

## What is More Important for Democracy - Separation of Powers or Independence of Courts?

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**Abstract:** The judicialization of politics is the reliance on courts and judicial means to address public policy and political controversies. This issue is debated around the world, since national high courts are involved in various issues of public policy and thus the debate over the role of the court in political decisions has been subject to contrasting views of researchers. Israel's current debate over changes in the role of its Supreme Court raises questions about the proper role of the courts. In every democracy, governments derive their power from winning elections, and the profound debate in Israel is about the separation of powers, namely what restraints should be placed on the majority rule and to what extent should the court be allowed to uphold the decisions of the government, which was elected by the majority. The essential issue in debate examined in this research is what are the checks and balances that guarantee democratic rule but equally protect minority rights.

**Key words:** Court; Politics; Democracy; Election; Government

### I. Introduction

The judicialization of politics has expanded worldwide (Hirschl, 2008) with the growing reliance on courts to address public policy questions and issues that are in political debate. The significant role of the court has become an important part of the political decision-making process in most democracies (Filgueiras, 2013). The common global perception of the role of judicial independence in democracy is based on the notion of public trust in the legal system, which – unlike political leaders – is not influenced by political views (Vanberg, 2009). Since the judicialization of politics is the result of a shift in core issues regarding democratic legitimacy (Filgueiras, 2013), the common view is that the Court is expected to play an important role in the protection of democratic systems of government and human rights. The courts maintain a dual role of protecting the separation of powers to allow democratic governance and protecting individual rights and interests that have been violated (Durbach, Reinecke & Dargan, 2020).

The research examines if this perception is valid according to the separation of powers that is currently implemented in Israel, or is it misinterpreted by supporters of a strong public service and weak government. The paper highlights the contrasted views of the role of courts to maintain the power of legal review of political decisions by declining legislative and executive action on the basis of a conflict with the law. It examines the question if this power plays an important role in a democratic society or threatens democracy by allowing the court to overcome decisions made by elected representatives of the public. The research explores this issue in light of the debate about the limits of free speech in democracy, involving the role of the courts, that is at the center of public discourse in Israel.

The controversy is on the way to preserve the role of the Supreme Court in protecting human rights while reducing its overall powers to interfere with political decisions. As argued by the government, the political deadlock prevented changes in this structure and forced a tradition of legal and procedural status quo among the three branches of governance. The issue of public trust in democracy in Israel has become a major issue of global concern following the plan of the government to enact a reform that would weaken the judiciary's power to overcome government decisions. The judicial reform presented by the government includes changing the way that judges are appointed, reducing or eliminating the current role of the bar association and Supreme Court judges and increasing that of elected officials. It also seeks to prevent the court from overriding or striking down laws and provide for a Knesset override of any Supreme Court ruling, mainly on the issue of the "reasonableness doctrine," which subjects government decisions to judicial rejection on grounds of "reasonableness". As a result of the government's plan, the debate has increased tremendously, involving the question of the ability of politicians to interfere with Supreme Court decisions.

## II. Reliance on the Court

The reliance on courts for addressing public policy questions and political controversies is a central phenomenon in contemporary democracies (Filgueiras, 2013), and as a result the social and political debate on the limits of judicial systems to intervene in political decisions and policy issues increased across the globe (De Sousa Santos, 2000). The perception of the role of the court in democracy has been in constant debate in many democracies, emphasizing the struggle of power between the legislative and judicial branches. Courts are perceived as central components in any political debates in order to achieve a functioning democratic order (Daly, 2017), and virtually every democracy debates this issue periodically, because there is an inherent conflict between majority power and minority rights (Dershowitz, 2023). But although there is no doubt that the separation of powers has been a central concept in modern constitutionalism (Barendt, 2005), the Court's authority is derived from public trust, since its decisions about the rule of law are involved with issues that are in political debate (Bellamy, 2018).

Supporters of the judicialization of politics argue that judicial independence and the rule of law are essential to any democracy (Helmke and Rosenbluth, 2009) and courts – which are objective and free of political considerations – can provide the best solutions to political disputes. In support of the supremacy of the court over the legislators, Bowie (2021) explains that it's the court's duty to interpret the law and the justices should follow their own interpretation of what the law requires. As a result, Supreme Court justices respond directly to changes in public opinion, which provides a mechanism by which the preferences of the Court can be aligned with those of the public (Giles, Blackstone and Vining, 2008). According to Dershowitz (2023), the traditional role of non-elected courts is to impose checks and balances on politicians who are elected by the majority. This perception is further explained by Prendergast (2019), which examined the need of courts to intervene in shaping political processes. He concluded that since democracies face threats of being manipulated towards authoritarianism, the judicial role should protect democracy from populism of movements that claim to be democratic in expressing what the people want, against the political establishment. This view is supported by Kerr and Wahman (2021), which examined the role of the court in Africa, where elections are often surrounded by accusations of fraud and manipulation, and found that legal avenues for challenging elections may enhance election integrity and trust in political institutions.

Judicial preferences and the political context under which judges operate are in constant interaction (Aydin-Cakir, 2018), as the danger of illegal activities by governments possess a global threat to democracy. Public faith in the value of democracy is declining around the world, according to the Global State of Democracy Report 2022, and global freedom faces a threat for independent court, according to Freedom House Report (2022). As explained by Sanchez Urribarri (2018), the evolution toward authoritarianism typically allows governments more latitude to reduce judicial independence and judicial power. Stahl and Popp-Madsen (2022) warn that with the electoral victories of authoritarian populists such as in Poland raises doubts about the ability of democratic institutions to keep authoritarian threats under control. In relations to Israel, Cohen and Lurie (2023) found that in only a very few countries the government appoints judges by means of a simple majority in a single selection body, as is planned in Israel, and even so, in those countries, it is an accepted practice to hold professional consultations or use professional vetting of candidates, so that the government only appoints judges recommended based on a professional mechanism. As they explain, the only exception in which there are no restrictions on the power of the majority to appoint judges, is Poland.

In contrast to this common perception, in support of the authority of elected legislators to overcome court decisions, Barroso (2019) argues that the roles of courts in contemporary democracies represents the judicialization of politics and judicial activism and complicates the border between law and politics. Bello Hutt (2017) is rejecting judicial supremacy in constitutional interpretation, since understanding only the interpretation of legal and judicial undertaking excludes citizens from such activity. As explained by Navarrete and Castillo-Ortiz (2020), the stability of a democracy depends on acceptable levels of public support for democratic institutions. This view is supported by Lee (2015), as he explains that it is widely agreed that dissatisfaction with Supreme Court decisions harms public trust and affects the legitimacy of the court. Filgueiras (2013) explains that like other representative institutions, the Judiciary has not been able to mitigate the perceptions on inequalities and provide the normative decisions to gain public trust and democratic legitimacy. This perception is further explained by Strother Kushner Gadarian (2022), that unlike political branches of government, the Court's unique hybrid legal and political identity allows citizens to discount Court decisions that they disagree with as "political" – thereby damaging the perception of integrity that courts maintain. These conclusions are similar to the findings of the research of Randazzo, Gibler and Reid (2016), which found that dataset of approximately 145 countries over forty years shows that development of judicial independence is related to the political landscape encountered by the executive.

### III. Separation of Powers

Both the separation of powers and the independence of courts are crucial to maintain democracy, and each of these principles has an important role to guarantee a system of checks and balances to ensure that no single entity becomes too powerful and that government decisions are subjected to supervision of the legal system. The democratic rule in Israel is based on a system of separation of powers, with three constitutional branches: the legislative branch, the executive branch, and the judicial branch. The role of the government is to decide and implement policy, according to the laws enacted by the Israeli parliament (Knesset) which also supervises the government, and the role of the court is to guarantee that the two other public institutions – the government and the Knesset - act within the law (Sharvit Baruch and Yosef, 2023).

The relationship between the three branches produce a policy of checks and balances, although the debate over the proper interrelationship among the three branches of government has become heated in recent years since this structure is not formal (Lurie, Fuchs, Friedberg and Shapira, 2022). Israel has no constitution, and Israel informally became a constitutional democracy in the 1990s, following the passage of human rights basic laws and the policy of the Supreme Court to consider these laws as an informal constitution. As explained by the then President of the Supreme Court, Aharon Barak (2014), the purpose of checks and balances is not to have an effective government, but to guarantee freedom. But this structure is controversial. Although the Supreme Court and the President of the Supreme Court enjoy great respect within Israel and abroad (Gabizon, 2014), they also face criticism about the active role of the court in the political process (Lurie and Shany, 2021). Defenders of the policy enforced by the Court argue that this intervention is essential for the existence of a democratic nation, which must preserve the independence of the judicial system and maintain effective supervision by the courts over government branches (Cohen and Rozani, 2021). As explained by Aharon Barak (2005), who initiated and implemented this policy, in the absence of a written constitution, the Basic Laws enacted by the Knesset were intended to provide quasi-constitutional protection for fundamental human rights. The enactment of the Basic Laws on Human Dignity and Freedom of Occupation in 1992 began what is known as the “Legal Revolution”, led by Barak. According to Barak (2003), in a series of cases the Supreme Court assumed the role of a constitutional court, with the power to strike down any law that contradicts the Basic Laws. As he explains, as a result of the legal revolution, the Supreme Court applied the principle of equality, which indirectly provided rights for groups that otherwise would not be protected or recognized by a majority in the Knesset. According to Barak, in this system of separation of powers, the task of the judicial branch is to adjudicate conflicts according to the laws, and for that purpose, the judicial branch has to perform three principal functions. The first is concerned with determining the facts, and from the entirety of the facts, one should determine those facts which are relevant to adjudicating the conflict. The second function is concerned with determining the law. The third function is concerned with applying the law to the facts, and drawing the appropriate judicial conclusion.

The question of the role of the court to review of government actions has been controversial since the new constitutional policy that was implemented by the Supreme Court in 1995, and the debate has mounted recently, after the government issued a plan to balance the relations between the branches (Gerber and Shalev, 2023). The claim against the excessive role of the Court is that it has assumed far-reaching powers of intervention in government decisions, in a way that prevents the government and the Knesset from governing. Based on this argument, it is claimed that the elected political representatives cannot implement the agenda presented to the voters, as it is blocked by the legal system. This includes Supreme Court justices and government’s legal advisors, which are considered independent and are not obligated to the policy of the government (Gerber, 2015). It is argued that the policy implemented by the Supreme Court, that “everything is justiciable”, has interfered in government decisions regarding issues of foreign policy, security, economic policy, and even who will receive the Israel Prize. In contrast to this policy, according to the legal reform advocated by the government, it has the right to enforce policy reforms, including about the relationship between the three branches of government, whereas intervention of the court violates the balance between the different sections of the government and the principle of separation of powers.

### IV. Independence of Courts

The most important issue in the debate that is going on in Israel is the fact that unlike any other place in the world, any majority in the Knesset can enact, amend, and delete any Basic Law – or any law – in a normal law-making procedure, in three readings, and even within one day. This process means that the politicians in Israel – and only in Israel – have the possibility to change the constitutional rules at any time. Israel has no written constitution, and the only mechanism for checks and balances is the judiciary. This issue is fundamental since judicial review of laws is not written in any Basic Law but follows a decision by the Supreme Court in 1995. Since then, the court possesses powerful judicial review, and can declare them unconstitutional (Navot, 2022).

In the current political structure, the Supreme Court serves the only checks on the legislative power of the Knesset — which is why opponents to the reform argue that shifting that balance of power would have such a dramatic impact on Israel’s democracy. As explained by Dershowitz (2023), Israel is different from other democracies because of the weak separation of powers. Unlike almost all the other countries, the Knesset is a single house legislature and there are no protections to prevent the ruling majority from changing the constitutional framework and revoking rights provided by basic laws. This structure creates a tremendous power of the ruling political majority in the Knesset, which can be supervised only by the Supreme Court (Cohen and Lurie, 2022). Furthermore: in light of Israel’s proportional representation election method, which has a low electoral threshold of 3.25%, it is possible that a small political party will demand to run the Ministry of Justice and leverage its bargaining political power to determine the composition of the judiciary (Weill, 2023). Given that under the current political structure, the government automatically controls a majority in the parliament, the Supreme Court became a check on the executive and legislative branches (Lederman, 2023).

Supporters of the independence of the court argue that an essential component of a democracy is the respect for human rights, and concerns of the definition of Israel’s Jewish identity and the implications for the approach to minorities are a major issue of debate, with the argument that Israel is undergoing a process of prioritizing its national Jewish component over its democratic component (Shavit, 2019). As a result, the definition of Judicial independence in Israel means that the legal system and the courts should be free from political influence or interference from branches of government, ensuring its impartiality and ability to make decisions based on the law. Judges are free to rule without political pressure, external intervention, or concern for their professional status due to their rulings (Sharvit Baruch and Yosef, 2023). According to this argument, even if a majority of the Knesset members support a violation of equality, the will of the majority should be rejected by the courts in order to maintain the essence of democracy. This argument however is conflicted with the plan of the government to reform the legal system, which results in a conflict between the government and the Court.

The policy initiated by the government in contrasted with the policy of the Supreme Court to defend democracy by supervising government policies. The argument made by the government is that a situation in which political decisions are taken by jurists and not by elected officials violates basic democratic principles of majority rule and the ability of the people to influence policy by electing their political representatives. The possibility of striking down Basic Laws according to the policy adopted by the court means - according to the supporters of legal reforms initiated by the government - that the court acts without political legitimacy and public trust and cannot fulfil its crucial social functions. By doing so, it is argued that the policy adopted by the court violates the democratic mechanisms, the proper functioning of government branches, and the right of each one of us to influence our fate in a democratic society. The controversy mounted after the Supreme Court judges advanced the idea that they are authorized to interfere even in the Basic Laws, which are considered as semi-constitution - a policy that according to the government it is argued that does not exist in other democratic countries. It is argued that the Court is taking policy decisions that the political leaders should take – and they are doing that without comprehensive responsibility to implement or review their decisions. After the Knesset passed the bill to cancel the reasonableness standard and limit the court’s oversight of government decisions, as the first part of the government’s judicial reform, the Supreme Court announced that it will hear petitions against a law with a full 15-judge panel for the first time in its history.

## V. Conclusion

Power struggle between politicians and the legal system identifies every country. The term “independent courts” means courts that are not subject to political authority, whose judges are not representatives of government or other political elements. The court's independence, impartiality, and commitment to upholding the rule of law are central to its role in a democratic society. By providing oversight and holding government actions accountable, the court helps maintain a system of checks and balances. This ensures that no single branch of government becomes too powerful and that the rights and freedoms of individuals are protected. By exercising judicial review, the court ensures that the legislative and executive branches of government are acting within the boundaries of the law and are not infringing upon individual rights or exceeding their authority. This role helps safeguard individual rights, liberties, and the overall framework of the democratic system.

The debate between the political system and the Supreme Court has mounted in Israel, as supporters of the reform advocated by the government argue that in a democracy the constitutional interpretation of Supreme Court justices should not be superior to the constitutional interpretation of the elected officials that received the political support of the people in a democratic election. They argue that the judicial revolution of the 1990s shifted the balance of power in Israel’s political system from one of parliamentary sovereignty, in which the elected parliamentary members of the Knesset enjoyed ultimate power, to one in which the legislature is restricted to approval and veto power of the Supreme Court.

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