



The Importance of Israel's Proposed Judicial Reform – and Ways to Improve It; A Response to the Barak-Corren Document

Ariel Erlich*

Against the backdrop of the controversy surrounding Israel's proposed judicial reform, Prof. Netta Barak-Corren has published a comprehensive paper of analysis and criticism.¹ Her paper is notable for its detail and depth, and for the impartial analysis it offers, recognizing the need for changes in the current state of affairs, without exaggerating or generating false alarm. As such, it contributes to the much-needed measured public discourse regarding the reform.

The aim of this paper is to present the key benefits and overall importance of the proposed Judicial Reform, while also suggesting ways in which it can be improved. In this critique, I will present the main arguments in Professor Barak-Corren's paper (hereafter, "Barak-Corren"), briefly present a few central observations, note where it would be well to consider accepting her recommendations, highlight the important benefits of the proposed reform, and finally, present a series of suggestions for enhancing the reform.

* Adv. Ariel Erlich is Director of the Litigation Department at the Kohelet Policy Forum.

¹ Netta Barak-Corren [The Levin-Rothman Plan for Altering the Israeli Justice System: A Comprehensive Analysis and Proposal for the Path Forward](#) (2.2.2023, available online).

A. Background – Barak-Corren's Paper, the Deficiencies It Recognizes in the Judicial System and its Stance on the Reform

Barak-Corren presents a detailed review of the main deficiencies in the judicial system and in the relations between the government branches as they stand today, on the backdrop of the far reaching powers the Supreme Court has assumed for itself in the past decades.

The first deficiency is the **opening of the HCJ's (High Court of Justice) doors in an overly-broad manner**, by weakening or removing previously-practiced filter mechanisms for petitions- standing, justiciability and other threshold requirements. Opening the doors in this manner paved the way for broadening the range of issues brought before the court and transforming it into the final arbiter on many questions formerly reserved for the political arena.

The second is **seizing the power of judicial review** over Knesset legislation by virtue of the Basic Laws enacted in 1992. The Basic Laws, originally enacted in the early years of the State primarily to establish Israel's fundamental institutions, were intended to form the basis of Israel's future constitution, but were widely considered to be without constitutional status in the interim. The Knesset passed Basic Law: Human Dignity and Liberty in 1992, and Basic Law: Freedom of Occupation in 1994, which were the first Basic Laws dealing with human and civil rights. The circumstances surrounding their passage, as well as the explicit statements of their initiators and proponents, demonstrate that the Knesset never intended these pieces of legislation to serve as the basis for judicial review. Indeed, the circumstances surrounding the passage of Basic Law: Human Dignity and Liberty hardly demonstrate the mark of a "constitutional moment". The Basic Law was passed during a lame duck government, was introduced as a private members bill, and was voted upon by a minority of Knesset members with, little media or public attention. In fact, proponents and opponents alike largely agree that Israel's quasi-constitution is largely the creation of the Supreme Court, rather than of the legislature.

Until the 1990s, the HCJ never pretended to hold the power to strike down Knesset legislation. Based on creative interpretation, the Court claimed the power to judicial review by virtue of the Basic Laws despite ambiguity (or evidence to the contrary) of the Knesset's intent. Although Barak-Corren believes that these laws can indeed possibly be construed to grant authority to the court, she points out the problematic nature of broadening the interpretation of the right to dignity so as to encompass a large number of other rights, including those that were deliberately left out of Basic Law: Human Dignity and Liberty. In practice, such broadening means a replacement of the sovereign, i.e. the Knesset, in determining the content of the constitution.

Thirdly, focusing judicial review **on an evaluation of the values contained in the legislation**, in such a way as to make the HCJ the deciding factor on politically-contentious issues based on considerations of values, a function that should be in the hands of the Knesset.

The fourth aspect is the use of the **reasonableness** standard to examine the validity of administrative decisions (on the part of the government or other agencies). Through developing and broadening the reasonableness doctrine far beyond the traditional common-law standard, the Supreme Court has expressed its willingness to adjudicate every professional decision made by a government agency, including those decisions that lack any other legal failing, despite the fact that the Court does not possess the required expertise for evaluating these decisions. Thus, the Court opened the floodgates to petitions on any and all government decisions; at times, asserting for itself the right to reexamine the considerations and decision-making processes of government agencies, based only on its determination of their 'reasonableness'.

Fifth, the empowerment of the **institution of the government legal counsel apparatus (the Attorney-General's office)**, arising from the expanding scope of the Supreme Court's actions. Unlike in other common-law countries in which the Attorney-General is a political figure and government minister, the Israeli AG is a professional civil servant. After the Supreme Court determined that the AG's opinion is binding on the government, every governmental decision is in effect subject to the final decision of the AG. The legal counsels of every government ministry are independent of their ministers and subservient to the AG. As the HCJ expands its discussion to matters of politics, values, and reasonableness, legal counsels are required to take these factors into account when developing the (binding) opinions they present to ministers, thereby making judgements on political decisions, addressing their reasonableness, and applying value-based tests. Thus, the AG's office and the government legal counsel apparatus have become a *de facto* judge, an actor with outsized power that lacks a democratic basis, whose influence extends beyond the judicial realm.

According to Barak-Corren, all these issues and problems need to be addressed; however, the current judicial reform proposal is not, in her opinion, the right way to go about it, and will lead to the collapse of the separation of powers in Israel and to a sharp decline in public services. Barak-Corren presents a thorough analysis of the proposal's components on which to base this argument.

Regarding the proposed reforms, Barak-Corren believes that the committee for judicial selection should not be changed; that judicial review of Basic Laws should not be proscribed until such time as a specialized legislative process for legislating such laws is established;

that the requirements for all Justices to sit on the panel, and for a supermajority of the Supreme Court to concur for the purpose of judicial review of legislation, go much further than warranted. Furthermore, she believes that the override clause will nullify the judicial review itself; and that the proposal to eliminate or narrow the reasonableness doctrine should be more moderate, as should be the proposal pertaining to the government's ability to choose its own representation in court. Alongside these, Barak-Corren suggests adopting two points from the proposed reform – the Supreme Court's exclusive authority to conduct judicial review, and the permission for the government to have its own representation before the court when it is at odds with the AG. At the same time, Barak-Corren proposes softer alternative mechanisms for judicial review and government restraint in various fields, in the hope that they will come, in practice, to replace judicial review.

B. General Remarks on the Barak-Corren Document

As mentioned above, Barak-Corren reviews a number of major deficiencies in the current judicial state of affairs but does not give them the appropriate weight in analyzing the reform proposal, or in suggesting solutions. I will lay out a few main points.

B.1. Formulating a Reform Program Considering the Current Judicial Reality in Israel

The reform proposal does not presume to deal with the full range of components of the judicial situation and its problems as we know it today. For instance, in the area of constitutional judicial review, it does not discuss application of the "proportionality" requirement, including the "strict proportionality test", which weighs legislation's advantages against its harm and is purely values-based.² It does not refer to the anomalous and unparalleled interpretive doctrine adopted by most Supreme Court Justices, incorporating the idea of a legislation's "objective purpose", an invention of Chief Justice Aharon Barak, according to which Justices may subjectively interpret the law in such a way that it furthers what the Justices believe should be its proper ("objective") end, even if the interpretation is far from the plain meaning of the text or intent of its author. It also does not touch on the conforming interpretation doctrine, according to which a new law is interpreted in the context of existing laws and legal doctrine. While this is a professedly restrained judicial technique, it in fact makes it possible

² This standard is called the cost-benefit analysis, the narrow proportionality test, the proportions test or the constitutional balance test. See Aharon Barak, *Principled Constitutional Balancing and Proportionality: the Jurisprudence Aspect*, in JUDICIAL LEGACY OF AHARON BARAK 47 (2009) [Hebrew]: "The values aspect of this test is strong enough to have prompted Justice M. Cheshin to remark that, "it is appropriate to call it the proportionality test in the sense of 'values'. The point of this test is values and it is proper we should name it so".

to hollow out a law's purpose without formally invalidating it, thereby undermining the use of new legislation to change the previous legal situation. It is doubtful if there is a legislative tool that can address these pervasive techniques in Supreme Court case law, which are partly what bring about the deficiencies detailed by Barak-Corren.

The reform likewise does not limit standing, a requirement which exists in other judiciaries, but which has been virtually eroded in Israel. It does not address the question of what is "justiciable", thus enabling the Court to continue to weigh in on every question that comes before it. As regards administrative law, the reform proposal deals only with the reasonableness doctrine, and it is doubtful how effective minimizing its usage will be in drawing a clear line between policy-making and adjudication.

Considering these and other features, it is safe to assume that the proposed reform will not substantially change the nature and scope of the Court's judicial review, certainly not immediately. In all probability it will not change the fact that the Court has become the deciding factor on many public issues, the debates over which are based on considerations of values, a state of affairs Barak-Corren herself sees as problematic.

Barak-Corren's paper mentions these aspects, and forms, on their foundation, her assessment that the Court is excessively engaged in values-based public disputes. Nevertheless, in the critique of the reform's solutions, and in her own proposed solutions, the document abandons the big picture and the agreed-upon necessity for overhaul. **The Barak-Corren document offers solutions as though the issue at hand is crafting inter-branch relations from the ground up, and not creating solutions for existing circumstances. It is imperative, however, in light of the fact that the judicial system (the courts and the AG office) has become the deciding voice on every contentious values-based public issue, to take into account the facts of the current situation, including the mindset, approach and practices adopted by the judiciary in Israel over the past three decades.**

Of course, none of the above is intended to detract from the importance of an independent, robust and professional judicial and legal system, fearlessly reviewing the other branches and restraining them from acting arbitrarily, discriminatorily, outside their authority, on the basis of irrelevant considerations, or in any other manner that recognizably calls for judicial intervention.

B.2. Review of Legislation: The Need for a Specialized Procedure for Review of Legislation in the Absence of a Constitution

Historical-judicial research has shown that while legislating the Basic Laws of 1992, the majority of MKs did not believe or understand that they were thereby authorizing the court to review legislation. The pronouncement of a "constitution", and Israel's conversion into a constitutional democracy (in which the parliament is subject to the constitution and the court is authorized to strike down parliamentary law) was made by the Court itself.³ Even if this is disputed by some,⁴ there is no dispute that reading additional rights into the basic laws via the expression "human dignity", including rights deliberately left out of the Basic Law's wording, is an instance of the Court writing a constitution. This process marches on in the Court's case law with no end in sight.

Therefore, even if the source of authority for judicial review would be regulated, as is proposed in the reform, the Israeli government system will continue to suffer from a democratic deficit: the Court will be authorized to strike down parliamentary legislation on the grounds of a "constitution" it formed and drafted itself; a "constitution" that is not an expression and realization of the will of the majority, but a document the boundaries and content of which are unknown, and which is being shaped incrementally by the Court.

Levin's proposed reform in its current form does indeed include a pronouncement that laws be reviewed solely on the basis of the basic laws' "explicit" language, but this is at best only a partial remedy. Firstly, because the question of what constitutes explicit language can itself be interpreted. Secondly, because it is unclear what the status of

³ For a detailed account, see GIDEON SAPIR, CONSTITUTIONAL REVOLUTION IN ISRAEL: PAST, PRESENT AND FUTURE (2010) [Hebrew]. Note also the difference between former MK Uriel Lynn's statement at the time of the passage of the basic law, and the claim made in his book THE BIRTH OF A REVOLUTION (2017) [Hebrew]. When presenting the Basic Law before the Knesset at the second reading, he claimed that: "We are not shifting the weight to the Supreme Court. We are not adopting what was proposed in the Basic Law: Legislation or the Basic Law: Human Rights submitted in the past. No constitutional court is being established ... with special power to repeal laws". In contrast, in the introduction to his book he claims: "These laws would never have attained their constitutional status if the Supreme Court, headed by Prof. Aharon Barak, had not bestowed upon them the deeper, broader meaning – exactly the deep and broad meaning we, the legislature, meant and aimed at".

⁴ Barak-Corren presumably favors the version that there was an awareness of this in the Knesset, at least in 1994. See footnote 3 in the Barak-Corren document. Barak-Corren seeks to rely on a quote from the 1994 Knesset deliberations transcript, in which were presented amendments to Basic Law: Freedom of Occupation adding a limitation clause, and an additional amendment to Basic Law: Human Dignity and Liberty. In point of fact, the amendment was made in order to weaken the force of the basic laws and in particular, to add a limitation clause to Basic Law: Freedom of Occupation to ensure the survival of the coalition under Yitzhak Rabin. It is difficult to deduce, from what MK Dan Meridor said then in his opening remarks, an intent (even a belated one) on the part of the constituent authority to create a constitution for Israel.

past interpretations of basic laws would be.

The democratic deficit of judicial review, paired with the absence of an agreed-upon constitution, is not only a formal question. Judicial review of legislation is the process of examining whether a law enacted by parliament resides within the constitutionally-defined framework. **Without a constitution, or under a constitution the boundaries of which are vague and have not been constructed in the manner that constitutions generally are created, it must at least be expected that judicial review be conducted not only with great restraint, but within the limits of an extraordinary procedure within the Supreme Court itself. There is therefore sound justification, so long as a full constitution in Israel has not been adopted, that judicial review of Knesset legislation be conducted by a full panel of judges and with a supermajority, as the reform proposes.** Barak-Corren's analysis misses this important consideration.

B.3. Public Ramifications of the Current Condition

Similarly, another aspect to which Barak-Corren's analysis gives no weight is the public ramifications of the current imbalance. The discrepancy created between the political- democratic verdict versus the judicial one on public issues (such as drafting the ultra-Orthodox; immigration, Law of Return and illegal immigrants; appointments to senior positions; outlining surrogacy arrangements) have fractured trust in the democratic system's ability to serve as a decision mechanism for contentious public issues, in conjunction with the continual erosion of public trust in the Supreme Court. In recent decades, there has been a clear path that leads from the Court-led revolution to a decline in trust of the courts.⁵

The court's deep involvement in public, values - based disputes has also, as a matter of course, political repercussions. Israel lacks a constitution that includes a bill of rights, whether adopted as such or developed incrementally. Nonetheless, in the current circumstances, there is a freeze in the willingness to proceed with drafting such a bill, first and foremost because of concerns among lawmakers regarding judicial review of legislation as it now stands. When the constitution's content is unknown, and creative interpretation has no limits, there is a strong disincentive to create additional "constitutional" material.⁶ Moreover, the Supreme Court has recently begun to assert its authority to review even Basic Laws. The court's revealed a willingness in principle to

⁵ Aharon Garber and Yonatan Givati, *The Judicial Revolution's Impact on Trust in the Court*, MISHPATIM 53 (2023). [Hebrew]. See also: Research Summary: Aharon Garber and Yonatan Givati, *The Judicial Revolution's Impact on Trust in the Court*, RESHUT HA'RABIM BLOG (9.11.2022). [Hebrew]

⁶ Already in the nineties, an ultra-Orthodox MK was quoted as saying he would object even to a basic law which contained the Ten Commandments, due to the Supreme Court's unpredictable interpretations.

strike down Basic Laws, either on the basis of procedural flaws ("abuse of constituent power") or substantive ones ("unconstitutional constitution"). This willingness neutralizes in advance any chance of developing the constitutional project in Israel, and justifies legislation barring future judicial intervention in Basic Laws.⁷

In light of the above, it is necessary, in order to enable the process of creating a constitution for the State of Israel to proceed, to clearly define the authoritative bounds of the government branches in a manner that restores the sovereign's ability to lead, as well as confidence in the democratic process on the part of both sides of the political aisle.

Israeli society is characterized by a multiplicity of viewpoints, to the point of polarization. Combining a court that settles values-based contentious issues with unrepresentative judicial selection is a guaranteed recipe for continuous conflict between the branches, for distrust of the Court, and for a mutual feeling of disadvantage and of "our democracy has been stolen". **The solution therefore must incorporate a measure of restraint in the Court's intervention in political disputes, alongside an increase in its members' representation of the full spectrum of political opinions.** This must also be a consideration that is part of the foundation upon which the reform is formulated.

C. The Weakness of the Knesset and the Government – The Premise And Its Implications

Following the general remarks on Barak-Corren's overall approach, I will address the assumption underlying the entirety of her analysis. Barak-Corren believes that both the Knesset and the Government in Israel suffer from severe weakness. The Knesset is weak due to the Government's control of the Knesset and of legislative procedures, and due to its members' dependence on coalition discipline. The Government is weak due to its dependence on a multiple-party coalition that includes small parties with disproportional bargaining power. Barak-Corren concludes that the executive and legislative branches in Israel are in fact merged together, with no mutual oversight mechanisms. This analysis, according to Barak-Corren, affects the imperative for other oversight mechanisms in Israel.

However, these circumstances are not exclusive to Israel. An interdependency between parliament and government, and the governance issues arising thereof, are typical of every parliamentary system (as opposed to a presidential one). The democratic world has

⁷ The very fact that HCJ Justices seriously debated the constitutionality of Basic Law: Israel as the Nation-State of the Jewish People, and particularly the fact that one Justice believed that the clause singling out the Jewish people's right to national self-definition in the State of Israel must be invalidated, casts a shadow on the possibility of continuing to develop the constitutional project. HCJ 5555/18 Hassoun v. The Knesset Israel (The Israeli Judicial Authority 8.7.2021).

lived with these challenges since the founding of parliamentary democracies, and has been aware of them since the middle of the 19th century.⁸ Formally, the parliament is superior to the government since the government serves for as long as it has the parliament's confidence, and parliament retains the prerogative to dissolve the government via a vote of no confidence. However, in practice, the government is the stronger party, as it controls parliament so long as the coalition sustains a majority. Naturally, countries in which one party enjoys a majority in parliament have a greater problem. Even bicameral parliamentary systems do not necessarily restrict government control of the parliament. The resultant parliamentary weakness does indeed create governance issues and failures of democracy from time to time, making it appropriate to explore ways and mechanisms for improvement, such as an electoral threshold, vote-sharing agreements, ways to dissolve and replace a government and other measures.⁹ There appears to be a consensus amongst political science scholars that there is no definitive way out of the tangle.

In any event, such dependence does not justify strengthening the undemocratic mechanisms (the Attorney-General and the courts) in such a way as to have them encroach on the democratic institutions' policy making. To the contrary, the inter-dependence between parliament and government creates robust mutual oversight mechanisms. A government that relies on a fragile majority in parliament will never be an omnipotent government, since its control of parliament is not guaranteed but must be maintained at all times. A government that strains the tolerance of its partners (small parties or factions within the leading coalition party) one time too many will be dismantled, sometimes causing parliament itself to dissolve.¹⁰ The elasticity between the voting blocs in Israel, and the existence of a large centrist leaning bloc, create a strong incentive for the government not to deviate from the norm, which could scare away votes in the next election. It must further be noted, that counter-intuitively, the multiplicity of small parties (and their capability to make exorbitant demands) actually minimizes their bargaining power and allows for more stable governance, since it is possible to exchange one small party with another.¹¹

⁸ Walter Bagehote, *English Constitution* (1867).

⁹ See, e.g. Diskin and Navon, *Improving the Accountability and Stability of Israel's Political System: A Detailed Proposal for a Feasible Electoral Reform*, Policy Paper No. 30 (Kohélet Policy Forum 2017). Barak- Corren herself discusses the issue in a different context. See *On the Lethal Cocktail of Israeli Democracy and the End Problem of the HCJ Wars*, TEL AVIV UNIVERSITY LAW REVIEW FORUM (2021).

¹⁰ In the 75 years of Israel's existence, 37 governments have been formed. On average, a little over two years per government.

¹¹ Diskin and Navon *supra* 9 at 31-32.

The interdependence and "weakness" are one side of the coin, while restraint and supervision are the other. However, the oversight mechanisms arising from the interdependency are not the only ones. Alongside them are additional Knesset oversight mechanisms, such as the deliberations and votes in the committees for every piece of proposed legislation.

The structural weakness of a parliamentary system typifies every such system, and is not unique to Israel. What is unique to Israel is principally the judicial system's entrance into the political arena by taking advantage of that weakness. This was achieved due to the dominance of certain personalities, who led a regime change in the relations between the government branches, without legal basis, without a procedure for wide public debate, and without mechanisms for defining the new powers which the judiciary from time to time assumes for itself. This is not the preferred solution, since it exchanges one problem with another, as Barak-Corren herself observes.

To summarize this point, the claim that government control of the Knesset, alongside its dependence on a coalition, necessitates strengthening oversight mechanisms that do not rely on elected representatives is baseless. **The failures in government function do not justify choosing to strengthen the Court's or the Attorney-General's power- solutions which only serve to further weaken parliament** (and such failures certainly cannot sanction the usurpation of authority by an unelected body.)¹² A better solution is to explore ways in which to improve and optimize the Knesset and government work within the parliamentary system's framework.¹³ The Barak-Corren document thus relies overly much on the claim of a merger of the Legislative and Executive branches, for the purpose of critiquing the reform.

D. Judicial Selection Reform

Barak-Corren explains how, without proportionality between the Knesset and the government, the proposed reform grants the government exclusive control over the judicial selection procedure. She believes that the consequence of such a judicial selection process will be to subordinate the judiciary to the executive and even "collapse" it into it, which will only aggravate the issue of separation of powers in Israel.

¹² Shaul Sharf, *In Praise of the Override Clause*, ICON-S-IL BLOG 8.12.22 and footnotes. [Hebrew].

¹³ See Rivka Weill, *The Yuli Edelstein Decision and the History of the Balance of Power Between the Knesset and the Government in Israel*, 44 TEL AVIV U.L. REV. 322 (2021). [Hebrew].

Barak-Corren does not preface her claims with a theoretical or factual analysis of the preferred mechanism for judicial selection. Her arguments are mainly based on the existing circumstances, with the underlying assumption that it reflects the preferred state, since allegedly, the judicial selection procedure, "must balance between professional considerations and political considerations, and must give weight to the opinions of all three branches of government".

Be that as it may, Barak-Corren ignores the research in this field, which clearly demonstrates that **in nearly all developed democracies, Justices of the supreme constitutional court are selected by the representatives**¹⁴. In most government systems, professional bodies (such as lawyers' representatives) or justices have only an advisory capacity. In common law states (Canada, New Zealand, Australia) the judicial selection is carried out exclusively by the government, at most following a voluntary consultation with an advisory committee or with judicial representatives. The American model, which Barak-Corren rightly notes is not particularly beneficial to emulate, does not divide the selection authority between the Senate and the President. The authority is vested in the President, although the requirement for the Senate's confirmation often leads the President to avoid the nomination of justices when he has no majority in the Senate. In other countries, judges are appointed by some combination of parliament and government, usually by a simple majority, and there are no extant claims of degraded professionalism in appointments made by the political system. The fears of the executive body's "control" over the Court can be allayed in a number of ways: in the fact that the executive body is itself periodically replaced, in stiffening the impeachment processes for judges and at times through mechanisms for restricting the justices' terms in office.

The judicial selection system in Israel was established in the beginning of the 1950s. At the time, the Court did not see itself as charged with the duty of crafting policy, and judicial review of legislation was unthinkable. Today it is clear that the authority to review legislation, as well as the intensification of administrative review and the incorporation of values-based considerations therein, must entail a judicial selection mechanism that reasonably reflects the variety of assumptions and positions that exist among the public. Criticizing the reform proposal through the prism of the current (outlying) situation in Israel, without referring to what is accepted practice in democracies around the world, hampers the search for workable solutions.

¹⁴ Shai-Nitzan Cohen, Shimon Nataf and Aviad Bakshi, *Selecting Judges to Constitutional Courts – a Comparative Study*, Policy Paper 55 (Kohelet Policy Forum, 2019); Yoav Dotan, *Judicial Review Within a Constitutional Framework: The Question of Accountability – A Comparative Study*, MISHPAT U'MIMSHAL 10 489 (2007). [Hebrew].

Changing the committee for judicial selection is essential for other reasons as well. It is difficult to be reconciled to a situation wherein the judiciary's representatives (who nearly always vote as a bloc - contrary to the law) possess a combined veto power over their colleagues' nomination to the court. Experience has proven that this veto power has been used to thwart the selection of worthy candidates, based, among other things, on their viewpoints. In addition, the current necessity of creating an alliance with representatives of the lawyers' guild does not contribute to the representativeness of the procedure or to public trust in it.

It is possible to formulate various approaches to beneficial reform of the judicial selection process by looking to other democracies. If the selection is carried out by committee, then granting the government dominance in such a committee answers the need for greater correlation between the world the justices inhabit and that of the public. Governments in Israel come and go, and Ministers of Justice represent, at different times, different sectors and stances. The alternative of granting dominance or veto power to minority representatives is worse,¹⁵ and will preserve the failings of the current system. A solution of full representation reflecting election results is unworkable and undesirable. Judicial independence can be maintained even with governmental dominance in the selection procedure, since the possibility of impeaching judges is virtually nonexistent, as demonstrated in other countries.

Regardless, Barak-Corren does not offer any solution to this issue, one of the cornerstones of the reform proposal.

E. The Attorney-General's Status, Monopoly of Representation and of Counsel

Barak-Corren details the problematic nature of the current monopoly given to the Attorney-General both in representing the government (or in extreme cases, refusing to represent it), and in legal counsel. She observes that in light of the expansion of constitutional review to questions of public values and ideological positions, and in light of the vagueness of the HCJ's administrative review, the Attorney-General similarly makes use of vague and subjective standards.

However, Barak-Corren limits the solution she offers to a singular point, that of providing the possibility of private representation for the government when the Attorney-General refuses to present its position in Court (and even then – while presenting both positions). Yet Barak-Corren does not explain **why the government's subordination to the**

¹⁵ See in this regard, Tami Meisels, *Tyranny of the Majority must not be Tolerated, but Tyranny of the Minority is No Less Severe*, ZIRA BLOG 10.2.2023. [Hebrew].

Attorney-General should be maintained, despite the problems this creates as she herself described. These are, of course, two separate questions, and Barak-Corren's lack of reference to the first leaves the issue of subordination unresolved.

There is no question that the government must act solely in accordance with the law and within its authority; and it is appropriate to find mechanisms that strengthen this obligation. Nevertheless, we cannot resign ourselves to the current situation, wherein the legal counsel's decision on a legal matter binds the government, especially in a world where numerous questions of policy can be presented as legal ones (as Barak-Corren herself notes). This situation grants the Attorney-General veto power over governmental and ministerial decisions, an outcome that cannot be tolerated for a number of reasons. On the level of principle, such veto power contravenes the democratic principle of rule by the majority or its representatives. It also contradicts the practical and moral principle that demands that authority and accountability be vested in the same body. The current situation does not incentivize the authority- the legal counsel- to avoid public harm caused by mistaken decisions, as he or she is not accountable to the public. On a practical level, it harms the functionality of the government and its ministers both directly, by harming their ability to shape policy, and indirectly, by transforming every decision into a legal question, and so subject to negotiation with the Attorney-General.

All this is reinforced in regards to government bills, in which the use of the veto power is relatively new, and was apparently unthinkable in the past. Legislation is the primary tool for extensive policy change, and the idea that an unelected body can approve or reject it in advance contravenes the basic tenets of majority rule. It is also an infringement on the idea of the separation of powers. As such, it is puzzling that Barak-Corren expresses approval of directives granting legal advisors veto power over the very ability to introduce legislation.

In all this Israel is absolutely anomalous in the international landscape.¹⁶ The fact, moreover, that the Attorney-General is an independent appointment, and not an integral part of the executive branch, makes Israel an even more extreme outlier in this area. In common law countries, the Attorney-General is a political position. The differences between the Israeli judicial system and other systems cannot reasonably explain this anomaly.

In short, the Attorney-General in Israel is, in many ways a fourth, independent branch of government, that can enforce its opinion at will on the executive one. This situation must be addressed, and the law must

¹⁶ See Gad Barzilai, *The Attorney General and the State Prosecutor: Is Institutional Separation Warranted?*, Policy Paper No. 84 (The Israel Democracy Institute, 2010); *Legal Advisers and the Government: Analysis and Recommendations*, Policy Paper No.10 (Kohelet Policy Forum, 2017).

explicitly define that the government is not subordinate to its legal counsel (of course, the government is certainly subordinate to the law). Such clarification was already articulated in 1962 in the Agranat Report on the Attorney-General's office, when the Court rarely weighed in on public disputes, and did not use judicial review standards such as reasonableness.¹⁷ Barak-Corren recognizes the problem, but does not offer any solution, despite the severity of the problem she herself points out.

F. Some Ideas in the Barak-Corren Document that Should Be Adopted

Alongside the criticisms outlined above, Barak-Corren points out some aspects in which changes and improvements to the reform proposal should be considered:

A- Excluding Basic Laws from Judicial Review Greatly Increases the Imperative, which Exists in Any Event, to Establish Special Procedures for Legislating Basic Laws.

It must be recalled that the origin of the confusion around this issue is the Supreme Court's ruling (in *Bank Mizrahi*) that raised Basic Laws to the status of a constitution solely based on the formal inclusion of the words "Basic Law" in their title, as opposed to using substantive criteria to determine which laws should have constitutional status.¹⁸ It was the Court who created the paradox of formalistic supremacy, in order to lay a supposed analytical and democratic foundation for its authority to review "regular" legislation. This ruling gives rise to continual difficulties, since some of the Basic Laws regarding governance include rather detailed provisions that require periodic revision, which dilutes their value and leads to public disapproval. The Supreme Court is also the one who recently "solved" this paradox by declaring itself authorized to review Basic Laws as well, thereby removing itself from that same legal and democratic foundation. Now, when the constituent-legislator seeks, for the first time, to grant formal authority to the Supreme Court to review legislation based on Basic Laws, there is an increased imperative not only for clearly defining what a Basic Law is, but also for establishing a specialized process for its enactment. It would be well if such a special legislative process reflected the unique essence that grants Basic Laws their supremacy over regular legislation adopted by a transitory majority.

¹⁷ *Legal Opinion of the Jurists Committee, Shimon Agranat, Zvi Berenson and Avraham Levin on the Justice Minister and Attorney-General's Powers* (1962) in THE KLINGHOFFER BOOK OF PUBLIC LAW 421, 448 (Ed. Yitzhak Zamir, 1993). [Hebrew]

¹⁸ CA 6821/93 *Bank Mizrahi v. Migdal Cooperative Village* [1995] 49(4) 221.

B- Further Stiffening the Requirements for a Full Panel and a Supermajority of the Supreme Court to Strike Down Legislation Can be an Alternative to Adopting an Override Clause

If the presently proposed bill is passed, the Supreme Court will, for the first time, be authorized by an explicit Basic Law to review legislation. As previously noted, there are sound justifications for requiring a full panel and a supermajority for the Supreme Court to invalidate legislation, particularly in a situation where a full constitution has yet to be adopted.

At the same time, legislating an override clause may bring about unintended consequences. It might, on the one hand, make it easier for the Supreme Court to strike down legislation, knowing that the Knesset can re-legislate if it so desires. On the other hand, the Knesset may prove hesitant to use this power, as has been the case with regards to the override clause already contained in Basic Law: Freedom of Occupation. Conversely, the Knesset may prove too quick to re-legislate, thus nullifying the oversight mechanism.

An override mechanism such as is proposed in the reform exists in Canada. So too does it exist in Israel's Basic Law: Freedom of Occupation. In Israel, it has never been used, apart from the matter of restricting meat importation, which is the specific issue for which it was formulated.¹⁹ Therefore, although an override clause is a legitimate option, establishing stricter standards requiring a full panel and supermajority for the Supreme Court to review legislation may reduce the need for such a clause.

C- The Option of Allowing the Government to Choose Private Representation Must, in Practice, Remain the Exception, not the Rule

With regards to the routine work of government and its agencies, the straightforward route of provision of legal assistance by the Attorney-General's office, a repository of organizational memory and relevant knowledge and experience in matters pertinent to the government, should be maintained as the general rule. Still, it is doubtful if there is a way to legally stipulate the relation between a rule and its exception without turning the very issue itself into a legal dispute. It is more reasonable that the current state of affairs remains unaltered, that is, the counsel and legislative apparatus continue their full function, while in appropriate circumstances, the government and ministers be allowed to seek external counsel.

¹⁹ See: *A personal conversation with Professor Amnon Rubenstein*, MISHPAT VE'ASAKIM 14 31, 59 (2012). [Hebrew]. Rubenstein notes that the Meat and Meat Products Law was passed due to "coalition imperatives. Yitzhak Rabin said that without the amendment on meat importation, there would be no peace deal".

G. Summary

The Barak-Corren document accurately maps the primary deficiencies in the current situation. However, the solutions suggested therein leave a number of these, some recognized by the document itself, unanswered:

First, in the premises of the document. The document does not give enough weight to the fact that the judicial system is the final arbiter in all public disputes, a starting point that is in need of balance. It does not attach sufficient weight to the fact that even after authorizing the Supreme Court to conduct judicial review of legislation, the review itself is expected to be carried out on the basis of an unwritten, vaguely defined constitution. It does not take into account the necessity of repairing the relations of trust between the branches of government, and between them and the public, both for their own sake and in order to create the necessary basis for the development of a constitution.

Secondly, the document exaggerates the claim that the weakness and interdependence of the Knesset and government merge them for all practical purposes into one body. This dependence is typical of every parliamentary democracy, and does not justify reinforcing unrepresentative oversight mechanisms.

Thirdly, the document presents the issue of judicial selection from an internal Israeli perspective, overlooking the existing reality on this matter around the world. The document rests on the assumption that it is appropriate to hand the Justices veto power over who is appointed to the court on which they themselves sit, and suggests no change regarding this issue.

Fourthly, despite recognizing the problematic nature of granting the Attorney-General veto power over government decisions, the document suggests no changes in this area, and finds it sufficient to allow for parallel representation for the government and the Attorney-General before the Court in the case of a dispute.

On the basis of the above discussion, I shall outline the preferred framework for reform:

- A. A clarification that Basic Laws are immune from judicial review. Establishing a specialized procedure for the legislation of Basic Laws.
- B. Granting the Supreme Court exclusive authority to deliberate on whether Knesset laws align with the explicit provisions of the Basic Laws, only with a full panel and a supermajority. The need for an override clause depends on the rigidity of the requirements for invalidating a law, and on the judicial selection process.
- C. A clarification that the Attorney-General's counsel is not binding, and that in the case of a dispute, the government may choose to appoint other counsel or representation external to the Attorney-

General apparatus. In practice, the continued reliance on the Attorney-General in all cases that do not involve direct conflicts should be encouraged and ensured.

- D. A change in the membership of the judicial selection committee so as to grant dominance to the coalition, in line with what is the practice in all common law systems, and to remove the judiciary's veto power.

It is right that a discussion of the issues the proposed reform seeks to resolve, and of alternative solutions, continue to engage academic, public and of course political forums as long as the reform is being formulated. It is likewise appropriate that the reforms continue to be examined in research and literature, even after their enactment and until the adoption of a constitution, a path to which shall hopefully be opened up subsequent to the reform. One would hope the entire process be accompanied by impartial and moderate discourse that does not wax extreme or generate alarm. Such discourse would be a guarantee that the reform leads to the improvement of the systems of government and of democracy in Israel, to the strengthening of the rule of law, to respect for human rights, and to placing the relations between the government branches in their proper setting.

Suggested quote: Ariel Erlich, *The Importance of Israel's Proposed Judicial Reform – and Ways to Improve It; A Response to the Barak-Corren Document*, RESHUT HA'RABIM BLOG (12.2.23).