Legislative Initiatives to Change the Judicial System are Unnecessary

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Numerous initiatives aimed at weakening the judicial system in Israel have become increasingly prominent on the public agenda. These include concrete initiatives to deny/circumvent the authority of the Supreme Court to disqualify Knesset legislation. This article argues that such initiatives are unnecessary, given the constitutional dialogue between the Supreme Court and the Knesset already in place. In the decisive majority of cases, the Court permits a political response to its rulings, and for this reason occasionally even avoids interfering in matters. For its part, the Knesset has the effective ability to confront a Supreme Court ruling and respond to it, which it indeed has done in practice. Based on an empirical and extensive study, the article illustrates how this dialogue is conducted, and shows that the existing constitutional process involves all the governing authorities.

Keywords: law and politics, law and security, Supreme Court, Knesset, constitutional dialogue

In May 2019, and within the framework of coalition negotiations to form the 35th government, the media reported on initiatives aimed at significantly weakening the Supreme Court and its authority, while turning it into a body with a political orientation. A similar move, targeting legal advisors in the government, was supposed to have followed.[1] Despite the vagueness as to exactly what was included in these initiatives, the fact they were publicized and "on the table" greatly influences the public, political, constitutional, and legal discourse underway in Israel today.

These initiatives did not arise in a vacuum. For a long time a heated debate has been waged in Israel (as in many other countries) concerning the role

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of the Court in a democratic society and, more broadly, the question of the correct way of perceiving the principle of democracy. Is the emphasis on majority rule? Or is it on a set of values such as the rule of law, separation of powers, and protection of minorities, all of which require judicial review?

On the one hand, some argue that the conduct of the Supreme Court, its readiness to intervene in fundamental issues, and the extended nature of its intervention constitute a danger to democracy and necessitate a fundamental change of the rules. In this context it is argued that the Court, through its increased intervention, affects the power of the political authorities to govern and implement what they view as desired policy.[2] On the other hand, there are those who argue that supervising the government, and in this regard its administrative and legislative action, is an essential component of a proper and functioning democratic administration.[3] This approach views the Court as the guardian of democracy in its broad sense (especially in Israel, where there are no other structural limits on the power of the Knesset and the government).[4]

As these initiatives are likely to alter the nature of the state's democratic regime they also have implications for national security, which includes not only defending the physical existence of the state, but also preserving its identity as a Jewish and democratic state. One finds this expressed, for example, in the document entitled "IDF Strategy," in which the country's defined national objectives include "preserving the values of the State of Israel and its character as a Jewish and democratic state and the home of the Jewish people."[5] A substantial change in the scope of the Supreme Court's review of security-related matters also has practical implications for aspects concerning legitimization of security activity, both internally and externally, as reflected in an address by the President of the Supreme Court, Esther Hayut.[6]

In contrast to the common assumption, there is already an ongoing dialogue underway between the Supreme Court and the Knesset and the government. Therefore, judicial intervention and the capacity to govern politically are not necessarily in opposition.

The purpose of this article is not to espouse a particular position in the debate between those who seek to limit judicial review and those who seek to preserve or even expand it; nor does it argue for the appropriate scope of such judicial review. The goal is to address the factual background of this debate and show that in contrast to the common assumption, there is already an ongoing dialogue underway between the

Supreme Court and the Knesset and the government. Therefore, judicial intervention and the capacity to govern politically are not necessarily in opposition. The insights contained in this article are based on an empirical and extensive study of Supreme Court rulings that include all published Supreme Court rulings in which arguments were raised against the conformity of Knesset legislation to Israel's Basic Laws from 1992 through 2018. The essence of the argument is that the Supreme Court and the political authorities are engaged in an inter-institutional dialogue. This dialogue allows each branch to respond and express its position in a manner that does not deny any future response of other branches. The present discussion is meant to serve as an additional conceptual tool to discuss in a straightforward manner the fundamental questions that have arisen recently, without reducing the discussion to the superficial or rendering it populistic.

Background

Before discussing judicial review of legislation, how it is designed, and how it allows a political response, a brief but essential background survey is in order. Over the years the Knesset has passed thirteen Basic Laws. Most of them are institutional in the sense that they regulate the activity of government institutions (for example Basic Law: The Knesset; Basic Law: The Judiciary; Basic Law: The President of the State; and so on). In 1992, for the first time, the Knesset passed Basic Laws dealing with the protection of human rights, namely: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. In addition to constitutional protection of human rights, these two Basic Laws include a limitations clause. The clause provides that the Knesset is forbidden to use these Basic Laws to jeopardize rights unless a number of conditions are met: the limitation is legally permissible, it conforms to the values of the State of Israel, it is done for an appropriate purpose, and it is proportional.[7]

In 1995, three years later, in the United Mizrahi Bank case, the Supreme Court determined that since the Knesset had limited its own legislative ability, the Court has the authority to examine whether the Knesset has met the conditions it placed on itself.[8] In other words, the Court is authorized to examine whether legislation meets Basic Law conditions and to determine that a statute is null and void if it does not meet these conditions. This is constitutional judicial review.[9]

Since 1992, constitutional judicial review has taken place fairly frequently; there are approximately two hundred published rulings that include arguments against the constitutionality of legislation. However, this should not give the impression that legislation is repealed frequently. First, this is an extremely negligible percentage of the total cases handled by the Supreme Court. According to the Supreme Court website, some 10,000 cases are opened each year for the Court's consideration.[10] Furthermore, given that only 10 percent of cases reach an actual verdict, we are talking about some two hundred constitutional verdicts as opposed to many thousands that do not deal with the constitutionality of legislation. Second, even in this limited framework, the Court is extremely cautious when asked to repeal legislation. To date, only 16 statutes have been repealed on the grounds of infringing on a right protected by Basic Law: Human Dignity and Liberty, or Basic Law: Freedom of Occupation, not having met the conditions of the limitations clause.[11]

Moreover, in many cases of repealed legislation, a dialogue takes place between the Supreme Court and the Knesset (and in this regard, the government as well, in its capacity to influence the legislative process), with the limitations clause serving as the key constitutional "instrument" to facilitate this dialogue. Such a dialogue is possible for both the Court and the Knesset. This constitutional dialogue between the Supreme Court and the Knesset provides a solution in the face of arguments behind many of the initiatives to reduce the Court's authority. Indeed, even in the existing situation, each institution has the opportunity to respond to the other (whether through statute or through ruling), without resorting to the override clause.

In order to complete the picture, it is important to point out that Israeli law includes an explicit override clause as part of Basic Law: Freedom of Occupation. This provision is found in section 8(a) of the Basic Law and allows the Knesset to reenact (through a 61-vote majority) a statute that has been disqualified by the Court. Nevertheless, since the grounds for disqualifying most of the laws in Israeli constitutional law lie in Basic Law: Human Dignity and Liberty (which sets in law core rights such as respect, liberty, freedom from bodily harm, property rights, and more) the existing override clause lacks any significant implication.

Mechanisms of Constitutional Dialogue

The Supreme Court has four types of mechanisms at its disposal that allow it to engage in a "constitutional dialogue" with the legislative branch.[12]

One mechanism is *judicial rhetoric*, which allows the Court to relay messages and express its opinion, thus toning down the inter-institutional tension without requiring a bottom line. In the majority of cases in which the Court examines the compatibility of legislation with the requirements of Basic Laws pertaining to human rights, the Court stresses that it does so under considerable restraint; and that it examines whether the statute meets requirements of Basic Laws rather than determining whether the a law is "good" or "bad," or the desirability of the policy at its basis. In addition, in many cases the Court also emphasizes the dialogue underway in the proceedings between the Supreme Court and the Knesset. Thus, for example, Salim Joubran, then deputy to the Supreme Court Chief Justice, wrote the following on the right of a male couple to a surrogate after having decided to leave the decision in the hands of the Knesset:

> In our decision we suspend deciding on the weighty issues I have referred to above. We do this out of respect for the legislative branch and the relationship between the judicial and legislative branches. This relationship is a complex one founded on a dialogue between the Court and the Knesset. This dialogue revolves around the basic principles and laws of the State of Israel, and through it, both branches seek to advance the goals of the State and optimally deal with the challenges facing it – this while preserving the fundamental rights bestowed on each person by virtue of the Basic Laws. Upon the conclusion of this dialogue we should expect to obtain a judicial result that is compatible with the fundamental principles of the State and protects the liberties of the individual. Now it is the turn of the legislative branch to have its say. We are confident it will fulfill its constitutional obligations and act to fulfill constitutional rights.[13]

The Court sometimes even stresses the Knesset's ability to respond with re-enactment of a statute. Thus, for example, in the ruling concerning the disengagement from Gaza, the Court disqualified a portion of the compensation arrangements because they encroached on the property rights of those evicted such that the arrangements did not satisfy the provisions Basic Law: Human Dignity and Liberty. The Court added (in a united decision by the ten justices of the majority):

> Needless to say that our annulment of the provisions we examined is not the final word. It is part of the continuing dialogue between the judicial and legislative branches. Thus the Knesset is of course authorized to examine the result obtained due to the annulment of several provisions of the Disengagement Plan Implementation Law. It is entitled to alter different arrangements at its discretion in order to fulfill the legislative objectives it sees as desirable and as observing the requirements that the Knesset itself determined in the Basic Laws concerning human rights.[14]

A second mechanism that facilitates dialogue between the branches is *response-based doctrines*: various proceedings at the disposal of the Court that allow it to avoid a constitutional decision and keep it in political hands. One doctrine for example is "judicial guiding": Supreme Court rulings tend to be tortuous and replete with judicial statements, some of which have nothing to do with the sides in terms of litigation before the Court and therefore are not binding on them. However, such statements are meant to convey multiple messages, including to the political authorities. Thus the Court is able to express its opinion to political authorities such that it does not compel them; for their part, the political authorities are able to weigh matters judiciously. There are studies that show that in Israel the Court makes frequent use of this tool.[15]

An additional doctrine is the "nullification warning": The Court informs the state that it is acting illegally in a specific case and cannot continue in this manner, but abstains from striking down the statute in the case. The nullification warning sends a pointed message to the political authorities yet allows the Court to abstain from issuing a binding directive.[16]

Another way is through assigning decisive weight to legislative initiatives. Occasionally, during proceedings over petitions to the High Court of Justice, it becomes apparent that a legislative initiative exists that can provide a solution to the matter under deliberation. The Court, in response, suspends, dismisses, or removes the petition. The reasoning for this choice is based systematically on the Court's respect for the Knesset and the government, and on the judicial desire to leave the decision in the hands of policymakers. A study that examined this doctrine in Israel reveals that the Court relies on it in the vast majority of cases and avoids ruling on petitions that can be linked to relevant legislative initiatives.[17]

A further way of abstaining from ordering the annulment of legislation is through constitutional interpretation. For many years the Court has acted

according to the rule that if it is possible to interpret a provision of law such that it remains valid and fulfills its goal, then that is what must be done and the Court should avoid repealing the statute. This method has two significant advantages from the viewpoint of the constitutional dialogue: the first is that judicial interpretation can be changed by the Knesset through regular legislation; the second is that an interpretation does not carry with it the political or public price incurred by striking down legislation.

A third mechanism that facilitates dialogue is the *constitutional remedies*. As a rule, when the Court finds that a law has been violated, it extends relief – a remedy – to the petitioner if the claim is found to be justified. This is true in all realms of law. However, in the constitutional domain it has a particular complexity. From a practical aspect, disqualifying a statute has extremely broad repercussions that extend far beyond the sides involved in the case. A second complexity is at the public and inter-institutional level: when the Court orders the annulment of legislation it is in fact issuing a forced order to the Knesset such that it generates considerable tension between the branches. It is for these two key reasons that the Supreme Court tends to extend softened constitutional remedies. Such remedies are those that maintain the Court's declaration in principle of the law's annulment but reduce the declaration's impact and the inter-institutional tensions that it generates. Thus the decision is transferred to political hands.

There are two central remedies used by the Court. The first is known as "severance," or the "blue pencil" doctrine. The Court "circles in blue pencil" the part of the statute that is unconstitutional (a clause or several clauses, a section, and so on) and disqualifies it alone, so long as the remainder of the statute may continue to fulfill its goals. Thus the impact on the activity of the Knesset is reduced as much as possible. A second remedy is suspension of invalidity. The Court in its verdict rules a statute invalid, but at the same time orders that the declaration of invalidity shall come into force after a specific period (for the most part three or six months later).[18] This time period is meant to allow the Knesset to amend the statute such that it meets the Basic Laws' requirements. If the Knesset amends the statute within this time period then the judicial declaration loses all meaning and shall have no practical significance. (In practice, the time period may be extended, which indeed has happened many times.)

> The claim that the Supreme Court has appropriated control over policymaking does not reflect the reality.

The final mechanism deals with *how* the Court determines that a statute does not satisfy the requirements of a Basic Law. As mentioned, there are four cumulative requirements to be met in order to justify legislation that harms a right contained in one of the human rights Basic Laws. In practice, the first two requirements – that the infringement is legally permissible and that the statute conforms to the values of the State of Israel (those customarily interpreted as the values for a Jewish and democratic state) – raise no difficulties. The third and fourth requirements are that the infringement be done for an appropriate purpose and is proportional. In point of fact, *the Court has never disqualified the purpose of legislation*. Rather, all instances of disqualifying legislation on the basis of a Basic Law concerning human rights were done so in light of the proportionality of the means by which the statute would fulfill its purpose.

This is a significantly weighty matter. Disqualifying a statute's purpose is an extremely scathing action and in fact blocks the Knesset from carrying out the policy it wishes to implement. The Court recognizes this and for this reason avoids disqualifying the purpose of legislation, even when the purpose poses substantial difficulties.[19] Thus the Court knowingly and wisely acts to allow the Knesset to respond and carry out its desired policy so long as it meets the requirements of Basic Laws.

Opposite the Court is the Knesset, which expresses its opinion through legislation. If the Court's dialogue in the context of constitutional judicial review is akin to an "invitation," then clearly in the vast majority of cases, the Knesset accepts the invitation. As mentioned, in sixteen cases the Court struck down legislation because it contradicted provisions of the human rights' Basic Laws. In eleven cases the Knesset responded and amended the statute. It was the limitations clause and the Court's judicial avoidance of disqualifying the purpose of the legislation that allowed this. The Knesset altered the means such that they would satisfy the proportionality requirement and thus made the legislation compatible with provisions of Basic Laws. In five other cases the Knesset did not respond. In two of the five, various legislative initiatives are under development (concerning legal provisions of the Law for Prevention of Damage to the State of Israel through Boycott – 2011, and the draft laws) that, as far as one can see, will lead to a response by the Knesset.

From here, it appears that the claim that the Supreme Court has appropriated control over policymaking does not reflect the reality. The Court has and continues to conduct itself in a manner that preserves

(and occasionally actually advances) the ability of the political authorities to respond. For their part, the political authorities accept this judicial "invitation" and uphold the dialogue. The Knesset sees itself as having the ability to think independently and respond independently through legislation, and indeed does this. The fact that until now the Knesset's responses have been case related and focused on the statute itself rather than aimed at reducing constitutional judicial review has been highly constructive conduct and has made it possible to preserve and advance this constitutional dialogue.

Conclusion

Similar to the discussion concerning the scope of judicial review, the discussion of the constitutional dialogue and its implications has different facets that cut both ways and have many critics. Nevertheless, this article does not seek to address whether the constitutional dialogue underway is desirable or not; rather, the intention is to offer a glimpse into this dialogue that is often hidden from the public eye.

An additional remark concerns changes in the manner of the Court's conduct. Over the past two years, despite claims of heavy judicial intervention, there is in fact a change in the direction of increased restraint. What is troubling with this situation is that this increased restraint does not stem from any reasoned decision or serious discussion, but rather from what appears to be a series of threats – subtle or less so – on the Court. The Supreme Court should not act out of fear for its independence. The process of contemplating the Court's place in society and politics and the appropriate scope of its intervention is most welcome. However, influencing the Court based on threats to narrow its latitude and weaken its authorities is not the correct path for altering the existing constitutional balance – if there is a desire to do so.

In an overwhelming majority of cases, the legislative branch has at its disposal the possibility to alter a Court ruling. The Knesset legislates and the Court scrutinizes. Occasionally, the ball is returned to the constitutional playing field without a binding decision, and sometimes with a binding decision. One way or another, the ball remains in legislative hands. Upon the end of the legislative process it is possible the ball will return to the hands of the Court. And so on and so forth. For this reason it would not be correct to employ the term "the last word." The constitutional dialogue between the judicial branch and political authorities is a continuing and

involved process in which all governing authorities participate in fashioning the constitutional law of the State of Israel. It is for this reason that many of the initiatives proposed today for limiting the authority of the legal system are superfluous.

In conclusion, today a constitutional dialogue is underway between the Supreme Court and the Knesset. The political arguments, that the Court has "hijacked democracy" and become the central decision maker in Israel, are far from reflecting reality. Unquestionably, the Court expresses its clear willingness to intervene in social, economic, and political issues. Nor is there any doubt that the political authorities are extremely active in all matters concerning the constitutional and public agenda. That said, there is already a solid basis for inter-institutional relations in terms of constitutional judicial review. The Supreme Court in its conduct exerts efforts to preserve political governance. For its part, the Knesset has thus far avoided carrying out initiatives that undermine the Supreme Court. Between these two institutions there is, and will continue to be, a great deal of tension; this, after all, is the nature of a constitutional system. So long as there is a need to discuss "recalculating the route," it would be advisable not to ignore the broad basis that already exists today. It is always possible to rectify and improve institutions and the manner in which they conduct themselves, but this must be done while acknowledging the complexity of their relations and ascribing due importance to the existing situation before erasing it.

Notes

1 See for example the extremely wide coverage in the press in this context, including Matti Tuchfeld, "The Override Clause is Just the Beginning: Here's What the Major Revolution in the Legal System will Look Like," *Yisrael* Hayom, May 12, 2019, https://www.israelhayom.co.il/article/656863 [in Hebrew].

2 Recent examples include Netael Bandel, "The Public Will Judge," *Makor Rishon*, May 31, 2019 [in Hebrew]; Yehuda Yifrach, "Back to Proportions," *Makor Rishon*, May 17, 2019 [in Hebrew]. See also the article by former Justice Minister Ayelet Shaked, "The Path to Governance," *Hashiloach*, October 2019, https://bit.ly/2DsruLh [in Hebrew].

3 There is much media coverage on this as well. See for example Eli Salzberger, "A Clear and Present Danger," *Maariv*, May 14, 2019 [in Hebrew]; Avi Bar Eli, "The Courts' Day of Judgment," *The Marker*, May 28, 2019 (interview with Vice President of the Supreme Court of Israel Elyakim

Rubenstein) [in Hebrew]; Mordechai Kremnitzer, "The Court, To the Flag!" *Haaretz*, May 19, 2019 [in Hebrew].

4 Amichai Cohen, "The Override Clause: Checks and Balances of Political Institutions and the Legal System," Israel Democracy Institute, May 2018, https://www.idi.org.il/books/23438 [in Hebrew].

5 Office of the Chief of Staff, "IDF Strategy," Chapter 1, Section 2, April 2018, https://www.idf.il/media/34416/strategy.pdf [in Hebrew].

6 Esther Hayut, "The Role of the Court in Reaching Judicial Decisions that Concern the State of Israel's National Security," *Strategic Assessment* 22, no. 1 (2019): 3-13, https://bit.ly/2XOUqHK.

7 The source of the limitations clause is contained in Section 1 of the Canadian Charter of Rights and Freedoms, in which an explicit judicial review determines: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

8 Civil appeal 6821/93, Bank Mizrachi Ltd. vs. Migdal Cooperative Village, PD 49(4) 221 (1995).

9 Thus wrote former Supreme Court President Aharon Barak: "The limitations clause prescribed in Section 4 of Basic Law: Freedom of Occupation and in Section 8 of Basic Law: Human Dignity and Liberty sets a material safeguard, namely: It is forbidden to jeopardize, through standard law, human rights that are guaranteed in the Basic Law, unless the standard law observes essential requirements regarding the Basic Law's content. This safeguard is legally applicable. It is constitutional. It negates the power of standard legislation that does not observe the safeguard requirements against jeopardizing the human rights protected by the Basic Law."

10 Supreme Court website, https://supreme.court.gov.il/Pages/Overview.aspx. For more, see the Israel Judicial Authority's report for the year 2017 (2018).

11 Four additional laws were repealed before 1992. All four were laws dealing with elections to the Knesset, and it was determined that they violated the requirement for egalitarian elections, protected in Section 4 of Basic Law: The Knesset. This Basic Law stipulates that it is possible to infringe on the equality requirement through a majority vote of at least 61 Members of Knesset. Because these laws violated the principle of equality without meeting the formal requirement of 61 votes in each reading of the law, it was determined that the laws were null and void. Nevertheless, the Court allowed the laws to be re-legislated, this time with the required majority vote. Three of the laws were indeed passed with a majority of 61 votes, thus satisfying the requirement of the original law that was struck down.

12 The full and complete findings based on a broad empirical study will appear in the forthcoming article: Bell Yosef, "The Constitutional Dialogue in Israel: Two Viewpoints," *Law and Business* [in Hebrew].

13 High Court of Justice 781/15, Pinkas Arad vs. Committee for Approving the Carrying of Fetuses, Based on Agreements Law for the Carrying of Fetuses (Approval of Agreement and Status of the New Born), 5756-1996, paragraph 51 of the judgment of Deputy to the Supreme Court Chief Justice, Salim Joubran (published in *Nevo* legal repository, August 3, 2017) [in Hebrew].

14 High Court of Justice, Gaza Coast Regional Council vs. the Israeli Knesset, PD 59 (2) 481, 748 (2005).

15 Liav Orgod and Shai Lavi, "Judicial Directive: Remarks on Legislative Revisions in Supreme Court Verdicts," *Tel Aviv Law Review* 34 (2011): 437 [in Hebrew]; David Zachariah, *The Refined Sound of the Piccolo: The Supreme Court, Dialogue, and the Fight against Terror* (Nevo, 2012) [in Hebrew].

16 For a discussion of the nullification warning, see Suzie Navot, "The Constitutional Dialogue: A Debate through Institutional Mechanisms," *Mishpatim Online* 12, no. 99 (2019) [in Hebrew].

17 Bell Yosef, "The Normative Status of Legislative Initiatives," *Tel Aviv Law Review* 40 (2017): 253 [in Hebrew]. In 2018, the Court relied on this doctrine in order to reject petitions submitted to it, without formal deliberation. See also Bell Yosef, "The Normative Status of Legislative Initiatives as a Threshold," *ICON-S-IL Blog*, December 4, 2018 [in Hebrew].

18 For more on the subject of this remedy, see Yigal Marzel, "Suspension of Declaration of Invalidity," *Law and Government* 9 (2006): 39 [in Hebrew].

19 The most striking and most recent example consists of various matters surrounding the Prevention of Infiltration Law – 1954. In three separate rulings, the Court disqualified parts of the corrective legislation. Nevertheless, and despite the fact that the deliberation leading to the verdict shows that the legislation's purpose raised a significant difficulty, the Court was willing to read into its purpose in its broadest sense and allow it – this while each time disqualifying only the proportionality of means. See High Court of Justice 7146/12, Adam vs. the Knesset (published in *Nevo*, September 16, 2013) [in Hebrew]; High Court of Justice 7385/13, Eitan – Israeli Immigration Policy vs. Government of Israel (published in *Nevo*, September 22, 2014) [in Hebrew]; and High Court of Justice 8665/14, Deseta vs. the Knesset (published in *Nevo*, August 8, 2015) [in Hebrew]. See also the Prevention of Infiltration Law (Offenses and Jurisdiction) (amendment 3 and temporary order), 2012; the Prevention of Infiltration Law (Offenses and Jurisdiction) (amendment 4 and temporary order), 2013; the Law for Prevention of Infiltration and Assuring the Departure of Infiltrators from Israel (legislative amendments and temporary orders), 2014; and the Prevention of Infiltration Law (Offenses and Jurisdiction) (temporary order), 2016.