Judicial Reform or Abusive Constitutionalism in Israel

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Abstract: How should the constitutional reform in Israel be assessed in comparative terms? After all, constitutional systems worldwide adopt a variety of different approaches to the design of judicial systems. In this essay we suggest that comparative constitutional understandings point to the centrality of three key sets of norms as part of the "democratic minimum core": (1) commitments to free and fair, regular, multi-party elections; (2) political rights and freedoms and (3) a system of institutional checks and balances necessary to maintain (1) and (2). Any change to 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 to 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.

I 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 basic laws themselves.[2] A powerful judiciary, it was argued, was necessary in light of the strengthening of the executive vis-à-vis the legislature in 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] And the Netanyahu government has floated a much wider

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[1] See Rosalind Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' 59(2) (2021) Columbia Journal of Transnational Law 298.

[2] Yaniv Roznai, *Constitutional Review – Development, Models and a Proposal for Anchoring Judicial Review in Israel* (IDI, 2021) [Hebrew].

[3] Yaniv Roznai & Amichai Cohen, 'Populist Constitutionalism and The Judicial Overhaul in Israel (under review). See also Amichai Cohen & Yaniv Roznai, 'Populism and Constitutional Democracy in Israel' (2021) Tel Aviv University Law Review 87 [Hebrew].

[4] Aeyal Gross, 'An Unreasonable Amendment' VerfBlog (July 24, 2023).

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]

Yet how should we think about these changes in comparative terms? Constitutional systems worldwide adopt a variety of different 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 to 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": (1) commitments to free and fair, regular, multi-party elections; (2) political rights and freedoms and (3) a system of institutional checks and balances necessary to maintain (1) and (2). 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 to the power and independence of the Court. Any change to 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

[5] David Kretzmer, 'Israel's political and constitutional crisis' IACL-AIDC Blog (December 23, 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 (Jan. 19, 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 (March 31, 2023), https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel/; Alon Harel, 'The Proposed Constitutional Putsch in Israel' VerfBlog (March 14, 2023), https://verfassungsblog.de/the-proposed-constitutional-putsch-in-israel/

[6] Aaron David Miller, 'Netanyahu Faces His Own "Israeli Spring"' Foreign Policy (February 23, 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' Wall Street Journal (July 26, 2023), https://www.wsj.com/articles/israel-protests-judicial-overhaul-netanyahu-7e264a71

[8] Anat Rosenberg, Eliav Lieblich, Tomer Shadmi, and Doreen Lustig, 'A broad Analysis: The argumentative Structures of the Judicial Overhaul Spokespersons' (The Israeli Law Professors Forum for Democracy, 2023) [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/

[9] David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis Law Review 89. See also Rosalind Dixon & David E. Landau *Abusive Constitutional Borrowing - Legal globalization and the subversion of liberal democracy* (Oxford University Press, 2021).

[10] Landau, id.

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 essay is divided into three parts. Part II offers a brief history of the power and independence of the Supreme Court, and recent attacks on it. Part III proposes a standard for judging these proposed changes and their relationship to democratic constitutional commitments, based on the idea of the "democratic minimum core". Part IV concludes by considering what if anything the Court and civil society can do to stem this kind of attack on the democratic minimum core.

II 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:

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 d 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.[11]

Second, Levin proposed removing the authority of the courts to review basic laws. In Israel, basic laws have a constitutional status. They 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 matter, 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 that was enacted, Israel has had 140 constitutional changes (i.e. 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 the 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 to be considered along with the proposal requiring a supermajority 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.

[11] On super-majority requirements of judicial review, see Cristobal Caviedes, 'Is Majority Rules 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(3) International Journal of Constitutional Law 1162; Mauro Arturo Rivera Leon, 'Judicial Review of Supermajority Rules Governing Court's Own Decision-Making: A Comparative Analysis' (first view, 2023) Global Constitutionalism.

[12] Suzie Navot & Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) Eeuropean Journal of Law Reform 403.

A fourth element in Levin's proposal is to abolish the reasonableness standard in judicial review of administrative action. According to the existing jurisprudence, the Israeli Supreme Court applies a broad standard of reasonableness to examine all administrative actions. This standard of review requires all administrative bodies or officials to consider 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 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, judges are selected by the committee of nine members: three supreme court judges, two ministers, two Knesset Members, and two members of the Israeli bas 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 to an 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 advisors – from an independent committee to a personal appointment process, while reducing their legal authority from binding to non-binding advice.[15]

III Judging Constitutional Abuse: The Idea of the Democratic Minimum Core

So far, the only "reform" to pass the Knesset is the constitutional amendment to Basic Law: The Judiciary, limiting the power of the Supreme Court to engage in certain forms of reasonableness-based review. 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 over-reach, or a rebalancing between the Court and the political branches of government.[17] The

[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(2) Theoretical Inquiries in Law 705.

[14] Eliav Breuer, 'Will the Knesset be back to judicial reform mayhem post-recess?' 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 advisor reflects, for the ministry, the legal situation. As stipulated in the instructions of the Attorney General, "the 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 to contact the Attorney General to decide in cases of disputes, because his opinion on legal issues is binding on the government and its authorities as long as the court has not ruled otherwise. This authority of the government legal advisors seems strong in a comparative perspective. See eg Conor Casey & David Kenny, 'The Gatekeepers: Executive Lawyers and The Executive Power in Comparative Constitutional Law' (2022) 20(2) International Journal of Constitutional Law 664.

[16] The Israeli Law Professor's Forum for Democracy, 'Israel's Recent "Unreasonableness Amendment" and its Implications' (29.7.2023).

[17] Amir Tibon & Ben Samuels, 'Netanyahu Warns He Could Ignore Supreme Court if Reasonableness Clause Reinstated' Haaretz (July 27, 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 & TOI Staff, 'Netanyahu tells US media new judicial law is "minor," democracy fears are "silly" Times of Israel (July 27, 2023), https://www.timesofisrael.com/netanyahu-tells-us-media-new-judicial-law-is-minor-democracy-fears-are-silly/

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 the 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 in through legislation but meant a change in the case law by the judges. 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 a legislative change.[19]

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

A 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, detailed consideration of each piece of legislation on its own terms. It is also consistent with traditional adversarial norms of concrete judicial review.

There are, however, dangers to 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 undermine longstanding 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 to cry wolf. And only in retrospect it was understood that the border line between a liberal democracy and a fake one has been crossed.[23]

In Hungary, Kim Lane Scheppele likewise argues that the Orban government has adopted a series of constitutional and legislative changes that if viewed in isolation might be defensible, but interact to

[18] Noam Sohlberg, 'On Subjective Values and Objective Judges', 18 Hashiloach 37 (2020), https://hashiloach.org.il/wp-content/uploads/2020/01/hashiloach-18print.pdf [Hebrew].
[19] Jeremy Sharon, 'Judge who "inspired" reasonableness bill says he didn't intend legislative changes' Times of Israel (July 17, 2023), https://www.timesofisrael.com/judge-who-inspired-reasonableness-bill-says-he-didnt-intend-legislative-changes/
[20] 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(1) Law & Ethics of Human Rights 49.
[23] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019) 5-6.

produce a form of constitutional "frankenstate" – i.e., combine 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 comprised of small steps which hardly are a frontal assault on the basic principles of liberal democracy. When each is examined in isolation, it is difficult to say its "the end of democracy". Yet when the various means are examined accumulatively, in an 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 to 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]

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

B Changes to Core v 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 us (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 to 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] But 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 and 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. But 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 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

[24] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) Governance 552.
[25] Tom Ginsburg & 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), 112-119.
[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(6) 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) 2193 Cardozo Law Review 38; Yaniv Roznai, 'Waldron in Jerusalem' (2020) 44 Tel Aviv University Law Review Forum 1 [Hebrew].
[29] Dixon & Landau (n 9).

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 toward 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 countries, and countries decide on these questions at least semi-independently, the fact of a practice's diffusion 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) 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 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]

Admittedly, any form of comparison raises its own methodological challenges. One challenge is to determine the appropriate denominator for comparison. What counts as a sufficiently democratic country for these purposes? And 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 aggrandizement 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]

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[30] Rosalind Dixon, 'A Demcoratic Theory of Constitutional Comparison' (2008) American Journal of Comaprative Law 56(4) 947.

[31] Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119(1) Harvard Law Review 129.

[32] Ibid.

[33] Eric A. Posner & Cass R. Sunstein, 'The Law of Other States' (2006) 59 Stanford Law Review 131; Eric A. Posner & Cass R. Sunstein, 'On Learning From Others' (2007) 59(5) Stanford Law Review 1309.

[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-on-line/367-african-union-law/7266-objectives-and-principles-of-the-african-union

[36] Rosalind Dixon & David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', 13(3) International Journal of Constitutional Law 606 (2015)

[37] David Landau, Yaniv Roznai & 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.

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 kinds of 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, one might argue, 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 characterized: the more general the level at which practices are characterized, the more commonality among countries there is likely to be; whereas the more concrete or specific the characterization, 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 anchor judgments about the kinds of legislative and constitutional changes that count as a clear and present danger to democracy, versus those likely to have a lesser immediate impact on the health of a democratic constitutional system.

C 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 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 effect itself may also be a standalone 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. And hence, the analysis depends squarely on how one interprets the effect of the current legislation limiting the court's power to engage in reasonableness review. If one views the law as a complete ban on any form of reasonableness, rationality or arbitrariness-style review, it could be viewed as a significant

[38] 'The overhaul of Israel's judiciary will maim its democracy, says Polly Bronstein' Economist (Feb. 14, 2023), https://www.economist.com/by-invitation/2023/02/14/the-overhaul-of-israels-judiciary-will-maim-its-democracy-says-polly-bronstein;

[39] Roznai & Cohen (n 3).

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

[41] Dixon & Landau (n 9).

[42] In that respect, Roznai and Cohen (n 3) argue that "early signals of the activities taken by the new government in Isael raise concerns", that the main purpose of the government is not 'rebalance' but rather remove limitations on governmental power, referring to the coalition's no hesitations to utilize power to make changes even to the rules of the game, and change them even retroactively and for personal gains.

erosion of the institutional checks and balances on executive power– i.e., an erosion of the democratic minimum core. But conversely, if one views the current legislation as precluding only some forms of review of this kind (i.e., robust forms of proportionality-like, reasonableness review), and not others (eg 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, versus possible longer-term, threats could also be viewed as a difference between full-scale abusive and proto-abusive constitutional change.[44] Abusive change is change that has a clear and immediate adverse impact on the health of the democratic minimum core, whereas proto-abusive change is change that poses a longer term, and/or less certain, risk to the same core set of democratic constitutional rights and institutions.

IV 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 decision to invalidate the government's measures. The Court, for instance, could decide that the existing reforms are invalid, or an "unconstitutional constitutional amendment."[45] Or the Court could instead conclude, as Part III notes, 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 passed is simply the *amuse-bouche* which would open the appetite for further steps toward erosion of judicial independence.[47]

The key question these declarations raise is what if anything can be done to halt such a path toward 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. And it has arguably deterred, or at least slowed down, further efforts to undermine judicial power and independence.

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[43] Eric C Ip, 'Taking a 'Hard Look' at 'Irrationality': Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) 34(3) Oxford Journal of Legal Studies 481.

[44] Dixon & Landau (n 9).

[45] 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 e.g P. Murray, 'Reconsidering Ouster Clauses: The High Court's Decision in Oceana', U.K. Const. L. Blog (5th July 2023) (available at https://ukconstitutionallaw.org/

[47] JP Staff, 'A Little sensitivity wouldn't hurt': Coalition MKs reject Ben-Gvir tweet' Jerusalem Post (July 23, 2023).

[48] Dixon and Landau (n 32); Dixon & Landau (n 9). See also Bojan Bugaric, 'Can Law Protect Democracy? Legal Institutions as "Speed Bumps"' (2019) 11 Hague Journal on the Rule of Law 447; Yaniv Roznai, 'Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020-2021) 29(2) William & Mary Bill of Rights Journal 327.

Hard questions remain, however, about how institutional players – such as the President and 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 structure" or unconstitutional constitutional amendment doctrine.[50] Taking this approach would also have the advantage of calling the changes out for what they are – i.e., abusive or proto-abusive in nature. But 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 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 they 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. But if it bides its time, there is the danger that judicial power and independence will have been already 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 essay, we simply note it as the dilemma raised by an appreciation of abusive or proto-abusive constitutional change in Israel.

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

[50] Navot & Roznai (n 12); Roznai (n 38); Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) Israel Law Review 321.

[51] Po Jen Yap & Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19(1) International Journal of Constitutional Law 127.

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

[53] Rosalind Dixon & 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 & Jennifer Rankin, 'Declaration of war': Polish row over judicial independence escalates' The Guardian (Jan. 24, 2020), https://www.theguardian.com/world/2020/jan/24/declaration-of-war-polish-row-over-judicial-independence-escalates; John Macy & Allyson K. Duncan, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale' (2020-2021) 104(3) Judicature, https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/