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ARTICLE

When the First Brick falls of the Fortress of Democracy: Dealing with the First Slice of the 'Salami Tactic' for Eroding Democracy

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Abstract
Democracies today do not collapse all at once, in an extreme and illegal manner, but erode gradually, through a series of subtle and seemingly legal measures. This challenges traditional theories of unconstitutional constitutional amendments, which are designed to address revolutionary changes that negate core features of the constitutional order. How should courts respond when a constitutional amendment comes at the early stages of a process of democratic erosion, when the 'first brick' is falling from the fortress of democracy, or when would-be autocrats slice the first piece from the 'salami' that is the democratic constitutional order? Against the backdrop of Israel's recent judicial overhaul, we argue that in countries experiencing incremental democratic erosion, courts must take a broad and contextual view and, when there is evidence that further anti-democratic moves are being planned, prevent that 'first brick' from falling. This is crucial to protect other democratic institutions, such as significant gatekeepers or constitutional courts.

Introduction

In May 2020, the Israeli Supreme Court rejected petitions arguing that the continued rule of a prime minister (PM) under indictment for corruption threatened democracy. In rejecting the petition, Chief Justice Hayut stated that the claims of a threat to democracy were overstated and that that 'no fort will fall' should Netanyahu's candidacy not be blocked.[1] In the years that followed, Israel has experienced an unprecedented political and constitutional crisis. The questions of what *can* 'bring down the fort' (that is, which law or act is decisive in the process of the crumbling of democracy, specifically in the context of abusive constitutionalism), how to identify such an act, and what to do against it, have been debated heatedly in the public sphere.

These questions, however, are not unique to Israel, but are relevant to any country experiencing a process of democratic erosion fostered by the gradual employment of abusive constitutionalism.

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[1]Israeli Administration of Courts, 'Court Hearing in HCJ 2592/20' (YouTube, 3 May 2020) 3:41:25 <https://www.youtube.com/watch?v=dstaoB925hk> accessed 1 Feb 2025; see also Tamar Hostovsky Brandes, 'Is it the Court's Role to Save a Country from Itself? On the Israeli Supreme Court's Rejection of the Petitions Against Netanyahu' (Verfassungsblog, 12 May 2020) <https://verfassungsblog.de/is-it-the-courts-role-to-save-a-country-from-itself/> accessed 1 Feb 2025.

In this article, we examine the challenges of identifying and addressing the *first steps* in the process of democratic decline and, specifically, the ability of courts to provide redress in relation to these steps. How can courts deal with a constitutional amendment that may *not appear to be unconstitutional* but is *illegitimate* because of its potential harm to the democratic system and because it may serve as a step that provides would-be autocrats or populist politicians with a convenient entry point for court or institutional capturing. We draw on the case study of Amendment No 3 to *Basic Law: The Judiciary*, which limits the authority of the Supreme Court to examine the reasonableness of any act or decision of the government, the PM, or the ministers, to examine what parameters and considerations courts should apply to determine whether there is room for judicial intervention. On the one hand, this amendment was promoted by the government as a 'minor' amendment, certainly not the end of democracy. On the other hand, beyond the harm of this amendment on its own, it is clear that this amendment is part of a wider project of democratic erosion and populist takeover, and that this amendment was crucial to the continuation of the populist project. How, then, should the court address such an amendment that is 'merely' the first slice of the 'salami tactic' of eroding democracy? In the following section, we explain the problem courts face in light of the incremental nature of democratic erosion. Thereafter, we demonstrate those challenges with a case study of the Israeli illegitimate judicial overhaul of 2023. And finally, we aim to bridge illegitimacy and illegality and propose a new judicial doctrine to intervene in the first illegitimate 'slice of the salami', for the protection of democracy.

What is the problem? Incrementalism in Democratic Erosion and the 'first slice of the Salami'

Incrementalism as a tactic of democratic erosion

Democratic erosion is defined by Tom Ginsburg and Aziz Z Huq as a 'process of incremental, but ultimately still substantial, decay in three basic predicates of democracy – competitive election, liberal rights to speech and association, and the rule of law'.[2] This process, they explain, typically leads to a form of government in which the rule of law and basic rights are eroded, but in which elections still take place. Such processes have taken place in Hungary,[3] Turkey,[4] and Venezuela.[5]

In many of these examples, democratic erosion is characterised by two features. First, it is a gradual and incremental process, often involving measures that may initially appear contradictory but in fact supplement each other. These measures include, for example, the imposition of limitations on the power of the judiciary, while at the same time packing the courts with government loyalists. A similar approach is used against the media: restricting its independence on the one hand while tightening control on the other.[6] The use of incremental and gradual measures allows populists to strategically weaken institutions until they are controlled. First weakening independent institutions, such as the judiciary, paves the way for the takeover of others.[7]

[2]Tom Ginzburg & Aziz Z Huq, *How to Save A constitutional Democracy* (University of Chicago Press 2018). For a discussion of democratic decay, see also Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 Hague Journal on the Rule of Law 9.

[3]Jacques Rupnik, 'Hungary's Illiberal Turn: How Things Went Wrong' (2012) 23 Journal of Democracy 132; Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 Journal of Democracy 138.

[4]See Ozan O Varol, 'Stealth Authoritarianism in Turkey', in Mark A Graber, Sanford Levinson, & Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 339.

[5]See, eg, David E Landau, 'Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce', in Mark A Graber, Sanford Levinson, & Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

[6]Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 53.

[7]On court-capture, see David Kosar & Katarína Šipulová, 'Comparative court-packing' (2023) 21 International Journal of Constitutional Law 80; Benjamin Garcia Holgado & Raúl Sánchez Urribarri, 'Court-packing and democratic decay: A necessary relationship?' (2023) 12 Global Constitutionalism 350; David Kosar & Katarina Sipulova, 'How to Fight Court-Packing?' (2020) 6 Constitutional Studies 133.

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The second feature found in cases of democratic erosion is the use of constitutionalism as a tool. While in the post-WWII era constitutionalism was associated with democratisation, in the context of democratic erosion constitutional changes often implement non-democratic measures that weaken the separation of powers, facilitate the concentration of power in the hands of the executive, and assist it in entrenching power. In this context, Paul Blokker argues that while authoritarian leaders in the past were generally hostile towards constitutionalism, which they perceived as limiting their power, the relationship of current populist regimes to constitutionalism is more complex. 'Populists in power', he explains, 'engage in intense reform (and abuse) of the existing constitutional arrangements, in contrast to the idea that populism consists of a merely oppositional, anti-political phenomenon'.[8]

The phenomenon of populist regimes using constitutional law to advance their goals has been extensively reviewed and described in the literature. Scholars use a variety of terms to describe it, including but not limited to 'constitutional capture',[9] 'constitutional retrogression',[10] 'abusive constitutionalism',[11] 'autocratic legalism',[12] and 'populist constitutionalism'.[13] Each of these terms emphasises a different aspect of counter-democratic constitutionalism, but they are all based on the observation that one of the characteristics of 'new populism' is the manner in which populists, once in power, employ mechanisms of constitutional change to erode the democratic order.

In the context of democratic erosion, judicial review of constitutional amendments is a measure of defensive democracy.[14] As such, when examining the effects of constitutional changes, it is essential to assess their impact on the basic elements of democracy, such as checks and balances, while also acknowledging the fragility of democracy itself.

Special attention should be paid, in this regard, to the aggregate nature of abusive constitutionalism. The regular practice of courts examining challenges to constitutional changes is to examine the implications and gravity of the specific measure before them. However, where the gravity stems from the aggregation of constitutional changes, an examination of each measure in isolation may not reveal its actual implications. In past work, we argued that the unconstitutional constitutional amendment doctrine should be tailored to the specific characteristics of democratic erosion.[15] We suggested that, in assessing the unconstitutionality of a constitutional amendment, courts should weigh the overall aggregate effect of subsequent constitutional changes enacted, rather than examine, in each case, only the specific change brought before them. We also suggested that, although it may be counterintuitive, special scrutiny should be applied to constitutional changes affecting the courts themselves, since the weakening or taking over of courts is often one of the first steps in democratic erosion. The weakening or capture of courts removes a significant institutional check that could otherwise resist subsequent anti-democratic measures.

In considering the aggregate effect of constitutional changes, a court reviewing a certain constitutional change will take into consideration the way in which previous changes have already altered

[8]Paul Blokker, *New Democratic in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland Romania and Slovakia* (Routledge 2013).

[9]Jan-Werner Müller, 'Rising to the Challenge of Constitutional Capture: Protecting the Rule of Law within EU Member States' (Eurozine, 21 Mar 2014) <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/> accessed 1 Feb 2025.

[10]Aziz Z Huq & Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78.

[11]David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189.

[12]Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

[13]Paul Blokker, 'Populist Constitutionalism', in Carlos de la Torre (ed), *Routledge Handbook on Global Populism* (Routledge 2019); Gábor Halmai, 'Is There Such Thing as "Populist Constitutionalism"? The Case of Hungary' (2018) 11 Fudan Journal of the Humanities and Social Sciences 323.

[14]See, eg, Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William & Mary Bill of Rights Journal 327.

[15]Yaniv Roznai & Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020) 14 Law and Ethics of Human Rights 19.

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the constitutional structure, for example by affecting the separation of powers or removing checks on executive power. In other words, the constitutional landscape is taken into account when evaluating the implications of a particular measure. However, what if the measure examined by the court is the *first* constitutional change passed in a context of democratic erosion, where additional changes have been declared or are in the pipeline? Considering that courts do not review theoretical scenarios that may or may not happen, is there or should there be some way of taking these potential subsequent changes into account?

The Israeli case study of the passing and judicial invalidation of Amendment No 3 to Basic Law: The Judiciary is an example of this dilemma. As will be reviewed in the case study section below, the amendment was the first constitutional change to be passed in a series of constitutional changes proclaimed by the government. Some of these changes had already passed the first stages of legislation, while others had only been declared by the government. The decision invalidating Amendment No 3[16] provides an opportunity to examine the ability and willingness of a court to consider the context of democratic decline in general, and prospective constitutional changes in particular, when examining a challenged constitutional amendment.

Constitutional but illegitimate?

To make the problem clearer, it is important to understand the challenge in conceptual terms. In this article, we raise the question of how to address a constitutional amendment that is not *prima facie* unconstitutional but may threaten democratic principles through incremental erosion. In other words, the type of constitutional amendment we focus on does not necessarily undermine the constitutional order in a revolutionary manner. It does not necessarily undermine the core values of the constitution to the extent of changing its constitutional identity. It does not necessarily fundamentally abandon unamendable principles or provisions, whether explicit or implicit. And it is enacted in accordance with the formal procedural rules of amending the constitution. Thus, our focus is not on unconstitutional constitutional amendments, manifestations of illegality that can be countered through judicial doctrines when the amending power exceeds its limits.[17] Instead, we consider a constitutional amendment that is *prima facie constitutional but illegitimate*. It is illegitimate not because it is not representational or not reason-based.[18] It is illegitimate from a democratic point of view because it undermines democracy as part of a larger and incremental process. It is one 'slice' of the salami that is the overall project of democratic erosion.[19] Haggard and Kauman have emphasised this incremental nature:

[16] *Movement for Quality Government v Knesset* [2024] HCJ 5658/23 (Israel). An English translation by Avinoam Sharon is available at Cardozo Law, 'Versa: Opinions of the Supreme Court of Israel' <https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-knesset> accessed 1 Feb 2025.

[17] On unconstitutional amendments and constitutional identity, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 150–152; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) 89–124; Oran Doyle, 'Constitutional Identity and Unamendability', in Ran Hirschl & Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024) 259.

[18] On these understandings, see Alon Harel & Adam Shinar, 'Two concepts of constitutional legitimacy' (2023) 12 Global Constitutionalism 80. Cf, Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118 Harvard Law Review 1787, who distinguishes between legal legitimacy (whatever is lawful is legitimate); sociological legitimacy (legitimate is what the relevant public regards something as justified or appropriate); and moral legitimacy (even if a regime or decision is legally correct or enjoys broad public support, it may be morally unjustified and therefore illegitimate).

[19] See, eg, Grzegorz Ekiert, 'Democracy and Authoritarianism in the 21st Century: A sketch' (Harvard Kennedy School, Ash Center for Democratic Governance and Innovation Policy Briefs Series, Dec 2023), <https://ash.harvard.edu/wp-content/uploads/2023/12/democracy_and_authoritarianism_in_the_21st_century-_a_sketch.pdf> accessed 1 Feb 2025:

> Dictatorial drift occurs through a gradual process that Laszlo Rajk, the infamous Stalinist Interior Minister of Hungary, described as 'salami tactics.' This strategy involves destroying liberal political institutions and taking over opposition

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> The use of 'salami-slicing tactics,' or piecemeal attacks, can normalise abuses, disorient oppositions, and encourage acquiescence. Autocrats are masters of ambiguity and obfuscation, if not outright disinformation. As a result, … the wider public may not recognise that the playing field has been decisively tilted until it is too late to mount a meaningful defence.[20]

In order to understand the illegitimacy of a single amendment that is an incremental part of a larger picture of democratic erosion, it is important to understand what exactly the 'salami argument' is, as opposed to the 'slippery slope' or other arguments.[21]

One of the patterns repeated again and again in the discussions about judicial overhaul in Israel was the relationship between specific actions or changes and a more general set of actions or changes. This pattern is prominently expressed in some of the discussions about Amendment No 3 to Basic Law: The Judiciary, concerning the reasonableness standard, which we elaborate on in the next section. Some argue that while the amendment is problematic and undesirable, it is not severe enough on its own to justify an unprecedented response, such as the Supreme Court striking down a Basic Law (akin to a constitutional amendment) for the first time in the Court's history.

Such an argument can be rejected in two different ways. One way is to insist that the specific measure in question – for example, removing the reasonableness doctrine – is bad enough on its own. By itself, the effect on the democratic character of the country is so severe that it should be invalidated. This is basically the decision of the majority of the Israeli High Court of Justice in the case of Amendment No 3 – the amendment undermined the rule of law and the separation of powers to such an extent that it should be regarded as an unconstitutional constitutional amendment.[22] Nevertheless, in this article, we do not address this claim.

The second counter-argument examines the role of the measure in question within its context, namely as part of a set of measures that together have the potential to seriously harm Israeli democracy. Under this reasoning, the amendment regarding reasonableness, for example, must be opposed *not only because of the problematic nature of this change itself*, but *because it is part of a wider move that must be opposed* with determination. That is, the normative status of the specific case, according to this response, is affected by the normative status of the general movement of

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parties, independent media, and civil society organizations, one thin slice at a time. The result is the destruction of alternative sources of power and of checks and balances, individual freedoms, and civil rights. In short, dictatorial drift is driven from above by authoritarian leaders who can escape controls and, once in power, gradually destroy independent institutions and checks and balances and actively mobilize anti-liberal forces.

[20]Stephan Haggard & Robert Kaufman, 'The Anatomy of Democratic Backsliding' (2021) 32 Journal of Democracy 27, 38. See also 'The Authoritarian Playbook: How reporters can contextualize and cover authoritarian threats as distinct from politics-as-usual' (Protect Democracy, Jun 2022) 5, 23 <https://protectdemocracy.org/wp-content/uploads/2024/03/The-Authoritarian-Playbook-Updated.pdf> accessed 1 Feb 2025:

> By using 'salami tactics,' slicing away at democracy a sliver at a time, modern authoritarians still cement themselves in power, but they do so incrementally and gradually … [T]he salami tactics that make up the most common forms of backsliding today are extremely effective in incrementally chipping away at the quality of our democracy. Yet they rarely provide the type of brazen, system-wide threat that is so clear as to motivate a broad response in defence of democracy. As each new transgression normalizes new behaviour, it shifts the perceived 'red lines' another fraction, raising the risk that the public will miss the story until it's too late.

[21]This section draws heavily on David Enoch's argument in David Enoch, 'On slippery slopes and salami sausages: several points on the relationship between specific actions and more general moves, in matters of the regime revolution, and in general' (ICON-S-IL Blog, 27 Aug 2023) <https://israeliconstitutionalism.wordpress.com/2023/08/27/270823/> accessed 1 Feb 2025.

[22]*Movement for Quality Government v Knesset* (n 16).

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which it is a part. The illegitimacy of the constitutional amendment derives from the illegitimacy of the larger plan to undermine democracy.

David Enoch has provided a framework for analysing individual actions that are part of a broader set of actions contributing to democratic erosion or judicial overhaul, particularly through the lens of the slippery slope argument.[23] Slippery slope arguments serve as objections to actions that are at the top of a metaphorical slope. The actions being criticised are not problematic in themselves, but their performance will set off a chain reaction – one action leading to another, each incrementally closer to an outcome that is clearly undesirable. In other words, we find ourselves sliding down the slope. Slippery slope arguments are based on two predictions: first, that taking the initial step, even if it is not problematic in itself, will indeed lead to further, more problematic actions, so that it is necessary to avoid even the first action.[24] And second, that it will not be possible to draw clear and consistent distinctions between the (unproblematic) actions at the top of the slope and the clearly problematic ones at the bottom. Consider, for example, restrictions on rights. A particular restriction of a right may be justified in itself, but it is likely to lead to further restrictions that are more problematic, which in turn will lead to more draconian restrictions, and so on.[25] However, if it is possible to effectively prevent slippage down the slope, or to maintain distinctions between different types of action, then the objection to actions up the slope loses its force.

Traditional slippery slope arguments rely on two key elements: a causal chain in which each action leads to the next, and a significant difference in the status of the actions up and down the slope when judged in isolation (the former are acceptable, the latter are not). However, not all cases of cumulative harm fit this model. Sometimes, a series of actions has an important cumulative effect (which none of the actions individually has), but the sequence does not meet the necessary causal conditions of a slippery slope. Enoch gives the example of smoking cigarettes. Smoking cigarettes does not fit the traditional slippery slope pattern if we assume that smoking the third cigarette of the day does not cause the decision to smoke the fourth, and that the marginal damage to health caused by each cigarette is the same as the marginal damage caused by any other cigarette. In such cases, the problem is one of aggregation: it is the broader pattern of smoking many cigarettes a day that makes the habit harmful, and this pattern is relevant in evaluating the rationality of smoking any given cigarette. Ignoring this cumulative effect, Enoch argues, is irrational. Here, objecting to the specific action (smoking a cigarette) because it is part of a problematic general pattern is not a slippery slope argument. The harm of the twentieth cigarette is no different from that of the first, and there is no necessary causal link between smoking one cigarette and the decision to smoke the next. The argument against smoking relies only on the cumulative effect of actions that are not significantly different in themselves, but their cumulative effect is relevant to judging any specific action.[26] If one justifies smoking a particular cigarette on the grounds that its harm is negligible, that same justification will logically apply to the next cigarette, and the next, and the next, ultimately amounting to habitual smoking – unless one accounts for the cumulative harm. This creates a practical dilemma: if each individual action seems acceptable when viewed in isolation, how do we determine when to stop? The harmfulness of habitual smoking should inform our judgment about smoking each individual cigarette. Hence, even in cases that do not meet the causal and normative conditions of slippery slope arguments, there may still be what we call weighty 'salami method' arguments that oppose a certain action not because of its status as such, but because it is part of a series of moves that together must be opposed. Of course, not all cumulative patterns carry such significance. In cases where individual actions are independent

[23]Enoch, 'On slippery slopes and salami sausages' (n 21).

[24]See generally David Enoch, 'Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope' (2001) 21 Oxford Journal of Legal Studies 629.

[25]Enoch, 'On slippery slopes and salami sausages' (n 21).

[26]ibid.

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and their aggregate effect is irrelevant, the only rational approach is to assess each action in isolation.[27] The key is recognising which scenarios require us to consider the broader pattern and which do not.

Generally, in law, it is more convenient to examine specific actions in isolation rather than as part of a wider phenomenon. Such an examination raises many analytical questions, such as from when, temporally, to begin the evaluation? Or how to treat future actions when there is uncertainty as to their enactment? These difficulties are particularly pronounced in situations where the 'salami method' is applied, as the 'salami method' is not a slippery slope argument, in that the situation is such that 'we cannot stop' and an early move does not causally lead to a later one; supposedly there will always be an ability to identify the harm in the future and then avoid taking the next step.[28] This presents a major challenge, especially for a court. But at the same time, the court cannot afford to completely ignore the 'salami method' arguments. It would be clearly irrational – and dangerous – to make decisions on particular steps of democratic erosion, such as individual constitutional amendments, while ignoring their aggregate damage. The core danger of the 'salami method' lies in the difficulty of drawing a red line. As Wojciech Sadurski, analysing democratic erosion in Poland, observed, identifying a specific event as a turning point is difficult; there was no single new law or change that seemed 'sufficient to cry wolf'. Only after the fact do we realise that the line dividing democracy from a fake one has been crossed: threshold moments are not seen as such when we live in them'.[29] Thus, dismissing the cumulative damage of actions simply because each individual step seems relatively benign, much like smoking a single cigarette, would be an unforgivable mistake.[30]

Case-Study: The Judicial Overhaul in Israel and the Reasonableness Law

The elements of Levin's 'Legal Reform'

Days following the establishment of a new government headed by Benjamin Netanyahu on 29 December 2022, Israel's Minister of Justice, Yariv Levin, announced in a highly publicised press conference that he planned to promote dramatic changes in Israel's judicial system. Presenting what he called a 'legal reform', and what was later dubbed a 'constitutional overhaul' by his opponents, Levin explained that the goal of the changes was to 'rehabilitate governance', which he argued had been weakened by the activism of the Supreme Court, and to change the balance of power between the different branches of government, a change that Levin said was necessary because 'time after time, people we didn't elect choose for us'.[31]

The initial plan presented by Levin included several significant changes: restricting the power of the Supreme Court to perform judicial review of legislation by requiring a special majority within the full bench of judges to invalidate legislation; restricting the power of the Supreme Court to perform judicial review of governmental decisions by limiting the Court's authority to examine the reasonableness of such decisions; introducing an 'override clause' that would allow the Knesset, with a majority of Knesset members, to override a judicial decision that strikes down a law; changing the composition of the committee for the election of judges, allowing the government control of the

[27]ibid.

[28]See, eg, Eyal Gruner & Doron Menashe, 'The "salami" method – not what you thought' (Jokopost, 2 Sep 2023) <https://jokopost.com/law/42196/> accessed 1 Feb 2025.

[29]Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 5–6.

[30]Enoch, 'On slippery slopes and salami sausages' (n 21).

[31]Justice Minister Levin's Press conference is available on YouTube, see <https://www.youtube.com/watch?v=RzLEgHeAwPU> accessed 1 Feb 2025. For arguments supporting the reform, see, eg, Yechiel Oren-Harush, 'The Case for Israel's Judicial Reform' (2023) 33 Hashiloach 39 <https://hashiloach.org.il/the-case-for-the-judicial-reform-en/> accessed 1 Feb 2025; Yonatan Green, 'The Peculiar Case of the Israeli Legal System' (2023) 24 Federalist Society Review 212 <https://fedsoc.org/fedsoc-review/the-peculiar-case-of-the-israeli-legal-system> accessed 1 Feb 2025.

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election process;[32] and allowing ministers to appoint their own legal advisors, a change from the previous situation in which the advisors were employees of the state.[33]

All the changes Levin described were geared towards the same direction: removing existing limits on the government's power and freeing it from external, independent legal oversight.[34] Levin could have chosen to move forward with each of these measures on its own, one by one. He chose, however, to reveal the plan in its entirety, stipulating the full extent of the changes to be made.

Levin's speech caused a frenzy in both the political and legal spheres. On 12 January 2023, the Chief Justice of Israel's Supreme Court, Esther Hayut, addressed the proposed reforms in a speech at the annual conference of the Israeli Association for Public Law. She condemned the reforms as 'a plan to crash the justice system', warning that they would 'fatally injure the independence of the judges and their ability to perform their function as public servants. The meaning of this bad plan is to change the identity of the democratic state'.[35] Furthermore, the proposal has sparked an unprecedent wave of civil protest.[36]

Israel's Constitutional Framework

As noted above, the plan presented by Levin was a combination of elements, all designed to enhance the government's power over the judiciary and legal advisors. Some of these elements, such as allowing ministers to appoint their legal advisors, required only changes to regular legislation. Most of these changes, however, required changes to the Basic Laws.

Basic Laws are Israel's constitutional norms. They differ in several respects from classic constitutions of liberal democracies. Understanding the status of Israel's Basic Laws within Israel's normative framework requires some familiarity with Israel's constitutional history.[37]

When the state of Israel was established, in 1948, the understanding among the founders was that one of the features of the transition from the British Mandate to the new state would be the enactment of a constitution. In practice, however, political disagreements over the content of the constitution and the appropriate time for its enactment meant that a full constitution was never adopted. Instead, in 1950, the Knesset adopted a decision known as the 'Harari Decision', which stated that the Knesset would enact a series of Basic Laws which, together, would form the Israeli Constitution. The Harari Decision was the result of a political compromise whereby the constitution would be enacted 'in parts'.[38] It created an ongoing, gradual process of enactment of Basic Laws, which was justified as a way of enabling the Knesset to selectively entrench some aspects of the constitutional framework while leaving others for a later stage.[39]

[32]Guy Lurie, 'The Attempt to Capture the Courts in Israel' (2023) 56 Israel Law Review 456; Yaniv Roznai, Rosalind Dixon & David E Landau, 'Judicial Reform or Abusive Constitutionalism in Israel' (2023) 56 Israel Law Review 292.

[33]Amichai Cohen & Yuval Shany, 'No More Legal "Gatekeepers"? Plans to Downgrade the Status of Government Legal Advisors in Israel' (Lawfare, 21 Feb 2023) <https://www.lawfaremedia.org/article/no-more-legal-gatekeepers-plans-to-downgrade-the-status-of-government-legal-advisors-in-israel> accessed 1 Feb 2025.

[34]Suzie Navot, 'An Overview of Israel's "Judicial Overhaul": Small Parts of a Big Populist Picture' (2023) 56 Israel Law Review 482, 486.

[35]Chief Justice Esther Hayut, 'Speech at the Annual Conference of the Association for Public Law' (12 Jan 2023) <https://www.gov.il/he/departments/news/presidentspeech12012023> accessed 1 Feb 2025; see also Yaniv Roznai & Shani Schnitzer, 'Navigating the Ship in Stormy Waters: President Esther Hayut and the Israeli Constitutional Crises, 2018–2023' [2025] International Journal of Constitutional Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5033108> accessed 1 Feb 2025.

[36]See Doron Shultziner, 'The Movement Against Democratic Backsliding in Israel' (2023) 38 Sociological Forum 896; Yaniv Roznai, 'We the Fourth Branch? The People as an Institution Protecting Democracy', in Vicki C Jackson & Madhav Khosla (eds), *Redefining Comparative Constitutional Law: Essays for Mark Tushnet* (Oxford University Press 2025).

[37]Suzie Navot, 'Israel', in Dawn Oliver & Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011).

[38]Tamar Hostovsky Brandes, 'Israel's Legal System: Institutions, Principles and Challenges', in Guy Ben-Porat et al (eds), *Routledge Handbook on Contemporary Israel* (Routledge 2022) 114–128.

[39]ibid.

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The Harari Decision created a peculiar constitutional framework. It effectively turned the Knesset into both a constitutional assembly, enacting Basic Laws, and a legislature, enacting regular laws.[40] The Decision made no distinction between the process of enactment of Basic Laws and that of enactment of regular legislation, and specifically, it did not require a special majority for changing Basic Laws. As a result, Basic Laws are enacted in exactly the same way as regular legislation and, with a few exceptions, can be changed by a simple majority in the Knesset.

The characteristics of this constitutional framework are crucial to understanding Levin's plan and the application of the doctrine of unconstitutional constitutional amendment to the case of Israel. Levin's plan entails significant changes to Israel's constitutional framework – in effect, a constitutional overhaul. In light of Israel's relatively weak mechanisms of checks and balance, Levin's plan would have given the government enormous powers.[41] In other countries, such changes would require a long process of constitutional amendment. In Israel, however, where constitutional amendments (changes to the Basic Laws) require only a simple majority, Levin was able to move forward swiftly with his proposed changes.

Judicial Review of the Government and the Reasonableness Standard

Basic Law: The Judiciary was enacted in 1984. It regulates the structure and authorities of the judicial system. Article 15, which addresses the authority of the Supreme Court, states that

> [t]he Supreme Court shall also sit as a High Court of Justice. When so sitting it shall deliberate matters, in which it deems it necessary to provide relief for the sake of justice, and are not under the jurisdiction of another court or tribunal.[42]

Article 15(2)(d) further explains that, when acting as the High Court of Justice, the Supreme Court will have the authority

> [t]o grant orders to state authorities, to local authorities, to their officials, and to other bodies and persons holding public office under the law, to act or refrain from acting while lawfully exercising their duties, and if they were unlawfully elected or appointed – to refrain from acting.[43]

The general authority of the Court under Article 15 to grant orders necessary 'for the relief of justice' has served as the primary source of administrative law in Israel, under which the Court has developed various grounds and tests for judicial review of governmental acts.

One of the tests developed by the Court over the years was the test of reasonableness. The standard of reasonableness allows the Court to assess the manner in which the discretion of a government official has been exercised.[44] In examining reasonableness, the Court assesses both the factors that

[40]For years, the status of Basic Laws in relation to regular legislation was a matter of unsettled debate. However, in the landmark *Mizrachi* decision of 1995, the Court declared that Basic Laws are superior to regular legislation and that laws that conflict with Basic Laws can be declared void. Basic Laws have the central features of constitutional norms, both in terms of the matters that they regulate and in the fact that they are superior to regular legislation in the normative hierarchy and serve as the basis for judicial review of such legislation. However, unlike most constitutions, they do not have the constitutional feature of rigidity. Thus, with few exceptions, the Basic Laws in Israel can be easily changed and amended to accommodate political goals.

[41]See Guy Lurie & Yuval Shany, 'The Institutional Role of the Judiciary in Israel's Constitutional Democracy', in Aharon Barak, Barak Medina & Yaniv Roznai (eds), *The Oxford Handbook on the Israeli Constitution* (Oxford University Press 2025); Yaniv Roznai & Amichai Cohen, 'Populist Constitutionalism and The Judicial Overhaul in Israel' (2023) 56 Israel Law Review 502.

[42]Basic Law: The Judiciary, art 15(c).

[43]ibid art 15(2)(d).

[44]Hostovsky Brandes, 'Israel's Legal System' (n 38).

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were considered by the government actor and the respective weight accorded to each factor.[45] Suzie Navot explains that 'the reasonableness test is essentially a "tool" enabling the Court to ensure that the government and public agencies take decisions in an appropriate manner',[46] and that it reflects the obligation of the government to act in the public interest. Mordechai Kremnitzer similarly explains that the standard of reasonableness reflects the duty of allegiance; public officials, he argues, are required to 'act responsibly and diligently, exercising common sense and good judgment – in a word, reasonably'.[47] Kremnitzer further argues that

> [i]t is widely agreed that … a public official must consider all relevant considerations. Skewing blatantly the weight given to one or more of them leads to a decision that runs counter to common sense. There is no significant difference between a relevant consideration that is ignored entirely and one that is allotted negligible weight. Therefore, it is required that cases of manifest failure to weigh relevant considerations are included under unreasonableness.[48]

Over the years, the Court has applied the reasonableness standard in an array of cases regarding the manner in which the executive has exercised its discretion, including in relation to the failure to provide missile shelters in schools near the Gaza Strip,[49] the limitation of the authorities of a transitional government acting during an election period,[50] and the withholding of disability stipends.[51] One of the most contested areas in which the standard of reasonableness has been applied has been in relation to appointments.[52] The Court found that it was unreasonable not to remove a minister charged with a serious offence,[53] as well as a deputy minister.[54] The Court also applied the reasonableness standard to the decision to appoint various public officials who had been convicted of offences[55] or who did not meet the required professional standards.[56]

Two points need to be emphasised in relation to the development and application of the reasonableness standard. The first is that while the reasonableness standard has been used to invalidate governmental acts in a relatively small number of cases, its influence extends beyond these cases. Due to the *possibility* of invalidation, the reasonableness standard has become an important working tool for legal advisors to the different branches of government, through which they assess the legality of a government act and advise on whether it is likely to be upheld in court. Much of the actual work done by the reasonableness standard is therefore of a pre-emptive nature. Second, the manner in which the Court has applied the reasonableness standard has been a matter of controversy. Critics of the Court have argued that reasonableness is a device sophistically applied by judges to override the government, substituting the judges' own opinions for the government's discretion. This claim has been made particularly with respect to judicial review of appointments,

[45]Similar in principle to proportionality *stricto sensu*; see generally Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 11–12.

[46]Suzie Navot, 'The Reasonableness Issue Requires Serious, Informed, and Consensual Discussion', (The Israel Democracy Institute, 14 Jul 2023) <https://en.idi.org.il/articles/50172> accessed 1 Feb 2025.

[47]Mordechai Kremnitzer, 'Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness' (2023) 56 Israel law Review 343.

[48]ibid 345–346.

[49]*Wasser v Minister of Defence* [2007] HCJ 8397/06 (Israel).

[50]*Mafdal v Speaker of the Knesset* [2002] HCJ 9577/02 (Israel).

[51]*Sofer v Labor Minister* [2002] HCJ 5580/98 (Israel).

[52]Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19 Theoretical Inquiries in Law 705; Daniel Friedmann, 'Politics in Legal Disguise' (2023) 56 Israel Law Review 320, 325–328.

[53]*The Movement for Quality in Government v State of Israel* [1993] HCJ 3094/93 (Israel).

[54]*Amitai – Citizens for Sound Administration and Moral Integrity v Prime Minister of Israel* [1993] HCJ 4267/93, 4287/93, 4634/93 (Israel).

[55]*Movement for Quality Government v The Chairman of the Appointments Committee* [1999] HCJ 932/99 (Israel).

[56]*Movement for Quality Government v The Government of Israel* [2009] HCJ 5657/09 (Israel).

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an area where it has been argued that the Court has limited legitimacy in overriding the government's discretion.

Amendment No 3 to Basic Law: The Judiciary

As indicated above, the abolishment of the reasonableness standard was one of the central pillars of the judicial reform proposed by Levin, which was aimed to strengthen the power of the government. The justification for this amendment was criticism of the manner in which the Court exercised its discretion in applying the reasonableness standard. It should be noted that during the deliberations on Amendment No 3 to Basic Law: The Judiciary, several proposals were made in an attempt to respond to this criticism without abolishing the reasonableness standard altogether. In this regard, a number of possible amendments were proposed. One alternative was to exclude matters of appointment from the reasonableness standard, as these were seen as the matters where the application of the standard was most controversial. Another option was to exclude general matters of policy from judicial review under the reasonableness standard, on the grounds that policy matters are political by nature and should thus be left to the discretion of the executive. A formal compromise proposal, published by Israel's President Yizhak Herzog under the title 'The People's Directive', included certain limitations on the judicial use of the reasonableness standard. The directive suggested that

1. The decisions of the government in its plenary in matters of policy and appointments of ministers will not be reviewed by a court under the reasonableness standard alone.
2. Decisions of ministers in matters of policy shall not be overturned on the grounds of unreasonableness alone unless they are arbitrary or capricious.
3. Notwithstanding the above, the reasonableness standard will continue to apply, insofar as it applies according to the ruling of the Supreme Court moving to the enactment of the arrangements set forth in this document, as far as the rest of the executive branch.[57]

The compromise reflected in the Directive involved limiting, rather than curtailing, the ability of the Court to apply the reasonableness standard. Importantly, this compromise was part of a general pact, which explicitly determined that

> [a]ll the arrangements set forth in this document constitute a full legislative package, resting on a delicate system of balances that should be kept between government authorities, and must be seen as a whole. That is, no part of this document stands on its own, by itself, but depends on the other parts of the document. The document expresses proper balances, which must be maintained during legislative procedures.[58]

The approach taken in the Directive reflects an understanding that concessions on certain elements of judicial oversight of the government can only be made if other safeguards and checks on government power are ensured, as the crafting of the system of checks and balances requires a holistic approach.

The government, however, took a very different path. The change made to the reasonableness standard was the most extreme option available: the standard was completely abolished with respect

[57]Office of the President of Israel, 'From a crisis to a constitutional opportunity: The president's proposed constitutional framework for settling the relations between the branches of government in Israel by broad consensus' (Peoples' Directive, 16 Mar 2023) <https://www.mitve-haam.org/_files/ugd/f35a26_8eb0f820ae1b4d32bd178cc2b7cf4352.pdf> accessed 1 Feb 2025. For an analysis, see Amichai Cohen & Yuval Shany, 'The Israeli President's Plan to End the Constitutional Crisis' Lawfare (Lawfare, 24 Mar 2023) <https://www.lawfaremedia.org/article/israeli-presidents-plan-end-constitutional-crisis> accessed 1 Feb 2025.

[58]Office of the President of Israel (n 58).

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to the government and its ministers, stripping the Court entirely from its authority to use it. Moreover, this was explicitly declared as just the first step of Levin's series of planned changes to reshape the judicial system.[59]

On 24 July 2023, the Knesset amended Article 15 of Basic Law: The Judiciary, to include the following amendment:

> Notwithstanding the provisions of this basic law, those who have jurisdiction by law, including the Supreme Court sitting as the High Court of Justice, will not consider the reasonableness of a decision of the government, the prime minister, or any other minister, and shall not issue an order in this regard. In this section, 'decision' means any decision, including regarding appointments or a decision to refrain from exercising any authority.[60]

The amendment to the Basic Law was passed by the vote of sixty-four of the 120 members of the Knesset, which included all members of the coalition. All members of the opposition were absent from the vote. Members of the opposition protested both the content of the amendment and the process of its adoption, which they argued was exclusionary and rushed. Petitions against the amendments, discussed below, were filed immediately following its enactment.

As outlined above, when taking office as Minister of Justice, Levin had presented his plan in its entirety. In this regard, the constitutional overhaul in Israel differs from other scenarios of populist constitutionalism. Eventually, however, Levin retracted to an incremental method in which the changes he announced would be implemented piece by piece. While the abolishment of the reasonableness standard was, as of the date of this article, the only measure from Levin's plan that had fully passed, others are already in the legislative pipeline. Amendments to entrench the override clause, to limit the judicial review of legislation, to prohibit judicial review of Basic Laws, and to secure the control of the coalition in the committee for the election of judges have already passed the first of three rounds of vote in the Knesset (the second and third rounds are usually held simultaneously). That means, the next steps in the constitutional overhaul are already on the table, and can be enacted within a very short timeframe. This scenario presents an interesting case study for examining whether the possible aggregate effect of pending constitutional changes should be taken into account when examining a constitutional change that has already been adopted, and if so, how.

The political illegitimacy of the Amendment

Naturally, the petition against Amendment No 3 to Basic Law: The Judiciary framed the question of its legitimacy in legal terms. However, the controversy surrounding it is as much political as it is legal. Three points should be noted in this regard. The first concerns the abnormal situation in Israel, a result of its peculiar constitutional history, in which changes to constitutional norms can easily be made through a regular legislative process. The result of this abnormality is that constitutional changes are often made to accommodate narrow political goals.[61] A study of constitutional changes by the Israeli think-tank Tachlit found that the pace of constitutional changes in Israel is the highest in the world, that the majority of constitutional changes concern the authorities of the Knesset and the government, and that many of the changes take place in periods close to elections.[62] Instead of

[59]Yaniv Roznai, 'Du « Blitz hongrois » au « Salami polonais » : La refonte judiciaire en Israël comme projet populiste' (2024) 2 Revue de Droit Public 14 (an English version: Yaniv Roznai, 'From the "Hungarian Blitz" to the "Polish Salami": The Judicial Overhaul in Israel as a Populist Project' (25 Apr 2024) <https://ssrn.com/abstract=4807540> accessed 1 Feb 2025).

[60]Basic Law: The Judiciary, art 15(2)(d1).

[61]See Yaniv Roznai, 'Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power' (2024) 8 Jurídica Ibero 51.

[62]'Changing the Rules of the Game During the Game: An Israeli Pathology' (Tachlith Institute, 18 Jun 2023) <https://www.tachlith.org.il/_files/ugd/d4d9e4_9db0dcea1e2a4e8689dd21a1a761f7c6.pdf> accessed 1 Feb 2025.

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the constitutional framework determining the political leeway, the reality in Israel is that constitutional changes are often made to facilitate narrow and partisan (and often even personal) political goals. The use of constitutional changes as a narrow political tool – often rushed through with bare coalition majorities in a swift process without due deliberation – undermines the fundamental purpose of modern constitutions and thereby the political legitimacy of the constitutional framework. Modern constitutions are meant to set the rules of political game, ensure rights protection, mitigate the principal-agent difficulty, create constitutional patriotism, and serve as a mechanism for precommitment to certain rules and values.[63] These functions are no longer fulfilled if constitutional change becomes a mere tactical manoeuvre in day-to-day politics.

While this political aspect of the amendment was not addressed directly by the Court, Chief Justice Hayut did refer to it indirectly when examining the justifications for applying the doctrine of unconstitutional constitutional amendment in Israel. The ability to easily change the constitutional framework, coupled with the coalition's control of the legislative process, Hayut explained, was a justification in favour of applying the doctrine in Israel, precisely because of the possibility of political abuse of the constitutional framework.[64]

The second political aspect of the amendment concerns its specific political objectives. The amendment was not enacted in a vacuum, nor was it enacted only as part of a constitutional agenda regarding the desired bases for administrative review. Rather, it was exacted in a very specific political context, in which the Court applied the reasonableness standard to invalidate political appointments in a series of decisions that provoked the fury of coalition members. Indeed, constitutional changes are never made behind a real 'veil of ignorance'. But the closer a constitutional amendment is to a specific political goal that it seeks to achieve, the less legitimate it is likely to be.

While for a few of the political actors involved, the driving force behind the so-called reform was their worldview about the powers the government should have, for the majority of the political actors, the 'reform' was a means to achieve concrete political goals. For example, the ultra-Orthodox parties wanted to limit judicial review of legislation in order to enable the enactment of a law exempting ultra-Orthodox men from military service, as previous laws entrenching such exemptions had been invalidated by the Supreme Court.[65] Other parties wanted to carve an exemption from the duty to provide equal service, allowing service providers to refuse customers 'on the basis of religious faith'. These are not speculations but specific clauses outlined in the coalition agreements. Other clauses proposed permitting gender segregation in the public sphere, restricting human rights organisations by limiting donations, and introducing measures that would further discriminate against Israel's Arab-Palestinian minority.

For the Religious Zionist party, headed by the pro-annexation Bezalel Smotrich, weakening the Court would make it easier to expand settlement in the West Bank, an issue where rulings of the Court have often posed obstacles.[66] Smotrich, Israel's Minister of Finance, who also serves as an additional minister in the Ministry of Defence, has expressed in more than one forum his position that large parts of the West Bank should be annexed to Israel, with limited rights granted to the

[63]Roznai, 'Clownstitutionalism' (n 61).

[64]*Movement for Quality Government v Knesset* (n 16) Chief Justice Hayut, ss 75–80.

[65]See, eg, David E Rosenberg, 'The Power of Israel's Ultra-Orthodox Has Peaked' (Foreign Policy, 27 Jul 2023) <https://foreignpolicy.com/2023/07/27/israel-ultra-orthodox-judicial-religion-netanyahu/> accessed 1 Feb 2025.

[66]Following the Six-Day War in 1967, Israel annexed East Jerusalem and the Golan Heights. As a result, Israel applied its own law in these territories. The West Bank, however, has not been formally annexed to date. Thus, even from an internal Israeli perspective, the legal framework that Israel applies in the West Bank is the international law of occupation (although Israel recognises the applicability of only parts of the law of occupation, notably excluding the application of the *Fourth Geneva Convention*). This legal framework, which is based on the premise that control over the territory is temporary, has been reinforced by the Supreme Court in numerous cases. While some of Israel's actions on the ground, particularly the expansion of settlements, arguably do not indicate an intent of temporary control, Israel has avoided formal annexation of the West Bank.

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Palestinian residents of these territories. He has laid down what he referred to as 'the decisive plan', which rejects the two-state solution and would allow Israel to 'win the conflict'.[67]

This process may be facilitated by the constitutional overhaul in a number of ways, including the removal of the reasonableness standard, the weakening of legal advisors, and the weakening of judicial review and its deterrent effect.[68]

Finally, there is the ongoing criminal trial of PM Netanyahu in the District of Jerusalem on charges of corruption, fraud, and breach of trust. This raises suspicions about Netanyahu's sudden support for a reform of the judicial system after years of preventing such reforms.[69]

Given this combination of political interests, it is not surprising that the coalition agreements of the thirty-seventh government explicitly stipulated that the laws related to the 'reform' are to 'receive priority' over any other legislation.[70] The changes to the constitutional framework were necessary to pave the way for the laws and policies that the government wanted to pursue.

The third reason for the political illegitimacy of the amendment is procedural. As noted above, Israel's Basic Laws can be amended very easily, without any special procedure or formal limitation (with some minor exceptions for constitutional provisions that are formally entrenched). Moreover, the coalition imposes coalition discipline even when enacting or amending Basic Laws. This means that the coalition speaks with a single voice, with decisions usually taken by a small circle of leaders of the political parties that form the coalition. Indeed, the amendment on the reasonableness standard passed its third and final reading in the Knesset along strict party lines, with all members of the coalition voting in favour, while all members of the opposition walked out of the vote in protest.[71] This in itself is a problem of political legitimacy. The purpose of constitutional norms is, among other things, to prevent a random majority from harming the rights of the minority, the system of checks and balances, or the broad public interest; to cure the tendency of the present majority to favour short-term considerations; and to prevent the representatives of the occasional majority from using their electoral power to entrench their interests and consolidate their power.[72] Enforcing coalition discipline on constitutional matters precludes the formation of the broad consensus in the Knesset that should underpin constitutional changes. This approach prioritises short-term political gains over long-term constitutional stability and thereby erodes the legitimacy of the constitutional process.

Beyond that, the entire legislative process undermined the amendment's legitimacy, as it was rushed and one-sided. The amendment was enacted in a process that took three weeks, during which the opposition, experts, and parties were invited to present their opinions on the bill, but none of them were really heard, and no claim was accepted. Notwithstanding the widespread opposition to the bill expressed in the committee, even by those who generally favoured limiting the reasonableness standard, not a single change was made to soften the bill, from the time it was presented to its enactment. The only change was the addition of a final clause – 'In this section, "decision" means any decision, including regarding appointments or a decision to refrain from exercising any authority' – which, rather than mitigating concerns, only heightened the amendment's potential to harm the rule of law. Throughout the process, there was no proper deliberation,

[67]Bezalel Smotrich, 'Israel's Decisive Plan' (Hashiloach, 2017) <https://hashiloach.org.il/israels-decisive-plan/> accessed 1 Feb 2025. See also, eg, Dahlia Scheindlin & Yael Berda, 'Israel's Annexation of the West Bank Has Already Begun – Netanyahu Moves to "Civilianize" the Occupation' (Foreign Affairs, 9 Jun 2023) <https://www.foreignaffairs.com/israel/israels-annexation-west-bank-has-already-begun> accessed 1 Feb 2025.

[68]David Kretzmer, 'The "Constitutional Reform" and the Occupation' (2023) 56 Israel Law Review 397.

[69]See, eg, Tom Ginsburg, 'The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective' (2023) 56 Israel Law Review 385.

[70]See, eg, Coalition Agreement Between the Likud and the Religious Zionist Party (28 Dec 2022), art 30.

[71]Adam Shinar, 'In Israel, the Worst May Be Yet to Come' (New York Times, 26 Jul 2023) <https://www.nytimes.com/2023/07/26/opinion/international-world/israel-supreme-court-protest.html> accessed 1 Feb 2025.

[72]Roznai, 'Clownstitutionalism' (n 61).

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and despite repeated requests, Knesset members were denied the opportunity to hear the full range of principled opinions or to receive the full information necessary to properly consider the bill and form an informed position.[73]

The coalition further undermined procedural legitimacy by exploiting a legislative loophole to fast-track the amendment. Rather than following the more complex legislative path of government bills and private bills – which requires involvement of diverse actors and mandatory waiting periods – they pushed the amendment through as a bill on behalf of a committee. This procedural manoeuvre has so far been used sparingly, reserved for rare cases of broad political consensus, where both coalition and opposition agree on the need for expedited action. However, no such consensus was reached in this case.[74]

The amendment's passage thus represented a profound breach of constitutional legitimacy on both procedural and substantive grounds. Notably, the combination of severe procedural defects (the rushed timeline, exploitation of legislative loopholes, strict coalition discipline, and rejection of all opposition input) and substantive flaws (its advancement of narrow partisan interests, facilitation of controversial policy changes, and fundamental alteration of constitutional safeguards through ordinary legislative means) renders the amendment not only politically illegitimate but also raises serious doubts about its legality in a democratic society committed to the rule of law.

The petition against the amendment and court ruling

As indicated above, petitions against the amendment were filed almost simultaneously with its enactment. On 1 January 2024, the Court delivered its decision in the case of the *Movement for Quality Government v the Knesset*.[75] The decision, which runs to over 700 pages, is a landmark case, as it is the first in which the Court has applied in practice the unconstitutional constitutional amendment doctrine, declaring the amendment void on the grounds that it violates Israel's core democratic values. Sitting in full bench, twelve of the fifteen judges determined that the Court had the authority to invalidate Basic Laws, while eight determined that the amendment was void.

The first decision concerns a matter of principle, asserting that the High Court has the authority to conduct judicial review of the Basic Laws and to intervene in exceptional, extreme cases in which the Knesset has deviated from its constituent authority (ie, when it has denied or facially contradicted the core character of the State of Israel as a Jewish and democratic state). This decision was supported by an overwhelming majority of twelve (or thirteen, depending on interpretation) of the fifteen judges.

The second decision concerns the specific law under review. A majority of the Court (eight of the fifteen judges) held that the amendment should be declared void. The Court emphasised that the exceptional, sweeping language of the amendment prevented all courts from adjudicating and hearing arguments on the reasonableness of decisions taken by the government, the prime minister, and government ministers in respect of any decision, including those to refrain from exercising authority. The majority further held that the amendment's interpretation left no doubt that it applied even to capricious or extremely unreasonable decisions. This, they concluded, constituted an unprecedented infringement of two core pillars of Israel's democracy: the separation of powers and the rule of law. The ruling highlighted that the amendment significantly increased the already substantial power concentrated in the hands of the government and its ministers, while at the same time stripping individuals of the ability to seek judicial relief in a wide range of cases where government actions could cause grave harm to their vital interests. The Court also emphasised that the

[73]See Ori Aronson et al, 'Between Abusive Constitutionalism and Proper Constitutional Process: Procedural Norms for Enacting Basic Laws and Knesset Committee Initiatives' (18 Sep 2023) <https://ssrn.com/abstract=4566393> accessed 1 Feb 2025.

[74]ibid.

[75]*Movement for Quality Government v Knesset* (n 16).

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amendment effectively exempts the most significant elements of the executive from their duty to act reasonably. By removing entire areas from effective judicial oversight, it prevents the protection of public interests such as ethical conduct and administrative regularity. Furthermore, it risks fundamentally changing the state's civil service, severely damaging the independence of the law enforcement authorities and enabling exploitation of government resources for political gain in the electoral process.

In invalidating the amendment, the judges generally did not take into account the prospective legislation, ie, the parts of Levin's plan that had been presented but not yet passed. The ruling on the amendment was based on an assessment of the meaning and implications of the amendment itself, not of the overall plan. Chief Justice Hayut acknowledged the petitioners' claims that the implications of the amendment should be assessed in light of the fact that it was the first in a series of steps, but effectively rejected this claim. Hayut addressed this point explicitly, stating that

> [a] fundamental principle that derives from the principle of separation of powers is that the Court does not examine bills before they have been approved and have made their way into the lawbook. This is so, *inter alia*, because it is not at all clear how they will be adopted in the end, if at all.[76]

Justice Amit emphasised the importance of contextualisation:

> If one analyses the amendment to the law against the background of all the proposed amendments, according to the position of the Attorney General, the specific weight of the amendment and the dangers involved in it increase ten counters. This is because the image that is received clarifies that this is only one step in a whole legislative fabric which changes in a far-reaching (and possibly irreversible) manner the mechanism of checks and balances of our system.[77]

However, while acknowledging that the amendment was 'one step' in a larger process of weakening democracy, Justice Amit concluded that the harm caused by the amendment on its own was enough to declare it void, leaving open the question of its aggregate effect.[78] We concur with the Court's finding that the harm of the amendment itself was severe enough to invalidate it as an unconstitutional constitutional amendment. However, we also contend that even if this were not the case, judicial intervention would still have been justified due to the specific harm the amendment caused within the broader context of efforts to undermine democracy. In the following section, we propose a judicial doctrine to address such circumstances.

Linking Legitimacy with Legality: Proposing a Judicial Doctrine for Engaging with the 'Salami Tactic'

The challenge of 'seeing the big picture'

Courts face a particular challenge when confronted with the 'salami tactic' of constitutional change. Traditionally, courts examine the constitutionality of a particular law (or constitutional amendment) before them, and only that. This creates a problem when dealing with democratic erosion that occurs gradually. Here, as noted above, any change may appear in itself to be such that its impact on the democratic order does not reach the threshold justifying invalidation – even though, when accompanied with other changes, the change may threaten the country's fundamental

[76] ibid Chief Justice Hayut, s 109.
[77] ibid Justice Amit, s 106.
[78] ibid Justice Amit, s 109.

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characteristics or undermine its core constitutional values.[79] Rather than a dramatic shift that fundamentally departs from the country's core values, such as transforming a republic into a monarchy or a democracy into an authoritarian system, the issue at hand also involves smaller infringements on core constitutional values and institutions.[80] In cases where such assaults on the constitution's core principles are not immediately apparent in themselves, existing doctrines such as 'unconstitutional constitutional amendments' may offer limited protection, as they do permit minor infringements even of protected constitutional rights and values, as long as they do not completely abandon them. So, what can (or should) courts do when faced with such a situation?

Elsewhere, we have argued that when a court considers the constitutionality of a constitutional change that may affect the democratic order, it must examine the change in the broader context in which it is made, as part of a series of changes, and take into account their cumulative effect.[81] Consider the following scenario: democratic erosion is made possible by the introduction of small, separate changes to the judicial system. Each of these changes does not in itself constitute a fundamental departure from the basic principles of the constitutional order. Although problematic, they do not reach the threshold of an 'unconstitutional constitutional amendment'. Nevertheless, incrementally and cumulatively, these constitutional changes are fundamentally transforming the constitutional order into an illiberal or semi-authoritarian one. Assuming that the Court is still independent, it may be asked why the Court should not take into account its consideration of previous constitutional changes in its consideration of the single constitutional change currently under review. It may be that the amendment under review is in itself somewhat offensive, but – like the grain of sand that turns grains into a pile – it makes a qualitative contribution to the change in the constitutional value affected by the change, and so, if we look at previous amendments, it can be seen as 'the straw that broke the back of the constitution'.[82] We have therefore called for consideration of an 'aggregated form of judicial review of constitutional amendments' that would allow courts to review a specific amendment together with the surrounding legal environment with which it would interact. Such an aggregated review, we have argued, could mitigate – if not solve – the challenge posed by the incremental use of subtle constitutional amendments.[83]

Examining the cumulative effect of a piece of legislation is easier when it is enacted after a series of moves that seek to weaken democratic institutions. However, the challenge is far greater when a constitutional amendment is enacted in the early stages of that process. The problem is that a constitutional change that may *prima facie* seem to be minor could also 'open the door' to the rest of the regime's coup or capture and have a detrimental effect on the constitutional order. In other words, the image of a falling fortress becomes clearer after the third or fourth brick of the wall has fallen, but what about the very first one?

Consider the 'reasonableness' law discussed earlier. The question of whether or not the removal of the reasonableness review is the end of democracy is simply the wrong question. The correct question is whether the removal of the reasonableness review weakens the institutions of checks and balances and the gatekeepers in such a way as to endanger democracy and rights. In the Israeli context, the removal of the reasonableness review is a significant step towards weakening judicial review and strengthening the executive branch in a way that will make it easier to remove

[79]See n 18.

[80]See, eg, Marianne Kneuer, 'Trends on Democratic Erosion: The Role Of Agency And Sequencing' (2023) 73 International Political Science 837, 842: 'Each individual step seems marginal and not fundamentally threatening to democracy, and the full picture is only perceived over time.'

[81]Roznai & Hostovsky Brandes (n 15).

[82]Yaniv Roznai, 'The Straw that Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments', in Alejandro Linares-Cantillo, Camilo Valdivies-Leon & Santiago Garcia-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021) 147.

[83]Roznai & Hostovsky Brandes (n 15).

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important gatekeepers, appoint government officials and capture state institutions, all of which are actions that reasonableness review can prevent. As Suzie Navot writes,

> [t]he amendment gives the government a 'green light' to make arbitrary decisions and act with unlimited power, for example, in the hiring and firing of officials and gatekeepers. It makes it possible for the government to dismiss the Attorney General and, along with her, any of the gatekeepers who do not immediately align themselves with the will of the regime. The government and its ministers can make extreme, unfounded, or even corrupt decisions, and appoint whomever it wants to the most senior positions. Furthermore, as noted above, the Israeli government already has limited checks on its powers compared with governments in other democracies, with the Court being the only effective check. Indeed, the government has limited accountability with regard to individual governmental decisions and the Knesset enforces little meaningful parliamentary control over executive decisions.[84]

Accordingly, she rightly argues:

> Any discussion of the judicial reform, especially relating to the Court, must be carried out with a broad view, cumulatively, in a manner that is not detached from the context of the 'reform' and its goals. Democracies no longer die in one day; they erode, slowly and sometimes out of sight, until the people wake up to a completely different democratic reality.[85]

Focusing on each reform in isolation misses the larger picture – you see the trees but lose sight of the forest.

In this section, we argue that the courts must take a broad, contextual perspective and apply a 'militant democracy' approach, intervening to prevent even the fall of the 'first brick' in the fortress of democracy, when two conditions are met: (1) the country is undergoing a process of incremental democratic erosion ('salami tactic') and there is clear and sufficient evidence indicating further governmental moves in this direction, and (2) the measure under judicial review directly threatens a key safeguard of democracy, such as an important gatekeeper or the judiciary.

There is evidence indicating further moves towards democratic erosion

The first condition for intervention is that a country is undergoing a process of democratic erosion and that there is evidence to support the claim that the constitutional amendment under review is part of a larger picture and that further moves to erode democracy will be taken. In the Israeli case, this broader agenda is unmistakable, as the government explicitly revealed the 'big picture' in its proposal of the entire judicial overhaul. Had it initially proposed only the constitutional amendment on the reasonableness law, it would have been much more difficult to grasp the larger plan. But within the judicial overhaul framework, the reasonableness law was explicitly linked to other parts of the so-called reform. Furthermore, other key laws or constitutional amendments that were part of the judicial overhaul had already passed the first reading in the Knesset and were ready for second and third readings. Many other laws related to the judicial overhaul were in various stages of governmental and parliamentary legislation.[86] Further, when the amendment on the reasonableness standard was being promoted, members of the coalition never concealed their intention

[84]Navot, 'An Overview of Israel's "Judicial Overhaul"' (n 34) 486.

[85]ibid 500.

[86]The Political Scientists for Israeli Democracy, a collective of Israeli political scientists dedicated to monitoring and analysing legislative developments that may impact the country's democratic fabric, continuously track and document undemocratic proposals and steps. For an overview of their ongoing work, see Political Scientists for Israeli Democracy, 'Monitoring Legislation' <https://www.psfidemocracy.org/monitoring-legislation> accessed 1 Feb 2025.

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to complete the judicial overhaul, only this time in stages, piece by piece, with the reasonableness amendment being just one 'slice' of the larger plan. As one minister put it, the weakening of the Supreme Court through the removal of the reasonableness standard was only the appetiser, the 'salad bar', before the main course.[87] In a television interview, another minister said that after reasonableness, other standards of review that allow judicial intervention in government action, such as proportionality, would be limited.[88] In the Israeli case, it was clear that the reasonableness amendment was not an isolated measure but part of a coordinated effort to critically weaken Israeli democracy. It therefore cannot be assessed in isolation, detached from the cumulative impact of the broader legislative agenda it clearly belongs to. (This is not to say that the amendment, on its own, was not bad enough to warrant invalidation, a question we do not consider in this article).

In Israel, the government's proposals painted a clear picture of a political system determined to remove all constraints on its powers, and striving decisively to achieve this goal. This removal of restrictions of governmental power was achieved through two kinds of proposals that complemented each other: the weakening of the authority and independence of judicial bodies and gatekeepers, and the capture of these bodies. This integrated course of action, weakening the courts on the one hand and capturing them on the other, is common in countries subject to democratic erosion. What we argue is that in order to intervene judicially in a single constitutional amendment that is part of a larger movement to erode democracy, some indication or evidence of further moves in that direction is required.

As noted above, identifying the 'big picture' was relatively easy in the Israeli case because Levin had presented his plan in its entirety before retreating to a method of incremental change. This does not negate the importance of assessing the 'big picture' in other cases, although in practice this may, of course, be more challenging when a government conceals its overarching intentions. The Israeli example only highlights the importance of recognising the overall picture, even if it is less transparent in other countries. Yet, even in such instances, courts can remain vigilant by observing moves and changes, both large and small, that, based on comparative knowledge, signal patterns of democratic erosion.

The measure directly threatens a key safeguard of democratic institutions

The second condition for judicial intervention at the stage of the 'first brick' or the 'first slice of salami' is that the reform under review affects a fundamental institution or mechanism essential to safeguarding democracy. This includes, for example, judicial review and key gatekeepers such as a human rights ombudsman or a legal advisor to the government.

The justification for judicial intervention is particularly strong in the case of constitutional amendments affecting the independence of courts, in order to counter the populist tactic of capturing and neutralising courts and gatekeepers as a first step, after which it becomes much easier to weaken or control other institutions.[89] Within the 'salami tactic', neutralising the court is an important step for undermining other democratic institutions and values, because the court is the organ that can block other moves. This is why attacks on courts are linked to attacks on democracy.[90]

Courts around the world are under attack. They are captured, threatened, and their powers curtailed by governments seeking to undermine the democratic and constitutional order. As noted

[87]'"A Little Sensitivity Wouldn't Hurt": Coalition MKs Reject Ben-Gvir Tweet' (The Jerusalem Post, 23 Jul 2023) <https://www.jpost.com/israel-news/politics-and-diplomacy/article-752065> accessed 1 Feb 2025.

[88]Hatzinor, 'TV Broadcast from 25 Jul 2023' (clip posted by journalist Bar Shem-Ur on X, 26 Jul 2023) <https://x.com/Bar_ShemUr/status/1683883350975557646> accessed 1 Feb 2025.

[89]Roznai & Hostovsky Brandes (n 15).

[90]Schnutz Rudolf Dürr, 'Constitutional Courts: An Endangered Species?', in Dominique Rousseau (ed), *Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?* (Librairie Générale de Droit et de Jurisprudence 2019) 111.

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above, once courts are weakened or taken over, it is easier for those governments to undermine other democratic institutions. Just as militant democracy allows for the disqualification of parties seeking to subvert democracy, placing this 'brake' at the beginning of the political process, constitutional theory must adapt to an era of democratic erosion and protect those bodies and organs – such as courts – whose weakening or capture would pave the way for democratic backsliding.

It is often not easy for courts to identify in advance whether proposed changes to the court system are a legitimate reform, or whether changes that pave the way for a takeover by the government are a means of consolidating its power. This is where comparative research and familiarity with the 'populist playbook' become crucial. For example, while the Court of Justice of the European Union ruled that the Polish 'reform' to lower the retirement age of judges is a violation of judicial independence,[91] this does not indicate that any change to judicial retirement ages will amount to such a violation. However, it does signal the need for heightened scrutiny when such measures are introduced.

Of course, a decision in such a case must ultimately be based on the specific local conditions and context. For example, limiting the 'reasonableness doctrine' or changing the independent status of the government's legal advisors may have a different impact on the system of checks and balances in the Israeli context than in other countries, given the already weak system of existing checks. In other countries, there may be other mechanisms that can compensate for such a weakening. Eventually, this is an epistemic problem. 'In this case', argue Pablo Castillo-Ortiz and Yaniv Roznai,

> it is only the court on a case by case basis that will be able to decide if there is sufficient information to ascertain whether there is an aim to deconsolidate democracy, or if that will be the result of the reform. There will be cases of epistemic clarity, in which these things are easy to know with the information available to the court. But very frequently, the court will have to make a decision in a scenario of imperfect information.[92]

It is important to note that we are not advocating for courts to block any change to the authority or composition of the judiciary. Consider the reasonableness amendment discussed above, which was declared unconstitutional. During the legislative process, more nuanced versions were proposed but rejected by the Knesset. For example, Yoav Dotan, a former dean of the Faculty of Law at the Hebrew University and a conservative legal scholar, has long been a critic of the courts' use of reasonableness. During the legislative debates in the Knesset, he opposed the 'blanket' exemption from reasonableness review of decisions made by all elected officials (the government, the PM, or any minister) – ie, the version that was eventually adopted – and instead suggested a more nuanced approach, where only policy decisions made by the full cabinet would be exempt from such review.[93] Such a proposal, to our mind, is not without problems, but it is a reform that the

[91]Case C-619/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531.

[92]Pablo Castillo Ortiz & Yaniv Roznai, 'The Democratic Self-Defence of Constitutional Courts' (2024) 18 Vienna Journal on International Constitutional Law 1, 14.

[93]In the Parliamentary debate, Professor Yoav Dotan said:

> I understand that my name arose frequently in the committee's deliberations, and I was often quoted. I consider the current bill to be very problematic. I have criticised the reasonableness doctrine, and did not object to rethinking the issue, but the current bill throws out the baby with the bathwater. This is a very sweeping proposal, which purports to distinguish between the decisions of the political and administrative echelons, but in my estimation this will not happen in practice, because the distinction between decisions of a political nature and non-political decisions cannot only rely on the [identity of] the echelon that makes the decision. If someone wanted to do a serious job, he would have to address additional distinctions such as the distinction between general policy decisions and individual ones … If the Government of Israel decides to build or not to build a subway in the Gush Dan area, I don't see why the court's reasonableness is preferable to that of the Government. However, when you look at decisions that are defined as ministerial decisions, there are tens of thousands of ministerial decisions per day; district outline plans are signed by a

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Court should not strike down, even as a 'first brick'. The Knesset's decision to adopt the extremely broad scope of exemption made the Court's decision in the Israeli case easier.

In cases where governments use constitutional amendments to erode democracy, courts should (or even have a duty to) declare amendments unconstitutional if they undermine key features essential to the protection of the structure of the democratic structure, even if, on their own, these amendments would not normally be seen as an outright abandonment of the core values of the constitutional order. Importantly, the purpose of this protection is not to preserve the institutional powers of courts for their own sake, but to protect democracy itself. To protect democracy, courts must first be able to protect themselves.[94]

Conclusion

Democracies today do not collapse abruptly through extreme or illegal means; instead, they erode gradually through a series of subtle and seemingly legal measures. The doctrine of unconstitutional constitutional amendments – designed to prevent revolutionary changes that negate the core principles of the constitutional order – is proving inadequate against the subtle, incremental erosion that threatens democracies today.

In a previous study, we argued that cumulative judicial review should be adopted, examining constitutional changes in a broad context and against the background of other changes that threaten liberal democracy. Since quantity becomes quality in constitutional change, a minor constitutional change could have a dramatic effect on the constitutional order if it comes after a series of constitutional amendments that have already eroded democracy. But what if the constitutional change is not the last in a series of amendments, but the first? How should the Court respond when the 'first brick' is falling from the fortress of democracy, or when would-be autocrats slice the first piece from the 'salami' that is the democratic constitutional order?

We argue that the Court must intervene to prevent the fall of even the first brick when a country is experiencing incremental democratic erosion, when there is supporting evidence for further moves, and when this 'first brick' is critical for the protection of other democratic institutions (such as a significant gatekeeper or a constitutional court). Indeed, 'any discussion of the judicial reform, especially relating to the Court, must be carried out with a broad view, cumulatively, in a manner that is not detached from the context of the "reform" and its goals'.[95] We thus call to bridge the gap between legitimacy and legality in the context of democratic erosion.

In the Israeli case, we argue that the Israeli Supreme Court would have been right to invalidate the constitutional amendments that removed the reasonableness review even if it had not considered them extremely harmful in themselves (which it did), but in the light of the understanding that allowing this 'first brick' to fall would pave the way for the removal of significant gatekeepers to democracy and open the door to cumulative serious damage to democracy.

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minister, every Israeli residence permit is under the authority of a minister, and when it comes to decisions of this kind, there is no reason, democratic or otherwise, to give them full immunity from the court, including from the reasonableness standard.

See 'Constitution Committee approves reasonableness standard bill for first reading' (Knesset News, 4 Jul 2023) <https://main.knesset.gov.il/en/news/pressreleases/pages/press040723c.aspx> accessed 1 Feb 2025.

[94]Castillo Ortiz & Roznai (n 92).

[95]Navot, 'An Overview of Israel's "Judicial Overhaul"' (n 34) 500.

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