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SYMPOSIUM ARTICLE

Judicial Reform or Abusive Constitutionalism in Israel

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Abstract

How should the constitutional reform in Israel be assessed in comparative terms? Comparative constitutional understandings point to the centrality of three key sets of norms as part of the 'democratic minimum core': (i) commitments to free and fair, regular multi-party elections; (ii) political rights and freedoms; and (iii) a system of institutional checks and balances necessary to maintain (i) and (ii). Any change in judicial power and independence must be assessed against the benchmark of the democratic minimum core, and by reference to its cumulative practical effect on a system of institutional checks and balances.

We claim that recent changes in Israel may already threaten these institutional checks, and have the potential to do more damage in the future, if given broad effect and if combined with further changes in the power and independence of the Supreme Court. On this basis, we suggest, the relevant changes should be viewed as either 'abusive' or 'proto-abusive' in nature. By threatening to undermine both the power and independence of the Supreme Court of Israel, they directly threaten the health of the constitutional checks and balances system and, hence, the 'democratic minimum core' in Israel.

Keywords: Israel; abusive constitutionalism; democratic core; borrowing; constitutional reform

1. Introduction

For the last two decades Israel has had one of the most powerful supreme courts worldwide.[1] The Court's powers derive from the broad standing before it, narrow restrictions on justiciability, a broad doctrine of reasonableness in administrative review, authority to apply strong judicial review of legislation, and the power to review the Basic Laws themselves.[2] A powerful judiciary, it was argued, was necessary in the light of the strengthening of the executive vis-à-vis the legislature during the last few decades and the relatively weak mechanisms of checks and balances in Israel: a single chamber in parliament; no federal system with vertical separation of powers; not a presidential system with veto powers; an electoral system without a regional element or constituencies, and without subordination to any regional institution or a human rights court. In fact, Israel is the only democracy in the world that has none of these mechanisms.[3]

Yet, the Supreme Court of Israel is now under sustained attack: the Knesset has recently passed a constitutional law purporting to remove the Court's power to invalidate decisions of ministers and the cabinet on the grounds of unreasonableness.[4] The Netanyahu government has floated a much wider raft of judicial 'reforms', which would further limit the jurisdiction of the Court and its power to strike down laws, and shift the manner in which it is appointed.[5]

The opposition to these changes in Israel has been vocal and widespread.[6] For months, hundreds of thousands of protesters have flooded the streets in opposition to the proposed changes, and in support of the judiciary.[7]

[1] See Rosalind Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2021) 59 *Columbia Journal of Transnational Law* 298, 332.

[2] Yaniv Roznai, *Constitutional Review: Development, Models and a Proposal for Anchoring Judicial Review in Israel* (The Israel Democracy Institute 2021) 27–43 (in Hebrew).

[3] Yaniv Roznai and Amichai Cohen, 'Populist Constitutionalism and the Judicial Overhaul in Israel' (2023) *Israel Law Review* 502; Amichai Cohen and Yaniv Roznai, 'Populism and Constitutional Democracy in Israel' (2021) *Tel Aviv University Law Review* 87, 113–22 (in Hebrew).

[4] Aeyal Gross, 'An Unreasonable Amendment: The Constitutional Capture in Israel', *VerfBlog*, 24 July 2023, https://verfassungsblog.de/an-unreasonable-amendment.

[5] David Kretzmer, 'Israel's Political and Constitutional Crisis', *IACL-AIDC Blog*, 23 December 2022, https://blog-iacl-aidc.org/new-blog-3/2022/12/23/israels-political-and-constitutional-crisis; Aeyal Gross, 'The Populist Constitutional Revolution in Israel: Towards a Constitutional Crisis?', *VerfBlog*, 19 January 2023, https://verfassungsblog.de/populist-const-rev-israel; Aeyal Gross, 'The Battle over the Populist Constitutional Coup in Israel: Spring of Hope or Winter of Despair?', *VerfBlog*, 31 March 2023, https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel; Alon Harel, 'The Proposed Constitutional Putsch in Israel', *VerfBlog*, 14 March 2023, https://verfassungsblog.de/the-proposed-constitutional-putsch-in-israel

[6] Aaron David Miller, 'Netanyahu Faces His Own "Israeli Spring"', *Foreign Policy*, 23 February 2023, https://foreignpolicy.com/2023/02/23/israel-judicial-reform-protests-netanyahu-government-supreme-court.

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

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Yet, how should we think about these changes in comparative terms? Constitutional systems worldwide adopt a variety of approaches to the design of judicial systems and to the power and jurisdiction of appellate courts. The proponents of reform in Israel point to this variety as support for the legitimacy of the proposed changes domestically.[8]

There is, however, another sense in which the proposed changes in Israel are directly in tension with global understandings of what constitutional democracy entails – particularly if current changes are to be given full effect or followed by further changes in the power and jurisdiction of the Court. Prior work by two of us (Dixon and Landau) suggests that comparative constitutional understandings point to the centrality of three key sets of constitutional norms as part of the 'democratic minimum core': (i) commitments to free and fair, regular multi-party elections; (ii) political rights and freedoms; and (iii) a system of institutional checks and balances necessary to maintain (i) and (ii). Moreover, we suggest that this third prong of the democratic minimum core is at very real risk in Israel: recent changes in Israel may already threaten the institutional checks and balances necessary to maintain other core elements of a constitutional democracy, and have the potential to do more damage in the future if given broad effect and if combined with further legislative change in the power and independence of the Court. Any change in judicial power and independence must also be assessed against the benchmark of the democratic minimum core, and by reference to its *cumulative* practical effect.

On this basis, we suggest, the relevant changes should be viewed as either 'abusive' or 'proto-abusive' in nature.[9] By threatening to undermine both the power and independence of the Court, they directly threaten the health of a system of constitutional checks and balances and, hence, the 'democratic minimum core' in Israel.

The harder question is what, if anything, the Supreme Court and civil society could and should do to prevent this form of abusive or proto-abusive constitutional change.[10] To say that presidential or judicial intervention is conceptually justified is not to say that it should occur in practice. It is simply to show there is a principled argument for intervention – if and when it should be deemed prudentially wise, in the ever-shifting conditions of constitutional politics in Israel.

This article is divided into three parts. Section 2 offers a brief history of the power and independence of the Supreme Court, and recent attacks on it. Section 3 proposes a standard for judging these proposed changes and their

[8] Anat Rosenberg and others, 'A Broad Analysis: The Argumentative Structures of the Judicial Overhaul Spokespersons', Israeli Law Professors' Forum for Democracy, 2023 (in Hebrew) (copy with authors). For the argument why judicial reform is needed in Israel, see Yechiel Oren-Harush, 'The Case for Israel's Judicial Reform' (2023) *Hashiloach*, https://hashiloach.org.il/the-case-for-the-judicial-reform-en (in Hebrew).

[9] David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 89; Rosalind Dixon and David E Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

[10] Landau (n 9).

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relationship with democratic constitutional commitments, based on the idea of the 'democratic minimum core'. Section 4 concludes by considering what, if anything, the Court and civil society can do to stem this kind of attack on the democratic minimum core.

2. Proposals for judicial 'reform' in Israel

The proposed 'reform' was introduced by Justice Minister Yariv Levin during a special press conference on 4 January 2023. Levin put forward a package of 'legal reforms', which he stated would be the first in a series of planned packages. The first step alone included the following package.[11]

First, limiting the Supreme Court's authority of judicial review. Nowadays, in a diffused manner, every court in the country can engage in judicial review over executive and legislative action. If a law violates the Basic Laws, the courts may declare it unconstitutional. Levin proposed that judicial review would be centralised in the Supreme Court, which would be able to invalidate a law only by a decision of the full bench of 15 Supreme Court Justices, and only by a super-majority of 12. Such a super-majority requirement would severely undermine the effectiveness of constitutional review.

Second, Levin proposed removing the authority of the courts to review the Basic Laws, which in Israel have constitutional status. The Basic Laws function as the Constitution; yet, they are also subject to judicial review. According to the Court's jurisprudence, Basic Laws cannot violate the core values of the state as a Jewish and democratic state; nor can they be abused for personal or temporary matters, without justification.[12] According to the proposal, Basic Laws will no longer be subject to judicial review. This proposal is extremely problematic because Basic Laws are flexible and may be enacted or amended by an ordinary majority in parliament (other than in some exceptional situations) in a single day. Since 1958, when the first Basic Law was enacted, Israel has had 140 constitutional changes (that is, new Basic Laws adopted and existing Basic Laws amended). Providing complete immunity from judicial review by merely entitling a law 'Basic Law' seems incompatible with modern principles of constitutionalism.

Third, Levin proposed enacting an override clause. According to this proposal, an override clause would be enacted that will allow a majority of Knesset members – 61 out of 120 – to override a decision of a court that a law is unconstitutional (according to one proposal, even in advance) and re-enact the law notwithstanding its unconstitutionality. This proposal needs

[11] On super-majority requirements of judicial review see Cristobal Caviedes, 'Is Majority Rule Justified in Constitutional Adjudication?' (2021) 41 *Oxford Journal of Legal Studies* 376; Cristobal Caviedes, 'A Core Case for Supermajority Rules in Constitutional Adjudication' (2022) 20 *International Journal of Constitutional Law* 1162; Mauro Arturo Rivera Leon, 'Judicial Review of Supermajority Rules Governing Court's Own Decision-Making: A Comparative Analysis' (2023) *Global Constitutionalism* (forthcoming), doi: 10.1017/s2045381723000047.

[12] Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21 *European Journal of Law Reform* 403.

to be considered along with the proposal requiring a super-majority of the Court for invalidation of a law on the basis of unconstitutionality. Given that under the constitutional system in Israel the government enjoys a parliamentary majority, allowing a majority of parliament members to override a judicial decision would put at risk fundamental rights and freedoms and would grant the executive absolute powers.

A fourth element in Levin's proposal is to abolish the reasonableness standard in judicial review of administrative action. According to existing jurisprudence, the Israeli Supreme Court applies a broad standard of reasonableness in examining all administrative actions. This standard of review requires all administrative bodies or officials to take into account the relevant considerations in their decision making and to balance properly between them. It provides the Court with a large place for intervention, although the Court grants the executive a broad margin of appreciation and, in practice, intervenes only in extreme cases. What seems to worry the executive is the Court's relatively unique intervention in appointments, for example of ministers, based on this standard of review.[13]

A fifth element is the modification of the manner by which judges are selected. In Israel selection is made by a committee of nine members: three Supreme Court judges, two ministers, two members of the Knesset, and two members of the Israeli Bar Association. A decision to select a candidate for the Supreme Court requires a special majority of 7 out of 9. This gives the legislature and the judges effective veto powers, which, in turn, requires them to reach agreement on candidates. The proposal seeks to change the system to one in which the parliamentary coalition (controlled, as noted, by the government) would control the appointment of judges (this was later reduced to the appointment of 'only' two judges).[14]

Sixth, and finally, the proposal aimed to revamp the process for appointing government and ministerial legal advisers – from an independent committee to a personal appointment process, while reducing their legal authority from binding to non-binding advice.[15]

[13] For a critical perspective on this role of the Court see Yoav Dotan, 'Impeachment by Judicial Review: Israel's Off System of Checks and Balances' (2018) 19 *Theoretical Inquiries in Law* 705.

[14] Eliav Breuer, 'Will the Knesset Be Back to Judicial Reform Mayhem Post-Recess?', *The Jerusalem Post*, 8 April 2023, https://www.jpost.com/israel-news/politics-and-diplomacy/article-738616.

[15] According to the prevailing approach in Israeli jurisprudence, the opinion of the legal adviser reflects, for the ministry, the legal situation. As stipulated in the instructions of the Attorney General, '[t]he opinion of the legal adviser to a government ministry on a legal question determines, from the point of view of all the officials of the ministry, the existing legal situation regarding it, and that is as long as it is not ruled otherwise by a court' (Guideline 9.1000). This is subject to the possibility of the senior echelon in the ministry contacting the Attorney General to decide in cases of disputes, because his opinion on legal issues is binding on the government and its authorities for as long as the Court has not ruled otherwise. This authority of the government legal advisers seems strong in a comparative perspective; see, eg, Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law' (2022) 20 *International Journal of Constitutional Law* 664.

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3. Judging constitutional abuse: The idea of the democratic minimum core

So far, the only 'reform' to have passed the Knesset is the constitutional amendment to Basic Law: The Judiciary, limiting the power of the Supreme Court to engage in certain forms of review based on reasonableness. According to this brief reform, 'no court of law may consider or pass judgment on the reasonableness of any "decision" of the Cabinet, the Prime Minister or any minister; nor may a court give an order on the said matter based on its purported unreasonableness'. The amendment defines 'decision' as 'any decision – including in matters relating to appointments, or a decision to avoid exercising any authority'.[16]

This reform has also been labelled by the government as a 'minor correction' to the Court's previous overreach, or a rebalancing between the Court and the political branches of government.[17] The government has also labelled it 'Sohlberg's Proposal', named after Supreme Court Judge Noam Sohlberg who, in a 2019 article, suggested that the reasonableness test should apply to the bureaucracy but not to elected bodies such as ministers and the cabinet.[18] The problem is that according to Basic Law: The Government, a minister can arrogate to him or herself any decision belonging to the administration subordinated to him or her. In fact, Sohlberg's article did not suggest a modification through legislation but intended a change in the case law by the judiciary. This is an important distinction for the separation of powers and judicial independence. Just before the passing of the legislation, and in an unusual manner, Judge Sohlberg himself issued a statement according to which in his article he did not mean legislative change.[19]

Changes in the power and independence of the courts, however, must be assessed with two related ideas in mind. First, such changes should be examined in aggregate, not merely in isolation; second, the effect of such changes should be examined by reference to their impact on the 'democratic minimum core'.

[16] The Israeli Law Professors' Forum for Democracy, 'Israel's Recent "Unreasonableness Amendment" and Its Implications', 29 July 2023, https://www.lawprofsforum.org/post/israel-s-recent-unreasonableness-amendment-and-its-implications.

[17] Amir Tibon and Ben Samuels, 'Netanyahu Warns He Could Ignore Supreme Court if Reasonableness Clause Reinstated', *Haaretz*, 27 July 2023, https://www.haaretz.com/israel-news/2023-07-27/ty-article/netanyahu-says-scrapping-reasonableness-clause-minor-correction-in-abc-news-interview/00000189-9773-d5eb-abcb-fff76d510000; Luke Tress and TOI Staff, 'Netanyahu Tells US Media New Judicial Law Is "Minor," Democracy Fears Are "Silly"', *The Times of Israel*, 27 July 2023, https://www.timesofisrael.com/netanyahu-tells-us-media-new-judicial-law-is-minor-democracy-fears-are-silly

[18] Noam Sohlberg, 'On Subjective Values and Objective Judges' (2020) 18 *Hashiloach* 37 (in Hebrew).

[19] Jeremy Sharon, 'Judge Who "Inspired" Reasonableness Bill Says He Didn't Intend Legislative Changes', *The Times of Israel*, 17 July 2023, https://www.timesofisrael.com/judge-who-inspired-reasonableness-bill-says-he-didnt-intend-legislative-changes.

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3.1. Cumulative change and the 'Frankenstate' problem

Especially in common law systems, lawyers are accustomed to viewing legal changes in isolation – that is, considering each and every piece of legislation on its own terms, separate from how the legal system operates overall. There are numerous reasons for this: an approach of this kind creates the time and institutional space for careful and detailed consideration of each piece of legislation. It is also consistent with traditional adversarial norms of concrete judicial review.

There are, however, dangers in this disaggregated approach to judging the effects of legislative change: it is readily susceptible to abuse or manipulation by would-be authoritarian actors seeking to evade judicial review of their actions, and yet still pass a package of legal changes that effectively undermine democracy and the rule of law.[20]

This strategy has become commonplace among modern 'stealth' authoritarians:[21] in India, for instance, Tarun Khaitan suggests that the Modi government has deliberately adopted a series of piecemeal changes to constitutional and legal norms designed to fly under the radar of the Supreme Court and international actors, but at the same time undermine long-standing commitments to democratic constitutionalism in India. Hence, Khaitan suggests, constitutional democracy in India is suffering from death 'by a thousand cuts'.[22]

Wojciech Sadurski has described in length how constitutional democracy collapsed in Poland. Sadurski writes that it is difficult to point to a specific moment in time or to an event that was the tipping point: no new law, decision or change seemed worthy of crying wolf; and only in retrospect was it understood that the line between a liberal and a fake democracy had been crossed.[23]

Kim Lane Scheppele similarly argues that in Hungary the Orbán government has adopted a series of constitutional and legislative changes that, if viewed in isolation, might be defensible but interact to produce a form of constitutional 'Frankenstate': combining the worst elements of other constitutional democracies, and in ways that combine to produce serious damage to democratic constitutional norms.[24]

Indeed, a central element in the process of democratic erosion is incrementalism made up of small steps which are hardly a frontal assault on the basic principles of liberal democracy. When each is examined in isolation, it is

[20] On the need for developing an aggregated judicial review of constitutional amendments see 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 and Santiago Garcia-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021) 147.

[21] Ozan O Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa Law Review* 1673.

[22] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party State Fusion in India' (2020) 14 *Law & Ethics of Human Rights* 49. For different types of abusive borrowing see Alvin YH Cheung, 'Legal Gaslighting' (2022) 72 *University of Toronto Law Journal* 50.

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

[24] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 552, 560.

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difficult to say it constitutes 'the end of democracy'. Yet, when the various means are examined cumulatively, in aggregated form, the whole is greater than the sum of its parts.[25]

In Israel, this suggests that it is important to view the current changes in the Court's powers of review cumulatively, and in conjunction with current constitutional controversies and any further reforms the government may attempt to pass: even if the current law can be defended in isolation, its effect must be assessed against the backdrop of a government facing credible corruption charges, and the role of reasonableness-based review as a response to government corruption.[26]

Furthermore, even if the current law were to be upheld as consistent with democracy, it may later come to be inconsistent – simply because it coexists with and interacts with other legislative changes that limit the power and independence of the Court.

3.2. Changes to core versus non-core institutional arrangements

An independent court, with power to engage in some form of judicial review, is an essential component of a well-functioning constitutional democracy. Indeed, it is part of what two of the authors (Dixon and Landau) elsewhere have called the 'democratic minimum core'.

Countries can and do vary in how much power they allocate to courts, as compared with the political branches of government or other, independent 'fourth branch' institutions.[27] There is also a legitimate debate over the merits of legal versus political models of constitutionalism.[28] However, a key component of any truly democratic constitutional system is a meaningful set of institutional checks and balances on the exercise of legislative and executive power; and courts are an integral part of that system, at least in respect of controls over the executive branch.

Democracy itself is a notoriously contested idea, which permits of broader and narrow interpretations. Some notions of democracy emphasise rights and deliberation, whereas others emphasise more proceduralised commitments to free and fair elections. However, constitutional and political theorists also clearly agree on the existence of certain *necessary* (if not sufficient) conditions for the creation and preservation of constitutional democracy. These

[25] Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (Chicago University Press 2018) 45, 90–91.

[26] On the relationship between corruption and populist erosion of democracy see Samuel Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press 2023) 112–19.

[27] Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press 2021).

[28] See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346; Richard H Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review* 1693; Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38 *Cardozo Law Review* 2193; Yaniv Roznai, 'Waldron in Jerusalem' (2020) 44 *Tel Aviv University Law Review Forum* 1 (in Hebrew).

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conditions also include a system of: (i) multi-party, free and fair, regular elections; (ii) political rights and freedoms; and (iii) institutional checks and balances.[29]

This overlapping consensus among constitutional and political theorists is also the key basis of Dixon and Landau's concept of the 'democratic minimum core'. However, the idea of the democratic minimum core also draws on an actual overlapping consensus among constitutional democracies worldwide as to what democracy requires in practice to survive.

As prior work has shown, comparative constitutional practice can point towards a shared understanding of certain moral and political commitments in ways that offer epistemic insights.[30] One version of this kind of 'moral cosmopolitan' comparison involves deliberation – that is, the idea that ideas deliberated and debated among nations are more likely to reflect universal principles of democracy and human rights than those identified by a single country in isolation.[31] Jeremy Waldron calls this the idea of the *ius gentium*.[32] Another conception of moral cosmopolitan comparison, however, is more statistical or aggregative in nature. Drawing on the notion of the law of large numbers, or Condorcet's jury theorem, this idea of comparison is that where practices are widely adopted across countries, and countries decide on these questions at least semi-independently, the fact of the diffusion of a practice is itself indicative of its epistemic value.[33]

We thus draw on this notion of moral cosmopolitan comparison to anchor the idea of the democratic minimum core. Comparison of this kind also reinforces the importance of: (i) multi-party, free and fair, regular elections; (ii) 400 political rights and freedoms; and (iii) institutional checks and balances, as essential parts of the democratic minimum core.

The Copenhagen Principles, for example, embody principles identified by the European Union (EU) as common to member states, and foundational for what the EU requires for membership. They also closely align with our understanding of the democratic minimum core: they require states to maintain the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities', in addition to market-based principles and the aims of political, economic and monetary union.[34] The African Union adopts similar principles that emphasise 'respect for democratic principles, human rights, the rule of law and good governance'.[35]

[29] Dixon and Landau (n 9) 20.

[30] Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56 *American Journal of Comparative Law* 947, 949.

[31] Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 *Harvard Law Review* 129, 132–37.

[32] ibid 132.

[33] Eric A Posner and Cass R Sunstein, 'The Law of Other States' (2006) 59 *Stanford Law Review* 131, 142–43.

[34] 'Accession Criteria (Copenhagen Criteria)', https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html.

[35] 'Objectives and Principles of the African Union', https://www.abyssinialaw.com/study-online/367-african-union-law/7266-objectives-and-principles-of-the-african-union.

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Admittedly, any form of comparison raises its own methodological challenges, one of which is to determine the appropriate denominator for comparison. What counts as a sufficiently democratic country for these purposes? Are there regional or historical specificities to a country's constitutional arrangements that mean that only certain countries should be included in defining a *regionally or contextually specific* democratic minimum core?[36] Presidential systems, for example, may have peculiarities that require a somewhat contextually specific minimum core: for example, they may have a greater history of executive aggrandisement and dictatorship that make presidential term limits, or limits on power, a contextually specific requirement of any more general notion of institutional checks and balances.[37]

In Israel, as some commentary has pointed out, the political system places relatively few checks on the power of the Knesset.[38] Israel is a unitary state, without strong subnational units of government. It also lacks some of the other checking or accountability institutions found in some other democracies. Finally, the Israeli Basic Laws themselves are entrenched only to a relatively weak degree. In this context, it could be argued that one should be particularly concerned about attempts to weaken the Supreme Court, because those moves might eliminate essentially all checks on the power of majority coalitions.[39]

A related challenge is determining the appropriate level of generality at which constitutional practices should be characterised: the more general the level at which practices are characterised, the more commonality among countries there is likely to be; whereas the more concrete or specific the characterisation, the more likely it is there will be variation among countries, and hence no clear sense of a shared 'minimum core'.

Even with these caveats, however, the idea of the democratic minimum core can help to anchor judgments about the kinds of legislative and constitutional change that count as a clear and present danger to democracy against those likely to have a lesser immediate impact on the health of a democratic constitutional system.

3.3. Abusive or proto-abusive change

The notion of a 'democratic minimum core' can usefully be connected to the idea of abusive or 'proto-abusive' constitutional change.[40] Abusive constitutional change can itself be understood in a stronger or weaker sense. The

[36] Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *International Journal of Constitutional Law* 606, 634.

[37] David Landau, Yaniv Roznai and Rosalind Dixon, 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' in Alexander Baturo and Robert Elgie (eds), *Politics of Presidential Term Limits* (Oxford University Press 2019) 53, 57.

[38] 'The Overhaul of Israel's Judiciary Will Maim Its Democracy, Says Polly Bronstein', *The Economist*, 14 February 2023, https://www.economist.com/by-invitation/2023/02/14/the-overhaul-of-israels-judiciary-will-maim-its-democracy-says-polly-bronstein.

[39] Cohen and Roznai (n 3).

[40] Landau (n 9); Dixon and Landau (n 9).

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strongest sense involves the conscious or intentional erosion of the democratic minimum core by would-be authoritarian actors, and the ability of observers to prove intentional degradation or erosion of this kind.[41] The weaker understanding focuses simply on effects, or on measures that have an adverse impact on the democratic minimum core.

The distinction is clearly one of degree: the effect of a law may itself be prima facie evidence of the intent behind it, in which case the weaker and stronger versions of abusive constitutionalism tend to blur into one another, but the effect itself may also be a stand-alone yardstick for measuring abusive constitutional change.

This continuum suggests two ways of approaching recent 'judicial reform' efforts by the government. One approach invites attention to the intentions of the Prime Minister and his government, and whether they in fact intend to 'rebalance' judicial and legislative-executive power, or rather insulate themselves from judicial oversight in the context of allegations of corruption and other misconduct.[42]

The other approach focuses purely on the effects of the current, and potential future, proposed reforms. Hence, the analysis depends squarely on how one interprets the effect of the current legislation limiting the Court's power to engage in review of reasonableness. If one views the law as a complete ban on any form of review of reasonableness, rationality or arbitrariness, it could be viewed as a significant erosion of the institutional checks and balances on executive power – an erosion of the democratic minimum core. Conversely, if one views the current legislation as precluding only some forms of review of this kind (i.e., robust forms of proportionality-style, reasonableness review), and not others (such as more classic *Wednesbury*-style unreasonableness or irrationality review[43]), it could be considered a less immediate threat to the democratic minimum core.

The difference between clear and immediate, and possible longer-term threats could also be viewed as a difference between full-scale abusive and proto-abusive constitutional change.[44] Abusive change has a clear and immediate adverse impact on the health of the democratic minimum core, whereas proto-abusive change poses a longer term, and/or less certain risk to the same core set of democratic constitutional rights and institutions.

[41] Dixon and Landau (n 9) 28.

[42] In that respect, Roznai and Cohen (n 3) argue that early signals of the activities taken by the new government in Israel raise concerns that the main purpose of the government is not to 'rebalance' but rather to remove limitations on governmental power, referring to the coalition's lack of hesitation to use power to make changes even to the rules of the game, and even change them retroactively and for personal gains.

[43] Eric C Ip, 'Taking a "Hard Look" at "Irrationality": Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) 34 *Oxford Journal of Legal Studies* 481, 482.

[44] Dixon and Landau (n 9) 201.

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4. Conclusion: Proto-abusive change and the protection of democracy

There are three potential future paths for judicial 'reform' in Israel: one that involves a retreat by the government or acceptance of Court decisions to invalidate the government's measures. The Court, for instance, could decide that the existing reforms are invalid, or constitute an 'unconstitutional constitutional amendment'.[45] Alternatively, the Court could instead conclude (as noted in Section 3) that the measures must be interpreted narrowly so as not to preclude related forms of arbitrariness or rationality review, thus limiting their effect.[46]

A second option is that the existing reforms take effect, but the government makes no further attempt to alter the power and jurisdiction, or independence, of the Court. A third option is that the government continues to press for a much wider range of changes to the independence and power of the Supreme Court.

The third path seems like a realistic risk: ministers and members of the coalition have suggested that the first amendment that was passed is simply the *amuse-bouche*, which would increase the appetite for further steps towards erosion of judicial independence.[47]

The key question raised by these declarations is what, if anything, can be done to halt such a path towards democratic erosion, or abusive constitutional change.

Public protest is one important response: the large-scale protests that have occurred in Israel over recent months have clearly raised the costs of change of this kind for government. So too has the opposition of key elite players, such as the Israeli military. Opposition has served as both a valuable form of 'speed bump' and deterrent.[48] It has slowed down efforts by the government to remove reasonableness-based review as a tool for protecting democratic constitutional norms. It has also arguably deterred, or at least slowed down, further efforts to undermine judicial power and independence.

Hard questions remain, though, about how institutional players – such as the President and the Court itself – should respond. The same goes for Israel's international allies.[49] It is clearly legally open to the Court to strike down the existing reforms as in breach of some kind of implied 'basic

[45] For a comparative study of this idea see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

[46] For the radical 'reading down' of attempts to limit court jurisdiction in a comparative context see, eg, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; see, eg, Philip Murray, 'Reconsidering Ouster Clauses: The High Court's Decision in Oceana', *UK Constitutional Law Blog*, 5 July 2023, https://ukconstitutionallaw.org.

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

[48] Dixon and Landau (n 36) 613. See also Bojan Bugaric, 'Can Law Protect Democracy? Legal Institutions as "Speed Bumps"' (2019) 11 *Hague Journal on the Rule of Law* 447, 449; Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020–21) 29 *William & Mary Bill of Rights Journal* 327, 341.

[49] On his failing popularity, though still with plurality support, see, eg, Maayan Lubell, 'Israel's Netanyahu Down in Polls over Judicial Reform', *Reuters*, 26 July 2023, https://www.reuters.com/world/middle-east/israels-netanyahu-down-polls-over-judicial-reform-2023-07-26.

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structure' or unconstitutional constitutional amendment doctrine.[50] Taking this approach would also have the advantage of calling the changes out for what they are – abusive or proto-abusive in nature. However, such judicial involvement might be criticised as self-dealing – that is, as involving the doctrine of unconstitutional constitutional amendments being applied in order to preserve the Court's powers. Such a strategic use of the doctrine to protect judicial independence can be defensible in fragile democracies, particularly where judicial independence has been under serious threat from the executive.[51]

Alternatively, the Court could use deferral techniques to avoid these questions.[52] Doing so would avoid the risk of immediate conflict with the government, and the hope would be that by the time it did confront the issue, the Prime Minister's popularity would have fallen – to a point where he no longer commanded plurality public support. In this sense, an approach of this kind would allow both the Court and Israeli democracy to 'live to fight another day'.[53]

Both paths carry risks. If the Supreme Court directly confronts the current abusive or proto-abusive reform efforts, it may simply end up mobilising the government and its supporters to go further in enacting a raft of squarely abusive constitutional changes. Yet, if it bides its time, there is the danger that judicial power and independence will have already been weakened to the point that the Court is no longer able to stymie full-blown forms of abusive constitutional change.[54] How this dilemma is to be resolved is a question we leave for another day. In this article we simply note it as the dilemma raised by an appreciation of abusive or proto-abusive constitutional change in Israel.

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[50] On these doctrines see generally Navot and Roznai (n 12); Roznai (n 45); Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321.

[51] Po Jen Yap and Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19 *International Journal of Constitutional Law* 127, 142.

[52] Erin F Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 *Duke Law Journal* 1.

[53] Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) *Wisconsin Law Review* 683, 689.

[54] This, for example, is arguably what happened in the early stages of abusive constitutional change targeting the judiciary in Poland: Christian Davies and Jennifer Rankin, '"Declaration of War": Polish Row over Judicial Independence Escalates', *The Guardian*, 24 January 2020, https://www.theguardian.com/world/2020/jan/24/declaration-of-war-polish-row-over-judicial-independence-escalates; John Macy and Allyson K Duncan, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale' (2020–21) 104(3) *Judicature International*, https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale.

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