The Independence of the Courts and Israel's National Security

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Against the background of proposals for change to the judicial system in Israel and its relations with the government and the Knesset, this paper contends that loss of judicial independence and effective oversight of the government – as denoted by current political initiatives – could cause severe harm to the national security of the State of Israel.

The paper starts with an examination of whether and to what extent the independence of the courts and their supervision of the government affect Israel's national security; this is followed by examples of judicial intervention in the political branches' decision making and the impact on their ability to govern. Thereafter the proposed changes are assessed to determine whether they are an appropriate solution to the purported imbalance between the government branches, or instead represent an excessive blow to the courts' independence and authority. The article concludes that the proposed changes to the status of the courts are liable to undermine national security, both in the internal and external spheres, including by diminishing Israel's ability to defend itself against the legal and political campaign it faces in the international arena. It is the government's prerogative to examine the existing balance between the governmental authorities and propose reforms that govern the relations between them, but reforms must be implemented in an orderly, informed manner that corrects any existing imbalance without creating a new one.

Against the background of the heated public debate in Israel over the proposals for change in the judicial system and its relations with the government and the Knesset, this paper contends that loss of judicial independence and effective oversight of the government – as current political initiatives entail – could undermine the national security of the State of Israel. This is a critical dimension that must be considered in the framework of any discussion of the proposed changes.

For many years the weighty question of the proper scope of judicial review of government actions has been controversial in Israel. On the one hand, it is argued that the Supreme Court has assumed far-reaching powers of intervention in government decisions, in a way that prevents the government and the Knesset from governing. It is claimed that the elected representatives cannot execute their desired policy – on whose basis they were elected – due to the rulings of unelected judges.[1] It is also claimed that legal arguments by the government's legal advisors limit its freedom to act.[2] On the other hand, it is argued that the courts make use of judicial review in a measured way, and not as presented to the public by politicians or other opponents. It is also claimed that their interventions are necessary and even essential for the continued existence of Israel as a democratic and law-abiding country.[3]

The democratic regime in Israel is based on a system of separation of powers – the role of the government is to decide and implement policy, with consideration of Knesset laws; the role of the Knesset is to make laws and supervise the government; and the role of the court is to supervise and ensure that the regime acts within the law, including with reference to the special status of constitutional norms included in the Basic Laws and the state's basic values. Intrinsic to the separation of powers lies a system of checks and balances, which guarantees that each branch will not outreach its authority. In this system, the government is subject to the law and may not place itself above the law; it is forbidden to act arbitrarily and unfairly toward its citizens; it must conduct itself according to the democratic rules of the game set by the Basic Laws; it is forbidden to trample on minority rights. At the same time, the courts must allow the government to implement its policies, as long as it acts within the limits of the law, and not replace political discretion with judicial discretion. In other words, the role of the court in a democratic system of separation of powers is supervisory, to ensure that the various political branches do not exceed their authority and that they act within the law. As long as the political branches act according to law, theirs is the power to govern, within existing political limitations.

Most of the current public debate is focused on the question of the significance of judicial independence and effective supervision of government activity for the rule of democracy in Israel.[4] This paper does not attempt to deal with all these aspects, but focuses instead on an additional critical dimension: the importance of the existence of independent and effective courts and a system of checks and balances for Israel's national security.

The paper begins with an examination of whether and to what extent the independence of the courts and their supervision of government branches affect

Israel's national security; this is followed by an analysis of various positions on the question of whether the courts have violated the proper balance between government branches. Next, the changes currently proposed are assessed to determine whether they are the appropriate solution to the purported violation of balance, or whether they represent an excessive and undesirable blow to the independence and authority of the Courts. The paper concludes with a summary and recommendations.

The Implications of Judicial Independence for National Security

For the purposes of the discussion, the term "independent courts" means courts that are not subject to political authority, whose judges are not representatives of government or other political elements. In other words, in these courts the judges sitting in judgment feel free to rule without political pressure, external intervention, or concern for their professional status due to their rulings.

The term "effective supervision by the courts of the government branches" means that the rulings of the courts are binding on the government branches and honored by them, and that the courts have decisive standing regarding the interpretation and application of the law. This term also covers the right of full access to the courts and of legal proceedings carried out without the intervention of the government.

Although there is no explicit definition of the term "national security" in Israel, the concept denotes and connotes protection of the state's national objectives. These objectives have four components: ensuring the state's physical existence, the protection of its territorial integrity, and the safety of its citizens and residents; preserving Israel's values and its character as a Jewish and democratic state; ensuring its economic and societal resilience; and strengthening its international and regional status.[5] Implications for national security concern both the internal sphere and the external sphere.

The Internal Sphere

First and foremost, the definition of national security encompasses preserving the essence of the State of Israel, and not just its physical existence. As embodied in the Declaration of Independence, the essence of the State of Israel is to be a Jewish and democratic state. Therefore, a threat to the Jewish character of the state, for example by eliminating its Jewish features, undercuts its Jewish essence and hence is a threat to national security. Similarly, a threat to the state's democratic character likewise undermines its essence, and thus falls within the definition of a threat to national security.

A democratic regime is based, inter alia, on fair and timely elections, freedom of speech, protection of minority rights, and respect for the values of equality and freedom. Weakening the courts, which serve a crucial role in protecting all these parameters, could jeopardize the essence of democracy. Moreover, experience shows that such moves tend to spread slowly but surely.[6] A regime that holds extensive power and seeks even more power can violate the rights of citizens without restraint. Material weakening of the Supreme Court or curtailing its independence – even if originally intended to tackle limited issues – can subsequently weaken its systematic protection of civil rights and enable the government to impose restrictions arbitrarily and abuse the rights of individuals. In other words, the existence of checks and balances between the branches of government is an essential tool for the long-term survival of a robust democratic regime.

In addition, in terms of the personal security of every citizen and resident of the state, protection is needed not only against external enemies but also against government caprice. National security assumes a priori that the authority of the various security entities (the military, police, general security services, and prison service) are defined and limited. Security entities that are not clearly subject to the rule of law in an enforceable manner might abuse their power, leading to potential threats to the most basic rights and freedoms – from the arbitrary use of weapons, contrary to orderly, clear and known rules, through arrests that curb freedom and dignity, to surveillance and searches that invade privacy. When the security services are subject to a court with public authority, which has the power to oversee the way they operate, a governing culture of performing actions that impact people's rights only when legally authorized and strictly necessary is upheld. Moreover, in the absence of rule of law that is enforceable by the courts vis-à-vis security entities, the situation is liable to deteriorate – as has happened in various places worldwide – into an attempted military coup or transformation of the military into a political body. In other words, in the context of national security, judicial independence and effective judicial review help to preserve the appropriate nature of the security entities' actions, each according to its role and authority.

More generally, national security is contingent upon the existence of a professionally and properly functioning system of government. The courts perform an important role by blocking government acts based on extraneous or corrupt considerations, such as preferential treatment for political allies. Government corruption can weaken all the mechanisms of government, including the security apparatuses. There is no shortage of global examples – a striking one is the poor performance of the Russian army in the war in Ukraine, where the

culture of corruption that led to a shortage of personnel and proper equipment has played a central role.[7]

Israel's national security also relies on its economic strength. Leading economists have warned that the judicial reform endangers the achievements of the Israeli economy and could "deliver a severe blow to Israel's economy and citizens."[8] Crippling the stature and independence of the courts could affect the economy in various ways: (1) A strong economy is built on institutions that function in a professional and businesslike manner, free of extraneous considerations and corruption. (2) The rule of law and a functioning judicial system are central factors in decisions by foreign investors whether to invest in Israel. (3) Diminished independence of the courts could affect Israel's ranking in several democracy indexes, which annually assess democracy in different countries.[9] These indexes carry significant weight in global attitudes toward Israel. For example, a change in the country's rating from "free" to "partly free" in the Freedom House index of global freedom[10] could lead to a drop in Israel's credit rating, with negative consequences for trade, imports, and exports (both in the wide sense and in the security context – for security collaborations). (4) Erosion of human rights and the democratic nature of the state could lead many educated and professional members of Israeli society, who usually hold liberal viewpoints, to emigrate. "Brain drain" has occurred in countries that have lost their democratic or liberal character (such as Hong Kong, Turkey, and others). This would cause serious harm, especially to the hi-tech industry, with drastic impact on the Israeli economy, which is significantly based on this sector.

The maintenance of a balanced governing system and independent courts is also important for maintaining the stability of the country's internal security. The protection of minority rights, including access to a functioning judicial system for securing those rights, ensures that the state operates in accordance with ordered criteria and enables the address of internal disputes through legal channels. Without a way to enforce minority rights, weaker sectors could be subject to unrestricted discrimination, which could lead to unrest that might ultimately spill over into violence between various groups in society. Moreover, once society is split into factions between those that are supported by the government and those who feel their rights are being trampled, social solidarity is substantially weakened. This could even lead to cases of civil disobedience, including a refusal to enlist in the IDF or to fulfill other civil obligations. Lack of social solidarity infringes upon internal resilience, which is a vital element of national security and one of the pillars of strength in a society facing external threats.

The External Sphere

Israel is part of the camp of democratic states and enjoys good relations with most Western countries. This includes a critically important strategic alliance with the United States, and special status vis-à-vis the European Union. Any material change in Israel's democratic character, and its image as a law-abiding country with a functioning system of checks and balances, headed by an independent, professional, and effective judicial system, could have very serious international consequences. These consequences can be divided into two types – damage to Israel's foreign relations and its international standing; and difficulties in countering the legal and political campaign waged against it in the international arena.

Damage to Foreign Relations

A central pillar of Israel's security is its strategic alliance with the United States, and Israel's foundation on democratic and liberal values is an essential component of the close ties between the two countries. These shared values have been mentioned by successive US administrations as one of the reasons for their strong support for Israel, expressed inter alia by blocking anti-Israel resolutions in the UN and other international forums, and by supplying military and civilian assistance in areas vital to Israel's national security. It is enough to mention the Iranian threat and the importance of the United States in this context. Of course, US policy toward Israel is also based on shared interests. However, if these interests change, and the US becomes less involved in the Middle East, which is the emerging trend, then shared values will become more central to the relationship. Moreover, due to rising US rivalry with China and Russia, current US policy lays more emphasis on forging alliances with countries that share its world view.

Second, and still in the context of the United States, one of the important elements in the special status of Israel among many US administrations is the strong American Jewish lobby. Any erosion of democratic and liberal values will harm relations between Israel and the American Jewish community, which is primarily liberal, and in turn weaken the lobby that supports Israel. This could create challenges for Israel with future US administrations, particularly from the Democratic camp, where voices critical of Israel have grown stronger in recent years.

Third, the state's democratic character, which relies, inter alia, on the existence of independent and effective courts, is an important element in foreign relations generally. Of course, all countries prioritize their own interests, and democratic states do have close relations with non-democratic states, for example in the Middle East and the Far East, yet their strongest ties are with countries that share

common values. Consider, for example, the words of German Chancellor Olaf Scholz in December 2022, calling for the promotion of alliances between democratic countries worldwide, as a response to Russian aggression.[11]

Fourth, Israel's case often appears on the agenda of UN forums. The UN General Assembly and the UN Human Rights Council project anti-Israeli tendencies, but according to the UN structure, their decisions are not binding on Israel. However, the Security Council has the authority to pass binding resolutions, including the imposition of sanctions. Until now, most attempts to pass anti-Israel resolutions were blocked by its allies, and principally the United States, which has veto power in the Security Council. However, an erosion in relations with the United States and conduct that is perceived as problematic at the international level could expose Israel to binding resolutions with practical measures against it.

Fifth, the international arena is currently in a dynamic process of reordering. New alliances are forming between countries with similar values. One of the most important realms for such alliances is technology, evident in the United States *National Security Strategy* published in October 2022. If Israel's democratic and liberal essence is perceived as weakened by the erosion of the powers of its gatekeepers, it could find itself outside the camp, with no access to vital advanced technologies, including quantum computers, advanced chips, and developments in the field of artificial intelligence.

Confronting the Political and Legal Campaign in the International Arena

Over the years, the international arena has seen Israel subject to an ongoing campaign of disproportionate criticism relative to other countries, including from official international organizations and civil society organizations, such as Amnesty International and Human Rights Watch. While the criticism of Israel is often prejudiced and includes biased groundless allegations, Israel's conduct is vital in order to limit the practical consequences of the criticism. It is possible to point to a number of central fronts within this campaign.

First, the status of the courts directly affects the possibility that IDF personnel and others operating on behalf of the state may find themselves subject to international criminal proceedings. Since March 2021 Israel's actions are subject to an investigation by the International Criminal Court (ICC) in The Hague regarding allegations of war crimes carried out since June 13, 2014 by all parties to the conflict in the West Bank, East Jerusalem, and the Gaza Strip. The investigation relates inter alia to allegations of war crimes committed by the IDF during Operation Protective Edge in July-August 2014. The investigation can consider any alleged crime committed since that date, with no defined end date.

At this stage, the investigation has not been given special priority by the ICC Prosecutor, although it may later gain momentum.[12] One of the Court's main principles is the "principle of complementarity," which states that the authority of the ICC is complementary to national authority, and therefore it must only deal with cases that are not examined seriously by the countries involved. By virtue of this principle, if it is possible to point to genuine and serious investigations conducted in Israel with respect to a case involving accusations against the IDF, the ICC should refrain from engaging in such case. The decision as to whether the system is properly investigating itself depends directly on the question of whether the local judicial system is perceived as professional and independent. Apart from that, there are often appeals to the Court against decisions not to hold a trial or not to open an investigation. The rulings of the Supreme Court that ratify such decisions constitute written proof for the international arena that the decisions were made lawfully and are not attempts to whitewash the allegations. The principle of complementarity is also relevant to national courts when applying universal jurisdiction over war crimes. A famous example is the decision of the court in Spain to instruct the closure of investigations against several senior Israeli personnel on suspicion of committing crimes by authorizing an attack in July 2002 against Salah Shehade, commander of the Izz ad-Din al-Qassam Brigades, in which 14 civilians were killed. The Spanish court decided that genuine investigations had been carried out in Israel, both by the government, including through the establishment of a special committee to examine the incident, and by the judicial system, to determine if crimes had been committed.[13]

Second, in a recent development, the UN General Assembly passed a resolution on December 30, 2022 requesting the International Court of Justice (ICJ) in The Hague to issue an advisory opinion on the legality of Israel's "ongoing occupation" of the areas of the West Bank, East Jerusalem, and the Gaza Strip.[14] In 2004, the ICJ delivered an opinion critical of Israel on the construction of the security barrier (which the Court referred to as the "separation wall"). While this opinion has been quoted repeatedly by Israel's critics, it has not led to any practical steps against Israel. One of the factors that blocked the harmful effect of the opinion is that the security barrier was constructed under ongoing judicial review by the Supreme Court. Particularly worthy of mention is the decision of the Supreme Court in the matter of Mara'aba, issued a year after publication of the advisory opinion and referring to it. The Supreme Court dismissed the conclusions of the ICJ, referring to the fact that it ignored the reality on the ground, and confirmed the legality of the security barrier under international law.[15] The new opinion now requested from the ICJ is liable to be very critical, and Israel will have to defend itself in various arenas. Presumably Israel will rely, inter alia, on rulings of the Supreme Court that

have determined that various actions that will be attacked in the opinion, such as the use of state land for settlement purposes, meet the test of legality.

Third, Israel faces a campaign that undermines its legitimacy from various quarters, mainly the BDS organizations, which seek boycotts, divestment, and sanctions against it. Although the accusations are leveled with no connection to Israel's conduct and sometimes amount to baseless blood libels, and although today it is already difficult to rebuff them, mainly because of the ongoing Israeli control over the Palestinians, throughout the years Israel has managed to block most concrete measures against it. The more Israel is perceived as a law-abiding democracy, the easier it is to counter the international campaign. One argument that Israel uses against its detractors is the fact that it is a democratic country with an independent judicial system that is accessible to anyone whose rights are violated, including the Palestinians, and provides a satisfactory response. However, if the judicial system is weakened and perceived as irrelevant to the protection of such rights, it will be harder to block any international moves against Israel by organizations, states, and civilian entities. For example, Prof. Alan Dershowitz, one of Israel's most prominent defenders, remarked that the reform will make it harder for him to defend Israel against its critics.[16]

Fourth, attention should also be paid to the growing trend of social awareness and responsibility among corporations. This can be seen in the phenomenon of ESG investments – the preference of venture funds and entrepreneurs to invest on the basis of environmental, social, and governance indicators. Today more and more investors are examining the targets of their investment according to these criteria, and in the past few years several ESG indexes have emerged.[17] From this aspect, moves that are seen as harmful to good governance could have a direct impact on the ability of Israeli companies to raise investment capital and harm Israel's international credit rating. Moreover, in recent years there has been an identifiable trend among global companies to divest and withdraw from countries seen as "problematic" in terms of ethics and democracy. For example, soon after the Russian invasion of Ukraine, over 1000 companies, including Google, Amazon, and Microsoft, announced that they had suspended or limited their activities in the country.[18] Similar moves against Israel would be disastrous for its economy and national security. There is no expectation of such a situation in the foreseeable future, but this risk must be taken into account, should Israel be seen as a country that violates rights without any system of effective checks on the government.

To sum up, in face of the legal campaign against it, over the years Israel has managed to prevent hostile declarations from developing into concrete steps

against it. One of Israel's main arguments in its defense is that it is a properly democratic country that respects the rule of law and has a strong judicial system with international prestige to oversee the government.

Judicial Intervention in Governmental Decisions in Israel

An independent and professional judicial system does not mean that the Supreme Court or the court system in general should have the last word on all matters and intervene in policy decisions that are subject to the authority of the government and the Knesset, but that there should be proper balance between the branches. Accordingly, it is important to examine whether, as claimed, the courts have overstepped the line and prevent the government from governing and the Knesset from legislating. Without going into an in-depth historical examination and legal analysis, we believe that while it is possible to criticize the Supreme Court for the extent of its intervention in certain cases, and in particular for what at times is sweeping rhetoric, the actual intervention of the Supreme Court in Knesset legislation is limited in scope, and allegations that it prevents the government from implementing its policies are without foundation. Moreover, a thorough examination of rulings of the Supreme Court over the past decade shows that since about 2015, following a series of processes, judicial intervention has become more restrained.

In the 1990s and the early 2000s, liberal tendencies, both in Israel and throughout the world, were more pronounced and promoted than they are today. This was reflected not only in judicial decisions, but also in legislative positions and in the positions presented by state representatives before the courts. This liberal approach allowed the courts to place more restraints on the political branches. Prof. Barry Friedman, a prominent American scholar, compared the issue to bungee jumping: the court is bound by a bungee cord which gives it some freedom to go its own way, but if it strays too far, political and public powers inevitably bring it back into place. "There is room to roam, but it is not unlimited."[19]

An example of an incident where the limits were stretched centers around the Mehuyavut Supreme Court decision in the early 2000s.[20] In that case, dealing with cuts to the welfare budget, the Supreme Court, as part of the judicial proceedings, issued a conditional order on a question that went beyond what was requested in the petition, demanding that the government explain "why it would not define a standard for dignified human existence as required by the Basic Law: Human Dignity and Freedom."[21] The order sparked a harsh political outcry, including at a special Knesset meeting on this subject.[22] Given the severe political response, the Court, with a new composition, limited the scope of the order, so that the

government was only asked to relate to a specific question on the cuts to allowances discussed in that case.[23] The petition was ultimately rejected on its merits, with the Court determining that there was no constitutional flaw in the cuts and they were within the government's authority.

Indeed, the bungee cord of the Israeli Supreme Court has become shorter in recent years, and there is a growing conservative inclination that reflects both the political and the public mood. However, the Supreme Court still has broad judicial authority enshrined in Article 15 of the Basic Law: The Judiciary, within which it operates. Under this law, the Supreme Court wears two hats: it is the highest Court of Appeal in the State of Israel, and also sits as a High Court of Justice *(Bagatz)*, hearing petitions against various governmental authorities at first instance as well as against rulings of Appeals Tribunals. The Court has not refrained from examining issues at the heart of public discourse, the legislative process, questions of security, and even the question of whether the Basic Laws themselves are constitutional. However, it is correct to distinguish between its willingness to examine these issues and the final outcomes, which usually reflect less judicial intervention.

When examining how far the Court intervenes in policy, several aspects should be noted. First, in many cases the state does not dispute the existence of a legal obligation to operate in a specific way, and the judicial intervention is aimed at ensuring implementation where the state neglects to fulfill such obligations. This is seen, for instance, where the government fails to introduce bylaws and regulations that are required for implementation of a Knesset law. For example, in the Access Israel case, which has been ongoing in the Supreme Court for many years, the state is not disputing the obligation to introduce regulations that facilitate access for people with disabilities, and the judicial intervention focuses on the deficient implementation.[24]

Second, in issues with a political and security context, particularly those that involve considerable public sensitivity, judicial intervention is limited. A prominent example is the determination in principle – which the Supreme Court is still largely observing – that the question of the legality of settlements is not justiciable and hence is not suitable for judicial determination.[25] A similar example is the absence of intervention in the principled decision regarding the disengagement from the Gaza Strip, which was defined as a question of policy.[26] As for cases in which the Court orders the evacuation of settlements erected on private Palestinian land or without building permits, this is not a matter of rejecting the state's position, since there is no dispute over the illegality, but the debate usually centers around the question of how and when to carry out the evacuation.[27] Even in these cases, the

court often accepts the state's position and permits long periods of time for execution.[28]

Third, in the past few years the Supreme Court has placed more hurdles before petitioners than in the past, and used more threshold requirements that enable it to reject petitions without discussing them on their merits. In recent years, three new threshold requirements have been formulated in public law. The first is the rejection of a petition *in limine* due to the existence of legislative initiatives on the matter,[29] whereas in the past the existence of a legislative initiative on the subject of the plea would lead to adjournment of the discussion until the end of the legislative process. The second is the development of the grounds of "constitutional exhaustion of proceedings," which demands that even in petitions directed against the constitutionality of legislation, the petitioners must first turn to the competent authorities and make their claims, before turning to the Supreme Court. In a number of cases the Court rejected constitutional petitions *in limine* due to proceedings that were not exhausted.[30] In the past two years, another threshold has emerged, when the Court ruled that if there is a pending petition on a specific issue, a new petitioner must apply to join the existing petition, and does not have the right to file a separate petition. Otherwise, the new petition might be rejected *in limine*. This ground limits the broad standing right, which allowed almost anybody – whether or not directly affected by a government action – to petition the Supreme Court and bring about judicial review of an issue.[31]

Fourth, when the Court finds a flaw in a specific decision, law, or administrative act, in many cases it refrains from annulment and suffices with "a warning of invalidity." This is a judicial directive, whereby the Knesset or government must refrain from acting in this way in future, due to the constitutional defect, and that any subsequent such action could be abrogated.[32]

Fifth, an internal examination of data regarding Supreme Court cases reveals that the extent of actual intervention is far less than alleged. Based on the Supreme Court database that was compiled by Prof. Keren Weinshall, Prof. Lee Epstein, and Andy Wermes,[33] and analyzed by Prof Weinshall, about 88 percent of petitions to the Supreme Courts, sitting as the High Court of Justice, are fully rejected. In 12 percent, the position of the petitioners is accepted, although generally only in part. Moreover, in most cases where the state lost, the loss was due to the state's consent to compromise or change its position on the issue, so that the judicial decision was not forced upon it.[34] Clearly the very existence of a potential review by the Court has a chilling effect on decision makers. However, as the intervention of the courts is more restrained, then the chilling effect only occurs in the more extreme cases, which entail a shaky legal basis, where judicial intervention is more

feasible. Indeed, governments have been able to implement controversial policies without being held back by this chilling effect.[35]

Moreover, in cases where the court has intervened, the intervention did not necessarily lean a priori toward any specific side of the ideological or political map. A recent example – to the benefit of the ultra-Orthodox bloc, which is identified with the right wing of the political spectrum – is the annulment of a decision by then-Finance Minister Avigdor Lieberman to impose new conditions for receiving day care center subsidies in a way that led to the immediate cancelation of such subsidies for families where the father prefers to devote his time to study Torah rather than work, a decision that primarily affects ultra-Orthodox families.[36]

It is important to emphasize that it is certainly possible to criticize the substance of Supreme Court rulings by challenging the legal reasoning or the scope of intervention. An example is the increased judicial intervention in the matter of conscription arrangements for the ultra-Orthodox. This question is at the heart of a complex public and social debate. Such issues, given a functioning elected democratic system, and given that the state has not exceeded its authority,[37] should, in our view, be resolved in the public arena and not in the courts.

Furthermore, it is not only possible to criticize, but also to react. In the structure of Israeli governance – which includes a limitation clause that protects rights but also stipulates the conditions in which they can be breached, and a parliamentary structure that allows the government and the Knesset to legislate easily and quickly – it is possible to respond to rulings through the ordinary legislative process. Indeed, in most cases where the courts invalidated the Knesset legislation, the political branches responded with legislation designed to change the arrangement as defined by the court.[38] These cases were not intended to sidestep the court or to overrule it, as some in the political arena and the media described them, but present a practical way of dealing with a court ruling as part of the democratic dialogue between the branches of government. One example is the passage of the Unlawful Combatants Law in 2002, after the Supreme Court determined that there was no legal authorization for holding Hezbollah operatives who personally did not pose a threat under the Administrative Detentions Law. The constitutionality of this law was later affirmed by the Supreme Court.[39]

Another claim is that the courts in other countries are more restrained than the courts in Israel. This claim is not substantiated in reality.

First, the courts of democratic countries worldwide conduct ongoing judicial review of their governments and restrict actions that do not meet the requirements of that country's laws. Most European countries are also subject to

binding rulings of the European Court of Human Rights, which is an activist court that in many cases does not hesitate to intervene in decisions of the member states.[40] For example, it ruled that the Greek Parliament must remove the immunity of a minister so that a claim can be filed against him for damage to reputation;[41] that schools in Macedonia are forbidden to discriminate against children based on their origin;[42] that the existence of an unclear procedure for changing gender in Georgia amounts to a breach of the right to a private life; [43] and that the existence of a separate elections procedure for national minorities in Hungary infringes upon their right to equality and their right to vote.[44]

Regarding the annulment of legislation, a 2018 study by the Israel Democracy Institute, examining invalidations of statutes by Supreme Courts within a similar time range (largely since the 1990s), found that the rate of intervention by the Israeli Supreme Court was the lowest of all the courts studied.[45] The Israeli Supreme Court annulled an average of 0.72 laws each year, a total of 18 laws from 1992 to 2017. during the same period the United States Supreme Court annulled an average of two federal laws each year (apart from state laws) – a total of 50 laws; the Constitutional Court in Germany annulled an average of 8.24 pieces of federal legislation each year, a total of 206 laws in the studied period; and in Canada an average of 1.6 laws were annulled each year, a total of 45 laws in the relevant period.[46]

Another argument in the context of judicial review of legislation is that the Israeli Supreme Court is unique in reviewing the constitutionality of legislation without explicit authorization in the constitution. The allegation that the Court "invented" this power is a weak one. Article 15 of the Basic Law: The Judiciary, which was passed in 1984, grants the Supreme Court authority to issue orders to state branches, and also defines a power unique to the High Court of Justice: "(c) The Supreme Court will also sit as a High Court of Justice; in this capacity it will discuss matters for which it sees a need to give relief for the sake of justice and which are not within the power of another court or tribunal." The purpose of this clause is to enshrine in the Basic Law the situation that existed prior to its enactment, in which rulings had already been given to annul laws.[47] The Basic Law: Human Dignity and Liberty enacted in 1992 contains a limitation clause subjecting legislation to conditions that must be met in order to permit breaches of existing rights in the Basic Law.[48] Prof. Amnon Rubinstein, one of the initiators and formulators of the law, together with other prominent members of Knesset, including from opposing parties – such as Dan Meridor and Uriel Lynn from the Likud Party - explains that the law was clearly intended to grant the Court the power to conduct judicial review of Knesset legislation. A broad survey of the legislative process of this Basic

Law shows that this was fully known to the Knesset members at the time, and the Basic Law was ratified on this basis.[49]

Moreover, even if we assume that judicial review of legislation is not explicitly stipulated in the Basic Laws in Israel, this does not necessarily mean that the courts lack such authority. Even in countries where this power is not enshrined in the constitution, the courts have in fact regarded themselves as the qualified body to interpret the constitution and repeal actions, including legislation, that run counter to it. The most striking example is the United States, which has a strong constitutional ethos yet no explicit provision of constitutional judicial review. This authority has been derived from the supremacy of constitutional provisions, as decided in 1803 in the landmark Marbury v. Madison case.[50] The United States is indeed engrossed in a heated debate over Supreme Court decisions, but the discord is focused on the manner of exercising judicial authority and not on the very existence of judicial review.

Another legal claim is that contrary to other countries, in Israel there is no explicit, entrenched constitution and therefore there is no basis for the court's intervention in questions of constitutionality. Among democratic countries – certainly those that respect basic principles such as the rule of law, separation of powers, and human rights – only Israel, the UK, and New Zealand have no formal constitution. However, in both the UK and New Zealand, the courts make use of their constitutional powers. The basic concept is that the courts ensure adherence to constitutional principles even when they are not enshrined in a written constitution.

For example, a ruling was given by the Supreme Court of the United Kingdom in 2019, stating that the Prime Minister's advice to the Queen to prorogue Parliament in the critical weeks of leaving the European Union, with the aim of preventing supervision and legislation in this field, was unlawful. Even in the absence of a written formal constitution, the Court ruled that this contradicted the basic constitutional principles of British governance.[51] The UK Supreme Court also uses its powers in the field of human rights: even in the absence of authority to annul legislation that violates human rights, the Court has issued dozens of declarations that legislation is incompatible with the provisions of the human rights law.[52] Such a declaration is not binding upon the political echelons, but even without the power to oblige Parliament to respond, it has considerable weight, based on the British culture that the rules of the game must be respected. The UK Parliament considers these issues seriously, and in most cases chooses to respond and amend the legislation accordingly. In some cases, the violation of the rights is resolved by the executive branch even without legislative intervention. A study

that examined the 43 declarations of incompatibility issued up to 2020 found no cases in which the government ignored or attempted to overcome the ruling.[53]

New Zealand has a Bill of Rights Act, which does not have constitutional status. The Act defines rights, but it does not determine that such rights supersede regular legislation, although it also empowers the Courts to interpret the legislation in accordance with the rights protected in the Bill of Rights. Unlike Britain, the New Zealand Bill of Rights Act does not explicitly empower the court to declare that a law is incompatible with the rights defined in the Act.[54] However, in an important ruling of 2016, the New Zealand High Court determined that this power is inherent in the Bill of Rights.[55]

In other words, constitutional power is inherent in the authority of courts with a constitutional function, whether they operate by virtue of a formal, enshrined, and explicit constitution, or by virtue of the basic principles of the legal and political system.

Thus, it appears that the criticism against the Israeli Supreme Court's exercise of its constitutional authority is exaggerated and does not reflect its conduct, particularly in recent years – leaving aside the bluntness of the criticism, which deteriorates from a professional discussion into the realm of abusive slanders and accusations. In this context, it is also difficult to base conclusions on findings that show the decline in the public's trust in the courts, which is due, to a large extent, to the deliberate focused campaign being waged for some time against the judicial system.

The Government's Proposed Changes

The belief that it is important to preserve the independence of the judicial system and maintain effective supervision by the courts over the government branches crosses party lines. Even those who seek to implement the proposed changes insist, at least in their public statements, that they do not seek to destroy the basic principle of checks and balances, but to amend what they claim are distortions in the existing situation.

Almost immediately after its formation, the current government presented a plan for substantive changes regarding the judicial system and the governmental legal advisors. Justice Minister Yariv Levin presented a plan based, in the first stage, on four components: (1) a qualitative change in the method of selecting judges, so that the new composition of the committee appointing judges will ensure a majority of politicians from the coalition (three ministers, two Knesset members from the coalition, one Knesset member from the opposition, two representatives

of the public to be appointed by the Justice Minister, and three judges), eliminating the requirement for a majority of seven committee members to appoint Supreme Court justices; (2) formal authorization of the Supreme Court's authority to invalidate statutes, in a special majority, alongside an override clause that will allow the Knesset to overrule the Supreme Court's constitutional ruling with a majority of 61 Knesset members; (3) elimination of the reasonableness ground – the Court will not be able to annul government decisions on this ground; (4) ministerial legal advisors as personal appointments – ministers will decide who serves as the ministry's legal advisors and will be able to dismiss them (this step has since been deferred to the next phase of implementation).[56] There may also be further steps and further restrictions, including, for example, narrowing the right to strike, as proposed by MK Simcha Rothman, chairman of the Knesset's Constitution, Law, and Justice Committee.[57]

Taken together, the significance of these steps is severe infringement on the independence of the courts and their ability to limit government decisions. Supporters of the initiative claim that this will create the proper balance between the governmental branches and enable the government to implement policies favored by a majority of the public (based on their vote), thus fulfilling the democratic principle of government by the majority; opponents claim that it will be a fatal blow to the system of checks and balances that is the essential foundation of the country's democratic regime.

The current initiatives, whether proposed by the government or by MKs, can be divided into two types – one, increasing the influence of politicians on the appointment of judges in all instances, namely, beyond the Supreme Court, and including magistrate and district courts and government legal advisors; two, limiting the scope of the courts' intervention in the work of the political branches – the government and the legislature. Both types of strategies, independently but certainly when combined, arouse concern for the preservation of the balance of powers that is imperative for maintaining a democratic regime in Israel.

Political Involvement in the Appointment of Judges and Legal Advisors

Political elements are involved in the appointment of judges today, and the appointments follow a dialogue between representatives of the government, the Knesset, the judges, and the Israel Bar Association. This dialogue reflects both the political and professional elements of the committee. In recent years, the dialogue has led to the appointment of some judges considered conservative and some considered liberal. The composition of the committee, the discussions, and the compromises required have led to a situation where most appointed judges hold

moderate, topical positions and act on a professional basis. Thus, most judges appointed have indeed been held in great professional esteem. In addition, over the years there have been almost no cases of judges suspected of corruption or legal bias for ulterior motives, certainly not in the Supreme Court.

Giving decisive weight to representatives of the governing coalition, as proposed, means that all the judges could have the same views, and in the political structure of Israel, where more extreme parties have particular power within the coalition, they could well seek and obtain the appointment of judges with extreme views. If in the past, when the judges had more power in the appointment committee, it was alleged that all judges were similar to each other because they appointed their friends, it appears that the proposed solution could cause the pendulum to swing to the other end, with all the appointed judges associated with the same parties and the same ideology. This is not a reasonable outcome. Furthermore, this solution arouses considerable concern for possible corruption in the appointments, particularly when cases of corrupt politicians are far from rare in Israel and around the world.

It is often argued that in many other countries, judicial appointments are controlled by politicians. While this is indeed true, in most of these countries there are supplementary mechanisms that allow power to be decentralized and to prevent a situation in which the control of the appointments rests entirely in the government's hands. Thus in the United States, appointments must be accepted by the President and the Senate, which are often on opposite sides, unlike Israel where the government in fact controls the Knesset.[58] In France the appointment is also political, but the Constitutional Council, which serves as the constitutional judicial court, does not head the judicial system; the entire judicial system is built on the concept that being a judge is a career that begins on the completion of law studies, and judicial review rests on a different model that includes constitutional review of bills.[59] In other countries, with systems of governance more similar to that of Israel, such as Britain, Australia, and New Zealand, the appointment still has a strong professional character, even when controlled by the cabinet. For example, the UK Minister of Justice (the Lord Chancellor) can veto appointments, although only on defined grounds, which limit political influence.[60] Apart from that, in practice it is not acceptable for the Justice Minister to actually intervene in appointments.

The dangers inherent in the loss of the courts' independence are illustrated in processes that occurred in two European democratic countries in the last decade, when they underwent democratic decline, namely, Hungary and Poland. A central element of their decline was the curtailing of judicial independence, when in these

two countries various steps were taken to limit the judicial independence of their constitutional courts. In Poland the President refused to swear in a number of judges who were chosen by the highest constitutional court, and appointed others in their place. In addition, there was a seemingly procedural reform, which lowered the retirement age for judges in regular Polish courts, as well as the Supreme Court, forcing retirement on a number of judges who had previously ruled against the government; this was followed by a reform in the manner of appointing judges and the establishment of a disciplinary panel to hear accusations against judges who did not toe the line. The European Court of Human Rights maintained that these actions were a violation of Poland's obligations to respect the rule of law in the country.[61] In Hungary judges were appointed on behalf of the ruling party.[62] This was part of a systematic effort by the regime to amass power and grant the executive branch omnipotence.[63] It is not surprising that this move was accompanied by a weakening of the opposition in order to restrain their disapproval and their ability to influence the public agenda. The executive branch also assumed control of most media entities.

In these examples, the result of these moves was first of all limitations on the rights of minority groups (migrants as a prominent example) and opponents of the regime, with others soon also affected: trade unions were harmed; women's rights were curtailed, as well as the rights of the LGBT community; educational institutions were closed, and academic freedom was severely limited. In addition, the freedom to demonstrate and to speak freely and criticize the regime was restricted. Administrative and governmental authorities became more arbitrary, without any public accountability.[64] In the absence of an independent court, separate from the government, there was no element to protect these rights. As a result, the European Parliament recently concluded that Hungary can no longer be considered a full democracy, and its status has changed to a hybrid regime of "electoral autocracy."[65]

In contrast, in Brazil the court recently played an important role in securing implementation of the election results, after attempts by the serving President who lost the elections, and his supporters, to prevent the change of government.[66]

Apart from the process of judicial appointments, the government proposes to change the manner of appointing the legal advisors of ministries, whereby they are appointed by politicians as personal appointments. This is contrary to the current situation, in which the legal advisors are civil servants, professionally subordinate to the Attorney General and appointed in a professional process based on a tender. It is legitimate to criticize the excessive "legalization" of the decision making process and to make concrete suggestions for improvements.[67]

However, the step planned by the government goes well beyond practical amendments to improve the situation. The proposal reflects a material change in the perceived place of the law in the process of government decision making. The existing concept is that ministers and their aides must act within the bounds of the law, and the legal advisor's job is to ensure respect for the rule of law, and not the minister's interests. If the proposal is accepted, legal advisors will in effect become the minister's lawyers, whose job is to find a way of promoting his or her wishes – including by means of bending the law. The combination of legal advisors who are loyal to the ministers, together with judges appointed by those in authority, raises considerable fear for the preservation of the rule of law and respect for proper governance, and could open the way for government corruption without recourse.

A perception of an institutionalized lack of respect for the law and the how it regulates and limits what is permitted and what is forbidden for government officials could spill over into the civilian sphere. There is great concern that there will be more and more cases of civil disobedience and the promotion of a culture in which observance of the law is purely voluntary. Studies have shown that in democratic countries that do not forcibly enforce obedience, compliance with the law is linked to the fact that individuals perceive their government as neutral, fair, and objective.[68] Perceptions that legal advisors are biased and that the civil service has changed from public servant to "the minister's servant" could have an extreme detrimental impact on the nature and degree of civil obedience to the government.

Limiting the Scope of Judicial Review

The second type of change in the government proposals concerns the scope of judicial review, from two aspects: (1) the extent of judicial review of legislation and the Knesset's ability to supplant judicial rulings through an override clause; and (2) limitations on the use of the reasonableness grounds to repeal government decisions.

The override clause is a mechanism in the Basic Law intended to authorize the Knesset – in a regular law – to override a Supreme Court ruling.[69] In recent years it has come up several times as part of a political compromise to accompany the proposed Basic Law: Legislation, which was aimed explicitly to regulate both the process of legislating basic laws and judicial review. However, the current proposal has no constitutional restraints. Moreover, there are various ways of shaping the override clause. The version that is currently proposed by the government delineates a particularly thin version that provides that a simple coalition majority

of 61 Knesset members is sufficient to override a judicial ruling; does not require opposition involvement in the override; and does not limit the duration of the override provision. This legislation gives the government a "blank check" of sorts to violate rights, and this opening will potentially be exploited by the government.[70]

Regarding the reasonableness grounds, there are more varying opinions among legal experts.[71] The doctrine is an important measure, since it grants courts the ability to prevent government arbitrariness toward individuals. At the same time, it gives courts dealing with administrative and public questions broad judicial discretion. Its frequent use compromises legal certainty and can also be perceived by the public as depending on the personal opinion of the judges involved. At the same time, we believe that it would be wrong to completely abandon this ground in a unilateral and sweeping act and with regard to all administrative decisions. Wide ranging and sudden changes are not desirable and could also affect legal certainty. However, it is possible to suggest ways of limiting the use of this ground and ensuring that it is not used to replace government discretion with judicial discretion.

To sum up, the steps proposed by the government would lead to a dramatic change in the country's system of checks and balances. An examination of these steps raises genuine concern that they are not intended to rectify any alleged existing imbalance in favor of the courts in order to reach the proper balance, but rather that they seek to eliminate the independence of the judicial system and the scope of judicial power over government actions. This would create a stark imbalance in the opposite direction, giving too much power to the government and the coalition that controls the Knesset, by removing any supervision and barriers to the use of their power. This is not a matter of restoring the proper balance, of preventing too much intervention by the courts in government decisions and legislation, but is in fact a transfer of the power in its entirety to the government and the coalition majority in the Knesset, while removing legal and judicial mechanisms for oversight and review.

This conclusion derives in particular from the cumulative effect of the proposed moves and their sweeping nature. Even if some of the suggested steps may be legitimate in the proper context and based on a professional debate, the combination of moves and the legislative haste raise serious concerns of an almost total transfer of power to the government to act as it wishes, in a way that enables disregard of the rights of citizens, government arbitrariness, and trampling on the rules of the democratic game. In addition, there are signs that

this is only part of the planned moves and further steps that will remove additional restrictions on the government's actions are intended.[72]

Taking a broader view, the planned moves reflect a process that began several years ago and is gaining momentum, of significant erosion in the public perception of the nature of democracy, the principle of separation of powers, and the importance of the rule of law. Criticism concerning the intervention by the courts, legal advisors, law enforcement officers, and auditors in government activity is not new. The difference is that the debate has moved from a legitimate discussion of the content and scope of the intervention – in other words, where to set the limits – to a discussion of the principle of whether there should be any limits. This discussion focuses on the slogan of the need for governance, i.e., allowing the government to govern. In fact, under this heading there is a perceptible tendency to deny the legitimacy of both judicial review and scrutiny by other gatekeepers. This trend is extremely dangerous in the Israeli context, where there are few mechanisms for the supervision of the government (for example, there is no bicameral legislature, presidential veto, federalism, or subjugation to an international court, as in other countries).[73]

Conclusion and Recommendations

The government has the right to propose reforms regarding the proper and desired relationship between the branches of government, and there are certainly areas where the existing balances merit reexamination. Among these: the establishment of a review system over the State Prosecutor; the creation of additional judicial positions in order to lighten the load and shorten the duration of legal proceedings; the transfer of the power to file indictments against the government or government individuals from the Attorney General to the State Prosecutor or an independent committee; the introduction of Basic Law: Legislation; and reduced use of the reasonableness ground with reference to government decisions. However, the purpose of reforms should be to correct an imbalance, if such exists, without creating a new imbalance.

Giving the government unlimited power, by weakening the independence and professionalism of the courts and shrinking their authority, will undermine Israel's democratic regime, and in turn, harm the country's national security, both internally and externally: internally, because of the possible negative impact on the nature of the state, the internal and external function of the security forces, economic stability, and the sense of national solidarity and resilience. Externally, because of the possible negative impact on Israel's foreign relations, particularly with the United States, its most important ally, and on its standing in the

international arena, as well as concerns about losing an important advantage, embodied in the existence of a legal system that enjoys international prestige for its power versus the government, which serves Israel in the legal and political campaign waged against it internationally.

More generally, Israel should be extremely cautious about breaching the delicate balance between the Jewish-nationalist component and the democratic-liberal component of its essence, as enshrined in the Declaration of Independence. Maintaining this balance is an essential foundation for preserving social solidarity, which is a vital component of national resilience. From its earliest days, the State of Israel has faced the need to balance these values, and has developed means to meet this need from both directions. Thus, some religious aspects are imposed on the non-religious, such as in matters of marriage and divorce, or restrictions in the public space on the Sabbath, and some democratic-liberal aspects are implemented despite not being accepted by part of the Orthodox public, such as rights for the LGBT community. The fear is that the removal of restraints could seriously undermine the balance by giving too much weight to nationalist-religious values at the expense of democratic-liberal values. This would be seen as a deviation from the principles set forth in the Declaration of Independence, in a formula that managed to unite groups with very different and even opposing viewpoints, under one national umbrella. Such a move could be the start of a descent into irreparable rifts, the breakdown of Israeli society, damage to national resilience, and ultimately the abandonment of the Zionist vision.

If those holding the reins of government value the State of Israel and its security, it is not yet too late to move to a path of professional and respectful discourse, and adopt desired reforms in a cautious and responsible manner that recognizes the value and the fragility of the democratic regime.

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[50] Marbury v. Madison, 5 U.S. 137 (1803).

[51] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland ([2019] UKSC 41).
[52] Ministry of Justice, Responding to Human Rights Judgments 30 (2020) (UK).
[53] Thus according to the study, of the 43 declarations of incompatibility issued by the Court up to 2020, nine were overturned in a ruling, and it was decided there was no incompatibility between the provisions of the law and the rights being protected; five were amended in legislation before a ruling was given; eight were answered with a localized order that gave relief to the affected group; 15 legislative amendments were drawn up following an incompatibility declaration, in primary legislation or in regulations; four went through a comprehensive process of consideration; one is pending appeal, and one received a combination of solutions. Ibid, p. 30.
[54] The UK Human Rights Act (1998) contains both the power to interpret legislation in accordance with the rights, and the power to declare incompatibility between a specific law and the rights. Ibid, Articles 3 and 4 of the Act.
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[65] European Parliament, "MEPs: Hungary Can No Longer be Considered a Full Democracy," September 15, 2022, https://bit.ly/3jXNe87
[66] Shachar Bardichevsky, "After Losing the Elections: Bolsonaro's Supporters Give a Raised Arm Salute in the Streets of Brazil," Maariv, November 3, 2022), https://www.maariv.co.il/news/world/Article-955865 [Hebrew]; "Disturbances in Brazil: Bolsonaro Supporters Invade the Congress and the Presidential Palace, and are Removed Some Hours Later," *Calcalist*, January 9, 2023, https://www.calcalist.co.il/world_news/article/bjf1165o5i [Hebrew].
[67] See for example the proposals of Raz Nizri: Raz Nizri, "The Time for Compromise has Arrived: Adv. Raz Nizri Sketches an Outline of a Reform to the Judicial System in which All Parties Make Concessions," *Globes*, January 20, 2023, https://www.globes.co.il/news/article.aspx?did=1001436016 [Hebrew].
[68] The work of Prof. Tom Tyler in this field is very extensive. See for example: Tom R. Tyler, *Why People Obey the Law*(Princeton University Press, 2006); Tom R. Tyler, "What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures," *Law and Society Review*, 22 (1988): 301; Tom R. Tyler, "Governing Amid Diversity: The Effects of Fair Decision Making Procedures on the Legitimacy of Government," *Law and Society Review*, 28 (1994): 809; Tom R. Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law," *Crime and Justice*, 30 (2003): 283.
[69] There is already an override clause in Article 8 of the Basic Law: Freedom of Occupation, although it has hardly been used since very little judicial review is based on this Basic Law. The only use made of it was in the Meat and Meat Products Law, 5754-1994.
[70] See for example Prof. Weill: "I fear that if we adopt the explicit override clause, the Knesset will make frequent use of it." Rivka Weill, "On Narrative and Constitution: How to Dismantle the 'Landmine' of the Override Clause," ICON-S-IL Blog, May 10, 2021 [Hebrew].
[71] For prominent criticism of the unreasonableness ground, see Yoav Dotan, "Two Concepts of Restraint – and Unreasonableness," *Mishpatim*, 51 (2020): 673.

[72] "A Summary Opinion Concerning the Revolutionary Regime Transformation Proposed by Israel's Government," *Law Professors Forum for Democracy*, February 1, 2023, https://bit.ly/3lMJVRY.
[73] Amichai Cohen and Yaniv Roznai, "Why Constitutional Democracy in Israel is Particularly Exposed to the Influences of the Popular Movement," ICON-S-IL Blog, October 31, 2021 [Hebrew].