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ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

The Invisible Safeguards of Judicial Independence in the Israeli Judiciary

Guy Lurie[1]

[1]The Israel Democracy Institute, Jerusalem, Israel
Email: guyL3@idi.org.il

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Abstract

The Israeli democracy regulates the operation of the judiciary through the constraints of formal rules that check the political actors, the individual judges, and the judiciary. Basic laws, laws and regulations prescribe the operation of every subject. Yet beyond these formal rules, informal institutions and practices are sometimes equally important in the operation of the judiciary, as they are in any constitutional system. In Israel, some of these informal institutions are crucial for the flourishing of democracy and the rule of law, through their protection of judicial independence from external political interference. The imminent possibility that political actors may set some of them aside is nothing less than a potential transformation in the constitutional order. Over the past few decades, judges and court administrators have introduced other internal informal institutions in the administration of the Israeli Judiciary, which qualify formal judicial accountability mechanisms in ways that may prove to be detrimental to democratic principles. This article discusses informal institutions that are important in the operation of the Israeli judiciary, separating the former external kind that are conducive to the rule of law—such as the illegitimacy of political and partisan considerations in judicial appointments—and whose disregard may signal democratic decay from the latter internal kind that may prove detrimental to the courts—such as opaquely changing who is responsible for court administration. Lastly, the political attempt to change informal institutions, detailed herein, can be seen as a harbinger of the current attempt to change formal institutions in the constitutional status of the judiciary in Israel.

Keywords: Israel; judiciary; judicial independence; judicial overhaul; informal institutions

A. Introduction

In the first few months of 2023 the Israeli Minister of Justice spearheaded a governmental initiative to "overhaul" the judiciary by reducing its powers and granting the government complete control over the selection of judges.[1] With that intent, the Chair of the Constitution, Law and Justice Committee of the Knesset, Israel's parliament, introduced several coalition-backed bills that sought drastic changes in the laws with regard to the judiciary: (1) Limiting the Supreme Court's powers of judicial review of legislation (and some governmental decisions) and, in a similar fashion to the Canadian "notwithstanding clause", granting the Knesset the power to

[1]Jeremy Sharon, *Justice Minister Unveils Plan to Shackle the High Court, Overhaul Israel's Judiciary,* TIMES OF ISRAEL (Jan. 4, 2023), https://www.timesofisrael.com/justice-minister-unveils-plan-to-shackle-the-high-court-overhaul-israels-judiciary/.

override by an absolute parliamentary majority any decision of the Court to strike down legislation, which would be in force for a year following the term of the overriding Knesset, or permanently if a consecutive Knesset made a decision to that effect with an absolute parliamentary majority; (2) granting complete and permanent immunity from judicial review to any statute which the Knesset calls a "basic law", even though it is legislated by the same parliamentary process as all other statutes; (3) granting the government and its parliamentary coalition a majority on the Committee for the Selection of Judges, thus giving the government absolute control over the selection of judges for all the courts in Israel, including justices on the Supreme Court.[2]

Massive demonstrations, the parliamentary opposition, and various organizations criticized these bills as amounting to an attempt by the government to capture the courts and to overthrow almost all checks on governmental power. In light of this resistance, the government tried at first to pass only the bill on the selection of judges, then presented another version of this bill arguing that it was less extreme,[3] and then, at the end of March 2023, faced with growing public demonstrations and a general strike, Prime Minister Benjamin Netanyahu declared a pause in this legislative process.[4]

Rebuked for its efforts to pass a formal change to the law governing the selection of judges, it is unclear if the coalition will try to relaunch its initiatives in this regard—particularly the attempt to amend the law in a way that would give the coalition decisive control over the selection of judges—or if it will instead try to reach similar though less ambitious goals by informal acts. For instance, in May 2023, Haaretz reported that some members of the coalition were speculating that the retirement of the President of the Supreme Court in October 2023—upon reaching the mandatory age of retirement—could allow them to gain more control over the courts without formally revising the law. Supposedly, the coalition would do so by ignoring the informal institution of seniority which has seen the Selection Committee select the senior justice on the Supreme Court's bench to serve as its president, and instead either replace the retiring President with a justice that the coalition prefers or to leave the position empty.[5]

In this day and age of constitutions and constitution-making,[6] we sometimes grant formal written constitutional norms greater weight in the promotion of democracy.[7] Yet modern scholarship in the field of historical and comparative institutional analysis also recognizes the importance of unwritten rules and social institutions in the creation and maintenance of a self-enforcing constitutional order,[8] which, according to this field, is crucial for a regime to achieve a credible commitment to the rights of the public, and thus, economic success.[9] Similarly, constitutional law scholarship in recent years has increasingly focused on what has been called the "constitution by convention," namely the informal institutions that play a critical role in any

[2]Draft Bill to Revise Basic Law: The Judiciary HH (Knesset), 3085 (draft for discussion published by the Chair of the Constitution, Law, and Justice Committee on January 17, 2023) (Isr.), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawPrimary.aspx?t=lawlaws&st=lawlawsbasic&lawitemid=2000042; Draft Bill to Revise Basic Law: The Judiciary (Amendment—Strengthening the Separation of Powers) (third revision) (published on Feb. 13, 2023) (Isr.), https://fs.knesset.gov.il/25/law/25_ls1_1792677.pdf; Draft Bill to Revise Basic Law: The Judiciary (Amendment—Judicial Review over the Validity of a Law) (fourth revision) (published on Mar. 5, 2023) (Isr.), https://fs.knesset.gov.il/25/law/25_ls1_1935515.pdf.

[3]Draft Bill to Revise Basic Law: The Judiciary (third revision) (published on Mar. 27, 2023) (Isr.).

[4]Michael Hauser Tov, Noa Shpigel & Josh Breiner, *Netanyahu Pauses Judicial Overhaul After Unprecedented Strikes, Protests Rock Israel,* HAARETZ (Mar. 27, 2023), https://www.haaretz.com/israel-news/2023-03-27/ty-article/.premium/netanyahu-announces-freeze-to-judicial-overhaul-as-general-strike-shutters-israel/00000187-22bb-d7c4-ab8f-febf8f980000.

[5]Michael Hauser Tov, *Amid Spat Over Identity of Next Chief Justice, Israel Weighs Leaving the Position Empty*, HAARETZ (May 2, 2023), https://www.haaretz.com/israel-news/2023-05-02/ty-article/.premium/amid-spat-over-identity-of-next-chief-justice-israel-weighs-leaving-the-position-empty/00000187-d902-d9b4-abaf-f9bec0f90000.

[6]*See, e.g.,* Zachary Elkins, Tom Ginsburg & James Melton, *Data Visualizations*, COMPAR. CONST. PROJECT, https://comparativeconstitutionsproject.org/ccp-visualizations/ (providing historical data on new constitutions).

[7]Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMPAR. POL. STUD. 969 (2010).

[8]Douglass C. North, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 140 (1990).

[9]Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

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constitutional order beyond the text of the constitution itself.[10] These institutions are particularly vulnerable exactly because they are not part of the text of the constitution. While they are crucial for a regime to achieve a credible commitment that it will refrain from assailing the rights of the public, their very informality makes them less able for this purpose than formal institutions. Assaults on these informal institutions by authoritarian-minded populists are thus often harbingers of democratic decay or democratic backsliding.[11] Indeed, as shown below, the initiatives by Netanyahu's government to revise the law regarding the composition of the Selection Committee—the formal institution—in order to capture the courts came in the footsteps of previous Netanyahu governments' attempts to reach similar goals by changing informal institutions with regard to the selection of judges.

Similarly, in the study of judiciaries, scholarship has long recognized that the ability of judges to maintain *de facto* judicial independence has a sometimes tenuous connection with *de jure* judicial independence, the written formal rules mandating and maintaining judicial independence.[12] Some *de jure* written rules of judicial independence—particularly the institutional design of the process for appointment, promotion, and removal of judges—may prove important.[13] However, social institutions, economic circumstances, legal culture, and traditions are often no less important for *de facto* judicial independence,[14] indeed for the definition of judicial independence itself, as well as for its perception.[15] Thus, these informal institutions are an important part of any credible commitment to the rights of the public and the consequent flourishing of democracy. For instance, as Tara Leigh Grove has shown with regard to the US federal judiciary, its judicial independence relies not only on the text of the US Constitution, but also on "conventions of judicial independence," in other words, seeing court-curbing measures such as court packing as constitutionally out of bounds. As Grove demonstrates, these "conventions" were historically and politically constructed and may be similarly discarded, and the independence of the judiciary is—for this reason—fragile.[16]

Israel is no exception. The judicial independence of its judges relies on a combination of formally written rules and informal institutions and practices. As shown herein, basic laws, statutes, and regulations prescribe the operation of every subject in the judiciary, from the minutiae of the judicial process and the administration of the courts to the status of judges, their independence, their appointment, and their disciplining. Yet beyond these formal rules, informal

[10]Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CAL. L. REV. 1913 (2020). For a focus on how such informal institutions change, see MARK TUSHNET, AMENDING AN UNWRITTEN CONSTITUTION: COMPARATIVE PERSPECTIVES, *in* AMENDING AMERICA'S UNWRITTEN CONSTITUTION (Richard Albert et al. eds., 2022).

[11]Gerald J. Postema, *Constitutional Norms—Erosion, Sabotage, and Response*, 35 RATIO JURIS 99 (2022); Issacharoff & Morrison, *supra* note 10, at 1919–20. See also in this volume, Attila Vincze, *Schrödinger's Judiciary: The Formality at the Service of Informality in Hungary*, 24 GERMAN L. J., in this issue (explaining ways in which informality can serve as a mechanism to undercut judicial independence).

[12]David Kosař & Samuel Spáč, *Judicial Independence*, *in* CAMBRIDGE HANDBOOK TO CONSTITUTIONAL THEORY (Richard Bellamy & Jeff King eds., forthcoming 2024); Bernd Hayo & Stefan Voigt, *The Long-Term Relationship Between De Jure and De Facto Judicial Independence*, 183 ECON. LETTERS 108603 (2019); Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187 (2017); Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948–2012*, 3 J. L. & CTS. 223 (2015); Julio Ríos-Figueroa & Jeffrey K. Staton, *An Evaluation of Cross-National Measures of Judicial Independence,* 30 J. L., ECON., & ORG. 104 (2014).

[13]James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J. L. & CTS. 187 (2014).

[14]*See, e.g.*, Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. OF POL. 422 (2003); *see also* Peter H. Russell, *Toward a General Theory of Judicial Independence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 5 (Peter H. Russell & David M. O'Brian eds., 2001); Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 103 (Stephen B. Burbank & Barry Friedman eds., 2002).

[15]JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 374 (2006); John Bell, *Judicial Cultures and Judicial Independence*, 4 CAMBRIDGE Y.B. EUR. LEGAL STUD. 47 (2002).

[16]Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

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institutions and practices are sometimes equally important in judicial governance.[17] In Israel, as in other jurisdictions—such as the US, as demonstrated by Grove—these informal institutions are crucial for achieving a credible commitment to the rights of the public, and thus for the flourishing of democracy and the rule of law, since they protect the principles of separation of powers and judicial independence against external political interference.[18] Judges and court administrators in the past few decades have promoted other internal informal institutions and practices for administering the Israeli judiciary, which qualify formal judicial accountability mechanisms without sufficient transparency, thus possibly to the detriment of democratic principles.[19]

This article discusses informal institutions and practices that are important in the operation of the Israeli judiciary. It distinguishes two types of informal institutions and practices. First, those that are used to protect judicial independence from external threats, whose disregard may signal democratic decay. Actors within the judiciary, namely judges and court administrators, instituted the second type, which changes the responsibility for the administration of courts in a way that may prove detrimental to the courts because of its lack of transparency and accountability. The differentiation of the former kind of informal institutions from the latter is important, as will be shown herein.

Informal unwritten institutions and practices are not necessarily legally binding constitutional conventions. Supreme Court case law and Israeli jurisprudence have suggested three conditions for recognizing an informal practice as a legally binding constitutional convention: (1) The existence of a practice, (2) which is recognized as binding, and (3) is normatively justified.[20] However, the Supreme Court has not yet determined if this doctrine exists in Israel.[21] Indeed, in a relatively recent case in 2020, the Supreme Court of Israel decided that one of the informal practices regarding the judiciary, namely the practice of the Knesset—to appoint an opposition member as one of its two members in the nine-member Committee for the Selection of Judges, is not a binding constitutional convention that may be enforced by the Court. The Court decided that this informal practice did not meet the first two conditions mentioned above. First, it had not been consistent enough through the years. Even before the Knesset in 2020 ignored it—for the first time in nearly three decades—twice during previous Netanyahu governments the representative of the opposition was in fact ideologically close to the coalition. Second, it was not seen by the political actors as binding.[22]

These informal institutions are fragile exactly for this reason: Their legally unenforceable nature. Thus, once these informal institutions are assailed by a strong political actor, they are relatively easily overcome. Authoritarian-minded populists, whose playbook includes an attack on judicial independence and the separation of powers,[23] thus find these practices and informal institutions a weak spot in the defenses of democracy and the rule of law.[24]

It is important not only to figure out which informal practices and institutions defend judicial independence, but also to remain vigilant to possible assaults on them. As will be shown herein, former Netanyahu governments had already acted against some of the informal institutions and practices that undergird judicial independence in Israel and protect it against external political threats. Indeed, as noted, recently, the government began a new campaign against formal institutions as well. But exactly for this reason, the judiciary must be wary of its role in keeping and maintaining the inner informal practices that qualify mechanisms of accountability. While the

[17]*See infra* Section C.

[18]*See infra* Section D.

[19]*See infra* Section E.

[20]HCJ 9029/16 Aviram v. The Minister of Justice (Feb. 1, 2017) (Isr.) [hereinafter The Aviram Case]; Shimon Shetreet, *Custom in Public Law*, 21 Isr. L. Rev. 450 (1986).

[21]The Aviram Case

[22]HCJ 4956/20 The Movement for the Quality of Government in Israel v. The Knesset (Aug. 20, 2020) (Isr.).

[23]On the so-called "populist playbook" and its focus on undermining institutional checks including the courts, the separation of powers, and judicial independence, see Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78, 126 (2018).

[24]Postema, *supra* note 11, at 99; Issacharoff & Morrison, *supra* note 10, at 1919–20.

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judges and court administrators who run the judiciary may find it justified to maintain such informal practices, in terms of managerial, bureaucratic, or even institutional judicial independence considerations, their very informal nature makes it harder to guard against political assaults on those practices that protect the independence of individual judges.

Before the article proceeds, I will add one final note on the contemporary political context. At the time of the writing of this Article in July 2023, the current Netanyahu government has paused its legislative agenda of overhauling the formal institutions controlling the manner in which judges are appointed, though it is considering returning to it, and it is also trying to legislate its planned "judicial overhaul" in other spheres—already passing a law that limits the courts' powers of judicial review of "unreasonable" governmental decisions. Furthermore, as noted, the government is perhaps considering going back to policies of previous Netanyahu governments acting against informal institutions in the appointment of judges. Indeed, as noted herein, the changes that had already been made in previous years in the informal institutions governing the judiciary were harbingers of this paused attempt at formal change.

This article proceeds as follows. Section B identifies the most important principles in the construction of the Israeli judiciary. Section C describes in general the types of norms, both formal and informal, that check and regulate judicial governance in Israel. Section D describes informal rules in the appointment process of judges in Israel that are designed to protect judicial independence from external threats and are under political pressure to change. Section E describes informal processes within the judiciary that judges and court administrators have constructed in the past two decades, which qualify statutory mechanisms of judicial accountability. Section F concludes.

B. Principles in the Operation of the Judiciary

Before analyzing the informal institutions of the judiciary in Israel for the purposes of this article, one must first describe the importance of formal and informal institutions for the protection of judicial independence and accountability, particularly in the Israeli context. Judiciaries were designed to resolve disputes according to the law in a way that would uphold the rule of law and protect human rights, and are thus, crucial in maintaining a credible commitment to those.[25] Going beyond the traditional view of judges as "mouths" declaring the words of the law,[26] judges are also, in a way, policy makers upholding constitutional and legal principles.[27] Judges and judiciaries may have other goals and biases, which may sometimes conflict with the role of the judiciary.[28] The judicial branch is also a bureaucratic organization, which must be managed in order to achieve its function of resolving disputes, and allowing for efficient, timely, and easy access to justice.[29]

In light of these varied goals and interests, scholarship in recent years has pointed out a few principles that deal with the design and operation of judiciaries in order to achieve their ends,

[25]*See, e.g.*, Beth Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INTL. ORG. 225 (2010) (discussing credible commitment to human rights in the context of international human rights treaties); Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights,"* 16 IND. J. GLOB. LEGAL STUD. 437 (2009).

[26]CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS liv. 6, ch. 3 (1748).

[27]*See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE 400–03, 413 (1986); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279–95 (1957).

[28]*See, e.g.*, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997).

[29]*See, e.g.*, THE EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, ENCJ SOUTH-EASTERN SEMINAR ON TIMELINESS (Nov. 9–10, 2015); THE GENERAL ASSEMBLY OF THE EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, THE HAGUE DECLARATION ON PROMOTING EFFECTIVE JUSTICE SYSTEMS (Jun. 3–5, 2015).

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particularly judicial independence and judicial accountability, but also the efficiency of justice, quality of justice, access to courts, and diversity. These principles at times conflict with one another. Judicial independence must sometimes be qualified by the principle of the accountability of judges to the citizens and the other branches of government, particularly in light of views seeing judges as policymakers.[30] Furthermore, and importantly for our purposes, when analyzing judicial independence[31] and the mechanisms used to protect it, one may point to the external—in this article the focus will be on external threats from the other branches of government—and internal threats to judicial independence, particularly from the people administering the judiciary.[32]

The way of finding a balance between the various principles, particularly the tension between judicial independence and judicial accountability, is something that varies among jurisdictions. Instead of a "one size fits all" formula, each country must seek to find its way to realizing and maintaining all the various principles according to its own distinct constitutional order, political and legal culture, and particular history.[33] The same is true for Israel. A relatively young post-World War II democracy, Israel lacks an entrenched constitution, has only a partial bill of rights, has relatively few checks on its relatively strong executive, with a single-chamber parliament and a unitary—rather than federal—system.[34]

An important point: Lacking an entrenched constitution, almost every constitutional norm, including in the most important basic laws—not to mention any statute—may be changed in Israel by any parliamentary majority. Thus, the safeguards of judicial independence, including those instituted formally in law, crucial as they are for maintaining a credible commitment to the rule of law, are in such a system as important as they are feeble. The safeguards may be changed or discarded by any parliamentary majority, which is by definition at the grasp of all of Israel's governments, who require such a majority to govern. In other words, the constitutional regime concentrates power in a way that undermines the defenses against a possible populist attempt to attack the separation of powers.[35] We will keep this analysis in mind in the next section as we consider the types of norms that check and regulate the operation of the judiciary in Israel.

[30]*See* Nuno Garoupa & Tom Ginsburg, Judicial Reputation: A Comparative Theory 102–04 (2015) (discussing the dialectics between these two principles, which are in tension but, as will be seen herein, sometimes actually complement each other); *see also* Mads Andenas & Duncan Fairgrieve, *Judicial Independence and Accountability: National Traditions and Standards*, *in* Independence, Accountability, and the Judiciary 3 (Guy Canivet et al., eds., 2006); Horatia Muir Watt, *Quelques remarques d'ordre comparative sur la notion d'accountability appliquée à la justice*, *in* Independence, Accountability, and the Judiciary 3, 275–79 (Guy Canivet et al., eds., 2006); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y. Univ. L. Rev. 962 (2002); Russell, *supra* note 14, at 19–20; Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* Judicial Independence at the Crossroads: An Interdisciplinary Approach 3, 9–45 (2002); Russell, *supra* note 14, at 14–16.

[31]Russell, *supra* note 14, at 11; Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* Judicial Independence: The Contemporary Debate 590 (Shimon Shetreet & Jules Deschênes eds., 1985).

[32]*See, e.g.*, Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* Judicial Independence: The Contemporary Debate 590, 639 (Shimon Shetreet & Jules Deschênes eds., 1985); Julio Ríos-Figueroa, *Independence in Judicial Hierarchies: Civil Law Systems, in* Research Handbook on Law and Courts 105 (Susan M. Sterett & Lee Demetrius Walker eds., 2019); Maria Popova, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (2012); Michal Agmon-Gonnen, *Judicial Independence: The Threat from Within*, 38 Isr. L. Rev. 120 (2005).

[33]*See, e.g.*, Ferejohn & Kramer, *supra* note 30, at 975–76.

[34]Amichai Cohen, Checks and Balances: The Override Clause and its Effect on the Three Branches of Government (2018); Itzhak Galnoor & Dana Blander, The Handbook of Israel's Political System (2018).

[35]*Cf.* Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 59 Colum. J. Transnat'l L. 1 (2020).

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C. What Types of Norms Check and Regulate the Operation of the Judiciary in Israel?

The Kelsenian hierarchy of norms on the status of the judiciary in Israel is composed of three levels: Basic laws that have constitutional status, regular laws, and government-promulgated regulations. In lieu of a complete and entrenched constitution, Israel has 13 basic laws that, although legislated through the same process as regular laws, have been deemed as having constitutional status since the Supreme Court's landmark 1995 *Mizrahi Bank* decision, which also first recognized that the Court has powers of judicial review of legislation.[36] One of these 13 "basic laws" is the Basic Law: The Judiciary,[37] which includes the rule that judges must decide only according to the law, and includes protections of this decisional judicial independence principle, as well as mechanisms for judicial accountability. These mechanisms are the system of judicial appointment, tenure, disciplining and removals. As already noted, this basic law is unentrenched, and the Knesset may amend or even completely strike it out, just by a regular parliamentary majority. Other issues, such as the powers of courts and their administration, are set out in the 1984 Courts Law[38] and in various laws and regulations—promulgated by the Minister of Justice—dealing with the minutiae of civil procedure as well as with criminal procedure.[39]

Even if basic laws, statutes, and regulations prescribe the operation of every subject in the judiciary, from the judicial process and the administration of the courts to the appointment of judges and their disciplining, informal institutions and practices are still sometimes equally important in the operation of the judiciary. These institutions and practices do not necessarily have legally binding force. Indeed, as already noted in the Introduction, in a relatively recent case in 2020 the Supreme Court of Israel decided that the informal practice of the Knesset, Israel's parliament, to appoint at least one opposition member—as one of the two Knesset members in the nine-member Committee for the Selection of Judges—is not binding and cannot be enforced in court.[40] The Court decided the issue following the first time in nearly three decades in which the Knesset ignored this informal practice, though the Knesset has since returned to it.

Informal practices and institutions exist in Israel in each and every sphere of judicial administration. In the pre-deliberation stage, for instance, the president of each individual court has wide discretion in the area of allocation of cases, formation of panels, and such, generally empowered by sections 27, 38, and 48 of the Courts Law. In the communication of court decisions and responses to them, there are social norms governing the manner in which politicians respond to court decisions that they dislike. Particularly, there are a plethora of informal institutions governing the selection of judges and their disciplining. For instance, such institutions mandate ethnic and gender diversity.[41] There are also such institutions in the management of the courts in general, including, for instance, the informally expanding powers of the Director of Courts,[42] and in the management of each court in particular, such as regulating working schedules, monitoring of delays and informal reprimands on problematic conduct, as well as the drafting of judges into civil, criminal, and other divisions.[43]

[36]*See, e.g.*, Suzie Navot, Constitutional Law of Israel 148–151 (2016); Gary Jeffrey Jacobsohn & Yaniv Roznai, Constitutional Revolution 1, 183–223 (2020).

[37]Basic Law: the Judiciary, 5748–1984, SH 1110 78 (Isr.).

[38]Courts Law, (consolidated version) 5744-1984, SH 1123 198, as amended (Isr.).

[39]*See* Civil Procedure Regulations, 5779–2018 [Hebrew]; Criminal Procedure Law, 5742–1982, SH 1043 43 (1982–83) (Isr.), https://main.knesset.gov.il/EN/about/history/Documents/kns10_criminallaw_eng.pdf.

[40]HCJ 4956/20 The Movement for the Quality of Government in Israel v. The Knesset (Aug. 20, 2020) (Isr.).

[41]Guy Lurie, *Appointing Arab Judges to the Courts in Israel, 1948–1969*, 34 Isr. Stud. Rev. 47 (2019); Keren Weinshall, *Courts and Diversity: Normative Justifications and their Empirical Implications,* 15 L. & Ethics Hum. Rts. 187, 200 (2021).

[42]Guy Lurie et al., *Agencification and the Administration of Courts in Israel*, 14 Regul. & Governance 718 (2020).

[43]Staffing in a specific division within a court is in practice decided by the president of each specific court according to the needs of the court, according to a Letter from the Freedom of Information Act Officer of the Judiciary, to author (Dec. 12, 2022).

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This article will not deal with all types of informal institutions and practices but will instead focus on those of constitutional significance.[44] Among these, the focus will be on two types: Informal institutions and practices that protect judicial independence against external political threats and informal institutions and practices that internally influence accountability and inner judicial independence. The next section explores the first type, particularly those dealing with the appointment of judges, while the following section explores the second type, focusing on such institutions and practices regarding both the appointment of judges and the administration of the courts.

D. Informal Institutions in the Appointment of Judges: Protection of Judicial Independence against External Threats

This section will focus on informal institutions and practices used in Israel in order to protect judicial independence from external political threats. It shows how previous Netanyahu governments attempted to undermine informal institutions and to discard informal practices in the selection of judges. After a brief background note on the appointment of judges in Israel, each of these informal institutions and practices will be discussed. This section shows the importance of these informal institutions for the purposes of protecting judicial independence, as well as their feebleness and the possibility of capturing the courts if the government succeeds in discarding them.

I. The System of Appointing Judges in Israel

The system of the appointment of judges, as well as their promotion and removal, influences decisional judicial independence.[45] The aforementioned two laws, the Basic Law: The Judiciary and the Courts Law, define these procedures in Israel in a way that checks the powers of elected officials in making these decisions, thus attempting to guard against political encroachments that would undermine judicial independence. The law determines that judges of all courts—including justices of the Supreme Court—are to be appointed "by the President of the State, in accordance with the selection of the Committee for the Selection of Judges."[46] The Selection Committee is composed of nine members, who are "the President of the Supreme Court, two other justices of the Supreme Court chosen by their fellow justices, the Minister of Justice and another Minister assigned by the Government, two Members of the Knesset selected by the Knesset, and two representatives of the Bar Association, selected by the National Council of the Association."[47] The chairperson is the Minister of Justice. The Selection Committee decides on the promotion of judges to all courts, with decisions to appoint justices to the Supreme Court necessitating a seven-member majority of the Selection Committee, as opposed to appointments to all other courts which necessitate a regular majority of the Selection Committee.[48] Removal of judges from office is made upon a decision either of the Selection Committee "adopted by a majority of seven members at least" or of a Disciplinary Court that is made up of judges or retired judges appointed by the President of the Supreme Court.[49]

The Selection Committee is a judicial self-governing body—a third of its membership being judges[50]—which includes members representing the three branches of government as well as the

[44]In the sense described in Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1397 (2022).

[45]*See, e.g.*, Melton & Ginsburg, *supra* note 13, at 187.

[46]§ 4(a), Basic Law: the Judiciary (Isr.).

[47]§ 4(b), Basic Law: the Judiciary (Isr.).

[48]§ 7(c), Courts Law (Isr.).

[49]§§ 7, 13, Basic Law: the Judiciary.

[50]According to the definition of David Kosař, *Beyond Judicial Councils: Forms, Rationales, and Impact of Judicial Self-Governance in Europe*, 19 GERMAN L.J. 1567 (2018).

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legal profession. This nine-member Selection Committee was inspired by the judicial council model,[51] but it has narrower powers than do the European judicial councils.[52] Israel instituted this mechanism for appointing judges in 1953 instead of the older mechanism, in which the government had the power to appoint judges, with the approval of the Knesset in the case of appointments to the Supreme Court. This was a reform the government had explicitly advanced to strengthen judicial independence.[53]

The balanced membership of the Selection Committee seeks to promote and balance the principles of judicial independence and judicial accountability by including in the Selection Committee a majority of professional members—the justices and the legal professionals—who are best placed to consider professional considerations, and a minority of political members, thus preserving democratic accountability and allowing for wider social considerations in the appointment process.[54] In practice, fulfilling both principles in a balanced manner without giving more weight to judicial accountability at the expense of judicial independence, also depends on several informal institutions and practices that check political power in this appointment process. As we will see, the system implicitly depends on these informal institutions and practices no less than on its formal statutory rules to protect judicial independence and maintain a credible commitment to democracy and the rule of law.

The first informal institution is that the President of Israel appoints the judges not only "in accordance with the selection of the Committee," as the Basic Law states, but following a strong informal institution under which the President is bound by the Committee's selection. The President cannot appoint a different judge, nor refrain from appointing a judge selected by the Committee. The President's role is regularly seen as entirely ceremonial, lacking any discretion.[55] Yet this is only an informal institution. It is deeply embedded and even presumed by the authors of the 1953 law,[56] and since then also by the Supreme Court, which denied a petition against the Selection Committee and its practice of submitting only a single candidate for each position to the President.[57] Yet, it is still an informal institution. What would be the consequences if a President decided she could not appoint a certain judge to a higher court because of certain ideological faults

[51]*See* Mins. of the Knesset, vol. 9, 441–42 (1953) (explaining that in 1953, the Israeli Government, and particularly its Minister of Justice, pushed forward the establishment of the Selection Committee through the inspiration of the French and Italian Councils for the Judiciary); *see also* GUY LURIE, THE JUDICIAL SELECTION COMMITTEE 19–21 (2019). On councils for the judiciary, see Wim Voermans, *Councils for the Judiciary in Europe*, 8 TILBURG FOR. L. REV. 121 (2000); Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53 (2009); Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L.J. 1223, 1257–92 (2014); DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Samuel Spáč, *Recruiting European Judges in the Age of Judicial Self-Government*, 19 GER. L.J. 1567, 2077–2104 (2018).

[52]Note that European judicial councils usually combine the roles played in Israel by the Selection Committee—appointment and promotion of judges—and the Director of Courts—administrative competences. On judicial councils, see the sources listed at *supra* note 51. On the Director of Courts, see Lurie et al., *supra* note 42, at 718.

[53]Eli Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law and Politics*, *in* APPOINTING JUDGES IN THE AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES (Kate Malleson & Peter Russell eds., 2005).

[54]As nicely elucidated by the Israeli Supreme Court in The Aviram Case; *see also* GUY LURIE, THE JUDICIAL SELECTION COMMITTEE 63 (2019). For a comparative overview of balancing these two principles through a composite membership of the appointment body, see GAROUPA & GINSBURG, *supra* note 30, at 102–04.

[55]HCJ 594/83 Hoffer v. the Members of the Appointment Committee, 37(4) PD 24 (1983) (Isr.) [hereinafter The Hoffer Case]; The Public Commission on the Procedure of the Appointment of Judges, Report of the Commission (2001); AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF ISRAEL 1056 (6th ed. 2005).

[56]*See* Minutes of the 53/B meeting of the Constitution, Law and Justice Committee of the Second Knesset (July 29, 1953) (describing in the original legislative debates the way he envisioned the process, MK Shapira, one of the architects of the Israeli system, said: "If the Committee decides to select one of the candidates [. . .] the President usually decides to approve this proposal." He refrained from saying that the President "must" approve the selection, though it was assumed that he would invariably approve it.

[57]*See* The Hoffer Case at 24.

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she saw in that judge's rulings? What if that President were influenced in her decision by political considerations, even though hers is considered to be a ceremonial position acting above politics, usually because of her being a former politician?

But other more poignant and relevant examples are informal institutions and practices that have been under contention in recent years, and politicians may discard them in the near future, with dire consequences in terms of the protection of judicial independence from external political encroachments.

II. Professional Considerations in the Appointment of Judges

The first informal institution is that the Selection Committee considers professional considerations first and foremost in the appointment of judges and, second, if professional merit reaches the required level, it also considers social diversity.[58] Putting aside the social diversity consideration, the primacy of professional considerations is itself an informal and, as recent years show, a relatively feeble institution despite its importance in the context of protecting judicial independence.[59]

But first, some words on what formal law says. There are some formal rules regarding professional considerations, such as the minimum professional qualification set by sections 2–4 of the Courts Law, in the common law tradition, a minimum number of years of experience as an attorney or as a lecturer in a law faculty, and section 11a of the Rules of Procedure of the Committee for the Selection of Judges, promulgated by the Selection Committee, that stipulates the criteria used to evaluate the suitability of candidates—all of them related to legal merit or professional qualities. That said, nowhere does it say in law that only professional considerations—aside from social diversity—may be considered by the Selection Committee and that other criteria may not be. This informal institution is not set in any law.[60] But could the Selection Committee consider the legal views of candidates, which in Israel are related to partisan politics, such as the desired level of activism of the courts, their views on the status of Jewish law in Israel, or the level of judicial protection that should be accorded to various constitutional rights?

Until only a few years ago such legal philosophies were considered out of bounds. After its inception, the informal institution was that the Selection Committee was supposed to consider only professional qualifications and relevant character traits.[61] Notable in this context is the well-known rejection in 2005 of the candidacy for the Supreme Court of Professor Ruth Gavison by then President of the Supreme Court, Aharon Barak, on the "charge" that "she has an ideological agenda."[62] The informal institution that legal philosophies were out of bounds changed gradually

[58]On the commitment of the Committee on judicial diversity, see Lurie, *supra* note 41, at 50.

[59]On the importance of objective criteria such as merit in the selection of judges, see Recommendation CM/Rec(2010)12 of the Committee of Minsters to Member States on Judges: Independence, Efficiency and Responsibilities (2010), https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d.

[60]It could be based on Israeli administrative law, which is mostly unwritten and based on court precedents, and particularly on the principle that an authority may only consider relevant considerations in reaching decisions.

[61]*See, e.g.*, the argument of MK Shapira against granting the Knesset the authority to approve the selection of the Committee with regard to candidates to the Supreme Court: "MK Rubin [. . .] proposes to grant veto power to the house on the proposal of the Committee whose majority is not of the government but professional, whose considerations are unrelated to politics." Mins. of the Knesset, vol. 9, 2436–37 (1953) (translated from Hebrew by the Author). See also the minutes of the first Committee that decided on the appointment of two Supreme Court justices, where all members of the Committee shunned "party" or "political" considerations and professed a consensus on the need to weigh legal and personal qualities, with some debates only on the weight of judicial diversity considerations—in that case, the need for the appointment of Jewish religious justices and a Jewish *Mizrahi* justice. Mins. of the Committee, Israel State Archives CL-3291/21 (Dec. 22, 1953). For more recent views, see the Public Commission on the Procedure of Appointment of Judges, *supra* note 55.

[62]Yuval Yoaz, *Supreme Court Head Barak Explains Opposition to Gavison Appointment*, HAARETZ (Nov. 13, 2005), https://www.haaretz.com/2005-11-13/ty-article/supreme-court-head-barak-explains-opposition-to-gavison-appointment/0000017f-db18-db5a-a57f-db7a5fec0000.

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and recently, as the political system responded to the Supreme Court's transformed role with its new power after 1995 to review legislation, and its changing jurisprudence and expanded role in public life.

This process occurred particularly following the tenure of Supreme Court Presidents Meir Shamgar (1983–1995) and Aharon Barak (1995–2006), for example through the Supreme Court's jurisprudence that opened its doors to public petitioners and to more political questions by limiting the scope of the doctrines of standing and justiciability. First, considerations related to legal philosophies began to be utilized after 2008, especially during Prime Minister Benjamin Netanyahu's second and third governments (2009–2015), and particularly in the selection of Supreme Court justices.[63] In 2008, the formal rules of selecting justices to the Supreme Court changed, necessitating a seven-member consensus in the Selection Committee for appointing justices as opposed to the simple majority of former years. Since the government and the Knesset have four members out of the nine members on the Selection Committee, this new rule effectively granted veto powers to the political members of the Selection Committee—as well as to the justices—and created a dynamic of compromise candidates and deals, with right-wing politicians attempting to promote "conservative" candidates.[64]

Indeed, not only members on the Selection Committee, but some public opinion as well, have been receptive to the idea that legal philosophy—and its correlative assumed political allegiance—is a relevant consideration, particularly the question of the candidates' so-called "liberal" or "conservative" leanings or legal philosophies. These legal philosophies resonate in the political system, which has come to be polarized around such questions as the justices' levels of judicial activism and views on the proper relations between Israel's Jewish—national or religious—character and its democratic and rights' protection character.[65] Thus, an attempt to appoint "conservative" justices is seen as an attempt to appoint right-leaning ones, while an attempt to appoint "liberal" justices is seen as an attempt to appoint left-leaning ones. In reality, naming these candidates as "liberal" or "conservative" is sometimes misleading, especially when such designations are based on their professional careers, for instance when they involve judges who have worked in commercial, civil, or criminal law. Thus, some of the attempts to promote such "liberal" or "conservative" judges to the Supreme Court are actually founded on assumptions regarding their political leanings or their religious background.

III. New Informal Screenings of Candidates and Meetings of the Selection Committee

Since 2015, during Prime Minister Benjamin Netanyahu's fourth government (2015–2019), this dynamic of utilizing political considerations and reaching deals between justices and politicians has also been applied to all the other courts as well. The Minister of Justice—and Selection Committee's chairperson—Ayelet Shaked (2015-2019), explicitly attempted to appoint "conservative" judges to all courts including to the Supreme Court, and has claimed to be largely successful,[66] through a process of screening the candidates for their background and views. It should be mentioned that if the label of "conservative" is somewhat misleading for candidates to

[63]Iddo Porat, *Solving One-Side Polarization: Supreme Court Polarization and Politicization in Israel and the U.S.*, 15 L. & ETHICS HUM. RTS. 221 (2021).

[64]*See* Porat, *supra* note 63.

[65]*See* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANNU. REV. POLIT. SCI. 93 (2008) (explaining these processes are of course related to wider constitutional processes in Israel, particularly the "constitutional revolution" of the 1990s and the political response to it, as well as the judicialization of politics); NAVOT, *supra* note 36, at 148–51; JACOBSOHN & ROZNAI, *supra* note 36.

[66]Ayelet Shaked, Former Minister of Justice of Israel, Speech on the 100 Days Plan (Mar. 20, 2019) (Isr.), https://www.youtube.com/watch?v=-fQ_dCF_rN8 (claiming to having appointed or promoted "334 judges and 6 Supreme Court justices" out of a system with under 800 judges).

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the Supreme Court, it is even more misleading for candidates to lower courts, where it is mostly a code word for right-wing opinions or the religious background of the candidates.[67]

Since Shaked's tenure as Minister, some judges that were candidates for promotion to higher courts have reportedly come to informal interviews with political members of the Committee for the Selection of Judges, despite directives by the President of the Supreme Court against such interviews.[68] Similarly, other candidates—not judges—have been known to have lobbying meetings with political members of the Committee.[69] Beyond these meetings, some political members of the Selection Committee continue to conduct informal background screenings of candidates.[70] These informal processes also include informal meetings between Selection Committee members in attempts to reach a consensus on candidates, particularly in appointments to the Supreme Court in which a seven-member consensus is necessary. As the President of the Supreme Court once explained, she saw the need for these informal meetings following Minister Shaked's campaign to appoint conservative judges and justices. As part of this campaign, according to the then President of the Supreme Court, the late Miriam Naor, she realized that the Minister and the members from the Bar Association first began holding these informal meetings, and reached the formal meetings when already in agreement on the candidates. She thus saw the necessity to also conduct such informal meetings with other members of the Selection Committee.[71]

Since the law also charges the Selection Committee with the promotion of judges to higher courts, these screenings, informal interviews, and campaigns to promote "conservative" judges are undermining the principle of judicial independence from the political system. They hinder the protection of judicial independence, which was maintained partly through the informal institution that frowned upon such practices. These political encroachments on judicial independence were made possible through politicians' disregard of the informal institution that partisan and political considerations are off the table. As far as the informal screening of candidates by politicians goes, the politicians pushed the screenings through also in disregard of the aforementioned stipulation of the President of the Supreme Court that disallowed private interviews between sitting judges and politicians.

IV. An Opposition Member on the Selection Committee

Minister Shaked's self-proclaimed success was made possible through a coalition she built in the Selection Committee with the two members from the Bar and the other political members. Her success in assembling her coalition was aided by her gradually disregarding another informal practice, namely the practice of having at least one of the two members from the Knesset come from the opposition. This practice began in 1992. Since then, it has become an institution and a check on the power of the ruling coalition and the Executive in the appointment of judges and has

[67]As explicitly stated in a televised interview by the head of the Bar who was also a member on the Selection Committee and an ally of Minister Shaked, Shaked wants "conservative judges, and if possible also religious or right-wing judges." *See* Uvda Program, CHANNEL 12 (Nov. 22, 2017) (Isr.), https://www.mako.co.il/tv-ilana_dayan/2017/Article-8a19b6c5884ef51006.htm.

[68]For a description of this screening process by one of the MKs on the Committee, see Tomer Avital, *A Day with Simcha Rothman: "I've Met Candidates for the Supreme Court in Secret Apartments Because Hayut Does Not Allow It*," SHAKUF (Dec. 13, 2021) (Isr.), https://shakuf.co.il/28751. For the directive of the President of the Supreme Court disallowing these meetings, see Letter of the President of the Supreme Ct. to the Presidents of Cts (Nov. 26, 2017) (Isr.).

[69]A meeting that became infamous is that between a candidate, who later had to resign from office, and a minister of government who was a member of the Selection Committee. *See* Avishai Greenzweig, *Where Disappeared from the Minister's Calendar the Meeting of Kahlon with Judge Kreif Prior to her Appointment?*, GLOBES (Feb. 5, 2020) (Isr.), https://www.globes.co.il/news/article.aspx?did=1001317458.

[70]*See* Avital, *supra* note 68.

[71]Netael Bendel, *Naor: Member of the Committee for the Selection of Judges Coordinated Opinions Without Me, So I Began to Conduct Unofficial Meetings*, HAARETZ (Feb. 18, 2020) (Isr.), https://www.haaretz.co.il/news/law/2020-02-18/ty-article/.premium/0000017f-e0ea-d75c-a7ff-fcefa7ff0000.

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strengthened the non-political nature of the appointment process. Thus, this institution has helped to promote the principle of judicial independence without detracting from the principle of accountability.

During Minister Shaked's tenure as head of the Selection Committee, from 2015, one of the Knesset Members on the Selection Committee was at first part of the opposition, but from a right-wing party that shared much of the right-wing coalition's views. It was his membership that helped her build a coalition on the Selection Committee that allowed her to appoint "conservative"-leaning judges to court. After a while this Knesset member's party joined the coalition, but he remained part of the Selection Committee. A petition to the Supreme Court against his continued tenure on the Selection Committee was rejected for being a delayed petition.[72] Later, when a new unity government was formed between the centrist Blue and White party and the right-wing Likud party (Benjamin Netanyahu's fifth government, in 2020-2021), it found it convenient to disregard the informal practice and appoint a Knesset member from each governing block to the Selection Committee, ignoring the opposition's seat.

In 2020 a petition against the government's disregard of the practice of having an opposition member on the Selection Committee was submitted to the Supreme Court, but the Court rejected it. While the Court recognized that since 1992 there has been an informal "practice" of including one member of the Knesset from the right wing and one from the left wing or center, or at least one member of the Knesset from the opposition,[73] it was not consistent enough to become constitutionally binding. That said, the Court noted that this practice was desirable in order to preserve judicial independence through the independence of the members of the Selection Committee.[74] In 2021, and again in 2023, an opposition member returned to the Selection Committee, in a reversion to the informal institution.

For the purposes of this article, the informal character of this institution is significant, as it turned out that political actors were able easily to discard it once they were so inclined. The opposition member is a check on the concentration in the ruling coalition of the power to select judges as well as in their promotion. Disregarding this informal institution comes at the expense of the principle of judicial independence.

V. Appointment of the President of the Supreme Court: The Institution of Seniority

The President of the Supreme Court in Israel is selected by the Committee for the Selection of Judges. According to Section 8 of the Courts Law, the Committee selects only from among the justices of the Supreme Court. Informally, it invariably selects the senior justice on the Supreme Court bench to serve as its President, the "institution of seniority".[75] In a system in which the President of the Supreme Court is chosen from among its members—as opposed to other systems in which the President is chosen from outside the Supreme Court—the informal institution of seniority is intended to protect the decisional independence of the justices, to prevent attempts by justices to curry favor, and bring about their appointment as President.

Like other similar informal institutions in Israel which are designed to protect judicial independence against external political encroachments, the institution of seniority has become contentious in recent years, with law-makers and ministers of justice arguing against it.[76] Essentially their argument is that this informal institution detracts from the democratic accountability designed in law for this appointment process. That said, the Selection Committee still follows the seniority institution, as it has since the establishment of the Supreme Court of

[72]*See* The Aviram Case at paras. 3, 19 to the opinion of Justice Neal Hendel.

[73]In 2009–2013 and since 2015, the opposition member was from the same ideological block as the coalition.

[74]*See The Knesset* Case at paras. 27–28, 30 to the opinion of Justice Yitzhak Amit.

[75]*See* Suzie Navot, *The Seniority System as a Constitutional Convention*, ICON-S-IL BLOG (Jan. 16, 2017) (Isr.) (arguing that this informal institution has become a constitutional convention).

[76]*See, e.g.,* Mins. of the Const., L. & Just. Comm. of the Knesset (Sep. 7, 2017) (Isr.).

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Israel. But if the Committee were to discard it, as is currently suggested in parliamentary debates over the government's initiatives[77] and as discussed in the coalition as an alternative to these initiatives,[78] that move would further undermine the protection of judicial independence.

VI. Summary of This Section

The political critique of the informal institutions in the appointment of judges and attempts by politicians to institute new informal practices are nothing less than an attempted change of constitutional significance in the administration of the Israeli Judiciary. This attempt by politicians to change these informal institutions and practices is as significant as their current attempts to change the formal institutions in the appointment of judges, and they have the same purpose of gaining control of the courts. Indeed, the earlier attempts by politicians to change the informal institutions were harbingers of their current attempts to change the formal ones.

While some view these changes as positive developments and others—such as myself—view them negatively as attempts to undermine the safeguards of the principle of judicial independence, one has to agree that these informal practices have profoundly changed the nature of judicial appointments in Israel and that the political campaigns to more change will have potentially greater impacts if any of them prove successful. While some of the informal institutions and practices still stand—the institution of seniority and the membership of the Selection Committee of an opposition member—the attempts to change them are attempts by politicians to control the courts.

The attempts to cast off these informal institutions thus put at risk the judges' *de facto* judicial independence, without touching at all their *de jure* judicial independence, by attempting to create a judicial culture that is more responsive to political pressure. In this light, attempts to dismantle these informal institutions endanger the Israeli constitutional order's credible commitment to the rights of the public, the rule of law, and democracy, shedding light on the feebleness of such informal institutions in maintaining this commitment.

E. Informal Practices that Modify Mechanisms of Accountability in Court Administration

Meanwhile, in the past two or three decades, actors within the judiciary, namely judges and court administrators, have established other internal informal institutions and practices in the administration of the Israeli Judiciary. These institutions and practices have been qualifying or modifying statutory mechanisms of judicial accountability and transparency. These qualifications may not be problematic as regards their content—whose normative implications are outside the scope of this article, but are problematic due to their informal nature and opaque rather than transparent qualities. As such, these institutions and practices may potentially undermine the inner decisional independence of the judges.

I. Administration of Courts in Israel

The 1984 Courts Law sets out that the Minister of Justice is charged with implementing and promulgating civil procedure regulations in the courts as well as regulations on other administrative matters, such as the courts' days of operation. The Minister is also responsible for creating new courts, and according to Section 82 of the Courts Law the Minister prescribes the "administrative arrangements for the courts." The Director of Courts, who heads the Administration of Courts, is, also, "responsible to the Minister for implementation of the

[77]*See, e.g.,* Mins. of the Const., L. & Just. Comm. of the Knesset (Mar. 19, 2023) (Isr.).
[78]*See* Hauser Tov, *supra* note 5.

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administrative arrangements" according to Section 82. Since the Director of Courts is charged with overseeing the regular day-to-day operation of the courts, formally it seems that ultimate responsibility for court administration is in the hands of the Minister of Justice.

That said, the President of the Supreme Court is recognized as the head of the judiciary,[79] in what has been called a "constitutional convention,"[80] and beyond some housekeeping responsibilities set in law the President in practice also has many responsibilities in court administration, for instance through directives the President issues.[81] Several decisions in court administration, including the appointment of the Director of Courts and the presidents of courts, while at the hands of the Minister of Justice, by law require the consent of the President of the Supreme Court. Significantly, according to an informal practice the Director of Courts has also always been a senior judge—the law explicitly states that the Director does not have to be a judge. So, in practice, the Director of Courts is a "servant of two masters"—the Minister and the President of the Supreme Court—both of whom have responsibilities in court administration, with the Director being the liaison between them.[82]

II. Agencification of Court Administration

The above description of court administration in Israel already shows that it includes important informal practices that go beyond the formal stipulations set out in the Courts Law, such as the practice of appointing only judges as Directors of the Courts. In the past two or three decades this process has evolved further. During his tenure as the President of the Supreme Court (1983–1995), Meir Shamgar tried and failed to formally introduce a US style of judicial governance with an aborted attempt to create a judicial conference that would oversee the administration of courts.[83] However, the judiciary has attempted similar informal acts since then. Namely, since Aharon Barak's tenure as the President of the Supreme Court (1995–2006) a more gradual and largely informal move towards a more autonomous style of judicial administration has been taking place. The Director of Courts and the unit he heads (so far all directors have been male), the Administration of Courts, have in this period developed into a strong agency that runs the courts in a centralized manner.

Without any formal legal change to that effect, in practice the Administration of Courts has undergone a process of 'agencification' and has become a fully-fledged institution that regulates the operation of the courts and the conduct of judges with much greater organizational capacity and centralization than it had in the past.[84] For instance, the Director organizes the day-to-day operation of the courts through directives such as the use of media in courts or through regulatory powers. For example, since 2012, the Director has been empowered to transfer large numbers of cases from one court to another to relieve caseload pressure, with the approval of the president of the Supreme Court and the Minister of Justice. The Administration of Courts does so with a degree of partial autonomy, which past Directors of Courts could not have dreamed of.[85]

This process of agencification has tightened the regulation on judges and thus transformed formal accountability mechanisms. Significantly, it has been a mostly informal process, and thus not completely transparent. Though some of the Director's new powers have been formally granted in law, most of his new (since the 1990s) regulatory powers regarding the judges are

[79]HCJ 7067/07 Netanel v. The Justice Minister (Aug. 30, 2007) (Isr.).

[80]Izhak Zamir, The Supreme Court 205 (2022) (Isr.).

[81]A petition to the Supreme Court questioned the legality of these directives and was upheld in HCJ 4703/14 Sharon v. President of the Supreme Court (Nov. 30, 2014) (Isr.) [hereinafter, The Sharon Case].

[82]*See* Lurie et al., *supra* note 42, at 718; *see also* Yair Sagy et al., *A History of the Administration of Courts in Israel*, 40 J. Israeli Hist. 234, 355–79 (2023).

[83]*See* Sagy et al., *supra* note 82.

[84]*See* Lurie et al., *supra* note 42, at 718.

[85]*Id.* at 718.

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informal. The judges' work is now under the intense scrutiny of the Director, for instance through the use of a central computerized system that monitors judges' work, for example, the number and type of cases assigned to each judge.[86] This process has also transformed the accountability of the Director.

In addition, while in accordance with Section 82 of the Courts Law the Director is held accountable before the Minister of Justice, in informal practice since the inception of this position he has also been held accountable before the President of the Supreme Court, whose consent was needed for the Director's appointment.[87] The Director now enjoys greater autonomy also in terms of the question of *what* he is held accountable for before the Minister. It seems that in informal practice, Directors in the past two decades have considered themselves accountable before the Minister for smaller parts of their responsibilities than Directors in the more distant past, while they remain in the orbit of the President of the Supreme Court, but in general have greater autonomy as part of the process of agencification.[88] Thus, these informal practices have transformed both the formal accountability of judges—now under greater scrutiny by the Director—and the Director—now less accountable before the Minister. In addition, they have introduced opaqueness and uncertainty in the exact spheres of responsibilities because of the informalities involved.

III. Informal Managerial Authorities at the Judiciary and Individual Court Levels

Informal practices have transformed the accountability of judges not only through the informal managerial authority of the Director, but also through informal powers of the presidents of courts. The result of these informal practices is uncertainty and lack of transparency in terms of who is responsible for managerial authorities, as detailed in this section. As already mentioned, the president of each individual court has wide discretion in the area of the allocation of cases, formation of specific panels, and such, generally empowered by sections 27, 38, and 48 of the Courts Law. The presidents of the courts generally follow an informal practice according to which they allocate cases and form panels automatically, without their actual intervention, except in exceptionally difficult cases in terms of the legal question or the number of litigants or, in the Supreme Court, in cases of special public significance.[89] The President of the Supreme Court forms the panels for some special publicly significant cases according to an informal rule of seniority, allocating such cases to the longest serving justices on the bench.

On the legal basis of the presidents of courts' powers to allocate cases and to select panels, and perhaps also on their inherent powers as presidents of courts, in each specific court the president enjoys wide discretion in the management of the court and its judges.[90] The same is also true for the President of the Supreme Court, who, as already noted, issues directives on the administration of all the courts based on an interpretation of inherent powers.[91] While in the past there has been

[86]*Id.*

[87]*See* Sagy et. al, *supra* note 82.

[88]Lurie et al., *supra* note 42, at 729, 732.

[89]*See* Letter from the Freedom of Information Act Officer of the Judiciary, to author (Dec. 12, 2022); *see also* Meron Gross & Yoram Shachar, *How Are Supreme Court Panels Selected: A Quantitative Analysis*, 29 HEBREW U. L. REV. 567 (1999) (Isr.) (explaining there has been a lot of speculation on the ways in which the President of the Supreme Court selects judges for panels); Chen Maanit, *Hayut Selected the Judges in 19 out of 7,986* Cases, HAARETZ (Feb. 10, 2022) (Isr.) https://www.haaretz.co.il/news/law/2022-10-02/ty-article/.premium/00000183-94eb-d22b-adb3-bcff240c0000 (explaining between January 2020 and September 2022, the President of the Supreme Court allocated cases—rather than allowing them to be automatically allocated—in only 19 out of the 7,986 cases opened in that period); Yehonatan Givati & Israel Rosenberg, *How Would Judges Compose Judicial Panels? Theory and Evidence from the Supreme Court of Israel*, 17 J. EMPIRICAL LEGAL STUD. 317 (2020) (explaining in some proceedings in the High Court of Justice, judges used to informally select their peers at the panel).

[90]For example, regulating working schedules, monitoring of delays, and informal reprimands on problematic conduct.

[91]On the legal basis of these directives, *see* The Sharon Case.

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some variance in the way that each individual president managed her court[92]—various schemes in terms of the allocation of cases—the centralization and agencification of the courts' administration has today resulted in a more unified approach. Namely, as noted, the Administration of Courts issues directives on diverse issues such as the ability of judges to work from home, or when they are entitled to sabbatical leave, which are then applied either by the Administration or locally by the president of the court.[93]

Perhaps this centralization is helped by another informal institution: Informal sitting committees that have been formed in the past two decades. These committees are decision-making and policy-making forums at the judiciary-wide level which include the Presidents of Courts' Forum, the District Courts Presidents' Forum, the Magistrates Courts Presidents' Forum, the Labor Law Courts Presidents' Forum, and the Family Law Court Vice Presidents' Forum.[94] Each forum consists of the office holders mentioned—all the presidents of all the courts in Israel sit on the Presidents of Courts' Forum—and discusses issues that relate to its courts. For example, the Labor Law Courts Presidents' Forum discuss issues that relate to the Labor Law Courts.

The question, then, of who takes managerial decisions in court administration remains somewhat unclear because of the informalities involved. The presidents of courts seem to be formally responsible for court administration in each of their courts, though legally the issue is not completely clear. However, in practice the Administration of Courts seems to exert a lot of influence. At the judiciary level there are several decision-making bodies, from the Director of Courts and the President of the Supreme Court, through the various decision-making collegial bodies such as the Presidents of Courts' Forum, finally to the Minister of Justice. Who manages the judges? To whom are they accountable in practice? And who is then held accountable for the management of the courts and the judiciary?

IV. Informal Disciplinary Sanctions

A poignant example of the ways in which informal managerial practices instituted by judges and court administrators have created opacity in the *de facto* accountability of judges, mentioned in the previous sections, may be seen in the issue of disciplinary proceedings against judges. As already noted, the Basic Law: The Judiciary stipulates that judges are subject to the jurisdiction of a Disciplinary Court composed of judges or retired judges appointed by the President of the Supreme Court. The powers of the Disciplinary Court are set out in the Courts Law and include sanctioning judges for improper behavior under Section 18 of the Courts Law. According to Section 19 of the Courts Law, the sanctions may include a remark, a warning, a reprimand, transfer to another court, or removal from office. The proceedings of the Disciplinary Court are quite rigid, and, for instance, it is not able to impose sanctions which are not set out in the Courts Law, such as the temporary suspension of a judge.[95]

Perhaps for this reason, the presidents of courts, the Director of Courts, and the President of the Supreme Court utilize informal disciplinary action.[96] A judge slow to decide cases or behaving improperly might face, for instance, an informal reprimand agreed upon by the President of the judge's court and the President of the Supreme Court.[97] This informal practice goes beyond the

[92]Sagy et al., *supra* note 82.

[93]Some of these directives are published and some are not. The two mentioned directives were not published but included in Letter from the Freedom of Information Act Officer of the Judiciary, to author (Dec. 12, 2022).

[94]Letter from the Freedom of Information Act Officer of the Judiciary, to author (Jan. 17, 2023).

[95]HCJ 6301/18 Judge Poznanski Katz v. the Minister of Justice (Dec. 27, 2018) (Isr.).

[96]Lurie et al., *supra* note 42, at 730; Zamir, *supra* note 80, at 234.

[97]*See* Avishai Greenzweig, *This Judge Was Caught Copying a Verdict and Was Caught. Now He Did It Again and is Facing Removal,* GLOBES (May 25, 2022) (Isr.), https://www.globes.co.il/news/article.aspx?did=1001413102 (explaining a judge whose conduct was found lacking by the Ombudsman of the Judiciary, was reprimanded, and it was decided to delay any future promotions for four years).

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statutory accountability mechanism, in other words, the formal disciplinary proceedings of the Disciplinary Court, that the law has put into place for judges. Not a lot is known about these informal proceedings because of their lack of formality or transparency. Apparently, the judiciary sees these practices not as being meant to deal with "disciplinary problems" but rather with managerial problems such as inefficient judges, as part of the inherent unlegislated authority of the President of the Supreme Court to manage the courts.[98] Perhaps for this reason judges tolerate these practices and consent to them. Again, informality has created a lack of transparency as to what takes place in these proceedings, and thus also uncertainty as to the *de facto* accountability of judges.

V. Informal Judge-led Processes in the Appointing of Judges

Finally, informal judge-led processes are also apparent in the appointment of judges, and some of them have in recent years eroded the transparency of this process, and thus, indirectly, public accountability for it. Formerly, all the justices on the Supreme Court used to decide in an informal meeting whom among the candidates they would support for selection for the Supreme Court.[99] That was until the Courts Law was revised in 2004 to state that the members of the Selection Committee must make their decisions without influence from the body they represent on the Committee.

Still, two current informal processes led by judges and justices must be mentioned. First, the President of the Supreme Court has formed a two-member committee charged with assessing on behalf of the President the rulings of Magistrates Court judges wishing to be promoted to the District Court. This informal committee is not mentioned in law, but the President of the Supreme Court established it in 2007, and in 2019 the President also published a directive regulating it.[100] This committee is a crucial phase in assessing the professionalism of the candidates for promotion, as it helps the President of the Supreme Court to form her opinion on which of the judges seeking promotion she would propose as candidates to the Selection Committee in accordance with section 7(b) of the Courts Law, which states that only the Minister of Justice, the President of the Supreme Court, or three members of the Selection Committee "as one" may propose candidates.

Second, the Selection Committee has decided that candidates who are not already judges must go through an examination lasting several days led by three judges and two psychologists, with observers from the Israeli Bar. This examination and its significance in the process of appointing judges were not specified in law, but instead in a decision of the Selection Committee.[101] Thus, the weight that the Selection Committee gives these examinations is unclear, and it has been known for candidates to fail the examination but still be appointed judges. These two crucial informal processes in the appointment of judges, though going through institutionalization, are still largely opaque to the public and thus are problematic in terms of transparency and accountability.

VI. Analysis and Summary of This Section

All of these inner informal rules and proceedings in court administration, led by judges and court administrators—namely, actors within the judiciary—have modified or qualified formal accountability mechanisms. By informally taking responsibility for various managerial processes, these judges and court administrators are transforming the judicial accountability mechanisms set out in law.

[98]The Sharon Case at 8.

[99]Shimon Shetreet, On Adjudication: Justice on Trial 279 (2004) (Isr.).

[100]Directive 1-19 of the President of the Supreme Court (published July 23, 2019, revised May 5, 2021) (Isr.).

[101]Mins. of the Selection Comm. 5 (Sep. 8, 2015) (Isr.); Directive 5-09 of the Director of the Courts, Directive on the Handling of a Request to be Appointed Judge (June 7, 2009).

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These practices may not necessarily be problematic in themselves. As already noted, every judicial system promotes managerial interests pertaining to the efficient running of the courts. Several judicial systems have strengthened court governance and have in the past few decades transferred administrative responsibilities to various judicial self-governing bodies, and it may or may not be desirable to do so in Israel.[102] Making judges accountable for the quality of their decisions—through assessing them in their promotion—and for their efficiency and good conduct—through the regulation of their conduct by the growing institutional capacity of the Administration of Courts—is an important public interest. Some of these practices may improve court performance and help to protect institutional judicial independence.

However, every judicial system must find the proper balance between these public interests and preserving the decisional independence of judges. Through their informal nature and their opaque rather than transparent qualities, these informal practices shift the balance that formal law attempts to obtain, making them problematic in terms of democratic principles. Indeed, when judges and court administrators high in the hierarchy of the judiciary take informal decisions in the management of the courts without transparently holding themselves accountable for them, the risk is that these practices may potentially undermine the inner decisional independence of the judges or their *de facto* judicial independence.[103] For instance, judges wishing to advance in the court system may wish to show the President of the Supreme Court that they decide according to her understanding of the law, or may wish to show their efficiency before the Director of the Courts, instead of simply deciding according to their understanding of the law.

F. Conclusion

The importance of the informal institutions and practices surveyed herein shows that for an understanding of the balance in Israel between the principles of judicial independence, judicial accountability, and the quality and efficiency of justice it is not enough to be aware simply of the formal rules governing the judiciary. The informal rules are part of Israel's "constitution by convention," namely the practices and informal institutional arrangements that play a critical role in its constitutional order, beyond the text of the Basic Law: The Judiciary and the Courts Law.[104]

The political campaigns of previous Netanyahu governments against the informal institutions in the appointment of judges, which were set up to protect judicial independence against external political threats, were thus harbingers of the current Netanyahu government's initiatives against formal institutions designed for the same purpose,[105] such as the aforementioned attempts to change the membership of the Selection Committee into a more politically one-sided one controlled completely by the ruling coalition.

The possibility that politicians will disregard informal institutions and practices, such as utilizing only professional considerations in appointment, the membership of an opposition member on the Selection Committee, and the institution of seniority in appointing the President of the Supreme Court, is nothing less than an informal constitutional change that detracts from the safeguards of judicial independence, thus threatening judges' *de facto* independence without touching, as of yet, their *de jure* judicial independence. In this light, when politicians act to demolish these informal institutions, they are actually attempting to dismantle the invisible

[102]As noted, the normative desirability of the content of these processes deserves a separate, more in-depth discussion, which is outside the scope of this Article. For various views on the matter, see for example, Melton & Ginsburg, *supra* note 13; Bobek & Kosař, *supra* note 51, as well as the sources mentioned in Lurie et al., *supra* note 42, at 734.

[103]On the importance of formality and transparency for preserving inner judicial independence, see for example, Tim Bunjevac, *The Rise of Judicial Self-Governance in the New Millennium*, 44 MELBOURNE UNIV. L. REV. 812, 833 (2021). For potential problems in informal and opaque decision-making for inner judicial independence, see Ríos-Figueroa, *supra* note 32, at 112.

[104]*Cf.* Issacharoff & Morrison, *supra* note 10.

[105]*Cf.* Grove, *supra* note 16.

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safeguards of judicial independence, which maintain Israel's credible commitment to the rights of the public, the rule of law, and democracy.

The Israeli constitutional context makes the dangers of democratic decay due to these political assaults particularly dire. First, these assaults are especially dangerous because of the ease with which any parliamentary majority can revise or revoke any constitutional norm, including the constitutional safeguards of judicial independence, because of the lack of an entrenched constitution. Second, they are especially dangerous in light of the aforementioned concentration of power in the hands of the coalition-controlled executive in the Israeli system of government and the correlative feebleness of the safeguards against populist assaults on the separation of powers and judicial independence.

The conclusion is that some of the informal rules and institutions protecting judicial independence, mentioned herein, should undergo a process of formalization through an entrenched basic law. While informal rules and institutions are a necessary component of any credible commitment to the rule of law and democracy, maybe the Israeli case shows that they are not enough to completely fulfill this purpose. In the present atmosphere of authoritarian populism, some formalization and entrenchment of these informal rules is necessary for preventing democratic decay. Indeed, Israel's formal safeguards of judicial independence are also feeble, as shown by the current governmental attempt to dismantle them by revising the law in a way that would allow the coalition to gain a majority in the Selection Committee. These formal institutions are feeble because of their lack of entrenchment in a constitution or in an entrenched basic law. This law should also go through a process of entrenchment.

The inner informal practices in the judiciary that are used by judges and court administrators to qualify the formal measures of judicial accountability are also problematic, not necessarily for their content—whose normative implications are outside the scope of this article—but for the informal manner in which they transfer responsibility over court administration. Moreover, some of these informal decisions made by presidents of courts or by the Director of Courts in the management of the courts, because they are made opaquely without the decision makers holding themselves accountable for them, risk undermining the inner decisional independence of the judges.

Finally, the informal institutions in court administration, led by judges, make it difficult in terms of legitimacy for the judiciary to fight the current political assaults on the formal institutions protecting judicial independence, as well as previous political assaults on the informal institutions mentioned above, also used to protect judicial independence.[106] These problems reinforce the conclusion that some formalization and entrenchment of informal institutions is necessary for maintaining the judiciary's legitimacy as a bulwark protecting Israel's credible commitment to the rule of law and human rights.

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[106] *Cf.* David Kosař et al., *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, 15 EUR. CONST. L. REV. 427 (2019).

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