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SYMPOSIUM ARTICLE

An Overview of Israel's 'Judicial Overhaul': Small Parts of a Big Populist Picture

Suzie Navot

Full Professor of Constitutional Law; Vice President (Research), Israeli Democracy Institute (Israel)
Email: suzie@netvision.net.il

Abstract

In the comparative constitutional field relating to backsliding democracies, it is difficult to find an example of a single constitutional event that undermines the basic principles of democracy. Democracies die in a slow and gradual process. Each of the laws passed is not in itself fatal for democracy but when the measures are examined together, cumulatively, the whole is greater than the sum of its parts. It is the big picture, the whole series of legal moves, that brings about a fundamental change in the state's regime until it is no longer a liberal democracy. In these situations of gradual erosion there is no single law that can reveal the magnitude of the change inherent in it. To understand the risk, it is therefore necessary to refer to its overall institutional context. The proposed reform in Israel may result in serious harm to the principle of separation of powers. Moreover, given the importance of imposing limits on governmental power as a tool for protecting human rights and the 'rules of the game' in democratic regimes, the reform would seriously harm the protection afforded to these rights and principles, and constitute a clear and present danger to Israel's liberal democracy.

Keywords: judicial overhaul; Israel; populism

1. Israel's constitutional background and the rise of populism

It is hard to put a finger on a specific day when the populist movement landed in Israel; there seems to be no doubt that it is here with us, and has been for a few years now. For more than a decade, right-wing governments in Israel have been following the 'populist playbook':[1] we have witnessed an ongoing attack on the courts, the weakening of the gatekeepers and the civil service, a strong

[1] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 137–41.

denial of any kind of limitation of governmental power, a fight against independent bodies such as the media, human rights organisations, academia and non-governmental organisations (NGOs). We are also seeing populist legislation, the delegitimisation of non-conformist or opposition opinions and of people, as well as an attack on minorities. All of these factors characterise Israel of recent years. Tolerance towards criticism has greatly diminished and the right wing has instilled a rhetoric that frames at least some human rights organisations as 'enemies of the people'.

In the comparative constitutional field relating to backsliding democracies, it is difficult to find an example of a single constitutional event that undermines the basic principles of democracy. Democracies nowadays die in a slow and gradual process, when each of the anti-democratic measures passed, in itself, is not fatal for democracy. However, when the measures are examined together, cumulatively, the whole picture is greater than the sum of its parts. It is the big picture, the whole series of legal moves, that brings about a fundamental change in the state's regime until it is no longer a liberal democracy. This is the main argument in this article: the way in which democracies erode poses a challenge for the courts in dealing with specific legislation, which perhaps, in itself, does not justify judicial review on the ground of infringement of democratic values. Judges have not only a right but also an obligation to look at the broader context of populist legislation.

It is important to understand that the structure of the government in Israel exposes it to the dangers of populism even more than is the case in other democratic countries. In almost every democracy there are mechanisms that decentralise political power, such as a rigid constitution that entrenches human rights and the institutions, splitting the legislative authority into two houses, the right of veto on legislation given to the president, a federal structure, a regional electoral system, and sometimes even subordination to international organisations and courts. All of these tools are part of the concept of checks and balances, but none of these exist in Israel.

Israel is unique. It has a strong democratic 'spirit' but a rather fragile democratic structure. Israel has no single document known as 'The Constitution' but has a series of Basic Laws that have been granted constitutional status by the Supreme Court of Israel.

Israel's Declaration of Independence of 1948 said that a constitution would be adopted by the Constituent Assembly; however, this Assembly, elected as both a constituent and legislative body, after long debates on the future constitution reached a deadlock. It therefore endorsed a 'compromise', according to which Israel would introduce a constitution 'in stages': the constitution would be composed of chapters; each chapter would be a 'Basic Law'.

Until the early 1990s, the Knesset completed the enactment of almost all of the Basic Laws relating to the Israeli institutions (such as the Knesset, the government, the judiciary, the President, the army, the State Comptroller). Still missing, however, was a Basic Law on legislation, which would regulate the legislative proceedings for both regular laws and Basic Laws, and establish the power of the Supreme Court to judicially review legislation as part of Basic Law: The Judiciary. A chapter on human rights was also missing because

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a Basic Law covering human rights was (and still is) considered controversial. Therefore, a further political compromise divided the chapter on human rights (a draft of which was already discussed by the government) into a number of separate Basic Laws. This process made it possible for the Knesset to agree and support the enactment of particular human rights, while leaving pending the discussion of rights which were considered to be 'problematic', such as equality, freedom of religion and freedom of speech (other 'problematic' rights were not even included in the government's initial draft, such as social rights). Following this new 'compromise', two Basic Laws addressing human rights were enacted in 1992: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. Both Laws include a 'limitation' clause, stating that a law that infringes a human right is valid only if it was enacted for a proper purpose and is proportional.

The 1992 Basic Laws on human rights were followed by a monumental ruling handed down in 1995, the *Mizrahi Bank* case,[2] in which the Supreme Court declared that it has the power to enforce these limitations and to judicially review the Knesset legislation, even if that power is not explicitly mentioned in the Basic Laws.[3]

Following these developments, Israel is today the only country – among countries defined as free or as liberal democracies – that has no tool for the decentralisation of political power. The Knesset is the only institution with the power to legislate, both regular laws and Basic Laws, but the coalition (the government) actually controls the Knesset through coalitional discipline (which means the coalition expects its members to vote according to the decision of its leaders, which is enforced). An ordinary majority of the Knesset can enact and amend almost any Basic Law in a normal lawmaking procedure, in three readings, and even within one day. The dominance of the executive in the legislative process combined with the weakness of the Knesset allow the government to act almost without any limitation, in accordance with short-term political interests and with no other checks and balances other than the courts. There is therefore a greater possibility of abuse of the power to enact Basic Laws than in the case of other democracies, and the only institution that has a balancing power is the Supreme Court.

This means that the political actors in Israel have the ability to change the constitutional rules of the game at any time, and also to benefit those who are in power at a given moment – for instance, by increasing the unchecked power of the government in times of emergency or granting the parliamentary majority the power to disqualify certain opposition parties from running in elections. The Israeli Knesset has 120 members and 61 of them are enough

[2] CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C93%5C210%5C068%5Cz01&fileName=93068210_z01.txt&type=4.

[3] For further reading on the constitutional history of Israel see Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013); Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Hart 2014).

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to change Israel's Basic Laws; 61 seats might mean absolute power. The Supreme Court is actually the only branch that may limit this power.

2. Israel 2023: The judicial 'reform' – it's all about the power

Following the elections in November 2022 and the formation of a new government headed by Prime Minister Netanyahu, several bills were presented, proposing drastic reforms of the judiciary, curtailing its powers, and granting the coalition absolute control over the selection of judges to all courts. These bills form part of the government's 'judicial reform' package, aimed at significantly weakening the authority of the Supreme Court.

In the months that followed, the Chair of the Constitution, Law and Justice Committee of the Knesset (the Constitution Committee) introduced and promoted several bills that were supported by the coalition and sought to implement drastic changes in order to fulfil the government's plan. This reform comprises five main issues.

First, the government proposed an 'override clause', which would allow a majority in the Knesset (61 members) to pass legislation declared unconstitutional by the Court. The override clause would involve a procedure through which the Knesset, by a majority, may re-enact a law struck down by the Supreme Court. According to the bill, this override would remain in force for a year following the Knesset's end of term, or permanently if the subsequent Knesset were to reaffirm the decision with an absolute parliamentary majority. Furthermore, the coalition sought to limit the power of judicial review of legislation, enabling only the full bench of the Supreme Court to do so, with an 80 per cent majority of its justices (the original version of the bill called for a complete consensus of all justices).[4] This means that judicial decisions to strike down laws will be quite rare and, even then, the Knesset would be able to override such decisions. The upshot is that the Knesset would have absolute power to enact any law, even extreme infringements of basic human rights.[5]

Second, the coalition proposed the grant of immunity from judicial review to any 'Basic Law', even though it is legislated using the same parliamentary process as all other statutes. The only difference between a regular law and a Basic Law is the title of the enactment. This reform would allow a simple parliamentary majority to pass any law whatsoever, naming it a 'Basic Law', which would render it immune from judicial review.

Third, the coalition decided to grant immunity from judicial review to any decision by the government or any minister on the basis of its

[4] Bill to amend Basic Law: The Judiciary (Amendment No 4) (Judicial Review over the Validity of a Law) (2023). For the original version of the bill, see Bill to amend Basic Law: The Judiciary (Amendment – Strengthening the Separation of Powers) (draft for discussion published by the Chair of the Constitution, Law and Justice Committee, 17 January 2023) (Draft for Discussion).

[5] Amichai Cohen and Yuval Shany, 'Reversing the "Constitutional Revolution": The Israeli Government's Plan to Undermine the Supreme Court's Judicial Review of Legislation' *Lawfare*, 15 February 2023, https://www.lawfaremedia.org/article/reversing-the-constitutional-revolution-the-israeli-government-s-plan-to-undermine-the-supreme-court-s-judicial-review-of-legislation.

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unreasonableness.[6] This part of the reform has already been passed by the Knesset as an amendment to Basic Law: The Judiciary. The Israeli Supreme Court uses the standard of reasonableness almost exclusively to review specific types of governmental decision and action, such as the powers of a caretaker government and the appointment of top government officials. This means that if the government and its ministers apply an extremely imbalanced set of considerations, or make an irrational decision, the Court will step in. Why? Because it is the government's duty to act with 'reasonableness'. The government is the public's trustee – not just the public who voted for it, but the entire public – and therefore must act reasonably and in the public interest. The amendment gives the government a 'green light' to make arbitrary decisions and act with unlimited power, for example, in the hiring and firing of officials and gatekeepers. It makes it possible for the government to dismiss the Attorney General and, along with her, any of the gatekeepers who do not immediately align themselves with the will of the regime. The government and its ministers can make extreme, unfounded, or even corrupt decisions, and appoint whomever it wants to the most senior positions. Furthermore, as noted above, the Israeli government already has limited checks on its powers compared with governments in other democracies, with the Court being the only effective check. Indeed, the government has limited accountability with regard to individual governmental decisions and the Knesset enforces little meaningful parliamentary control over executive decisions.

The process by which this amendment to Basic Law: The Judiciary was passed, releasing the government and its ministers from the duty to act with reasonableness, is something to be mentioned. On live television, Israeli people witnessed a procedure that was rapid, aggressive and heavy-handed, and which demonstrated that there was no intention at all to listen to those who appeared before the Knesset Constitution Committee. There was no willingness for discussion or compromise with members of the opposition, or to amend the wording of the bill. The government was simply not prepared to listen: not to the hundreds of thousands of protesters; not to the hi-tech industrialists; not to the leaders of the business and financial sectors; not to the doctors, scientists, jurists, lawyers, heads of universities and senior academics; not to the heads of the security services, past and present, nor to senior IDF officers and the reservists who volunteer in various IDF units. None of these prevented the government from passing a law that dramatically changed Israel's constitutional system. As mentioned before: it is all about the power.

Several petitions were filed with the Supreme Court against this amendment.[7] The Attorney General, who represents the government in court, decided that she would not represent the government's position in this case, and allowed the government to have a private lawyer. The Attorney

[6] Basic Law: The Judiciary (Amendment No 3), https://fs.knesset.gov.il/25/law/25_lsr_2997865.pdf. For the original version of the bill, see Draft for Discussion (n 4).

[7] By various groups and NGOs: for example, the Israel Bar Association, Movement for Quality Government in Israel, Yesh Atid party, among others.

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General's position in this case is that the Supreme Court should strike down the amendment.[8] In her detailed opinion, she argued that eliminating the grounds of reasonableness would eliminate the possibility of compelling the government to behave reasonably. 'Citizens would no longer have a remedy to prevent harm to themselves and to their rights as the result of an extremely unreasonable decision – and this, on a daily basis'.[9] She writes that if the amendment to the Basic Laws could not be declared 'unconstitutional', Israel would have an unlimited executive branch, and it would no longer be possible for the courts to be able to rescue citizens in the event of an abuse of governmental power.

In fact, abolishing judicial review through the standard of reasonableness would not only leave the government free from judicial review in these spheres, but it would also potentially enable the firing of the Attorney General and curtailing the independence of this office. Without that independence, it would be difficult for the Attorney General to make professional decisions, in both capacities of the office: as head of the prosecution, and as chief legal adviser to the government. Her decisions in these fields would be politically motivated rather than legal, and would thus fail to maintain the rule of law. Today, the Attorney General's decisions reflect the law. Abolishing judicial review on the grounds of reasonableness would also have an impact on the independence of the legal advisers, as they act professionally under the direction of the Attorney General.

Fourth, the government's plan states that the legal advice given by the ministerial legal advisers should not be binding on the government or the ministers, that the government should determine the legal position presented in court in its name, and that the government and ministers should be able to seek private representation instead of representation by the Attorney General.[10] The government also wishes to appoint the legal advisers of all governmental ministries as political appointees, rather than in a public tender process.

Fifth, the last, but not least, part of the package of proposals is the change in the composition of the Committee for the Selection of Judges, according to which politicians will appoint the judges.[11] The coalition wants a majority

[8] The Knesset does not have unlimited authority to pass and amend Basic Laws. Indeed, in a democracy there is no such thing as unlimited power. According to past Supreme Court rulings, there is one restriction on the Knesset when it seeks to pass or amend a Basic Law: it cannot revoke or severely infringe the 'core characteristics' of Israel as a Jewish and democratic state. If it does so, the Supreme Court may intervene and even strike down such legislation. In HCJ 2144/20 *Movement for Quality Government in Israel v The Speaker*, Ruling and Decision (25 March 2020), the Speaker of the Knesset, Yuli Edelstein, refused to convene the Knesset plenum to elect a new speaker, despite a request from 61 Knesset members. Supreme Court President Hayut ruled that 'where there is an unprecedented infringement of the rule of law, then unprecedented remedies are called for': ibid para 5. This statement would seem to apply also to the current situation.

[9] HCJ 5658/23 *Movement for Quality Government in Israel v The Knesset* (3 September 2023), Response on behalf of the Attorney General (in Hebrew).

[10] Bill to amend Basic Law: The Government (Amendment – the Government's Powers in its Legal Affairs) (circulated to members of the Committee on 11 January 2023) (in Hebrew).

[11] Bill to amend Basic Law: The Judiciary (Amendment No 3) (Strengthening the Separation of Powers) (13 February 2023) (in Hebrew).

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on this committee, thus giving the government absolute control over the selection of judges to all of the courts in Israel, including justices of the Supreme Court. The coalition presented this issue as the core of its agenda and declared that the coalition would disregard the convention of seniority, whereby without an explicit formal stipulation in the law, the Committee has so far selected the most senior justice on the Supreme Court's bench as President of the Supreme Court.

These proposals have several characteristics in common. First, as we shall see below (Section 3.4), they remind us of the way in which populist governments in Poland and Hungary acted, in what has been known as a 'democratic capture', and, in particular, the focus on capturing the courts as the first course of action.[12] Second, the new Israeli government wants unlimited power. An override clause along with a provision stating that the Supreme Court cannot strike down a Basic Law would eventually eliminate all restrictions on the legislature. The abolition of the reasonableness test means that the Supreme Court would not be able to review governmental decisions, even if they are irrational or corrupt. Third, almost every public institution – which currently is professional, neutral, objective and independent – would be politicised. Judges will be chosen by politicians, which means political control of the courts, and legal advisers to government ministries will be appointed and dismissed by the ministers. In other words, the governmental plan for a judicial overhaul not only intends to roll back the 'constitutional revolution' of the 1990s, but to eliminate the institutional checks on the government's power that developed over decades in Israel, in lieu of an entrenched constitution.

3. Small parts of a big picture

3.1. A short comparative approach

When the reform was proposed, and four of the five parts were included in a bill, the Attorney General presented a long and detailed opinion on these proposals, in which she reminded the government of a fundamental principle: democracy is not only the idea of 'majority rules'. It is also about the protection of human rights, the rule of law, the separation of powers, and an independent judiciary that can serve as an effective check on the other branches of government. The 'reform' says nothing about these principles. I fully agree with her analysis. The proposals would spell the end of Israel as a constitutional liberal democracy with meaningful protection for human rights against rights-infringing legislation and with real limits on the powers of the Knesset. Israel has many human rights challenges; its political culture is increasingly hostile to human rights and pluralism, and senior politicians

[12] Huq and Ginsburg (n 1). For further discussion see also Erica Frantz, *Authoritarianism: What Everyone Needs to Know* (Oxford University Press 2018); Erica Frantz, *Democracies and Authoritarian Regimes* (Oxford University Press 2020); Wojciech Sadurski, *A Pandemic of Populists* (Cambridge University Press 2022); Samuel Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press 2023).

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have been heavily implicated in corruption. In the light of these realities, dismantling the Court as a rule-of-law constraint on governmental power and as a defence mechanism for human rights and minority rights – albeit imperfect – would be disastrous for Israeli democracy.[13]

However, there is another point of view on which I would like to focus, and that is the 'process' of democratic backsliding.

As mentioned above, excluding historical *coups d'état*, it is difficult to find in contemporary comparative law an example of a single constitutional event that undermines the basic principles of democracy. The extensive comparative research on this issue shows that damage to democracy is caused in a slow and gradual process, when every law in itself does not necessarily meet the test of a clear and present danger to democracy.

However, when the measures are examined together, when one looks at the whole picture – and not only at the parts that are being presented by the government as bills – the whole itself is greater than all of its parts. Democratic erosion is achieved through a series of legal moves – it is that which changes completely the state's regime.

According to Erika Frantz,[14] democratic backsliding refers to changes in formal political institutions and informal political practices that significantly reduce the ability of citizens to make enforceable claims or petitions against the government. In fact, erosion of democracy means a series of events that occur across several areas and, in particular, in the contexts of elections, government accountability, and civil and political liberties. Frantz describes democratic withdrawal as a 'gradual' process in which, through strategic manipulation by the government, democracy is undermined to tilt the rules of the electoral game in favour of the government or to ensure that the courts are loyal to the government. Each of these moves in itself harms the quality of democracy, but all together can lead to real democratic failure.

Comparative law indeed shows that the use of democratic and constitutional tools to achieve anti-democratic goals is implemented in a slow and measured manner, step by step, in a plan that was written in advance as an 'operational plan' for populist regimes.

Aziz Huq and Tom Ginsburg[15] describe the comparative experience as a sort of operating manual for starting a democratic backsliding using democratic tools. A populist platform must be activated, in which the majority is presented as victim and the opponents of the government as elitists. This was Orbán's strategy in Hungary and Erdogan's in Turkey. They emphasised threats to national security or the purity of the homeland from outsiders, refugees and immigrants. There is also the undermining of opponents in state institutions, such as the judiciary and the military. The electoral mechanism is critical to ensure that future competition is limited. Civil society must be attacked as 'elites operating with foreign funding from foreign sources' and a discourse based on intimidation must be created. Free media must be threatened, or

[13] Cohen and Shany (n 5).
[14] Frantz (2020) (n 12) 274–80.
[15] Huq and Ginsburg (n 1).

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limited, as well as the power of the courts. As noted, all of these features are an operating manual, so to speak – common features seen in the experience of democracies going through democratic backsliding in recent years.

Wojciech Sadorski[16] describes the strategy to weaken democracy by making incremental changes in diverse areas. These include:

- the takeover of institutions: staffing institutions with new people who lack the moral commitment to the original rationale for the existence of the institution;
- duplication of institutions: establishing new institutions parallel to existing ones, with the same apparent capacities that overshadow the original institutions;
- erosion of the selected institution by legal changes, to the point of making an institution redundant;
- expansion: granting unlimited powers to certain institutions;
- migration: transferring powers to another institution.

The changes are often vague and incremental. The toxic effects are actually caused by the interaction between the various changes.

In these situations of gradual erosion, there is not one law that can reveal the magnitude of the change inherent in it. To understand the risk, it is necessary to refer to its overall institutional context; this means that a gradual accumulation of quantity at some point results in a change in the quality of the situation.[17]

3.2. The weakening of the courts

The move that is taking place in Israel today is not that different from historical processes that have occurred in various countries in the distant past, as well as during recent decades. Changes to the legal system, in the courts and judges, are one of first and the main tool used in the process of democratic erosion. Comparative experience shows that when the judiciary is harmed – and especially when judicial independence is challenged – the deterioration of democracy is accelerated.

Erica Frantz, says in this context:[18]

> The weakening of the courts ... is a critical tactic (and one of the most common) among leaders in office in retreating democracies. The reason is quite clear, since once the judiciary is weakened (in terms of its

[16] Sadurski (n 12).

[17] William Thomas Worster, 'The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law' (2013) 31 *Boston University International Law Journal* 1, 4 and 13. See also Yaniv Roznai, 'The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments' in Alejandro Linares Cantillo, Camilo Valdivieso-León and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021) 147.

[18] Erica Frantz, 'Opinion dated 11 August 2023' in Suzie Navot and others, *Opinion on the Annulment of Judicial Review of Governmental and Ministerial Decisions for Unreasonableness*, Israel Democracy Institute, Annex B, 112, https://www.idi.org.il/knesset-committees/51189 (in Hebrew).

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> independence) it is much easier for leaders to succeed in everything on their agenda. The examples are many. In fact, it is hard to think of a case of democratic retreat in recent years where the weakening of the courts was not part of the initial process.

Samuel Issacharoff[19] argues that in populist regimes, a strong executive authority sees the legal system as a major obstacle to its immediate desires. Populism demands the rule of the majority and, on this basis, promotes agendas that oppose the power of counter-majoritarian governing institutions and social elites. Following this, the dysfunction of the legislative authority leads to the expansion of the powers of the executive authority. Thus, the judiciary becomes especially vulnerable under populist regimes. This is especially true in established democracies, following the German example: powerful constitutional courts that differ from the regular judicial system because they are tasked with curbing the anti-democratic tendencies of government. These courts often find themselves in difficult struggles with political power, precisely because they may take on the role of 'maintaining the integrity of the legislative process', and protecting against 'constitutional backsliding'. The courts then become targets for political attack, for example, in countries like Poland and Hungary, where reducing the power of the courts was a central pillar of the populist agenda. The author adds that in many other countries – such as Israel, South Africa, Argentina – the government tries to use its wave of political support to subdue the judicial system. When Donald Trump railed against 'so-called judges' or the 'Mexican judge', he joined a well-orchestrated chorus of attacks on the independence of the authority seen as thwarting the demand for 'immediacy' in the populist surge.[20]

Populist rulers tend to regard the courts as a dangerous entity and label the institution as a threat.[21] More than once, immediately after the elections they act to attack the courts. For example, the judges were presented as 'enemies of the people' in a headline published in the United Kingdom on 4 November 2016, after three judges ruled that despite the referendum the government must legally obtain the consent of Parliament in order to approve Brexit.[22] In April 2018, the Supreme Court of Hungary was severely criticised by Prime Minister Viktor Orbán for a decision concerning the elections. Orbán claimed that the Court 'is not intellectual enough for the task' and that it 'interferes in deciding the elections and takes the mandate from the elected'. He used to refer to the courts as the 'judicial state' and judges as irresponsible.[23]

[19] Issacharoff (n 12).

[20] Mark Landler, 'Appeals Court Rejects Request to Immediately Restore Travel Ban', *The New York Times*, 4 February 2017, https://www.nytimes.com/2017/02/04/us/politics/visa-ban-trump-judge-james-robart.html; Alan Rappeport, 'That Judge Attacked by Donald Trump? He's Faced a Lot Worse', *The New York Times*, 3 June 2016, https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html.

[21] Sadurski (n 12).

[22] James Slack, 'Enemies of the People', *The Daily Mail*, 4 November 2016.

[23] Zoltán Fleck, 'Judges under Attack in Hungary', *Verfassungsblog*, 14 May 2018, https://verfassungsblog.de/judges-under-attack-in-hungary.

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Comparative experience shows that the core of the country as a democracy, as well as the independent status of its courts and other gatekeepers, will not collapse because of one law but will erode in a gradual series of moves – the central of which is a change that harms judicial independence and the scope of action of the judicial authority, and the status of the gatekeepers. In both Poland and Hungary, the diminution of judicial review was a significant step in weakening the systems of balance, containment and criticism of governmental power, alongside the moves to capture the judiciary. At the same time as this weakening, and especially after the takeover of the legal system, the governments of Poland and Hungary worked to weaken the media, civil society organisations and academia, and following the changes to the legal system, they also worked to influence the elections. Comparative experience shows, therefore, that once the Court is neutralised, it is difficult, if not impossible, to stop the democratic retreat.

3.3. Israel's judicial overhaul and the 'big populist picture'

In Israel, the mechanisms of control over the executive authority are particularly weak. As mentioned above, there are no other tools for decentralising governmental power and the judiciary is the main authority that has the ability to balance the power of the majority. Therefore, changes that reduce the Court's ability to review the government must be carefully examined.

Weakening the Supreme Court is, as stated by members of the government, only the appetiser, the 'salad bar', before the main course.[24] The amendment that allows the majority to take control of the selection of judges has already passed the first reading; the Constitution Committee of the Knesset has approved it and it is now ready for a second and third reading vote. A further amendment, which has already passed first reading, will give absolute power to a political majority to enact new Basic Laws or to amend existing Basic Laws without any limitation, denying judicial review. In accordance with the reform plan proposed by the Minister of Justice, the government is planning additional measures, which include the transformation of legal advisers into positions of trust (that is, appointed by the Minister and not selected through public tender) and the abolition of the judicial holding that opinions of the Attorney General are binding on the government.[25]

As comparative law shows, jeopardising the Supreme Court by the diminution or neutralisation of judicial review is, as mentioned, a significant step in preventing criticism of the conduct of the government. It is also worth noting that the governments of Poland and Hungary, after taking over the judicial system, also acted against the media, academia and civil society organisations – a move that became easier after the Court was 'neutralised'. In Israel, as well, similar steps have begun. Several groups monitor the bills proposed by members of the coalition, which address various aspects of democracy and human

[24] '"A Little Sensitivity Wouldn't Hurt": Coalition MKs Reject Ben-Gvir Tweet', *The Jerusalem Post*, 23 July 2023, https://www.jpost.com/israel-news/politics-and-diplomacy/article-752065.

[25] HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v Prime Minister* (8 September 1993); HCJ 4646/08 *Lavie v Prime Minister* (12 October 2008).

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rights, and which follow the populist protocols in other countries.[26] More than 200 bills have been proposed, along with ongoing decisions by the government and ministers. To name just a few:

- the attempt by the Minister of Education to depose the rector of the National Library and to politicise the academic system by different appointments to the Council for Higher Education;
- the proposed reform of the media channels presented by the Minister of Communication, which includes a ban on the financing of media channels with advertisements and the establishment of a regulatory body in place of the Second Authority and the Cable Council;
- a bill which expands the powers of the rabbinical courts – a system of courts which is under the thumb of religious parties that are part of the coalition, and the expanded powers of which would come at the expense of the civil court system;
- a bill amending the tax ordinance (taxation of a donation from a foreign political entity), which is intended to make it more difficult for NGOs to raise donations from abroad.

3.4. Poland, Hungary, and the proposed reforms in Israel 2023: A short comparison

To illustrate the similarity between the processes that have gone through Poland and Hungary and the situation in Israel in recent months, the following summary tables (Tables 1 to 5)[27] refer to some of the issues only.

Table 1 Curtailing the independence of the judiciary

Hungary	Poland	Israel: Proposed reforms
(1) Changing the system of appointing judges		
The special judicial appointments committee, on which each party had a single vote, was replaced by a committee that reflects the composition of the parliament, thereby awarding the ruling party an automatic majority.	After the changes, the members of the judicial appointments committee are now nominated by the Sejm. As a result, 23 of its 25 members represent the parliament.	Changing the composition of the Judicial Appointments Committee in a way that increases the coalition's influence on the selection of judges. **Status:** Submitted to the Knesset for the second and third readings.

[26] See, eg, the monitoring of the anti-democratic legislation by Yael Shomer and Liron Lavi of the Political Scientists for Israeli Democracy, https://docs.google.com/spreadsheets/d/1e6iRsPhCgzFVFoYRU-7Svz2WqolZuJH1rwfwKsaMp7U/edit#gid=0 (in Hebrew), and the forthcoming monitor of the Israel Democracy Institute.

[27] These tables are translated and slightly revised from Navot and others (n 18).

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Table 1 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
(2) Politicisation of the law enforcement institutions		
A change in the method for appointing the Prosecutor General to require a two-thirds parliamentary majority, for a nine-year term; blatantly political appointment of Péter Polt, a member of the Fidesz party, to the post.	The posts of Prosecutor General and Justice Minister were merged, making the position wholly political.	Even before the government was sworn in, the new coalition wanted to grant the government, and especially the Minister of National Security, more powers to control the police, particularly stipulating that the minister is in charge of the police and could determine police policy as well as general policy in investigations, thus risking politicisation of the police and curtailing its professional independence [Law Amending the Police Ordinance (Amendment 37) 5783-2022]. **Status**: Passed into law; petitions against the law were submitted to the High Court of Justice, which issued an order nisi on 18 August 2023. The decision to establish a government commission of inquiry to investigate the 'spyware' affair, granting it the power to look into pending criminal cases against individuals, ignored the Attorney General's warning that this decision would infringe the independence of law enforcement [a petition against the decision has been filed with the High Court of Justice claiming that it infringes the independence of law enforcement and is thus ultra vires].
(3) Effective neutralisation of the Court's capacity for judicial review		
Most of the controversial provisions stipulated in legislation were inserted directly into the Constitution, including an article that deprives the Court of the power to review constitutional amendments.	It was stipulated that the Court must take up cases in the order in which they are filed, which makes it impossible to deal quickly and, when necessary, with unconstitutional legislation or policy.	As described at length above, the coalition suggested the elimination of the Court's power to invalidate government and ministerial decisions on the basis of reasonableness, by granting them immunity from judicial review. **Status:** Passed into law; petitions against it are pending.

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Table 1 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
A substantial reduction in standing rules that denies standing to public plaintiffs; a constitutional section stating that the Court is not authorised to handle matters of budgets and taxation.	A quorum of 13 justices was instituted. At the demand of four justices or the President of Poland, a 15-member bench may be required to rule on a case; this hinders the possibility of speedy judicial review. It was stipulated that a two-thirds majority of the panel is required to strike down a law. It was stipulated that 30 days must pass between passage of a law and the first hearing of an appeal against it; at the request of four justices the hearing must be postponed for an additional three months.	A proposal to curtail judicial review of legislation: (1) Only the Supreme Court can strike down a law. (2) A quorum of all justices is required to strike down a law (all justices of the panel hear the case) and 4/5 of them must vote to strike down the law. (3) Judicial review is limited to when a law was passed without the required majority or number of readings, or when there is a 'clear contradiction' with the stipulation of a Basic Law. (This eliminates the Court's ability to nullify laws that undermine rights implicitly protected by means of judicial decisions, such as equality and freedom of expression.) (4) Addition of an override clause that permits the Knesset to 'entrench' a law in advance against judicial review by means of an override provision passed by a majority of 61 Knesset members. Such a law will remain in effect until a year after the end of the term of the Knesset that passed it; but if the new Knesset confirms the law with a 61-vote majority, the law will enjoy permanent immunity from judicial review.
(4) Reduction in the normative status of past Court rulings		
The Constitution stipulates that court rulings up to 2011 (when the new Constitutions came into effect) are null and void and cannot be relied on.	An 'Extraordinary Complaint' agency was established for appeals to the Court against any ruling handed down during the previous 20 years by a series of officials (such as the Prosecutor General and the Public Ombudsman).	The above-mentioned immunity granted for governmental and ministerial decisions (or lack thereof) from judicial review based on reasonableness has these following important consequences (among others): • nullification of the *Deri/Pinhasi* precedent, which requires the dismissal of a minister or deputy minister under criminal indictment;

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Table 1 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
		• nullification of the *Eisenberg* precedent, which prohibits the appointment to a senior position in the public service of a person who has committed a serious crime; • nullification of the *Weiss* precedent, which states that limits may be set on the decisions and actions of a caretaker government. **Status:** Passed into law; petitions against it are pending; the Attorney General supports nullification of the amendment. A reform of the mechanism for determining the incapacity of the Prime Minister: a person can be deemed incapable of holding office of prime minister only on account of physical or mental disability and only the Prime Minister personally or the government can make such a determination, pursuant to the procedure stipulated. This amendment departs from the previous understanding of the law (implicit in some Court rulings) with regard to the determination of the incapacity of a prime minister, and particularly eliminates the Attorney General's authority to declare the Prime Minister incapacitated, a power the Court has assumed pertains to that office. It also eliminates the possibility, recognised in the past by the Court, that in extraordinary cases the Court may declare the Prime Minister to be incapacitated on the ground of criminal proceedings against him. **Status:** Passed into law; petitions against it are pending; the Attorney General supports nullification of the amendment.

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Table 1 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
		The coalition attempted to permit Deri's appointment as minister after he was disqualified by the High Court of Justice (HCJ 8949/22), which nullified his appointment as a minister for not meeting the standard of reasonableness as well as on account of the doctrine of judicial estoppel. In other words, the coalition, yet again, attempted to eliminate the consequences of Court rulings – here, even a particular Court ruling relevant to a particular Member of the Knesset. The coalition submitted a bill to that effect, amending the Basic Law: the Government. **Status:** Submitted to the Knesset for the second and third readings.

Table 2 Control of the media market

Hungary	Poland	Israel: Proposed reforms
Direct subordination of the media authorities to the government		
Passage of a National Media Authority Law; the authority is headed by the Media Council, all members of which are nominated and confirmed for nine-year terms by the parliamentary majority. At the end of a long process, all media outlets have voluntarily submitted to the Media Fund, a pro-government agency that is immune from government oversight or regulation of the concentration of media ownership.	A law was passed stipulating that the members of the Broadcast Authority board will henceforth be chosen by the Finance Minister; all those currently serving in management positions or on the Authority board were discharged immediately. This power was later transferred from the Finance Minister to the National Media Council, most of the members of which are selected directly by the Sejm.	*Politicisation of the media market* A reform of the media market spearheaded by Communications Minister Karhi includes increased involvement in regulation by the government and politicians. The Minister drafted a bill that proposes amending the Communications Law (Broadcasting) to that effect.

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Table 3 Trimming women's rights

Hungary	Poland	Israel: Proposed reforms
Reduction in the number of women's rights and their status		
The Constitution declares that fetal life is entitled to protection from the moment of conception. A law was passed that conditions the right to an abortion on the woman listening to the fetal heartbeat before deciding to go ahead with the procedure.	The Court, with its new composition, ruled that a fetus may not be aborted on account of severe deformities or genetic defects and that these grounds (stated in Polish law) are unconstitutional and hence null and void.	*Proposals and actions limiting women's rights as a result of decisions at ministerial level* • An attempt by the Minister of Environmental Protection to promote a pilot of gender-segregated bathing at natural springs managed by the Nature and Parks Authority; the Attorney General blocked the plan and stated that it could be implemented only with explicit legislative authorisation. [In response, several private members bills were submitted to the Knesset to do precisely this.] • Inadequate representation of women: Today there is only one female director-general of a ministry. [A petition was submitted to the High Court, which issued an order nisi: HCJ 1363/23.] • Dismissal of the director of the Authority to Advance the Status of Women by the Minister to Advance the Status of Women. At the same time, there are various initiatives in the pipeline (private member's bills) that would have a real impact on women's rights (e.g., removal of certain powers held by the Authority to Advance the Status of Women and an expansion of the powers of the religious courts).

Table 4 Curtailing the independence of public servants

Hungary	Poland	Israel: Proposed reforms
Politicisation of the public service		
A former member of parliament for the ruling Fidesz party was	The requirements of a tender for hiring public employees and prior	*Politicisation of Appointed Municipal Councils*

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Table 4 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
appointed director of the State Audit Office, which oversees government spending.	experience were eliminated. The Civil Service Commissioner was placed wholly under the government's thumb (because the government can hire and fire him whenever it pleases) and all qualifications for appointment to the position were abolished.	Eliminating the restriction in place since 2008, so that the chair of an appointed municipal council will be eligible to run in the next election for the council [Local Authorities Law, Amendment 53]. **Status**: The law was passed but its effective date was deferred. The High Court ruled unanimously that the amendment could not apply to the forthcoming local elections. This was its answer to the problems raised by changing the 'rules of the game' while the game is already in progress as well as the personal nature of the amendment, which was found to have been 'tailor-made' to fit one man. However, the High Court did not rule on the law's constitutionality. Accordingly, that issue remains undecided. *Politicisation of senior public officials by means of ministerial decisions* • The Minister for Regional Cooperation, David Amsalem, took steps to dismiss the director of the Government Companies Authority, Adv. Michal Rosenbaum. In his second role as a minister in the Justice Ministry, he also sought to freeze all the Authority's contracts and requests for bids, including for its deputy director. • Communications Minister Shlomo Karhi dismissed the Chairman of the board of the Israel Postal Service, despite his accomplishments and the satisfaction with his performance expressed by senior officials in the Finance Ministry and capital market. A Likud member who had run in the last party primaries was appointed Deputy Director General of the

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Table 4 (*Continued*)

Hungary	Poland	Israel: Proposed reforms
		Prime Minister's Office, despite her not satisfying the qualification for the position.

Table 5 Hasty passage of legislation

Hungary	Poland	Israel: Proposed reforms
The new Constitution was drafted in haste, without any public or professional discussion or consultation with the opposition parties, or attention to the social protest and public discourse about it.	Many dramatic amendments to laws came into force in real time, with almost no interval between their passage and their effective date.	The judicial reform, part of which has already been passed (the amendment to abolish the test of reasonableness), was advanced precipitously, with the intention that the new laws take effect immediately (thus with regard both to the standard of reasonableness and the Prime Minister's incapacity for office). For criticism of the rushed legislative process and demonstration that an orderly process based on consensus is required, refer to the Attorney General's comments about the draft text of the Basic Law: The Judiciary: https://www.gov.il/he/departments/dynamiccollectors/legal-opinions-attorney-general?

4. Epilogue

Taking over the courts along with the abolition of their legal authority for constitutional review were important milestones in the democratic erosion of several countries. The fundamental element of any democracy is an institutional system of checks and balances on the powers of the legislature and the executive. In Israel, even before the proposed constitutional changes, these mechanisms were weak to non-existent. The Supreme Court is the central institution, with real authority to restrain the power of the majority. Therefore, any discussion of the judicial reform, especially relating to the Court, must be carried out with a broad view, cumulatively, in a manner that is not detached from the context of the 'reform' and its goals. Democracies no longer die in one day; they erode, slowly and sometimes out of sight, until the people wake up to a completely different democratic reality.

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The judicial overhaul throws light upon the unbearable ease with which changes in the structure of the regime can be passed, without any special process or any deliberate and orderly fashion, and without any broad consensus. In order to resolve the relations and balances among the branches of government, one cannot focus exclusively on the judicial branch without, at the same time, setting boundaries for the executive and legislative branches.

The proposed reform may result in serious harm to the principle of separation of powers and the distribution of governmental powers, which is a core principle in a democratic regime. Moreover, given the importance of imposing limits on governmental power as a central tool for protecting human rights and the 'rules of the game' in democratic regimes, the proposed reform would allow serious harm to the protection afforded to these rights and principles: a clear and present danger to Israel's liberal democracy.

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