

# ON CONSTITUTIONAL IDENTITY, DEMOCRATIC LEGITIMACY AND JUDICIAL REVIEW IN TIMES OF DEMOCRATIC BACKSLIDING: THE CASE OF ISRAEL

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## Abstract

The Israeli Supreme Court's recent decisions to invalidate constitutional amendments that were part of the government's attempt at the so-called "Legal Reform" relied on the concepts of democratic legitimacy and Constitutional Identity. Explaining the decisions according to these concepts may contribute to a better understanding of the developing doctrine of unconstitutional constitutional amendment, and justify the Israeli Supreme Court's approach.

Israel's constitution is a hybrid of a written and an unwritten one. The Basic Laws are constitutionally binding because they were enacted by the *Knesset*, that enjoys partial procedural legitimacy to enact constitutional norms, and because, and as far as their content entrenches Israel's unwritten constitution.

The unwritten constitution, determined through the concept of Constitutional Identity, is formed primarily by reference to positive law, and only in part to society's culture and to moral, universal ideals. Moreover, the gravity of the *Knesset*'s procedural legitimacy is not fixed, but a matter of a sliding scale: An amendment which entrenches a norm that is already part of the unwritten constitution is constitutionally valid even if it enjoys only minimal procedural legitimacy; while an amendment that was adopted by an overwhelming political and public support would enjoy substantial procedural legitimacy, which may be sufficient even if it contradicts the unwritten constitution.

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I. INTRODUCTION

In a landmark 2024 judgment by the Israeli Supreme Court, known as *the reasonableness* case, Justice Baron, part of the majority that struck down an amendment to one of Israel’s Basic Laws, opened her decision with the following words: “Seventy-five years after the historic declaration of Israel’s independence, the State faces two existential threats—one external and one internal. [...] Israel is engaged in a bloody conflict with a barbaric enemy intent on our destruction. While we will prevail in this external fight, Israeli democracy also faces a severe internal threat. [...] These are critical times, and we must protect the separation of powers, the independence of the judiciary, the rule of law, and human rights, namely to protect Israel’s identity, its democratic values, and the principles of the Declaration of Independence. One cannot remain passive.”<sup>1</sup> The comparison between Hamas’s October 7 massacre, which attempted at the physical destruction of Israel, and the Israeli government’s proposed “Legal Reform” (or “judicial overhaul”), is stunning. It reflects the Court’s sense of urgency regarding the imminent threat to Israel’s democratic identity. It also suggests that the Court was aware of the unusual nature of decision to declare a constitutional amendment unconstitutional, based on what is effectively an unwritten constitution, which requires an especially strong justification. Primarily, this choice of words signifies the Court’s view about the importance of

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<sup>1</sup> HCJ 5658/23 *The Movement for Quality Government in Israel v. the Knesset* [2024], Justice Baron, para. 1.

the social and political context in evaluating its decision, and a self-reflection of the its role in times of national crises: “One cannot remain passive.”

This judgment is part of a series of recent decisions by the Israeli Supreme Court concerning the power to amend constitutional norms. The Israeli Court’s approach is often misunderstood, and the following discussion offers a novel reading of central aspects of Israel’s constitutional law. The analysis may also serve as a case-study, for theoretical inquires about democratic legitimacy and for assessing avenues that Courts can employ when facing democratic backsliding.

Israeli constitutional law may seem puzzling in two aspects: First, the Supreme Court’s 1995 decision that a set of laws which are titled “Basic Laws” is constitutionally binding, and that the Court is authorized to invalidate legislation which violates these norms, is perplexing, given that these Basic Laws are adopted and amended by the parliament (the *Knesset*), by a simple majority, through the same process of enacting “regular” laws.<sup>2</sup> Second, given this ruling, at first glance it is hard to understand the 2024 decisions, according to which the *Knesset*’s powers to amend the Basic Laws are limited by Israel’s unwritten constitution (which is characterized according to the state’s “Constitutional Identity”). If the supreme law of the land is a set of unwritten norms, the decision to declare the Basic Laws constitutionally binding may seem questionable, from a normative and political perspectives alike. The first part of this Article aims at addressing these difficulties.

The Court’s 1995 decision that the Basic Laws are constitutionally binding is based on the premise that the *Knesset*’s power to adopt a Constitution is neither absolute nor completely lacking. Instead, the Basic Laws are constitutionally binding because of the *cumulative effect* of both form and substance. The conclusion that the legislature is bound by the Basic Laws is based in part on *limited* procedural legitimacy, as the Constituent Assembly, a body that was elected specifically for the purpose of adopting a constitution, authorized the *Knesset* to enact the Constitution chapter by chapter, each of which to be called a Basic Law. But this procedural legitimacy is incomplete, because the *Knesset* can adopt and amend Basic Laws by a simple majority, and given the parliamentary regime in Israel, where the government enjoys a *de-facto*

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<sup>2</sup> See, e.g., Richard A. Posner, *Enlightened Despot* THE NEW REPUBLIC (April 23, 2007): “Israel does not have a constitution. It has ‘Basic Laws’ passed by the *Knesset*, Israel’s parliament, which [the Court] has equated to a constitution by holding that the *Knesset* cannot repeal them. That is an amazing idea.”

control over the *Knesset*, the *Knesset* may well be in a conflict of interests, in amending constitutional norms to cater for partisan interests of the ruling government and the current majority. Moreover, the original Constituent Assembly left it unresolved whether each “chapter” is constitutionally binding once it is adopted or only after all chapters are enacted and grouped together to form the Constitution. Consequently, identifying the Basic Laws as constitutionally binding has some, but not sufficient procedural legitimacy. The required legitimacy is obtained by also considering the substance of these norms. The Basic Laws bind the legislature because, and as far as their content reflects or is compatible with Israel’s *unwritten constitution*.

Importantly, the scope of the *Knesset*’s procedural legitimacy is not fixed. Its gravity is a matter of a sliding scale. On one hand, an amendment which entrenches a norm that is already part of the unwritten constitution, as is the case of the Basic-Law: Human Dignity and Liberty, is constitutionally valid even if it enjoys only minimal procedural legitimacy. On the other hand, an amendment that is the result of a bipartisan compromise, which was adopted by an overwhelming political and public support, would enjoy substantial procedural legitimacy, which may be sufficient even if it contradicts the unwritten constitution. At the same time, the *Knesset*’s power to adopt constitutional norms and amend them by a simple majority is limited by the state’s unwritten constitution, which is summarized by the phrase “Jewish and democratic state,” and consists of the basic elements of any liberal democracy.

Importantly, Israel’s constitution is only partially an unwritten one, for two main reasons. First, constitutional norms are enforceable through judicial review of legislation only as far as they were adopted by the *Knesset*, in a Basic Law. Second, the content of the unwritten constitution is determined through the concept of Constitutional Identity, which is formed primarily by reference to positive law, and only in part to society’s culture and to moral, universal ideals.<sup>3</sup> It is identified based on norms set by the *Knesset* itself, which is authorized, to a large extent, to amend these norms, and thus also shape Israel’s constitutional identity, as long as it does so through a process which reflects an overwhelming political and public support.

Implementing this approach is challenging, especially in times of democratic backsliding. The Israeli Court’s approach is based on a recognition of the limits of judicial review in preserving democracy when the public view drastically shifts. The ruling that a fundamental change is

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<sup>3</sup> See, e.g., MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CULTURE, AND COMMUNITY* (2010); GARY J. JACOBSON, *CONSTITUTIONAL IDENTITY* (2010).

valid only if it is enacted by a bipartisan majority, and thus enjoys sufficient political and public support, can at least slow down the process of democratic backsliding.

This aspect serves to refute the suggestion, already raised following the Court's 1995 decision, that its approach is aimed at serving the interests of elites in preserving their hegemonic status.<sup>4</sup> On a formal level, as already indicated, the Court does not prevent popular mobilization. It only determined that for overriding the existing constitutional identity, an explicit amendment is required, one that enjoys substantial and persistent popular support. On the level of substance, the purpose of the Israeli government's 2023 "Legal Reform" has been to radically change Israel's constitutional identity. The plan focused on aspects of institutional design, mainly providing the government an absolute control on judicial appointments and substantially limiting the power of judicial review. But the government did not conceal that its underlying aim is to reshape Israel's identity, to what can be characterized as Jewish supremacy. The government aims at enabling the *Knesset* and the government to ban political parties that represent the Arab-Palestinian minority in Israel (and thus secure the dominance of the Jewish right-wing parties), to implement policies which discriminate against women the Arab-Palestinian minority, to further violate freedoms of the Palestinians who live in areas under Israeli occupation and do not have citizenship rights, and more. Doing away with an independent judiciary and judicial review is designed to change Israel's identity, without formally amending the Declaration of Independence, Basic-Law: Human Dignity and Liberty, and other manifestations of Israel's identity as a Jewish and democratic state, given the lack of sufficient popular and political legitimacy to do so. Thus, judicial review is required to address the concern that the government would violate the most fundamental aspects of a liberal democracy, including the right to vote, treating all citizens as equals and preserving at least a minimal form of separation of powers.<sup>5</sup> These are not threats to private interests or ideologies of the liberal elite in Israel. Rather, it is an imminent risk to Israel's existence as a democracy, and in fact, to Israel's very existence.

The following discussion elaborates on these issues. Part II provides some background of the Israeli government's attempt at a "Legal Reform," and its meaning. Part III discusses the legal

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<sup>4</sup> See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007); Ruth Gavison, *Constitutions and Political Reconstruction? Israel's Quest for a Constitution*, 18 INT'L. SOC. 53 (2003).

<sup>5</sup> See, e.g., Yaniv Roznai, *Israel: A Crises of Liberal Democracy?*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 355 (MARK A. GRABER, SANFORD LEVINSON, & MARK TUSHNET EDS., 2018).

basis of recognizing the *Knesset* power to adopt and amend constitutional norm. It points out that the Court has based its decisions on procedural legitimacy but also on substance, invoking the idea of constitutional identity. Part IV analyzes the limits of this power of the *Knesset*. Part V explores the socio-political role of the courts during times of democratic backsliding, with an emphasis of the Israeli recent experience. Part VI concludes, with an overall moderately optimistic assessment, at least in the short term.

## II. BACKGROUND: THE ISRAELI GOVERNMENT'S 2023 ATTEMPT AT "LEGAL REFORM"

In January 2023, the government of Israel initiated a plan to grant itself the authority to appoint Supreme Court Justices and significantly curtail the scope of judicial review (the so-called "Legal Reform"). This attempt at judicial overhaul has been designed to weaken if not to completely dismantle all checks on governmental power. Its ultimate aim has been to change Israel's Constitutional Identity. The primary objective of the government has been to gain the power to implement illiberal policies, mainly by favoring the interests of the Jewish majority and discriminating against the Arab minority, and by enforcing religious norms in the public sphere.<sup>6</sup>

Israel lacks an entrenched Constitution, and thus, although the government is supported by only a slim majority in the *Knesset* (64 out of the 120 Members), it possesses the necessary majority in parliament to enact its plan. Given the strong support for the plan by all parties forming the coalition (but only them), it was widely expected that the government's uncontested formal political power would ensure the swift enactment of the entire plan. However, to the surprise of all observers, the government faced a remarkably effective opposition.

Mass demonstrations quickly emerged, organized by a spontaneous grassroots movement. Starting shortly after the government announced its plan, these demonstrations have been ongoing for over 40 weeks (until the October 7 Hamas attack). The numbers are staggering: Every Saturday night (with additional demonstrations that were held in response to specific events), around 250,000 people assemble in Tel-Aviv's city center, with a similar total number gathering in numerous locations across the country. This means that every week, approximately 7.5% of Israel's adult population participated in these demonstrations. To put it in perspective,

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<sup>6</sup> Barak Medina & Ofra Bloch, *The Two Revolutions of Israel's National Identity*, 56 *ISR. L. REV.* 305 (2023).

in the U.S. this would be equivalent to about 20 million people demonstrating each week for 40 consecutive weeks. About 22% of Israel's adult population reported participating in at least one mass demonstration against the government's plan in 2023 (equivalent to about 56 million persons in the U.S.). What is equally remarkable is that these mass demonstrations have been both entirely peaceful and highly effective.

The government's plan encountered a significant setback as a result of these popular protests. The demonstrations successfully mobilized influential entities, including: International community response, with the governments of the United States and Germany taking the lead in voicing their concerns; local business support, as high-tech and academic sectors provided widespread support to the protest movement;<sup>7</sup> and several thousands of IDF reserve soldiers, who serve voluntarily, who declared that they would withdraw from service if the government implemented its plan. The government did not formally abandoned its plan, but it did not propose it for the final vote in the *Knesset* and delayed the legislative process.<sup>8</sup>

At the same time, the government succeeded in passing amendments to two of Israel's Basic Laws, through a partisan vote. These amendments aimed to facilitate the enactment of its judicial overhaul plan. An amendment to Basic Law: the Judiciary prohibited the judiciary's power to review decisions made by the Cabinet and individual Ministers based on the doctrine of "unreasonableness." This could potentially enable the government to remove the Attorney General, who opposed the Legal Reform, and grant the government immunity from judicial review in various other areas, given the central role of this doctrine in Israeli administrative law. The other amendment imposed stringent conditions under which it is possible to declare the Prime Minister incapable of serving in office. This amendment was adopted in response to a petition to the Court arguing that Prime Minister Netanyahu acted in a conflict of interest by leading the legislation of the Legal Reform, as it could materially affect his criminal proceedings. The government was concerned that Netanyahu might be deemed (normatively) incapable of continuing to serve as Prime Minister. Shortly before the Attorney General was set to respond to the petition, the *Knesset* passed an amendment to Basic Law: the Government,

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<sup>7</sup> See, e.g., Kerim Karakaya and Galit Altstein, *Netanyahu Struggles to Woo Investors Shaken by Turmoil in Israel*, BLOOMBERG (7.8.2023), <https://www.bloomberg.com/news/articles/2023-08-07/netanyahu-struggles-to-woes-investors-shaken-by-street-turmoil>.

<sup>8</sup> See, e.g., Anna Foster & Marita Moloney, *Israel protests: PM Netanyahu delays legal reforms after day of strikes*, BBC.com (March 27, 2023); Eliav Breuer, *Netanyahu suspends judicial reform: I will not lead Israel to civil war*, The Jerusalem Post (March 27, 2023).

stipulating that a decision about incapability could be based solely on medical reasons and must be made by a significant majority in both the government and the *Knesset*, effectively rendering the provision regarding the Prime Minister's incapability moot. Both amendments were adopted solely by members of the ruling coalition and were given immediate effect.

The attack on October 7, 2023 and the subsequent war halted the government's plans to advance its judicial overhaul. However, the Minister of Justice repeatedly called for a renewal of the legislative process. Against this backdrop, the Court was tasked with determining the validity of the two amendments, which directly and indirectly impacted the Court's authority to review decisions made by Ministers and the Prime Minister. As detailed below, the decisions on these amendments were based on a series of earlier rulings concerning Israel's unique constitutional legal system.

### III. THE LEGAL BASIS OF THE *KNESSET*'S POWER TO ADOPT CONSTITUTIONAL NORMS

#### *A. Foundations: The Declaration of Independence and the Constituent Assembly*

Most democratic countries have a written Constitution, though a few, most notably the U.K., do not. What makes the Israeli case unique is that, even after 76 years since its establishment in 1948, the fundamental question of whether the state has a written Constitution—and, if so, what its content is—remains unclear. This controversy arises from the state's founders commitment, which was made both domestically and internationally, to enact a Constitution, a commitment that has persisted without being fulfilled. The challenge is to determine whether Israel has a written Constitution, and what are the legal implications of recognizing that the state's constitution is in fact an unwritten one.

The starting point is the U.N. 1947 Partition Plan.<sup>9</sup> This resolution determined the establishment of two nation-states in Palestine, one Arab and one Jewish, and defined each state's core constitutional identity. Defining a state's constitutional identity based on the majority's ethnicity poses significant risks, particularly the potential for the government to favor the majority's interests and discriminate against minorities, especially when these groups are engaged in armed conflict. Therefore, the Partition Plan required the Jewish state (and the Arab one) to guarantee that “no discrimination of any kind shall be made between the

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<sup>9</sup> Palestine Plan of Partition with Economic Union, General Assembly resolution 181, <https://www.un.org/unispal/document/auto-insert-185393/>.



inhabitants on the ground of race, religion, language or sex.”<sup>10</sup> The Resolution required that this and additional commitments be included both in the Declaration of Independence, that should prevail over any law,<sup>11</sup> and in a written Constitution, that would “[g]uarantee to all persons equal and non-discriminatory rights [...] and the enjoyment of human rights and fundamental freedoms.”<sup>12</sup>

Israel’s Declaration of Independence, that was made in 1948, followed these requirements. According to the Declaration, Israel is established as a Jewish state, and at the same time, it is committed to ensuring “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex” and to guaranteeing freedom of religion, conscience, language, education and culture.<sup>13</sup> The Declaration also stipulated that “[a] Constitution [...] shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.” It adds that until the establishment of elected, regular authorities in accordance with the Constitution, a Provisional State Council was to serve as the Legislative Branch.

The Declaration of Independence explicitly distinguished between the Constituent Assembly and the “regular” legislature, specifying that the latter would be elected according to the Constitution adopted by the former. However, this plan was not implemented as promised. Shortly before the elections to the Constituent Assembly, which were held in January 1949, the Provisional Council enacted a law merging the Constituent Assembly and the “regular” legislature into a single body, the *Knesset*, which was elected for a four-year term.

This integrated body, the First *Knesset*, did not adopt—or even draft—a Constitution. Instead, in 1950, it decided to gradually enact individual norms known as Basic Laws, intended to serve as “chapters” in a future Constitution. The decision not to adopt a written Constitution stemmed

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<sup>10</sup> Part I, Section C, Chapter 2, articles 2 and 3.

<sup>11</sup> Part I, Article C, General Provision: “The stipulations contained in the declaration are recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.” The Plan also determines that these provisions of the declaration “shall be under the guarantee of the United Nations, and no modifications shall be made in them without the assent of the General Assembly of the United Nations [...]” (*ibid*, Part I, Article C, Chapter 4, section 1).

<sup>12</sup> Part I, Section B, article 10(d).

<sup>13</sup> Declaration of Independence, Provisional Government of Israel, Official Gazette: Number 1; Tel Aviv, 5 Iyar 5708, 14.5.1948 Page 1. English translation at <https://main.knesset.gov.il/en/about/pages/declaration.aspx>.

from disagreements about Israel's national identity. More specifically, it resulted from a conflict between the Jewish majority's desire to avoid limiting its powers and the lack of international legitimacy to explicitly permit discrimination against the Arab minority in a Constitution. The 1950 decision allowed the *Knesset* to focus its constitutional legislation on non-controversial institutional aspects, such as election rules and the parliamentary system, while avoiding issues related to the state's Constitutional Identity, including the protection of human rights. Possibly for similar reasons, and in part based on the expectation of a forthcoming Constitution, the Court ruled in late 1948 that the Declaration of Independence is not constitutionally binding.<sup>14</sup>

### *B. Recognizing the Knesset's Limited Power to Adopt Constitutional Norms*

Shortly after its formation in 1949, the *Knesset* set, in regular laws, norms governing the electoral system and the characteristics of the state's form of government. Only in 1958, a decade after the State of Israel was established, the *Knesset* enacted the first Basic Law, and until 1992, nine Basic Laws were enacted, addressing institutional aspects like the electoral system and government powers. When the *Knesset* decided in 1950 to enact the Constitution piecemeal, it left unclear which chapters would be adopted, whether they would gain constitutional status individually or only as a complete document, and whether a qualified majority or another special process was required for adoption or amendment of Basic Laws.

It was not immediately clear whether the Basic Laws constitute Israel's written Constitution. The challenge is due to the fact that the *Knesset* was not explicitly authorized by the Declaration of Independence to adopt a Constitution. It is questionable whether the Provisional Council had the authority to delegate this power to the *Knesset*, violating the Declaration's provisions. The *Knesset*, acting primarily as the legislature, often prioritizes short-term interests of the ruling coalition. Additionally, Israel's form of government, where the government relies on *Knesset* support, and since no constraints regarding the process of enacting the Basic Laws

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<sup>14</sup> HCJ 10/48 Zeev v. Acting District Commissioner of the Urban Area of Tel Aviv [1948], IsrSC 1, 85, 90. English translation <https://www.cas.berkeley.edu/sites/default/files/upload/opinions/Zeev%20v.%20Acting%20District%20Commissioner%20of%20the%20Urban%20Area%20of%20Tel%20Aviv.pdf>.

were set, recognizing the *Knesset*'s power to adopt constitutional norms and amend them creates a risk of abuse of power by the current majority, and in fact the current government.<sup>15</sup>

This raises the question of whether, and to what extent, the *Knesset* has the authority to adopt constitutional norms. One aspect is the *Knesset*'s power to determine the election system and the form of government. This issue was not subject to controversy. As the only elected body, the authorization that it gained from the Provisional Council to adopt a Constitution, the fact that the *Knesset* viewed itself as authorized to set such norms and acted accordingly, and given that until the 1990's the rules were adopted by a bipartisan majority, it was self-evident that the *Knesset* holds the power to both set "the rules of the game" and amend them. A second, and more controversial issue is the constitutional status of the Basic Laws, namely the *Knesset*'s power to constraint itself, in its role as the legislature. This issue was not immediately resolved, primarily because save one provision that will be discussed below, the Basic Laws did not include provisions that were aimed at limiting the powers of the legislature.

At the same time, the court was required to determine what Israel's unwritten constitution is and to what extent it is legally binding. This question is important because the *Knesset* refrained from enacting norms which are fundamental elements of a liberal democracy. These include: the rule of law, the protection of human rights, and more. Resolving the debate to what extent an explicit majority decision is an essential condition for recognizing the legal validity of a constitutional norm was required for determining the powers of both the Executive Branch, and the Legislative one.

The Court developed a set of norms which were recognized as Israel's unwritten constitution. It ruled that Israel's unwritten constitution consists of norms such as the rule of law, the duty to respect human rights, the duty of administrative bodies to execute their powers subject to the requirement of reasonableness, both procedurally and substantially, and more. The Court developed the unwritten constitution given the lack of explicit contradictory legislation, and based on the view that these are norms which are considered as fundamental to any democratic system of government. A prominent example is the 1953 *Kol Ha'am* decision, in which the Court determined that all branches of government are required to protect freedom of speech, notwithstanding the lack of an enacted norm to support such ruling. It justified this result by referring to what is now known as the state's Constitutional Identity: "The system of laws under

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<sup>15</sup> Jon Elster, *Legislatures as Constituent Assemblies*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 181 (RICHARD BAUMAN & TSVI KAHANA EDS., 2009).

which the political institutions in Israel have been established and function are witness that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards the basing of the State ‘on the foundations of freedom’ [...] mean that Israel is a freedom-loving State. It is true that the Declaration ‘does not consist of any constitutional law’ [...] but insofar as it ‘expresses the vision of the people and its faith,’ we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State. [...] [I]t is a well-known axiom that the law of a people must be studied in the light of its national way of life.”<sup>16</sup>

The unwritten constitution has served to bridge the gap between the set of norms which reflects Israel’s Constitutional Identity and the ones formally adopted by the *Knesset*. The Court ruled that the decision of the *Knesset* not to enact these norms is not interpreted as a rejection of their binding status. In a long set of judgements, starting very shortly after the establishment of the State, the Court ruled that the government is bound by the entire set of norms which consists of Israel’s unwritten constitution. For this matter, it was immaterial whether the relevant norms were formally enacted or not, as their binding status has been based on Israel’s unwritten constitution.

The unwritten constitution has been also essential to identify the constraints on the legislature. This reference was inevitable, given that the *Knesset* itself did not determine whether the powers of the legislature are limited or not. Resolving this question required relying on an unwritten constitution. The Court ruled that while all constitutional norms are legally binding, and thus the legislature too is bound by them, the enforcement of these norms through judicial review requires an enhanced democratic legitimacy, given the counter-majoritarian dilemma. The Court ruled that the lack of tradition of judicial review of legislation, and enacted constraints on the legislature result in an insufficient democratic legitimacy to such a move. An example is the 1990 *Laor* case, in which Justice Barak ruled as follows: “In principle, it is possible that a court in democratic society will declare invalid a law which contradicts of legal system’s basic principles, even if these principles are not entrenched in a written Constitution. [However], according to the currently prevailing social and legal view in Israel, the Court does not employ this power, because otherwise, the public would view the court as acting outside of the social consensus about the role and power of a judge in Israeli society. [...] The currently

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<sup>16</sup> HCJ 73/53 Kol Ha’Am v. Minister of Interior [1953], IsrSC 7 871, 884 (Justice Agranat). English translation <https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior>.

dominant approach of the public is that such an important decision be made—at this stage of our life as a nation—by elected representatives of the people”.<sup>17</sup>

The unwritten constitution has thus served for limiting the powers of the Executive Branch, by enforcing this set on un-enacted norms through judicial review of administrative state actions, and at the same time to justify refraining from doing so regarding legislation. But the main role of the unwritten constitution has been to provide the required legitimacy for recognizing the power of the *Knesset* to constraint its own powers as legislature, by adopting Basic Laws that entrench norms which are part of the unwritten constitution. The following subsection elaborates on this fundamental aspect of Israeli constitutional law.

### *C. Democratic, and not Merely Procedural Legitimacy*

A prevailing interpretation of the Israeli Supreme Court’s 1995 *Mizrahi Bank* decision, which ruled that the Basic Laws constraint the legislature, suggests that it is grounded in the (purely) procedural legitimacy of the Basic Laws’ constitutional status. According to this view, the Basic Laws are constitutionally binding solely because they were enacted by the *Knesset*, the body authorized to adopt constitutional norms. This interpretation reflects a misreading of the court’s decision. In fact, Basic Laws are constitutionally binding because of the cumulative effect of their procedural legitimacy, namely their enactment by the *Knesset*, and the fact that their content entrenches Israel’s unwritten constitution.

In developing this doctrine, the Court relied on the concept of democratic legitimacy. The decision that the *Knesset* is authorized to adopt constitutional norms that limit its own legislative power is based on three main sources, which together form the required democratic legitimacy: procedural (or formal) legitimacy, which is generated by the fact that the Provisional Council granted the *Knesset*, to a certain extent, a constituent power; sociological legitimacy, which is determined according to the public support of the idea that the *Knesset* is so authorized; and moral legitimacy, which refers to the relevant policy considerations. While this approach is established in constitutional judicial interpretation,<sup>18</sup> its novelty lies in applying

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<sup>17</sup> H CJ 142/89 Laor Movement v. Speaker of the Knesset [1990], IsrSC 44(3) 529, 554.

<sup>18</sup> See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 64–69 (2011); Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). See also AHARON BARAK, ON CONSTITUTIONAL IMPLICATIONS AND CONSTITUTIONAL STRUCTURE 53 (DAVID DYZENHAUS & MALCOLM THORBURN EDS., 2016).

it to assess the powers of other government branches, including those responsible for adopting constitutional norms.

Implementing this approach has resulted with the ruling that the *Knesset* is authorized to adopt constitutional norms which limit its own legislative power, as long as these norms entrench the state's unwritten constitution, namely fundamental aspects of a liberal democracy. This later aspect is essential to compensate for the insufficient procedural legitimacy of enacting and amending constitutional norms by the *Knesset*. Two seminal precedents can serve to illustrate this approach.

The first example is the enforcement through judicial review of legislation of Article 4 of the Basic-Law: the *Knesset*. This provision, which was adopted in 1958, is an exception to the general pattern of the *Knesset*, until 1992, to avoid from limiting its legislative powers. It mandates that the elections be "equal" and that this norm can only be amended by a majority of at least 61 out of 120 members of the *Knesset*. While this required majority is minimal, in several occasions the *Knesset* legislated election rules, primarily dealing with campaign finance, by a majority that fell short of the required 61 votes, and given the Court's finding that these rules discriminated against certain parties, it had to determine the validity of this legislation. In the 1969 *Bergman* case, and then in three additional cases, the Court ruled that the *Knesset*, as the Legislative Branch, is constraint by Article 4, and thus (implicitly) recognizing the constitutional status of this provision.<sup>19</sup> Importantly, this ruling was not based exclusively on the *Knesset*'s constitutive power, namely on procedural legitimacy. In fact, the Court at the time did not explicitly recognize the constitutional status of Article 4. The violation of Article 4 resulted in declaring the law under consideration invalid because the content of this provision, dealing with the "fairness" of the election rules by requiring ensuring equal opportunity to all political parties, entrenches Israel's unwritten constitution. The Court explained that "the fundamental principle of the equality of all persons before the law exists independently of a written constitution or an entrenched Basic Law provision. This unwritten principle is the essence of our entire constitutional regime."<sup>20</sup>

Article 4 was essential to provide the Court with the required democratic legitimacy to employ judicial review of legislation, and thus when the law that was previously declared invalid was

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<sup>19</sup> HCJ 98/69 *Bergman v. Minister of Finance* [1969], IsrSC 23(1) 693. English translation <https://versa.cardozo.yu.edu/opinions/bergman-v-minister-finance>.

<sup>20</sup> *Ibid*, at 698 (Justice Landau).

reenacted according to the majority required by Article 4, the Court refrained from striking it down, despite its violation of the unwritten constitution.<sup>21</sup> But the same is true in the opposite direction: it was the content of Article 4, the finding that it refers to a “principle [which] is the essence of our entire constitutional regime,” that serves as the essential basis for recognizing its superiority over “regular” legislation.

The second precedent addressed the constitutional status of Basic Law: Human Dignity and Liberty, enacted in 1992. In the 1995 *Mizrahi Bank* decision, the Court ruled that this Basic Law provided the necessary democratic legitimacy for judicial review of legislation that violates human rights. If the court were to rely exclusively on procedural legitimacy, disregarding the content of this Basic Law, the *Mizrahi Bank* decision would be hard to justify.<sup>22</sup> As already indicated, it is unclear whether the Provisional Council had the authority to deviate from the Declaration of Independence’s framework and grant the *Knesset* the dual role of Constituent Assembly and legislature, without establishing special procedures for adopting constitutional norms. The constitutional status of the Basic Law: Human Dignity and Liberty is particularly contested, as it was supported by only 32 MKs (about one-quarter of the *Knesset* members) with 21 in dissent (although the support was bipartisan), and there were doubts during the legislative process about whether the Basic Law would indeed constrain the legislature’s powers.

An alternative, and to my view more favourable, interpretation of the Court’s jurisprudence addresses these concerns. According to this approach, Basic-Law: Human Dignity and Liberty is binding because its content aligns with Israel’s unwritten constitution. This interpretation aligns with President Barak’s words in the *Mizrahi Bank* decision: “True democracy limits the power of the majority in order to protect the values of society, the values of the State of Israel as a Jewish and democratic state, and the recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free. [...] Indeed, in a number of common-law legal systems, the recognition is slowly developing that certain fundamental values cannot be infringed by the legislature, even in the absence of a written constitution. [...] We need not go so far. We have a constitutional text. [...] All that is left is judicial recognition

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<sup>21</sup> See, e.g., H CJ 60/77 Resler v. Chairperson of the Knesset Elections Committee [1977], IsrSC 31(2) 556.

<sup>22</sup> See, e.g., GIDEON SAPIR, *THE ISRAELI CONSTITUTION: FROM EVOLUTION TO REVOLUTION* (2018).

that the Basic-Law is constitutional. We grant this recognition today.”<sup>23</sup> The enactment of this Basic Law, with its unique language,<sup>24</sup> and the formal authorization provided to the *Knesset* to adopt constitutional norms, provided the missing procedural legitimacy to employ judicial review to enforce the elements of the unwritten constitution entrenched in this Basic Law. It is not a coincidence that the avoided from affirming that the Basic Laws are Israel’s written Constitution. This approach provides an additional indication that the Court’s rationale is based on substantive rather than solely procedural legitimacy.

This rationale can also be inferred from the language of Article 1A of the Basic Law itself. It states that “[t]he purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” In this Article, the *Knesset* recognizes the fact that the duty to protect human rights is not established by the Basic Law as such, but is anchored in Israel’s Constitutional Identity, namely it being a “Jewish and democratic state,” which preceded the enactment of this Basic Law. The purpose of enacting the Basic Law is to “establish” these values “in a Basic Law,” a statement that is interpreted as a decision to make these values legally binding, enforced through judicial review. Accordingly, the Court ruled that the enactment of this Basic Law has transformed Israel’s legal system, creating a so-called “Constitutional Revolution,” in the sense that it has made certain unwritten constitutional norms enforceable through judicial review.

Thus, the Basic Laws are binding due to their procedural legitimacy (enacted by the *Knesset* with *some* basis for its Constituent Assembly powers) and their substantive legitimacy (reflecting the unwritten constitution). Neither justification alone is sufficient, but together they meet the required threshold. The unwritten constitution is not enforceable unless formally adopted by the *Knesset*, and the *Knesset* cannot bind itself as legislature (at least not by simple majority) unless it adopts norms reflecting Israel’s unwritten constitution. This is consistent with observations made by Ronald Dworkin, that for the European Convention on Human

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<sup>23</sup> CA 6821/93 United Mizrahi Bank v. Migdal [1995], IsrSC 49(4) 221, para 47. English translation <https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>.

<sup>24</sup> This norm includes a specific language limiting the powers of the legislature, requiring that legislation which infringes human rights to meet the proportionality requirement (Article 8), stating that “all governmental authorities are bound to respect the rights under this Basic Law” (Article 11), and securing the validity of existing legislation, even if it violates human rights (Article 10), thus suggesting that future legislation is not protected.



Rights to be binding in the UK, public acceptance, and not only legislative enactment, is required.<sup>25</sup>

The *Mizrahi Bank* decision did not resolve the question what are the consequences of the *Knesset* adopting norms that contradict the unwritten constitution or exploit its constituent power. This issue was not relevant in 1995, as there were no Basic Laws in conflict with the unwritten constitution at that time. Addressing this issue requires a closer inquiry of the content of Israel's unwritten constitution. Developments in the recent decade have made resolving this aspect inevitable.

#### IV. THE LIMITS OF THE KNESSET'S POWER TO AMEND CONSTITUTIONAL NORMS

In recent years, the *Knesset* has increasingly exploited its power to adopt and amend constitutional norms. The Court has subsequently addressed this issue, ruling that the *Knesset* exceeds in powers when it adopts or amends Basic Laws which contradict Israel's unwritten constitution.

This issue was briefly addressed, *in passim*, in the *Mizrahi Bank* decision. In response to Justice Cheshin's dissenting opinion there, which ruled that given the risk that the *Knesset* would abuse its constituent power, the Court had better avoid recognizing the Basic Law as constitutionally binding, and rely directly on the unwritten constitution in employing judicial review of legislation,<sup>26</sup> the majority opinion addressed the issue. President Shamgar observed that the *Knesset's* power "is not unrestricted. Patently, boundaries must be imposed [...]. It is not necessary to delineate these boundaries here, as there is consensus that in relation to basic rights such as those found in Basic Law: Human Dignity and Liberty – no difficulty is posed by the fundamental recognition [of the validity of relevant constitutional norm]. [...] [W]e do not need

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<sup>25</sup> RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 27 (1990): "[If] a national debate of constitutional principle took place, after which Parliament declared that the European Convention was incorporated into British law [...], [t]hen British constitutional history would have been altered just by that decision have been made, understood and accepted by the public as a whole." See also Robert Post & Reva Siegel, *Democratic Constitutionalism*, NATIONAL CONSTITUTION CENTER (2015): "[A]lthough Supreme Court decisions exert immense authority, constitutional interpretations are truly and finally settled only when the people accept their wisdom, not simply when the Supreme Court speaks."

<sup>26</sup> *Mizrahi Bank*, *supra* note 23. See also H CJ 6472/02 The Movement for Quality Government in Israel v. the Knesset [2006], IsrSC 61(1) 619, 757 (Justice Cheshin).

to delineate these boundaries for the purpose of the discussion before us, and we may leave this issue open. In any event [...] it is possible to take into account fundamental principles of our system as a Jewish and democratic state.”<sup>27</sup>

The dilemma at hand is how to address a *Knesset*'s decision to adopt a constitutional norm that contradicts the unwritten constitution. The challenge results from the lack of explicit “eternity clauses” in the existing Basic Laws, and the rejection of the view that the Declaration of Independence is the Basic Norm, which directly limits the powers of the *Knesset*.<sup>28</sup> Indeed, had the *Mizrahi Bank* decision based purely on procedural legitimacy, namely if the Basic Laws were constitutionally binding solely because they were enacted by the *Knesset*, imposing limits on its powers would have contradicted the *Mizrahi Bank* decision. However, understanding this decision as recognizing the *Knesset*'s power to adopt only constitutional norms which are aligned with the unwritten constitution, justified the conclusion that the *Knesset*'s constitutive powers are limited.

#### *A. Three Types of Constraints on the Constituent Power*

The precedents set by the Israeli Supreme Court present three types of constraints on the *Knesset*'s power to adopt constitutional norms or amend existing ones: “Soft” constraints that are based on existing Basic Laws, which entrench relevant norms of the unwritten constitution; the requirement that the *Knesset* would use its constituent powers only for legitimate purpose, but to for the interests of the ruling government or the current majority; and the prohibition to adopt constitutional norms which contradict the unwritten constitution. The following discussion briefly outlines this three aspects, and demonstrates their implementation.

1. “Soft” Constraints Enumerated in Existing Basic Laws. The existing Basic Laws incorporates central elements of Israel's unwritten constitution. Chief among those is Basic-Law: Human Dignity and Liberty, along with a few other Basic Laws. These provisions are not “eternity clauses,”<sup>29</sup> but as long as they have not been amended, as is the case thus far, the

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<sup>27</sup> *Mizrahi Bank*, *supra* note 23. para 35 (President Shamgar). *See also ibid*, para 43(c) (President Barak).

<sup>28</sup> For support of the position that the Declaration of Independence directly limits the constituent powers of the *Knesset* *see*, AHARON BARAK, BASIC-LAW: HUMAN DIGNITY AND LIBERTY 282 (2023) [in Hebrew].

<sup>29</sup> *See, e.g.*, YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWER (2017).

Court ruled that amendments to other Basic Laws are interpreted to ensure they do not contradict these norms. The rationale is that these provisions reflect Israel's Constitutional Identity, and for an amendment that contradicts these norms to overturn them, an explicit language is required.

Two prominent examples of implementing this “soft” constraint are the judicial review of the “override” clause in the so-called Nation State Basic Law. The first example is the 1996 *Meatrael* decision, where the Court reviewed the validity of an “override” (or “notwithstanding”) clause added in 1994 to the Basic-Law: Freedom of Vocation. The Court acknowledged that it is possible that “there are basic principles and purposes that a law [which will be enacted according to the override clause] cannot violate, ones that our entire constitutional structure, including the Basic Laws themselves, are based upon, if the violation is substantial and severe”.<sup>30</sup> However, it did not apply this doctrine in that case because the override clause had not been applied to the more general Bill of Rights, namely Basic-Law: Human Dignity and Liberty. Instead, the Court interpreted narrowly the override clause that was added to the Basic-Law: Freedom of Vocation, ruling that a law enacted under this clause would still be subject to scrutiny under the Basic-Law: Human Dignity and Liberty. This interpretation effectively muted the override clause to the Basic-Law: Freedom of Vocation.

A second, more dramatic example is the 2021 *Hasson* case, in which the Court reviewed the Basic-Law: Israel—the Nation State of the Jewish People. According to the Court's interpretation, Israel's Constitutional Identity as a Jewish and democratic state absolutely prohibits giving preferential treatment in the exercise of governmental powers to Jewish citizens and discriminating against Arab-Palestinian citizens. This Basic Law aimed to alter this interpretation by giving preference, particularly in land policy, to Jewish citizens of Israel. Article 7 states that “[t]he State views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation.” This norm could be interpreted as authorizing the government to give preference to Jews in land confiscation, land purchase subsidies, and the establishment of exclusively Jewish villages.

In reviewing this norm, the Court ruled, for the first time, that the *Knesset's* power to enact or amend a Basic Law is limited, such that it may not adopt a norm contradicting Israel's Constitutional Identity. The Court stated: “The constraints on the *Knesset's* powers as a Constituent Assembly [...] refer to extreme circumstances of a constitutional amendment

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<sup>30</sup> HCJ 4676/94 *Mitral Ltd. v. Israeli Knesset* [1996] IsrSC 50(5) 15.

which denies the core of the state's Jewish or democratic identity. [...] A Basic Law which severely violates fundamental democratic principles, including free and equal elections, recognition of core human rights, separation of powers, the rule of law, and an independent judiciary, cannot be reconciled with Israel's existence as a democratic state.”<sup>31</sup> The Court chose to affirm this limitation on power, an issue left unresolved in previous cases, likely because the Basic Law in question was very close to, if not exceeding, the threshold of undermining a fundamental democratic principle: the requirement that the government treat all citizens equally. Nevertheless, in a controversial decision, the Court avoided applying this doctrine to the specific case, opting instead to interpret Article 7 in a way that rendered it ineffective. Similar to the *Meatrael* precedent, the Court ruled that Basic Law: Human Dignity and Liberty, which entrench the government's duty to respect human rights, including the right to equality, is not affected by the new Basic Law due to the latter's lack of explicit language to the contrary. As a result, Article 7 was interpreted as not exempting the government from the duty to treat all citizens as equals, including in the subject matters covered by it.

This approach allows the Court to avoid explicitly invalidating constitutional amendments, while *de-facto* achieving this result, through constitutional interpretation. However, this approach is not always viable, particularly when an amendment violates fundamental democratic principles that are not explicitly enumerated in an existing Basic Law. In these cases, the Court employs two additional limitations on the *Knesset's* power to amend constitutional norms.

2. *Legitimate Purpose (the Prohibition to Abuse the Constituent Power)*. The second limitation refers to the purpose behind amending a constitutional provision. In principle, an amendment can aim either to establish what the decision-makers consider a better rule or to serve the interests of the ruling government or the current coalition. The latter purpose is impermissible as it undermines the essence of a constitutional norm, which is to constrain the current majority and ensure governance according to predefined rules. In Israel, where constitutional norms are not formally entrenched and can be altered by a simple majority, and where the government effectively controls the parliament, there is significant risk that amendments may primarily serve to exempt the current government from constraints or advance partisan interests. The Court has ruled that adopting an amendment for such an impermissible purpose constitutes an

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<sup>31</sup> HCJ 5555/18 Hasson v. the Knesset [2021].

abuse of the *Knesset*'s power to set or amend constitutional norms, and is therefore considered ultra vires and would be declared invalid.

The main challenge in applying this constraint lies in identifying the primary purpose of the amendment. The Court has addressed this challenge by establishing guidelines to detect abuse of power. These guidelines include: examining the motives behind the amendment, its impact on partisan interests, the nature of the legislative process, and the form of the amendment. Specifically, an amendment addressing a specific interest of the current government, which takes immediate effect, is supported only by coalition members, and was enacted through an expedited process, is likely to be classified as serving an illegitimate purpose, and thus as an abuse of power, unless proven otherwise.

One example is a 2017 case regarding two-year budget law. A 2016 amendment to a Basic Law, which was adopted as a provisional order to cater for specific interests of the ruling government, and thus applicable only for the relevant year, authorizing enacting a one-time two-year, rather than the regular one-year budget law. The Court ruled that given that the amendment was designed for impermissible purpose, namely serving partisan interests of the current government, that aimed at obtaining an exemption from the burden of achieving the *Knesset*'s approval of the state budget each year, and was thus willing to declare the amendment invalid.<sup>32</sup>

Another example is the 2021 *Shafir* case, where the coalition failed to approve the annual budget. To circumvent the consequences stipulated by the relevant Basic Laws, which included limiting government spending to the previous year's budget and necessitating early general elections, the *Knesset* majority adopted, in a partisan vote, a provisional constitutional amendment allowing the government to exceed the previous budget and avoid early elections. This was a clear case of abuse of power, as evidenced by the amendment's provisional nature and the government's significant interest in this exemption from the general norms. Although the issue became moot by the time of the Court ruling, the Court nevertheless issued a

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<sup>32</sup> HCJ 8260/16 Academic Center of Law and Business v. the Knesset [2017]. The ruling was made in September of the second year, and it was thus impractical to order the *Knesset* to enact a new, one-year budget for the second year, and thus the Court did not formally invalidate the amendment, but only made what it referred to as declaring an "invalidiy warning."

judgment, and determined that the *Knesset* had overstepped its powers due to the amendment's illegitimate purpose, which would have rendered it invalid.<sup>33</sup>

More challenging cases arise when an amendment has general applicability and may also have a legitimate purpose of improving the existing constitutional norms. In such cases, the possibility of a legitimate purpose does not automatically rule out the potential for an illegitimate one. The assessment involves determining the dominant purpose, considering factors such as the intensity of partisan interests, the intentions of the government, the form of the amendment (*e.g.*, whether it takes immediate or delayed effect), and the legislative process, including support or lack thereof from opposition parties. If there is doubt, an amendment will be declared invalid only if it also violates the third constraint, which relates to the content of the specific constitutional norm that was amended.

A notable example of implementing this constraint is the 2024 *incapability* case.<sup>34</sup> As already indicated, an amendment to Basic-Law: the Government, adopted in 2023, substantially narrowed the conditions under which the Prime Minister could be declared incapable of continuing in office. The amendment was enacted in response to a petition to declare Prime Minister Netanyahu incapable of serving due to alleged conflicts of interest related to the "Legal Reform" legislation, which could impact his criminal proceedings. The timing of the amendment, shortly before the Attorney General was to respond to the petition, the partisan nature of the vote, its immediate effect, and its sweeping scope, suggested that the amendment served a partisan rather than legitimate purpose. The content of the amendment, which effectively made it nearly impossible to declare the Prime Minister incapable, supported the conclusion that it was invalid. The Court ruled that the *Knesset* does not have the authority to alter the rules to benefit the current Prime Minister and decided that the amendment would only take effect after the next general elections and the formation of a new government.

3. *The Knesset may not Contradict Israel's Constitutional Identity.* The *Knesset* is authorized to establish and amend constitutional norms only as long as these do not contradict Israel's unwritten constitution, which reflects its identity as a Jewish and democratic state. The Court has determined that fundamental aspects of a democratic regime are effectively entrenched within this framework. These include, primarily, the principles of free and equal elections, the rule of law, the separation of powers, judicial independence, and the protection of human rights.

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<sup>33</sup> HCJ 5969/20 Shafir v. the Knesset [2021].

<sup>34</sup> HCJ 2412/23 The Movement for Quality Government in Israel v. the Knesset [2024].

While major violations of the unwritten constitution are strictly prohibited, a less severe violation may be acceptable if the amendment serves a legitimate purpose, rather than achieving an illegitimate purpose.

Applying this approach, in the 2024 *reasonableness* case, the Court struck down an amendment that removed the Court's power to review governmental decisions based on the legal doctrine of unreasonableness.<sup>35</sup> Given that administrative law in Israel is largely based on common law, due to the absence of a formal administrative proceedings act or other legislative norms, the unreasonableness doctrine is crucial for reviewing decisions made by ministers, who wield most of the administrative powers.

The Court ruled that while the *Knesset* can establish administrative law rules, such as determining the applicability of the unreasonableness doctrine in specific areas, the amendment in question aimed primarily to exempt the current government from legal constraints. This was evident from the amendment's form, namely its exclusive support from coalition votes, its expedited passage, and substance, which included a sweeping immunity that it granted the government from judicial review based on the unreasonableness doctrine, without providing an alternative mechanism or doctrine for oversight. The Court found that this amendment violated the aforementioned constraints, as its primary purpose was to facilitate illegal actions by the government and substantially limit judicial review, thus infringing on the rule of law and the separation of powers.

The difficult question is to justify judicial review of constitutional amendments that is based on the unwritten constitution, given the prevailing approach of refraining from doing so in the case of "regular" legislation, based on the lack of sufficient procedural legitimacy for this type of judicial review. One answer is that the *Knesset* enjoys a much greater level of procedural legitimacy when it acts as legislature in comparison to its role as a constituent assembly. A second answer refers to the greater harm that results from an amendment to a Basic Law that violates the unwritten constitution in issues such as elections rules, the form of government, the power of judicial review, the independence of the judiciary, and the general duty to protect human rights, in comparison to a violation by a specific "regular" norm. Finally, the Court is indeed limited in its power to enforce the limits on the *Knesset's* power to amend the Basic Laws, based on the doctrine that the scope of the *Knesset's* procedural legitimacy is not fixed. The gravity of procedural legitimacy is a matter of sliding scale. An amendment that is the

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<sup>35</sup> The *reasonableness* case, *supra* note 1.

result of a bipartisan compromise, which was adopted by an overwhelming political and public support, would enjoy substantial procedural legitimacy, which may be sufficient to validate it, even if it contradicts the unwritten constitution.

*B. The Irreversibility of Incorporating the Unwritten Constitution into Basic Laws*

At first glance, the doctrine might seem anomalous: The *Knesset* has the freedom to decide whether to enact norms that are part of the unwritten constitution, and as long as it refrains from doing so, the Court lacks the democratic legitimacy to impose these norms on the legislature (but not on the Executive Branch). However, once the *Knesset* adopts such norms, the decision becomes irreversible, as it cannot revoke them. This concern is only partially valid.

The *Knesset* may revoke an existing rule and replace it with an alternative that is also legitimate according to the unwritten constitution. The *Knesset* may be restricted from making changes if the motive is illegitimate, such as catering to the interests of the current government, but if the change is based on the *Knesset*'s assessment that an alternative norm is preferable, for instance, making a change in the form of government or the elections system, the original rule is revocable. Similarly, if the *Knesset* adopts a rule that contradicts the unwritten constitution—such as the Basic Law: Nation State, which was challenged in the *Hasson* case for discriminating against Arab-Palestinian citizens, or the amendment to revoke the unreasonableness doctrine—the issue of non-reversibility is irrelevant. These amendments are aimed at violating the unwritten constitution rather than merely altering an existing norm.

The issue of irreversibility is relevant when the *Knesset* revokes a provision in a Basic Law that reflects a norm which is also part of the unwritten constitution, such as a hypothetical repeal of the Basic Law: Human Dignity and Liberty. The open question is whether repealing such a provision would also strip the Court of its power to review legislation based on this (now unwritten) norm. Given the long-standing enforcement of adherence to the unwritten constitution, particularly regarding norms fundamental to Israel's Constitutional Identity, which have been incorporated into the Basic Laws, it is possible that an amendment that revokes this incorporation might be practically, if not formally, irrevocable. This outcome would be based on a change in the relevant background circumstances, including the sociological legitimacy of judicial review of legislation.<sup>36</sup> It is along the same rationale that

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<sup>36</sup> See, e.g., H CJ 10042/16 Quintinsky v. the Knesset [2017]. English translation of the abstract <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Quintinsky%20v.%20Knesset%20%28summary%29.pdf>.



John Rawls has suggested that “the [U.S.] Bill of Right [is] entrenched in the sense of being validated by long historical practice. [...] The successful practice of its ideas and principles over two centuries place restrictions on what can now count as [a valid] amendment”.<sup>37</sup>

## V. THE SOCIO-POLITICAL CHALLENGE

The most challenging aspect of the Israeli Supreme Court’s approach is its interpretation of Israel’s unwritten constitution. The content of this set of norms is determined through the concept of Constitutional Identity, which is formed primarily by reference to positive law, and only in part to society’s culture and to moral, universal ideals. This concept was developed in European constitutional law, as a mechanism to balance between national, domestic norms and the laws of the European Union. As set in Article 4(2) of the Treaty on European Union, “[t]he Union shall respect the [...] national identities [of Member States], inherent in their fundamental structures, political and constitutional.” This concept, even if not explicitly referred to in this name, is a central component of constitutional adjudication, mainly in the context of constitutional adjudication. It is constructed, similar to Dworkin’s concept of “constitutional theory” that is the basis of constitutional interpretation, based on the existing material, which includes “constitutional rules and settled practices under these rules”.<sup>38</sup> It is based on the interpretation of the constitution by the political Branches, as translated to enacted norms and policies that are implemented, on sociological understanding of the country’s fundamental ideals, and on moral considerations, about the just theory. The Constitutional Identity is not fixed. It is set endogenously, based on the perceptions, preferences, and policies of the relevant actors.

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<sup>37</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 239 (1993). For a different view see Vicki C. Jackson, *Unconstitutional Constitutional Amendments: A window into constitutional theory and transnational constitutionalism*, in *DEMOKRATIE-PERSPEKTIVEN* 46, 77 (MICHAEL BÄUERLE at al. Eds, 2013) (arguing that at least in the case of the U.S., there is no room for reviewing the validity of a constitutional amendment on its merits, given that “the amendment process itself is [...] a difficult one to surmount,” and it is thus preferable to assure “sufficient space for the democratic, consensual basis of constitutionalism.”).

<sup>38</sup> Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1084 (1975): “[The judge should ask] just what scheme of principles has been settled. He must construct, that is, a constitutional theory... [He] must turn to the... constitutional rules and settled practices under these rules to see which of the [possible] theories provides a smoother fit with the constitutional scheme as a whole”.

Israel's constitutional identity is identified chiefly on the basis of three norms set by the *Knesset* itself (or its predecessor, the Provisional Council): the Declaration of Independence, Section 7A of Basic-Law: the Knesset (which disqualifies political parties who deny Israel's existence as a Jewish and democratic state), and Basic-Law: Human Dignity and Liberty. As already indicated, the *Knesset* is authorized, to a large extent, to amend these norms, and thus also shape Israel's constitutional identity, as long as it does so through a process which reflects an overwhelming political and public support. It is in this sense that the constitutional identity is continually formed and shaped through a process of "reflective equilibrium."

At the same time, identifying Israel's Constitutional Identity is especially challenging in Israel. The difficulty arises from the lack of an overlapping consensus in Israeli society about the meaning of its identity as a Jewish and democratic state. Two minority groups, the Arab-Palestinians and the Ultra-Orthodox Jews, who together compose of about one-third of Israeli society, strongly disagree with fundamental aspects of Israel's Jewish or democratic identity, respectively. The remaining Jewish majority is split on the basic principles as well. The central controversy revolves around the state's "Jewishness": one view limits this to immigration policy and symbolic aspects of the public sphere, emphasizing equal treatment of all citizens as articulated in the Declaration of Independence. Another view argues that the state should prioritize the interests of Jews over Arabs and incorporate Jewish religious norms into state law. This issue is particularly complex because the government's "Legal Reform" plan aims to address this very conflict. While the Court has endorsed the former interpretation of Israel's Constitutional Identity in its review of governmental policies, the current majority in the *Knesset*—and a majority among the Jewish population—supports the latter approach.

The proposed judicial overhaul seeks to change the state's Constitutional Identity by limiting judicial review and empowering the government to appoint justices, thereby enabling the political branches to enact policies reflecting their preferred interpretation. This puts the Court and the government on a collision course.

On one level, the doctrine of Constitutional Identity highlights the limits of judicial preservation of democracy when public opinion shifts drastically. As Robert Dahl observed, democracies endure because of a consensus on core democratic values: "To assume that [the U.S.] has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because

our society is essentially democratic.”<sup>39</sup> If this assumption is challenged, it may align with Ryan Doerfler and Samuel Moyn’s view that “if right-wing nationalists win, [it means that] the country is already lost,”<sup>40</sup> at least regarding constitutional adjudication. This is not a limitation of the doctrine but an inherent feature of it.

Conversely, a less pessimistic perspective returns to procedural legitimacy. It is justified to hold that a shift of the Constitutional Identity is to be recognized only when the change is supported by an overwhelming majority. It is one which should be clearly expressed in a written Constitution that enjoys sufficient procedural legitimacy. Absent these modifications, the change in public sentiment is insufficient to recognize a change of the Constitutional Identity.

There is rich academic literature accentuating the view that Courts often reflect public opinion, as justices are influenced by evolving social norms and values. Dahl noted that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities.”<sup>41</sup> According to this premise, “the [U.S.] Constitution survived only because [its interpretation] was frequently adapted to fit changing social [norms].”<sup>42</sup> Dahl’s *is* has transformed to *ought* by what is known as the American Conservative Thought. As suggested by Garry Wills, the meaning of the Constitution should not be viewed as fixed, determined based exclusively on reason, but rather “[trace] the spontaneous growth and grouping of social norms.”<sup>43</sup> Accordingly, “the constitution [...] is never merely a written document. It is the ‘shared situation’ of society, that continuous arrangement whereby men preserve their common stake in a political regime.”<sup>44</sup> The idea is that determining what the constitution means should be based on referring to “an accumulation of actions taken over a period of years by various public authorities, as well as by private citizens and groups, [...]

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<sup>39</sup> ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY 143 (1956).

<sup>40</sup> Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, \_\_\_ (2021).

<sup>41</sup> Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. Pub. L. 279, 285 (1957).

<sup>42</sup> DAHL, *supra* note 39, at 143.

<sup>43</sup> Garry Wills, *The Convenient State*, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY 7, 23 (WILLIAM F. BUCKLEY, JR. ED., 1970).

<sup>44</sup> *Ibid.*, at 28.

which may eventually produce a broad synthesis”.<sup>45</sup> This ideal was adopted beyond the ranks of the Conservative Thought, and it has been translated to the concept of democratic legitimacy (or “democratic constitutionalism”).<sup>46</sup> Hence Jack Balkin’s conjecture that “[c]ourts have neither the first nor the last word on the practical meaning of the Constitution; to the contrary, courts are always in complicated streams of mutual influence with citizens, the national political process, and the decisions of state and local governments.”<sup>47</sup> However, constitutional interpretation must also be based on reason and moral considerations. Conflicts between prevailing popular preferences and fundamental moral principles of liberal democracy should not necessarily result in favouring the former.

A preferred solution to this conflict is to hold that overriding moral considerations, which entail transforming the Constitutional Identity into an illiberal one, requires substantial and persistent popular support for a new unwritten constitution. Paul Freund’s metaphor suggests that courts “should never be influenced by the weather of the day but [...] by the climate of the era.”<sup>48</sup> A significant shift towards illiberal values requires overwhelming popular support and the formal adoption of a new written Constitution to reflect the new Constitutional Identity.

This approach is applicable to the Israeli case. In the past decade, the government and the *Knesset* have implemented policies reflecting a shift in their perception of Israel’s Constitutional Identity, increasing the state’s “Jewishness” at the expense of democratic values. A pivotal piece of legislation in this shift has been the 2018 Basic Law: Israel—the Nation State of the Jewish People. While this Basic Law aimed to alter Israel’s constitutional identity,

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<sup>45</sup> L. Brent Bozell, *The Unwritten Constitution*, in AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY 52, 59 (WILLIAM F. BUCKLEY, JR. ED., 1970). See also William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SC. REV. 87, 89 (1993): “[Public opinion] influences the court as a result of gradual, almost imperceptible changes in the attitudes and beliefs of individual justices as they adapt, consciously or not, to long-term, fundamental trends in the ideological temper of the public.”

<sup>46</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

<sup>47</sup> BALKIN, *ibid*, at 68.

<sup>48</sup> Marcia Coyle, *The Supreme Court and the “Climate of the Era,”* NAT’L CONST. CTR. (June 29, 2020), <https://constitutioncenter.org/blog/the-supreme-court-and-the-climate-of-the-era>. See also STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 245, 258 (2024).

by omitting references to the right to equality and endorsing an illiberal approach, the *Knesset* has refrained from repealing or amending the Basic Law: Human Dignity and Liberty. Similarly, the right-wing coalition established in late 2022, while committed to ideological shifts, chose not to respond to the Court's narrow interpretation of the Basic Law: Nation State in the 2021 *Hasson* case by adopting a new Basic Law. Instead, the majority sought to limit judicial review and politicize the Court, hoping to align policies with its ideological preferences without explicitly changing the Constitutional Identity.

This choice by the government may stem from concerns about international backlash or insufficient political and popular support. Regardless, this omission should have legal implications. The strong popular opposition to the government's plan indicates that the reform is highly contested and does not reflect a sweeping shift in public opinion.

Under these circumstances, without explicit political and sociological changes, moral considerations challenge the legitimacy of norms undermining the rule of law, separation of powers, and human rights. While substantial conflicts between moral considerations and majority views may not be permanent, this approach can temporarily mitigate democratic backsliding. An amendment which is incompatible with the existing Constitutional Identity, and thus lacks in substantive legitimacy, requires a change in the state's Constitutional Identity to be valid. As long as there is determined and substantial political and popular opposition to such a change, it is justifiable to reject the claim that a (counter) constitutional revolution occurred. This doctrine compensates for the lack of formal mechanisms, requiring special majority and the involvement of multiple legislatures and institutions with different constituencies in the process of adopting constitutional amendments.<sup>49</sup>

## VI. CONCLUSION

Israeli constitutional law faces an inherent deficiency due to the absence of an agreed-upon procedure to ensure that constitutional norms are adopted with more support than the simple majority required for regular government and legislative actions. During the early decades of the state, this formal deficiency was politically mitigated by a tradition of adopting constitutional norms through a bipartisan process, which secured a qualified majority. However, in recent years, especially since the election of the government at the end of 2022,

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<sup>49</sup> TOM GINSBURG AND AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2019).

there has been a “discovery” of the formal power to amend the Basic Laws by a simple majority, which has been exploited for immediate political purposes and ideological changes.

The Court has refrained from imposing a procedural requirement for a qualified majority to amend the Basic Laws, as the *Knesset* has avoided enacting such a norm. Instead, the Court has developed a nuanced, sliding-scale approach. According to this approach, a simple majority can enact and amend constitutional norms as long as they do not contradict Israel’s unwritten constitution or Constitutional Identity. This constraint allows the *Knesset* substantial discretion, but also imposes limits. The greater the deviation of an amendment from the unwritten constitution, the more stringent the procedural requirements become. These requirements may include the majority needed for enactment, the government’s immediate interest in the amendment, whether the amendment takes effect immediately or is delayed, and other factors. In this context, the Israeli Supreme Court has developed the concept of democratic legitimacy. While procedural legitimacy is important, it is not considered absolute. The justification for an amendment also depends on sociological and moral legitimacy, which involves evaluating both substantive and procedural aspects.