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SYMPOSIUM ARTICLE

Politics in Legal Disguise

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Abstract

The article discusses the current legal-political crisis in Israel against the backdrop of the judicial and political powers that have led to the present situation. The disastrous Yom Kippur War of 1973 weakened the government and public confidence in the political institutions. The weaknesses of the government enabled the Supreme Court to carry out a judicial revolution, which completely changed the country's legal system. The legal revolution entered a new stage when the Supreme Court held that the Basic Laws form part of Israel's constitution. This judicially created constitution opened the way for judicial review of legislation. Its weakness stems from the fact that Basic Laws are legislated in much the same way as ordinary legislation. As a result, the Knesset can easily override any ruling of the Court that voids a statute, by amending the relevant Basic Law. The Court is now struggling to find a means of gaining some control over the legislation of Basic Laws. At the same time, the present government declared its intention to carry out legal reforms that are in effect a counter-revolution to the judicial revolution. The article examines how the fluctuation in the political support of the Court affects its decisions.

Keywords: judicial revolution; judicial activism; judicial review; Basic Laws; override provision; Declaration of Independence; law and politics; Attorney General; separation of powers; counter-revolution; demonstrations; interpretation; reasonableness

1. Introduction

> The question is, said Humpty Dumpty,
> which is to be master—that's all.[1]

The American Civil War was concerned with a number of legal issues, in particular whether the Confederate states were entitled to secede from the American union.[2] This type of conflict has recurred in modern times in numerous variations. In legal terms the issue can be broadly stated as follows: Does a minority group, which constitutes a majority in a specific area, have a right to self-determination by virtue of which it is entitled to be separated from the mother country and to create an independent entity? This issue has arisen in Kosovo, in Catalonia, and in Crimea. It is often settled by force.

These situations highlight the intricate relation between law and power, as well as the fact that changes in political power may lead to dramatic upheavals in the whole legal system. With regard to the Confederate secession, it has been argued that under the Constitution, as originally made and understood, the states had a right to secede.[3] However, Abraham Lincoln proclaimed that secession is impossible and decided to prevent it. In the war that ensued the Northern states won a decisive victory. It was also a victory of the legal system that prohibited slavery[4] and denied the possibility of separation.

In this article I will examine the issue of power and law in the Israeli context. I will start by describing the situation during the first 25 years following the establishment of the State of Israel. I will then discuss the change of power that enabled the judicial revolution, and will conclude by examining the attempted counter-revolution and the present legal and political crisis.

2. From 1948 to the early 1980s

On 29 November 1947, the United Nations General Assembly passed a resolution partitioning Palestine into Jewish and Arab states. The resolution also provided that '[t]he Constituent Assembly of each State shall draft a democratic constitution for its State'.

On 14 May 1948, the members of the provisional legislative body of the emerging State of Israel, headed by David Ben-Gurion, signed the Declaration of Independence, which referred to a 'Constitution which shall

[1] Lewis Carroll, *Through the Looking Glass*.

[2] Arguably, defining the American war (1861–65) as a civil war is a misnomer. A civil war is a war over the control of a single government, as in the case of the English civil war or the Russian civil war. In the American war the Confederate states did not seek to control the North; they fought to be separated from the Union and become independent: Kevin RC Gutzman, *The Politically Incorrect Guide to the Constitution* (Regnery 2007) 111–12.

[3] Gutzman (n 2) 121–23.

[4] Lincoln did not advocate the abolition of slavery throughout the Union before the war, but in the course of the war he issued the famous Emancipation Proclamation, which freed all slaves in the territories held by the rebels against the Union: Kenneth C Davies, *Don't Know Much About History: Everything You Need to Know About American History but Never Learned* (revised edn, Perfect Bound 2022) 228.

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be adopted by the Elected Constituent Assembly'. On 25 January 1949, Israel's citizens chose a Constituent Assembly of 120 members, which was to draft a constitution, but instead of doing that the Assembly resolved to change its name to the Knesset and constitute itself as Israel's parliament. This scarcely believable move can be explained mainly by the enormous power wielded at the time by Ben-Gurion, who eventually decided against the adoption of a formal constitution.[5]

About a year later, the Knesset passed the Harari Resolution, named after its sponsor, Knesset Member (MK) Yizhar Harari. This Knesset decision was not a formal law but simply charged the Knesset's Constitution, Law and Justice Committee with drafting a series of Basic Laws that would eventually be combined to form a constitution. Precisely how that constitution would eventually be ratified – whether by national referendum, special majority of the Knesset, or in some other way – was left open.[6]

Israel thus adopted a parliamentary system based on the British model. The Supreme Court recognised the supremacy of parliamentary legislation. The Court saw the Knesset as sovereign and held that it had no power to question the validity of its legislation.[7] It also rejected the argument that the Declaration of Independence was a constitutional document which empowered the courts to void parliamentary legislation that was inconsistent with that document.[8]

[5] See generally Nir Kedar, *David Ben-Gurion and the Foundation of Israeli Democracy* (Haim Watzman trans, Indiana Press 2021) 26–49.

[6] Daniel Friedmann, *The Purse and the Sword: The Trials of Israel's Legal Revolution* (Haim Watzman trans, Oxford University Press 2016) 5–6.

[7] HCJ 98/69 *Bergman v Minister of Finance* (3 July 1969), unofficial translation at https://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance. The case provides a seeming exception to the Supreme Court's recognition of the Knesset's supreme legislative power. Advocates of the legal revolution claim that it proves that the Court has always had constitutional power; but it proves nothing of the sort. The case concerned a law regarding the funding of elections to the Knesset and local authorities. The finance method established by this law denied funding to new parties and thus violated the principle of equality established by section 4 of Basic Law: The Knesset. This section was 'entrenched', meaning that it could be amended only by a majority of all members of the Knesset – that is, at least 61. The Court held that the Minister of Finance may allocate campaign finance money only if the Knesset re-enacts the provisions of the law as they were, despite their manifest inequality, by passing them with the special majority of 61 required by the Basic Law. Alternatively, it could amend the law to remove the inequality. The Court thus recognised the sovereignty of the Knesset and its power to override the Court's holding by a majority of 61. Indeed, Justice Landau expressly stated that '[i]t need hardly be said that in making this suggestion we in no way presume to encroach upon the sovereignty of the Knesset as the legislative authority': ibid. See also Friedmann (n 6) 20. The *Bergman* case addressed the requirement of a majority of 61 (out of 120), which is merely a procedural requirement. There is nothing in this case to support the concept that the Knesset can put any substantive limitation on the majority rule by requiring a majority of 70, 80 or 100. See the view of Justice Cheshin in the famous case of CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), paras 87–103, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C93%5C210%5C068%5Cz01&fileName=93068210_z01.txt&type=4.

[8] HCJ 10/48 *Ziv v Gubernik* (2 December 1948).

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The Supreme Court also adopted a number of principles, recognised in Anglo-American law, which limit the review of governmental and administrative action. It refrained from intervening in the government's economic and security policy decisions. The Court also limited its reach by providing that it would hear petitions only by those who had legal standing. In other words, only persons whose individual interests are at stake can seek redress in court.

Furthermore, the Court recognised that some issues were not justiciable. When Ben-Gurion established diplomatic relations with the Federal Republic of Germany, the German government appointed Rolf Paulus as its first ambassador to Israel. Paulus had served as an officer in the Wehrmacht during the Second World War. A petition submitted to the Supreme Court to prevent his entry into the country was succinctly dismissed. Justice Sussman needed only a few lines to lay out the Court's reasoning:[9]

> The government has decided as it sees fit ... The Knesset endorsed the government's decision ... The considerations are not legal ones but rather of foreign policy and the candidate's fitness for the position, and this court is not authorized or able to decide those questions.

This self-restraint still left the Supreme Court with a broad field of action and enabled it to play a critical role in defending human rights. In the leading case of *Kol Ha'am v Minister of the Interior*,[10] the Court upheld the right to freedom of speech and voided an order of the Minister of the Interior that temporarily suspended the publication of two newspapers. This decision remains to this day a cornerstone of free speech law in Israel. Another leading decision established the right of employment, of which no one is to be deprived by arbitrary administrative action.[11]

The religious monopoly in the field of marriage and divorce has had dire consequences for many couples. Jewish law does not recognise the marriage of a Jew with a non-Jewish spouse. It also disallows the marriage of a Cohen (a Jew of priestly origin) with a divorcee. The Court has often mitigated these results for couples whose right to marriage had been denied. Thus, it ruled that the Interior Ministry has to register couples who wed outside Israel as married, even when one member of the couple is not Jewish and the marriage therefore has not been recognised by the rabbinical courts.[12] In another case the rabbinate refused to marry a Cohen and a divorcee. The couple nonetheless were married in a privately held ceremony conducted according to Jewish law. The Supreme Court held the marriage to be valid.[13]

[9] HCJ 186/65 *Reiner v The Prime Minister* (23 June 1965).

[10] HCJ 73/53 *Kol Ha'am Co v Minister of Interior* (16 October 1953), unofficial translation at https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior.

[11] HCJ 144/50 *Scheib v Minister of Defence* (8 February 1951), unofficial translation at https://versa.cardozo.yu.edu/opinions/sheib-v-minister-defence.

[12] HCJ 143/62 *Funk Shlezinger v Minister of Interior* (2 February 1963), unofficial translation at https://versa.cardozo.yu.edu/topics/marriage. The legal complications that ensued are discussed in Friedmann (n 6) 22.

[13] CA 238/53 *Cohen and Buslik v Attorney General* (15 January 1954).

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Hence, the recognition of the supremacy of Knesset legislation has not weakened the Court's ability to protect human rights in very broad areas. In fact, very much to the contrary, objections to judicial legislation could always be met by the argument that if the political echelon is unhappy with it, the Knesset is always free to change the judicial ruling. It hardly ever did.

3. The judicial revolution

On 6 October 1973, at midday on Yom Kippur, Egypt and Syria launched a surprise attack on Israel. In this war over 2,600 Israeli soldiers were killed; thousands were wounded. The economic losses were tremendous, and it took many years before the Israeli economy began to recover. At the end of the Yom Kippur War, Israel declared victory, but so did Egypt.

The debacle of the Yom Kippur War led to a complete change in the country. No longer was there a strong central leadership such as the state had enjoyed until that war. Since then, most governments have been weak and have faced frequent political crises, while the public has utterly lost confidence in the political leadership. The weakness of the central government has empowered two minority groups far beyond their numbers: the Israeli settlers in the territories that Israel captured in the Six Day War of 1967, and the Haredim (ultra-Orthodox). These groups have been able to dictate the country's political and social agenda.

A governmental upheaval took place in 1977 when, for the first time, a right-wing government headed by Menachem Begin came into power. However, the severe economic crisis that Israel faced following the Yom Kippur War worsened and Begin himself resigned in 1983, after the tragic events of Sabra and Shatila and the conclusions of the ensuing commission of inquiry.[14]

The ineffectuality of the executive and legislative branches led to a vacuum that enabled the Supreme Court to revolutionise the legal system and to seize new powers for itself and for the Attorney General, who is the government's legal adviser and also head of the public prosecution. The revolution began with the accession of Meir Shamgar to the post of Chief Justice of the Supreme Court in the very same year in which Begin resigned,[15] although its first glimmerings were apparent a few years earlier, during Yitzhak Rabin's first government, in the period just following the Yom Kippur War of 1973.[16]

[14] Friedmann (n 6) 45.

[15] According to Aharon Barak, the constitutional revolution began in 1992 when the Knesset passed Basic Law: Human Dignity and Liberty: Aharon Barak, 'The Constitutional Revolution: Protected Basic Rights' (1992) 1 *Mishpat Umimshal (Law and Government)* 9. In my view, it was the second phase of the revolution that began in the 1980s.

[16] The fall of that government was an outcome of the growing power of the legal establishment. It enabled Attorney General Aharon Barak to notify Prime Minister Rabin that he would be indicted on rather minor charges of keeping a bank account abroad. Consequently, in the ensuing elections Shimon Peres replaced Rabin as head of the Labour party, which lost its leadership position, and Begin became Prime Minister.

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The legal revolution led to a drastic transformation of Israel's legal culture.[17] The classical Court had developed the law cautiously and gradually, treated precedent with respect, and fully accepted Knesset legislation. All this changed, however. Within a relatively short time, the revolutionary Court abolished previous rulings, one after the other, including some that had previously constituted the foundation of the Israeli system.[18] The requirement of legal standing was abrogated. The Court also developed the rule that any governmental or administrative decision can be quashed on the ground of unreasonableness. In addition, the principle adopted by the classical Court that certain matters were not justiciable was drastically curtailed, if not completely abolished.[19]

Thus, every decision made by a governmental authority could be appealed against to the Supreme Court. Examples include the exemption of Yeshiva students from military service (a topic on which the Court has rendered numerous lengthy decisions with nil results);[20] military operations;[21] diplomatic negotiations and the withdrawal from the Gaza Strip;[22] the award of the Israel Prize;[23] and the supply of electricity to the Gaza Strip, which is governed by a 'hostile entity'.[24]

As a result, the Supreme Court is no longer concerned merely with resolving disputes but has become deeply involved in the way in which the country is run, and the line between law and politics has become completely blurred. Lord Sumption has described developments in other jurisdictions: 'To adapt the famous dictum of the German military theorist Clausewitz about war, law is now the continuation of politics by other means'.[25]

In comparison, the involvement of the Israeli Supreme Court in public and political matters dwarfs the situation in the jurisdictions referred to by Lord Sumption. It is the only court in the world that has created a constitution where none previously existed and claims to control its content.

The intervention of the Supreme Court in appointments to public positions is of unique importance in the power relations between the different branches of government. The long line of cases on this issue began with a leading decision rendered by Justice Barak in 1993 regarding the appointment of Yossi Ginossar to the post of Director-General of the Ministry of Housing. A few

[17] Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011) 54–74.

[18] Friedmann (n 6) 52–54.

[19] In this respect, the Shamgar Court of 1983–95 and the Barak Court of 1995–2006 are clearly distinguishable. Under Shamgar, the Court still recognised in principle that there were some non-justiciable issues, notably in the areas of national security and foreign policy. Under Barak's approach, even political and national security issues were subject to judicial review. In fact, Shamgar criticised Barak's views on this matter and continued to do so even after his retirement: Meir Shamgar, *An Autobiography* (Miskal–Yedioth Ahronoth and Chemed Books 2015) 196–98 (in Hebrew).

[20] Friedmann (n 6) 73–77.

[21] ibid 175–82.

[22] HCJ 1661/05 *Gaza Coast Local Council v The Israel Knesset* (9 June 2005); Friedmann (n 6) 158–61.

[23] Friedmann (n 6) 163–66.

[24] ibid 276–77.

[25] Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2020) 35.

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years earlier, Ginossar had been forced out of the Shin Bet (Israel Security Service) because of his involvement in the cover-up of the killing of two terrorists who had been apprehended alive (Ginossar, as well as other Shin Bet members who were involved in this very serious affair, received a presidential pardon). Ginossar was also involved in the Nafso affair, a case in which interrogators used improper interrogation techniques and gave false testimony to the military court that convicted an officer of the Israel Defence Forces (IDF), Izzat Nafso. Ginossar was never indicted but Barak ruled that under administrative law, a person may be held to have committed an offence even if he has not been convicted, and even if he has been pardoned. In conclusion, Barak held that in view of his background, the government's decision to appoint Ginossar as Director-General of the Ministry of Housing was unreasonable in the extreme and therefore illegal and void.[26]

This case was followed by numerous decisions. In essence, the Court held that any public appointment can be judicially reviewed on the grounds of some blot on the candidate's character, some misconduct in the past, or even an improper statement he may have uttered. The criteria for judicial review are extremely vague and based on the Court's moral views. In this process, in which the Court regards itself as responsible for purifying the public sector of immoral elements, the human rights of the person involved hardly play a role. Indeed, this method of impeachment does not meet the requirements of due process and violates basic principles of fairness and human rights.[27]

This ruling has been extended to political appointments, and it has been held that the Prime Minister must dismiss a member of the cabinet against whom an indictment has been filed. The issue arose with regard to Aryeh Deri and Raphael Pinchasi of Shas, the Sephardi-Haredi religious party. Deri was its leader and served as a cabinet minister in Rabin's government at the very time at which the Oslo agreements between Israel and the Palestine Liberation Organization were being negotiated. Pinchasi was a deputy minister. The Attorney General filed charges of corruption against both, presented the charges against Deri to the Knesset, and asked that his parliamentary immunity be withdrawn. While this issue was still pending before the Knesset, the Supreme Court agreed to hear a petition demanding his dismissal from the cabinet. Another petition, demanding the dismissal of Pinchasi, was submitted at the same time. Pinchasi's case was more complicated because his immunity remained in force.[28]

Attorney General Harish, who represented the Prime Minister, acted in accordance with Barak's view, under which the Attorney General may dictate the government's position on legal matters and may decline to defend the

[26] HCJ 6163/92 *Eizenberg v Minister of Construction* (23 March 1993), unofficial translation at https://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing.

[27] For a trenchant and convincing criticism see Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19 *Theoretical Inquiries in Law* 705, 726–39. Dotan points out that this Israeli doctrine is unique in the world, that it stands on shaky normative foundations, and disregards constitutional principles and human rights.

[28] On the saga of Pinchasi's immunity see Friedmann (n 6) 170–71.

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government in court. Harish decided that the two Shas leaders should leave office and refused to argue against their dismissal. He also refused to allow the Prime Minister to be represented by another lawyer. The best that Rabin could do was to write a letter, which Harish was gracious enough to allow to be read in court.

This position was fully supported by the Court. The Prime Minister's position is that which the Attorney General decides is the legally correct one. The fact that the Prime Minister himself maintains otherwise is irrelevant. As Barak put it:[29]

> [T]he state attorney [who represented the Attorney-General] ... pled before us in the name of the single authorized authority—the prime minister. True, the position of Mr Yitzhak Rabin, the prime minister, differs ... ... But that is not the position that was represented to us.

This proposition is beyond belief. Barak reasons here that the Prime Minister is not a person elected by the public who has formed a government that received the confidence of the Knesset. Rather, the Prime Minister is a legal fiction, 'a reasonable prime minister', a phantom created by the Court and the Attorney General. This phantom Prime Minister, usurping the real one, is the one whose position is brought before the Court.

Barak also ruled that '[t]he attorney general is the authorized interpreter of the law for the executive branch ... and his interpretation obligates it internally ... This view derives its vitality from our constitutional tradition'; but the tradition was, in fact, the exact opposite. In the past, the Attorney General's opinions did not obligate the government, as Ruth Gavison clearly pointed out.[30]

The Supreme Court therefore ordered that Deri and Pinchasi be dismissed from the government,[31] despite the fact that at the time they still enjoyed parliamentary immunity.

Rabin desperately needed Shas to remain in the coalition. Following the Deri-Pinchasi decision, Shas left the coalition, undermining Rabin's government at the very moment that the Oslo agreements were signed, drastically reducing thereby the prospects for their successful implementation. The Court completely disregarded these factors. But isn't a reasonable prime minister required to take them into account in deciding whether to dismiss a central figure in his government?

After these decisions were rendered, the Knesset re-enacted Basic Law: The Government, which provides in section 23(b) that the term of a minister ends upon conviction of an offence involving moral turpitude. Nevertheless, the

[29] HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v Prime Minister* (8 September 1993).

[30] Ruth Gavison, *The Attorney General: A Critical Review of New Trends* (1996) 5 *Plilim (Israel Journal of Criminal Law)* 27, 95–96.

[31] HCJ 3094/93 *The Movement for Quality Government in Israel v Government of Israel* (8 September 1993), unofficial translation at https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-state-israel; *Amitai* (n 29).

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Court managed, by way of interpretation, to circumvent this provision and continues to uphold the view that a minister must leave office when an indictment against him is filed.[32] The issue arose also with regard to Prime Minister Benjamin Netanyahu, against whom an indictment has been filed. Its decision on this matter is discussed below (Section 7) in the context of the present crisis.

4. Review of legislation

The judicial revolution reached a new stage in 1992 when the Knesset passed Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. In that very same year, Justice Aharon Barak published an article entitled 'The Constitutional Revolution: Protected Basic Rights'.[33] Some three years later, the Supreme Court stated in the famous *Bank Mizrachi* case (in what is probably the longest obiter dictum in Israeli jurisprudence) that the new Basic Laws empower the Court to annul subsequent legislation that conflicts with their provisions.[34] This was a great innovation. Numerous Basic Laws had been enacted in the past and they were not considered to be on a higher normative level than ordinary legislation, but past rulings were never an obstacle to the judicial revolution.

The major task that the Supreme Court took upon itself was to transform Israel from a parliamentary democracy into a constitutional democracy. To this end, the Court declared that the Knesset possesses not only legislative power but also constitutional authority, which by virtue of the Harari Resolution[35] passes to every subsequent Knesset. The shaky foundations of this highly artificial theory are undermined by the fact that in not one of

[32] The Court's interpretation is based on the distinction between the capacity to serve and the discretion regarding the appropriateness of the appointment. Under this interpretation the provisions of Basic Law: The Government relate only to the capacity to serve, leaving open the issue of the appropriateness of the appointment, which remains subject to judicial review. This interpretation is clearly untenable. It could presumably be maintained if the capacity provision has been confined to such matters as age, citizenship or other qualifications, but it is inapplicable to the case in which the statutory provision deals with the very element that in the Court's view renders the appointment unreasonable. Section 6(c)(1) of Basic Law: The Government provides that a person who has been convicted of an offence involving moral turpitude (and was also sentenced to imprisonment) shall not be appointed as minister. The Law specifically addresses criminal conviction and expressly allows the appointment in the absence of moral turpitude. The claim that, nevertheless, the Court can hold that such an appointment is inappropriate and unreasonable is a complete aberration. Yet, this was the majority conclusion in HCJ 5853/07 *Emunah – Women Nation Religious Movement v Prime Minister* (6 December 2007), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Emunah%20v.%20Prime%20Minister.pdf (obiter dictum). This interpretation also renders section 23(b) of the Basic Law superfluous. The section deals with the conviction of a minister for an offence involving moral turpitude. Yet, such a conviction can never occur as, according to the judicial interpretation, the minister will have to leave office once he is indicted.

[33] Barak (n 15).

[34] *Bank Ha'Mizrachi and Others v Migdal* (n 7).

[35] Text accompanying nn 5–6 above.

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the very many elections held in Israel since 1949 has the public been told that they were voting not only for a legislative body but also for a constituent assembly. Needless to say, by granting the Knesset the elevated status of a constituent assembly, a status that the Knesset never asked for itself, the Court did not intend to strengthen the Knesset's position. The intention was the very opposite: namely, to subordinate the Knesset and its legislation to the Court's supervision.

Many issues remain open. Can the Knesset limit its own power by providing that a Basic Law can be amended only by a majority larger than 61? If so, are there any boundaries to such limitation, or is it possible to require a majority of 100, or perhaps even 120?

In the absence of constitutional provisions that address such issues, the question whether the Court can create a constitution and fill it with content remains highly controversial. The former Chief Justice, Moshe Landau, said that the Israeli constitution is 'the only one in the world to be created by judicial fiat'.[36] Barak himself acknowledged that his 'constitutional revolution' took place 'almost surreptitiously',[37] to which Landau replied: 'Who has ever heard of a country's constitution being approved "almost surreptitiously"?'[38]

5. The judicial revolution and the division of power among the branches of government

It is well known that a sharp division of governmental powers among three separate authorities, in accordance with Montesquieu's theory, does not exist anywhere. In fact, it is not difficult to find countries with more than three branches of government.[39]

This is clearly the situation in Israel. Article 1 of Basic Law: The Government states: 'The Government is the executive branch of the State'. Seemingly, there is one executive branch headed by the government. This, however, is completely detached from reality. The most drastic power that a state has in relation to its citizens and residents is the power to investigate crimes and to indict suspected offenders. The power to convict is entrusted to the judiciary, but the power to investigate and prosecute is a major function of the executive branch. This power is in the hands of a separate body, the prosecution, which is headed by the Attorney General. The government has nothing to do with it, and may not intervene in the process.

Furthermore, under the Deri-Pinchasi rulings discussed above, the Attorney General's opinion is binding upon the whole executive branch, including the government. No longer is the Attorney General bound by the plain meaning

[36] Moshe Landau, 'Symposium: The Bank Hamizrachi Case: Three Years Later' (2000) 5 *Hamishpat* 249, 254 (in Hebrew).

[37] Aharon Barak, 'The Risks and Chances' (1995) *Halishka (The Jerusalem District Bar Association Magazine)* 14 (in Hebrew).

[38] Moshe Landau, 'Giving Israel a Constitution Using Judicial Ruling' (1996) 3 *Mishpat Umimshal (Law and Government)* 697, 702 (in Hebrew).

[39] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 728.

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of his Hebrew title – rather than being the government's adviser, he or she is its commander-in-chief. Theoretically his opinion is binding only in respect of legal matters. However, the 'reasonableness' of every action in the public sphere has become a legal matter. Consequently, any governmental action is within the Attorney General's purview.

The executive branch is thus divided between the government and its Attorney General, whose position has been described by Shlomo Avineri, a well-known political scientist, as follows: 'The attorney general concentrates in his hands powers that are unparalleled in any democratic state. The fact that he is an appointed official and not an elected one only intensifies the damage to democracy'.[40] In addition, the government bureaucracy has also acquired considerable power in which the government is unable to intervene.[41]

Broadly speaking, the judicial revolution led to a massive transfer of power from elected bodies to appointed officials, in particular to the legal establishment. The powers of the Supreme Court, as well as those of the Attorney General, have been increased tremendously at the expense of the government and the Knesset. The enhanced power of the legal establishment is intensified by virtue of the symbiotic relations between the Attorney General and the Supreme Court.[42]

6. Reactions to the judicial revolution – before the present crisis

The legitimacy of the judicial revolution has been questioned by large sections of the legal profession, the political milieu, and by numerous academic professors. The most notable critic has been the former President of the Supreme Court, Moshe Landau, who has criticised the Court's activism, stating that it 'is tantamount to judicial dictatorship', and that the Court is amassing governing power. The Court, he said, has lost its sense of humility: 'It displays arrogance and hubris'.[43]

The government's reaction and that of the Knesset, until recently, have been rather hesitant and mostly indirect. In 2002 the Knesset passed the Ombudsman for Complaints against Judges Law. In 2004 it passed a law requiring judges to refrain from adjudicating on cases in which they have a conflict of interest; and in 2006 the Knesset amended the Courts Law, requiring the President of the Supreme Court to adopt a code of ethics for judges.

The appointment of judges, primarily to the Supreme Court, became a subject of major interest. During their presidency, both Shamgar and Barak had a

[40] Shlomo Avineri, 'Enough with Centralisation', *Haaretz*, 25 October 2009, https://www.haaretz.co.il/opinions/2009-10-25/ty-article/0000017f-dbfc-d3ff-a7ff-fbfc42480000.

[41] There are also a number of independent bodies regulating various aspects of the economy. Discussion of these developments is beyond the scope of this article.

[42] These bodies share a common ideology regarding their supremacy. There has also been a close relationship between the Attorney General, the state prosecutor and their staff with members of the Court. In fact, Attorney Generals and state attorneys often have been appointed to the Supreme Court.

[43] Ari Shavit, 'A State on the Titanic: Interview with Moshe Landau', *Haaretz*, 6 October 2000, https://www.haaretz.co.il/digital/2019-05-23/ty-article/.premium/0000017f-f568-d044-adff-f7f91f3e0000.

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dominant influence upon these appointments, but the situation changed towards the end of Barak's term. The new Minister of Justice, Tzipi Livni, had a candidate, Ruth Gavison. However, Barak had no intention of allowing Gavison, a vocal advocate of limiting judicial activism and a critic of many of Barak's rulings, to sit on the Court. The result was a deadlock. However, Barak was no longer able to appoint judges in conformity with the Supreme Court's wishes.

When I became Minister of Justice (serving in office from 2007 to 2009), I stopped the problematic practice of temporary appointments to the Supreme Court. I also supported a private bill, submitted by Gideon Sa'ar, according to which an appointment to the Supreme Court would require a majority of seven (out of nine) members of the Judicial Selection Committee. The President of the Supreme Court and the two additional justices, who are members of this committee, continue to wield considerable influence. However, they no longer control the committee and they have had to accept a number of justices whose appointment in the old days would have been highly unlikely. The end result is that the Court has become more diversified.

However, the Knesset did not intervene directly in the powers that the Supreme Court had arrogated to itself and granted to the Attorney General. There were several reasons for this inaction. One is the weakness of successive Israeli governments, in which the dominant party has had to depend on a number of small parties, each with a different agenda and interests. It suffices for one of these parties to support the increased power of the legal establishment in order to forestall legislation that would affect it.

Criminal law also provided an important tool for deterring politicians from taking measures that would curb the judicial revolution. Since the 1990s, Israel has been swept by an unprecedented wave of criminal investigations and trials of central political figures, most likely without parallel in any other democracy. At times, there has been justifiable cause for an investigation, but in numerous cases the impression has been that the suspicions were baseless or trivial, involving the kinds of deed that hardly called for a criminal investigation, certainly not for criminal punishment. The doubtful and vague offence of 'breach of trust'[44] could provide an excuse for such measures, which were often directed against those considered unfriendly to the judicial revolution.

Notable examples of improper use of criminal proceedings include the indictment of Dror Hoter-Yishai, former president of the Israel Bar Association and a strident opponent of the legal revolution,[45] the indictment of Justice Minister Yaakov Neeman, and the investigation against Ruvi Rivlin, President of Israel (2014–21), which prevented his appointment as Minister of Justice in 2001. It was Rivlin who coined the popular expression 'rule-of-law gang'.[46]

[44] Penal Code 5737–1977, s 284.

[45] Friedmann (n 6) 222–30 (also discussing the night session in the Supreme Court before Justice Itzhak Zamir on the issue of Hoter-Yishai's detention).

[46] This expression refers to the legal establishment, which justifies its inappropriate use of state power by claiming that they are merely enforcing the rule of law. See also Friedmann (n 6) 213–30.

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In addition, we find that in the past 25 years numerous cabinet ministers and all of Israel's prime ministers, including Ehud Barak and Arial Sharon, have come under criminal investigation. Prime Minister Ehud Olmert resigned and was convicted of a number of charges. His salient conviction of bribery was in my view clearly unjustified.[47] Benjamin Netanyahu, the current Prime Minister, is standing trial while still in office. Criminal law has thus become part of national politics, a situation that now prevails in the United States as well.

7. The attempted counter-revolution and the political crisis

Elections to the 21st Knesset were held in April 2019 and, for the first time in Israel's history, the Knesset was unable to form a coalition. Netanyahu stayed on as Prime Minister of a caretaker government. New elections were held in September 2019, which also ended in deadlock. At this stage the crisis was purely political, but a legal element was shortly to be added.

On 21 November 2019, AG Avichai Mandelblit announced his decision to prosecute Prime Minister Netanyahu. The indictment, which included charges of bribery and breach of trust, was filed in January 2020.

The next elections were held some two months later on 2 March 2020. This time Benjamin (Benny) Gantz, head of a centrist party, decided to break the deadlock and formed a coalition agreement with Netanyahu, according to which Netanyahu and Ganz would hold the position of Prime Minister in rotation. Netanyahu would remain Prime Minister, Ganz would serve as Alternate Prime Minister, and in October 2021 they would exchange roles and Ganz would become Prime Minister.

To implement the agreement, the parties prepared extensive amendments to Basic Law: The Government, which were legislated by the Knesset. The new government headed by Netanyahu received the support of 72 Knesset members. Of course, these events could not pass without the Supreme Court's involvement. Petitions were submitted against numerous provisions in the amendment to the Basic Law and also against Netanyahu forming a government and serving as Prime Minister on the ground that, in view of his indictment, his assumption of that role is unreasonable. An enlarged panel of 11 justices unanimously dismissed the petition.[48] In common parlance it is described as the 'eleven : nil' result. Justice Amit scorned the result that he and his colleagues had reached by pointing out that no public official would have remained in office with such an indictment, except the one at the head of the governmental pyramid.

The decision stands in stark contrast to the earlier rulings regarding cabinet ministers who must leave office if they are indicted. Although technically the rulings can perhaps be reconciled, in substance they are clearly incongruous.

[47] Daniel Friedmann, *The End of Innocence: Law and Politics in Israel* (Yedioth Ahronoth 2019) 770–91 (in Hebrew).

[48] HCJ 2592/20 *The Movement for Quality Government in Israel v Attorney General* (6 May 2020). See also Daniel Friedmann, 'The Deri-Pinchasi Ruling and Basic Principles of Interpretation' (2020) 44 *Iyunei Mishpat Forum (Tel Aviv Law Review Online Forum)* (in Hebrew).

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The difficulty stems from the different approaches of the Knesset and the Court, respectively. The Knesset upholds the presumption of innocence and has declined to grant an unelected public official the power to dismiss a cabinet minister or a prime minister by filing an indictment against him. It has adopted a uniform and systematic approach in the cases of both a cabinet minister and a prime minister. Basic Law: The Government clearly provides that no minister is required to leave office unless and until he is convicted (the section relating to the prime minister is worded differently from that relating to a cabinet minister, but for our purposes the difference is irrelevant).[49]

The Court thinks otherwise. With its prosecutorial inclination, it treats an indictment as tantamount to conviction, at least for administrative law purposes. In addition, with its symbiotic relationship with, and complete confidence it has in the Attorney General, it sees no difficulty in granting him the power to oust a political figure from his office.

The reason for the incongruity between the Supreme Court rulings relating to a cabinet minister and that relating to a prime minister is purely political. It is not to be found in the relevant judgments; judges do not always disclose the real reasons for their decisions. In the case of an indicted cabinet minister, the Court felt that it had the political power to circumvent the statutory provision by interpreting it against the obvious intention of the legislature, and thus maintain the judicial rule requiring the minister's dismissal. However, the case of Prime Minister Netanyahu was different.

Netanyahu formed a unity government with Ganz, supported by a large majority of 72 MKs, thus ending the deadlock and a series of three elections within eight months. Disqualifying Netanyahu clearly would have led to new elections, the results of which might have been disastrous for the Court. The public was in no mood to go to the polls again. The Court would have been blamed for toppling a unity government and the elections might well have centred around the excessive power of the Court and its dangers. Deterred by the possibility of such a scenario, the Supreme Court made no attempt to circumvent the statutory provisions and unanimously dismissed the petition against Netanyahu.[50]

The Supreme Court reached a similar result in the petition to void the amendments to Basic Law: The Government, which enabled the formation of

[49] The main difference between the Prime Minister and cabinet ministers relates to a conviction that is subject to appeal. A prime minister who is convicted is not yet obligated to leave office; the term as prime minister ends only when the conviction becomes final. In the interim period – namely, after the conviction and before it becomes final – a prime minster can be removed by a political process. A minister must leave office once convicted, even though the conviction is not final until after the right of appeal has been exhausted (as already indicated, this provision regarding cabinet ministers has lost its meaning, as under the Court's ruling a minister must leave office once indicted). These differences do not detract from the points mentioned above – namely, that in both cases the Knesset maintains the presumption of innocence (although the Prime Minister is given a period of grace in the interim period after the conviction and before it becomes final). It is also evident that in both cases the Knesset has no intention of empowering an official such as the Attorney General to remove a political figure from office.

[50] n 48.

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a government headed by rotating prime ministers. The petition was unanimously dismissed.[51] To hold otherwise would have led to new elections, a result the Court could not politically afford.

Today, some three years later, the political arena has completely changed, as has the balance of power between the government and the Supreme Court.

The Netanyahu-Ganz government was formed in May 2020. It was short lived. All the detailed amendments to Basic Law: The Government were of no avail. Netanyahu was able to prevent the rotation by failing to pass a budget.[52]

The next elections were held in March 2021, leading to the formation of a new rotation government headed by Naftali Benet and Yair Lapid. This government collapsed after about one year and in the elections held in November 2022, the bloc headed by Netanyahu won a decisive victory, winning 64 seats.

The new government, formed on 29 December 2022, was based on a coalition of Netanyahu's party, the Likud, with the Haredim (ultra-Orthodox) and extreme right religious parties, which support the settlers and the annexation of at least part of Judea and Samaria (the West Bank).

The composition of the government and the concessions made to the extreme right and ultra-Orthodox parties sent shock waves through large sections of the public. On 4 January 2023, Minister of Justice Yariv Levin announced his plans for sweeping reforms of the legal system, which, in fact, were intended as a counter-revolution to that led by the Supreme Court. The reforms included an override provision by a bare majority of 61, a dramatic change in the composition of the committee for the selection of judges, abolition of the 'reasonableness' ground of judicial review, as well as changes relating to the powers of the Attorney General and the legal advisers to the various ministries.

Technically, it was possible for the government to carry out the counter-revolution. The Basic Laws, which the Supreme Court has turned into a constitution, can be legislated and amended in much the same way as ordinary legislation (though some of them require a majority of 61). Indeed, the Knesset has never treated the Basic Laws as a constitution and has shown little hesitation in amending them. Thus, Basic Law: The Knesset, originally enacted in 1958, has since been amended no fewer than 50 times! Basic Law: The Government was completely re-enacted in 2001 and has since been the subject of eight amendments.

The fact that 61 votes suffice to make fundamental changes to the Basic Laws and that the coalition government was determined to exploit this possibility exposed the Achilles heel of the judicially created constitution. However, these plans for a counter-revolution, coupled with the unpopularity of the

[51] HCJ 2905/20 *The Movement for Quality Government v The Knesset* (12 July 2021). Justice Hanan Melcer rendered a minority reasoning under which the amendments are to remain valid, but the Court should issue a 'qualified warning of voidness' under which constitutional amendments that become immediately binding might be voided in the future or their coming into effect might be postponed until after the next elections.

[52] Such a failure is regarded 'as if the Knesset had decided to dissolve itself before the end of its term, and early elections shall be held …': Basic Law: The Knesset, s 36A.

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government among the secular and moderately religious public, led to massive demonstrations against the government and its counter-revolution. These demonstrations, in which hundreds of thousands of Israelis have participated,[53] have been going on for months. Leading economists have warned that the government plans would have grave economic consequences, and a substantial number of volunteer reserve soldiers have declared that for as long as the government legislative programme continues they would stop their voluntary service.

These developments have been a gift from heaven to the Supreme Court. Criticism of its excessive activism has vanished, as if by waving a magic wand. The demonstrations have provided the Court with massive support. Its political weakness has disappeared, and it can now feel considerably more confident in facing the challenges posed by the government.

One of the major issues relates to judicial review of the Basic Laws. The whole theory of judicial review of legislation was founded on the supremacy of the Basic Laws, which, as construed by the Supreme Court, are a kind of constitution. However, if they form a constitution, then prima facie they are beyond the reach of the Court. Yet, if Basic Laws can easily be enacted and amended, what is there to prevent the Knesset from depriving the Court of the powers that it has arrogated to itself to review legislation?[54]

The question had already arisen in the case of Basic Law: Israel – The Nation-State of the Jewish People (Nation-State Basic Law). Petitions were submitted to the Supreme Court to void this Basic Law on the ground that it discriminates against minorities. This gave rise to the issue of whether there are any limitations on the Knesset's power to legislate Basic Laws. Various theories were discussed, including the one under which constitutional amendments can be reviewed in cases of 'unconstitutional constitutional amendments'.[55] Ultimately the petitions were dismissed and the Court, by a majority of ten to one, upheld the validity of the Basic Law.[56] The President of the Supreme Court, Esther Hayut, who delivered the main judgment, was nonetheless willing to recognise two exceptions to the supremacy of basic legislation. One of them was substantive: namely, a Basic Law cannot deny that Israel is a

[53] Yael Freidson, 'Seven Million Israelis Have Participated in Protests Against Netanyahu's Judicial Coup, Police Chief Says', *Haaretz*, 4 September 2023, https://www.haaretz.com/israel-news/2023-09-04/ty-article/.premium/police-chief-around-7-million-israelis-participated-in-anti-judicial-coup-protests/0000018a-5f41-d845-adfe-ff61a2940000.

[54] The question of whether the Knesset should adopt an override provision, which would enable it to change or annul the Supreme Court's rulings, has long been debated. In fact, it has been part of the government's counter-revolution plans. The main issue concerns the number of MKs that would be required to override the Court's ruling (supporters of the Court have demanded that it should be more than 61, at least 70, maybe even more). However, it transpired that the whole question is moot as the Knesset can easily override the Court's ruling by simply amending the relevant Basic Law. In other words, the override possibility is already built into the system, which enables amending the so-called constitution by a majority of 61.

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

[56] HCJ 5555/18 *Hasson v Knesset of Israel* (8 July 2021). George Karra, an Arab justice, was the only one who dissented.

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Jewish and democratic state. The other limitation was procedural, based on the idea that the Knesset may not abuse its constitutional power. These limitations – which were, of course, obiter dictum – are somewhat vague and open wide avenues for judicial review.

The Nation-State Basic Law was held to be valid, yet the Court had another very potent arrow in its quiver, that of interpretation. It held that the Nation-State Basic Law is to be interpreted as including the right of minorities to equality.[57]

As pointed out earlier, the political atmosphere has since changed completely. The demonstrations have injected new vigour into the Supreme Court, which now faces a much weaker government and Knesset majority. Two new cases relating to Basic Laws will now be decided by enlarged panels. One concerns an amendment to Basic Law: The Government, relating to the Prime Minister's inability to perform his duties (the incapacitation amendment). The Basic Law originally did not specify who is authorised to decide such a matter. It has been suggested that this power is entrusted to the Attorney General and there have been rumours that she is considering holding that the Prime Minister is unable to perform his duties because of his involvement in the legal reforms while his case is pending in court. The Attorney General has denied these rumours. Nevertheless, Basic Law: The Government was amended to counter this possibility: it now provides that the Prime Minister's incapacitation can be decided only by a political process.

The other case is concerned with an amendment to Basic Law: The Judiciary. It provides that no court (including the Supreme Court) will examine the reasonableness of a decision of the government, the Prime Minister, or any other cabinet minister (the reasonableness amendment). The validity of this amendment is to be decided, for the first time in the history of Israel, by a panel consisting of the entire Supreme Court – 15 justices. As already indicated, the Supreme Court has unduly and sometimes even unreasonably expanded the reasonableness ground for judicial review, notably in the context of disqualifying appointments on moral grounds. In fact, there was broad agreement in the Knesset that this ground for judicial review should be limited. However, the reasonableness amendment as it stands is very broad, and it was not supported by any member of the opposition.

Both amendments raise the fundamental issue of whether the Supreme Court can review Basic Laws, which, according to its jurisprudence, form a

[57] The Talmudic legend of The Oven of Akhnai (Bava Metzia 59a-b) demonstrates dramatically the power of interpretation. In that story the sages debated a legal issue regarding the purity or impurity of this oven. The President of the Sanhedrin and a majority of the sages held one view. Rabbi Eliezer, son of Hyrcanus, held a different view. Rabbi Eliezer, with the aid of heaven, performed a number of miracles to prove that the *halakha* (the law) is according to his view. The sages were not convinced, so finally a voice from heaven announced that Rabbi Eliezer's statement of the law is the correct one. The sages rejected the heavenly voice, stating that 'it (the *halakha*) is not in heaven', and ostracised Rabbi Eliezer for his failing to accept the majority interpretation. This is probably the most dramatic demonstration of the unlimited power of the authorised interpreter (in that case the majority of the sages) who is not even bound to accept the ruling of the divine legislator. The authorised interpreter is the master of the law.

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constitution. Theoretically, the Court can claim that it can do so on the ground, already suggested in the case of the Nation-State Basic Law, that a Basic Law impinges on democracy. This would grant the Court broad discretion to intervene in Basic Laws, notably as 'democracy' has a variety of meanings, one of which is a value-based system.[58] These values include a whole set of human rights, many of which are vague and open to different interpretations. To strengthen this ground for judicial review, a new theory, based on the Declaration of Independence, has been invented. It is based on the following statement in the Declaration:

> The State of Israel ... will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

A few days before the date scheduled for the hearings of the petitions against the reasonableness amendment, both Aharon Barak, former President of the Supreme Court, and Yitzhak Zamir, former Justice of the Court, published newspaper articles advocating this theory.[59] Barak states, in his article, that the Declaration of Independence determines Israel's identity and expresses its values as a Jewish and democratic state. The Knesset as a constituent authority is not authorised to deviate from these values and the Supreme Court is authorised to strike down Basic Laws that conflict with them.

The hopping from one legal theory to another – from the Basic Laws constitutional theory to the Declaration of Independence theory – is just one indication that the whole argument is political and result-oriented. It aims to establish the supremacy of the Supreme Court over the Knesset and, if to achieve this purpose, it is necessary to invent new arguments – so be it. This is a political struggle. It is couched in legal terminology, but it is pure politics.

I will not elaborate on the constitutional theory of the Declaration of Independence; it suffices to point out that in the past this theory has been

[58] Sumption (n 25) 68–71.

[59] Aharon Barak, 'The Supreme Court Must Strike Down Laws Violating Israel's Jewish and Democratic DNA', *Haaretz*, 10 September 2023, https://www.haaretz.com/israel-news/judgment/2023-09-10/ty-article-opinion/.premium/protecting-israels-democratic-dna/0000018a-7f47-dc8f-ab8a-ffe7d5820000; Yitzhak Zamir, 'The Basic Law to Void the Reasonableness Ground of Review Rests on Shaky Foundation', *Haaretz*, 24 August 2023, https://www.haaretz.co.il/opinions/2023-08-24/ty-article-opinion/.premium/0000018a-26db-d700-a7ef-fefb078c0000; Yitzhak Zamir, 'Israel Faces the Real Threat of Autocracy. But Israelis Are Rising Up', *Haaretz*, 10 September 2023, https://www.haaretz.com/israel-news/judgment/2023-09-10/ty-article/.premium/the-people-will-save-israeli-democracy/0000018a-7ed6-dd5d-abbe-fefeacfc0000. The petitions against the reasonableness amendment were argued before a panel of 15 on 12 September 2023.

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rejected over and over again. Thus, in *Rogozinski v The State of Israel*[60] the Supreme Court agreed that it is arguable that the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, which compels an apostate to resort to a rabbinical court in matters of marriage and divorce, infringes his freedom of conscience. This Law may thus be incompatible with the Declaration of Independence. Nevertheless, the Court recognised the validity of the Rabbinical Courts Jurisdiction Law on the ground that the Declaration is not a constitution and does not provide grounds for invalidating legislation.

The Supreme Court can, of course, overrule such precedents and bring about another upheaval in the legal system. However, there are serious obstacles in turning the Declaration into a constitution. The document does not even mention democracy, nor does it mention a supreme court. In fact, the Supreme Court did not exist at the time of the Declaration; it was established by the People's Council a few months later. Moreover, the Declaration bases the establishment of the State of Israel, inter alia, on the UN partition resolution. However, Israel does not consider itself bound by the borders of the state as determined by the UN resolution.

There are further problems inherent in the Declaration theory. Section 10 of Basic Law: Human Dignity and Liberty provides that it does not affect the validity of previous legislation. Yet, if the Declaration has binding constitutional authority, it is effective from the date of the establishment of the State of Israel. Can the Supreme Court overrule the *Rogozinski* decision and void the monopoly granted to rabbinical courts in matters of marriage and divorce of Jews in Israel on the ground that it conflicts with the Declaration of Independence, and presumably also on the ground that the Jewish law applied by the rabbinical courts discriminates against women and thus militates against the Declaration?[61]

A host of new issues may arise, one of which relates to the Emergency Regulations enacted during the British Mandate. Many of these regulations are still in force in Israel. They are also in force in the West Bank. Some of them are clearly in conflict with the Declaration of Independence and with Basic Law: Human Dignity and Liberty. Nevertheless, the Supreme Court, relying on section 10 of the Basic Law (mentioned above), continues to recognise their validity.[62] However, if the Declaration is now to be turned into a constitutional document, with retroactive effect, the issue of the validity of the Emergency Regulations will be reopened.

Another serious problem relates to the Absentees' Property Law, 5710–1950, under which Israel confiscated the property of Arab refugees who left the country during the War of Independence. Is this law compatible with the

[60] CivA 450/70 *Rogozinski v The State of Israel* (10 December 1971).

[61] This reasoning may also apply to the legislation that grants jurisdiction in family matters to Islamic courts, Christian courts and other courts over their respective communities. I strongly believe in the need for civil marriage in Israel but it should be introduced by a political process rather than by court decision.

[62] FHHCJ 10190/17 *IDF Commander in Judea and Samaria v Aliyan* (9 September 2019), unofficial translation at https://www.adalah.org/uploads/uploads/SCT_Erekat_Judgment.pdf.

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Declaration of Independence? Will the Supreme Court deal with a petition to restore all this property? I support an arrangement regarding the property of Arab refugees, but it should be the outcome of political agreements that take into account Jewish property left in Arab countries.

If the Court is determined to grant itself the power to review the Basic Laws, it will have to delineate its rules and limitations. It will also have to say something about the limit of the power that it can arrogate to itself, and will have to explain the difference between reviewing ordinary legislation as compared with Basic Laws. In other words, the Supreme Court, the only court in the world that granted its country a constitution, will have to write its contents – a purely political task.

Let us assume that the demonstrations against the government gave the Supreme Court the political power to arrogate authority to review Basic Laws and that it will find the legal tools to do so. This opens the question of reviewing the two amendments (incapacitation and reasonableness), both of which were passed by a small majority (64 votes). This is unlike the case of the rotation government amendment, which was supported by a broad coalition of more than 70 MKs. In legal terms this makes no difference. A law is binding once it has received the minimum number of votes required. A Basic Law is binding irrespective of whether it is passed by 61, 70 or 80 votes. There is no legal hierarchy among Basic Laws, but the political difference is dramatic. A court, notably if its very power to intervene is in dispute, will take into account the extent of public and political support granted to the law that it seeks to review.[63]

On the other hand, even if it is assumed that the Court may intervene in amending a Basic Law if it undermines democracy (an example given is a law depriving a minority of its voting rights), none of these amendments belong to this category. The fact that decisions of the government and its members are not subject to review on the grounds of unreasonableness does not affect the democratic system. This is the situation in other countries as well and was the situation in Israel before the legal revolution that occurred in the 1980s. The Attorney General, in a brief submitted to the Court, took the extreme position that this amendment is most harmful and dangerous. President Hayut also pointed out, in the course of the argument, that the government agrees that there is a rule requiring it to act reasonably. If so, does it not follow that its reasonableness ought to be subject to judicial review?

The answer, of course, is that the reasonableness of the Court is not superior to that of the government. The Supreme Court itself is a governmental authority and yet nobody reviews its holdings, although some of them are patently unreasonable: one such example is the rule invented by the Court that the Prime Minister is not entitled to have his day in court, unless the Attorney General grants him the right to be represented.[64] Numerous decisions of the Knesset and the government are not subject to review, such as the

[63] The Court is unlikely to mention the political consideration. Judges do not always state their real reasons in their decisions.

[64] Above text to nn 28–29.

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decision to establish diplomatic relations with Germany, withdraw from the Gaza Strip,[65] or bomb the nuclear installation in Syria. All of this does not prevent democracy from thriving.

Moreover, even if review on the ground of unreasonableness is excluded, there remain ample grounds for reviewing governmental decisions when they are made without authority, are made for improper purposes, or are based on irrelevant considerations. This was demonstrated by the very recent temporary injunction against the dismissal of Mishael Vaknin as chairman of the board of directors of Israel's postal service, and the issuing of an order nisi against Minister of Justice Levin to explain his failure to convene the committee for the selection of judges.

The incapacitation amendment raises different issues. Arguably, this amendment constitutes personal legislation, intended to protect Netanyahu against the possibility of the Attorney General holding him incapable of performing his duties. In one case relating to ordinary personal legislation, the Supreme Court held that it would come into effect only after the next elections. This solution seems to me inappropriate for the case at hand. The validity of personal legislation, which is generally worded but motivated by the intention to benefit a particular person, has been recognised in the past. Indeed, the Supreme Court recognised the validity of the rotation government amendment, which was clearly intended to ensure the appointment of Benny Ganz as Prime Minister. The Knesset also passed the 'Grunis law', which was generally worded but clearly intended to enable the appointment of Asher Grunis as President of the Supreme Court. An application to void this law was succinctly dismissed by the Supreme Court in a decision that did not conceal the Court's satisfaction with the Grunis law. (Grunis proved to be one of the best Presidents).[66]

Moreover, if the Court decides to void the incapacitation amendment or to postpone its coming into force until after the next elections, we would remain

[65] The case of the evacuation of the Gaza Strip was decided in the heyday of judicial activism. The Supreme Court purported to review the evacuation decision and the legislation that enabled it. A panel of 11 justices wrote a document, of about 300 pages long, entitled 'judgment'. In reality, it was a political document. A court cannot intervene in such a process, which was indeed confirmed by a majority of ten with one dissenter: *Gaza Coast Local Council* (n 22).

[66] HCJ 85/12 *The Movement for Quality Government in Israel v The Knesset* (16 January 2012). When I was Minister of Justice I passed the 'tenures law' under which appointments to the position of President or Deputy President of any court in Israel require a minimum period of three years (until retirement) and would be for seven years (or until retirement, whichever comes earlier). When the retirement date of President Dorit Beinish arrived, Grunis had a few weeks left in which to complete the three years until his retirement at the age of 70. It was still possible to appoint him if Beinish had agreed to retire a few weeks before reaching the age of 70. It was assumed that she would not agree, so Justice Minister Neeman passed the 'Grunis law' under which the requirement of a minimum of three years will not apply to the Supreme Court or the National Labour Court. With regard to this law see also Friedmann (n 47) 798–99. Ironically the Grunis law, which the Supreme Court ardently supported, enables Justice Yosef Elron to present his candidacy for the presidency of the Supreme Court and thus undermine the seniority system, which the legal establishment considers (wrongly in my view) to be a pillar of judicial independence. Elron has less than three years until his retirement.

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in the situation under which there is no procedure to decide upon the Prime Minister's incapacity to perform his duties. Would this open the gate to the legal establishment to arrogate to itself this power? It is an unreasonable solution. The Knesset consistently objected to the deposing of a Prime Minister who had not been convicted, by the Attorney General or the Court. In fact, the Supreme Court had to accept this result when it recognised that Netanyahu could form a government in spite of his being indicted. It is inconceivable that the Court will circumvent this rule and enable a similar result by empowering the Attorney General to hold the Prime Minister incapable of performing his duties.

Other points worthy of mention relate to the panels that will decide these cases and to the majority required in order to void a law. The President of the Supreme Court assigned the reasonableness amendment to a panel of 15 justices and the incapacitation amendment to an 11-justice panel. No explanation was given regarding the difference between the two (is the incapacitation amendment less complicated because it is 'personal'?). Justice Minister Yariv Levin included in his reform plans legislation requiring that panels that review legislation would consist of all members of the Supreme Court (this related to ordinary legislation; the government assumed that the Court could not review Basic Laws). However, this legislation did not pass and the matter remains at the discretion of the President of the Supreme Court.

With regard to the majority required to void legislation, there was broad agreement in the Knesset that the Court could do so only by a special majority (probably two-thirds). The government sought a unanimous decision but was willing to settle for an 80 per cent or 75 per cent majority. Eventually, the law on this matter did not pass, so an ordinary majority in the Court will suffice.

The Court is under pressure from the media[67] and from its reference group, including former justices,[68] to void the amendments to the Basic Laws and to embarrass the government. The case for doing so, however, is rather tenuous. In addition, the government continues to enjoy the support of substantial sections of the population, and the Prime Minister has declared that the Supreme Court has no power to tamper with the constitution. Therefore the Court must reckon with the possibility that further arrogation of power will meet a strong governmental reaction and possibly also massive counter-demonstrations, which will further disrupt the life and economy of this country.

There have been numerous proposals to avert a forthcoming collision between the government and the Supreme Court,[69] but at present the two seem to continue unchecked on their respective courses.[70] All that can be

[67] A variety of arguments are advanced in support of this position, notably with regard to the incapacitation amendment, among them the dangers facing the country if the amendment remains in force; see, eg, Zamir (10 September 2023) (n 59).

[68] n 57 and text.

[69] I was among those who expressed concern about the situation: Daniel Friedmann, 'Emergency Brake', *Maariv*, 11 August 2023 (in Hebrew) (in which I proposed a temporary halt of legislation as well as of decisions related to the legal system).

[70] The government has declared that it will halt the judicial reform, at least for the time being, but insists on changing the composition of the committee for the selection of judges – an explosive subject. It also insists that the Supreme Court has no power to review Basic Laws.

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said at this stage is that the Court has a whole gamut of possibilities. It can dismiss the petitions and content itself with statements (obiter) regarding the possibilities of reviewing Basic Laws in the future. The opposite extreme would be to void the amendments and thus exacerbate its conflict with the government. Alternatively, the Court can move more cautiously and choose an intermediate solution, such as recognising the validity of the reasonableness amendment but declaring that it will interpret it in a way that leaves open the possibility of judicial review in cases of extreme unreasonableness that are tantamount to lack of authority.

Other possible solutions include introducing changes to the amendments or holding that the two amendments (or one of them) will come into force only after the next elections. However, the question arises regarding the ground for such intervention. After all, these are, according to the Court's theory, constitutional provisions in which the Court's power to intervene is highly problematic. Indeed, even if it is assumed that such intervention is possible in extreme situations that undermine democracy, it is hardly possible to argue that any of these amendments pose such a threat.

Finally, a general comment on the crisis. I have nothing positive to say about this government and its reform proposals. However, the Supreme Court, the only court in the world that has invented a constitution for its country, cannot escape responsibility for the legal chaos that now engulfs Israel. It is also difficult to believe that the Supreme Court can resolve this entanglement. It is incumbent on the major political parties to reach an agreement, if not upon an entire constitution, then at least on some basic constitutional rules relating to legislation and judicial review. Unfortunately, the conflicts and animosity between the parties have reached such levels that this seems unlikely to happen in the near future.

8. An update …

On 7 October 2023 the Hamas carried out an incredibly heinous attack on Israel, which led to the 'Swords of Iron' war and to the formation of an emergency unity government. One can safely assume that for as long as the unity government remains in power, it will not initiate any significant reform to Israel's legal system.

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