

Introduction

In early January 2023, the Israeli government unveiled a broad plan for a ‘reform’ of the legal system in Israel, which would have a profound impact on the constitutional and democratic make-up of the country. This proposal sparked a heated controversy, expressed in all areas of public debate – in the halls of political and governmental institutions, in legal and academic fora, in the media, and also in the streets on an unprecedented scale.

This special issue of the *Israel Law Review* brings together 16 articles by leading constitutional law experts from Israel and abroad, dedicated to a discussion of the constitutional crisis in Israel, and the government’s efforts to overhaul the country’s judicial system and its relations with the other branches of government. Collectively, the articles provide in-depth perspectives on key aspects of the crisis, the goals and potential consequences of the government initiatives, and the constitutional debate around them. These issues are also of much relevance to other countries facing judicial overhaul initiatives and democratic backsliding, as evidenced by the comparative perspectives of many of the articles in this special issue.

At the time of writing, several components of the government plan have already been legislated, including far-reaching restrictions on judicial review of legislation and executive actions, and these are being contested before the Supreme Court. Formal initiatives to advance additional key elements of the ‘reform’ have largely been put on hold in the wake of the Hamas massacre in Israel’s southern towns and villages on 7 October 2023 and the subsequent war – but the project has not been retracted, and some elements are being implemented in practice. The many issues raised by the government proposals remain as salient and consequential as ever – indeed, if anything, the armed conflict and the many public law questions it raises only underscore the significance of the proposed changes.

The special issue opens with ‘Judicial Reform or Abusive Constitutionalism in Israel’ by Yaniv Roznai, Rosalind Dixon and David E Landau. The article assesses the constitutional reform in Israel in comparative terms, and argues that by threatening to undermine both the power and independence of the Supreme Court of Israel, it directly threatens the health of the institutional checks and balances system that is essential for the preservation in Israel of a ‘democratic minimum core’.

In ‘The Two Revolutions of Israel’s National Identity’, Barak Medina and Ofra Bloch argue that the judicial overhaul, designed to weaken the judiciary and unleash governmental power from its structural checks, is part of a deeper transformation of Israel’s constitutional identity. At its core, this transformation questions Israel’s commitment to the principle of equal citizenship,

mainly regarding the permissibility of preferring the interests of Jews over those of non-Jews.

Daniel Friedmann's 'Politics in Legal Disguise' examines how the fluctuation in the political support of the Supreme Court affects its decisions. It argues that loss of public confidence in the political institutions in the 1970s enabled the Supreme Court to carry out a judicial revolution, which entered a new stage when the Court later held that the Basic Laws form part of Israel's constitution, opening the way for judicial review of legislation. The present government's legal reforms are, in effect, a counter-revolution to this judicial revolution.

In 'Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness', Mordechai Kremnitzer examines the recent amendment to the Basic Law: The Judiciary, which eliminates the ability of the courts to issue an injunction against the government or any of its ministers based on the reasonableness of their decisions. The author concludes that the amendment undermines basic features of democracy, fractures the social contract between the citizens and the government, and should not be immune from judicial review.

'Constitutionalising Israel's Constitutional System' by Manal Totry-Jubran explores whether Israel is experiencing a 'constitutional moment' and what such a moment entails, taking into account the intricate social, legal and political reality of the country.

Iddo Porat's 'Political Polarisation and the Constitutional Crisis in Israel' argues that the high level of polarisation in Israeli society is intertwined with the processes that led to the current constitutional crisis, and the fact that the current crisis appears to be so intense and intractable can be explained by the dramatic rise in polarisation that preceded it.

Tom Ginsburg, in 'The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective', uses a comparative anti-corruption lens to examine the possibility that the decades-long institutionalisation of anti-corruption efforts in the Israeli legal system is a particularly powerful motivator for the current governing coalition's efforts to assert more control over the Supreme Court.

In 'The "Constitutional Reform" and the Occupation', David Kretzmer discusses the connection between various elements of the reform and the plans to make a radical change in Israel's policies in the occupied West Bank. The author argues that a key driver of the attempt to change the constitutional system and the composition of the Supreme Court is the determination of important actors in the current government to adopt policies in the West Bank that are otherwise unlikely to stand up to judicial review.

Tamar Hostovsky Brandes, in 'The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?', argues that Israel's current form of control of the West Bank and its commitment to the settlement project hinder the political feasibility of the enactment of a constitution, as that control depends on the ambiguity of the Israeli constitutional framework and on fragmentation of the normative framework.

'Is There a "Constitutional Moment" in Israel and Hungary?', by Gábor Halmai, addresses the concept of 'constitutional moment' in contemporary Israel, where an illiberal constitutionalisation process is in progress, and in Hungary, where the illiberal constitutional system has been in place since 2010.

Joshua Segev's 'Reforming the Israeli High Court of Justice: Proposed versus Desirable' discusses four structural problems in the operation of the Israeli High Court of Justice, which have contributed significantly to the Court's current legitimacy crisis: fact-finding, panel composition, standing, and judicial selection. The author examines the government reform in relation to these structural problems and proposes practical solutions for each of the problems.

Guy Lurie, in 'The Attempt to Capture the Courts in Israel', looks at one of the key elements of the government's legislative agenda – its proposed change to the system of selecting judges to all courts in Israel – arguing that it would grant the government complete control over judicial selection and promotion, replacing considerations of professional merit with considerations of loyalty to elected officials.


'Reflections on Constitutional Adjudication in a Democracy', by Andreas Paulus, examines the necessity for constitutional adjudication as a necessary component of a constitutional democracy, to preserve self-government and individual rights as a pre-condition for the acceptance of majority decisions by the minority.

Suzie Navot's 'An Overview of Israel's "Judicial Overhaul": Small Parts of a Big Populist Picture' argues that it is difficult to find an example of a single constitutional event that undermines the basic principles of democracy. Democracies nowadays deteriorate in a slow and gradual process, when each of the anti-democratic measures that are passed is not in itself fatal to democracy, but the whole series of legal moves brings about a fundamental change in the state's regime until it is no longer a liberal democracy.

In 'Populist Constitutionalism and the Judicial Overhaul in Israel', Yaniv Roznai and Amichai Cohen argue that the judicial overhaul must be analysed as a populist constitutional project, and that understanding how Israeli democracy is especially vulnerable to populism – because of its unique institutional design factors coupled with social factors – is crucial in order to grasp the risks that the judicial overhaul poses to Israeli democracy.

This issue concludes with Yoav Dotan's 'Israel's Constitutional Moment'. The author argues that the core of Israel's constitutional structure has always been the institutions of administrative law as created and developed during the 'administrative revolution' of the 1980s, and that the 'constitutional revolution' of the mid-1990s has not changed this core structure. Israel remains a monistic democracy with no true constitutional layer of norms that enjoy higher status vis-à-vis regular legislation.

We wish you all an enlightening read.

Professor Malcolm N Shaw KC
 Professor Yuval Shany
Editors-in-Chief
 Professor Yaël Ronen 
Academic Editor