THE PECULIAR CASE OF THE ISRAELI LEGAL SYSTEM*

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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The Israeli legal system often draws a great deal of confused and excited attention from outsiders—critics and well-wishers alike. It is a constant subject of adoring praise, scornful derision, and genuine curiosity. Due to the way in which the line between the legal and non-legal has been entirely obscured, almost any issue in Israeli politics, culture, security, economics, and society will have a dominant legal element. Events and controversies directly involving the legal system itself seem to generate an exceptionally high degree of interest and concern. This was true over the years even before the current efforts at reforming Israel's judiciary, and recent events have brought this interest to a peak.

Yet despite its similar language and trappings, the Israeli legal system sharply diverges from many established and accepted norms in Western, democratic, liberal countries, and its familiar appearance can be deceiving. As Judge Richard Posner observed in his insightful 2007 essay on Israeli jurisprudence, "some foreign legal systems, even the legal system of a democratic nation that is a close ally of the United States, are so alien to our own system that their decisions ought to be given no weight by our courts."[1]

Understanding some of these fundamental differences is critical for anyone trying to make sense of Israeli current affairs, and of developments in the Israeli legal world in particular. Those who support Israel and who wish to see its continued prosperity and stability ought to be especially conscious of such flaws (as they can only be called) and of their cumulative and detrimental effects on Israeli government and society.

What follows is a list of ten key points in which the Israel legal system stands out as singularly unconventional. Each characteristic—each flaw—alone illustrates the extent to which Israel deviates from conventional legal norms in a democratic society. But these flaws are naturally interrelated and often overlap, and indeed the aggregated sum of their effects is larger than its parts. This essay deliberately does not directly address recent efforts at reforming Israel's judiciary. Any serious evaluation of current reforms requires an impartial and dispassionate understanding of Israel's underlying legal challenges, which are best presented and discussed without the polarizing and muddying effects of current affairs and preconceived opinions.

Needless to say, the discussion of each issue will be unavoidably generic and brief. This essay focuses on public law and avoids private law

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[1] Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007), https://newrepublic.com/article/60919/enlightened-despot.

altogether. Such a list is not exhaustive and is not intended as a comprehensive introduction to the Israeli legal system.[2] Furthermore, some of the details and descriptions here could quickly become obsolete or outdated, due the bewildering pace of change within the rapidly shifting Israeli legal landscape.

The object of this essay is to alert the reader to some of the Israeli system's most severe flaws—perhaps highlighting the areas which require urgent rectification—as things stand at the time of this writing. Those interested in the current initiative for legal reform in Israel—regardless of one's position on the matter and whatever becomes of it—will benefit from a deeper and broader understanding of the legal reality forming the background for efforts at legal change. This list may even serve as a warning to legal systems elsewhere, as to some pitfalls and risks about which responsible citizens and policymakers ought to be vigilant. At the very least, this essay may demonstrate the limited capacity of a reader in evaluating Israeli legal current events, and may encourage non-expert observers or critics to reserve judgment when considering many law-related Israeli issues.

And indeed, such cautious skepticism is generally warranted. Unlike most other developed democracies, very few foreigners will find it easy to follow—let alone fully comprehend or effectively scrutinize—Israeli legal events and developments. Even the most earnest efforts of an outside observer at understanding Israeli jurisprudence may be easily frustrated by significant geographical, cultural, and linguistic obstacles. The relative isolation of Israel has most likely contributed to the widening gap between Israeli legal thought and that of most Western democracies.

The coming years may well bring much-needed dramatic change to our legal system (perhaps sooner than expected), some of which will likely be decried by detractors as "democratic backsliding" or as acts of a sinister nature. This essay might provide a sobering perspective to counter such alarmism.[3] This essay will also hopefully illustrate the necessity of (and challenges to) individuals and organizations that seek to repair

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[2] For a modern and readable English-language introduction, see DANIEL FRIEDMANN, THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL'S LEGAL REVOLUTION (2016); GIDEON SAPIR, THE ISRAELI CONSTITUTION: FROM EVOLUTION TO REVOLUTION (2018).

[3] *See* Yonatan Green, *The Judicial Apocalypse is not upon us*, THE TIMES OF ISRAEL (Jan. 8, 2023), https://blogs.timesofisrael.com/the-judicial-apocalypse-is-not-upon-us/.

the Israeli legal system, such as the Israel Law & Liberty Forum (of which the author is a co-founder).[4]

I. EXTREME UNREASONABLENESS: THE COURT AS CHIEF EXECUTIVE

The Israeli Supreme Court has developed a unique and innovative standard for review of any government action by the executive, radically diverging from the causes for administrative review established in Western and common law jurisdictions. The Court may analyze whether and to what degree a particular decision by the executive was "reasonable," even when such decision was within the discretion explicitly afforded by statute. If such action is deemed to have been outside the "range of reasonability," defined on an ad hoc basis from case to case, it may be invalidated by the Court.[5] In other words, the Court directly scrutinizes discretionary decisions by the executive *on their merits* and nullifies the decisions it finds "unreasonable."

This requires some background and elaboration. The traditional approach of administrative judicial review contains a limited set of causes which may justify judicial intervention in government action. One primary example is where a government action is alleged to be illegal or "ultra vires"—that an action was taken without legal authorization, that an official or agency (an "authority") has exercised powers not granted to it by law.[6] The underlying principle of all causes for administrative review is the Court's assessment of whether an action was taken within the sphere of authority granted to the body taking the action, and whether that authority was properly exercised.

The concept of "extreme unreasonableness" as grounds for judicial intervention indeed exists in many jurisdictions. Yet the unreasonableness cause in other countries still adheres to the basic question of legality, and it still essentially considers whether a decision exceeded the authority originally granted. Usually called "*Wednesbury*

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[4] ISRAEL LAW & LIBERTY FORUM, https://lawforum.org.il/?lang=en (last visited Aug. 1, 2023).

[5] HCJ 389/80 Dapei Zahav LTD. v. Broadcasting Authority, PD 35(1) 421, at § 8 of Justice Barak's opinion [1980] (Hebrew) (henceforth, *Dapei Zahav* case). For a general description of the Israeli unreasonableness doctrine, see Yoav Dotan, *Judicial Conservatism and Intellectual Courage: A Homage to President (ret.) Asher Grunis*, VERSA (2015), https://versa.cardozo.yu.edu/viewpoints/judicial-conservatism-and-intellectual-courage-homage-president-ret-asher-grunis.

[6] The original description of ultra vires as an administrative law doctrine, together with reasonableness, is credited to Lord Russell in Kruse v. Johnson [1898] 2 QB 91 (UK).

Unreasonableness" after the leading UK case on the issue,[7] the underlying rationale is that an act may conceivably be outside the bounds of legal authority even when technically seeming to follow the letter of the law. A decision may be unreasonable, and therefore illegal, if authority is exercised in a manner clearly never imagined or intended by the original source of that authority (usually, the legislature).

The standard for judicial intervention on such grounds is very high, and one might call it "radical" or "extreme" unreasonableness. The court in the *Wednesbury* case indeed did *not* interfere with the particular decision being challenged, and it presented the "unreasonableness" cause as a far-fetched and unlikely scenario in which the court could properly intervene without a clear violation of the law. The *Wednesbury* case deemed judicial interference justified only where a decision was "so unreasonable that no reasonable authority could ever have come to it."[8] A subsequent and oft-cited case, *Council of Civil Service Unions v Minister for the Civil Service*, defined the *Wednesbury* test more clearly, as applying to a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[9] This is a high bar indeed. A common example is that of a Prime Minister appointing his horse as a cabinet member—while an authorizing statue may not have explicitly mandated ministers be human beings, the decision could be considered outrageous, never intended by the original statute, and therefore legally unreasonable. To this day, in the U.S., the UK, and many other jurisdictions, the "unreasonableness" challenge (and others like it) against government action is the least likely to succeed in court.

Back to Israel. Through a series of cases and with the symbiotic assistance of the government legal counsel corps, the Supreme Court has established "unreasonableness" as the key and primary cause for challenging executive action of any kind, and today it is the most common basis for lawsuits against the government. While ostensibly relying on the *Wednesbury* Unreasonableness doctrine, the Court has warped the concept so thoroughly that it would now be beyond recognition to any Western jurist.

First, the Court defines a narrow "range of reasonability" delineating precisely which decisions could be considered reasonable under given circumstances. Thus, decisions not within the prescribed range become

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[7] Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223.

[8] *Wednesbury* [1948] 1 KB 223, at 230.

[9] Council of Civil Service Unions v. Minister for the Civil Service [1984] UKHL 9, at 45, [1985] 1 AC 374, at 410.

"unreasonable," even where they in no way resemble the outrageous or extreme type of unreasonableness envisioned in the *Wednesbury* doctrine. In other words, the Court has massively expanded the definition of what can be considered unreasonable, while at the same time severely restricting the scope of discretion originally granted by law.[10]

Second, the Court analyzes whether the *conclusion* reached by the deciding body was "reasonable," even when all the necessary and correct considerations were taken into account.[11] That is to say, the Court may determine that a government act was "unreasonable" because the government actor "incorrectly weighed" the various conflicting interests and considerations. This is the core of the Israeli unreasonableness doctrine—judicially "balancing" executive policy decisions on their merits, even when all appropriate aspects were considered, and thus directly circumventing the authority granted to the executive to perform precisely this evaluation.

Israel's foremost administrative law expert Prof. Yoav Dotan has usefully dubbed this novel type of review as "on-balance unreasonableness," contrasting it with the traditional "outrageous unreasonableness" of *Wednesbury* fame.[12] While the Israeli Court professes to merely apply an extended version of the latter by employing the same term, the two doctrines share nothing in common. As Dotan points out, *Wednesbury* requires that a governmental action be so "outrageous"—so clearly beyond the pale—that the original grant of authority could not have possibly meant to include such an action. The Israeli doctrine reviews the governmental decision on its merits, supposedly weighs the various factors against each other, and either agrees or disagrees with the final outcome.

It is critical to emphasize that the analysis described here takes place with respect to decisions taken *within* the scope of formal legal authority. The unreasonableness doctrine is not needed if the challenged executive action was ultra vires or procedurally flawed, or when other traditional causes for judicial review may apply (such as arbitrariness, discrimination, undisclosed conflict of interest, etc.). Rather, it only applies where the Court has concluded the government has acted within the formal authority granted by law. This cannot be stressed enough.

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[10] *Dapei Zahav* case, *supra* note 5.

[11] HCJ 8397/06 Eduardo Wasser v. Minister of Defense (May 29, 2007), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense.

[12] Yoav Dotan, *Two Concepts of Deference—and Reasonableness*, 51 MISHPATIM 673 (2022) (Hebrew). For an English summary, see Yoav Dotan, *Two Concepts of Deference—and Reasonableness*, 51 MISHPATIM (Booklet 3, 2022), *available at* https://bit.ly/3Qr3QTS.

The rationale consistently offered by the Court runs along the following lines: While a statute may grant *authority* to make or apply a certain decision, any subsequent governmental action entails an exercise of *discretion* in determining how to use that authority. Such exercise must be performed "reasonably" (as defined above) and is thus subject to judicial oversight under the ostensibly legal standard of "reasonableness."[13] This distinction between authority and discretion is at the core of the Court's unreasonableness doctrine.

Over the years, the Court has generally refused to recognize—let alone, cope with—the obvious objection to this rationale: that interfering with duly-granted governmental discretion based on the vague and inscrutable standard of "reasonableness" simply transfers the same discretionary power to the Court itself. UK Supreme Court Justice Lord Jonathan Sumption observed that a technique of this nature

> puts great power into the hands of judges. Judges decide what are the norms by which to identify particular actions as illegitimate. Judges decide what language is clear enough. These are elastic concepts. There are usually no clear legal principles to shape them. The answer depends on a subjective judgment in which a judge's personal opinion is always influential and often decisive. Yet the assertion by judges of a power to give legal effect to their own opinions and values, *what is that if not a claim to political power?*"[14]

Critics of the Israeli unreasonableness doctrine have observed that the Court seems to supplant the executive's policymaking prerogative, despite judges being democratically unaccountable. This is undoubtedly true. The very essence of governing and creating policy is the balancing of various valid interests and considerations, and selecting a specific policy which reflects an elected government's preferred priorities and values, and those of the electorate which put the government in power. The Court's interference with this final outcome on the basis of "unreasonableness" replaces the executive's judgement with that of the bench.

However, it should be noted that this doctrine undermines the *legislature* as much as it does the executive. The legislature decides to delegate certain authority and to grant certain powers to various parts of the executive government, in a manner and with a scope defined by statute and through the formal democratic and legislative process. But under the pretense of examining a decision's "reasonableness," the Court in

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[13] *Dapei Zahav* case, *supra* note 5.

[14] Jonathan Sumption, *The Reith Lectures 2019: Law and the Decline of Politics*, BBC RADIO 4 (May 21, 2019), *available at* https://lawforum.org.il/wp-content/uploads/2020/05/Sumption-full.pdf (henceforth, Lord Sumption lecture) (emphasis added).

fact challenges the original grant of authority and claims to restrict, define, and otherwise limit the powers conferred by statute. All this without ever explicitly challenging the constitutionality of the original statute and without offering any reason to consider the initial granting statute unlawful. In sum, the Israeli unreasonableness doctrine can often be best described as constitutional legislative intervention in the guise of mere administrative review.[15]

An exhaustive review of the use of the unreasonableness doctrine by the Court would be an enormous undertaking due to its sheer scope; virtually any lawful governmental decision, action, or policy of consequence is susceptible to review and is indeed often litigated, despite the absence of any sound legal grounds for such challenges. Some general categories in which the Court has used the doctrine include the review of virtually any appointment of senior government officials (which it holds "unreasonable" if the appointee is perceived to have ethical flaws),[16] including the military Chief of Staff, the National Police Commissioner, elected representatives such as municipal mayors, and, ultimately, cabinet ministers;[17] review of immigration policy down to individual discretionary actions,[18] including the Minister of Interior's decision to deny entry to a non-citizen in accordance with law;[19] judicially-imposed limitations on the authority and policies of "caretaker" (pre-elections) governments with no statutory basis;[20] review of multiple

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[15] The ambiguous existence of an Israeli constitution is explained in section VIII, *infra*. Despite the absence of a typical (or codified) constitution, this essay will employ the term "constitutional" in a broader sense—to mean either the basic governmental arrangements, structure, and institutions of a given state, or to mean strong judicial review capable of striking down primary legislation. *See generally* Daphne Barak-Erez, *Israeli Administrative Law at the Crossroads: Between the English Model and the American Model*, 40 ISR. L. REV. 56, 63 (2007).

[16] *See e.g.*, HCJ 6163/92 Eisenberg v. Minister of Building and Housing (Mar. 23, 1993), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing (henceforth, *Eisenberg* case); HCJ 1284/99 Doe v. IDF Chief of Staff, PD 53(2) 62 (1999) (Hebrew).

[17] *See infra* section II.

[18] HCJ 11437/05 Line for the Worker v. Ministry of Interior (Apr. 13, 2011), Israel Supreme Court Database, https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C05%5C370%5C114%5Cr27&fileName=05114370_r27.txt&type=2 (Hebrew).

[19] HCJ 1765/22 Varsha v. Minister of Interior (July 3, 2022), Israel Supreme Court Database, https://www.gov.il/BlobFolder/dynamiccollectorresultitem/decision1765-22/he/1765-22.docx (Hebrew); LAA 7216/18 Alqasem v. Ministry of Interior (Oct. 18, 2018), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/alqasem-v-ministry-interior-and-hebrew-university.

[20] *See e.g.*, HCJ 5167/00 Weiss v. Prime Minister, Cardozo Law School Versa Database (Jan. 25, 2001), https://versa.cardozo.yu.edu/opinions/weiss-v-prime-minister; HCJ 2144/20

aspects of military policy, including rules of engagement, minute operational tactics, and discharge of commanders for improper conduct (recently the Court has even entertained a suit against the military's haircut policy);[21] review of prosecutorial decisions, including decisions to close criminal investigations and cases (when no illicit motives are suspected on the decider's part); review of ministerial decisions granting or refusing discretionary national honorary awards;[22] and many more.

Among the many bizarre examples, the following two are instructive and will suffice for present purposes. In 2017, a private grammar school of the "Waldorf" (known in Israel as the "Anthroposophical") education method filed a petition against the Tel Aviv municipality due to the latter's refusal to provide the school with funding equal to that received by traditional public schools. The district court ruled for the plaintiff. While the municipality did not exceed its authority and did not run afoul of other established causes for judicial review, the Court held that the decision not to fund the Waldorf school was "unreasonable."[23]

In 2019, the State Prosecutor stepped down from his position, with the existing "caretaker" government (during an elections cycle) yet to nominate his successor. Acting Minister of Justice Amir Ohana exercised his statutory authority to appoint an interim State Prosecutor, naming seasoned and widely-respected prosecutor Orly Ben-Ari to the post. This raised the ire of the Legal Counsel to the Government, Avichai Mandelblit, who issued a haughty legal memo claiming that Ohana's choice was unreasonable, despite the law in question implicitly allowing for wide executive discretion. More amazing still, Mandelblit claimed that there was in fact only one possible "reasonable" appointee Minister Ohana could choose—he was obligated to appoint Shlomo Lemberger, the serving Deputy State Prosecutor. In this manner, Mandelblit wielded the unreasonableness doctrine to dictate to the Minister of Justice the exact identity of the interim State Prosecutor,

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Movement for Quality Government in Israel v. Speaker of the Knesset (Mar. 25, 2020), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/movement-quality-government-israel-v-speaker-knesset.

[21] HCJ 6798/22 Cohen v. Israel Defense Forces (Jan. 22, 2023), Israel Supreme Court Database, https://shorturl.at/wJL28 (Hebrew).

[22] HCJ 8076/21 Judges Committee of the Israel Prize v. Minister of Education (Mar. 29, 2022), Israel Supreme Court Database, https://www.gov.il/BlobFolder/dynamiccollectorresultitem/decision8076-21/he/8076-21.docx (Hebrew).

[23] HCJ 4500/17 Tel Aviv-Jaffa City Government v. Aviv Foundation (Feb. 20, 2019), Israel Supreme Court Database, https://supremedecisions.court.gov.il/ Home/Download?path=HebrewVerdicts%5C17%5C000%5C045%5Co12&fileName=17045000.O12&type=2 (Hebrew). A rare panel of conservative judges on the Supreme Court eventually overturned this decision.

despite black-letter law placing such a decision squarely in the hands of the politically-accountable Minister. In the opening minutes of Orly Ben-Ari's commencement ceremony, the Supreme Court issued a temporary injunction against her appointment by Ohana,[24] on the basis of a petition mirroring Mandelblit's unreasonableness argument. The injunction led to chaos and disarray, and ultimately to Orly Ben-Ari withdrawing her own nomination.

In 2023, rampant use of the unreasonableness doctrine as de novo judicial review of the merits of executive policy decisions, entirely divorced from traditional questions of administrative authority and capacity, is a fixed feature of the Israeli legal system.[25]

II. THE PINHASI-DERI DOCTRINE: IMPEACHMENT BY JUDICIAL REVIEW

The Court may effectively impeach and dismiss senior public officials and elected representatives on the grounds that they have been indicted (or even investigated) for a criminal offense.

While this doctrine might seem at first glance trivial and esoteric, some scholars have characterized it as the overarching and defining feature of the Israeli legal system, which casts its shadow on all other issues. According to Professor Yoav Dotan, this doctrine is the key to understanding the entire relationship between the judiciary (along with its "forward outposts" in public service) and the elected branches of government, and to recognizing the way this relationship has enabled the massive expansion of judicial power over the last three decades. Dotan characterizes the doctrine as "impeachment by judicial review."[26]

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[24] *Justice minister's appointee for state attorney turns down job after backlash*, THE TIMES OF ISRAEL (Dec. 20, 2019), https://www.timesofisrael.com/justice-ministers-appointee-for-state-attorney-turns-down-job-after-backlash/; *Mandelblit assails justice minister for seeking to subvert legal system*, THE TIMES OF ISRAEL (Mar. 5, 2020), https://www.timesofisrael.com/mandelblit-assails-justice-minister-for-seeking-to-subvert-legal-system/.

[25] The Israeli Knesset recently passed controversial legislation aimed at limiting the use of "extreme unreasonableness" to invalidate decisions and policies enacted by elected officials, such as government ministers and the cabinet itself (the executive branch). The legislation is consistent with suggestions previously made by leading scholars, including Prof. Yoav Dotan and Justice Noam Sohlberg. *See* Noam Sohlberg, *On Subjective Values and Objective Judges*, 18 HASHILOACH (2020), *available at* https://shorturl.at/elpL7 (Hebrew). The longevity, effectiveness, and fate of the legislation remains to be seen. (The legislation, passed as an amendment to a Basic Law, has been challenged in court, and a hearing has been set for the fall of 2023.)

[26] Yoav Dotan, *Impeachment by Judicial Review: Israel's Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES IN L. 705 (2018), *available at* https://www7.tau.ac.il/ojs/index.php/til/article/view/1587.

The controlling precedent remains the dual Pinhasi-Deri rulings from the early 1990s, which were in turn based on the aforementioned unreasonableness doctrine. The Supreme Court ruled that the Prime Minister (then Labor's Yitzhak Rabin) was obligated to dismiss two senior cabinet ministers from his government due to their implication in an ongoing criminal investigation. The Court held that when an alleged crime is severe enough, the refusal to dismiss an indicted minister or senior official would damage public trust in government institutions and was therefore "unreasonable."[27]

At the time and to this day, there has been no statutory rule which explicitly requires such action. On the contrary, the controlling statute mandates the termination of a minister's tenure only where he or she has been convicted of a crime involving "moral turpitude."[28] However, the Court reasoned that while the black-letter law indeed mandated dismissal of a minister only upon conviction of certain charges, the discretion of the Prime Minister *not* to dismiss the indicted minister at an earlier stage is limited by the Court's evaluation of how "reasonable" such a decision might be.

While these rulings employed the unreasonableness grounds discussed above, they are almost universally regarded as creating a unique and independent doctrine.[29] The resulting "Pinhasi-Deri doctrine" can be thus summarized: If a government minister is suspected of committing a crime, the Court may order that the minister be removed (or not appointed in the first place) by the Prime Minister; and it is assumed and understood that any Prime Minister is expected to do so preemptively without the need for an explicit court order.

This doctrine suffers from a number of irredeemable flaws. The Court's decision (and the entire doctrine) purports to be about ordinary administrative judicial review. That is, the Court analyzes the "legality" and "reasonableness" of a decision by the head of the executive on whether to dismiss senior ministers under indictment as if it were the decision of a local township clerk on whether to grant a business license. By framing the cases this way, the Court ignores the gravity and

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[27] HCJ 3094/93 The Movement for Quality Government in Israel v. State of Israel (Sept. 8, 1993), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-state-israel (henceforth, *Pinhasi-Deri* case).

[28] § 23(b), Basic Law: The Government (Isr.), *available at* https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheGovernment.pdf.

[29] *See, e.g.*, Noam Sohlberg, *Pinhasi-Deri Doctrine Through the Prism of the Reasonableness Cause*, RESHUT HARABBIM BLOG (Jan. 13, 2022), *available at* https://lawforum.org.il/wp-content/uploads/2022/01/ILLF-Solberg-Deri.pdf (Hebrew). *But see Pinhasi-Deri* case, *supra* note 27, at § 20(h) of Chief Justice Shamgar's opinion.

delicacy of what is actually being done: judicial impeachment of elected officials.

Prof. Dotan has pointed out that in most democratic states, impeachment of senior elected officials is a sensitive and complex process, usually directly addressed in constitutional instruments, for obvious reasons including core notions of the separation of powers.[30] In Israel however, the Court has assumed for itself the authority to cause the dismissal of any high-ranking official (elected or appointed), as well as to prevent officials from attaining high-ranking positions in the first place, as a result of criminal charges filed against them. By extension, this doctrine grants de facto impeachment power to a handful of senior civil servants in the government investigation-prosecution apparatus,[31] who are largely insulated from the electorate as well as from meaningful legislative or executive oversight. Thus, a small clique of democratically unaccountable officials has the authority to cause the dismissal of almost any high-ranking member of government, a state of affairs which would seem to be odious to those with strong democratic sensibilities.

The doctrine also violates basic norms of criminal law, such as the presumption of innocence and procedural due process. As criminal law experts such as Prof. Rinat Kitai-Sangero have pointed out, the Court-mandated dismissal amounts to a severe de facto legal sanction for an offense which has not yet been proven in court (and indeed before the defendant has ever appeared before a judge).[32] Notably, such indictments need the approval of only a handful of people with vested institutional interests—there is no grand jury or similar public participation in making such decisions.

Perhaps the most jarring feature of this doctrine is its disregard for the fundamental democratic value of elected representation, which is the main reason impeachment proceedings are usually handled with delicacy in the first place. The Pinhasi-Deri doctrine essentially robs senior Israeli politicians of their most important value-proposition to voters: that they can serve in ministerial positions. At the same time, it subverts voters' intentions and expectations and undermines one of the core factors on which they base their electoral decision-making.

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[30] Dotan 2018, *supra* note 26, at 711.

[31] For example, a senior investigator in one of various branches of the Israel National Police, the Chief Prosecutor or other senior criminal prosecutor, the Legal Counsel to the Government, or, in some instances, a judge.

[32] Rinat Kitai-Sangero, *The Israeli Case for the Applicability of the Presumption of Innocence to Indicted Public Officeholders*, 52 CAL. W. INT'L L.J. 175 (2021), *available at* https://scholarlycommons.law.cwsl.edu/cwilj/vol52/iss1/6/.

It is worth pointing out that the Israeli system of government is roughly based on the Westminster parliamentary model (albeit with proportional representation, wherein voters choose between fixed party "lists" of candidates). Senior government members are not merely appointed at the discretion of an elected executive. Rather, their positions reflect their relative electoral success, the clout of their political parties within a coalition government, and their own popularity among their party voters. Voters consider this when choosing parties, as they are effectively also choosing candidates for senior leadership positions in government. A vote for a given party is also a tacit vote for that party's top-ranking members to be instated in positions of governmental power, usually in the executive branch (e.g., a voter may choose the Shas party so that party leader Aryeh Deri may be a cabinet member or Minister of the Interior, just as much as for their desire for Shas to advance a certain legislative agenda).

While this doctrine seems to violate basic norms of constitutional, administrative, and criminal law, the Court rarely recognizes or even addresses these violations as such.[33] The key ruling and subsequent decisions have refused to acknowledge the legal and political ramifications of this judge-made rule, and have preferred skirting these issues or ignoring them entirely.

Consider one glaring example of the doctrine being tactically employed. Yaakov Neeman was a leading attorney (a founder and named partner of Israel's preeminent law firm) when he was appointed as Justice Minister in 1996, in the first Netanyahu government. Neeman was known for his critical stance towards the Israeli Supreme Court and for his objection to its judicial activism that prevailed at the time. A day after Neeman was appointed to office, the attorney general announced an investigation into alleged crimes. Within months, Neeman had been indicted for obstruction of justice in a case in which he had acted as counsel—a grossly inflated charge which was based on a minor and inconsequential clerical error in an affidavit filed by Neeman. Neeman

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[33] On the contrary, in several cases, the Court uses the democratic process as a justification for *applying* the Pinhasi-Deri doctrine. *See* HCJ 5261/04 Fuchs v. Prime Minister, at § 17 of Chief Justice Barak's opinion (Oct. 26, 2004), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/fuchs-v-prime-minister. *But see* HCJ 3997/14 Movement for Quality Government in Israel v. Minister of Foreign Affairs, at § 24 of Chief Justice Grunis' opinion (Apr. 12, 2015), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/14039970-s09.htm (Hebrew) (questioning the viability—and the legitimacy—of the Pinhasi-Deri doctrine with regard to the impeachment of elected officials in a rare dissenting opinion).

had no choice but to resign in light of the Pinhasi-Deri doctrine.[34] In his stead, the much more amicable and pro-Court Tzahi Hanegbi became Justice Minister.

Almost a year later, Neeman was fully acquitted of all charges by the Court, which severely criticized the Legal Counsel to the Government's decision to indict Neeman in the first place. The so-called error, the Court said, was a minor mistake by a junior lawyer who had drafted an edition of the affidavit and, amazingly, this lawyer was never even questioned by the prosecution, though his testimony could have voided the entire investigation.[35] Here, then, is one example of how every politician and senior official in Israel must be wary lest they raise the ire of the judiciary or the closely-aligned government prosecution services.

The effect of this doctrine on the entire legal system cannot be overstated. One need not be an expert in game theory and power dynamics (or indeed a conspiracy theorist) to understand that the doctrine has established an incentive structure encouraging the initiation of criminal proceedings against unruly or bothersome politicians—effectively inhibiting almost any action by the elected branches against the courts and legal elite. Any effort to effect change or to advance reform in the legal and judicial world—especially if such effort is seen as a way to curb judicial authority—may lead to the derailment of one's public career, or worse. As Prof. Dotan wrote, "one cannot understand the relationships between the courts and politics in Israel without taking this component into account."[36]

III. NO STANDING REQUIREMENT: FROM DISPUTE RESOLUTION TO ABSTRACT SUPERVISION

As Judge Posner observed in his aforementioned essay, "The judicial power of the United States can be exercised only in suits brought by persons who have standing to sue in the sense of having a tangible grievance that can be remedied by the court."[37] The very concept of

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[34] *See* Yir'on Festinger, *The Judicial Conservative Persecuted by the System: In Memoriam of Ya'akov Ne'eman*, MIDA (Jan. 3, 2017), *available at* https://bit.ly/47gA6ic (Hebrew). *But see* Gidi Weitz, *Signed, Sealed, Deposed: The Letter That Nearly Did in Yaakov Neeman*, HAARETZ (Jan. 8, 2012), https://www.haaretz.com/2012-01-08/ty-article/signed-sealed-deposed-the-letter-that-nearly-did-in-yaakov-neeman/0000017f-deba-d3a5-af7f-febe82bc0000.

[35] *Former Justice Minister Neeman Acquitted on All Counts; Coalition Demands His Reinstatement*, GLOBES (May 15, 1997), https://en.globes.co.il/en/article.aspx?did=359279.

[36] Dotan 2018, *supra* note 26, at 708.

[37] Posner 2007, *supra* note 1.

standing reflects the fundamental idea that a court's role is to settle and resolve actual conflicts, including those between individuals and the state, not to adjudicate ideological disagreements over policy questions. The court is not tasked with resolving hypothetical or potential conflicts ex ante. Therefore, to get her case into court, a claimant is required to show a tangible harm caused to her and an enforceable legal right as a cause of action; merely disliking or disagreeing with government policy does not grant standing to sue.

In this sense, standing is not a mere procedural technicality, nor does it deny any individual citizen a right to initiate legal proceedings. Rather, a firm standing requirement is a critical check on judicial power, ensuring that a court's fast and binding decision-making procedures and privileges are limited to settling disputes and are not directed towards abstract legal or political controversies. Justice Antonin Scalia made this case persuasively in his essay describing standing as "an essential element of the separation of powers."[38] Standing thus serves as a threshold condition which exists separately from the substantive legal disagreement at issue in a case, and it defines the permitted parties to legal proceedings challenging government action. It's about *who* gets to avail themselves of a court's formidable authority.

Not so in Israel. Over a gradual process spanning two decades, the Israeli Supreme Court has abolished the traditional standing requirement for petitioners challenging government action or policy.[39] Thus, any citizen in Israel may ask that the Court block allegedly illegal government action, even when that citizen is not personally affected by the challenged action. This essentially abandons the notion that a court settles controversies and recasts the Court as an omnipotent policy supervisor and overseer. Without the limiting condition of standing, the Court has become an appellate tribunal reviewing any and all duly enacted government policy, merely on the basis that someone objects to it.[40]

Some other jurisdictions have also loosened standing requirements, especially with the ascendancy of human rights litigation. While indeed

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[38] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983), *available at* https://bpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/3/1172/files/2015/11/Scalia_17SuffolkULRev881.pdf.

[39] *See* Joshua Segev, *The Standing Doctrine: What Went Wrong?*, *in* OXFORD HANDBOOK OF THE ISRAELI CONSTITUTION (Aharon Barak, Barak Medina, & Yaniv Roznai eds., forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4010860.

[40] *See* Segev, *supra* note 39. *See also* Joshua Hoyt, *Standing, Still? The Evolution of the Doctrine of Standing in the American and Israeli Judiciaries: A Comparative Perspective*, 53 VAND. J. TRANSNAT'L L. 645, 664 (2020), *available at* https://scholarship.law.vanderbilt.edu/vjtl/vol53/iss2/5/.

some courts and legislatures have chosen to expand standing to allow for easier access to judicial remedies, there is a stark difference between such tweaks and the fundamental changes made by the Israeli Supreme Court. Other jurisdictions have maintained the basic conception of standing as a desirable limit on judicial power, even while making borderline cases easier to file or creating various exceptions. The Israeli case represents an explicit rejection of the very core of standing itself, as the Court positioned itself as the ultimate supervisor of all government.[41]

The Israeli example also demonstrates the secondary ramifications of abandoning any standing requirement. While standing is indeed about *who* gets to go to court, it also often yields a natural limit on *what cases* can be brought before the court. Certain categories of governmental decisions and policies are just less likely to produce aggrieved parties with a tangible, actionable harm, and are thus less likely to produce potential plaintiffs. One such category is governmental appointments, where the only plaintiff who conceivably has standing might be a close runner-up who was overlooked. The population at large would usually not have standing to challenge the appointment of, say, the National Police Commissioner. Thus, governmental appointments are usually shielded from litigation by their very nature, as the standing requirement drastically reduces the likelihood of bona fide plaintiffs. In this sense, limits on standing are inherently also limits on justiciability.

This development must be seen within the context of the Supreme Court's broader revolution in Israeli public law throughout the 1980s. The standing requirement was steadily abolished just as the unreasonableness doctrine was conceived and cultivated. These two changes combined were sufficient to effect an explosion of judicial power virtually unparalleled in any Western legal system. Without the limitations imposed by the standing requirement, anyone could bring any issue before the courts; with the unreasonableness doctrine, any government action became subject to judicial scrutiny, and any policy decision could be evaluated in quasi-legal terms.

The 1993 Pinhasi-Deri rulings, along with many others before and since, serve to demonstrate this point. Due to the lack of any standing requirement, the motions against Prime Minister Rabin were filed by public interest NGOs, with no discernable plaintiff showing a grievance

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[41] *See, e.g.*, HCJ 910/86 Ressler v. Minister of Defense (June 12, 1988), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence (henceforth, HCJ 910/86 *Ressler*); HCJ 1308/17 Silwad City Government v. Knesset (June 9, 2020), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/17013080-V48.htm (Hebrew).

requiring judicial resolution. The unreasonableness doctrine provided the Court with a quasi-legal framework to review Rabin's refusal to dismiss his cabinet ministers, and ultimately with the tools to spawn the Pinhasi-Deri doctrine.

IV. JUSTICIABILITY AND THE POLITICAL QUESTION DOCTRINE: "EVERYTHING IS JUSTICIABLE"

The Israeli Supreme Court has systematically abolished any justiciability requirement, such that any government decision of any kind may be challenged, adjudicated, and overruled, even on contentious policy issues at the heart of public disagreement and debate.

The twin concepts of justiciability and the "political question doctrine" will be familiar to most Western jurists, and they together reflect the widely accepted and established notion that some issues cannot and should not be resolved by a court of law. Asking whether an issue is justiciable is an admission of the limits inherent in the court's function as a neutral adjudicator of legal disputes. A key principle of the separation of powers is that some decisions can only be made by the people's representatives in the elected branches. These decisions are out of bounds to courts due to considerations of expertise, democratic legitimacy, and their inherently non-legal character. Similarly, the political question doctrine in the U.S. holds that any question of a fundamentally political nature ought to be resolved in the political realm, by the political process designed for collective democratic decision-making.[42] Such decisions must take into account core values, the prioritization of equally valid but competing interests, the distribution of public goods, and so on.

At least on some level, justiciability is a meta-legal notion which exceeds legalistic arguments. Rather, it is about the wisdom, propriety, and sustainability of judicial decision-making with regard to contentious public issues, the resolution of which belongs to the elected branches of government. In this sense, it is not to be confused with whether a court can identify some legal hook to justify its intervention in a case. Justiciability reflects the notion that courts should avoid adjudicating certain types of issues, even if judges can concoct some far-fetched or convoluted legal argument to justify doing so.

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[42] *See e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (explaining when an issue is a political question and therefore not justiciable); Nixon v. United States, 506 U.S. 224 (1993) (clarifying that if an issue is not given to the courts by the Constitution, it is not justiciable).

After Israel's founding, the Supreme Court often refused to hear cases due to their political nature, including one that sought to invalidate the government's decision to initiate diplomatic relations with post-WWII Germany.[43] However, the justiciability requirement has since been gradually yet summarily rejected by the Israeli Supreme Court. Justice Aharon Barak has held that any conceivable government decision has a legal element to it, and thus is subject to judicial review. This even includes, according to Barak, decisions on whether to go to war or to make peace.[44] Cases deemed justiciable and heard by the Court have included challenges to agreements between political parties, to the legislature's appointment of the Prime Minister, to intra-parliamentary proceedings, to a law for being too deliberately "personal," and to primary legislation of any kind.

One of the most common quotations associated with Justice Barak—and the Supreme Court he managed to mold in his image—is "everything is justiciable." Here is Justice Barak's view of justiciability, in his own words:

> In my opinion, every dispute is normatively justiciable. Every legal problem has criteria for its resolution. There is no "legal vacuum." According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be "imprisoned" within the framework of the law. Even actions of a clearly political nature—such as waging war—can be examined with legal criteria, as evidenced by the laws of war in international law. The mere fact that an issue is "political"—that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality.[45]

One of the most instructive examples of the Court's flouting of justiciability concerns has to do with the Israeli government's consistent and conscious decision to exempt Jewish Ultra-Orthodox ("Haredi") men from compulsory military service. This policy has been in effect since the State's founding, and it has been supported by every governing coalition since. The decision has been the political solution to a host of delicate and complex social and cultural dilemmas. Importantly, this policy has always been a constant point of contention for Israeli society

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[43] HCJ 186/65 Rainer v. Prime Minister, PD 19 485 (1965).

[44] 1 AHARON BARAK, A COLLECTION OF WRITINGS 709 (2000) (Hebrew).

[45] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 98 (2002).

and represents a typical democratic (and, one might say, multicultural) compromise between different and rival groups participating in shared government.[46] In other words, it is a classic political question.

For many years, the Court dismissed any legal challenges to the Haredi exemption as non-justiciable. Later, in the *Ressler* opinion, the Court about-faced and agreed to hear cases despite the political nature of the policies being challenged.[47] The Court eventually accepted a legal challenge to the exemption, asserting that such an arrangement must be codified in primary legislation, and that a blanket exemption by the Minister of Defense was inappropriate (despite the Defense Minister having the statutory authority to make the exemption and despite the Court's own past rejection of this exact argument).[48] In light of this ruling, the Knesset[49] passed a law authorizing the compromise in the form of primary legislation. However, later still, the Court struck down the exemption law as unconstitutional, on the grounds that it violated a core non-enumerated right to "equality."[50]

To summarize, today the Israeli Supreme Court may be petitioned to intervene in any government action, regardless of whether the action under review is suitable for judicial adjudication, and regardless of whether the action is a patently political question.

Finally, it's worth noting the interplay between the standing requirement discussed above and the question of justiciability. An effective standing requirement will inevitably keep out of court many purely political issues, as such issues usually yield no distinct injured plaintiff. A typical example is, again, senior governmental appointments. There is rarely an injured party with standing to bring a viable challenge (aside from perhaps an aggrieved runner-up), on top of the fact that such appointments are inherently political. Thus, an effective standing doctrine and a justiciability requirement would work in tandem to prevent judicial intervention in such a case. Conversely, in a legal system with a

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[46] Jonathan Lis, *Disagreement between Netanyahu and Barak on the extension of Tal Law: five or one year*, HAARETZ (Jan. 16, 2012), https://www.haaretz.co.il/news/politics/2012-01-16/ty-article/0000017f-e616-d97e-a37f-f7778c600000 (Hebrew).

[47] HCJ 910/86 *Ressler*, *supra* note 41.

[48] HCJ 3267/97 Rubinstein v. Minister of Defense (Dec. 9, 1998), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/rubinstein-v-minister-defense (henceforth, *Rubinstein* case).

[49] The Knesset is the Israeli parliament or legislature.

[50] HCJ 1877/14 Movement for Quality Government in Israel v. Knesset (Sept. 12, 2017), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/14018770-c29.htm (henceforth, HCJ *Recruitment Law*). *See infra* at Section VIII for a discussion of the validity of this legal-constitutional argument.

weaker standing requirement, any justiciability constraints would have to be all the more stringent to avoid the Court serving as an omnipotent adjudicator in all policy disagreements. Yet Israel has effectively abolished both standing and justiciability.

V. THE INSTITUTIONAL STRUCTURE OF THE JUDICIARY: FIRST AND FINAL SAY

The Israeli Supreme Court is the highest court in the land and has two primary functions. One is that of the "High Court of Justice" (HCJ).[51] The HCJ has original and final jurisdiction for a host of administrative and constitutional issues, and really for any consequential challenge to government action, be it executive or legislative. Many of the key cases on publicly contentious matters would usually be heard and decided in the context of an HCJ petition. There is no additional court or tier with higher authority than the Supreme Court, and HCJ rulings are not appealable. In extremely rare instances, the Court may decide, at its own sole discretion, to review its own rulings with an extended panel of judges.

The Court's second function is as an appellate court for most District court cases as a matter of right. The District courts have original jurisdiction for almost any substantial case (e.g., involving issues above certain thresholds of financial value or of criminal severity), such that thousands of appeals are routinely heard by the Supreme Court. This in no way resembles the highly discretionary appellate function of the U.S. and UK Supreme Courts, which select the cases they choose to hear and which usually serve as a third tier of review at the very least (i.e., they typically review cases already decided by other appellate courts).

The practical ramifications of this institutional design are disquieting.

First, the HCJ is the court of first and last instance for the most controversial and publicly charged lawsuits in the entire legal system. It has no higher appellate body or tier reviewing its decisions and no prior process of judicial consideration and fact-finding. The HCJ judges are answerable to no one for their rulings, and at the same time are the first tier to adjudicate the most important, value-laden and contested cases in the nation. This would seem to defy established notions of natural justice and common sense—surely such decisive and consequential cases ought to be appealable, or to pass through at least two tribunals. West-

[51] § 15(c)-(d), Basic Law: The Judiciary (Isr.).

ern court systems are built around precisely the core assumption that a single tier is inadequate for the determination of complex and fraught cases.

Second, the same Supreme Court judges preside over a vast number of appeals from the lower District courts. Most of these are a first appeal as a matter of right. This means that almost any ordinary case of consequence in the entire country will easily and inevitably find itself in the hands of the Supreme Court.[52]

This appellate jurisdiction has a system-wide detrimental effect with many manifestations. It provides politically-minded and agenda-driven judges the opportunity to apply their ideology far more often than in HCJ cases (as the case load is much higher) and with far less public scrutiny (due to the general lack of public interest in thousands of routine civil and criminal appeals). As District court cases of original jurisdiction are appealable by right, the Supreme Court need not offer any justification for selecting a specific case for review, and even the brittle and diminished threshold requirements of standing and justiciability do not apply. The Court has access to thousands of cases and can select the most opportune and convenient one out of the dozens heard each day, with the intent to make that particular case an example, to set a new precedent, or for any other purpose. Tellingly, the *Bank Hamizrachi* ruling, largely considered the most important case in Israeli constitutional law, was in fact a civil appeal and not part of an HCJ proceeding.[53]

Besides providing opportunities for ideological mischief, this design makes the development of appellate case law erratic and unpredictable. An ordinary appellate judge may feel more constrained by precedent, more subject to judicial oversight from a higher-tier court, and more inclined to value stability and predictability in the legal system. But a high court constitutional judge is accustomed to hearing the most publicly contentious and significant cases of their age, and to setting new rules or charting new legal territory. Imagine, if you will, the Supreme

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[52] According to the Courts Administration Authority, in 2021, the Supreme Court heard around 10,000 cases, nearly a third of which were HCJ petitions. COURTS ADMINISTRATION, ANNUAL REPORT 2021, at 17 (2022), https://www.gov.il/he/Departments/publications/reports/statistics_annual_2021 (Hebrew). *See also* Eli M. Salzberger, *Judicial Appointments and Promotions in Israel—Constitution, Law and Politics*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 241, 245 (Kate Malleson & Peter H. Russell eds., 2006).

[53] CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village (Nov. 9, 1995), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village (henceforth, *Bank Hamizrachi*).

Court of the U.S. or the UK routinely hearing thousands of ordinary civil and criminal appeals. Under such circumstances, the entire appellate system would take on a different character—any routine appeal could suddenly become a landmark judicial event if the judge was so inclined.[54] Indeed, the gradual deterioration of legal consistency and predictability in all fields of Israeli law due to Supreme Court meddling through its appellate function has been the object of much criticism.

Despite the protestations of some judges regarding the burden of handling so many cases, it is no accident that the Supreme Court has consistently blocked all efforts to establish an appellate division of the District courts, or a "Constitutional Court" dedicated only to the separate adjudication of major constitutional cases. The Court benefits enormously from the considerable influence afforded by its dual function as HCJ and as-of-right appellate court.

An additional element of note is the erratic, inconsistent, and at times ideologically suspect nature of Supreme Court rulings as a function of its panel compositions. The fifteen Supreme Court justices never hear a case en banc (although the first ever en banc hearing has just been scheduled for September 2023). Rather, cases are heard by different panels ranging from (the default) three to (a rare) thirteen members. While an outline of the procedure for panel selection is beyond the scope of this essay, the panel selection process is in some cases demonstrably subject to manipulation and bias; further, even without concern for deliberate tampering, the mere variance between panels may lead to legal discrepancies and inconsistent rulings.[55]

The third crucial feature of the Court's design is that the Chief Justice may elect to hear certain cases with an expanded panel, and she has sole discretion as to how many members sit on the panel. While by custom justices are selected to panels according to seniority on the bench, the Chief Justice is still able to manipulate judicial outcomes by selecting the panel size. For instance, she may choose a panel of seven judges so as to create a majority of four liberal over three conservative judges,

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[54] *See, e.g.*, CA 48/16 Dahan v. Simhon, at §§ 39-43 of Justice Barak-Erez's opinion (Aug. 9, 2017), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/16000480-a16.htm (Hebrew) (Barak-Erez, using past decisions, creates an "objective" bona fides doctrine, contrary to the literal wording of § 9, Land Law, 5729-1969, in a situation where it seemed fitting to assign responsibility to the third party, instead of the first buyer. She based her decision on Chief Justice Aharon Barak's objective bona fides doctrine in CA 2643/97 Ganz v. British Colonial LTD., PD 57(2) 385 (2003) (Hebrew)).

[55] 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), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630071.

whereas a panel of five judges would have rendered a majority of three conservative over two liberal judges. Thus, the Chief Justice has the power to tip the scales in favor of a particular result in a contentious constitutional case by determining how many judges—with their own judicial and ideological inclinations—hear the case.[56]

One final element is that the Supreme Court does not conduct any evidence hearings—virtually all proceedings involve strictly legal argumentation. There is no witness testimony or cross-examination, no expert or physical evidence submitted. The closest the Court comes to fact-finding is through affidavits which counsel submits and upon which they may elaborate in oral argument.[57] While this may make sense for appellate courts and proceedings, it is most unusual within the context of the Court's function as High Court of Justice.

First, recall that the HCJ is the court of first-and-last instance for constitutional cases. The challenge to and supervision of government action must rest on salient and legally established facts. Naturally, almost any administrative or constitutional case will typically involve factual elements and disputes which require adjudication and resolution: the procedure undertaken to arrive at a given executive decision, the information and data which served as the basis for policy, the harm caused or right violated by a specific measure, and so on. Rarely is such a case argued on purely legal grounds. One must wonder at the Court's sweeping discretion and decision-making power, considering its utter inability to establish questions of fact. Consider the many cases scrutinizing military policy down to rules of engagement, all of which involve complex questions of real-world impact and effectiveness, and which often revolve around technical factual disputes. Consider the Pinhasi-Deri rulings, which did not involve the testimony or examination of any law enforcement officials regarding the criminal investigations against the named cabinet members.

Second, the issue of standing—discussed at length above—is inherently linked to questions of fact. Whether a plaintiff has an individual and discernable grievance against government action is often a factual question to be ascertained at an early stage of litigation. Thus, without any fact-finding procedure in place, the Court would be limited in its ability to establish standing even if it wanted to.

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[56] Maoz Rosenthal, Gad Barzilai, & Assaf Meydani, *Judicial Review in a Defective Democracy*, 9 J.L. & CTS. 137, 151 (2022).

[57] Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism*, 8 ISR. AFFS. 87, 100 (2002).

VI. AN INTERIM SUMMARY

It's worth pausing to review the five issues discussed above and their combined effect. Any person or organization can petition the Court for redress regardless of whether they are directly harmed or affected by the action being challenged (standing). No issue is considered to be beyond the reach of legal scrutiny or outside the bounds of judicial authority (justiciability). Any technically lawful government action or policy is nevertheless subject to substantive review on its merits (unreasonableness).

All of these converge elegantly in the aforementioned landmark Pinhasi-Deri cases.[58]

In the Pinhasi-Deri affair, then-Prime Minister Yitzhak Rabin refused to fire two senior ministers in his government who were under criminal investigation; neither's trial had commenced, and only one had been formally indicted. The black-letter law had (and to this day has) no requirement that indicted ministers resign or be dismissed.

There were no aggrieved parties who could claim to be directly harmed by Rabin's decision not to dismiss the ministers. If there were such parties, they did not take legal action. The only conceivable harmed party in the most abstract sense was the electorate at large, which of course has a political remedy at its disposal: periodic elections. Yet because Israeli courts lack a standing requirement, the petition was filed by a public interest NGO in its own name.

A decision by the head of the executive whether and under what circumstances to dismiss senior government ministers would typically be considered squarely within their discretion. It is a quintessentially political issue and in no sense a legal subject fit for judicial scrutiny. Yet because it has abolished the concept of justiciability and claims authority to review any decision and policy regardless of its non-legal nature, the Court heard the case.

Finally, the legal basis and standard for review of a political personnel decision should be illegality (ultra vires) or another coherent and firmly established cause for judicial intervention—especially due to the deeply political nature of the decision under review. Yet on the basis of its expansive unreasonableness doctrine, the Court found for the petitioners and ruled against the Prime Minister. The Court held that the Prime Minister's refusal to dismiss the accused ministers would so undermine public confidence and trust in the government—an abstract

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[58] *Pinhasi-Deri* case, *supra* note 27.

assertion with no direct empirical support—that it was severely unreasonable and therefore unlawful. This was ironic as the Court itself does not have a political appointment process which could lend its decisions a semblance of democratic legitimacy, and it does not seem to consider the effects of its rulings on public trust and confidence in the courts or in the legal system.

Rabin complied with the ruling and accordingly dismissed both ministers, causing the collapse of his government.

This was in 1993.

VII. THE JUDICIAL APPOINTMENTS VETO: JUDGES CHOOSE THEIR COLLEAGUES AND SUCCESSORS

In Israel, judges of all tiers in the primary judicial system are appointed and promoted by a nine-member committee. In that committee, Supreme Court judges exercise veto power over appointment of their future colleagues. By law, this committee consists of two government ministers (one of whom, the Justice Minister, chairs the committee), two legislators, two attorneys appointed by the Israel Bar Association, and three judges currently serving on the Supreme Court (these are selected by the Chief Justice, who is usually one of the three committee members from the Court).[59] The committee composition is striking in that representatives of the elected branches are a minority—only four out of nine members. The other five members are part of the legal establishment.

Judges in Israel are forced to retire at the age of 70, though a judge appointed at a young age may serve on the Court for a number of decades because there are no term limits. The Chief Justice is technically appointed by the judicial appointments committee, but by custom he or she is the longest-serving judge on the Court. The combination of these two points means that the identity of the Chief Justice (who holds considerable power and influence) can be predicted decades in advance.

A recent comparative study by the Kohelet Policy Forum found that Israel stands out for the mismatch between its judicial selection process and the expansive powers wielded by its judiciary.[60] In almost all developed democracies, membership of the highest judicial court is deter-

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[59] § 4(b), Basic Law: The Judiciary (Isr.), *available at* https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheJudiciary.pdf.

[60] SHAI-NITZAN COHEN, SHIMON NATAF, & AVIAD BAKSHI, KOHELET POL'Y F., SELECTING JUDGES TO CONSTITUTIONAL COURTS—A COMPARATIVE STUDY (2022), https://en.kohelet.org.il/publication/selecting-judges-to-constitutional-courts-a-comparative-study.

mined directly by the public or by their elected representatives, especially when such a court enjoys semi-legislative authority in the form of constitutional judicial review. In contrast, the Israeli public has decidedly limited influence on the Court's composition due to elected representatives being outnumbered on the committee; this seems to contradict established notions of democratic legitimacy and accountability, particularly given the power that the Israeli Supreme Court enjoys.

The appointments system has been severely criticized for a variety of reasons. The very presence of the Israel Bar Association (henceforth the IBA, which simultaneously serves as both the statutory regulator of the legal profession and attorneys' representative labor union) leads to questionable incentives for both lawyers and judges throughout the legal system. Lawyers can indirectly influence the promotion of judges before whom they appear in court, and senior judges in the legal system can determine which lawyers are appointed as judges. Aside the more subtle biases this can cause, there have in fact been some shocking scandals involving alleged illicit intimate relationships between judicial candidates and the highest IBA officials,[61] as well as other sexual misconduct allegations against senior IBA officials.[62]

At the same time, its presence on the committee gives the IBA enormous leverage over the elected branches. The latter rely on the IBA's cooperation for judicial nominations, which are often a key part of political campaign promises and government agendas.[63] Politicians are therefore wary of rocking the boat with the IBA and thus often neglect to properly exercise government oversight over the legal profession. It is nearly impossible to enact any kind of reform regarding the legal profession in Israel, and the IBA successfully and consistently advances its own agenda through government action.[64]

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[61] Yonah Jeremy Bob, *Female judge in sex-for-judgeship scandal named as Eti Karif*, THE JERUSALEM POST (Mar. 14, 2019), https://www.jpost.com/israel-news/female-judge-in-sex-for-judgeship-scandal-names-as-eti-karif-583323.

[62] *Alleged misconduct by Israel Bar chief to be probed; he resigns, denies wrongdoing*, THE TIMES OF ISRAEL (Jan. 31, 2023), https://www.timesofisrael.com/police-to-probe-alleged-misconduct-by-bar-chief-who-resigns-but-denies-wrongdoing/.

[63] Tova Tzimuki, *Hayut, Shaked gear up for Supreme Court nominee tug of war*, YNET (Nov. 1, 2018), https://www.ynetnews.com/articles/0,7340,L-5069669,00.html.

[64] For example, the IBA successfully lobbied the legislature to enact a bill which granted the IBA a statutory right to voice its opinion regarding any pending legislation, and which redefined the IBA's role to include protecting human rights, the rule of law, and Israel's "core values." The IBA also successfully lobbied to significantly lengthen mandatory legal apprenticeships (a condition to being admitted to the bar). Both major governmental concessions to the IBA were widely considered to be part of a deal involving the IBA's cooperation with the

Another important effect of the judicial appointments system is that lower-tier judges are reluctant to challenge problematic precedents and to push the boundaries of the judicial status quo. In a functioning legal system, the lower-tier courts play an important role as legal laboratories, testing the boundaries of binding appellate rulings and new legal norms in the field, so to speak, and conveying problems upwards through the judicial hierarchy. For instance, such courts may convey when a legal precedent is simply not working—by expressing their discontent explicitly in their rulings, or even by making defiant decisions that will likely be overturned. However, the current method of judicial promotions (which work the same way as appointments) serves as a strong disincentive against any such judicial feedback. The involvement of Supreme Court justices in promotion decisions means that lower court judges are reticent about challenging rulings made by their senior peers. Any judge making a decision knows that if she is not sufficiently careful and does not toe the legal line, she could be jeopardizing her future judicial career.

Yet all these flaws are overshadowed by the starkest divergence of Israeli judicial appointments from democratic sensibilities: the de facto judicial veto power over Supreme Court appointments. The fact that sitting Supreme Court judges participate at all in choosing their future counterparts is alarming in and of itself, and one may reasonably wonder how such involvement can be justified. But far more egregiously, Supreme Court appointments by the committee require a supermajority of seven votes (unlike the five votes needed for other tiers). This grants the three Supreme Court judges on the nine-member committee effective veto power over any appointment to their own bench. In a nutshell, *it is impossible to appoint a judge to the Israeli Supreme Court if the sitting judges do not favor that particular candidate*. Even if the judiciary and the elected branches are at a deadlock, and no judges are nominated, all the sitting judges need do is wait patiently for a more cooperative government to come along.

This design flaw is not merely theoretical—the judicial veto power has in fact been abused, increasingly since the 1990s. Perhaps the most illustrative example is that of Prof. Ruth Gavison, who was famously not appointed in 2005 to the Supreme Court due to the objection of presiding Chief Justice Aharon Barak. Gavison was a political moderate and renowned legal scholar, studied at Oxford under H.L.A. Hart, was

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government on judicial nominations. *See* § 1, Israel Bar Association Law (Amendment No. 38), 5776-2016, SH 662.

a founder of Israel's leading civil rights NGO, and was universally considered qualified for the job. She was also a compelling and outspoken critic of the Court's activist jurisprudence spearheaded by Justice Barak, leading Barak to say Gavison "has an agenda unfitting for the Court."[65] Much later on, Barak seemed to repeat this sentiment when discussing the Gavison affair, saying that the Supreme Court is "a family," and that it was not possible to admit someone "from outside the family."[66] The attempt to appoint Prof. Gavison to the Supreme Court was ultimately unsuccessful, despite her reflection of public sentiment and in the teeth of the elected branches' clear desire that she join the bench.

Of course, one might argue that a mere judicial veto power does not amount to the ability to positively *choose* colleagues and successors for the bench. While intuitively appealing, this is not quite the case. As mentioned above, in the case of severe disagreement or poor relations between the judicial-legal establishment and the political-elected branches of government, all the former needs do is to "ride it out." Supreme Court judges know precisely how long their tenure is and can plan ahead accordingly; politicians need to deliver on campaign promises and present some measure of success to voters within a very limited timespan, and they must consider the likelihood that they will fairly soon no longer be in power. Thus, politicians have a strong incentive to compromise and avoid rocking the boat—one non-optimal judge (acceptable to the current judges) appointed is better than the optimal judge never appointed. On the other hand, the Supreme Court justices know precisely when their tenure ends (and indeed who will be Chief Justice, and when), and they can weather a standoff until the current government is replaced, in the hope that the ensuing one will be more favorable. This imbalance of incentives and maneuverability means that a seemingly benign veto power translates into the ability to de facto dictate who is appointed to the bench. As illustrated above, this is not a theoretical question—in addition to being implicit in any debate around judicial candidates, the Court has exercised this power for a number of potential nominations over the past few decades.

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[65] David Hazony, *The First Word: Aharon Barak's true colors*, THE JERUSALEM POST (Nov. 24, 2005), https://www.jpost.com/opinion/editorials/the-first-word-aharon-baraks-true-colors.

[66] Michael Deborin, *Aharon Barak Brings His War on Israeli Democracy to the Next Level*, MOSAIC (Avi Woolf trans., Dec. 9, 2016), https://mosaicmagazine.com/picks/israel-zionism/2016/12/aharon-barak-brings-his-war-on-israeli-democracy-to-the-next-level/.

VIII. THE ISRAELI PSEUDO-CONSTITUTION: THE SUPREME COURT UNILATERALLY INVENTS AND PROCEEDS TO ENFORCE THE ISRAELI CONSTITUTION

The Supreme Court has single-handedly created an Israeli constitution out of whole cloth from which it derives considerable power. The very existence of this constitution and the validity of the authority purportedly derived from it are deeply controversial to this day.

Israel has no "constitution" in the commonly accepted and understood meaning of the term. Despite stating a desire to do so in its Declaration of Independence from 1948, Israel in fact never adopted a comprehensive formal constitution. In lieu of the typical constitutional instrument, lawmakers in the early days of the Knesset decided to legislate various "Basic Laws" piecemeal, with the aspiration that one day these would be fused into a constitution.[67] All agree that this amalgamation has yet to happen. Basic Laws were (and still are) enacted by the same exact process as ordinary laws, and they involve no special requirements such as an enlarged majority or quorum, enhanced debate, or separate legislative procedures. They are, essentially, ordinary laws which are marked by the title "Basic Law" as having some measure of importance and as serving as draft candidates for future constitutional consolidation. Over the years, Israel has indeed enacted many Basic Laws which deal with the state's fundamental institutions and powers.

A full account of the nature of Israeli constitutional law and of the "constitutional revolution" is beyond the scope of this essay. My purpose here is to emphasize just how far removed Israeli constitutional law is from conventional theory and practice. To this end, some key issues bear elaboration: I will focus on the circumstances surrounding Israel's watershed constitutional moment, and on the substance of Israel's most significant constitutional legislation. While it is easy to get lost in the details and technicalities of the Israeli "constitutional revolution," the essence of this revolution and its particular evil can be summarized fairly simply: The Israeli Supreme Court took Israel's unwritten (or "political") constitution and began treating it as if it were a written (or "legal") constitution.[68]

Israel has had an unwritten constitution since its founding, much like the United Kingdom and New Zealand and unlike the United

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[67] DK, 1st Knesset, Session No. 152 (1950), at 1728 (Isr.), https://fs.knesset.gov.il/1/Plenum/1_ptm_250235.pdf#page=21 (Hebrew).

[68] *See generally* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

States and most continental European democracies. Even without a distinguishable constitution per se, Israel had some generally accepted understanding of the fundamental rules defining the structure of government, delineating government authority, and limiting governmental action. To borrow a phrase from Lord Jonathan Sumption, Israel had a "political constitution," enforced by the political classes, by custom, by public opinion, and by the electorate, whereas countries like the United States have a "legal constitution" that is primarily enforceable by the judiciary.[69]

Like all other unwritten constitutions, the Israeli version had some written elements such as Basic Laws, other significant statutes, established institutions, and some key judge-made case law. And like all democratic regimes with an unwritten (or political) constitution, Israel had one ultimate and insurmountable constitutional rule: parliamentary sovereignty or "legislative supremacy."[70] Such a rule means simply that no court may invalidate legislation—that the elected legislature has final say. This is consistent with the established idea that courts may wield power over primary legislation only under authority granted by a written (or legal) constitution—an explicit constitutional instrument with its unique hallmarks and familiar methods of adoption. Absent the deliberate enactment of such a document, any democratic system reverts to the default model of a political constitution. Indeed, legislative supremacy is perhaps the defining distinction between democratic regimes with written and unwritten constitutions.

Seen in this context, the actions of the Israeli Supreme Court may be described more easily. The Court decided to treat a handful of new Basic Laws (by most accounts merely additional written elements of the overall unwritten constitution) as a transformative event essentially establishing the "substantive" equivalent of a new Israeli written constitution. In doing so, the Court made a unilateral, controversial, and legally dubious decision to upend the entire Israeli constitutional order. The Court simply took the unwritten Israeli constitution, proclaimed it to be a written one, and proceeded to assume judicial supervision of parliamentary legislation.

Let us resume with this in mind.

In 1992, the Knesset enacted two novel Basic Laws which listed a slew of core individual rights. These included protection of one's life,

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[69] Lord Sumption lecture, *supra* note 14.

[70] Dicey defines this as the cornerstone of the original uncodified (political) English constitution. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 20 (Liberty Classics 1982) (1915).

person, dignity, property, liberty, and privacy, among other rights.[71] The laws were enacted by a transitional government (i.e., in the leadup to national elections), with only a small number of legislators voting. Out of 120 Knesset members, 32 voted in favor and 21 against (tellingly, a majority of the "in favor" votes were cast by members of the Opposition). The law did not expressly grant courts the power of judicial review over legislation, or any new authority which did not already exist.[72] It was considered a fairly inconsequential piece of legislation which passed with little fanfare and virtually no public attention. As noted above, the legislative procedure for enacting or amending a Basic Law was (and remains) generally the same as for any ordinary law.

A few years later, the Supreme Court led by Justice Aharon Barak elevated these two laws to constitutional status in a landmark ruling, in what is today called the "constitutional revolution," a term coined by Barak himself (or, to some of its detractors, the "judicial coup"). In the famous 1995 case of *Bank Hamizrachi*, the Supreme Court dedicated some 600 pages to deliberating the constitutional significance of the two new laws.[73] The Court held that the enactment of the two Basic Laws amounted to a "constitutional revolution," which made these Basic Laws (and most other earlier Basic Laws along with them) the supreme law of the land. It also held that new legislation contradicting or violating norms found in these Basic Laws could be struck down by the Court. The Court has indeed relied on this "substantive constitution" to reshape the entirety of Israel's public law, including by invalidating duly enacted primary legislation.

The fundamental conceit in Barak's argument was that a political and legal constitution are interchangeable—that Israel indeed has a *political* (or uncodified) constitution which can nevertheless be regarded for all intents and purposes as a *legal* (or codified) constitution. That legislative supremacy is the hallmark of the former and can only be overcome by explicit adoption of the latter was, to Barak, quite beside the point. To sidestep this thorny issue, the Court posited that the constitution's existence may be inferred by merely "interpreting" specific

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[71] Basic Law: Human Dignity and Liberty, *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/39134/97918/F1548030279/ISR39134.pdf; Basic Law: Freedom of Occupation, *available at* https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawOccupation.pdf (henceforth, *Basic Law: Human Dignity* and *Basic Law: Freedom of Occupation*, respectively; *1992 Basic Laws* collectively).

[72] *See* Gideon Sapir, *Constitutional Revolutions: Israel as a case-study*, 5 INT'L J.L. IN CONTEXT 355, 366 (2009).

[73] *Bank Hamizrachi*, *supra* note 53.

clauses within the new Basic Laws. The Court deftly glossed over the fact that the very existence of a constitution limiting the exercise of majority rule—the bedrock of democratic government—is not an interpretive question but rather a factual one, external and prior to the statutory text itself.

Some (including Aharon Barak) contend that the *Hamizrachi* case resembles the U.S. Supreme Court's decision in *Marbury v. Madison*,[74] which recognized the Court's authority to invalidate government acts violating the U.S. Constitution.[75] However, any such comparison is patently false. In *Marbury*, there was no question as to the very existence and validity of a written Constitution—the U.S. Constitution had been debated, adopted, and ratified only twenty-four years earlier by clear majorities of the several United States. *Hamizrachi* could not have been more different. The larger part of *Hamizrachi* was dedicated to resolving whether Israel in fact had any constitution to begin with—whether two obscure and vaguely worded Basic Laws, passed in a near-empty chamber with virtually no public attention or awareness (let alone discussion and debate), could in fact be considered the new Israeli constitution, revolutionizing the Court's jurisprudence and the entire Israeli system of government. Indeed, the Court first had to answer the fundamental question of whether the Knesset even possessed the authority to enact constitutional legislation—a unique power which until that time was not thought to be vested in the Knesset. To top it all off, around 90 percent of the ruling was in fact obiter dictum; the judges unanimously agreed that the law being challenged in the case was not "unconstitutional," and the challenge was thus dismissed, making the debate at the heart of the ruling entirely theoretical and immaterial to the final result in the case. While *Marbury* may have created judicial review based on the existing U.S. Constitution, *Hamizrachi* invented the Israeli constitution itself.

In a detailed and scathing dissent, Associate Justice Mishael Heshin painstakingly dismantled the arguments presented by Barak and other judges, and he characterized their elaborate theories as wishful thinking: while a written constitution enshrining basic rights was certainly desirable, the two new Basic Laws were clearly not such a constitution, as a matter of simple fact. Not only Heshin disputed the *Hamizrachi* ruling and the "constitutional revolution" it proclaimed. Some of the most

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[74] 5 U.S. 137 (1803).

[75] Yoram Rabin & Arnon Gutfel, Marbury v. Madison *and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT'L & COMPAR. L. REV. 303, 310 (2007); 1 AHARON BARAK, *supra* note 44, at 398.

prominent, learned, and respected jurists of the age weighed in against it. Among these were Prof. Ruth Gavison and former Supreme Court Chief Justice Moshe Landau. Landau, who had served on the Court for over thirty years and had retired a decade earlier, published a detailed critique of the ruling titled "Granting Israel a Constitution By Way of Judicial Decree." He believed Israel was the only country in the world in which a constitution came into being through "judicial utterances":

> Glaring above all the caveats I have tried to outline up to this point is the striking question of legitimacy in seizing the right of oversight that the court has claimed for itself: By what right? What or who granted the Supreme Court the authority to do so, without explicit authorization by the legislative body? Without such authorization, the theories upon which the decision is constructed lack any basis in existing law.[76]

The various critiques pointed out the obvious: not only was the Court contradicting its own precedent and rulings regarding Basic Laws since Israel's inception, but the new laws bore none of the hallmarks of a momentous constitutional event. The laws were not adopted by any special procedure; they were not recognized as having constitutional status when deliberated; they were not celebrated and were hardly noticed when enacted; there was no empirical indication they actually represented any kind of broad consensus, within the public or even within the legislature. When arguing for the existence of a judicially-enforceable Israeli constitution, the Supreme Court essentially demanded that the Israeli citizen (and any thoughtful observer) ignore or deny all overwhelming evidence to the contrary. Small wonder Prof. Daniel Friedmann contends that Aharon Barak's constitutional revolution "stands on chicken legs"—that is, on very weak grounds indeed.[77]

There is something fundamentally counter-intuitive about a contested constitution. Surely a valid and good-faith dispute regarding the very existence of a constitutional instrument (including a dissent to that effect by a Supreme Court judge) undermines the entire function and purpose of a constitution: that it be a widely agreed and publicly accepted supreme norm which governs all other laws and institutions. Whether a constitution exists or not ought to be beyond debate and abundant-

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[76] Moshe Landau, *Granting Israel a Constitution By Way of Judicial Decree*, 3 MISHPAT UMIMSHAL L. REV. 697 (1995), https://law.haifa.ac.il/wp-content/uploads/2021/11/14-landoy.pdf (Hebrew) (translation of the title is the author's).

[77] This term is used on page 587 of the Hebrew version of Friedmann's "The Purse and the Sword." The official English version uses the sentence ". . . Barak had constructed a constitution for Israel out of nothing . . ." *See* FRIEDMANN 2016, *supra* note 2, at 333.

ly clear. Six hundred pages of philosophical deliberation would seem to obviate the very question being debated, by its existence suggesting a negative conclusion. Nonetheless, this is the nature of the Israeli pseudo-constitution: born in controversy, deeply and vehemently disputed, yet in full force and wielded by the courts to great effect.

Now we turn briefly to the substance and application of the Israeli constitution. As constitutions go, the provisions of the 1992 Basic Laws are vague and ambiguous.[78] The handful of short operative sections are general, laconic, and abrupt. The limitations and rights appear at a high level of abstraction, as with "there shall be no violation of the life, body or dignity of any person as such."[79] More obscure yet is the provision permitting such violations only by "a law befitting the values of the State of Israel, enacted for a proper purpose."[80] These terms are very broad, and they afford great judicial discretion when treated as binding constitutional text.

Using terms of this high level of abstraction and ambiguity, the Supreme Court has essentially treated almost any conceivable claim as an unenumerated right protected by the Basic Law. And it has subjected legislation to remarkably fluid and subjective standards of review, such as whether it seeks to realize a "proper purpose" or whether it is consistent with Israel's values as a "Jewish and democratic" state.[81] All this, while the very basis for *any* constitutional authority of the Basic Laws is highly dubious. Once the floodgates had been opened, mere expansive interpretation of constitutional norms seemed small beans compared with the judicial creation of a binding constitution. Since 1997, the Court has invalidated over a score of laws (it is admittedly and regrettably difficult to keep track), many of them going to the core of public policy and debate and relating to the most contentious and fraught issues in Israeli society and politics; others, relating to mundane and almost trivial matters.

Several examples will serve to illustrate this. In 2003, amid a severe economic recession, the Israeli government decided to reduce various welfare payments so as to cut public expenditure and passed the necessary legislation to that end. The welfare cuts were challenged in court, with the petitioners arguing that the enumerated right to "dignity" entailed a right to "dignified living" that included a certain basic mini-

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[78] 1992 Basic Laws, *supra* note 71.
[79] § 2, Basic Law: Human Dignity.
[80] § 8, *id.*; § 4, Basic Law: Freedom of Occupation.
[81] § 2a, Basic Law: Human Dignity.

mum income, which the state was obligated to provide.[82] Though the case was ultimately dismissed, the Supreme Court seemed close to accepting the petition, and it ordered that the government provide the Court with an estimation of what constitutes a minimum income for "dignified living." This potential judicial intervention in pure economic policy during a national economic crisis caused an uproar, and the government refused to provide such an estimation, arguing that no objective standard for "dignified living" exists. At the same time, the Knesset initiated legislation which would have directly curtailed the Supreme Court's authority. It seems that this explicit threat of a showdown between the judiciary and legislature was what mollified the Court, leading to the case being dismissed. Nonetheless, the Court recognized in principle a right to "dignified living," essentially a social welfare right, which ostensibly exists under the explicit right to "dignity" in the Basic Law.[83]

Some years later, the Court found the opportunity to make good on its recognition of a right to "dignified living." Various petitions challenged a government policy according to which ownership of an automobile precluded eligibility for certain welfare benefits. During the proceedings, this policy was incorporated into law via an amendment to the "Income Support Law." In 2012, the Supreme Court ruled to invalidate the amendment and to cancel the policy, holding that it unjustifiably violated the benefit recipient's right to a minimum standard of dignified living.[84]

Regardless of one's opinion about various social welfare policies, the example above demonstrates the way in which obscure, vague terms in the quasi-constitutional text of the Basic Laws can be used to further almost any personal agenda and almost any subjective values. Here, a right to "dignity" was used to dictate to the government a particular social welfare policy, right down to minute eligibility criteria for welfare payments.

Another example is the Court's direct and consistent intervention in legislation concerning immigration policy. Israel is the only developed country in the world which has a land border with continental Africa.

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[82] HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance (Dec. 12, 2005), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/commitment-peace-and-social-justice-society-v-minister-finance.

[83] *Id.* at § 16 of Chief Justice Barak's opinion.

[84] HCJ 10662/04 Salah Hassan v. National Insurance Institute, § 71 of Chief Justice Beinisch's opinion (Feb. 28, 2012), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute.

For many years, Israel saw a steady increase in the amount of illegal immigration (by way of border infiltration) by African migrants looking for work and for a better life. While measures were taken to erect physical obstacles to infiltration, many believed that the only way to curb such immigration would be to change the incentives of would-be migrants. That meant severely limiting the income opportunities for those entering Israel illegally.

Over the years, the Court has struck down at least four different laws designed to address illegal immigration.[85] Let us set aside the first three laws, which defined various physical detention schemes, and which were deemed unconstitutional by the Court due to their disproportionate violation of the migrant's right to liberty and human dignity. The fourth law, commonly referred to as "the deposit law," set up a financial mechanism whereby illegal work migrants had to "deposit" a maximum of 20% of their income (in many cases the actual maximum was 6%).[86] This sum would be returned to them upon repatriation, if and when they moved back to their country of origin or to a third country. As illegal work migrants don't pay Israeli social security, this "withheld" sum was no more than what ordinary Israeli citizens were obligated to pay as part of Israel's standard welfare income deductions.

In a 2020 majority ruling, the Court held that this arrangement was unconstitutional, violating the migrant's right to property and to human dignity. Thus, based on an expansive reading of the obscure right to "property," the Court struck down a critical piece of primary legislation in the key area of immigration policy.[87] This constitutional nuclear option was wielded against a fairly benign financial constraint, no more severe than most taxes paid by law-abiding citizens.

Perhaps most striking of all is the Court's relentless involvement in the contentious issue of Haredi military service, as mentioned above in the context of justiciability. Since the State's founding, Haredi men have been exempt from serving in the Israel Defense Forces based on a blanket exclusion from compulsory military service issued periodically by the Minister of Defense. A host of petitions were filed against this

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[85] A law to tackle a related phenomenon—that of legal foreign workers who unlawfully remain in the country past the expiration of their work visas—was also recently struck down, bringing the tally to five. HCJ 6942/19 Chevano v. Minister of Interior (July 12, 2023), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/19069420-V44.htm (Hebrew).

[86] § 4, Law for the Prevention of Infiltration and Assuring the Exit of Infiltrators from Israel (Amendments and Temporary Orders), 5775-2014, SH 84.

[87] HCJ 2293/17 Garsegeber v. Knesset (Apr. 23, 2020), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/17022930-V53.htm (Hebrew).

policy in the early years, but they were thrown out of Court as inherently political and non-justiciable.

This modest judicial approach was upended by Aharon Barak's Court in the late 90s, when the Court ruled that the Minister of Defense was no longer authorized to provide such a blanket exclusion, and that such an exemption must be grounded in primary legislation.[88] Israeli lawmakers obliged, arriving at elaborate and painful legislative compromises between the various factions in the Knesset representing Israeli society. But then two separate Haredi exemption laws were summarily struck down by the Supreme Court as unconstitutional, the first in 2012 and the second in 2017 (the latter may be said to have instigated the political turmoil that has engulfed Israel over the past few years).[89]

For our current purposes, we may focus on the legal reasoning behind these decisions, the aftershocks of which are still felt throughout Israeli society and politics. The Court found the Haredi exemptions to be in violation of the "right to equality."[90] The astute reader may have noticed above that no such right is explicitly recognized in the text of the "Basic Law: Human Dignity and Liberty." Rather, the Court *deduced* the existence of an amorphous constitutional right to equality—yet another instance of an unenumerated right justifying constitutional review of primary legislation.

To make matters far worse, consider that the "right to equality" was deliberately and explicitly excluded from the Basic Law in the first place. Previous drafts of the Basic Law bill included references to equality and corresponding "rights," yet these drafts did not command a majority of legislators who would support it. The historic compromise between various factions in the Knesset which enabled enactment of the 1992 Basic Laws was predicated precisely on the exclusion of a "right to equality" from the statute.[91] Even more clearly, the Haredi legislators involved (who supported the final version which omitted any right to equality) were unequivocal about their concern: they were worried a right to equality would be used to destabilize many religious status quo arrangements, foremost among them the military exemptions.[92] This

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[88] *Rubinstein* case, *supra* note 48.

[89] HCJ 6298/07 Ressler v. Knesset (Feb. 21, 2012), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ressler-v-knesset; HCJ 1877/14 Movement for Quality Government v. Knesset (Sept. 12, 2017), Nevo Legal Database (Hebrew).

[90] HCJ *Recruitment Law*, *supra* note 50.

[91] Sapir 2009, *supra* note 72, at 365.

[92] Judith Karp, *Basic Law: Human Dignity and Liberty—A Biography of Power Struggles*, 1 MISHPAT UMIMSHAL L. REV. 323, 337 (1993) (Hebrew); Yuval Shani, *Basic Law: Equality*

legislative history is universally acknowledged and is not a matter of debate.[93]

In this context, whether a vague right to dignity may be reasonably interpreted to consist of a still vaguer right to equality is immaterial. The Court read into the text of the Basic Law an unenumerated right to equality, in complete contradiction to the political agreement to exclude the very same right from the final bill as it was approved. In this, the Court exhibited a blatant disregard for the express and undisputed intent of the legislature, and for the very validity and force of legislative political compromise—the bread and butter of a functioning democracy.

It's also worth noting that this undefined and unanchored blanket right to abstract equality is unparalleled in most democracies, which usually settle for an explicit right to "equal protection of the laws" or "equality before the law" in the sense of non-discrimination. The judicially-invented Israeli version of equality is thus far more potent than similar provisions elsewhere, giving the judiciary and its proxies vast discretion to enforce so-called equality for any purpose or end it sees fit.

Finally, two examples serve to illustrate the judicial pettiness that has led the Court to strike down some fairly inconsequential laws. The very first law struck down following the *Hamizrachi* ruling, in 1997, was a minor amendment relating to the licensing of investment advisors.[94] There were (per the Court's own reasoning) other routes to reaching an identical result, but the path of constitutional invalidation was chosen nonetheless.[95] Comparably, the most recent law struck down, in 2023, related to an amendment of local municipality elections rules. In this instance, the Court struck down a law due to it being of a "personal" nature, designed to benefit a particular candidate in the mayoral race in the small town of Tiberius (population under 50,000).[96] "Personal legislation" is not prohibited by any statute or concrete constitutional rule,

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11 (Israel Democracy Institute, Policy Paper No. 37, 2020), https://www.idi.org.il/media/15253/proposed-basic-law-equality.pdf (Hebrew).

[93] Hillel Sommer, *In Favor of Judicial Restraint in Constitutional Cases*, 14 RUNI L. REV. 155 (2012), https://www.runi.ac.il/media/b0gpbyr1/sommer.pdf (Hebrew).

[94] HCJ 1715/97, Association of Investment Managers v. Minister of Finance (Sept. 24, 1997), Nevo Legal Database.

[95] Sommer, *supra* note 93, at 178. Sommer submits that the Court was eager to strike down a marginal law out of public view, so as to establish precedent of judicial review without arousing public attention or opposition.

[96] HCJ 5119/23, The Movement for Integrity v. the Knesset (July 30, 2023), Nevo Legal Database. The Court issued a curt decision with detailed reasoning to be published at a later time.

and indeed scores (if not hundreds) of laws have been passed under similar circumstances throughout Israel's history. In the Tiberius case, the Court did not even seem to bother anchoring its ruling in any hitherto known Israeli legal norm.

These examples paint a portrait of a Court heavily engaged in judicial legislation of individual policy preferences while contemptuous of the legislature's policymaking prerogative, and indeed barely faithful to the ostensibly constitutional text of the 1992 Basic Laws. The Court's willingness to strike down duly-enacted primary legislation reflecting public debate and compromise, coupled with its casual eagerness to strike down mundane laws with negligible impact, show that it has rejected its duty of prudential constitutional adjudication, such as was championed by Justice Louis Brandeis in his famous *Ashwander* rules:

> It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.[97]

The Israeli experience of judicial review could not be more distant.

Last but not least, it is worth pointing out that Israel's so-called constitution is missing many essential components, such as a user manual regarding the constitution itself. How can it be amended? When can legislation be considered as having constitutional status? Are *all* Basic Laws part of the constitution? Are there ordinary laws which are also of a constitutional nature? (Note, for example, that the Law of Return, a key element of Israeli immigration policy and considered part of the bedrock of the Israeli system of government, is not a Basic Law.) Much remains unclear.

This lack of clarity and certainty has led to a severe constitutional crisis, with the Supreme Court actively considering the legality of Basic Laws passed since 2017—that is, deliberating on petitions against constitutional legislation itself.[98] In a challenge to the "Basic Law: Israel Nation-State of the Jewish People,"[99] the Court upheld the law but reasoned that it has the authority to invalidate Basic Laws in the future if it

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[97] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

[98] Johnny Green, *A Looming Constitutional Crisis in Israel?*, THE ALGEMEINER (Sept. 20, 2018), https://www.algemeiner.com/2018/09/20/a-looming-constitutional-crisis-in-israel/.

[99] Emmanuel Navon, *Israel's Nation-State Law*, *in* THE PALGRAVE INTERNATIONAL HANDBOOK OF ISRAEL 1 (P.R. Kumaraswamy ed., 2021), *available at* https://navon.com/wp-content/uploads/2022/02/Navon2021_ReferenceWorkEntry_IsraelSNation-StateLaw.pdf.

holds they violate Israel's core values as a "Jewish and democratic" state.[100]

In much the same way, in the recent *Shafir* case, the Court blindsided the Israeli constitutional order by invalidating a provisional Basic Law based on a new "misuse of constituent power" doctrine.[101] The Court assumed for itself the authority to determine whether a law that the legislature characterizes as a constitutional amendment is in fact deserving of such characterization; it also claimed the right to invalidate constitutional legislation it deems unworthy of elevated constitutional standing. Per the Court's reasoning, the fact that the Knesset (in this instance the constituent power by the Court's own definition) made a conscious and deliberate decision to bestow constitutional status on certain legislation is of no consequence.

More recently yet, the Court is entertaining petitions against multiple amendments to Basic Laws which go to the core of Israel's system of government, and it will hear oral arguments on these petitions over the next few months in the fall of 2023.[102]

The gall of reviewing the legality of Basic Laws is nothing short of astonishing. For one thing, the Court has frequently made assurances that the Knesset (and the Israeli electorate) retained sole discretion in forming Basic Laws, and thus that final democratic decision-making power was still vested in the legislature. When critics alleged that the Court was usurping political power, overstepping its bounds, and violating principles of separation of powers and the rule of law, the Court (and Aharon Barak himself) maintained in its defense that the legislature was always free to amend the Basic Laws, and as such always had recourse to roll back or amend judicially-created constitutional rules.[103]

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[100] HCJ x5555/18, Hasson v. Knesset, § 3 of Justice Hendel's opinion (July 8, 2021), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18055550-V36.htm (Hebrew).

[101] HCJ 5969/20, Shafir v. Knesset (May 23, 2021), Nevo Legal Database (Hebrew); Yaniv Roznai & Matan Gutman, *Saving the Constitution from Politics*, VERFASSUNGSBLOG (May 30, 2021), https://verfassungsblog.de/saving-the-constitution-from-politics/.

[102] Michael Starr, *All 15 High Court Justices to Convene for Judicial Reform Law Hearing*, THE JERUSALEM POST (July 31, 2023), https://www.jpost.com/breaking-news/article-753169.

[103] *Bank Hamizrachi*, *supra* note 53, at § 60 of Chief Justice Barak's opinion, and § 13 of Justice Levin's opinion. In addition, Aharon Barak made these comments to senior jurists convened at the Knesset in 2003: "The Knesset may pass a Basic Law annulling constitutional judicial review, and the court could not overturn such a rule . . . If the court strikes down a law as unconstitutional, the Knesset could override such a ruling by re-enacting the law anew as a Basic Law." These remarks were considered obvious and uncontroversial at the time. *Barak: Only the Knesset can Remove Judicial Review by way of BASIC Law,* GLOBES (Nov. 20, 2003) (Hebrew), https://www.globes.co.il/news/article.aspx?did=743373.

In other words, the idea that the Knesset retained the power to amend Basic Laws as it saw fit was employed by the Court as a justification for (and a check on) the systematic expansion of judicial power. If the Court places novel judicial limits the Knesset's power to amend Basic Laws, most critiques of the Court for pursuing unbridled judicial supremacy would be confirmed.

A further point is that the Court had maintained throughout the years that it was not enforcing the opinions and values of its individual judges (as critics alleged), but that it was merely enforcing the Basic Laws which prohibited violations by lesser ordinary legislation. By the Court's own reasoning, the Basic Laws are the highest legal norms—the "supreme law of the land," so to speak. Striking down Basic Laws would require the pretense that they violate some higher legal norm; but none exists.[104] It is unclear what "legal" (in any established sense) norm a Basic Law could violate, beyond abstractions such as "democracy" or "justice" which, when wielded by judges to make binding rulings, are no more than pseudonyms for the exercise of blunt political power.[105]

The absence of legal arrangements surrounding the constitution should come as no surprise. The development of Israeli constitutional law by the legislature was halted in its tracks precisely by the *Hamizrachi* ruling. Israel may well have been much closer today to a comprehensive constitution had it continued at the same pace as had previously existed. Up to that 1995 decision, Basic Laws were legislated on a fairly consistent basis, true to the original aim of preparing the building blocks for a future constitution. *Hamizrachi* made the enactment of Basic Laws seem an unreasonable risk: if the Court could turn the two innocuous 1992 laws into a "constitutional revolution," then any legislation could be bent or broken to fit judicial whims. Veteran ultra-orthodox politician Aryeh Deri summed it up well after *Hamizrachi*, when he famously quipped that he would vote against adopting even the biblical Ten Commandments as a Basic Law, for fear of the way in which it might be interpreted and applied by the Court.[106] *Hamizrachi* and ensuing rulings destroyed the public perception of constitutional legislation; it began to seem like a futile exercise in a world where the last word belonged to the courts.

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[104] *Bank Hamizrachi*, *supra* note 53, at § 63 of Chief Justice Barak's opinion.

[105] Barak uses the term "Basic Values of the System." AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 163-65 (Sari Bashi trans., 2005).

[106] Moshe Gorali, *Rights of Passage*, HAARETZ (Mar. 26, 2002), https://www.haaretz.com/2002-03-26/ty-article/rights-of-passage/0000017f-eff8-d487-abff-fffe19fa0000.

In sum, the experience of the past three decades must lead to the doctrinal conclusion that the Israeli constitution is in fact whatever the Supreme Court says it is. There would seem to be no other qualifying factor—not the legislative text itself, nor the designation of legislation as Basic Laws, nor notions of separation of powers and the rule of law, nor the Court's own historical reasoning. As Member of Knesset Simcha Rothman has quipped, Israel truly has a "living constitution," in that the constitution is vested in the very persons of the presiding Supreme Court justices themselves, and scarcely elsewhere.[107]

IX. UNPARALLELED POWER: THE LEGAL COUNSEL TO THE GOVERNMENT

The Israeli Legal Counsel to the Government (LCG) oversees government legal counsel, government representation in court, and the criminal prosecution system. According to renowned political science expert Prof. Shlomo Avineri, the Israeli LCG is one of the most powerful figures in the democratic world.[108] He or she is Attorney General, Solicitor General, Advocate General, and Chief Prosecutor, all rolled into one astonishingly centralized yet unelected role. The LCG can dictate government policy, either by issuing (ostensibly) binding proclamations that certain government actions and policies are illegal, or by ruthlessly employing a monopoly on government representation in litigation, or by some combination of both. At the same time, the LCG serves as head of the government criminal prosecution apparatus, with final say on a host of issues including whether to investigate or indict high-ranking political and government officials. Many of these powers are not granted by any statute and were not born of legislative reflection, deliberation, and compromise; rather they were carved out in controversial Supreme Court rulings.

As this explanation proceeds, keep in mind that while the Israeli LCG is often called the "Attorney General," the position is *not* equivalent to that of the U.S. Attorney General, who is a cabinet member and is in essence the political Justice Secretary that stands at the head of the Department of Justice. The LCG is more similar to the UK Attorney General insofar as she is an unelected (and indirectly appointed) civil

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[107] *See Basic Law: Legislation—Necessity or Calamity?*, Israel Law & Liberty Forum Student Chapter Debate between Simcha Rothman and Yaniv Roznai (Hebrew), YOUTUBE (Jan. 11, 2022), https://youtu.be/CQdu04o4neI.

[108] Shlomo Avineri, *Decentralize Now*, HAARETZ (Oct. 25, 2009), https://www.haaretz.com/2009-10-25/ty-article/decentralize-now/0000017f-e2ac-df7c-a5ff-e2fe36640000.

servant, and the Office of the LCG is a quasi-independent government body within the Justice Ministry, which some have called the Israeli "fourth branch of government." Israel has a separate Minister of Justice that heads the Justice Ministry and is a member of the government, but who is effectively powerless when opposing actions or policy of the LCG.

Monopoly on Representation. The Pinhasi-Deri cases discussed above set another critical precedent in addition to the substantive rule regarding dismissal of indicted government ministers: The Supreme Court ruled that the LCG is the sole representative of the Israeli government in litigation proceedings, and thus that no adverse legal position may be argued before the Court unless expressly authorized by the LCG.[109] In the Pinhasi-Deri cases, then-LCG Yosef Harish was in agreement with the *petitioners* against the government; he claimed that Prime Minister Rabin was indeed obligated to dismiss the implicated ministers. The Prime Minister wanted to argue that he was under no legal obligation to do so.[110]

The Court refused to consider Rabin's argument. The Court reasoned that the LCG is the exclusive legitimate government representative in court, and that he therefore speaks for the hypothetical government (or for the "reasonable" Prime Minister), regardless of what the actual, real-life government might argue. The Court held that the government itself is not entitled to argue its own case before the Court and, crucially, that in the case of a legal disagreement between the LCG and the government itself, the Court will only consider (and usually will only hear) the LCG's legal position. Consequently, in the event that the LCG agrees with the petitioner's challenge against the government and disagrees with the government's legal argument, the Court will effectively not consider or hear *any* opposing legal argument in defense of the disputed government action or policy. The judges will preside over an artificial controversy where the parties do not disagree, the defendants (i.e., the government and the people represented by it) will lose by forfeit, and the petitioners will win in what is essentially an ex parte proceeding.

Under such rules, it is hardly surprising that the Court ruled as it did in the Pinhasi-Deri case. The Court considered only one legal posi-

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[109] HCJ 4287/93 Amitai Foundation v. Yizhak Rabin, Prime Minister, PD 47(5) 441 (1993).

[110] *Pinhasi-Deri* case, *supra* note 27.

tion—that of the plaintiff, which was echoed by the LCG acting on behalf of the government.

One must admire the audacity of both the Court and the LCG in advocating such a policy. While an elaboration of why this approach is so alien to democratic sentiments seems unnecessary, one could start with the widely accepted second tenet of natural justice: "audi alteram partem"—hear the other side.[111]

The resulting sway the LCG holds over government decisions and policy cannot be overstated. Any dispute or disagreement between the LCG and the government itself comes with an implicit (and at times explicit) threat: the LCG can choose to simply not defend a government decision in the event of a challenge by litigation, and the decision would be automatically defeated in court. In such an event, the decision under consideration would often be abandoned in light of the LCG's effective veto.

Some brief examples are in order, of which there is no shortage. In 2010, the Israeli government voted to appoint General Yoav Galant to the position of Israel Defense Forces Chief of Staff. Soon after, media outlets reported zoning and planning violations with regard to Galant's home. The decision was nonetheless approved by the official state nonpartisan committee charged with vetting senior government appointments. Following an HCJ petition challenging the appointment, then-LCG Yehuda Weinroth told the government he would not defend the appointment in court. As a result, considering their almost certain legal defeat, the Prime Minister and Defense Minister backed down and withdrew the appointment.[112] This instructive example demonstrates the chilling effect caused by the LCG representation monopoly—one can only imagine how many legal positions are abandoned and never make it to court due to the LCG adopting an adverse position or even merely expressing misgivings.

In 2018, Minister of Science Ofir Akunis refused to approve the appointment of scientist Prof. Yael Amitai to a certain statutory research-related council, despite the recommendation of a subordinate professional committee. The appointment required the Minister's approval by

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[111] *Natural Justice*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100225319 (last visited Aug. 1, 2023).

[112] Amos Harel, *Barak Still Pushing for Galant to Be Named IDF Chief, Despite AG's Ruling*, HAARETZ (Feb. 4, 2011), https://www.haaretz.com/2011-02-04/ty-article/barak-still-pushing-for-galant-to-be-named-idf-chief-despite-ags-ruling/0000017f-f959-d7c0-afff-fd5b85770000; Amos Harel, *Benny Gantz Approved as Israel's New Army Chief*, HAARETZ (Feb. 10, 2011), https://www.haaretz.com/2011-02-10/ty-article/benny-gantz-approved-as-israels-new-army-chief/0000017f-e3ad-d75c-a7ff-ffad13bf0000.

law, and this approval was declined due to Amitai's past remarks calling on Israeli soldiers to refuse to serve in the West Bank. When this decision was challenged in the Supreme Court (under the unreasonableness doctrine, of course), the LCG refused to argue the Minister's case, and at the same time refused to permit Akunis to retain a private attorney who could do so. The LCG maintained that the Minister's decision was indeed unlawful, and that the LCG was the sole legitimate representative of a government legal position in court. As such, the *only* legal counsel in court, on both sides, was that in favor of the petitioners. Perhaps unsurprisingly, Akunis lost the case.[113]

In the ruling, Justice Alex Stein cast doubt on the legal validity of the LCG's monopoly on government representation.[114] Stein mused, not without a hint of sarcasm, that if there was in fact no controversy between the parties due to the apparent consensus between them, why had they spent precious judicial time adjudicating a seemingly nonexistent dispute? And indeed, Stein wondered, why was there any need for the Court to provide a ruling in light of the supposed agreement between the parties?

In 2020, Minister of Internal Security Amir Ohana was in the midst of defending a legal challenge against some regulations he had mandated with regard to firearm licensing. (Ohana's name will come up a few times, as until recently he has been one of the few politicians willing to openly challenge the legal norms discussed in this essay.) The LCG sided with the petitioners, refusing to argue Ohana's legal claims, and also did not permit Ohana to retain his own representation in Court. Ohana took an unprecedented step and filed an independent brief with the Court in his own name, stating simply that the LCG did not represent the Minister and that he demanded to be represented by his own counsel. Ohana noted that if this request was not granted, the Court would essentially be ruling without having heard the arguments of the primary respondent in the suit. The basic right to assistance of counsel in Court—afforded to the common criminal—was not being extended to senior government officials carrying out their duties as democratically elected representatives of the public will.[115]

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[113] HCJ 5769/18 Amitai v. Minister of Science and Technology (Mar. 4, 2019), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18057690-Z09.htm (Hebrew).

[114] *Id.* at §§ 7-11 of Justice Stein's opinion.

[115] Avishai Grinzaig, *Minister Ohana Independently Requested the HCJ to Terminate his Representation by the LCG*, GLOBES (Oct. 2, 2020), https://www.globes.co.il/news/article.aspx?did=1001344388 (Hebrew).

The Court did not seem impressed with Ohana's desperate plea for a fair hearing. In a short decision, the Court dismissed his motion, as it was filed without the LCG's consent, and ordered it removed from the case file. The government has since been replaced, and a new Minister of Internal Defense has clarified that he will comply with the petition (and with the LCG) and will reevaluate the regulations being challenged. The case was recently resolved in favor of the petitioners.[116]

From Legal Counsel to Binding Directive. The LCG is the formal and foremost source of legal counsel and advice to the executive branch, to the government as a whole and its individual members, and to the various administrative authorities throughout the state. This is the original and primary function of the Israeli "Legal Counsel to the Government," as the name suggests. Even without a comprehensive and exhaustive review, the peculiar direction in which this position has evolved will immediately strike the reader. A discussion of two aspects of this evolution will suffice for the purpose of this essay.

First, what was originally legal "counsel" has become something just short of a "mandatory directive."[117] The LCG's legal position on almost any issue, including pure policy decisions, has binding effect such that any such legal pronouncement by the LCG's office obligates adherence by government authorities and agencies. Any government action in violation of such directives is immediately branded as illegal, even though these are not binding regulations in a typical sense (i.e., these are not rules or guidance issued by a higher figure in the government hierarchy), and even in cases where there is in fact legitimate dispute as to the legality of the action in question.

One theoretical exception to this rule pertains to decisions of the actual government itself, i.e., the collective group of ministers who head the various government departments and who jointly issue official government decisions and policy (also sometimes known as a "cabinet," though in Israel this term is usually reserved for a smaller clique of senior government officials). However, this exception has been gradually eroded over the years, and the LCG's pronouncement on legality is increasingly seen as constraining even the actual national government.

A recent development is the new legal construct of "legal prevention" (or "legal prohibition"), which has started appearing in public

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[116] Hadas Labrisch, *Public Security Minister Bar Lev to rethink Erdan's lax gun laws*, THE JERUSALEM POST (July 23, 2021), https://www.jpost.com/israel-news/public-security-minister-bar-lev-to-rethink-erdans-lax-gun-laws-674723.

[117] HCJ 1635/90 Zarzevsky v. Prime Minister, PD 45(1) 749 (1991); *Pinhasi-Deri* case, *supra* note 27.

statements and court briefings filed by the LCG. The LCG has begun characterizing his policy opinions—on matters that appear to be disputes over correct application or interpretation of the law—as the black-letter law itself. As such, any action or decision not in accordance with the LCG's position is deemed illegal and void. As some have pointed out, the use of this term seems to be inversely correlated to the legal basis of the LCG's considered opinion—the weaker the legal argument, the likelier the claim of a "legal prevention" will be trotted out.[118]

It is worth recalling that the very use of the term "legal" can in fact be misleading, particularly where the "unreasonableness" standard is in play. If any government action or decision is subject to the quasi-legal standard of "unreasonableness," discussed above, then the LCG can determine the precisely "reasonable" action in advance and advise the government that it has no choice but to make the only reasonable decision. In other words, because of the unreasonableness standard, just about any policy decision may be considered a legal issue and therefore made subject to the LCG's scrutiny and binding directives.

The innovative construct of the "legal prevention" recently came to a head in court. In February of 2020, then-Minister of Justice Amir Ohana led an initiative to appoint a governmental commission which would report on the state of the Police Investigations Department (Israel's "internal affairs" authority, which is part of the Justice Ministry, but which ultimately reports to the LCG). This was during Ohana's tenure within an interim "caretaker" government (i.e., the government which has lost the confidence of the legislature, but which continues to govern until a new one is formed after national elections). The motion to appoint the commission was expected to be approved by the government.

The LCG objected to this proposal in advance, and he issued a directive not only describing the legal grounds for his objection, but also invoking the new "legal prevention" claim, stating that the government simply could not make such a decision. After having duly considered the LCG's objection, the government proceeded to vote in favor and appointed the commission. This decision was immediately challenged in court. While the LCG disagreed with the government decision and was effectively a party to the petitions, he graciously deigned to permit

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[118] *See* Aharon Gerber, *The "Legal Prevention" of the LCG—Criticism and Evaluation*, RESHUT HARABBIM BLOG (Feb. 7, 2021), https://lawforum.org.il/wp-content/uploads/2021/02/Garber-Legal-Prevention.pdf (Hebrew).

the government to retain its own independent representation for the legal proceedings.[119]

Let us put aside the merits of the legal argument against appointing the committee (if you had guessed "unreasonableness," you would not have been wrong), and let's put aside the fact that there seems to be a conflict of interest since the Police Investigations Department is under the LCG's responsibility and jurisdiction. Remarkably, both the petitioners *and the LCG himself* advanced the argument that the LCG directive itself bound the government, such that the decision to appoint the commission was illegal merely because the LCG has so opined—regardless of the legal basis of the directive itself. In other words, they claimed that the highly contested quasi-legal opinion of the unelected and unaccountable LCG is, in and of itself, sufficient to render illegal any decision or action by the elected national government.

The Court issued a temporary injunction freezing any activity of the commission pending further thorough adjudication, though it did not elaborate the prima facie legal grounds for this initial decision. The order effectively buried the commission as a new Minister of Justice had since assumed office, who was not interested in advancing the commission's activity.[120] Indeed, the commission remained in limbo until it was finally disbanded an entire year later, as its commencement was not pursued by the new Minister of Justice.

A second aspect of the LCG's evolving advisory function is the demand that the LCG enjoy a complete monopoly over the provision of legal counsel to the government. In yet another recent controversy, the Israeli government was set to discuss a slew of COVID-19-related restrictions, including various limitations on public protests. The LCG had presented the government with a particular legal argument regarding the government's authority to so issue such restrictions. One government member, Amir Ohana, felt that the legal opinion was one-sided and flawed, and he sought to present the government with opposing legal argumentation. To that end, he summoned Dr. Aviad Bakshi, a respected scholar of public and constitutional law and head of the legal research department at an established policy think tank, to present an alternative legal analysis of the government's authority with regard to

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[119] *AG asks High Court to halt work of panel probing internal police investigations*, THE TIMES OF ISRAEL (Feb. 21, 2020), https://www.timesofisrael.com/ag-asks-high-court-to-halt-work-of-panel-probing-internal-police-investigations/.

[120] *High Court order freezes panel probing internal police investigations*, THE TIMES OF ISRAEL (Feb. 24, 2020), https://www.timesofisrael.com/high-court-orders-freezes-panel-probing-internal-police-investigations/.

the restrictions being contemplated, and also regarding whether the LCG's legal counsel should be considered binding.

Sure enough, in a brief letter to the cabinet secretary, the LCG vehemently opposed both Bakshi's presence in the meeting and any indirect presentation of Bakshi's legal position to the government. So forceful was his opposition that some government members—those representing a political faction more sympathetic towards the legal status quo and the LCG's extensive authority—threatened to cancel the critical government meeting altogether if Ohana proceeded with presenting the opinion. Bakshi consequently remained outside the meeting, and the alternative legal opinion was not presented.[121]

Regardless of whether the LCG's objection was grounded in existing law or was an unfounded fiction, the very notion that the government is not entitled to receive alternative legal viewpoints seems highly objectionable and intuitively problematic.

Chief Prosecutor. The LCG is the official head of the government criminal prosecution apparatus, with extensive powers both in formulating policy and in specific key decisions left to the LCG's discretion by statute. The LCG oversees government agencies such as the police prosecutions department and the state prosecution service, including its "internal affairs" police investigations department. Many aspects of high-profile criminal cases lie within the LCG's discretion, including the initiation of preliminary probes, full-scale investigations, and the indictment of senior politicians in public corruption cases. The LCG holds key authority that can make or break the careers of any but the most senior, popular, and resolute politicians.

The notion of an over-zealous LCG prosecuting unfavored politicians is firmly grounded in reality. In the aforementioned case of Justice Minister Yaakov Neeman in 1996, then-LCG Michael Ben-Yair was overheard saying of Neeman, "I'm going to screw that fascist," mere days before filing the bogus charges against him.[122] There is in fact a respectable tally of top-tier politicians, public figures, and legal professionals, all considered adverse to the legal establishment, who have had their careers tanked and worse only to be fully exonerated down the

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[121] Netael Bandel, *Likud Minister Request for Outside Legal Opinion on Curbing Protests Shot Down*, HAARETZ (Sept. 22, 2020), https://www.haaretz.com/israel-news/2020-09-22/ty-article/.premium/likud-minister-request-for-outside-legal-opinion-on-curbing-protests-shot-down/0000017f-e186-d75c-a7ff-fd8fded60000.

[122] Kalman Liebskind, *Following Mandelblit's tapes: Where's Netanyahu's Responsibility for the Malfunctions in the Law Enforcement System?*, MAARIV (Oct. 17, 2020), https://www.maariv.co.il/journalists/Article-795994 (Hebrew).

line. A partial list may leave an impression: Yaakov Neeman as Justice Minister, indicted and resigned—acquitted in court; President Reuven Rivlin, investigated and his appointment as Justice Minister prevented—all cases closed with no charges (in his reaction, Rivlin coined the phrase "the rule of law hoodlums");[123] Rafael Eitan, indicted and his appointment as Minister of Internal Security prevented—acquitted by the Court with "no case to answer";[124] Minister of National Security Avigdor Kahalani, indicted—fully acquitted with "no case to answer" and acquittal upheld on appeal;[125] Gal Hirsch, criminal probe initiated preventing his appointment as national police commissioner—most charges dropped;[126] Dror Hoter-Yishai, elected Chairman of the statutory Bar Association, indicted on three separate charges and hounded through the courts, destroying his career and causing him to lose his seat as Chairman—fully acquitted in court.[127]

And that's just to name a few. All of these figures were considered less-than-sympathetic to the legal establishment status quo and were vocal critics of the Supreme Court and the LCG Office. All of them were targeted in what turned out to be baseless criminal witch-hunts.

Roles in conflict. These multiple roles of the LCG are in some degree of tension with one another; in other countries, this tension would amount to a clear and indefensible conflict of interest. Since 1996, almost every Israeli Prime Minister has been under criminal investigation during his tenure, along with dozens of government ministers and elected legislators. The LCG initiates and approves the investigations and ultimately controls whether to charge these politicians with crimes. Throughout these criminal proceedings, the very same LCG is *also* the primary legal counsel to the government, sitting in regular, personal

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[123] Simcha D. Rothman, *Israel's Judicial System Has a Stranglehold On Politics*, THE JERUSALEM POST (June 14, 2021), https://www.jpost.com/opinion/israels-judicial-system-has-a-stranglehold-on-politics-opinion-671026.

[124] Evelyn Gordon, *How the Government's Attorney Became Its General*, 4 AZURE 75, 95 (1998).

[125] Zvi Harel, *Ex-minister Kahalani Cleared Again of Obstructing Justice*, HAARETZ (July 31, 2002), https://www.haaretz.com/2002-07-31/ty-article/ex-minister-kahalani-cleared-again-of-obstructing-justice/0000017f-ea54-d4a6-af7f-fed62d3f0000.

[126] Gidi Weitz, *Critics of Gal Hirsch as Israel Police Chief Should Look in the Mirror*, HAARETZ (Aug. 27, 2015), https://www.haaretz.com/2015-08-27/ty-article/.premium/look-at-who-is-attacking-hirschs-police-chief-appointment/0000017f-e305-d568-ad7f-f36f02b60000; *But see*, *Ex-general Gal Hirsch indicted for tax evasion totaling $1.9 million*, THE TIMES OF ISRAEL (Oct. 21, 2021), https://www.timesofisrael.com/ex-general-gal-hirsch-indicted-for-tax-evasion-totaling-1-9-million/.

[127] Hadas Magen, *District Court Acquits Hoter-Yishai on Tax Offence Charges*, GLOBES (June 8, 1998), https://en.globes.co.il/en/article-357032.

meetings with members of government and providing confidential legal advice in the most critical and sensitive affairs of state. The Prime Minister sits in a one-on-one legal counsel meeting with the LCG a day after the LCG publicly announces his criminal investigation against the same Prime Minister—such an image may seem bizarre, but it is par for the course in the Israeli legal system.[128]

It is not only the prosecutorial and legal counsel overlap which is untenable. Consider that any change advanced by lawmakers directly or indirectly affecting the LCG's authority or the legal system may come with a heavy price. The LCG can label key policy efforts by politicians as "legally prohibited" or may decline to defend their policies when challenged in court; thus, the LCG may often hold decisive power over a politician's ability to advance their policy agenda. The LCG can signal to legislators and policymakers that they are overstepping and are better off not interfering with his domain. Few politicians have the incentive or the wherewithal to rock the legal boat.

Take one recent example highlighting the problematic combination of the LCG's roles, from June 2020. After the LCG formally indicted him with criminal charges, Prime Minister Netanyahu sought to finance his legal defense costs. He requested that the official state gifts committee approve a grant of 10 million NIS (approximately 3 million USD) from his longtime friend and financier Spencer Partridge, who had offered to cover the considerable attorney's fees (no one, including the LCG, suggested or alleged that the sum was excessive). The LCG issued a formal memorandum to the gifts committee stating that the grant would be unlawful and directing them to deny the request. The request was accordingly denied (and some officials within the LCG department were quoted as saying that Netanyahu could easily receive double the amount—if he were to resign as PM).[129]

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[128] HCJ 4507/18 Movement for Quality Government in Israel v. Attorney General (July 22, 2018), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18045070-E03.htm (Hebrew) (Justice Amit, with Justices Elron and Willner concurring, stated that "it is proper to trust the LCG's judgment, when he finds that, according to his role, deliberations in "four eyes" with the Prime Minister are necessary. We presume that the Legal Counsel to the Government—in accordance with his status and the presumption of proper administration—keeps a "Chinese wall" between his different hats [referring to his dual role as legal counsel and as a prosecutor], and there is no place to assume that he's in conflict" (my translation, Y.G.)).

[129] *Rejecting request, comptroller committee says it won't weigh PM's bid for legal funds*, THE TIMES OF ISRAEL (July 2, 2020), https://www.timesofisrael.com/liveblog_entry/rejecting-request-comptroller-committee-says-it-wont-weigh-pms-bid-for-legal-funds/.

Regardless of the propriety or legality of Netanyahu obtaining external funding for his legal defense, the point here is that the LCG at the time was the key official behind the criminal charges against Netanyahu, in what is certain to be the defining criminal case of his legal career and probably the defining public decision of his life. His reputation and legacy were on the line, and his name will forever be associated with the failure or success of the Netanyahu prosecution. Naturally, the funds available to any defendant's legal team may influence the outcome of the case, and in this instance, Netanyahu's ability to finance his legal expenses could prove decisive (consider that Netanyahu was charged in three separate cases regarding a period spanning over a decade, with the prosecution mustering 333 witnesses). The LCG had a clear interest in limiting Netanyahu's legal defense as it could possibly affect the outcome of the trial. Yet here was the LCG, the same "chief prosecutor" overseeing the criminal proceedings against Netanyahu, in his role as "legal counsel" effectively deciding whether to approve the defendant's access to funds for his legal team.

Symbiotic relationship with the Supreme Court. The majority of the LCG's powers described above were never granted expressly via primary legislation, but were rather bestowed through a series of Supreme Court rulings which adopted increasingly wide interpretations regarding the LCG's authority. There is no statute which defines the LCG's legal opinion as having any legal force; there is no statute which grants the LCG a monopoly over government litigation.

The LCG is appointed via a public committee which is headed by a *former* Supreme Court justice, himself appointed to the committee by the *sitting* Supreme Court chief justice. This gives the judicial establishment enormous influence over the appointment of any LCG. Since the founding of the State of Israel, about half of all LCGs have subsequently been appointed to the Supreme Court (including two out of the four most recently retired LCGs, as of 2023). Each LCG has consistently and uniformly favored the legal system status quo, acting as a bulwark against any attempts to limit the Supreme Court's influence. The LCG functions as a de facto proxy of the Supreme Court, controlling which precedents may be challenged in litigation, and ensuring that even controversial or dubious rulings are afforded expansive interpretation and institutional backing while being enforced via binding legal directives. Prof. Yoav Dotan has dubbed the LCG a "forward base" for the Su-

preme Court—executing judicial policy without the need to go through the tedious motions of adversarial argument and legal procedure.[130]

The overwhelming and conflicting powers wielded by the Israeli Legal Counsel to the Government are a far cry from the democratic vision of limited and accountable government. In the LCG, many separate and overlapping functions of government are exercised by one man or woman who is either unconstrained by the law or who has definite authority to state the law as he or she sees fit.

X. CRIMINAL INJUSTICE: VAGUE OFFENSES AND ZEALOUS PROSECUTION

Israeli criminal law, both substantive and procedural, includes a host of alarming features which diverge from accepted democratic norms, and at the same time lacks many elements commonly found in free societies. These reflect a severely flawed criminal justice system unconcerned with individual liberty and dominated by an unbridled criminal justice bureaucracy. While an exhaustive survey is beyond the scope of this essay, the following points serve to demonstrate the problem in all its gravity.

Criminal defendants in Israel have only a limited right against self-incrimination, and they have no right to assistance of legal counsel during police interrogation.[131] Unlike almost all adversarial common-law jurisdictions in the developed world, Israel does not hold jury trials of any kind. In addition, Israel has no "exclusionary rule" doctrine; a judge has wide discretion over whether to admit evidence obtained illegally—not to mention a "fruit of the poisonous tree" doctrine regarding subsequent evidence gained as a derivative of the initial illegal act.[132] Indeed, illegally obtained evidence is rarely deemed inadmissible in criminal trials. Israel has no second-tier approval process for authorizing severe indictments—no grand jury or impartial public committee—such that the prosecution service has near-total discretion on whether to indict and with what charges. These alone make Israel an outlier among democratic regimes.

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[130] 1 YOAV DOTAN, JUDICIAL REVIEW OVER ADMINISTRATIVE DISCRETION 308 (2022) (Hebrew).

[131] *See* Thomas Weigend & Khalid Ghanayim, *Human Dignity in Criminal Procedure: A Comparative Overview of Israeli and German Law*, 44 ISR. L. REV. 199, 209-11 (2011).

[132] A law amending Israel's evidence code was passed by the 24th Knesset, allowing judges to invalidate evidence derived from an illegal act. However, such authority remains discretionary. *See* Law Amending the Evidence Order (No. 19), 5782-2022, SH 984.

Israeli criminal conviction rates are unusually high by international standards: over 90% of criminal cases end with a final conviction (2020-21 data).[133] Perhaps not unrelatedly, the judicial bench in Israel is numerically skewed toward ex-prosecutors and other governmental lawyers. Nearly half of Israeli judges were previously government employees, with 20% of judges hailing specifically from the ranks of state prosecution and litigation—a proportion many times above their general share in the legal profession.[134] This lends credence to claims of a bench unduly sympathetic towards criminal prosecutors and towards the government in general.

Criminal offenses and statutes are often interpreted liberally, to the detriment of the suspect or defendant, despite clear statutory instructions (and the long-held Western tradition) to the resolve ambiguity in favor of the defendant.[135]

In a widely followed recent ruling, the Court adopted a dubious and groundbreaking theory of "cumulative" criminality, whereby separate and unrelated actions can lead to conviction of a crime, despite none of the individual actions constituting a crime in its own right.[136]

An especially instructive example of Israel's deviation from democratic norms in substantive criminal law is the "Fraud and Breach of Trust" criminal offense applicable to public officials. This offense covers improper use of official office that does not rise to the level of outright bribery or corruption.[137] The particular crime of "Breach of Trust" has no standard meaning or accepted definition, and it has been severely criticized by legal experts across the political spectrum as excessively

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[133] Office of the State Attorney, 2021 Yearly Report Summary 38-42 (2022), https://www.gov.il/BlobFolder/news/report2021/he/2021-year-report.pdf (Hebrew).

[134] IDO ABGER, KNESSET CTR. RSCH. & INFO., DATA ON THE DEMOGRAPHIC AND OCCUPATIONAL BACKGROUND OF JUDGES 3 (2020), https://fs.knesset.gov.il/globaldocs/MMM/e95db6db-1d12-eb11-8108-00155d0aee38/2_e95db6db-1d12-eb11-8108-00155d0aee38_11_16514.pdf (Hebrew).

[135] *See infra* section XI regarding statutory interpretation. *See generally* Boaz Sangero, *Broad Construction in Criminal Law?! On the Supreme Court Chief as a Super Legislator and Eulogizing the "Strict Construction Rule,"* 3 ALEI MISHPAT 165 (2003) (Hebrew).

[136] The "Cumulative Effect Doctrine" was used to convict former Israel Police Commissioner Nissan "Nisso" Shaham for Fraud and Breach of Trust in eight cumulative cases of actions that the Court said amounted to sexual harassment. Though the cumulative doctrine had been hinted at in past cases, Shaham's case was the first one where the Supreme Court used it to uphold a conviction by the district court. The Court reasoned explicitly that no single action of Shaham's constituted a crime in and of itself, but rather that their "cumulative effect" amounted to a punishable offense. CrimAA 6477/20 Shaham v. State of Israel (Nov. 15, 2021), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/20064770-J07.htm (Hebrew).

[137] § 284, Penal Code, 5737-1977.

vague and unclear, thus violating the principle of legality in criminal law.[138] Simply put, politicians and other public officials can find themselves guilty of a crime without any ability to foresee their culpability in advance. Similar laws in other jurisdictions are rarely applied, and many are in the process of being scrapped. Indeed, in a recent report, the UK Law Commission recommended entirely repealing the common law offense of "Misconduct in Public Office,"[139] which was the original model for the Israeli "Breach of Trust" provision.

Nonetheless, the Breach of Trust offense is applied by the Israeli courts often and to great political effect; criminal law expert Prof. Miriam Gur-Aryeh described its effect as resembling a "moral panic."[140] In the leading case on the matter, *State of Israel v. Shavas*,[141] the Supreme Court decided to retain the crime's vague character and to leave judges wide discretion in interpreting and applying the statute, so as not to hamper the state's efforts in combating governmental corruption. Politicians and public officials have since found themselves indicted (and sometimes convicted) under ambiguous circumstances, for conduct which few had previously (or subsequently) considered of a criminal nature.

Setting aside its deficiency from both liberal and democratic perspectives in and of itself, the Breach of Trust offense is also inseparable from some of the other issues discussed above. Consider the Pinhasi-Deri doctrine requiring the resignation of indicted public officials; consider the enormous power wielded and discretion enjoyed by the Legal Counsel to the Government and the prosecution service subordinate to him or her; then consider the vague and unforeseeable nature of the Breach of Trust crime and the relative ease with which public officials can find themselves embroiled in a criminal probe.

The combination of these elements puts much of the political and governmental establishment at the mercy of near-total prosecutorial and

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[138] FRIEDMANN 2016, *supra* note 2, at 233-36; Moshe Gorali, *How the Crime of Breach of Trust Was Abolished*, HAARETZ (Feb. 6, 2003), https://www.haaretz.com/2003-02-06/ty-article/how-the-crime-of-breach-of-trust-was-abolished/0000017f-e344-df7c-a5ff-e37ebf990000; Yuval Karniel, *Breach of Trust of a Public Servant—A Proposal for Interpretation Based on the Value Protected by the Offense*, 7 MISHPAT UMIMSHAL L. REV. 415 (2004) (Hebrew).

[139] LAW COMMISSION, MISCONDUCT IN PUBLIC OFFICE, 2020, Law Com. 397 (UK), https://www.lawcom.gov.uk/project/misconduct-in-public-office/.

[140] Miriam Gur-Aryeh, *Moral Panic and Political Corruption: The Expansion of the Criminal Offense of Breach of Public Trust over Disciplinary and Ethical Areas*, 17 RUNI L. REV. 467 (2014), https://www.runi.ac.il/media/qwph2xe4/gur-arye.pdf (Hebrew).

[141] FHCrim 1397/03 State of Israel v. Shavas, PD 59(4) 385 (2004) (Hebrew).

judicial discretion—every politician and civil servant is under the constant threat of having their public career halted indefinitely or even terminated. In other words, the full effect of the Pinhasi-Deri doctrine and of the LCG's political leverage crystallizes when applied to crimes such as Breach of Trust, especially within the context of an aggressively prosecutorial criminal justice system.

Finally, Israel has a single national police force and a single state prosecution service, with jurisdiction throughout the country. District police chiefs, as well as district attorneys and state criminal prosecutors, are unelected and are not directly appointed by the elected branches—rather, they are directly accountable only to the senior prosecution bureaucracy (or national police leadership). And under the current government job application scheme, senior government-prosecutor positions are open only to existing prosecutors within the system, making it nearly impossible to inject senior "new blood" willing to challenge the status quo.[142]

Due to the lack of local accountability between law enforcement officials and the communities they are meant to serve, the Israeli criminal enforcement apparatus prioritizes national problems over the more typical localized duties of policing and criminal justice. This in turn often leads to heavy-handed over-enforcement of purported national crimes—with a special focus on political corruption and white-collar financial cases—at the expense of routine law enforcement. Ordinary cases such as those involving property crime, organized crime, personal safety, and public order tend to be underenforced.

Moreover, the entire criminal justice system is largely insulated from any kind of meaningful public or governmental supervision. Perhaps uniquely instructive regarding such a lack of oversight are the consistent and relentless media leaks of prosecution evidence, which have now become a staple feature of high-profile criminal cases. Such routine and comprehensive leaks, emanating from the police or prosecution service with the goal of inducing public support for indictment or conviction, have even raised the ire of the Supreme Court[143] and of the State

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[142] Nitzan Shafir & Chen Maanit, *Closed Prosecution: Following the Controversial Appointments Process in the State Attorney Office*, GLOBES (Dec. 29, 2020), https://www.globes.co.il/news/article.aspx?did=1001355046 (Hebrew).

[143] *Supreme Court chief calls for probe of 'worrying' leaks from Netanyahu case*, THE TIMES OF ISRAEL (Sept. 14, 2020), https://www.timesofisrael.com/supreme-court-chief-calls-for-probe-of-worrying-leaks-from-netanyahu-case/.

Comptroller,[144] to no avail. LCG Mandelblit recently refused to investigate the leaks (issued from his own subordinates) on the grounds that such a probe had "a very low chance of yielding a result."[145] This despite his own complaint to the Supreme Court in 2015, prior to his appointment as LCG, about the same type of severe and unjust leaks from a criminal probe into his own conduct. With courts unwilling to force any serious investigation into the media leaks, despite the perversion of justice and intolerable conduct, the public and their elected representatives remain relatively powerless in pursuing any kind of change or accountability.

XI. OBJECTIVE-PURPOSIVE INTERPRETATION: BARELY-DISGUISED JUDICIAL LEGISLATION

Israeli courts regularly employ a form of statutory interpretation pioneered by Justice Aharon Barak in the mid-1980s, locally labeled "objective-purposive interpretation" (OPI). This interpretive method at times stands at odds with fundamental democratic, judicial, and linguistic norms.

The proponents of OPI argue that in addition to a "subjective" purpose (i.e., the purpose stated as part of the legislative text, or perhaps one which may be gleaned from external sources), any statute also carries an "objective" or hypothetical purpose, which is rather a moral ideal—the advancement of fundamental values, democracy, human rights, the rule of law, and much more besides. The "objective" purpose of a statute is the purpose that a "reasonable" legislator would have wanted to pursue.[146] Needless to say, judges may coax almost any desired meaning out of a given statutory text when interpreted or applied in accordance with such abstract concepts, thus dramatically expanding judicial discretion beyond conventional interpretive constraints.

While the OPI terminology seems to focus on the viewpoint of the legislator (hence "subjective" refers to the actual, real-world purpose stated by legislators, and "objective" refers to the theoretical purpose divorced from whatever a legislator may have actually contemplated), a pragmatic assessment of OPI reveals just how misleading these terms

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[144] Jacob Magid, *Ombudsman calls on AG to probe cops leaking contents of interrogations to press*, THE TIMES OF ISRAEL (Nov. 5, 2019), https://www.timesofisrael.com/ombudsman-calls-on-ag-to-probe-cops-leaking-contents-of-interrogation-to-press/.

[145] *Attorney General resists opening probe into leaks from Netanyahu case*, THE TIMES OF ISRAEL (Oct. 2, 2020), https://www.timesofisrael.com/ag-resists-opening-probe-into-leaks-from-netanyahu-case/.

[146] BARAK 2005, *supra* note 105.

can be. From a judicial point of view, the so-called subjective purpose is the only *objective* element in the analysis (that is, it may be impartially considered and debated on a textual-logical-historical basis), while the purported objective purpose amounts to little more than a vague judicial whim at the highest level of theoretical abstraction. Put differently, the so-called subjective purpose is the only one which may be jointly evaluated by an agreed standard or against the real world; the so-called objective purpose would vary between every single judge—and indeed every citizen—who might have very different notions of the ideal purpose of any given statute and of the legal system taken as a whole.

Hopefully the irony is not lost on the reader that the very reversal of the terms subjective and objective in the context of OPI is itself verbal obfuscation of their conventional, dare I say objective meanings.

Judge Richard Posner's scathing critique of Aharon Barak includes an assessment of OPI:

> This opens up a vast realm for discretionary judgment (the antithesis of "objective"); and when a judge has discretion in interpreting a statute, Barak's "advice is that . . . the judge should aspire to achieve justice." . . . It is thus the court that makes Israel's statutory law, *using the statutes themselves as first drafts that the court is free to rewrite*.[147]

So much for "a government of laws and not of men."

Similarly damning are the remarks made by Oregon State Supreme Court Justice Thomas Balmer in a review of Barak's book on judicial interpretation:

> Barak's emphasis on judicial discretion in the interpretation of legal texts and his argument that judges should interpret ambiguous statutory and constitutional texts in a way that "actualizes" unwritten and abstract social values suggest a wide-ranging judicial role that raises serious concerns about the role of the judiciary in a representative democracy.[148]

Not to put too fine of a point on the matter: OPI is not merely an outlandish mode of statutory interpretation. It is rather a judicial tool explicitly enabling courts to make binding decisions (and hence, to create law) based not on statutory text, nor even on a realistic appraisal of legislative intent, but rather on the entirely personal and prejudiced moral ideology of each and every judge. The use of OPI renders legislation meaningless, legislators powerless, and the legislative process futile.

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[147] Posner 2007, *supra* note 1 (emphasis added).

[148] Thomas A. Balmer, *What's a Judge To Do?*, 18 YALE J.L. & HUMANITIES 139, 141 (2006), *available at* https://newdemo.openrepository.com/handle/2384/583068.

OPI also seems to run afoul of the very definition of linguistic interpretation (of any kind). In his own review of Barak's book on OPI, renowned literary theorist Prof. Stanley Fish explains that the term "purposive" here is redundant—any textual interpretation is only ever about the actual purpose or intention of the author. Analysis that ceases to consider the author's intent and looks elsewhere for meaning is simply not any form of interpretation at all, but rather something entirely different. In his own words:

> I trust it will be no surprise if I respond that determining the meaning of the text at the point in time of its creation is what interpretation is supposed to do, and that substituting for that meaning a meaning friendly to modern democracy is not interpretation, but re-writing. Modern democracy's needs did not author the text and when you make modern democracy's needs the text's author, you have broken free of any and all constraints on what you then declare the law to be.[149]

The OPI method is used consistently by all Israeli courts at all levels. It is employed in insignificant disputes and in landmark cases, in criminal, civil, administrative, and constitutional law. It ties in with many of the flaws discussed at length above, as may be illustrated in the following examples.

OPI has been employed to strictly define executive authority such that its exercise against what a court deems a law's objective purpose is deemed unreasonable, even if the legal text itself seems to permit the same action. This happened in the Lara Alqasem case.[150] There, the Minister of the Interior barred an ardent BDS (anti-Israel boycott) activist from entering Israel, pursuant to a law which was enacted for this specific purpose. The Court first reasoned that the law's "objective" purpose did not include punitive measures and therefore did not apply to former BDS activists, despite the statute's text and legislative history providing no basis for such a claim. The Court then held that the Minister's decision was "unreasonable" in light of the statute's purported objective purpose.

OPI is also used to expansively construe criminal offenses such that defendants may be found guilty due to conduct violating the "protected

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[149] Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1145 (2008), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo29&div=44&id=&page=.

[150] LAA 7216/18 Alqasem v. Ministry of Interior (Oct. 18, 2018), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/alqasem-v-ministry-interior-and-hebrew-university.

norm" at the heart of the statute's objective (i.e., judicially-determined) purpose, even when such conduct is explicitly excluded from the statutory text.[151] The Supreme Court said this in a relevant case:

> Interpretation of the law in the criminal sphere is also purposive interpretation, in the framework of which one must examine the language of the law, as well as the goals and interests that the law is intended to realize . . . An interpretation of the language of the law that is favorable to the accused may nevertheless be rejected if it fails to optimally realize the purpose of the law.[152]

Such reasoning using OPI in the context of criminal law—to indict and indeed convict defendants on the basis of a law's purported purpose and despite ambiguous statutory language favoring the defendant—has become common fare in Israeli criminal jurisprudence, with little regard for the principle of legality.

In the case of *Elka Holdings*, OPI was used to dilute and disarm economic tax legislation that the judges disfavored.[153] The Court ruled that despite clear statutory language reflecting well-considered tax and economic policy, a contested tax law had a number of broader abstract "objective" purposes such as advancing justice, protecting fundamental rights, and even "legislative harmony." These supposed objective purposes yielded an interpretation which resulted in the opposite outcome than that dictated by the statutory text, rendering the law meaningless and simply replacing the Israel Tax Authority's policy preference with that of the judges.

Putting aside objections based on principle, OPI places enormous strain on the entire legal system's efficiency due to its contribution to the law's lack of legal clarity, stability, or consistency. When judges have so much discretion to interpret statutes according to their own social values and not their literal-textual content, it is no surprise that they reach radically different conclusions when applying the same law to similar cases. Almost any legal argument may be formulated as the legitimate OPI of existing law, thus encouraging frivolous litigation (which is almost never penalized, because under OPI just about any legal argument can be said to be in good faith). At the same time, a motion to dismiss a lawsuit (or for summary judgment) will rarely be successful, as the substantive law itself becomes so nebulous under OPI that judges

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[151] Sangero 2003, *supra* note 135.

[152] CrimA 9334/08 Ali v. State of Israel (Nov. 23, 2011), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ali-v-state-israel.

[153] CA 2112/95 Tariffs and VAT Department v. Elka Holdings, PD 53(5) 769 (1999) (Hebrew).

can hardly know in advance what the actual law is. Indeed, since the advent of OPI, the volume of litigation and the caseload backlog in Israel have skyrocketed.[154] What else could have happened, with such flexible standards for determining the meaning of textual legal norms?

XII. CONCLUSION

In this brief overview, I have endeavored to highlight some of the most glaring and fundamental flaws in the Israeli legal system. Many of these cannot be reconciled with established notions of liberal democracy. Some are directly at odds with the very essence of accountable and legitimate self-government and with core tenets of the rule of law. Each feature stands in its own right as worthy of attention; taken together as a whole, they paint a deeply disturbing image of a system in urgent need of judicial and legal reform.

Despite arguments made by some staunch defenders of the current system, none of these features are excusable by Israel's unique story or features; our idiosyncrasies can serve, at most, as individual historical explanations, not as justifications. As Judge Richard Posner wrote in discussing similar flaws: "That is not a justification for a hyperactive judiciary, it is merely a redefinition of it."[155]

Yet these flaws are not some inevitable condition ordained by fate, just as they are not irreversible. The reader will have observed that many were introduced over a short time span, in a flurry of Supreme Court rulings led by Justice Aharon Barak and his later adherents. Consider these key cases which reshaped the Israeli legal system: Extreme unreasonableness (*Dapei Zahav*, 1980),[156] objective-purposive interpretation, (*Kibbutz Hazor*, 1985),[157] standing and justiciability requirements (*Ressler*, 1988),[158] judicial review of political appointees (*Eisenberg*, 1993),[159] impeachment by judicial review (*Pinhasi Deri*, 1993),[160] and the constitutional revolution (*Hamizrachi*, 1995)[161]—all decided within a 15-year span. The bulk of the flaws discussed in this essay originated in a concentrated judicial effort some thirty to forty years ago. They are by no

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[154] *See* Courts Administration report, *supra* note 52.
[155] Posner 2007, *supra* note 1.
[156] *Dapei Zahav* case, *supra* note 5.
[157] CA 165/82 Kibbutz Hazor v. Rehovot Assessing Officer, PD 39(2) 70 (1985).
[158] HCJ 910/86 *Ressler*, *supra* note 41.
[159] *Eisenberg* case, *supra* note 16.
[160] *Pinhasi-Deri* case, *supra* note 27.
[161] *Bank Hamizrachi*, *supra* note 53.

means sacred or inviolate. They may be unmade much in the manner they were made, or by parliamentary initiative.

The purpose of this essay is not to censure or denounce Israel, nor to agitate alarmist claims about its future. Israel remains, overall, a thriving, vibrant, and prosperous democracy deeply committed to rights, liberty, and self-determination, of which I am proud to be a native-born citizen and in which I live and raise my children.

Rather, as I set out in the introduction above, the goal of this essay is to give pause to some potential critics of Israeli public or governmental efforts to curtail judicial authority and expansionism, which are sure to come. One need not be an expert or legal scholar to recognize that the situation as it stands is untenable, and that the modern world's understanding of a free ordered society requires some significant alterations to the Israeli legal system.

Other Views:

- Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002), *available at* https://core.ac.uk/download/pdf/72831741.pdf.
- Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Criticism of Aharon Barak's Judicial Activism* (June 15, 2007), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=992972.
- Rivka Weill, *The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding*, 14 L. & ETHICS OF HUM. RTS. 227 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296578.
- Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 118 (2009), *available at* http://www.commonlii.org/in/journals/INJlConLaw/2009/8.pdf.
- Aeyal Gross, *An Unreasonable Amendment*, VERFASSUNGSBLOG, July 24, 2023, https://verfassungsblog.de/an-unreasonable-amendment/.
- Rivka Weill, *War over Israel's Judicial Independence*, VERFASSUNGSBLOG, Jan. 25, 2023, https://verfassungsblog.de/war-over-israels-judicial-independence/.
- Yaniv Roznai & Matan Gutman, *Saving the Constitution from Politics*, VERFASSUNGSBLOG, May 30, 2021, https://verfassungsblog.de/saving-the-constitution-from-politics/.