This article tackles this complex issue, particularly addressing the *conditions under which constitutional courts should veto reforms of their institutional design*. The argument of this article is thus complementary to, but distinct from, previous debates in the field that seek to elucidate *how* constitutional courts should respond to attacks on democracy,[5] or the effectiveness of constitutional court action in protecting democratic systems.[6]

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1 See, eg, Rivka Weill, 'Court Packing as an Antidote' (2021) 42(7) Cardozo Law Review 2705; Arron Belkin, 'The Case for Court Expansion' (27 June 2019), <https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d14e7ae04c5970001fa4cb1/1561651120510/The+Case+for+Court+Expansion.pdf> accessed 9 January 2024; Kermit Roosevelt III, 'I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now', Time (10 December 2021), <https://time.com/6127193/supreme-court-reform-expansion/> accessed 9 January 2024.

2 Bojan Bugarič and Tom Ginsburg, 'The Assault on Postcommunist Courts' (2016) 27 The Journal of Democracy 69; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 German Law Journal 1140; Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019), 58–131.

3 On these questions, see, eg, Mark Tushnet and Bojan Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (Oxford University Press, 2021) 148–176; David Kosar and Katarína Šipulová, 'Comparative court-packing' (2023) 21(1) International Journal of Constitutional Law 80; Benjamin Garcia Holgado and Raúl Sánchez Urribarri, 'Court-packing and democratic decay: A necessary relationship?' (2023) 12(2) Global Constitutionalism 350.

4 For different institutional safeguards against court-packing, see David Kosar and Katarina Sipulova, 'How to Fight Court-Packing?' (2020) 6 Constitutional Studies 133.

5 Tom Ginsburg, 'The Jurisprudence of Anti-Erosion' (2018) 66 Drake Law Review 823; Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William and Mary Bill of Rights Journal 327.

6 Tsai Robert L, 'Why Judges Can't Save Democracy' (2022) 72 Syracuse Law Review 1541; András Jakab, 'What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) 6 Constitutional

The response to the question addressed in this article is *the theory of democratic self-defence of constitutional courts*. In essence, the theory posits that constitutional courts should always declare the unconstitutionality of reforms on their institutional design when such changes serve as instruments for democratic decay. In this article, we develop such a theory and explain how its main elements should be interpreted. The article not only aims to clarify an obscure question in constitutional law but also endeavors to provide doctrinal tools for real-world courts to safeguard democracy by defending themselves against illiberal and authoritarian reformers.

The structure of this article is as follows: Following this introduction, we present some methodological considerations, explaining the main conceptual and methodological priors underpinning our argument. Subsequently, we address the background problem justifying this research: the takeover of constitutional courts by illiberal or authoritarian actors preceding processes of democratic decay. The following section presents the theory of democratic self-defence, detailing three main aspects that delimit its content and applicability: why it is a duty (not merely a right) for these institutions to protect themselves, which types of attacks are relevant to this theory, and when should an attack on the constitutional court constitutes an attack on democracy. The following section anticipates and responds to potential criticisms of the theory. The penultimate section of the article applies the theory to the Israeli case study, while the final section concludes.

2 Methodological Remarks

This article seeks to integrate theoretical and doctrinal approaches in discussing the idea of self-defence of courts. While the *theory* and *doctrine* of democratic self-defence of courts are distinct, they are inherently linked and intertwined. The *theory* of democratic self-defence of constitutional courts, being normative, involves an assessment of whether and when constitutional courts should safeguard themselves to uphold democracy. Operating on an abstract level, it seeks to provide a common denominator applicable to all courts in democratic polities, even if the ideas generated are often political and legal in nature.

Conversely, the *doctrine* of democratic self-defence of courts utilizes law and legal authorities to serve the theory. It seeks to interpret existing legal systems to implement the core aspects of the theory through a sound legal reasoning. That being the case, this doctrinal approach is inherently specific to each legal system, so

Studies 5. Compare with Sergio Verdugo, 'How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy while Preserving Judicial Independence' (2021) 59 Columbia Journal of Transnational Law 554.

Table 1: Theory and doctrine of democratic self-defence.

	Theory	**Doctrine**
Task	Normative assessments of political situations	Interpretation of legal authorities
Scope	All democracies with constitutional review	Specific to each polity with constitutional review
Questions to respond	Why and when should constitutional courts self-defend to protect democracy?	How can the legal system be interpreted so that constitutional courts can legitimately self-defend to protect democracy?

rather than speaking of a general doctrine of democratic self-defence of courts, it is more accurate to speak of a Spanish doctrine of democratic self-defence, a French doctrine, a Chilean doctrine, an Israeli doctrine etc (Table 1).

This article deals with the relationship between constitutional courts, democracy and democratic decay. Thus, for reasons of clarity and transparency, and for the sake of methodological rigour, these three concepts need to be defined before delving into our discussion.

In this article, the term *constitutional court* denotes any judicial-type organ that has the final say on the constitutionality of legislation. Thus, this definition includes not only Kelsenian-style constitutional courts that monopolize the control of constitutionality, such as the German Federal Constitutional Court, but also apex courts in systems that follow the model of diffuse review of legislation, such as the US Supreme Court or the Supreme Court of Israel. The notion of 'constitutional court' is used loosely in this article.

Democracy, as defined in this article, adopts a 'thick' sense, including a system of government that enables the governed to remove incumbents from power through free and fair elections. However, this definition goes beyond mere electoral processes, incorporating additional elements such as respect for the rule of law, protection of basic rights, and the presence of checks on governmental power.[7]

Democratic decay, as articulated by Daly, is adopted in this article, denoting 'the incremental degradation of the structures and substance of liberal constitutional democracy'.[8] The incremental nature of democratic decay, that Daly defines as a 'subtle, step-by-step hollowing out of democratic governance',[9] aligns with the

7 See also Roznai (n 5) 330–334.

8 Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 Hague Journal on the Rule of Law 9, 17.

9 Ibid.

purposes of this article. Attacks on democracy, particularly those directed at constitutional courts, often exhibit this incremental nature.[10] While the arguments presented in this article can be relevent to abrupt democratic breakdowns, the discussion is primarily developed with situations of democratic decay in mind.

On the methodological priors, the research rests on several of assumptions, and while space constraints prevent an exhuastive elaboration of the normative justification for each, they are transparently presented as the background framework of our argument. The research has, in particular, three methodological priors:

Democratic desirability. The first methodological prior posits the normative assumption that democracy is inherently valuable. It is considered a desirable form of political organization, not solely for instrumental reasons such as its potential to foster economic prosperity or ensure peace, or not only because of them. Democracy is a desirable form of political organizations for reasons that are inherent to it, and that have to do with human dignity. It is based on the expression of pluralism, a fundamental element of free human societies.[11]

Militant democracy. Second, democracies can and must defend themselves. Democracies are not only normatively desirable but must also, because of that, create the arrangements to ensure their own viability and resilience vis-à-vis authoritarian threats. This prior is thus inspired by the ideas of militant democracy, that were best systematized by Karl Loewestein in the 20th century.[12] However, recent literature highlights the inadequancy of traditional tools of militant democracy against contemporary forms of authoritarianism.[13] This article takes note of these observations. Acknowledging this insufficiency of the traditional toolkit of militant democracy, but vindicating its telos, this article aims to provide a new tool for democracy protection, contributing to update militant democracy.

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10 See also Yaniv Roznai, 'The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments', in Alejandro Linares-Cantillo, Camilo Valdivies-Leon and Santiago Garcia-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021), 147.

11 See, for instance, John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 The University of Chicago Law Review 765.

12 See Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 The American Political Science Review 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 The American Political Science Review 638. More recently, see Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012; online edn, Oxford Academic [21 November 2012]) <https://doi.org/10.1093/oxfordhb/9780199578610.013.0062>, last accessed 15 December 2023); András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004); Markus Thiel, *The 'Militant Democracy' Principle in Modern Democracies* (Routledge, 2016).

13 David Landau, 'Abusive Constitutionalism' (2013) 47 University of California Davies Law Review 189, 193.

Pluralist legal constitutionalism. The final methodological prior relates to the ongoing debate between legal and political constitutionalists and the broader discourse on the constitutional powers of judicial institutions. Legal constitutionalism asserts that judicial enforcement of a normative constitution is essential for the democratic order's viability.[14] In contrast, political constitutionalists, constitutional review skeptics, generally argue that the ultimate decision on policy matters should rest with democratically elected branches of government.[15] This article adopts legal constitutionalism as a methodological starting point, recognizing the necessity of an institution with constitutional review powers for the theory of democratic self-defence of courts to have relevence. However, the article adopts a pluralist approach to legal constitutionalism. While legal constitutionalism requires constitutional review as a necessary condition, a pluralist approach acknowledges diverse design possibilities and varying degrees of court powers.[16] This prior allows for the acceptance of constitutional review forms that, for some extent, accommodate the assertions of political constitutionalists regarding policy choices made by democratically elected politicians.[17] The only condition is that the constitutional court possesses the capability to enforce rules protecting democracy, aligning with our two previous methodological priors.

3 The Problem to Tackle: Constitutional Courts and Democratic Decay

The implementation of constitutional review in many countries is driven by the objective of protecting democracy.[18] However, to fulfill this role, constitutional

14 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017).

15 See, among others, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000); Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 62; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

16 For diverse roles and powers of courts, see David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 BC Law Review 1500, 1503; Amal Sethi, 'Towards a Pluralistic Conception of Judicial Role' (2021–2022) 90 University of Missouri Kansas-City Law Review 69.

17 For instance Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions' (2020) 39 Law and Philosophy 617; see also the discussion by Maartje De Visser, 'Prevention is Better than Cure: Rethinking Court Behaviour and Design' (2020) 29 William and Mary Bill of Rights Journal (online) 1, 8 <http://wm.billofrightsjournal.org/wp-content/uploads/2021/01/Visser.pdf> accessed 9 January 2024.

18 See Kelsen's approach in Lars Vinx (ed and tran), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015); See amongst

courts accumulate a wide range of powers, frequently intersecting with the political process.[19] Consequently, the capture of courts by illiberal politicians posses a significant threat. As suggested by Ginsburg and Huq, under such control, courts can transform into a powerful instrument in the hands of illiberal politicians to 'turn the law loose on their enemies'.[20]

This scenario appears to have unfolded in a numerous countries around the world, spanning from Poland to Venezuela, Hungary to Turkey. Increasingly, literature characterizes political control over constitutional courts as a catalyst of democratic decay and rule of law backsliding.[21]

The danger is twofold: firstly, once courts are weakened, captured, or controlled, undermining other democratic values and institutions becomes markedly more fesible. As stated in the introduction to these special issues:

> Comparative experience shows that weakening the ability of courts to supervise the government and review its actions is a central pillar of democratic erosion, as it removes a crucial obstacle for a government seeking to consolidate its power, and makes it easier for it to make further changes later. In other words, because the judiciary is the last line of defense of democracy, in order to capture and undermine democratic institutions the first thing that governments do, once in power, is to threaten, limit and if possible, to capture and court. Once the court is weakened or captured, it then becomes easier to weaken or capture other democratic institutions.[22]

Secondly, once courts are captured, they themselves become instrumental in the process of democratic decay by affirming and advancing the anti-democratic agenda of the government. Indeed, the paradox lies in the fact that institutions initially established to protect democracy find themselves serving processes of democratic decay. This phenomenon is termed by Rosalind Dixon and David Landau 'abusive

more recent literature on the emergence of constitutional courts, Francisco Ramos, 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2(1) Review of Law and Economics 103; Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 The Journal of Law, Economics, and Organization 587; Yaniv Roznai, 'Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review' (2020) 14(4) ICL Journal 355.

19 Landau (n 16); Sethi (n 16); Samuel Issachroff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 NC Law Review 1.

20 Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 190.

21 See, inter alia, Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3; Sadurski (n 2); Drinóczi and Bień-Kacała (n 2).

22 Christoph Bezemek and Yaniv Roznai, 'Introduction: The Most Endangered Branch' (2023) 17(3) ICL Journal 203, 206.

judicial review'.[23] The theory of democratic self-defence of courts aims to address this predicament by offering remedies. It does so by presenting a general justification for vetoing attacks on constitutional courts. Furthermore, it provides a nuanced analysis distinguishing between democratically legitimate reforms to the design of constitutional courts and those that are not, warranting overturning.

4 A Theory of Democratic Self-Defence of Constitutional Courts

The theory of democratic self-defence of constitutional courts argues that *it is a duty for these institutions to defend themselves from attacks that are part of a larger process of democratic decay*. This simple presentation of the theory involves three elements that necessitate a more in-depth explanation.

4.1 A Duty – Not Just a Right – for Constitutional Courts

The theory of democratic self-defence of constitutional courts does not merely suggest that constitutional courts can defend themselves from certain attacks, but that they *must* do so when the viability of the democratic system of government is jeopardized. This obligation arises from both theoretical and doctrinal-constitutional considerations.

On the theoretical level, the values inherent in constitutionalism and in the telos of constitutional courts are pivotal. Drawing from Sartori, constitutionalism is understood as a system of limited government wherein citizens' rights are protected.[24] Thus, the existence of a constitutional court in a constitutional democracy mandates that its most prominent task is the protection of the democratic system of government upon which the constitution is based. Our concept of democracy ecompasses free and fair elections, coupled with respect for the rule of law, basic rights protection, and checks on governmental power. Considering their institutional design, courts are strategically positioned to ensure both the democratic legitimacy of the

23 David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2023) 53 UC Davis Law Review 1313. See also Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy* (Oxford University Press, 2021) ch 5.

24 Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 The American Political Science Review 853.

political process's outcome vis-à-vis the constitution, and the political process itself.[25] In other words, democracy is fundamental to the constitution, a cornerstone that the constitutional court is duty-bound to protect. 'Without an independent judiciary, democracy is in deep peril.'[26]

On the doctrinal-constitutional level, the positive regulation of constitutional courts necessitates a case-by-case basis analysis to justify the application of the idea of democratic self-defence. Each legal system is unique, requiring each constitutional court to determine the extent and basis for applying the theory. At the very least, constitutional judges should examine the constitution at two levels.

The first level focuses on specific constitutional provisions. Ideally, constitutional judges would explore provisions explicitly mandating the constitutional court to protect democracy. In fact, expanding on the democratic self-defence theory, drafters should consider including such explicit provisions in the constitution. This inclusion facilitates the court's self-defence in the face of political leaders with authoritarian tendencies. Explicit provisions mandating the constitutional court to protect democracy have important advantages, by offering constitutional judges a clear legal foundation, making it more challenging for political leaders to dismiss their actions. Additionally, if some constitutional judges are hesitant to protect the institution to protect democracy, specific provisions may provide strong incentives for an interpretation of the constitutional framework in a proactive, pro-democratic manner.

The second level involves a systematic interpretation of the constitution. Even when specific mandates are lacking, a systematic reading of constitutional provisions related to democracy can serve as an alternative. In such cases, the constitutional court discovers its mandate for democratic self-defence through a

25 On court's commitment to protecting and promoting the democratic system, see, eg, Aharon Barak, 'The Role of a Supreme Court in a Democracy' (2002) 53 Hastings LJ 1205, 1215: 'A supreme court does not merely solve disputes. … It preserves democracy both by protecting the political process and by guaranteeing human rights. It safeguards the rule of law.' Aharon Barak, 'Foreword: A Judge on Judging: The Role of A Supreme Court in a Democracy' (2002–2003) 116 Harvard Law Review 19, 26: 'The second major task of the judge is to protect the constitution and democracy. In my opinion, every branch of government, including the judiciary, must use the power granted it to protect the constitution and democracy. The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy, and substantive democracy, as expressed in basic values and human rights.' On judicial review and political process theory, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), and more recently Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18 International Journal of Constitutional Law 1429; Landau (n 16); Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023).

26 Andreas Paulus, 'Reflections on Constitutional Adjudication in a Democracy' 56 Israel Law Review (2023) 471.

systematic reading of the constitution. Although a certain constitution might not explicitly state that the constitutional court's ultimate role is to protect democracy, the constitutional text might entrust the constitutional court with the task to enforce the normativity of the constitution, which includes provisions declaring the polity to be organized along democratic lines.

4.2 Self-Defence from Attacks

In order to be able to protect democracy, courts must have the ability to protect themselves. Constitutional courts, in defending themselves, should consider using the main weapon tat their disposal: declarations of unconstitutionality. However, the concept of self-defence presupposes an attack on the court, as previously explained, linked to a broader attack against democracy in the country.[27] These attacks can manifest in various types and can be classified based on different criteria.

The first criterion is content. By their content, the most typical attacks on constitutional courts will target either their independence or their powers of review.[28]

Attacks on judicial independence usually seek to render the institution or its members subject to the power of external actors, primarily the executive. These attacks frequently manifest through alterations in the procedure of appointing constitutional judges or modifying the court's composition. Notably, not every institutional reform of appointment procedures or court composition falls within the realm of the democratic self-defence theory. In fact, there will be clear instances of such reforms that do not pose *a priori* a threat to democracy. For instance, reforms disempowering the executive in the procedure of judicial appointment, making it more pluralistic or consensual.[29]

In contrast, attacks on the powers of review of the court seek to strip the institution from its jurisdiction. These fall within the scope of the theory of democratic self-defence when they curtail the court's powers to protect democracy through

27 Schnutz Rudolf Dürr, 'Constitutional Courts: An Endangered Species?', in Dominique Rousseau (ed), *Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?* (LGDJ, 2019) 111.

28 See for the cases of Poland, Hungary and Turkey, Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48.

29 Consider, for example, the recent reform in Ireland, in which the Judicial Appointments Commission Bill 2022 aimed to create a new commission to select and interview potential candidates to become judges, replacing the current Judicial Appointments Advisory Board, and limiting the Government's authority on deciding who is appointed as a judge. The Supreme Court has upheld the constitutionality of the Bill. See The Supreme Court, In The Matter of Article 26 of The Constitution and In the Matter of The Judicial Appointments Commission Bill 2022 [2023] IESC 34, <https://www.courts.ie/acc/alfresco/af4b1773-a5c7-4626-9b01-9b8ab9b690e2/2023_IESC_34.pdf/pdf#view=fitH> accessed 9 January 2024.

constitutional review, but not otherwise. For instance, the democratic self-defence theory would not apply to a situation where a political majority restricts the court's powers in making ordinary policy choices. This aligns with this article's prior on pluralist legal constitutionalism. This prior poses that there might be different, legitimate approaches to the legal protection of constitutional democracy, some of which might give more prominence to democratically elected actors to make policy choices. If that is the case, then the democratic self-defence theory must accept a situation in which policy areas that are not part of the core democratic process are kept away from the powers of constitutional review.[30] For these policy areas, it is acceptable for the purposes of our theory to give democratically elected political actors the ultimate say.

The second criterion for classification refers to legal sources. By their legal source, we can classify attacks on the constitutional court into those operated via administrative amendments or statutory amendments of the institution and those via constitutional amendment. The former – administrative or statutory amendments – are easier to tackle by the court since, being non-constitutional, the constitutional court can always declare the unconstitutionality of the regulation or statute amending its institutional design if it contradicts statutory or constitutional provision, respectively.

Conversely, the latter – formal constitutional amendments – are much more difficult to tackle. When the constitutional court faces an attack through a constitutional amendment to its design, it may signal a case of abusive constitutionalism.[31] Landau defines abusive constitutionalism as 'the use of mechanisms of constitutional change – constitutional amendment and constitutional replacement-to undermine democracy'.[32] In these instances, the constitutional court may have to rely on a combination of the doctrine of 'unconstitutional constitutional amendments'[33] and the theory of democratic self-defence of constitutional courts. The doctrine of unconstitutional constitutional amendments establishes the basis of legal legitimacy for declaring the unconstitutionality of a constitutional reform to the constitutional court's design. According to this doctrine, certain constitutional amendments may be deemed unconstitutional if they conflict with explicit unamendable provisions or even in the absence of an explicit unamendability clause. This occurs when such constitutional amendment is considered revolutionary, such as when it 'collapses the

30 Compare with the concept of the 'democratic minimum core' of Dixon and Landau (n 23), which includes a system of: (i) multi-party, free and fair, regular elections; (ii) political rights and freedoms, and (iii) institutional checks and balances.

31 See Landau (n 13); Dixon and Landau (n 23).

32 Landau (n 13) 191.

33 See generally, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).

existing order and its basic principles and replaces them with new ones, thereby changing its identity'.[34] The theory of democratic self-defence, in turn, establishes a conceptual link between such a 'collapse of the existing order' and the reform of the constitutional court:

> considering how detrimental attacks on the judiciary were to democratic decline, and considering how the weakening of judicial institution facilitated the capture of political institutions, in countries such as Poland, Hungary, and Turkey, in the context of abusive constitutionalism, there is strong justification for applying the UCA [unconstitutional constitutional amendments – PCO & YR] doctrine especially in cases concerning judicial independence and separation of powers.[35]

Simply put, in this doctrine, the reform of the constitutional court is considered to be part of and instrumental to a process of democratic deconsolidation, the most radical form of such collapse of the existing order for a constitutional democracy.

4.3 That are Part of Larger Processes of Democratic Deconsolidation or Rule of Law Backsliding

If a reform of the design of constitutional courts is *instrumental* to a process of democratic decay, then it may justify a veto by the institution in the form of a declaration of unconstitutionality. The problem, however, is what 'instrumental' means in this context. The reason is that this is a relatively vague concept that can be interpreted from two very different perspectives:

A teleological perspective would argue that the reform of the court falls within the democratic self-defence theory when it is *aimed* at provoking democratic decay, regardless of the actual practical outcome of the reform. This approach involves an element of deliberate intent by the reformers, who reform the design of the court precisely seeking to deconsolidate democracy in the country. This conforms with existing literature on court-capture that focus on 'the motivations behind court-packing',[36] 'the character and motivations of those elected or appointed to high office',[37] the 'purpose – the need for a full articulation of

34 Ibid, 8. On revolutionary constitutional changes, see Gary J Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020).

35 Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020–2011) 14(1) Law and Ethics of Human Rights 19, 47.

36 Kosar and Šipulová (n 4) 135.

37 Aziz Huq, 'Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design' (2018) 65 UCLA Law Review 1506, 1530.

the reform's aims',[38] whether the reform is 'intended for potential abuse'.[39] As Tushnet and Bugarič argue, predicting court-packing's effects requires taking into account the actors' goals, that means 'making some judgment about what else the people proposing the policy want to do'.[40] Holgado and Urribarri distinguish between 'two types of court-packing: (1) policy-driven, in which the alteration of the composition of a court aims to promote public policies; and (2) regime-driven, in which the alteration of the composition of a court aims to assist the executive in replacing the existing regime with a new one.'[41] The difficulty here has to do with the epistemic hurdles to know if such aim, motivation or intention exists, as even authoritarian rulers often hide their purpose to undermine democratic rule.

A consequentialist perspective would suggest that the reform of the court falls within the democratic self-defence theory when it will *result* in a deterioration of the democratic quality of the polity, regardless of whether this outcome is intended or unintended by the reformers. The difficulty with the application of this perspective is again epistemic, as it is often difficult to know in advance what the actual results of a certain reform of the constitutional court will be for the polity as a whole.

Everything that has been said in this section so far leads to two important problems for the theory of democratic self-defence of constitutional courts. First, there is the conceptual problem linked to having two different criteria to define what an attack 'instrumental' to democratic deconsolidation mean. The second problem is epistemic and is derived from the fact that it will be often difficult to know if the two different criteria – or at least one of them – concurs in the case at stake.

Table 2 explores the first conceptual problem that just mentioned above. The theory of democratic self-defence of constitutional courts posits that these institutions must veto reforms on their institutional design that are instrumental to democratic decay. However, as discussed earlier the 'instrumental' nature of these reforms can be seen from the perspective of their outcome and from the perspective of their intent. Table 2 simply presents how these two dimensions combine. Two of these combinations are relatively easy to deal with. When the reform is both aimed at and has as its consequence democratic decay, then it is clear that such a reform falls within the area of application of the theory of democratic self-defence of constitutional courts: it should be vetoed. If a reform is neither aimed nor has a consequence democratic decay, then it should be considered as a legitimate reform of the design of the institution that falls beyond the area of application of the theory. This does not

38 Tom Gerald Daly, '"Good" Court-packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23 German Law Journal 1071, 1074.

39 András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press, 2021), 154–55.

40 Tushnet and Bugarič (n 3) 161–62, 76.

41 Holgado and Urribarri (n 3) 355.

Table 2: Aims and outcomes of the reforms.

	Aimed at deconsolidating democracy	**Not aimed at deconsolidating democracy**
Results in democratic backsliding	Criteria met for the application of the doctrine	Difficult cases
Does not result in democratic backsliding	Difficult cases	Criteria not met for the application of the doctrine

mean that the reform cannot or should not be declared unconstitutional. It just means that, if that is the case, it would be unconstitutional on grounds other than the theory of democratic self-defence of constitutional courts. If such alternative grounds do not exist either, the reform should not be declared unconstitutional, as it would be a constitutionally legitimate institutional reform. Finally, there are two situations that could be described as 'difficult cases'. First, if there is an intent to erode democracy but the reform of the constitutional court is unlikely to provoke it. This can happen, for instance, in the case of illiberal yet clumsy rulers, whose reform of the constitutional court will not produce the effects they desire or when the reform may cause such an effect but only to a minimal degree, making it difficult for a court to exercise the extreme remedy of invalidation. Second, there is the situation in which a reform of the constitutional court is not aimed at provoking democratic decay but might produce such outcome. Such could be the case for liberal rulers unable to understand potentially illiberal, unintended consequences of a reform of the constitutional court. The two 'difficult cases' put the court in a challenging, problematic scenario.

A second problem, which is epistemic in nature, is even more difficult to tackle. In this case, only the court on a case-by-case basis will be able to decide if there is sufficient information to ascertain whether there is an aim to deconsolidate democracy, or if that will be the result of the reform. There will be cases of epistemic clarity, in which these things are easy to know with the information available to the court. But very frequently, the court will have to make a decision in a scenario of imperfect information.

The theory of democratic self-defence confronts in scenarios of 'difficult cases' and of 'imperfect information' with similar trade-offs. If the court opts in these cases for the application of the theory, it will maximize protection of a core democratic institution – itself – but that will be at the cost of overturning a decision of democratically elected decision-makers which might have been, after all, innocuous for democracy. This might also harm the legitimacy of the court itself as it might be

regarded as if the court is acting in self-dealing simply to preserve its powers.[42] Alternatively, the court might opt for giving democratic decision-makers the benefit of the doubt and defer to their decisions, but this will be at the cost of risking a potential – yet uncertain – democratic deterioration. This trade-off faced by the court in difficult scenarios is a limit of the theory of democratic self-defence.

5 Some Potential Objections Against the Theory: a Preventive Response to Critics

So far, we have argued that constitutional courts should defend themselves from attacks that can endanger democracy. But we understand that our argument might raise some objections.

A first potential criticism against our argument has to do with the epistemic problem that we acknowledged above, as well as with the acknowledged existence of 'difficult cases' in which the teleological and the consequentialist criteria for the determination of a risk for democracy do not match. For instance, sometimes it will not be easy for constitutional courts to know the intentions or the outcomes of a certain reform on their institutional design. We already acknowledge that, in these cases, the application of the theory of democratic self-defence encounters difficulties, as it faces a trade-off: either to declare unconstitutional a reform of its design that could not be in the end a threat for democracy, or declaring the constitutionality of a reform that could turn out instrumental to a process of democratic decay. But the problem is actually more acute in contemporary democracies, as given the strategies followed by illiberal actors, such difficulties are doomed to arise very frequently. The criticism could thus be that the theory of democratic self-defence is unable to meet one of its declared goals: to update militant democracy and make it more functional at a time in which democratic decay – as opposed to abrupt democratic breakdown – becomes more frequent.

The theory of democratic self-defence of constitutional courts can only respond to this criticism by reminding what it can still do and by simultaneously acknowledging its limitations. The theory of democratic self-defence of constitutional court faces indeed difficulties in these scenarios. Such difficulties would need to be solved on a case-by-case basis, with whatever level of information is available to the court. The trade-off described above will be however, in many instances, unavoidable. But even in these cases, the theory of democratic self-defence of constitutional courts is useful for two reasons. First, it will be helpful to remind constitutional courts that

42 See infra Section 5.

one of the criteria against which they have to assess the constitutionality of a reform of their own design is the extent to which it can be instrumental to democratic decay. Second, in making explicit the trade-off that courts might confront in many cases, the theory helps the constitutional court think about the choice they are down to make and its potential implications.

Besides, not all cases will be difficult cases. The theory of the democratic self-defence will have a rather straight-forward application in many instances, when the court has enough information to conclude that a reform of its design is both intended at and will likely cause democratic decay. Such cases will be the most blatant ones, and thus the most necessitated of a conceptual apparatus like the one developed in this article. The greater challenge will arise when democratic backsliding is subtle and incremental.[43]

The theory of democratic self-defence of constitutional courts is designed for scenarios in which the court is attacked via a reform of its institutional design. But very often, attacks on constitutional courts do not require of such reforms. This might occur in two different scenarios. First, it might happen because attacks on the court operate through the existing institutional design of the court, which in certain circumstances allow illiberal politicians to neutralize or control the court. Second, it might also occur because the attack on the constitutional court proceeds not through formal but through informal mechanisms, such as corrupting constitutional judges.

Both these scenarios might be thought of as a failure of institutional design. Constitutional courts ought to be designed in such a way that control of the court cannot occur, neither through the abuse of the existing formal mechanism nor through the use of informal mechanisms.

In any case, because there is no formal amendment of the design of the court, there is no option to declare such an amendment unconstitutional, and thus the theory will not be of direct use in these cases. This is not to say, however, that the theory cannot be of some help even in these scenarios. At the very minimum, some of its elements – even if not the theory in its entirety – can help provide for an assessment of the situation and prompt action. If the telos of constitutional courts is to protect democracy, and constitutional courts have a duty to counter attacks on them that are instrumental to democratic decay, this duty applies not only when formal amendments are considered but also when informal mechanisms are applied.

Another possible objection that the theory might encounter is of a practical nature. The theory of democratic self-defence of constitutional courts expects these institutions, in certain cases, to declare the unconstitutionality of reforms of their own design. However, because of the complex context this entails, it will be easy for

43 On this challenge to constitutional adjudication and the need to consider aggregated and accumulative judicial review, see Roznai and Hostovski Brandes (n 33).

authoritarian political actors to argue that the constitutional court is behaving unlawfully.

Imaging for instance an illiberal reform aimed at packing a constitutional court with judges loyal to an illiberal government. Existing constitutional judges might declare such reform unconstitutional. But the illiberal political actors behind the reform might respond that the declaration of unconstitutionality is invalid because it has been issued by the old constitutional judges who, according to the new legislation, are no longer the legitimate members of the institution. Or consider a reform that makes it more difficult to strike down legislation, for example by requiring a super-majority of the panel; a declaration of unconstitutionality by an ordinary majority might be regarded as invalid.[44]

We have two responses to this criticism. The first is that problems of a practical nature are not enough to invalidate the theory at the conceptual level. The second is that, at the practical level, these problems might well exist. In the worst case, they provoke a constitutional crisis, in which different constitutional organs have different, irreconcilable views on the constitutional way ahead. But a constitutional crisis will often be better than the suppression of liberal constitutionalism altogether.

A related challenge concerns the legitimacy consideration. When the court is to apply the self-defence theory to strike down legislation, and even more so to strike down a constitutional amendment, the court may be seen as acting to preserve its powers, its superiority over other branches of government and to enhance its self-interests, and be criticized for that. Such claims of misuse of the unconstitutional constitutional amendment doctrine have been made regarding judicial application of the doctrine in India, Pakistan, and Bangladesh in cases concerning judicial appointments and removal.

However, as Po Jen Yap and Rehan Abeyratne demonstrate, not every judicial review of constitutional amendments concerning the powers and status of the judiciary is problematic, when the theory is used to block interference by the executive in judicial functions and considering the legal and political context of the country. When judicial independence is in danger, judicial intervention even in constitutional amendments concerning the judiciary itself may be justified, especially in fragile democracies.[45]

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44 On this dilemma see, Mauro Arturo Rivera Leon, 'Judicial review of supermajority rules governing courts' own decision-making: A comparative analysis' (2023) Global Constitutionalism, First View 1–25; For an argument in favour of supermajority rules see, Cristóbal Caviedes, 'A core case for supermajority rules in constitutional adjudication' (2022) 20(3) International Journal of Constitutional Law 1162.

45 Po Jen Yap and Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19(1) International Journal of Constitutional Law 127.

If preserving judicial independence is vital to the survival of the democratic order, then protecting the court seems more important than perceived legitimacy; but more than that, if the court does not intervene in such cases, it may lose its independence and thereby allowing democratic decay. The result of such non-interference might thus also have negative effects on the court's legitimacy. If the choice is between suffering legitimacy harm and protecting democracy or suffer legitimacy harm and undermining democracy, the former is preferred.

A final criticism is that such judicial intervention will not prevent democracy decay anyway.[46] Out of all the criticisms explored in this article, this is probably the most consequential one. In a way, it poses an existential criticism to the theory of democratic self-defence. Since the idea behind the theory is for constitutional courts to protect themselves in order to protect democracy, whenever democracy protection through the theory fails, the very theory becomes futile.

Against this backdrop, is it still worth wasting any efforts on such an idea as the theory of democratic self-defence of constitutional courts? we believe that is indeed the case, for at least the following reasons.

First, it is not entirely true that the theory is only worth if it achieves the desired effects. This is a consequentialist argument and, while it is powerful, it is not the only way to approach the theory. To this consequentialist argument, we could contrapose a different, deontonic argument: this theory is simply the logical corollary of the ideas implicit in the very concept of constitutional review. Constitutional courts are conceptually designed to protect democracy and thus have a duty to pursue democracy protection through the enforcement of the constitution regardless of whether they achieve this goal.

Second, taken to the extreme, the criticism that formal checks on power are unable to deter democratic decay when political actors do not commit to democracy leads to a somehow absurd scenario. This is because, if that were the case, why have formal checks on power at all? We could in this scenario dispense not only with constitutional courts but also with rigid constitutions, ombudsmen, supranational democratic clauses, organs for judicial governance, and a long list of other formal and institutional checks on power. Democracies, however, generally do rely on these sorts of arrangements.

In Israel, a similar argument against authorizing the court to review Basic Laws (ie, laws of a constitutional status) was made, according to which courts cannot protect democracy because, in any case, when a basic law that would truly harm democracy

46 Elsewhere, one of us cited the son of the Israeli Prime Minister Netanyahu, Yair Netanyyahu who tweeted 'Fact check: in Germany before the rise of the Nazis, the court had the authority to invalidate laws!', in response to a speech by the President of the Supreme Court on the importance of judicial review as a lesson from the Holocaust. Roznai (n 5) 337.

arrives, its invalidation by the court would simply be ignored. As former Minister of Justice, Ayelet Shaked, stated, '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', or '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.'[47]

With all respect, this argument falls to the false dichotomy of democratic failure: either we have a perfectly functioning democracy or a complete failure, Weimar style. But that is never the case; the court's influence on democracy is not measured in the final hypothetical law that transforms a country from a democratic one to an autocracy but incrementally and gradually in a series of judgments in the life of a nation. The dichotomy between a perfectly functioning democracy and a complete failure is a false one. 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 and legal reforms aiming to undermine or erode the democratic order.[48]

To say that institutions do not matter mischaracterizes the problem and underestimates the role of formal institutions, precisely, in regulating the behaviour of political actors through incentives, constraints and values.

For that reason, the theory of democratic self-defence of constitutional courts can be helpful. At a very basic level, it has the capacity to change the cost-benefit calculus by illiberal political actors. Insofar as it gives the constitutional court a doctrinal tool to protect itself from attacks and fightback, it creates an incentive for illiberal political actors to be restrained. Thus, even before a constitutional reform is enacted, the mere possibility of its judicial invalidation has an 'anticipatory effect' that assists in protecting democracy.[49] As Mark Tushnet correctly notes, the mere existence of unamendability doctrines 'may serve as a political check on the amendment process, as a "sword of Damocles" that, because it occasionally drops, cautions political actors against devoting too many resources to attempting to alter the existing specification of some component of the [constitution's] basic structure.'[50]

Paradoxically, the theory would be most successful in cases in which it is not utilized. Of course, if a court can use the theory to break the causal chain that links a reform of its design with a process of democratic decay, that would be a success. But the theory can be particularly successful if it is not used because the very

47 Cited in Roznai, ibid, 39–340.

48 Ibid, 341.

49 Ibid, 349. Building on Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) 10(3) Journal of Theoretical Politics 299, 314.

50 Mark Tushnet, 'Amendment Theory and Constituent Power', in Gary Jacobsohn and Miguel Schor (eds), C*omparative Constitutional Theory* (Edward Elgar, 2018), 317, 332.

awareness of its existence deters illiberal politicians from seeking an assault on the court.

Finally, there is the issue of the assumptions. We should indeed not assume that the theory will be something akin to a universal solution to prevent democracy decay everywhere. But the assumption that it would not work also lacks empirical grounding. Because this is a novel theory, we have little evidence about how it would perform in real-world scenarios. It might well be that the theory, if put to the test, fails to protect democracy in all cases, or that it is very effective in fostering democratic resilience, or that its effectiveness depends on its specific application in specific settings. Because of the novelty of the theory, we cannot have enough evidence to argue in favour or against its effectiveness. We do have, however, instances of constitutional courts that tried to resist authoritarian assaults and of courts that managed to protect democracy.[51]

6 Case Study: Israeli Supreme Court

So far in this article, we have provided a rather theoretical outline of the idea of democratic self-defence of constitutional courts. In this section, we aim to sketch how this idea could apply in practice. To do so, we use the case study of Israel. We chose Israel as a case study because, as highlighted in the introduction to the special issues, the country has witnessed in 2023 a judicial overhaul by a right-wing and populist government, proposing major constitutional reforms to the judicial system. These reforms included limiting the power of constitutional review, enacting an override clause allowing the enactment of unconstitutional laws notwithstanding court decisions, limiting the court's authority of administrative review, weakening the status and independence of government legal advisors, and changing the manner by which judges are selected.[52] In this section, we shall focus on two elements within this

51 Roznai (n 5).

52 Bezemek and Roznai (n 22). For different perspectives on the judicial overhaul/constitutional reform, see Daniel Friedmann. 'Politics in Legal Disguise' (2023) 56 Israel Law Review 320; Joshua Segev, 'Reforming the Israeli High Court of Justice: Proposed versus Desirable' (2023) 56 Israel Law Review 440; Yoav Dotan, 'Israel's Constitutional Moment' (2023) 56 Israel Law Review 521; Barak Medina and Ofra Bloch, 'The Two Revolutions of Israel's National Identity' (2023) 56 Israel Law Review 305; Iddo Porat, 'Political Polarisation and the Constitutional Crisis in Israel' (2023) 56 Israel Law Review 369; Tamar Hostovsky Brandes, 'The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?' (2023) 56 Israel Law Review 415; Tom Ginsburg, 'The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective' (2023) Israel Law Review 385; Manal Totry-Jubran, 'Constitutionalising Israel's Constitutional System' (2023) 56 Israel Law Review 355; Gábor Halmai, 'Is There a 'Constitutional Moment' in Israel and Hungary?' (2023) 56 Israel Law Review 426; David Kretzmer, 'The 'Constitutional Reform' and the Occupation' (2023) 56

reform (although all the elements have accumulative effect and the whole is greater than the sum of its parts): changing the manner by which judges are selected and limiting administrative review.

Judicial selection: On January 4, 2023, Israel's Minister of Justice, Yariv Levin presented his plan to overhaul the judiciary by reducing its powers and giving the government more control over judicial selection. The current committee for selecting judges is composed of nine members: three Supreme Court judges, two Ministers, two Knesset Members, and two members of the Israeli Bar Association. To appoint a judge to the Supreme Court, a super-majority of 7 out of 9 is required, ensuring that no branch controls that process entirely. Instead, the proposal sought to change the composition of the committee so that the process for selecting judges (to all courts in Israel, not only to the Supreme Court), would be controlled by the government and the coalition that supports it in the Knesset. The explanatory notes of the bill stated that intention was to 'strengthen the influence of the public's elected officials – the representatives of the executive and the legislature' in the selection of judges, in order for those judges to reflect 'the values of the public', yet the proposal would effectively allow the government to capture the judiciary: 'Rather than democratic legitimacy and judicial accountability – principles that are legitimately involved in judicial appointments and justify legislative and executive involvement – what the bill promoted was the capture of the courts, through absolute executive control of judicial selection and promotion.'[53]

The bill passed the first reading and was prepared for the second and third reading, but the legislative process was paused in response to the unprecedent and massive public protest against the reform.[54] However, if the constitutional amendment had been enacted, we argue that the Supreme Court could have applied the self-defence doctrine and declare the bill as an unconstitutional constitutional amendment. Given Israel's relatively weak system of checks and balances,[55] the capture of the judiciary by the government would have granted it almost absolute powers and put the very democratic character of the regime at risk. The consequences for the democratic character are clear, and even the intentions of the legislatures make this case an easy one, revealing the entire package of proposed reforms which revealed the government's intentions: to weaken external checks and balances on its power,

Israel Law Review 397. Suzie Navot, 'An Overview of Israel's "Judicial Overhaul": Small Parts of a Big Populist Picture' (2024) 56 Israel Law Review 482.

53 See Guy Lurie, 'The Attempt to Capture the Courts in Israel' (2023) 56 Israel Law Review 456.

54 Yaniv Roznai, 'We the Fourth Branch? The People as an Institution Protecting Democracy', in Vicki Jackson and Madhav Khosla (eds), *Comparative Constitutional Law: Redefining The Field* (Oxford University Press, forthcoming 2024).

55 Yaniv Roznai and Amichai Cohen, 'Populist Constitutionalism and the Judicial Overhaul in Israel' (2023) 56 Israel Law Review 502.

and granting it absolute powers of law-making without limitations. Considering the ongoing process of democratic erosion in the country,[56] this attack was part of a larger process of democratic decay. Accordingly, the court would have been justified, in our view, to strike down this reform had it been enacted.

The second example is the law that limited the court's authority of administrative review. This law – Amendment Number 3 to Basic Law: The Judiciary, stated that no court would hear cases about or issue an injunction against the government, the Prime Minister, or the ministers based on the reasonableness of their decisions, including appointments and inaction. Again, the aim was to eliminate judicial review and grant the government unlimited power.[57] One may claim that the amendment does not completely grant the government absolute powers without administrative oversight because other doctrines, such as proportionality conflict of interest, still apply. However, these do not necessarily overlap with the reasonableness doctrine, are more difficult to prove, and without reasonableness, important gatekeepers such as legal advisors or the attorney general may be replaced with less independent once, allowing the government to continue with the process of democratic decay.[58] It is also important to note that this amendment is extremely broad in its scope; unlike some suggestions to remove certain policy areas from reasonableness scrutiny (such as immigration, economic or security), it completely removes the court's authority from supervising the reasonableness of any decision by the Prime Minister, the Ministers, and the Cabinet. Furthermore, the entire body of jurisprudence of the court regarding restrictions imposed on transitory government (a caretaker government has a narrower range of reasonableness than an ordinary government),[59] in order to maintain competitive elections, is based precisely on this reasonableness standard. Accordingly, the amendment could have far-reaching implication to the democratic order.

This law was enacted in July 2023. It is the only part of the Minister of Justice's package of reforms that was enacted thus far. Multiple challenges were submitted to the Supreme Court, which heard the petitions in a full bench of 15 judges, for the first time in its history.

Should the court intervene in this case? This example is more challenging than the previous one. In the beginning of the article, we have claimed that we accept that

56 See, eg, Nadiv Mordechay and Yaniv Roznai, 'Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel', 77(1) Maryland Law Review (2017), 244; Yaniv Roznai, 'Israel – A Crisis of Liberal Democracy?', in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018), 355.

57 Mordechai Kremnitzer, 'Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness' (2023) 56 Israel Law Review 343.

58 Ibid.

59 See Rivka Weill, 'Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters' (2021) 45 Vanderbilt Law Review 1381.

policy issues should belong to democratically elected branches of government. This is true. Removing the court's authority to review the reasonableness of government's actions aims to allow the government to advance its preferred policies. Thus, prima facie, the court should not veto the amendment. However, a deeper observation that includes the larger context of democratic decay process, the aims of the government (revealed by the other components of the reform), and the importance of the reasonableness standard to checks on the governmental powers in the Israeli context, leads to the conclusion that this reform (if interpreted as a complete ban on any form of review of reasonableness or arbitrariness), 'could be viewed as a significant erosion of the institutional checks and balances on executive power – an erosion of the democratic minimum core.'[60] Accordingly, the court may be justified if it declares this amendment as unconstitutional as part of the democratic self-defence doctrine of constitutional courts. Indeed, on January 1, 2024, the Israeli High Court of Justice declared the amendments as unconstitutional and invalidated it. A majority of Eight to Seven judges held that the amendment severely harms the core characteristics of the State of Israel as a democratic state, especially separation of powers and the rule of law.[61]

Of course, this analysis is specific and context-based. A different conclusion may be reached if the analysis applies to different jurisdictions, considering local conditions, institutions and context.

7 Conclusions

As explained earlier in this article, the theory of democratic self-defence of constitutional courts is largely tributary of the work of Karl Loewestein. As he himself put it: 'Democracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification? At last, however, legalistic self-complacency and suicidal lethargy gave way to a better grasp of realities. A closer study of fascist technique led to discovery of the vulnerable spots in the democratic system, and of how to protect them'.[62] Loewestein's argument was, we believe, that democracies should not allow authoritarians to take advantage of democratic freedoms in their quest to undermine democracy itself. Democracies should protect themselves.

60 Yaniv Roznai, Rosalind Dixon and David E Landau, 'Judicial Reform or Abusive Constitutionalism in Israel' (forthcoming) Israel Law Review.

61 HCJ 5658/23 The Movement for Quality Government in Israel v The Knesset (1.1.2024).

62 Loewenstein (n 12) 430–431.

The theory of democratic self-defence of constitutional courts is an application of this idea to the question of reforms of these institutions. It seeks to provide the theoretical and doctrinal basis that should allow constitutional courts to protect themselves from attacks by authoritarian politicians, not in order to protect court per se, but precisely in order to protect democracy. The militant-democratic character of the theory is particularly clear when it comes to abusive constitutional reforms: reforms of the design of constitutional courts that look formally constitutional but which are linked to a risk of democratic decay. In these situations, the theory of democratic self-defence of constitutional courts provides for a solid basis that allows for action in defence of these institutions and of democracy. The theory seeks to afford such democratic protection while preserving the margin of democratically elected politicians to engage in legitimate reforms of the architecture of the court: those that do not pose a risk for democracy. The overall aim of the theory is thus to facilitate protection of democracy through the protection of certain aspects of the constitutional court, without fully entrenching all aspects of the design of these institutions. Since courts are the final gatekeepers of democracy, democracy should have a 'militant protection' of courts.