


SYMPOSIUM ARTICLE

# Populist Constitutionalism and the Judicial Overhaul in Israel

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## Abstract

In the last year Israel has been going through its most severe constitutional crisis in its history. The newly elected right-wing government has initiated a judicial overhaul that would limit the authority of the judiciary and grant the executive almost absolute powers. In response, the country has witnessed unprecedented civil protestations and opposition from nearly all segments of civil society, academia and economic sectors. In this article we argue that the judicial overhaul must be analysed as a populist constitutional project. We also explain that compared with other systems, Israeli democracy is especially vulnerable to populism, because of its unique institutional design factors coupled with social factors. Only with understanding these factors can one grasp the risks that the judicial overhaul poses to Israeli democracy.

**Keywords:** populism; democratic erosion; Israel; judicial overhaul

## 1. Introduction

On 29 December 2022 the new government of Israel was inaugurated. Two prominent positions within the government and the Knesset were assigned to individuals who have long been critical of the Israeli judiciary: Yariv Levin (Likud), who was appointed Minister of Justice, and Simcha Rothman (Religious Zionism), who was appointed Chair of the Constitution, Law and Justice Parliamentary Committee. The coalition agreements between the political parties forming the governing coalition stated unequivocally that judicial

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reform would take precedence over any other matter, and all coalition parties committed to support this.<sup>1</sup>

Without delay, both Levin and Rothman embarked on their objectives. During a press conference on 4 January 2023, Levin introduced a package of ‘legal reforms’ which, he stated, would be the first in a series of planned changes in the legal system. Levin declared that the these reforms would include legislation to limit the Supreme Court’s authority to invalidate Knesset legislation, restrict the ability of the Supreme Court to review administrative actions, enhance the influence of the executive and legislative branches on judicial appointments, and revamp the process for appointing government legal advisers while reducing their legal powers.<sup>2</sup> On 11 January, Levin submitted a draft bill to the Knesset, seeking to implement the first three proposed changes.<sup>3</sup> On 12 January, Rothman presented his Committee with an initial draft bill constituting the fourth proposed change, with the aim of reforming the position of government legal advisers.<sup>4</sup>

The proposed legal reform has garnered significant criticism from opposition parties,<sup>5</sup> numerous voices within academia<sup>6</sup> and the legal profession,<sup>7</sup> including the previous and present Chairs of the Israel Bar Association.<sup>8</sup> Moreover, it has become the focal point of a growing protest movement, with hundreds of thousands of demonstrators participating in mass rallies in

<sup>1</sup> Ash Obel, ‘Coalition Agreements Require Factions Give “Total Preference” to Judicial Reforms’, *The Times of Israel*, 22 December 2022, <https://www.timesofisrael.com/coalition-agreements-require-factions-give-total-preference-to-judicial-reforms>.

<sup>2</sup> Owen Alterman, ‘Israel’s Justice Minister Levin Presents Dramatic Court Reforms’, *I24News*, 24 January 2023, <https://www.i24news.tv/en/news/israel/politics/1672867118-israel-s-justice-minister-levin-presents-controversial-court-reforms>.

<sup>3</sup> Jeremy Sharon, ‘Levin Unveils Bills to Remove Nearly All High Court’s Tools for Government Oversight’, *The Times of Israel*, 11 January 2023, <https://www.timesofisrael.com/levin-unveils-bills-to-weaken-top-court-enable-laws-to-be-immune-to-judicial-review>.

<sup>4</sup> Carrie Keller-Lynn, ‘Bill Would Allow Ministry Legal Advisers to Make Only Non-Binding Recommendations’, *The Times of Israel*, 12 January 2023, <https://www.timesofisrael.com/bill-would-allow-ministry-legal-advisers-to-make-only-non-binding-recommendations>.

<sup>5</sup> TOI Staff, ‘Lapid Says Judicial Overhaul Plans Will Destroy Israel’s “Constitutional Structure”’, *The Times of Israel*, 5 January 2023, <https://www.timesofisrael.com/lapid-says-judicial-overhaul-plans-will-destroy-israels-constitutional-structure>.

<sup>6</sup> Michael Starr, ‘Israel’s Legal Reform: A Counterrevolution to the Constitutional Revolution?’, *The Jerusalem Post*, 13 January 2023, <https://www.jpost.com/israel-news/politics-and-diplomacy/article-728428>.

<sup>7</sup> AFP, ‘Lawyers Rally Outside Tel Aviv Court against “Dangerous” Judicial Overhaul’, *The Times of Israel*, 12 January 2023, <https://www.timesofisrael.com/lawyers-rally-outside-tel-aviv-court-against-dangerous-judicial-overhaul>.

<sup>8</sup> TOI Staff, “‘They Want to Turn Us into Hungary’: Israeli Bar Chief Slams Plan to Limit Top Court’, *The Times of Israel*, 5 December 2022, <https://www.timesofisrael.com/israeli-bar-chief-on-plans-to-limit-high-court-they-want-to-turn-us-into-hungary>; Jeremy Sharon, ‘Official Results Give Big Win to Anti-Overhaul Amit Becher in Bar Association Vote’, *The Times of Israel*, 21 June 2023, [https://www.timesofisrael.com/liveblog\\_entry/official-results-give-big-win-to-anti-overhaul-amit-becher-in-bar-association-vote](https://www.timesofisrael.com/liveblog_entry/official-results-give-big-win-to-anti-overhaul-amit-becher-in-bar-association-vote).

Tel Aviv, Jerusalem and other cities across Israel.<sup>9</sup> These protestors argue that implementation of the reform package would signify the end of liberal democracy within the country of Israel. One of the most prominent critics of the legal reform is Chief Justice Esther Hayut, President of the Supreme Court (who retired in October 2023). In a public speech delivered at a professional conference on 12 January, the then President Hayut vehemently denounced the proposal. She characterised the reform as an ‘unrestrained attack on the legal system’, emphasising that it posed a significant threat to judicial independence and impartiality. She further described it as a ‘flawed plan’ that would fundamentally alter the democratic identity of the State of Israel, rendering it ‘unrecognisable’.<sup>10</sup> At the time of writing this article, the Knesset had passed only one of the proposals, that of limiting the application of the ‘reasonableness’ doctrine by the Court.<sup>11</sup> Yet, the possibility of further changes remains very much alive, and so do the protests.

In this article we seek to provide a broader perspective on the current discussions taking place in Israel. Specifically, we assert that the proposed constitutional reforms are a manifestation of the growing influence of populism within the country. This populist movement is part of a global trend that has had an impact on numerous democratic nations, giving rise to a crisis in many liberal democracies.

This trend represents a gradual yet significant erosion of the fundamental elements of democracy: competitive elections, liberal rights to speech and association, and the rule of law. At its peak, this erosion can lead to a comprehensive transformation of the governing system, characterised by the introduction of authoritarian and anti-democratic elements, as observed in countries like Hungary, Poland and Turkey.<sup>12</sup>

We focus, in this article, on the rise of populism within Israel. We claim that both the social structure of Israeli society and the constitutional framework of the state are particularly conducive to a populist takeover. Drawing from this Israeli experience, we offer specific cautionary points and indicators to identify democracies that may be more susceptible to populist capture than others.

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<sup>9</sup> TOI Staff, ‘Hundreds of Thousands Join Nationwide Protests, with Key Overhaul Law about to Pass’, *The Times of Israel*, 25 March 2023, <https://www.timesofisrael.com/over-200000-protest-across-israel-against-judicial-overhaul-as-gallant-urges-pause>; Sam McNeil, ‘Thousands March from Tel Aviv to Jerusalem to Protest Israeli Government’s Judicial Overhaul Plan’, *abcNEWS*, 21 July 2023, <https://abcnews.go.com/International/wireStory/thousands-march-tel-aviv-jerusalem-protest-israeli-governments-101545314>.

<sup>10</sup> Nitsan Shafir, ‘Supreme Court President Hayut Blasts Judicial Reform Plan’, *Globes*, 12 January 2023, <https://en.globes.co.il/en/article-supreme-court-president-hayut-blasts-judicial-reform-plan-1001435441>; see Yaniv Roznai and Shani Schnitzer, ‘Navigating the Ship in Stormy Waters: President Esther Hayut and the Israeli Constitutional Crises 2018–2023’ (copy with authors).

<sup>11</sup> Aeyal Gross, ‘An Unreasonable Amendment: The Constitutional Capture in Israel’, *VerfBlog*, 24 July 2023, <https://verfassungsblog.de/an-unreasonable-amendment>.

<sup>12</sup> Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 90–91.

## 2. Populism: A short description

Populism, at its core, revolves around a distinct division of society into ‘us’ versus ‘them’. This underlying perspective has always lingered in the backdrop of democratic systems. Cas Mudde defines populism as ‘an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the *volonté générale* (general will) of the people’.<sup>13</sup>

Jan-Werner Müller uncovered two fundamental ideas that form the internal logic of populism. Firstly, populists are not only anti-elitists; they are also anti-pluralistic. Populist leaders claim exclusive representation of the people,<sup>14</sup> asserting that anyone who opposes their leadership inherently works against the interests of the common people. Moreover, Müller argues that the populist concept of the people is non-institutionalised. Populists presume the existence of superior understanding that is not adequately reflected in the formal structure of democratic institutions. The populist leader purports to faithfully represent the authentic ‘people’ or the true essence of the nation.<sup>15</sup>

It can be said, therefore, that populism is antagonistic to the liberal-democratic order on several fronts: as populists perceive their own views as the embodiment of popular will, they regard any institutional limitations on majority power as an illegitimate usurpation of power by elites. Hence, they reject constraints such as constitutional safeguards, gatekeepers and other checks on their authority. Courts, in particular, as independent institutions that may block governmental power, are attacked as ‘unelected’, anti-democratic and elitist institutions, and attempts are made to weaken or capture them.<sup>16</sup> Once the courts are weakened or captured, it becomes easier to undermine other democratic institutions.<sup>17</sup>

Naturally, the concise description provided above serves as a general framework in that populism manifests itself differently in various countries. However, it establishes the common foundations required to begin to evaluate the populist movement in the Israeli context.

## 3. Why is Israel a fertile ground for populism?

Observers from around the world view the Israeli government’s proposals for judicial overhaul and the mass public protests, asking themselves ‘what happened to Israel?’.<sup>18</sup> We argue that the judicial overhaul must be analysed as

<sup>13</sup> Cas Mudde, ‘The Populist Zeitgeist’ (2004) 39 *Government and Opposition* 541, 543.

<sup>14</sup> Jan-Werner Müller, *What Is Populism?* (Penguin 2016) 3.

<sup>15</sup> *ibid.*

<sup>16</sup> David Kosař and Katarína Šipulová, ‘How to Fight Court-Packing?’ (2020) 6(1) *Constitutional Studies* 133; David Kosař and Katarína Šipulová, ‘Comparative Court-Packing’ (2023) 21 *International Journal of Constitutional Law* 80.

<sup>17</sup> Andrew Arato, ‘Populism, Constitutional Courts, and Civil Society’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 318.

<sup>18</sup> eg, Dov Lieber, ‘What’s Happening in Israel? Protests and Strikes over Netanyahu’s Judicial Overhaul’, *The Wall Street Journal*, 26 July 2023, <https://www.wsj.com/articles/israel-protests-judicial-overhaul-netanyahu-7e264a71>.

a populist constitutional project. According to Mudde and Kaltwasser, populism has assumed a significant role in Israeli politics.<sup>19</sup> Our claim is that while populism in Israel is part of the broader global movement, Israel possesses distinct characteristics – social factors and institutional design factors – that render it particularly vulnerable to a populist takeover. This insight is necessary in order to understand recent events in Israel.

### 3.1. Social factors

#### 3.1.1. The Jewish-Arab divide

Israel is a nation characterised by profound polarisation, with distinct groups, often referred to as ‘tribes’, experiencing significant tensions among them.<sup>20</sup> Throughout Israeli history, one of the most enduring of these tensions has been the Israeli–Palestinian conflict. As a result, the Arab–Palestinian citizens of Israel are not just an ethnic minority. For many of them their self-identification is as part of the Palestinian people. Of perhaps more importance, many Israelis identify them as part of the Palestinian people, who are in intense conflict with Israel, at times escalating into armed confrontation. As a result, Palestinian–Arab citizens are often readily associated by Israeli Jews with Israel’s enemies.

This context provides fertile ground for the emergence of a populist narrative centred around the ‘us’ versus ‘them’ divide. Establishing a clear distinction between an enemy and a friend becomes easier when the perceived ‘bad guys’ are associated with West Bank Palestinians engaged in an armed conflict that poses a direct security threat.

The long-standing Arab–Jewish divide in Israel, coupled with the underlying emphasis on national security concerns, significantly influences the ideological underpinnings of Israeli populism. In contrast to many other countries where populism flourished against the backdrop of economic and cultural tensions, the populist imagination in Israel is fuelled predominantly by a sense of insecurity related to national security.<sup>21</sup>

This dynamic also enables the identification of certain Jewish individuals or groups as supporters of ‘them’. Consequently, human rights organisations and individuals who oppose the continuation of the Israeli occupation are immediately perceived as ‘belonging’ to the opposing side and as supporting ‘the enemy’. Through this mechanism, the entire Israeli ‘left’ spectrum, including both Jewish and Arab members, can be delegitimised as supporters of the enemies of the ‘real’ people.<sup>22</sup>

<sup>19</sup> Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017).

<sup>20</sup> Hanan Peres and Eliezer Ben-Rafael, *Proximity and Quarrel: Rifts in Israeli Society* (Am Oved 2006) (in Hebrew).

<sup>21</sup> Yonatan Levi and Shai Agmon, ‘Beyond Culture and Economy: Israel’s Security-Driven Populism’ (2021) 27 *Contemporary Politics* 292.

<sup>22</sup> Dani Filc, *The Political Right In Israel: Different Faces of Jewish Populism* (Routledge 2009).

### 3.1.2. Ashkenazi versus Mizrahi

Since the very early years of the State of Israel, there has been a divide between Jewish Israelis of Ashkenazi (or European) descent and Mizrahi (Middle Eastern and North African) descent. This divide originated during the mass immigration to Israel in its formative decade. Mizrahi Jews faced discrimination and were settled predominantly in Israel's peripheral regions.

The Ashkenazi group historically dominated key centres of power, including politics, academia, media and the economy, while the Mizrahi group faced exclusion from the elites through various forms of differentiation and discrimination: geographical, occupational, educational, symbolic and cultural.<sup>23</sup>

Although studies indicate a narrowing of the gaps between the two groups, significant disparities persist in areas such as income and educational attainment.<sup>24</sup> Moreover, the legacy of historical discrimination remains entrenched within Israeli culture and politics. This disparity is particularly evident in elite institutions such as the Israeli Supreme Court where, out of 72 justices who have served throughout its history, only 11 were of Mizrahi descent.

Populists exploit this divide in multiple ways. Firstly, the divide allows for a fixed identification of the elite. Anti-elitism poses a challenge for populists as, once they attain power, they become part of the elite they once criticised. Yet, by associating the elite solely with the Ashkenazi segment of Israeli society, populists (regardless of their own descent) can continue to portray others as the elite, even after gaining power. Moreover, the populist distinction between 'us' and 'them' is founded on socio-economic antagonism and perceptions of hegemony. The use of the term 'the people' serves as a rhetorical tool that addresses real or perceived inequality, exclusion and under-representation. It empowers a political subject seeking to 'restore' lost power or sovereignty against alleged anti-populist elitist institutions that have supposedly hijacked it.<sup>25</sup>

Accordingly, some perceive the Supreme Court as an institution that represents the 'old hegemony', or the 'old elite', asserting that it fails to adequately represent the broader public.<sup>26</sup>

Thus, the historical assimilation of the legal elite with the old Ashkenazi hegemony reinforces populist narratives.

### 3.1.3. Anti-liberal groups

The third important social factor is the existence of certain groups that lack strong commitment to liberal democracy. Israel, compared with established Western democracies such as the US or the UK, is a relatively young democracy without a very long-standing and deeply entrenched democratic culture.

<sup>23</sup> Dani Filc, 'We Are the People (You Are Not!): Inclusive and Exclusive Populism in Israel' (2010) 20 *Iyunim Bitkumat Israel* 28–48 (in Hebrew)

<sup>24</sup> Yinon Cohen, Noah Lewin-Epstein and Amit Lazarus, 'Mizrahi-Ashkenazi Educational Gaps in the Third Generation' (2019) 59 *Research in Social Stratification and Mobility* 25.

<sup>25</sup> Yannis Stavrakakis, 'Populism and Hegemony' in Cristóbal Rovira Kaltwasser and others (eds), *The Oxford Handbook of Populism* (Oxford University Press 2017) 535, 539.

<sup>26</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 54.

Furthermore, the liberal constitutional setting is under stress not only because of the occupation of the Territories but also because of the 'Jewish' character of the state, which creates complex religion-state relations, including religious personal laws that place significant restrictions on liberal rights.<sup>27</sup>

One important group that does not place high value on the liberal-democratic regime is the ultra-Orthodox community, which holds a perception that can be characterised as 'anti-liberal' regarding the overall arrangements that should prevail in the State of Israel.<sup>28</sup> Such groups can be described as anti-liberal and not merely as illiberal, because they wish not only to conduct their lives according to illiberal values but also to impose such illiberal values on minorities within them as well as, more broadly, on the wider population, so as to influence the lives of other groups and the nature of the state.

For example, a significant majority (64 per cent) of the ultra-Orthodox population believe that the balance between democracy and the Jewish character of the country, encapsulated in the 'Jewish and democratic state' formula, tilts too heavily towards the democratic component (in contrast, only 20 per cent of the wider Israeli Jewish population share this view).<sup>29</sup> Furthermore, over 75 per cent of ultra-Orthodox agree with the statement that 'in Israel, Jewish citizens should have more rights than non-Jewish citizens', and approximately 50 per cent oppose women having the same influence as men in decision making.<sup>30</sup>

The deep mistrust of the ultra-Orthodox society in the institutions of liberal democracy is exemplified by its lack of trust in the Supreme Court. A substantial majority within the ultra-Orthodox public expresses distrust in the Supreme Court and deems its rulings illegitimate. A recent survey conducted by the Israel Democracy Institute reveals that nearly 90 per cent of voters affiliated with Torah Judaism believe that the Supreme Court should be stripped of its powers of judicial review.<sup>31</sup> According to the ultra-Orthodox perspective, the liberal worldview advocated by the Court stands in stark opposition to their own perceptions and positions on various issues, such as the relationship between religion and state, and autonomy for the ultra-Orthodox community.<sup>32</sup>

We emphasise this group for demographic and political reasons. The ultra-Orthodox population is 13.5 per cent of the total national population (1.28 million out of 9.45 million). Its current growth rate is 4 per cent, the

<sup>27</sup> That is why Gila Stopler describes Israel not as a liberal democracy but as a semi-liberal constitutional system: Gila Stopler, 'Semi-Liberal Constitutionalism' (2019) 8(1) *Global Constitutionalism* 94.

<sup>28</sup> On the distinction between illiberal and anti-liberal minorities see Amnon Rubinstein, 'Unashamed Liberalism – Liberal, Illiberal and Anti-Liberal Minorities' [2017] (2) *Public Law* 270;

<sup>29</sup> Tamar Hermann and others, *The Israeli Democracy Index 2019* (Israel Democracy Institute 2019) 33, <https://en.idi.org.il/media/14242/the-israeli-democracy-index-2019.pdf>.

<sup>30</sup> Yedidia Z Stern and others, *Jewish, Haredi, and Democratic: The State of Israel through Haredi Eyes* (Israel Democracy Institute 2021) (in Hebrew).

<sup>31</sup> *ibid.*

<sup>32</sup> See generally Haim Zicherman, 'One Trial You Shall Have: The Triple Confrontation of Haredi Society with the Israeli Judiciary' in Haim Zicherman and Yoram Margalot (eds), *Law, Society and Culture – Law and the Ultra-Orthodox in Israel* (Tel Aviv University Press 2018) 37 (in Hebrew).

highest of any group in Israel, and by the end of the decade it will constitute 16 per cent of the total population.<sup>33</sup> The importance of the ultra-Orthodox group is not solely because of its large and growing percentage in the population but also lies in the efficacy of its political power. Since 1977, for more than 80 per cent of the time at least one party representing the ultra-Orthodox community has been part of the ruling coalition in the Knesset, often having the ability to ‘tip the coalitional scale in one direction or another’.<sup>34</sup> This underscores the group’s political potency.

#### 3.1.4. Summary

Indeed, while social variables play a role in explaining the rise of populism in any country, we believe that the distinctive combination of social divisions within Israeli society creates a particularly fertile ground for populists.

Naturally, background factors alone are insufficient to explain fully the potential impact of populism on the Israeli political system. However, no less importantly, Israel possesses certain unique structural features that enable populism to exert a significant influence on its democratic framework.

### 3.2. Institutional design factors

We now turn our attention to the institutional sphere, positing that Israel’s unique political institutional structure, coupled with its incomplete constitution, makes it much easier for populists to capture state institutions.

#### 3.2.1. Lack of mechanisms of separation of powers and checks and balances

The dispersion of political power among multiple institutions is a fundamental characteristic of most democratic systems. These mechanisms serve to prevent power concentration in the hands of a single elected body, ensuring a more balanced distribution of influence. One can identify six distinct institutional mechanisms that facilitate the distribution of political power: bicameralism, presidential systems, federalism, regional electoral systems (constituencies), supra-national organisations, and supra-national courts.<sup>35</sup>

Each of these mechanisms carries significant implications for the functioning of democracy, the representation of various voices, decision-making processes, the relationship between majority and minority interests, and the efficacy of governance. These mechanisms act as substantial barriers to the concentration of power in the hands of the legislature.<sup>36</sup>

To gain further insights into the mechanisms of checks and balances in democratic countries, we conducted a survey encompassing 66 countries

<sup>33</sup> Judah Ari Gross, ‘Haredim are Fastest-Growing Population, Will Be 16% of Israelis by Decade’s End’, *The Times of Israel*, 2 January 2023, <https://www.timesofisrael.com/haredim-are-fastest-growing-population-will-be-16-of-israelis-by-decades-end>.

<sup>34</sup> Asher Cohen and Bernard Susser, *Israel and the Politics of Jewish Identity: The Secular-Religious Impasse* (The John Hopkins University Press 2000) 17.

<sup>35</sup> For full country-by-country information see Amichai Cohen, *Checks and Balances: The Override Clause and Its Effect on the Three Branches of Government* (Israel Democracy Institute 2018) (in Hebrew).

<sup>36</sup> *ibid.*



categorised as ‘free states’ by Freedom House.<sup>37</sup> The survey results revealed that almost all democracies adopt one or more of the aforementioned mechanisms to distribute political power among multiple institutions. Notably, *Israel stands out as the only democratic country with no structural, internal or external political restriction on the legislature.*<sup>38</sup>

Israel’s uniqueness extends beyond the absence of restrictions on legislative powers vested in the Knesset. In fact, the concentration of political power in the hands of a small group of decision makers, comprising the leadership of the ruling coalition parties, is another distinctive aspect of Israel’s political landscape. This selected group exercises significant control over both the Knesset (Israel’s parliament) and the government, aided by strict coalition discipline. In many cases, parties within the Israeli Knesset bypass primary elections, with the party leader personally handpicking the electoral slate. Consequently, party leaders wield complete control over their respective parties, with little or no room for internal opposition.

The critical factor contributing to Israel’s vulnerability to populist takeover lies in the presence of a single elected institution controlled by a small group of individuals. Populists need only to seize control of this solitary institution to exert authority over the entirety of the political power structure.

### 3.2.2. *Lack of a rigid constitution*

Israel’s Constituent Assembly, elected in 1949 and tasked with drafting a constitution, transformed itself into the first Knesset and failed to complete the constitution. Instead, the Knesset adopted a fragmented approach, enacting a series of Basic Laws that would eventually serve as chapters in the future constitution. However, the Knesset never explicitly determined the special status of these Basic Laws during the ongoing constitutional project, nor established specific procedures for their adoption or amendment. Consequently, a series of Basic Laws were enacted, primarily addressing the state’s institutions (the Knesset, government, State Comptroller, the courts, and so on). Some of these Basic Laws include provisions that require a majority of members of the Knesset (61) for any modification, with some cases requiring a special majority exceeding 61 members.<sup>39</sup>

In 1992, the Knesset adopted Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation, creating, for the first time, a partial ‘Bill of Rights’. In the famous, and highly contentious *United Mizrahi Bank v*

<sup>37</sup> Freedom House rates 88 states as ‘free’ (eg, democracies); 22 of these are islands in the Pacific or the Caribbean, or very small countries in Europe with fewer than 250,000 citizens. The reason they were excluded is that for a very small country the direct costs associated with checks and balances might be prohibitive.

<sup>38</sup> There is a vast literature on the effects of institutional design on the distribution of power, and the comparative operation of democracies; see, eg, Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd edn, Yale University Press 2012) 26.

<sup>39</sup> eg, Basic Law: The Knesset (s 44) requires an 80-member majority in order to delay an election. Basic Law: Referendum requires a referendum or a majority of 80 members of the Knesset in order to adopt a decision to withdraw from any territory under Israeli sovereignty (although the law itself can be modified by a majority of 61).

*Migdal* judgment in 1995, the Supreme Court declared that Basic Laws are superior to regular laws, and that laws violating the rights protected by the Basic Laws could be struck down.<sup>40</sup>

Israel is therefore in a unique position. On the one hand, the Supreme Court has struck down 23 laws or provisions since 1995 based on this authority (out of about 4,000 laws that were enacted since). On the other hand, the Supreme Court's authority to do so is not explicitly defined in legislation but rather is proclaimed by the Court itself, deriving it implicitly from the Basic Laws, which can be easily amended.

### 3.2.3. *Extreme flexibility*

In every other democracy there are inherent restrictions on the constitutional amendment process: procedural, substantive, or temporal.<sup>41</sup> However, the amendment process of Israel's Basic Laws, as previously discussed, exhibits an exceptional level of flexibility. It is characterised by the absence of significant procedural, substantive or temporal limitations.<sup>42</sup>

The frequency of amendments to the Basic Laws exemplifies this flexibility. Since 1958, when the first Basic Law was constituted, Israel has undergone 140 formal constitutional changes. Since 2013 alone, over 30 amendments have been enacted, along with the introduction of three new Basic Laws. These figures surpass the number of constitutional changes implemented throughout the entire history of the United States. This is a relatively recent phenomenon: from 1958 until 2023 there were 2.15 constitutional changes a year, but in the past eight years this number has increased to 4.75 changes a year.<sup>43</sup> Furthermore, the process of amending Basic Laws is often carried out through an expedited procedure, with some changes being made within a day and a half. Many of these amendments are temporary in nature and tailored to specific circumstances.<sup>44</sup>

This prevailing trend aligns with the essence of the populist constitutional project, particularly the instrumentalist approach as a political strategy.<sup>45</sup> This approach undermines the value of the constitution by frequently modifying it to serve political interests. Populists in Israel have blurred, and perhaps even obliterated, the distinction between regular and constitutional politics. The

<sup>40</sup> For elaboration see Gary J Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020).

<sup>41</sup> Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019).

<sup>42</sup> Suzie Navot, 'Israel' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart 2011) 191

<sup>43</sup> Netael Bendel, 'Research: Israel Is a World Leader in Changing Basic Laws', *Israel Hayom*, 20 January 2023, <https://www.israelhayom.co.il/news/politics/article/13605731>.

<sup>44</sup> Nadav Dishon, 'Temporary Constitutional Amendments as a Means to Undermine the Democratic Order: Insights from the Israeli Experience' (2018) 51 *Israel Law Review* 389; Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21 *European Journal of Law Reform* 403.

<sup>45</sup> Paul Blokker, 'Populism as a Constitutional Project' (2019) 17 *International Journal of Constitutional Law* 536.

formal requirement of a simple majority of 61 Knesset members to modify almost any aspect of the Basic Laws has provided populists with the means to legitimise any change they seek, further consolidating their influence.

### 3.2.4. *A slim Bill of Rights*

From a comparative perspective, the scope of protected rights in Israel is notably limited. While the average number of rights safeguarded by constitutions in the 1950s was below 20, today that average has increased in other liberal democracies to around 35.<sup>46</sup>

In contrast, Israel's constitutional document explicitly protects fewer than a dozen protected rights. This small number of protected rights moreover highlights some notable omissions, such as an explicit protection of equality, freedom of religion and freedom of speech.<sup>47</sup> Formally, at least, populists face only few limitations on their desire to promote policies that infringe human rights. They can thus easily change the basic features of the Israeli regime, facing hardly any formal limitations. In other words, the scope for populists to advance their agenda and reshape the country's constitutional framework remains considerably broad.

### 3.2.5. *The Israeli Supreme Court*

The final aspect to consider in this brief analysis of Israel's constitutional regime is the distinctive role of the Supreme Court in its development, as well as its treatment by populists.

As mentioned above, Israel's Basic Laws do not explicitly authorise the courts to strike down laws that infringe the rights or arrangements protected within these Laws. While this is not unique in itself – the US Constitution, for example, also lacks explicit provision granting such authority to its courts – the difference lies in the claim made by many lawyers and politicians in Israel that the Knesset never intended to grant the Supreme Court this authority.<sup>48</sup>

Moreover, while the textual content of the Basic Laws protects only a limited number of rights, the Supreme Court has developed a rich and delicate protection for numerous additional rights.<sup>49</sup> This expansion is particularly evident in the Court's interpretation of the term 'human dignity', which has been constructed to encompass the protection of unenumerated rights such as equality and free speech, and even social rights.<sup>50</sup>

<sup>46</sup> Adam Chilton and Mila Versteeg, 'Small-c Constitutional Rights' (2022) 20 *International Journal of Constitutional Law* 14.

<sup>47</sup> Adam Shinar, 'Idealism and Realism in Israeli Constitutional Law' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (Cambridge University Press 2018) 257.

<sup>48</sup> Gideon Sapir, *The Israeli Constitution: From Evolution to Revolution* (Oxford University Press 2018) Ch 2.

<sup>49</sup> Jacobsohn and Roznai (n 40) 211.

<sup>50</sup> The distinction between formally protected constitutional rights and those forms of protection developed by the Court is sometimes called the 'big C' versus 'small c' constitutional protection.

These two features of judicial review power in Israel align directly with the populist agenda. The fact that the Supreme Court strikes down laws without explicit authorisation, coupled with its perceived ‘activist’ attitude towards rights protection, fuels the populist narrative of the Court overstepping its bounds. Populists find a receptive audience when they assert their claim against the Supreme Court’s historical lack of authorisation, drawing on the writings of respected jurists and emphasising an inflated role for the Court through expansive interpretation.<sup>51</sup>

#### 4. Democratic erosion in Israel

Levin’s recent proposals are not the first attempt by populists to promote their agenda in Israel; in fact, several such proposals were suggested between 2015 and 2019, under the Netanyahu government. However, they faced significant political and judicial opposition. The current suggestions reflect the realisation within the Israeli populist movement that achieving its goals would be challenging without fundamental structural changes to the country’s democracy.

While it is beyond the scope of this short article to extensively discuss all the laws or proposed bills aimed at promoting the populist ideology in Israel,<sup>52</sup> some noteworthy examples include legislation that criminalises calls for boycotts of any part Israel, including the territories;<sup>53</sup> laws that impose disclosure obligations on civil society organisations funded by foreign countries – primarily human rights organisations;<sup>54</sup> and laws allowing the denial of state funding to institutions that oppose the view of Israel as a Jewish and democratic state or that view the establishment of the State of Israel as a tragedy for the Palestinians.<sup>55</sup> This trend has soared under the current government. According to one count, there are over 220 bills now before the Knesset aimed at promoting a specific aspect of the Israeli populist project.<sup>56</sup>

<sup>51</sup> See, eg, Sapir (n 48) Chs 2 and 3. For an analysis of the rhetoric and persuasion tools used by supporters of the judicial overhaul, including relying on various scholars, see The Israeli Law Professor’s Forum for Democracy, ‘The Argumentative Structures Utilized by Supporters of the Regime Overhaul’, 4 September 2023, <https://www.lawprofsforum.org/post/argumentative-structures>.

<sup>52</sup> Nadiv Mordechai and Yaniv Roznai, ‘A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel’ (2017) 77 *Maryland Law Review* 244; Yaniv Roznai, ‘Israel – A Crisis of Liberal Democracy?’ in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 355.

<sup>53</sup> Law for Prevention of Damage to the State of Israel through Boycott, 5771–2011. See also Lior A Birn, ‘The Israeli Anti-Boycott Law: Balancing the Need for National Legitimacy Against the Rights of Dissenting Individuals’ (2012) 38 *Brooklyn Journal of International Law* 345.

<sup>54</sup> Duty of Disclosure regarding Those Supported by a Foreign Political Entity Law, 5771–2011, s 5A, amended by the Knesset on 12 July 2016.

<sup>55</sup> The Budgetary Foundations Law, Amendment No 40, 5771–2011 (also known as the Nakba Law).

<sup>56</sup> Political Scientists for Israeli Democracy, <https://www.psfidocracy.org> (in Hebrew). Many of these bills aim to limit the independence of the judicial system; others are intended to strengthen political control of the media, of the public service, and of academia. Especially worrisome are those bills aimed at giving the government more control over the elections process. Most

However, we will focus our discussion on one event, namely the enactment of Basic Law: Israel – Nation-State of the Jewish People (Nation-State Basic Law), which we believe explains the dynamic that led to the current situation.

The Nation-State Basic Law represented a significant legislative effort in targeting the Arab minority in Israel, aimed explicitly at rolling back some of the progress made by this minority in recent years.<sup>57</sup> The enactment of this Basic Law was clearly a response to a decision by the Supreme Court that upheld rights of the Arab minority. Former Justice Minister Ayelet Shaked expressed the sentiment behind the Basic Law, stating that ‘Zionism should not continue, and it will not continue to bow down to the system of individual rights’.<sup>58</sup>

The Basic Law was enacted in July 2018 by a coalition majority of 62 against 55. All members of the opposition voted against it. The Nation-State Basic Law states explicitly that ‘self-determination’ in Israel is reserved exclusively for the Jewish people.<sup>59</sup> It designates Hebrew as the sole official language in Israel (assigning Arabic a ‘special status’).<sup>60</sup> It also provides that the state will encourage and promote Jewish settlements.

The Nation-State Basic Law aligns with the Israeli populist movement in two significant ways. First, it emphasises the Jewish population, effectively excluding any mention or acknowledgement of the Arab population, or the existence of minorities in Israel. By doing so, the Basic Law contributes to the definition of an essential populist conception: the notion of ‘us’ versus ‘them’. The Basic Law solidifies the identification of Israeli Jews as part of the collective ‘us’, starkly contrasting with the perceived ‘they’ – the Arabs.

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of these bills are private bills that have little chance of becoming law; some of them, however, enjoy significant support from certain coalition parties.

<sup>57</sup> For a discussion see Menachem Mautner, ‘Protection of Liberal Rights amidst a “War of Cultures” (Kulturkampf) between Secular and Religious Groups’ (2018) 48 *Israel Yearbook of Human Rights* 137; Tamar Hostovsky Brandes, ‘Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination, and Social Solidarity’ (2020) 29 *Minnesota Journal of International Law* 65; Alon Harel, ‘Basic Law: Israel as the Nation State of the Jewish People’ (2021) *Nationalities Papers* 262; Simon Rabinovitch (ed), *Defining Israel: The Jewish State, Democracy, and the Law* (Hebrew Union College Press 2018); Special Section on ‘Israel Dialectics—Basic Law: Israel as the Nation-State of the Jewish People’ (2020) 25(3) *Israel Studies* 130–266.

<sup>58</sup> Revital Hovel, ‘Justice Minister Slams Israel’s Top Court, Says It Disregards Zionism and Upholding Jewish Majority’, *Haaretz*, 29 August 2017, <https://www.haaretz.com/israel-news/2017-08-29/ty-article/israels-top-court-disregards-zionism-justice-minister-says/0000017f-dbdb-db5a-a57f-dbf5230000>.

<sup>59</sup> Whether or not this means that the Arab minority have no collective rights or that the character of the state must remain Jewish is a subject of some debate.

<sup>60</sup> Meital Pinto, ‘Why the Basic Law of Nationality Does Change the Status of the Arabic Language for the Worse’, *ICON-S-IL Blog*, 31 October 2018 (in Hebrew), <https://israelconstitutionalism.wordpress.com/2018/10/31/%D7%A1%D7%99%D7%9E%D7%A4%D7%95%D7%96%D7%99%D7%95%D7%9F-%D7%91%D7%A0%D7%95%D7%A9%D7%90-%D7%97%D7%95%D7%A7-%D7%99%D7%A1%D7%95%D7%93-%D7%94%D7%9C%D7%90%D7%95%D7%9D-%D7%95%D7%A4%D7%A1%D7%A7%D7%AA-%D7%94-8>.

Second, unlike the Basic Laws of 1992, this Basic Law does not include any reference to the Declaration of Independence<sup>61</sup> and does not include the formula of 'Jewish and democratic state' – the balancing principle that underpinned the existence of pluralistic democracy in Israel. The 'Jewish and democratic' formula represented the commitment of the Jewish majority to take into account the rights and interests of minorities. In other words, this formula, and the implicit commitment to the principle of equality derived from the reference to the principles of the Declaration of Independence, has allowed minorities in Israel to feel a sense of participation, even if only secondary, in Israel. Basic Law: Israel – Nation State of the Jewish People, then, is a milestone in changing Israel's constitutional landscape from a pluralistic democracy to a state in which the majority can 'overpower' the minority.

In this context, it is essential to recognise the role of the Supreme Court in curbing the populist agenda. In its decision in *Hasson v The Knesset*, the Court addressed the claim that the Basic Law is unconstitutional. The Court, led by Chief Justice Hayut, declared that even a Basic Law may be subject to judicial review and potential invalidation if it fundamentally alters the democratic or Jewish character of Israel. However, the Court took great care to interpret the Basic Law as not in itself contrary to the principle of equality or to the characterisation of Israel as democratic.<sup>62</sup> This decision provided a degree of relief for pluralists who viewed the Court as a check on potential discrimination. The Basic Law was not struck down but rather interpreted in a way that aimed to prevent actual discriminatory effects.

For the populists, however, the judgment was the final straw. It was all the proof they needed that the Court would not allow the Israeli populist ideology to change Israel's basic pluralist structure. The need for structural change became clearer and more urgent.

## 5. The 'judicial overhaul' proposals

On 4 January 2023, Yariv Levin, Minister of Justice in Benjamin Netanyahu's newly formed government, held a press conference to introduce what he described as the initial step in his 'governance reform'.<sup>63</sup> The stated goal of this reform was to 'restore the balance between the three branches of government'. Actually, far from 'restoring any balance', this proposed reform is designed to limit the authority of the Supreme Court and of the professional government legal service, and empower the executive.

As previously mentioned, political power in Israel is heavily concentrated in the hands of coalition party leaders. The Israeli Supreme Court and the non-

<sup>61</sup> The Israeli Declaration of Independence of 1948 states: 'The State of Israel ... will foster the development of the country for the benefit of all its inhabitants; ... it will ensure complete equality of social and political rights to all its inhabitants'.

<sup>62</sup> Rehan Abeyratne and Yaniv Roznai, 'Interpreting Unconstitutional Constitutional Amendments' in Catherine O'Regan, Carlos Bernal and Sujit Choudhry (eds), *Research Handbook on Constitutional Interpretation* (Edward Elgar forthcoming).

<sup>63</sup> Press conference available on YouTube, <https://www.youtube.com/watch?v=RzLEgHeAwPU> (in Hebrew).

partisan Attorney General within the professional government legal service have emerged as counterforces of political checks and balances – in fact, as the only check on the concentrated power of the coalition party leaders. The suggested reform, as a whole, aims to diminish the power of these legal institutions and effectively eliminate any limitation of the government’s political power.

The proposed reform is made up of four different steps. The first proposal is to limit constitutional review. This proposal has three elements, the first of which is to enact an ‘override clause’ that would allow the Knesset to re-enact any statute invalidated by the Court by a majority vote of its members (61 out of 120). If this override clause becomes part of Israel’s constitutional framework, it will grant the government, which effectively controls the Knesset, the ability to pursue any policy it wishes without being constrained by judicial decisions. The second element is a limitation of the Supreme Court’s power of judicial review, from a decentralised to a centralised model, in which only the Supreme Court will be authorised to declare unconstitutionality; but, more importantly, the invalidation of unconstitutional laws can be made only with a super-majority of 12 out of the entire 15 judges of the Court sitting. The third element is to provide that Basic Laws themselves – which function as constitutional documents – will be immune from judicial review, but without providing for any special procedure for their enactment. This means that any legislation can be made immune to judicial review by simply having the words ‘Basic Law’ in its title.<sup>64</sup>

The second part of the proposed reform suggests changing the composition of Israel’s judicial selection committee. Currently, the committee consists of two ministers (one of whom is the Minister of Justice); two Knesset members; three Supreme Court justices, and two representatives of the Israeli bar. For the election of judges to all courts except the Supreme Court, a simple majority of the committee is required. Election to the Supreme Court requires seven out of the nine members. The method of electing justices, especially to the Supreme Court, has generally led to the appointment of agreed candidates.

Levin’s plan intends to change this model to one in which the government and the Knesset, which share a similar perspective, would have control over all judicial appointments, including those to the Supreme Court. This proposal would grant the government significant control over appointments to all levels of the judiciary.<sup>65</sup>

The third proposal, which is the only one to have been enacted thus far, is the law stripping all courts of their authority to conduct a review of the

<sup>64</sup> 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>.

<sup>65</sup> Amichai Cohen and Yuval Shany, ‘The Fight over Judicial Appointments in Israel’, *Lawfare*, 16 February 2023, <https://www.lawfaremedia.org/article/the-fight-over-judicial-appointments-in-israel>; for elaboration see Guy Lurie, ‘The Attempt to Capture the Courts in Israel’ (2023) 56 *Israel Law Review* 456.

reasonableness of decisions of the government and individual ministers.<sup>66</sup> Critics argue that this doctrine is too open-ended and has led to improper interventions by the Court in various government policy decisions. In contrast, proponents of the doctrine stress that it allows the Court to intervene when executive branch decisions fail to consider important factors, such as the deterioration in trust in government when indicted politicians are appointed to government ministries. The complete removal of judicial competence to examine the reasonableness of decisions of the government or its ministers prevents the courts from intervening in cases where the government's desired policy is clearly arbitrary or extremely unreasonable.<sup>67</sup>

The final part of the proposed reform is to transform the position of legal advisers of ministers to a 'trust appointment' or, in other words, to a political nomination. The independent status of government lawyers, developed over time, reflects the perception that the Attorney General and ministerial legal advisers act as 'gatekeepers', subject only to the law, and entrusted with preservation of the public interest. Levin's suggestion aligns with a perspective that views the role of legal advisers in government as similar to that of legal advisers in private corporations: to advise the minister on promoting policies without considering the public interest.<sup>68</sup>

While some of Minister Levin's specific suggestions may appear reasonable when considered individually, when taken together they paint a bleak future for Israeli democracy. Even if some of the mechanisms proposed in these suggestions exist, in one form or another, in other countries, their application in Israel out of local context and structure may be regarded as 'abusive borrowing',<sup>69</sup> which may lead to a 'Frankenstate'.<sup>70</sup> These reforms are intended to create a democracy where power is centralised in the hands of a small number of partisan actors, with no effective limitations on their authority and ability to promote their preferred policies.

These reforms, we suggest, emanate from a unique Israeli version of the populist movement. They also conform to the populist constitutional project as described in the literature.

<sup>66</sup> Gross (n 11).

<sup>67</sup> Amichai Cohen and Yuval Shany, 'From All-Out Assault to Salami Slicing Tactics: Israel's Crisis Continues', *Lawfare*, 20 July 2023, <https://www.lawfaremedia.org/article/from-all-out-assault-to-salami-slicing-tactics-israel-s-crisis-continues>; for elaboration see Mordechai Kremnitzer, 'Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness' (2023) 56 *Israel Law Review* 343.

<sup>68</sup> Amichai Cohen and Yuval Shany, 'No More Legal "Gatekeepers"? Plans to Downgrade the Status of Government Legal Advisors in Israel', *Lawfare*, 21 February 2023, <https://www.lawfaremedia.org/article/no-more-legal-gatekeepers-plans-to-downgrade-the-status-of-government-legal-advisors-in-israel>.

<sup>69</sup> Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

<sup>70</sup> See Yaniv Roznai, Rosalind Dixon and David Landau, 'Judicial Reform or Abusive Constitutionalism in Israel' (2023) 56 *Israel Law Review* 292. See generally Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 552.



While there can be many mutual interests for different political actors to support the judicial overhaul – such as those political parties pushing to further the annexation,<sup>71</sup> or the Prime Minister's ongoing criminal trial – in this article we argue that the judicial overhaul must be understood as a populist project.

What is unique about new populists, compared with the authoritarians of the last century, is the legal and constitutional *modus operandi* – namely, acting within the formal constitutional framework in order to advance their aims.

Whereas in the past, illegal and even violent measures were taken in order to undermine the constitutional order, nowadays democratic breakdown takes place by democratically elected governments that abuse the democratic institutions in order to weaken, in legal and constitutional ways, the democratic values and institutions themselves.<sup>72</sup> In other words, populism is accompanied by a constitutional project for its achievement – political constitutionalism. Paul Blokker argues that populist systems have the following four main characters:

- (1) *Reliance on the notion of popular sovereignty as justifying state action.* From this notion derives another populist argument, according to which a strong judicial system turns popular sovereignty into unfulfilled fiction.
- (2) *Majority rule as a tool for governance.* For populists, the sovereign will of the people is expressed by the will of the majority – this is extreme majoritarianism. The majority represents the sovereign people; thus any restrictions on majority power are illegitimate. While parliamentary and representative politics make society fragmented, the 'majority' is a unified entity, which is equated by populism to the entire nation, an equation that allows the populist to radically change the rules of the game.
- (3) *Instrumentalism as political strategy.* Populism weaponises law and the constitution as a tool that can be activated for and on behalf of the collective project. Populist constitutionalism thus tends to collapse the distinction between ordinary politics and political politics, manifested in the constant and frequent changes of constitutional rules and norms, within everyday politics.
- (4) *Resentment towards law and the judicial system:* Populism is critical of courts and the judicialisation of society and politics. It attacks the idea that law is neutral and apolitical. It also rejects the idea that sovereignty rests within the legal system and within the constitution as a supreme legal document. Finally, the rule of law principle, which was regarded in the liberal idea as restraining the government, is replaced by a collective conception in which the courts ought to serve the community and the people.<sup>73</sup>

Understanding the constitutional project is crucial for the analysis of populism's influence. Accordingly, as we noted in the second section, populist

<sup>71</sup> See Tamar Hostovsky Brandes, 'The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?' (2023) 56 *Israel Law Review* 415.

<sup>72</sup> David Landau, 'Abusive Constitutionalism' (2018) 47 *UC Davis Law Review* 189; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

<sup>73</sup> Blokker (n 45).

projects for constitutional reform focus on changing the powers of courts and procedures for the selection of the judiciary in order to weaken their independence, pack the courts, and even capture them.

The result of the main characters of the populist's constitutional project is multifold: a crisis in the rule of the constitution, emphasising the arbitrary nature of the political government ('if the constitution limits us, we shall simply change it for our own needs'), and the exercise of constituent power not by a consensus but by the political majority in order to remove limitations on governmental power allegedly on behalf of 'the people'. When the government takes upon itself the role of constituent authority, this move tends to be univocal, partisan and monist, rather than a process that is built on broad agreement and aims to reach consensus.<sup>74</sup> It is this populist conception that was clearly expressed in the unilateral move of the Israeli government coalition in advancing the judicial overhaul in Israel.

The quick move also conforms to the temporal conception of populism. As described by Sam Issacharoff, the secret for democratic stability is that it is a recurring game that requires prolonged periods of governing. Time allows the losers of today to become the winners of tomorrow (or at least to organise to try and be the winners). The elections may bring about 'bad' results, which may also lead to 'bad' legislation, but the critical point is the ability to recover – to be able to correct mistakes of the past. In contrast, the populist urge shortens the time period of the relevant political implications, making everything a bi-model choice; political *modus vivendi* defined by existential dilemmas: us or them, success or treason, the people or the elites, the nation or foreigners. There is no such thing as a partial win, a legitimate disagreement, or cooperation with the opposition for a mutual benefit. One can see the implications of these dense timeframes in the populists' willingness to ignore long-standing and established rules and conventions.<sup>75</sup>

The populists want everything here and now. The Israeli government, as well, wants everything and fast.

## 6. Conclusion and looking forward

Unchecked political power is potentially dangerous. Supporters of the reform in Israel claim that periodic elections are sufficient as a deterrent of misuse of power by politicians. However, the crucial question revolves around whether politicians, when granted unbalanced power, would indeed make problematic use of their authority.

Early signals of the activities taken by the new government in Israel raise concerns. Even before the government was sworn into office, the Knesset passed an amendment to the Police Ordinance, authorising the Minister of Police to issue an 'outline [of] the police policy and the general principles for its activity, including regarding priorities, work plans, general instructions'.

<sup>74</sup> *ibid.*

<sup>75</sup> Samuel Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press 2023) 7–8.

Thus, in a legislative process that lasted just a few days, almost without professional input from government agencies, the Knesset significantly strengthened the political control over the police, without providing the police with any protection against political use or assurance of its independence. Furthermore, the minister was explicitly empowered to outline policies even in delicate areas such as investigatory police, which are susceptible to political abuse.

The second swift change made before the new government was sworn in was of a narrower scope, but demonstrated a more pronounced disregard for accepted procedure. Arye Deri, chairperson of the Shas party, was promised the role of Minister of Interior Affairs, despite having been convicted in early 2022 upon his admission of tax evasion, and having received a suspended prison sentence. According to Basic Law: The Government, if Deri intended to serve as minister, he should have approached the chairperson of the elections commission (a sitting justice of the Supreme Court) to obtain a decision stating that his offence did not carry moral turpitude. Instead of following this procedure, Deri compelled the incoming coalition to amend the Basic Law so that this requirement would no longer apply to suspended prison sentences. In other words, it was easier for Deri to change the Basic Law than to adhere to its provisions. The appointment of Deri as a minister in the government was eventually blocked by the Supreme Court for other reasons, but the Court did not strike down the amendment to the Basic Law. The coalition's position still holds.<sup>76</sup> This action reflects the incoming coalition's cynical view of the 'rules of the game'. Since it holds the power to make changes, it does not hesitate to utilise that power.

Considering these developments, the judicial overhaul discussed earlier appears to be just a prelude. The coalition demonstrates no internal reservations about using its actual power. If its plan to remove all external judicial restrictions on its authority comes to fruition, it is evident that the government will exploit that power without hesitation.

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<sup>76</sup> In 2023, with an extended bench of 11 judges, the High Court of Justice ruled that Deri, indeed, was prevented from being appointed as minister because his appointment was extremely unreasonable, especially considering his statement that he intended to retire from political life: HCJ 8948/22 *Ilan Sheinfeld v The Knesset* (18 January 2023) 20–21.

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