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Israel's Juristocracy

MOSHE COHEN-ELIYA

What explains the transfer of power from elected representative institutions to the judiciary in Israel?

IN EARLY 2024 AND AT THE HEIGHT OF THE ISRAEL-HAMAS war in Gaza, the Israeli Supreme Court published the most important ruling in its history. By a narrow majority of 8 to 7, the Court struck down the constitutional amendment to “Basic Law: The Judiciary.” This amendment did not apply the “unreasonableness” doctrine to ministerial and government decisions and therefore allegedly violated Israel’s core democratic and Jewish values.

This ruling represents a peak moment of judicial activism on a global scale. In the few instances in which apex courts have invalidated a constitutional amendment without explicit textual authorization to do so, such as in India, Bangladesh, and Slovakia, the amendments dealt with a

specific and sensitive issue—that of the judicial appointments process. And unlike in Israel, these cases took place within the context of a fully established and codified constitution. On the other hand, the Israeli “unreasonableness” amendment regarded only a doctrine of administrative judicial review, which has only been applied in the rarest of cases throughout the world. And in the wake of the events on October 7th, such a hyper-activist judicial ruling raises serious concerns regarding democratic accountability in a legal system in which the judiciary holds unprecedented powers.

How then can we explain such an unprecedented action taken by the majority of the Israeli Supreme Court?

Professor Ran Hirschl, a leading scholar in comparative constitutional law, [described in the early 2000s](#) a process by which significant governmental authority in common law jurisdictions is transferred from elected representative institutions to the judiciary. He argued that such power transfers served hegemonic groups in demographic decline and were aimed at preserving these groups’ interests through the judiciary, in which they still maintained greater influence. Hirschl notes the Israeli case as the paradigmatic and most distinct example of such a process. In order to make sense of the Israeli Supreme Court’s hyper-activist “unreasonableness” ruling, it must be framed as part of the sociological struggle for hegemony between rival demographic groups in Israel.

The state of Israel was founded primarily by pioneers hailing from Eastern Europe. The Ashkenazi-secular hegemony remained unchallenged for the state’s first few decades. But the 1977 elections, in which the Ashkenazi-secular hegemony was electorally defeated, were a critical turning point. Demographic shifts in Israel led to the growth of more religious and traditional groups which challenged the Ashkenazi-secular hegemony. The latter’s method of preserving its interests was the transfer of critical governing powers to institutions in which the fading hegemony still retained significant influence and control. Thus, after their loss in the 1977 election, and mere days before the formation of a new right-wing government, the outgoing left-wing cabinet issued an executive order that dramatically strengthened the status and powers of government agencies like the Planning and Budgeting Committee of the

Council for Higher Education. This agency was granted autonomy in the allocation of resources to higher education institutions in Israel, under the assumption that the fading hegemonic group would remain influential in public universities which it still controls.

Another method by which the hegemonic group in demographic decline preserved its interests was the intense efforts at entrenching constitutional rights by legislating the “Basic Law: Human Dignity and Freedom” in 1992. Here too, a bi-partisan coalition of representatives for the declining Ashkenazi-secular-liberal group acted in concert to ensure the constitutional entrenchment of rights that conformed to their interests and value system. Despite Israel having no codified constitution, the Supreme Court decided to regard this new law as a constitutional instrument and has since used its alleged violation as justification to invalidate dozens of laws. The same group worked ceaselessly to maintain a “professional” and “non-political” judicial appointments process, correctly assuming that under the guise of professional judicial qualifications they may advance the values of the bourgeoisie legal professional class which forms an integral part of the same group.

The political necessities of the fading hegemony saw the rise of Aharon Barak, a charismatic judge who radically expanded the role of the Supreme Court within Israeli society. This is how Barak presented his approach to law and jurisprudence in 1977, even before he was appointed a judge:

As jurists, we are not limited to the interpretation and application of existing law. We are the vanguard of the aspiration for the better, more desirable law. ... We are the architects of social change. We possess the skills to construct a better and more just legal system. We do not see our roles as those of mere legal technicians. We see our role as incorporating legal statesmanship.

With his ascent to the Supreme Court in the late 1970s, Barak and subsequent judges worked vigorously to expand the Court’s authority, in three main waves.

The first wave took its form in the 1980s and included rules of interpretation that departed from textual meaning and focused on a text's "objective" purpose, along with the elimination of traditional threshold requirements for Supreme Court adjudication such as those of standing and justiciability. The second wave was the "constitutional revolution" which radically expanded the significance of the 1992 Basic Laws, far beyond any intention contemplated by the legislators who voted for them. The Court granted an expansive interpretation to the right of "human dignity" such that it included a wide series of human rights that the Knesset (Israel's parliament) deliberately avoided entrenching in the Basic Law. Well after Barak's retirement, Chief Justice Hayut expanded the Court's powers in a third wave, so that it could strike down so-called constitutional amendments (that is, amendments to Basic Laws) in which the Knesset abused its constituent powers or which violate what the judges define as the State's core Jewish and democratic values.

The invalidation of the 2023 constitutional amendment limiting the application of the reasonableness grounds is a peak moment in this process. The unreasonableness ground for administrative judicial review is almost unused in other democratic countries. Common law jurisdictions (of which Israel is one) apply the well-known *Wednesbury* standard as grounds for judicial intervention in government action if it is "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Barak essentially abandoned this test in the 1980s and instead crafted the "balancing" version of reasonableness, in which judges exercise discretionary executive powers if they conclude that the government did not correctly weigh or "balance" different factors or considerations.

This radical warping of the reasonableness standard is exceptional by any global comparative standard, but its true implications are only fully manifested when paired with the unrivaled powers granted by judicial fiat to the Government Legal Counsel in Israel. Barak had already ruled in the 1990s, with no basis in existing precedent or statutory law, that the government must adhere to directives of the Government Legal Council (a high-ranking civil servant similar to the role of Attorney General in the United Kingdom) while granting the latter an exclusive monopoly over

representing the government in judicial proceedings. The combination of a “balancing” reasonableness standard and the unprecedented powers the Court had bestowed upon the Government Legal Counsel created a severe democratic anomaly in Israel. In effect, the last word on any government decision belongs to the Supreme Court and the Government Legal Counsel.

There is no precedent in the democratic world for a legal system accruing such vast powers, with no explicit statutory authorization and no clear mechanism conferring popular legitimacy. For some forty years, the demographically declining Ashkenazi-secular hegemony expanded the Supreme Court’s authority while the Court enjoyed the support of the political left, whose supporters for the most part belonged to the same hegemonic group. The Supreme Court also enjoyed the support of the professional government bureaucracy, big business, the military, academia, mainstream media, and additional Israeli institutions dominated by the fading hegemony. As a result, groups associated with the Israeli right-wing party—among them “Mizrachis” of Middle-Eastern and North-African descent, the religious or ultra-orthodox, and traditional Jews—lost faith in the Supreme Court. The Israeli Democracy Index of 2022 paints a troubling picture: While 86 percent of left-wing party supporters have faith in the Supreme Court, this faith is shared by only 26 percent of right-wing party supporters. A recent empirical study by [Prof. Yehonatan Givati and Aharon Garber](#) shows a direct link between Barak’s constitutional revolution and the public’s plummeting faith in the Supreme Court.

Israel's transition from a democracy to a juristocracy raises thorny questions as to the relationship between authority, responsibility, and accountability.

In early 2023, right-wing parties strived to reduce the Supreme Court's authority as well as to change the composition of the Judicial Selection Committee, so that the governing coalition would have greater control over judicial appointments while eliminating the current veto granted to sitting Supreme Court justices over new colleagues and successors. These initiatives prompted fierce resistance among Israeli citizens belonging to the old hegemony and among institutions under their control. This forceful reaction led to the significant softening of the proposed reforms. The amendment stipulated that while the "unreasonableness" doctrine would still apply to all governmental or municipal decisions, including those that harm citizens or their rights, it would cease to apply to the top tier of elected executive officials—the cabinet and government ministers. Note that even with this softened approach, the adjudication of government harm to civil and individual rights is conducted under the entirely separate legal framework of proportionality and is thus unaffected.

Nonetheless, this formulation too was the subject of severe criticism from institutions dominated by the fading hegemony and was portrayed as leading to "dictatorship," despite there being no comparable example in the democratic world of such expansive use of the "unreasonableness" doctrine such as that found in Israel. Worse still, senior figures within the anti-reform protest movement and even retired senior military generals publicly called for army reservists to halt their military service in protest, with statements such as, "By September 2023 you will no longer have an army."

The concern of those objecting to legal reform was that the shift in power dynamics between the Knesset and the Supreme Court would serve as the basis for a more fundamental shift in values, abandoning Israel's liberal core and transitioning into a system of "illiberal democracy." But, without belittling such concerns, they seem to have been severely blown out of

proportion. Israel has been a democracy since its founding in 1948, as indeed were its pre-state institutions. Israel is ranked higher than the United States in the Economic Intelligence Unit's Democracy Index of 2022.

Within this context, it would be more accurate to regard the Supreme Court majority opinion's unreasonableness ruling as founded in the fear that Israel is in the midst of democratic backsliding, and that the Court must aggressively intervene in order to curtail this process. Without explicitly stating so, the Justices in the majority acted as a "militant court," echoing the notion of "militant democracy." The idea of militant democracy is based on the circumstances defined by the German jurist Carl Schmitt as a "state of exception," in which a struggle between "friend and foe" displaces the rule of law. Supporting this impression is the large discrepancy between the minimal practical implications of limiting the unreasonableness doctrine (in the past decade the Supreme Court had intervened in only 16 ministerial or cabinet decisions due to their unreasonableness) and the high bar for intervention in amendments to Basic Laws. The standard for such intervention was ostensibly very high indeed: only extreme and extraordinary violations of core Jewish and democratic values that shocked the state's foundation could justify judicial interference with constitutional amendments.

Because it seems so implausible that limiting a technical ground for administrative judicial review hardly used in the democratic world would meet this high bar, the majority opinion justices were compelled to exaggerate the amendment's effects. They claimed, *inter alia*, that while the Court had only intervened in 16 relevant cases over the past decade, the "unreasonableness" standard is, in fact, a "super-norm" that imposes a culture of governance that preemptively averts decisions that the judges may deem to be unreasonable.

The very idea that courts can strike down constitutional amendments, absent explicit authorization in the constitution (through for example what is often called "eternity clauses"), suffers from a major democratic deficit. Such a radical use of judicial powers has hardly been applied across the globe. India and Bangladesh are rare instances of such use, and even there, and contrary to Israel, both hold fully codified constitutions.

The Court's unpersuasive stance is further evinced by the ruling's sheer length, which reaches over 1,000 pages when translated to English and competes only with the longest decisions of the Supreme Court of India. This is due to the fact that there is no constitutional text to authorize the Court to invalidate constitutional amendments, so the Court had to rely on *its own* vague precedents involving the "discovery" of core societal values which only the Court can interpret and apply regarding *its own* authority. Justice Anat Baron went so far as to equate the "external threat" facing Israel (the brutal murderers and rapists of Hamas) with the "internal threat" of those supporting legal reform.

For these reasons it would not be far-fetched to conclude that the majority justices (led by the retiring Chief Justice) consciously decided to adopt an aggressive stance, deliberately avoiding the more subtle "interpretive" solutions that some of the minority judges preferred. It's also worth noting how this ruling demonstrates the manner in which a declining hegemony attempts to "lock in" the recently expanding conservative faction within the Israeli Supreme Court. Two of the majority justices—Chief Justice Hayut and Justice Baron—had retired from the court in October of 2023, and issued their opinions (as part of the main ruling) within the relevant statutory timeframe for post-retirement rulings. Attempts by moderate elements within politics and academia to postpone issuing the ruling until after the current war were also summarily rejected by Hayut. This meant that by the time of the ruling's actual issuance and publication, the majority on the Court which supported the ruling no longer existed. And thus, the hyper-activist camp led by Chief Justice Hayut presumed to bind the current majority on the Supreme Court, which is slightly less activist, by way of a monumental precedent with severe implications for Israeli democracy in its entirety. This is yet another illustration of Hirschl's insightful description of a declining hegemony willing to maintain power by constraining a future majority.

The title of Prof. Hirschl's book from 2004 is *Towards Juristocracy*. I believe that following the Israeli Supreme Court's ruling which invalidated the "unreasonableness" amendment, it is by no means an exaggeration to state that Israel experienced a regime change at the start of 2024 and can no longer be considered a democracy but rather a

juristocracy. The legitimacy and authority of the Supreme Court are no longer derived from the demos, but rather rely on the consent and collaboration of hegemonic groups that dominate the nerve centers of Israeli power and that have radically depleted the authority of Israeli representative institutions.

Israel's transition from a democracy to a juristocracy raises thorny questions as to the relationship between authority, responsibility, and accountability. In 2018, the Supreme Court dismissed petitions by left-wing NGOs against the Israeli military's rules of engagement on the Israel-Gaza border but did so only after the IDF legal counsel were compelled to produce "stricter" rules of engagement which did not match genuine Israeli defensive needs. The actual security requirement was creating a one-kilometer buffer zone between Israeli villages and the Hamas operatives across the border. But this crucial buffer zone was gradually worn down by a combination of Israeli legal culture (resulting from a constant fear from judicial intervention) and international diplomatic pressure, until the border was breached with minimal effort on October 7th. Only now, following the war in Gaza, is Israel renewing the one-kilometer buffer zone which will serve as a no-man's land.

Any public inquiry commission established to investigate the catastrophic failures of October 7th must also analyze the vast powers transferred over recent years to the legal system, and the inherent flaws of accountability resulting from this process. Perhaps akin to "taxation and representation" in the American founding, so must authority be grounded in accountability. Until then, a system in which ultimate governing power is wielded by an unelected caste of judges whom the public is incapable of holding to account for their decisions, can only be described as juristocratic.

Prof. Moshe Cohen-Eliya is an expert in comparative constitutional law and human rights, and has served as President of the College of Law and Business in Israel. Cohen-Eliya has worked as a litigator for the

Association for Civil Rights in Israeli, is a founder of the *Law & Ethics of Human Rights* journal and is the co-author of *Proportionality and Constitutional Culture* (Cambridge University Press, 2013). His next co-authored book with I. Porat *Supreme Courts in the age of Political Polarization* (Cambridge University Press) will be published later this year.

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