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SYMPOSIUM ARTICLE

Israel's Constitutional Moment

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Abstract

As the result of the initiation of the 'judicial reform' in January 2023, and the huge wave of public protest, Israel is currently undergoing a political turmoil which may develop into a fully fledged constitutional crisis. In this article I provide an account of the roots and causes of the present crisis from a public law theory perspective. In particular, I discuss the relationship between constitutional and administrative law in Israeli law. I argue that the core of Israel's constitutional structure has always been the institutions of administrative law as created and developed during the 'administrative revolution' of the 1980s. In contrast, Israel's constitutional law has always been a peripheral in the core structure of judicial review over the political branches. Contrary to common wisdom, I argue that the 'constitutional revolution' of the mid-1990s has not changed this core structure, but rather provided an external belt of normative barricades for this core structure. Accordingly, and despite the pretentious constitutional discourse developed in the 1990s by the Court, Israel was and still is a monistic democracy with no true constitutional layer of norms that enjoys higher status vis-à-vis regular legislation.

Keywords: judicial review; administrative review; constitutional crisis; constitutional decline

1. Introduction

Since January 2023, Israel has been undergoing an unprecedented constitutional crisis. One of the initial actions taken by the extreme right-wing coalition formed after the November 2022 elections was the initiation of the judicial 'reform'. The plan aims to significantly curtail judicial review over the executive and the Knesset, as well as the broader powers of the judicial system. The introduction of this plan triggered an unprecedented wave of protest

that persists even eight months after it began, with no signs of abating. At the time of writing these words, it seems that the protest has succeeded in slowing the pace of execution of the reform but not in compelling the government to abandon it altogether. As certain parts of this programme that have been passed by the Knesset are challenged before the High Court of Justice (HCJ), and given that some senior members of the government have already cast doubts as to whether the government would comply with judicial decisions in the event that the legislation is invalidated by the Court, there is a reasonable chance that Israel is on the path towards a fully blown constitutional crisis.

In this article I wish to provide an account of the roots and causes of the present crisis from the perspective of public law theory. In particular, I aim to discuss the relationship between constitutional and administrative law in Israeli law. My primary argument is that the core of Israel's constitutional structure has always been the institutions of administrative law, as created and developed over the years and, in particular, during the 'administrative revolution' of the 1980s. In contrast, Israel's constitutional law has always been peripheral in the structure of judicial review over the political branches. I argue that contrary to common wisdom, the 'constitutional revolution' of the mid-1990s did not change this core structure, but rather provided (or at least sought to provide) an external belt of normative barricades for this core structure. Accordingly, and despite the pretentious constitutional discourse developed since the 1990s by the Court, Israel was and still is a monistic democracy, with no true constitutional layer of norms that enjoys higher status vis-à-vis regular legislation.[1] Accordingly, as a typical monistic regime, the only true constitutional guarantees in the Israeli public law system are derived directly from basic principles of Israeli democracy as embedded in its administrative law and affiliated institutions. This harsh truth is brutally exposed through the developments over the last year.

In order to present the above argument, I will systematically examine the developments in Israeli public law from the administrative revolution of the 1980s, through the constitutional revolution of the 1990s, to developments in constitutional law that followed it over the last two decades. I focus, in particular, on the process of realisation by the Supreme Court that the principal constitutional theory created during the constitutional revolution is beginning to crumble as a result of the increasing pressures exerted by the political branches, and the attempts made by the Court to develop an alternative constitutional theory. I will then discuss the status of the constitutional structure in the light of threats imposed on judicial independence by the current proposed 'reform'. I conclude with some remarks regarding the status of constitutional theory in contemporary Israeli public law.

[1] In contrast to a constitutional democracy, which is 'dualist' in the sense that there is a layer of norms that is superior to the regular normative layer of legislation (the constitution), in a monist democracy there are no such superior constitutional norms. Instead, theories of monist democracy hold that the only constraints on majority will – as expressed by parliamentary legislation – derive from the fundamental principles underlying the democratic idea itself and/or by fundamental human rights: Bruce A Ackerman, *We the People: Foundations* (Harvard University Press 1991) 7–13 and references there.

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2. The administrative revolution of the 1980s

It is a well-known fact that Israel is among the few countries in the world that does not have a formal written constitution.[2] This fact, however, did not stop the Israeli judiciary and, in particular, the High Court of Justice (HCJ) from developing a rich jurisprudence of protecting fundamental human rights.[3] Shortly after the establishment of the state, and despite severe pressures brought on by the fragility of national security, the HCJ decided some major cases that firmly established the principle of the rule of law,[4] as well as guarantees for freedom of speech,[5] rights of detainees,[6] right of political association,[7] freedom of religion,[8] and other fundamental human rights.[9]

During the first three decades after establishment (1948–80) the HCJ largely followed the footsteps of English law. During the 1980s, however, the Court took some major steps that broadened judicial review over administrative agencies,[10] far beyond its counterparts in other common law jurisdictions. Firstly, the Court drastically reformed its *access* doctrines to almost completely discard all preliminary barriers to judicial review. It essentially deserted the concept of *standing* by ruling that *anyone* may challenge in court *any* (allegedly illegal) official decision even if they do not have any material or personal interest at stake. The Court also set aside the requirement of *justiciability* (or *political question)* by ruling that any governmental action in any field (including foreign relations, military actions, secret services) is justiciable.[11] The immediate effect of this move was the opening of the Court to various legal actions by non-governmental organisations, politicians, political parties and other

[2] Instead, the Knesset legislated, throughout the years, a series of Basic Laws, which were attributed constitutional status, as is discussed in the following section.

[3] The HCJ is one of the three capacities of the Israeli Supreme Court. It also functions as an appellate court and as court of cassation for criminal and civil cases. In administrative law the HCJ functions as first and last instance for administrative litigation in important matters, including when the legality of regulations is at stake (The Administrative Affairs Courts Law, 5760-2000 (2000), s 5). In administrative petitions of lesser importance the HCJ functions as an appellate court over the Courts of Administrative Affairs: Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2014) 18–21.

[4] eg, HCJ 5/48 *Leon v Acting District Commissioner of Tel Aviv (Gubernik)* (19 October 1948), unofficial translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Leon%20v.%20Acting%20District%20Commissioner%20of%20Tel-Aviv.pdf; HCJ 1/49 *Bejerano v Minister of Police* (10 February 1949), unofficial translation at https://versa.cardozo.yu.edu/opinions/bejerano-v-police-minister.

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

[6] HCJ 7/48 *Al-Karbutli v Minister of Defense* (3 January 1949).

[7] FH 16/61 *Companies Registrar v Kardosh* (21 June 1962).

[8] HCJ 105/54 *Lazarovitz v Food Controller* (3 January 1956).

[9] Dotan (n 3) 32–36.

[10] I shall sometimes refer to this type of review over administrative decision making as 'administrative review' as opposed to 'constitutional judicial review' over primary legislation.

[11] HCJ 910/86 *Ressler v Minister of Defense* (12 June 1988), unofficial translation at https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence. On this matter see also Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements' (2001) 23 *Law and Policy* 1.

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organisations in the format of *actio popularis*, thus transforming the Court into a forum that is involved in almost any public issue or controversy brought to the public agenda.[12]

Secondly, the Court significantly expanded the scope of administrative review over fields that previously were largely exempted from judicial scrutiny. Among these fields were actions by the military, the secret services, other issues of national security and foreign relations.[13] Later, the scope of administrative review was extended further to include review over semi-governmental corporations and service providers, utility providers, hospitals, and even major financial services providers such as banks and insurance companies. These were all categorised as 'semi-public' entities and subjected to various doctrines of public law, including anti-discrimination and fairness.[14] The HCJ also ruled that its judicial review power rests over and above other supervisory agencies such as the State Comptroller and commissions of inquiry.[15]

Thirdly, the Court developed ambitious tools for administrative review by imposing broad requirements on administrative authorities, such as the duties of reasonableness,[16] rationality of the decision-making process,[17] and proportionality.[18] These requirements were imposed by the Court on a host of governmental decisions at all levels, including cabinet decisions.[19]

Lastly, the Court extended the reach of its supervision over the Attorney General (AG) and the Attorney General's Office, by ruling that that all decisions made by the AG are subject to the full scope of administrative review by the Court.[20] This move by the Court (during the late 1980s and the early 1990s)

[12] ibid. See also Yoav Dotan and Menachem Hofnung, 'Legal Defeats – Political Wins: Why Do Elected Representative Go to Court?' (2005) 38 *Comparative Political Studies* 75.

[13] HCJ 428/86 *Barzilai v Government of Israel* (6 August 1986), unofficial translation at https://versa.cardozo.yu.edu/opinions/barzilai-v-government-israel-0; HCJ 680/88 *Schnitzer v Chief Military Censor* (10 January 1989), unofficial translation at https://versa.cardozo.yu.edu/opinions/schnitzer-v-chief-military-censor; Dotan and Hofnung (n 12).

[14] On semi-public entities see, eg, HCJ 731/86 *Micro Daf v Israel Electric Corporation Ltd* (12 April 1987).

[15] HCJ 453/84 *Iturit Communication Services v Minister of Communication* (10 January 1985); HCJ 4914/94 *Terner v State Comptroller* (30 October 1995). See also Yoav Dotan, *Judicial Review of Administrative Discretion, Vol 1* (Sacher Institute for Legal Studies/Nevo 2022) 96–98, 106–109 (in Hebrew).

[16] HCJ 389/80 *Dapei Zahav Ltd v Broadcasting Authority* (10 November 1980). The duty of reasonableness existed in the case law before 1980 but its content had been much narrower; see Yoav Dotan, 'Two Concepts of Deference and Reasonableness' (2022) 51 *Mishpatim* (*Hebrew University Law Review*) 673.

[17] HCJ 297/82 *Berger v Minister of the Interior* (12 June 1983).

[18] HCJ 5510/92 *Turkman v Minister of Defense* (15 February 1993).

[19] eg, HCJ 8397/06 *Wasser v Minister of Defense* (29 May 2007), unofficial translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Wasser%20v.%20Minister%20of%20Defense.pdf (the Court held that the decision not to equip the classrooms in Sderot and other settlements near the Gaza Strip with full protection is so unreasonable as to justify judicial intervention and gave an absolute order that the respondents would equip all the main classrooms in those places with full protection); see also Dotan (n 16).

[20] eg, HCJ 935/89 *Ganor v Attorney General* (10 May 1990); HCJ 425/89 *Tzufan v Military Judge Advocate* (27 December 1989).

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is of particular importance because the office of the AG serves three major functions within the government system. In its first function the AG is head of the national prosecution agency, which means that the whole mechanism of criminal enforcement is subject to the AG's directions and policies. The AG has the power to initiate or to stay any criminal prosecution.[21] The second principal function of the AG is as chief legal adviser to the government. As such, the AG is responsible for wide-ranging machinery consisting not only of all legal advisers in the Ministry of Justice but also all other legal advisers in the various departments and ministries. As chief legal adviser to the government, the AG enjoys exclusive power to advise the government on legal issues, and the legal *opinions* of the AG are considered binding on the government unless and until a court of law rules differently.[22]

The third principal function of the AG is the exclusive right to represent the government in any legal proceedings (criminal, civil, administrative, and so on). This means that it is for the AG to decide whether to institute proceedings in court on behalf of the state in any particular case. Moreover, it is up to the AG to decide whether to defend the government or any agency when it is sued in court and the conditions or grounds of such defence. Therefore, if the AG concludes that a particular decision is unlawful and refuses to represent the government in court, the government remains with no legal defence before the court unless the AG provides the relevant minister or agency with permission to hire a private attorney for this purpose.[23]

The centrality of the position of the AG within the executive system points to the crucial importance of the move made by the HCJ in the late 1980s (described above) to subject the AG to judicial review. Until then, it was clear (following the footsteps of the status of criminal prosecution in common law jurisdictions) that the prosecutorial functions of the AG in criminal law should be independent of any political intervention or governmental influence.[24] This does not mean, however, that the AG should be subject to judicial supervision and, indeed, in most common law jurisdictions the AG is almost completely immune from such supervision.[25] The judicial move made by the Court rendered the AG, including *all* of its functions (not only the prosecutorial

[21] Dotan (n 3) 56–57).

[22] HCJ 73/85 *Kach Party v Speaker of the Knesset* (1 August 1985); HCJ 3094/93 *Movement for Quality Government in Israel v Government of Israel* (8 September 1993), unofficial translation at https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-state-israel; Eitan Levontin and Ruth Gavison, 'The "Binding" Position of the Attorney General' in Aharon Barak (ed), *Essays in Honor of Meir Shamgar, Vol 1* (Israel Bar Association 2003) 221 (in Hebrew).

[23] Dotan (n 3) 57–59.

[24] In the context of the US, the leading case on this matter is *Heckler v Chaney*, 470 U.S. 821 (1985). In English law, judicial review of the prosecutorial power of the Attorney General is extremely limited: *R (Corner House Research) v The Serious Fraud Office* [2008] WLR 568; see also William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 533.

[25] For the US see *Heckler v Chaney* (n 24). For the UK see *Gouriet v Union of Post Office Workers* [1978] AC 435 (House of Lords). See also Yoav Dotan, 'Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review: A Comparative Analysis of the Law in England and Israel' [1997] *Public Law* 513, 514–16.

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powers) fully independent of governmental control – but, at the same time, fully subject to the supervision of the judiciary (in particular the HCJ). This meant, in essence, that from that stage onwards the whole legal apparatus of the government was transformed into a supervisory mechanism operating on behalf of the judicial branch, but functioning within the executive branch.

The combination of these developments during the 1980s – namely, the wide-ranging standing in court, the expanded reasonableness doctrine, and the full scope of administrative review over the functions of the Attorney General's office – enabled the HCJ to make a further move to expand its review to an additional crucial aspect of executive decisions: that of appointments and removal of senior executive officials. At the beginning of the 1990s the HCJ ruled that it holds the power to review the removal from office or to strike down appointments of senior executive officials, and even cabinet ministers, whenever criminal investigations (and particularly criminal indictments) are issued against them.[26] This move by the HCJ made it the only court in the world that enables any member of the public to go to court, by regular proceedings of administrative review, and bring about the removal from office of executive officials – effectively creating a procedure of 'impeachment by judicial review'.[27]

Before concluding this review of the administrative revolution of the 1980s, it is important to note that all the changes described above in the content of the legal doctrines, as well as in the functions of the relevant institutions and the relationship between the Court and the executive branch, were judge made. None of these radical changes in Israeli public law were incorporated in any statutory change (let alone any change in constitutional text). Rather, the whole process was built upon the jurisprudence developed by the HCJ.

3. The constitutional revolution of the 1990s

As described in the previous section, during the 1980s Israeli public law underwent radical changes that completely transformed the role of the judiciary within the legal framework and the political system alike. It should be noted that these changes were not limited to the relationship between the judiciary and the executive branch; rather, the Court also expanded its intervention in the business of the Knesset. It ruled, for example, that decisions that infringe rights of members of the Knesset (MKs) (such as disciplinary actions conducted by house committees)[28] and parliamentary decisions regarding the internal management of the Knesset (such as regarding the procedures for votes of no confidence) are subject to judicial review.[29]

[26] On the removal power of the HCJ, eg, HCJ 6163/92 *Eisenberg v Minister of Construction and Housing* (23 March 1993), unofficial translation at https://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing; *Movement for Quality Government in Israel* (n 22); HCJ 4267/93 *Amitai, Citizens for Good Administration and Integrity v Prime Minister* (8 September 1993).

[27] Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19 *Theoretical Inquiries in Law* 705.

[28] eg, HCJ 306/81 *Flatto-Sharon v Knesset Committee* (30 July 1981).

[29] eg, HCJ 652/81 *Sarid v Knesset Speaker* (1 March 1982), unofficial translation at https://versa.cardozo.yu.edu/opinions/mk-sarid-v-chairman-knesset; HCJ 742/84 *Kahane v Knesset Speaker*

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There was one crucial area, however, that remained completely intact during this era of rapid and radical change in public law: the doctrine relating to judicial review of primary legislation. Indeed, it was in the mid-1970s (in the well-known *Bergman* case) that the Court had already acknowledged its power to review (and even strike down) legislation that stood in direct contrast to entrenched provisions of Basic Laws (provisions containing an express requirement for a special majority for their amendment).[30] The *Bergman* decision, however, was narrowly framed as based on interpretative doctrine, and the Court was shy in acknowledging any constitutional superiority of the Basic Laws over regular legislation, or even to admit that its ruling reflected any constitutional function.[31]

The change in the constitutional arena took place during the 1990s. In 1992 the Knesset enacted two new Basic Laws – Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. Contrary to earlier Basic Laws, which were of a structural nature and addressed the composition and powers of state institutions, the new Basic Laws contained direct reference to fundamental human rights. These new Basic Laws also acknowledged the duty of any state institution (the Knesset included) to respect the listed rights and provided that any law that infringes these rights should conform to the values of Israel as a Jewish and democratic state, and meet the requirements of legality and proportionality.[32]

The two new Basic Laws were far from a perfectly designed constitutional bill of rights, for several reasons. Firstly, the list of protected rights was short, inadequate and lacking reference to some of the most important rights such as freedom of speech, freedom of procession, freedom of religion, and the principle of equality. Secondly, the more important of the two, Basic Law: Human Dignity and Liberty, lacked any formal entrenchment or any other provision that expressly endowed it with normative superiority over regular legislation; nor did the text of these Basic Laws expressly provide the judiciary with the power of judicial review. Therefore, their constitutional status, as well as

(31 October 1985); HCJ 9070/00, *MK Livnat v Chairman of the Constitution, Law and Justice Committee* (3 July 2001); see also Yoav Dotan, *Judicial Review of Administrative Action* (Harry Sacher Institute for Legislative Research and Comparative Law 2023) para 3.2.4 (in Hebrew). This move to expand judicial review to internal parliamentary decisions stands in sharp contrast to the position of most common law jurisdictions: in the US and the UK, for example, such decisions are completely immune from judicial scrutiny.

[30] HCJ 98/69 *Bergman v Minister of Finance* (3 July 1969), unofficial translation at https://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance; HCJ 141/82 MK *Rubinstein v Knesset Speaker* (16 June 1983); HCJ 107/73 *'Negev' – Automobile Service Station Ltd v State of Israel* (24 February 1974). On this matter see Yoav Dotan, 'The Constitution of the State of Israel – Constitutional Dialogue after the Constitutional Revolution' (1997) 35 *Mishpatim* (*Hebrew University Law Review*) 149, 166–68.

[31] HCJ *Negev* (n 30), in which the Court openly rejected Claud Klein's theory according to which Basic Laws should be acknowledged as superior constitutional norms (Claude Klein, 'A New Era in Israel's Constitutional Law' (1971) 6 *Israel Law Review* 376). Instead, the Court adhered to the rationale that by imposing entrenched provisions in Basic Laws over the Knesset, it only interprets the legislative order of the Knesset: Dotan (n 30) 167–68.

[32] Basic Law: Human Dignity and Liberty, ss 1A, 8; Basic Law: Freedom of Occupation, ss 1, 4.

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the relationship between their provisions and regular legislation that contradicted them, was far from clear. Lastly, the scope of these Basic Laws was significantly limited as earlier legislation has been expressly exempted from their reach.[33]

On the face of the matter, the above textual deficiencies, together with the fact that the Basic Laws were passed by the Knesset in a somewhat baffled process and with a limited majority (many MKs were not even present during the vote), could have cast doubts as to their constitutional nature and/or as to their superiority over regular legislation.[34] However, in its celebrated decision in the *Bank Hamizrachi* case, the Supreme Court did not hesitate to use the adoption of the two new Basic Laws to anchor a new constitutional doctrine.[35] Chief Justice Barak (who prepared the majority opinion)[36] opened the judgment by asserting that the enactment of the new Basic Laws had transformed Israel into 'a constitutional democracy'.[37] According to the new doctrine, the constitution is composed of Basic Laws enacted by the Knesset. Thus, while previously the Court was extremely cautious about relating constitutional status to the Basic Laws and adamantly refused to acknowledge their normative superiority vis-à-vis regular legislation, in *Bank Hamizrachi* it openly acknowledged the constituent power of the Knesset exercised through the creation of Basic Laws. This means that the Knesset holds the power to operate on two levels, the first of which is regular legislation. The second, and superior in the normative hierarchy, is the creation or amendment of the constitution by forming Basic Laws. Accordingly, as Chief Justice Barak himself framed it, the Knesset operates wearing 'two hats'.[38]

From the Court's point of view, the new constitutional doctrine (based on the [then] new Basic Laws) had one obvious significant advantage: by acknowledging the constituent power of the Knesset, the Court provided *itself* with the constitutional power of judicial review over primary (regular) legislation:

[33] Basic Law: Human Dignity and Liberty, s 10; However, Basic Law – Freedom of Occupation (s 10) provided that prior legislation that is not in conformity with the Basic Law would stay in force only for two years from the commencement of the Basic Law.

[34] On the process of enacting Basic Law: Human Dignity and Liberty, and critique of it, see Judith Karp, 'Basic Law: Human Dignity and Liberty – A Biography of Power Struggles' (1993) 1 *Mishpat Umimshal (Law and Government)* 323.

[35] CivA 6821/93 *Bank Hamizrachi 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.

[36] See also Justice Shamgar, who based his decision on a theory of the unlimited sovereignty of the Knesset, according to which the Knesset can do anything and, therefore, can also limit itself: ibid, opinion of Chief Justice Shamar, para 32. Similarly, Justice Cheshin presented the minority opinion, which undermined the constitutional standing of the Basic Laws – that is, Cheshin questioned the majority stance that the Basic Laws turned Israel into a legal system with two tiers, and continued to emphasise the position that Israel was and remains a democracy with a single tier. Justice Cheshin rejects in his ruling both Justice Barak's two-hat theory (ibid, opinion of Justice Barak, para 9) and the theory of the unlimited sovereignty of the Knesset (ibid, opinion of Chief Justice Shamgar, para 99); see also Dotan (n 29) 174–76 and see the discussion after n 44 below.

[37] *Bank Hamizrachi* (n 35) opinion of Justice Barak, para 1.

[38] ibid para 9; Klein (n 31).

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the main function of the theory presented in *Bank Hamizrachi* was to provide *the Court* with the power to review primary legislation (regular laws) and to strike down any such law that unconstitutionally infringes the basic rights listed in the Basic Laws.[39] There is hardly a question that the main purpose underlying the presentation of the 'two-hats' theory in *Bank Hamizrachi* was the judicial aspiration to confer the constitutional power of judicial review on the Court itself.

The two-hats theory and the constitutional doctrine on which it is based, however, suffer from several drawbacks and shortcomings. At the theoretical level, a constitutional theory that bestows the constituent power on the same parliamentary institution that is authorised to legislate regular laws is flawed because it lacks the critical distinction between constitutional activity and regular politics, which is vital for any established constitutional theory.[40] In the regime presented in *Bank Hamizrachi* these flaws are even more serious, as not only is it the same organ (the Knesset) that creates both constitutional norms and regular legislation, there is also no *procedural* difference between the two. The Knesset may enact, amend or repeal Basic Laws using the exact same procedure as that used for regular laws (and with no requirement for any special majority, save for some exceptional cases in which the Basic Law provides otherwise),[41] provided only that it gives the product of the legislation the title of 'Basic Law'.[42] At the practical level, as noted above, the constitutional text itself (and the bill of rights provided by the Basic Laws) is partial and lacking. In addition, the more important law (human dignity) contains no formal entrenchment or any reference to the status of regular legislation that does not conform to its provisions.[43] Accordingly, at least during the early stages following *Bank Hamizrachi*, several questions regarding the superiority of the new Basic Laws over regular laws remained open.[44]

[39] Thus, not surprisingly, *Bank Hamizrachi* was described by some as the Israeli *Marbury v Madison*: eg, Rivka Weill, 'Despotism or Judicial Craftsmanship? Narrative Wars in Israel's Marbury v. Madison', *IACL-AIDC Blog*, 16 June 2022, https://blog-iacl-aidc.org/new-blog-3/2022/6/9/despotism-or-judicial-craftsmanship-narrative-wars-in-israels-marbury-v-madison-mta6g.

[40] Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013.

[41] Some Basic Laws contain provisions requiring that any change in such provisions should be passed only by special majority: Basic Law: The Knesset requires a majority of 61 MKs (s 4), and a majority of 80 MKs (ss 4, 9(a)); Basic Law: The Government – a majority of 61 MKs in all three votes (s 44(1); Basic Law: Jerusalem, Capital of Israel – a majority of 80 MKs (s 6); Basic Law: Freedom of Occupation – a majority of 61 MKs (s 7); Basic Law: Referendum – a majority of 61 MKs (s 5); Basic Law: Israel – Nation-State of the Jewish People – a majority of 61 MKs (s 11). The latter two Laws were enacted many years after the constitutional revolution.

[42] For a discussion of the flaws of this state of affairs from a constitutional theory perspective see Ackerman (n 1) 9–10.

[43] To make things even worse – in terms of consistency – it is the less important Basic Law: Freedom of Occupation that does contain an express provision requiring that any change in the law should be made only by a Basic Law passed by special majority in the Knesset: Basic Law: Freedom of Occupation, s 7.

[44] See discussion in the next section.

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These deficiencies of the two-hats theory, however, pale in comparison with the main flaw of the theory: that is, the very acknowledgement of the constituent power in the hands of a political institution such as the Knesset, and with zero formal constraints over this constituent power. The theory bestowed the constitutional power of judicial review on the Court, but at the same time it acknowledged the unlimited constituent power in the hands of the Knesset. It was therefore clear, even at the initial stage when the decision was prepared, that the same organ that bestowed the power of judicial review on the Court, namely the Knesset, is the body that is constitutionally authorised to curtail or deny this power from the Court at any stage in the future.[45] It was also clear that there were no formal constraints in the two-hats theory that could stop the Knesset should it decide to use its constituent power for such purpose. Hence, by adopting this theory, the Court in essence mortgaged its own constitutional future.

The majority of the justices in *Bank Hamizrachi* supported the two-hats theory and acknowledged the constituent power of the Knesset.[46] There was, however, one exception: Justice Mishael Cheshin. In his dissenting opinion Justice Cheshin objected to the idea that the Knesset holds constituent power, arguing that the acknowledgement of such power in the hands of the legislature infringes both fundamental constitutional *desiderata* and basic principles of democracy.[47] He accepted that the Knesset holds the power to entrench its current legislation in Basic Laws vis-à-vis future Knessets seeking to amend the entrenched laws. He denied, however, that this entrenchment power derives from any constituent power of the Knesset and stated that, in any case, such powers are subject to fundamental principles of democracy.[48] He insisted that – in the absence of a formal constitution – the only constraints that the Court is authorised to confer on Parliament are those derived from fundamental principles of democracy. In short, while the majority in *Bank Hamizrachi* adopted a dualist constitutional theory, for Cheshin, Israel had been and remained a monistic democracy.[49]

4. Developments after the constitutional revolution

The constitutional doctrine presented in *Bank Hamizrachi* had several weaknesses and limitations. Many crucial questions regarding the reach of the doctrine and the status of Basic Laws were left open. Hence, during the period following the 'revolution' the Court's main focus was on developing, fortifying and expanding this doctrine. Firstly, the Court rapidly developed the doctrine

[45] *Bank Hamizrachi* (n 35) opinion of Justice Barak, para 105.

[46] Chief Justice Shamgar adopted a somewhat different version of the theory (n 36).

[47] *Bank Hamizrachi* (n 35) opinion of Justice Cheshin, paras 47 and 7.

[48] ibid, opinion of Justice Cheshin, paras 85, 96–101, 126. For a discussion of Justice Cheshin's theory see Yoav Dotan, 'The Noise of the Revolutionary Drums and the Voice of the Piccolo: The Constitutional Legacy of Justice Mishael Cheshin' (2021) 21 *Law and Business* 1; Rivka Weill, 'Twenty Years of Bank Mizrahi: The Spicy Tale of the Israeli Mix Constitution' (2016) 38 *Iyunei Mishpat* (*Tel Aviv University Law Review*) 501.

[49] See text in n 1.

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of the superiority of Basic Laws vis-à-vis regular legislation. While in *Bank Hamizrachi* it established that Basic Laws are the product of the constituent power of the Knesset, the decision left unclear the question of whether and the extent to which their content is constitutionally superior to contradictory provisions in regular laws. The uncertainty in this respect related particularly to non-entrenched provisions in Basic Laws (and Basic Laws that did not contain any express entrenchment). Cases that followed the decision expanded the two-hats theory by stating that *any* provision in *any* Basic Law enjoys normative superiority over regular legislation, thus enjoying 'substantive' entrenchment against amendment by regular legislation.[50]

The second field of development referred to the content of the bill of rights. As explained above, the list of human rights specified in the texts of the Basic Laws was short and deficient. Some central political rights – such as freedom of speech and religion and the right to equality – were left out. The Court, however, significantly expanded the reach of the constitutional protection of these rights through an expansive interpretation of the term 'human dignity' in Basic Law: Human Dignity and Liberty. It ruled that while not all infringements of speech, religion and equality would count as violations of human dignity, a blatant violation of these rights would constitute such an infringement and, hence, would trigger constitutional intervention by the courts. Thus, for example, laws discriminating on the basis of race or gender violate the human dignity of the discriminated group and are thus subject to constitutional scrutiny.[51] Later, the Court further expanded the reach of human dignity to include socio-legal rights such as the right to a minimal income, the right to education and the right of access to health services.[52] Similarly, human dignity was interpreted as inclusive of additional rights, such as the right of marriage and family life.[53]

Thirdly, the Court expanded the constitutional doctrine by applying it to legislation that was presumably exempt from the reach of the Basic Laws, by narrowly construing the exemptions. The most notable example refers to

[50] EA 92/03 *Mofaz v Chairman of the Central Elections Committee for the Sixteenth Knesset* (15 May 2003); AP 92/03, *Mofaz v Chairman of the Central Elections Committee for the Sixteenth Knesset*; HCJ 212/03, *Herut – The National Jewish Movement v Chairman of the Central Elections Committee for the Sixteenth Knesset* (8 January 2003), unofficial translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Herut--The%20National%20Jewish%20Movement%20v.%20Cheshin.pdf. These decisions essentially reversed contrary statements of the Court in *Bank Hamizrachi* (n 35) opinion of Justice Barak, para 65.

[51] eg, HCJ 6427/02 *Movement for Quality Government in Israel v The Knesset* (11 May 2006), opinion of Justice Barak, paras 25–43; HCJ 7052/03 *Adalah – The Legal Center for Arab Minority Rights in Israel v Minister of Interior* (14 May 2006), opinion of Justice Barak, paras 23–29, unofficial translation at https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior; HCJ 466/07 *Gal-On v Attorney General* (11 January 2012), unofficial translation at https://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary.

[52] eg, HCJ 5373/08 *Abu Lebdeh v Minister of Education* (6 February 2011); HCJ 1067/08 *Noar Kehalacha Association v Ministry of Education*, (2009) 63(2) PD 398; HCJ 4988/19 *Rozenzweig v The Public Services Authority – Electricity* (20 January 2022).

[53] HCJ 2245/06 *Dovrin v Israel Prison Service* (13 June 2006); CivA 377/05 *A and A v The Biological Parents* (21 April 2005).

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laws that were enacted prior to the Basic Laws of 1992. Under Basic Law: Human Dignity and Liberty such laws should have been exempted from the constitutional requirements.[54] The Court, however, ruled that while such laws could be struck down if they failed to meet the constitutional standards, they would still be interpreted in a manner that conforms with the rights and values protected under the Basic Laws.[55] In addition, the Court broadly interpreted other key expressions in the Basic Laws in a manner that expanded the reach of judicial review.[56]

While the main focus of the Court during the period following the constitutional revolution was on developing the constitutional doctrine, it did not stop developing judicial review at the administrative level. As described above, the main doctrines of (expanded) administrative review were revised during the 1980s, but the process of broadening judicial review over administrative actions and fortifying the vehicles of judicial review continued. I shall refer, in this context, to two main lines of development.

The first line refers to the question whether and the extent to which the Knesset is entitled to shape the content of the doctrines of administrative review and specifically the scope of review. The point of origin of Israeli law on this question was based on the English doctrine that the whole concept of administrative review is based on the principle of ultra vires; therefore, the main function of the courts is to ensure that the executive remains within the boundaries set by the legislature. Accordingly, it is completely up to the Knesset to define the scope of administrative review.[57] Thus, while the courts would narrowly interpret statutory provisions that limit judicial review, the legislature holds the ultimate power to limit administrative review, or even to oust it completely, by express statutory statements.[58] Within a short period between the late 1980s and the early 1990s, the HCJ rapidly abandoned this approach. First, it did so by adopting an aggressive interpretative approach, which effectively ignored any statutory provisions that aimed to limit the scope of administrative review.[59] It completed this move by asserting that

[54] Basic Law: Human Dignity and Liberty, s 10.

[55] Misc CrimR 537/95 *Ganimat v State of Israel* (6 April 1995), opinion of Deputy Chief Justice Barak, para 9.

[56] For example, the Basic Laws require that the listed fundamental rights would be 'infringed' as a condition for triggering constitutional review: Basic Law: Human Dignity and Liberty, ss 2, 8; and Basic Law: Freedom of Occupation, ss 4, 8. The Court interpreted broadly the term 'infringement' to include almost any governmental action that bears influence on human rights: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Nevo 2010) 135–140 (in Hebrew).

[57] eg, Paul P Craig, *Administrative Law* (7th edn, Sweet and Maxwell 2012) 885 ('Ever since Coke, Holt and Mansfield laid the foundations for judicial review the legislature has attempted to prevent those principles from being applied. Various formulas have been inserted into legislation with the intent of precluding judicial intervention. These efforts have not been successful as the courts have time and again restrictively construed such legislation'); see also Dotan (n 29) para 7.2.

[58] Dotan, ibid paras 7.2, 7.2.1.

[59] HCJ 294/89 *National Insurance Institute v Appeals Committee under Section 11 of the Compensation for Victims of Hostile Actions (Pensions) Law 5730-1970* (12 September 1991) (legislative determination that 'no appeal to the Appeals Committee shall lie, and no appeal at all' does not prevent judicial review by the Supreme Court and does not suffice to limit the scope of the judicial review);

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any statutory provision aiming to influence the substance of administrative review should be regarded as an infringement of the jurisdiction of the HCJ itself. The Court asserted that such provisions infringe the principle of judicial independence, embedded in Basic Law: The Judiciary. Hence, any such statutory provision would be subject to fully fledged constitutional review.[60] The bottom line of this development was that all doctrines of administrative review developed by the Court during the 1980s – and most notably the doctrine of reasonableness – were effectively accorded constitutional status.[61]

The second important development was with regard to the institution of the Attorney General. As described above, during the 1980s the Court established that the AG is 'independent' vis-à-vis the executive branch and, at the same time, is fully answerable to the Court through administrative review. Between 1990 and 2010 the Court, in a number of key decisions, fortified the independence of the AG and its status as a 'gate-keeper' serving the rule of law. Among other things the Court ruled that when representing the government in judicial review, if the AG holds that the governmental position is wrong, it is entitled to present to the court its own legal position separately from its presentation of that of the government.[62] Moreover, in extreme cases, if the AG holds that the government's position is unequivocally illegal (or unconstitutional), it may refuse to represent the government altogether.[63] In such cases, the government risks being unrepresented in court unless the AG allows it to represent itself through private lawyers. Similarly, the Court ruled that the legal opinions provided by the AG are legally binding on the government (unless and until a court of law rules otherwise). This means that if governmental action is taken contrary to an opinion of the AG (or any of its staff) the government risks immediate challenge in court and through a process in which it may not even enjoy legal representation.[64] The combined effect of these developments is that the AG and the Attorney General's office form a central element within the Israeli constitutional structure.

Schnitzer v Chief Military Censor (n 13) (as above regarding the granting of a 'subjective' discretion to the responder in emergency defence regulations); HCJ 758/88 *Kendall v Minister of the Interior* (3 September 1992) (exemption from the duty of justification does not constitute evidence of the legislator's intent to limit the scope of judicial scrutiny); see also Dotan (n 29) para 7.2.3.

[60] *Herut* (n 50) paras 4–5.

[61] Dotan (n 15) 238–39.

[62] HCJ 4287/93 *Amitai* (n 26) 473.

[63] ibid.

[64] eg, HCJ 3495/06 *Chief Rabbi Yona Metzger v Attorney General* (30 July 2007); HCJ 4646/08 *MK Lavie v Prime Minister* (12 October 2008); HCJ 5134/14 *Movement for Quality Government in Israel v Israel Land Council* (14 November 2016); HCJ 3350/04 *Director-General of the Ministry of the Interior v Shanan* (13 June 2007). For an example of a case in which the government found itself without representation in court see HCJ 5769/18 *Amitai, Citizens for Good Administration and Integrity v Minister of Science* (4 March 2019).

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5. The last decade

During the two decades following the constitutional revolution it seemed that the move made by the Court in *Bank Hamizrachi* was successful. Despite the limitations of the shaky constitutional text, the Court managed to expand its judicial review by broadly interpreting the text and using various tools of constitutional review. Moreover, despite the fact that the 1992 Basic Laws were not passed through a solemn constitutional process and under conditions of broad political and social consensus, it seemed that the reaction of the political branches was mundane. This is not to say that the judicial move did not encounter objections; it drew criticism (sometimes even sharp criticism) from politicians and academic scholars alike.[65] In addition, there were some initiatives in the Knesset to curtail judicial review in order to 'set back' (at least partly) the products of the revolution. However, by and large, these initiatives failed to pass into law, and it seems that the political branches gradually grew accustomed – if by acquiescence – to the constitutional reality following the revolution.[66]

This state of affairs, however, changed during the last decade. Critiques of judicial activism became commonplace in political circles (and, in particular, in right-wing circles, accusing the Court of being ultra-liberal).[67] Likewise, legislative initiatives to curtail judicial review became ever more common. Some of these initiatives aimed to change the balance of power between the Court and the Knesset by adding a 'notwithstanding provision' to the Basic Laws, which would allow the Knesset to overcome judicial decisions that strike down legislation that infringes basic rights.[68] The only proposal that succeeded in passing into a law, however, was the enactment of Basic Law: Israel – Nation

[65] eg, Gideon Sapir, *The Constitutional Revolution: Past, Present and Future* (Miskal – Yedioth Ahronoth Books and Chemed Books 2010) (in Hebrew); Ruth Gavison, 'The Constitutional Revolution – Description of Reality or Self-Fulfilling Prophecy?' (1997) *Mishpatim* (*Hebrew University Law Review*) 28; Ori Aronson, 'Why Hasn't the Knesset Abolished Basic Law: Human Dignity and Liberty? On the Status Quo as Counter-Majoritarian Difficulty' (2016) 35 *Iyunei Mishpat* (*Tel Aviv University Law Review*) 509, 511. These proceedings have also often been reviewed critically by political factions: ibid 523–24, and especially n 48.

[66] For a review of specific cases and proposed laws that sought to override court decisions: Aronson, ibid 525–26. Aronson notes that not only did these proposals not achieve practical success but also that the Knesset (initiated by the Ministry of Justice) has, on occasion, amended existing legislation to implement a court decision even though it was not obligated to do so: ibid 526–27 and references therein.

[67] eg, Editorial, 'Israel's Likely-to-be New Justice Minister Is a Red Flag', *Haaretz*, 28 April 2019, https://www.haaretz.com/opinion/editorial/2019-04-28/ty-article-opinion/israels-likely-to-be-new-justice-minister-is-a-red-flag/0000017f-e6bd-dea7-adff-f7ff8c440000.

[68] Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding Provisions of a Law), 1891/18 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding Provisions of a Law), 1406/19 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding Provisions of a Law), 1944/19 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding Provisions of a Law), 2115/20 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding Provisions of a Law), 4005/20 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding a Decision),

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State of the Jewish People (Basic Law: The Nation State). The initiators of this Basic Law openly declared that their main purpose is to reverse some Supreme Court decisions (mainly regarding the rights of the Arab minority).[69] While the final version of the Law was considerably less harmful to minority rights compared with the initial bill, some of its provisions (in particular, those referring to the 'Jewish nature' of the state and the importance of Jewish settlement and immigration) hardly conform to the values of Basic Law: Human Dignity and Liberty (at least as read by the Supreme Court).[70]

These political developments were not overlooked by the HCJ. Court opinions over the last decade reflect a growing awareness of the possibility that the Knesset might use its constituent power to curtail judicial review severely and judicial powers in general. These opinions also reflect an awareness of the fact that the current constitutional theory (the two-hats theory) is poorly equipped to meet these potential challenges. As a result, the Court has started to seek alternative theoretical tools, one of which is the doctrine of 'misuse of constituent power'. As, under the two-hats theory, the Knesset can create (or amend) Basic Laws in the very same way that it enacts regular laws, the newly presented doctrine asserts that the constituent power cannot be used to regulate issues that are bluntly unsuitable to be part of the constitutional text. The Court adopted this approach in one case to prohibit the Knesset from using Basic Laws to address short-term needs. It ruled that the Knesset cannot use its constituent powers to pass 'sunset' Basic Laws (laws enacted with an automatic termination date) in the budgetary field.[71]

The 'misuse of constituent power' doctrine was the first concept that the Court adopted as a constraint on the constituent power of the Knesset. It was clear, however, that the reach of this doctrine is limited in that it applies only to cases in which the subject of the Basic Law is plainly unsuitable as a constitutional component. It does not provide an answer for situations in which the Knesset addresses issues that are perfectly appropriate for the constitutional text, but in a manner that plainly infringes fundamental rights (such as in the case of Basic Law: The Nation State). Accordingly, over the last decade the Court has started to seriously consider other ideas (albeit, mostly in detailed *diktats*, discussed below). One such idea is the theory of

5219/20 (Private Member Bill); Draft Bill for Basic Law: Human Dignity and Liberty (Amendment – Overriding a Decision), 459/25 (Private Member Bill).

[69] The main decision regarding this is HCJ 6698/95 *Ka'adan v Israel Land Administration* (8 March 2000), unofficial translation at https://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration.

[70] Indeed, Basic Law: Israel – Nation State of the Jewish People has been construed narrowly by the Court in order to mitigate the tensions between its provisions and the principle of equality: HCJ 5555/18 *Hasson v The Knesset* (8 July 2021).

[71] HCJ 8260/16 *The Academic Center of Law and Business v Knesset of Israel* (6 September 2007) (striking down the sunset amendment of Basic Law: The Economy, in order to enable the Knesset to enact bi-annual budget laws); see also HCJ 4908/10 *MK Bar-On v Knesset of Israel* (11 January 2011), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Bar-On%20v.%20Knesset.pdf.

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'unconstitutional constitutional amendment'.[72] Other ideas are the concept of judicial intervention to preserve 'the core structure' of the existing constitutional system,[73] and the argument that the constituent power of the Knesset is constrained by 'the basic principles of Israel as a Jewish and democratic state' (discussed below). Earlier during the last decade the Court discussed these ideas as purely theoretical concepts.[74] However, as the years passed, and as the threats to the autonomy and powers of the Court became more present, the willingness of the Court to turn these theoretical ideas into binding legal doctrine became conspicuous. Finally, in the *Hasson* case (in which the constitutionality of Basic Law: The Nation State was challenged) the Court declared that it endorses the notion that the constituent power of the Knesset is constrained by 'the basic principles of Israel as a Jewish and democratic state'.[75] While this statement was still made obiter dictum, the case clearly marked the Court's willingness to use this notion as a major tool for 'ultra-constitutional' review (review over the constituent powers of the Knesset) in the future.

The concepts and ideas proposed as bases to constrain the constituent power of the Knesset vary (and each raises new and intriguing theoretical questions that are beyond the scope of the current discussion). However, they all share one common feature: all are sharply at odds with the two-hats theory that has served as the anchor for the Court's constitutional doctrine for almost three decades. One cannot have the (constitutional) cake and eat it too: one cannot assert that the Basic Laws are the elevated product of the superior constituent power of the Knesset and, at the same time, assert that they are subject to some (unwritten and vaguely framed) higher constitutional principles. Either the Basic Laws *are* the 'constitution of the land', and therefore we need to take them seriously, or they are no more than fragile legislative instruments, hastily produced as a result of political contingencies, and thus are subject to strict judicial scrutiny. If Israel is a true 'constitutional democracy' (as Chief Justice Barak asserted in *Bank Hamizrachi*), then it needs to be committed to its constitution. Otherwise, we do not have a real constitution, and the Court's only true commitment is to the basic democratic (or 'Jewish and democratic') principles.[76] If this is the case, then Justice Cheshin was correct (in his dissent in *Bank Hamizrachi*): Israel has always been – and still is – a monistic democracy.

6. The judicial 'reform'

One of the first steps taken by the extreme right-wing coalition that was formed after the November 2022 elections was the initiation of the judicial

[72] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 143–44; Yaniv Roznai and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment – the Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10 *International Journal of Constitutional Law* 175.

[73] HCJ 5744/16 *Ben Meir v Knesset* (27 May 2018), opinion of Chief Justice Hayut, para 23.

[74] See references at n 71.

[75] *Hasson* (n 70) opinion of Chief Justice Hayut, para 27.

[76] *Hasson*, ibid.

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'reform'. The plan, announced by the Minister of Justice, Yariv Levin, in a press conference, included four principal components.[77] The first was a radical reform of the system of judicial appointments in a way that would give the coalition government full control over the judicial selection committee.[78] The second component involved wide-ranging limitations on the power of the judiciary to strike down legislation by the Knesset, by requiring a super-majority (of 14 out of 15 justices) in the Court for such purpose, and by providing the Knesset with the power to overcome any such judicial decision by a simple majority.[79] Thirdly, the plan sought the annulment of reasonableness as a ground for judicial review. Lastly, the plan proposed radical changes in the appointment procedures of the Attorney General and other legal advisers to the government, as well as in their powers and in their status as 'gatekeepers' (by redefining all legal advisers as political appointments).[80]

From the way in which the plan was openly presented shortly after the formation of the government and from its content, it was crystal clear that – unlike in the case of previous proposals to reform judicial review – the architects of this plan are aiming to wipe out completely the concept of judicial review as developed by the Supreme Court since the early 1980s. It was also clear that the current coalition regards this reform as the most central element of its political platform. Additionally, it was evident that the initiators of the plan fully understand the centrality of administrative law doctrine within the overall structure of judicial review. Two of the four central components of the plan (relating to the reasonableness doctrine and the competence of legal advisers) target central arrangements that were formed under the administrative revolution' of the 1980s (and, in principle, had nothing to do with the constitutional revolution of the 1990s). Hence, at least in theory (and to the extent that legal doctrine counts), reforms of these two components do not even necessitate constitutional amendment and can be pursued through regular legislation by the Knesset.[81]

[77] The government, however, announced that the plan presented in this press conference was only 'the first stage' in the greater plan to transform the judicial system, and additional steps, such as reforming the content of access doctrines to limit standing and justiciability in judicial review, are to follow, https://www.youtube.com/watch?v=RzLEgHeAwPU (in Hebrew).

[78] Currently, the committee is composed of three Supreme Court justices, two cabinet ministers, two MKs and two representatives of the Bar. According to the plan, 7 out of the 11 members of the committee would be appointed by the coalition, the representation of the Bar would be abolished and the appointment of the judges on the committee would need the approval of the Minister of Justice: Basic Law: The Judiciary, s 4A.

[79] In more recent versions of the plan, the majority required in the Court is reduced to 12 out of 15 justices: Nitsan Shafir, 'Rotman Announced that He Would Lower the Necessary Majority for Striking Down a Law in the HCJ to 12–13 Justices Instead of a Full Bench', *Globes*, 26 February 2023, https://www.globes.co.il/news/article.aspx?did=1001439472 (in Hebrew).

[80] Avishai Grinzaig, 'Override Clause and Changing the Mechanism for Appointing Judges: Yariv Levin Introduced a Dramatic Reform for the Judicial System', *Globes*, 4 January 2023, https://www.globes.co.il/news/article.aspx?did=1001434707 (in Hebrew).

[81] Nevertheless, in the proposed plan the initiators were careful enough to entrench all parts of the plan as amendments of Basic Laws rather than of regular laws.

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Needless to say, from the point of view of the Supreme Court (and the judicial system at large) this plan creates a host of critical problems. On the practical level, the plan – if it succeeds – aims not only to severely curtail the scope of judicial review and the jurisdiction of the HCJ but also to break down the essential link between the judicial branch and the legal advisory mechanism within government. This link, established during the administrative revolution of the 1980s (and fortified after the constitutional revolution) is vital for the preservation of the current regime of judicial review.[82] Elimination of this link will severely curtail the impact of judicial review over the Israeli executive, irrespective of any changes in the legal or constitutional text (as the architects of the reform well discerned).

The problems that the reform creates for the judicial system on the theoretical level are no less acute. From a purely constitutional perspective the whole plan is based on the execution of the constituent powers of the Knesset – that is, powers that were created, acknowledged, and even elevated by the jurisprudence of the Supreme Court itself in *Bank Hamizrachi* (and further). This means that the architects of the plan are not required to make any special intellectual effort to provide constitutional legitimacy for their actions. All they need to do is refer to the existing constitutional doctrine as created and shaped by the Court. In other words, in *Bank Hamizrachi* the Court provided the Knesset with a promissory note. The Knesset is now telling the Court: 'Its payment time!'.

From the point of view of those who object to the reform (the majority of the legal community as well as legal academia) the situation is, of course, the reverse. They need to dig for constitutional arguments to dissolve the legitimacy of the reform. There are, however, very few (if any) valid constitutional arguments – within current doctrine – that offer effective ammunition in this respect. Even worse, from the point of view of those who oppose the plan, is the fact that the plan directly targets those institutions of administrative law (reasonableness and the status of legal advisers) that are, on the one hand, central components in the array of judicial review but, on the other hand, do not enjoy *any formal* constitutional status (and, in fact, are largely embedded in administrative case law, and not even in express statutory provisions).[83] In other words, the plan exposes the shaky normative status of the link discussed above between administrative structures and constitutional doctrine in Israeli public law. So far, these institutions have formed an essential component in judicial review, while their formal normative status was embedded in internal administrative guidelines and in broad, but somewhat ambivalent, judicial dicta.[84] The reform forces the supporters of the current regime to argue that their de facto constitutional status should be converted into a valid normative argument endorsed by the Court despite the lack of any formal basis in the constitutional text.

[82] Sections 2 and 4 above.
[83] Section 4 above.
[84] Section 2 above in relation to the Attorney General.

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The above theoretical difficulties are well reflected in the various arguments raised by the opposition to the plan. Some of these arguments focus on the idea that there are some 'core' constitutional values derived from the very nature of the State of Israel as Jewish and democratic (and possibly from the Declaration of Independence) that limit the constituent power of the Knesset and thus cannot be infringed even by Basic Laws.[85] Another argument revolves around the essence of democracy and the inherent need to constrain majoritarian will to defend fundamental rights of the minority.[86]

A thorough discussion of the various (and often conflicting) theories and arguments raised in this respect is beyond the scope of the current discussion. However, they all share two common features. Firstly, on the theoretical level, none of these arguments reconciles easily with the two-hats theory.[87] Accordingly (and not surprisingly) the whole jargon regarding the elevated 'constituent powers' of the Knesset, which has so conspicuously dominated the language of the legal system for the last three decades, seems to have completely disappeared from the current constitutional discourse.[88] Secondly, on a more practical level, none of these arguments seem to provide a solid ground for the much needed formal constitutionalisation of the principal institutions of administrative review that are the main focus of the current attack on the judicial system.

One cannot end the discussion of current events in Israel without reference to the protest movement. The protest broke out in January almost immediately after the announcement of the reform, and it continues as these lines are written. The protest movement encompasses almost all sectors of Israeli civil society as well as from the legal profession, the business and financial sectors, senior officials and veterans of the military and security services, professionals in the public health and educational sectors, academia, and many others. The movement is heterogeneous and composed of various organisations that generate a large variety of activities, which include mass demonstrations, picketing near the residences of cabinet ministers, strikes, parades, petitions, and various other diverse and creative measures of protest and civil disobedience in Israel and even abroad. Up to this point, the size of the protest, as well as the determination, resilience and persistence demonstrated by such a large number of individuals, has yielded significant achievements in impeding, hampering and compromising the reform efforts. This is noteworthy given the solid majority enjoyed by the current coalition in the Knesset. It can be stated

[85] The main argument in this respect is that presented by Yaniv Roznai, which distinguishes between original constitutional authority and 'derived' constitutional authority that is limited by the fundamental principles of the original constitution: Roznai (n 72); see also Aharon Barak, 'The Initial Entrenched Authority and the Limitations Imposed upon It' (2023) 28 *Law and Business* 123 (in Hebrew).

[86] In practice, this is a return to Justice Cheshin's theory (n 36); see also John H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

[87] See the discussion in Section 3 above.

[88] eg, Ronit Levine-Shnur, 'The Harari Decision Has Reached Its End', *ICON-S-IL Blog*, 20 April 2023, https://israeliconstitutionalism.wordpress.com/2023/04/20/החלטת-הררי-הגיעה-לקיצה-רונית-לוין-שנור-שנור.

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confidently that the relatively limited success of the government's plan, at least thus far, can be attributed exclusively to the influence of the protest.[89] Observation of the history of constitutional crises suggests that the relationship between the judiciary and the political branches is never detached from social and political realities, and the ability of courts to withstand constitutional 'show downs' on the part of majoritarian forces often depends on public opinion.[90] If this is the case, it seems that the impressive response of the Israeli public against the 'reform' and the support provided to the Court by the protest movement may well serve as the *deus ex machina* that could enable the Supreme Court (and the legal system at large) to overcome the theoretical gaps and the political difficulties to provide a new viable constitutional theory that would preserve the principal institutes of judicial review in Israel.

7. Conclusion

The legal 'reform' initiated by the Israeli government in 2023 directly threatens the fundamentals of judicial review as developed by the Supreme Court over the last four decades. On the theoretical level, the reform has exposed the weaknesses of the constitutional theory developed by the Supreme Court as of 1995. On the practical level, the reform, if completed, may transform not only the institution of judicial review but also the very nature of democracy in Israel. In this article I have argued that behind the constitutional discourse of the Supreme Court, there is a thick layer of administrative norms that form the most important elements within the structure of judicial review. Hence, the success of the opponents of the reform and the protest movement in the political battle to defend these elements is crucial for the ultimate preservation of both judicial review and democracy alike.

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[89] So far, only one component of the reform, the reasonableness part, has passed muster in the Knesset: Basic Law: The Judiciary (Amendment No 3), https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2207472; petitions against the amendment are currently pending, https://www.maariv.co.il/news/politics/Blog-1024739).

[90] eg, Eric A Posner and Adrian Vermeule, 'Constitutional Showdowns' (2008) 156 *University of Pennsylvania Review* 991, 1006–10.

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