The Strategic Commonlaw Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding

Rivka Weill*

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There is renewed scholarly interest in studying the dynamics of constitutional revolutions and the explanations for the rise of constitutional courts around the world. At the same time, there is growing discussion of democratic backsliding and concern that democracies are exhibiting extremism, weakening of opposition forces and constitutional courts, and violations of civil and political rights that are pertinent to vibrant democracies. Scholars try to study both phenomena and understand the relationship between them. Israel is an important case study for both agendas. This essay analyzes the jurisprudence of Aharon Barak, one of the greatest jurists of our time with a worldwide reputation for revolutionizing both Israeli constitutional law and comparative constitutional law. It explains the tactics and strategy used by Barak to revolutionize Israeli constitutional law on issues of reasonableness, proportionality, standing, justiciability, constitutional review, equality, and supra-constitutional law. It reveals how each revolution paved the way for the next. It offers explanations for the effectiveness of these judicially-led revolutions as well as possible bases for their legitimation. Barak was a commonlaw judge and ultimately treated parliamentary sovereignty as a doctrine arising from commonlaw and constrained by commonlaw, though he never quite put it in these terms. The essay concludes with explanations to the political backlash experienced by the current Israeli Supreme Court that the Israeli branch of I*CON-S has characterized as democratic backsliding. It argues that Barak was a strategic player that laid foundations for an expansive judicial power but his Court was very prudent in utilizing that power. His successors may have contributed unintentionally to the backlash against the Court by following Barak’s substantive jurisprudence, but not his prudent tactics and strategy.

Keywords: constitutional revolution, constitutional evolution, strategic courts, democratic backsliding, Aharon Barak, standing, justiciability, reasonableness, proportionality, stare decisis, Israeli Marbury v. Madison decision, savings clause, non-delegation doctrine, commonlaw constitutionalism, supra-constitutional law, unconstitutional constitutional amendment, misuse of constituent power.
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I. Introduction

There is growing scholarly interest around the world in studying constitutional revolutions that led to the adoption of supreme formal constitutions authorizing the power of judicial review over primary legislation.1 At the same time, there is much discussion around the world about democratic backsliding, as we witness the rise of nationalism, isolationism, extremism, bigotry and xenophobia.2 Scholars try to study both phenomena and understand the relationship between them. Israel is an important case study for both agendas. It underwent a famous constitutional revolution in the mid-1990s that transformed it from a parliamentary sovereignty system to a system with a supreme formal Constitution.3 This constitutional revolution is associated with the 1995 Israeli Supreme Court version of the U.S. Marbury v Madison decision.4 Yet, in recent years, the Israeli Supreme Court is under major political attack to “pack” the Court with conservative justices through judicial appointments (though no attempt to expand the Court’s size) and curtail its power through the adoption of a general legislative override power. Such a power would enable the legislature to undo judicial decisions in constitutional matters with bare majorities.5 In an unprecedented move, not taken regarding other no less pressing issues, the Israeli branch of I*CON-S denounced the proposal to adopt a legislative override as a manifestation and deepening of democratic backsliding in Israel.6 This essay aims to trace Israel’s constitutional development

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6 Branch of I*CON-S Israel, Opinion regarding a Bill of an Override Clause, April 29, 2018.
to explain how constitutional revolutions came about in Israel, by which processes and tactics they were legitimated, and why we are witnessing formidable challenges to the continued ascendancy of the Israeli Supreme Court.

The story of Israel’s constitutional development is intertwined with the story of a worldwide renowned jurist: Aharon Barak. Barak served on the Israeli Supreme Court for 28 years, 11 of which he served as the President of the Court. His decisions transformed private, public and criminal law in Israel. Most of the transformative constitutional judicial opinions in Israel bear the signature of Barak. Although Barak left the bench in 2006 at the mandatory retirement age of 70, when one studies law in Israel, one still studies primarily the decisions of Aharon Barak because of their long-lasting effect on Israel’s jurisprudence and their deep theoretical underpinnings. Barak’s decisions are not only studied carefully in Israel but have influenced comparative and international law. His landmark decisions on torture and targeted killings have helped shape current policies in the international fight against terrorism. Barak’s judicial philosophy, enumerated in his 2002 Foreword to the Harvard Law Review, has influenced the approach of jurists everywhere.

To understand Israeli constitutional law, one must understand the personal story of Aharon Barak and how he attained so much influence over Israeli constitutional law. Aharon Barak is a member of the Founding generation of the Israeli State. His personal history is in many ways the history of the Israeli State. A single child who spent his childhood in Europe hiding from the Nazis to remain alive, he survived with an unbroken spirit of resilience. Even in captivity, he studied with his parents and had a relentless thirst for knowledge. He was a grandchild of a rabbinic ancestry whose immediate family was secular and committed to Zionism. The Israeli State is the only Jewish and democratic state worldwide. Like Barak, it is committed to an uncompromising need to excel to survive. Like him, it was born on the ashes of the Holocaust and the recognition of the world that Jews need a homeland to exist. Like him, it is a secular state that must deal with its people’s religious heritage.

Aharon Barak thought of studying mathematics at Hebrew University, but instead became the youngest professor to get the Israeli Prize at age 39 for his legal contributions to the Israeli society. He left the Deanship of Hebrew University School of Law to become the Attorney General of the State of Israel (AG). The Attorney General is a potent position because it combines two functions: the highest prosecutorial power and the advisor to the government. Because the government could not traditionally hire private lawyers and had to accept the advice of the Attorney General, the Attorney General could leverage his influence: No one wanted to disobey his advice, especially if it could lead to criminal prosecution. As Attorney General, Barak feared nothing but the law itself. In one famous story, Barak demanded that Prime Minister (PM) Yitzhak Rabin resign for having a negligible illegal foreign bank account from the days when he was an

7 Aharon Barak’s Personal CV available at: https://www.academy.ac.il/SystemFiles/19703.pdf.
Ambassador in Washington. There was no need for a special prosecutor to investigate the charges. It was enough that this was the demand of the AG, Aharon Barak.11

Later, Barak became the youngest appointee to the Israeli Supreme Court but postponed his entry to assist in the drafting and negotiations of the Camp David agreement that enabled 40 years of strategic peace between Israel and Egypt.12 He is a natural, charismatic leader with an unmatched intellect and unique political skills that do not compromise his profoundly generous compassion and his humanistic principles.

Aharon Barak shaped Israeli law in different ways. As a law professor, he continued his commitment to scholarly writings even while on the bench. Many times, his academic writings preceded and even prepared the intellectual grounds for important judicial decisions. This is most obvious in his book on Constitutional Interpretation,13 which anticipated the constitutional revolution of United Mizrahi Bank, the decision in which the Court for the first time recognized Israel’s Basic Laws as its formal Constitution and declared the existence of the accompanying power of judicial review over primary legislation. As a former AG, he had intimate knowledge of Israel’s executive branch. As a former Dean and frequent visitor to Yale Law School, he was consulted on all major Israeli legal academic appointments. As a President of the Court, his consent was sought and needed for all judicial appointments. As a specialist of both private and public law, he chaired—even as a justice—the major professional committees that drafted different parts of Israel’s law, including corporate law. Since Israeli law incorporated pre-existing law (including law from the British mandate) to avoid chaos,14 these professional committees prepared drafts of legislation that restated the law in terms that were compatible with the needs of the modern democratic State and the Knesset (Israel’s legislature) codified the new proposed law. Barak exercised the influence of a judge, a legislator, an executive, and a world-renowned former Dean. He was at the center of all aspects of Israel’s public life. He was part of all the major decisions and turning points of the country. It is thus of special interest to study the tactics he used to revolutionize Israeli public law, while maintaining relatively broad public support and confidence in his Court. He was no doubt a strategic judge, having a clear vision of the role of the Court in guaranteeing a democratic and pluralist society.15 Studying his way to power also enables us to understand the political wrath against the Court at the present time.

Barak’s landmark decisions bear a similar pattern: the ratio dicidendi appeases the political branches on the hot political topic of the day. The outcome of the decision pleases the political branches. The dicta has a bite and impact on future legislatures and administrations. The rationale

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12 Owen Fiss, Law is Everywhere, 117 YALE L. J. 256 (2007).
15 On strategic courts, see Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962); Rosalind Dixon and Samuel Issacharoff, Living to Fight Another Day: Judicial Deferral in Defense of Democracy, WISC. L. REV. 683 (2016).
and reasoning of the decision broadens the Court’s power vis-a-vis the political branches. This is the landmark Marbury v Madison strategy: The Court recognized judicial review power over primary legislation but denied Marbury his remedy.¹⁶

Many of the landmark cases that revolutionized Israel’s public law dealt with a single issue: whether the State must draft the ultra-orthodox men to the army, just like it drafts other young Israelis, or whether it can exempt them or defer their service indefinitely because of their religious studies. While the ultra-orthodox men stayed at home and de facto exempt from the draft during Barak’s term on the Court, the cases that dealt with them revolutionized every other aspect of Israeli public law. In a way, Israelis can truly thank the ultra-orthodox community for staying at home, because the constitutional revolutions brought about through their cases had a much more important effect on the Israeli society than whether or not they should serve in the army. Some of the revolutionary decisions did not deal with the ultra-orthodox community but nonetheless manifest the same tactics and signature strategy of the Barak Court.

After surveying the gradual way in which Aharon Barak built judicial power, this essay offers explanations why these tactics were effective. It further evaluates their legitimacy. It then contrasts Aharon Barak’s strategic Court with current trends of the Israeli Supreme Court. It argues that the heated dialogue between the branches of government can only be understood against the background of the Barak Court. It further suggests that the Court inherited the powers of the Barak Court but is not playing its cards in a strategic prudent way characteristic of the Barak Court.

II. The World Inherited and the Rise of Purposive Interpretation

Aharon Barak is associated with the rise of purposive interpretation in Israeli judicial decisions.¹⁷ He was not the one to introduce this interpretive method into the Israeli legal system. A few years after the establishment of the State, President Shimon Agranat, in the famous Kol Ha'am decision in 1953, held that the Press Ordinance of 1933, a British mandate statute authorizing the Minister of Interior to prevent the publication of a newspaper based on security concerns, must be read and interpreted in light of the values of the nation. The Court held that we should read into the statute a requirement that the Minister must weigh the probability that the danger will materialize as a result of the publication, as well as the seriousness of the harm that will be caused by it (this is similar to an expected value test in statistics). The Court invalidated the decision of the Minister of Interior who had ordered communist newspapers to close for 10-15 days because they had denounced the Israeli government, (falsely) alleging that it intended to support the U.S. if a war between it and the Soviet Union were to break out.¹⁸


¹⁸ HJC 73/53 "Kol Ha'am" v. Minister of Interior 7 P.D. 871 (1953) (Isr.).
The *Kol Ha’am* decision is a landmark because it deviates from the British maxim of parliamentary sovereignty by which the interpretation should reflect the legislative will as much as possible. Since the Israeli State incorporated laws that existed prior to its establishment, the justices felt the need to update their meaning through purposive interpretation. In fact, the statute incorporating pre-existing laws into the new Israeli legal system conditioned such incorporation on adjusting the old laws to the new State. The decision was courageous for invalidating a decision of the Minister of Interior regarding security matters to protect free speech and democracy when the State was so young and under an emergency regime. At a time when McCarthyism characterized the U.S. system, the Israeli Supreme Court prevented the Israeli government from persecuting communists in Israeli society. Moreover, during this founding period, Israel lacked a formal constitution. The Court was able to develop a commonlaw bill of rights protected through purposive interpretation. Every statute would be interpreted to align with human rights unless the legislature explicitly overrides commonlaw rights.

While the Israeli system was familiar with purposive interpretation prior to Barak, he made it into the only acceptable judicial interpretation method applicable to all acts of State. Any other method of interpretation, such as textualism or originalism, disappeared from judicial decisions. Every grant of authority to a State body must be interpreted in a purposive way. This means taking into account both the specific purpose of the grant of authority (be it a statute or regulation) as well as the general purpose, which embodies the values of a Jewish and democratic State. The specific purpose embodies the contextual intentions and purposes that led to the adoption of the statute/regulation. It is perceived as *subjective*. The general purpose, implied in every grant of State power, is considered *objective*: that it intends to advance the values of the State as Jewish and democratic. In case of a contradiction between the specific and the general purposes, the latter should prevail. This interpretive approach is applicable not just to colonial statutes (under review in the *Kol Ha’am* case), but also to current legislation. Furthermore, it will be applicable to the interpretation of the Israeli Constitution after the constitutional revolution. Purposive interpretation frustrates the specific intent of political bodies whose statutory goals conflict with the values of a Jewish and democratic state as ultimately interpreted by the judiciary.

There is no specific judicial decision that marks this rise of purposive interpretation. It occurred in an evolutionary fashion in judicial decisions and through Barak’s influential academic work much of which he wrote while on the bench. In fact, Barak wrote a series of five books on interpretation, a topic he tackled more than any other, clearly revealing the importance he attached to it. Later, he would explain many of his contentious decisions as a matter of “interpretation,” alluding to CJ Marshall’s holding that “[i]t is emphatically the province and duty of the Judicial

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19 Section 11 of the Law and Administration Order 1948 stated that the law that existed in Israel prior to its establishment will continue to be valid subject to new laws and with the necessary alterations resulting from the establishment of the new State.


Department to say what the law is.”

Other transformative effects of Barak’s jurisprudence can be more easily discerned and anchored in specific decisions and timelines.

**III. Early 1980s: The Reasonableness Revolution**

In 1978, the Committee for Appointing Judges—composed of two members of Knesset (MKs), two members of the government, two representatives of the Israeli legal bar and three justices of the Supreme Court (including its President)—appointed Barak a Justice of the Supreme Court. In 1980, he delivered his first ground-breaking decision in public law in the *Yellow Pages* case, holding that administrative bodies must act with reasonableness, and a lack thereof may be the grounds for invalidating their decisions. Although the Court at times had previously held that administrative bodies should act with reasonableness, it was unclear whether this could be an *independent* basis on which to invalidate administrative decisions. The justices had been vague about whether these administrative decisions could be invalidated due to arbitrariness or bias, rather than unreasonableness alone. Thus, Barak’s opinion clarified that the Court could intervene in administrative decisions on substantive grounds, rather than mere questions of authority, legality, or decision-making processes.

The *Yellow Pages* decision paved the way for later decisions that gradually replaced the requirement of reasonableness with the requirement of proportionality. Barak interpreted the reasonableness requirement to mean that an administrative body must weigh all relevant considerations that pertain to the purpose of its decision, and that it must further give proper weight to the different considerations. This is a balancing test between individual rights and public interests which would later become the central test of proportionality—proportionality *stricto sensu*. No less important, this decision enabled the next judicial constitutional revolution: eliminating the non-justiciability doctrine.

The revolutionary nature of the *Yellow Pages* decision is not explicitly declared. It is implied by the dissent of President Landau, who rejected the requirement that administrative bodies should act with reasonableness, writing that this holding did not present the law on the subject. It is also implied from the concurring opinion of Justice Ben-Porat that was “inclined” to agree with Barak.

It is interesting to study Barak’s bases for his revolutionary decision in *Yellow Pages*. He suggested that it aligns with past judicial decisions and is merely an evolutionary development. He further relied on comparative law, particularly that in the UK, to suggest that this is how other developed countries treat their administrative branches. He also left open the question of whether

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22 *Marbury*, at 177.
23 The composition of the Committee for Appointing Judges is provided in Basic Law: the Judiciary.
25 Id. at 425-435 (President Landau’s opinion).
26 Id. at 449-450 (Justice Ben-Porat’s opinion).
27 Id. at 437 (Justice Barak’s opinion).
28 Id. at 438 (Justice Barak’s opinion).
the judicial power to invalidate administrative decisions applied to any unreasonable decision or only to extreme cases. Subsequent law developed in the direction of the former. He further suggested that a range of reasonableness exists, and within that range the Court will not override administrative decisions. These last two moves were intended to assuage any worries that judicial power might usurp that of the administrative bodies. Barak proposed no deference doctrine, however, like the one later articulated in the United States in the *Chevron* case.

Most notable was Barak’s judicial long-game, in which he was willing to compromise the specific case’s outcome to lay theoretical grounds for future judicial intervention. *Yellow Pages* involved the decision of the Israeli Broadcasting Authority (IBA) to extend the term of a contract for an additional decade with a private company and grant it the exclusive right to provide advertisement services to its radio station, the Voice of Israel (Kol-Israel), without having a tender offer process or granting equal opportunity to other companies to compete for the contract. (Such requirements were not part of Israeli public law until years later.) Barak hinted that the IBA’s decision was questionable, given that the IBA might have improved its bargaining power and resulting contract by considering additional offers. But he nonetheless found the term-extension reasonable or at least “not unreasonable.”

By affirming the IBA’s decision while still laying substantive grounds for future intervention, Barak was gaining a few tactical advantages. The decision was unanimous with all three Justices agreeing in the result that denied the petition. There was no need to force the "swing" Justice Ben-Porat to decide whether she agreed with Barak or Landau on the outcome of the case. Further, there was no frustration of the administrative will. During this period, the IBA monopolized the TV field and had strong backing of the Israeli government. The decision pleased the IBA that derived 10% of its income from this private contract. After this *Yellow Pages* decision, the Israeli Supreme Court started to review the reasonableness of administrative decisions as an independent ground for judicial intervention.

**IV. Late 1980s: The Right to Standing and Justiciability Revolutions**

Even before the establishment of the State of Israel, on March 9, 1948, the Chief of Staff held that Yeshiva (Jewish institutions dedicated to religious studies) students may be exempted from military service according to pre-approved lists. The decision was valid for one year. PM David Ben Gurion decided to defer the service of Yeshiva students for as long as the students studied in Yeshiva. This created an incentive for students to remain in the Yeshiva rather than join the army or the work force. Over the years, the decision was limited to a list of enumerated Yeshivot and a quota of 800 students. Ben Gurion also held that the deferment should be done by executive discretion, rather than legislation, to give it less permanence. The decision recognized the need to

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29 Id. at 444 (Justice Barak’s opinion).
30 Id. at 445 (Justice Barak’s opinion).
32 Dapei Zahav, supra note 24, at 448-449.
33 Id. at 449 (Justice Barak’s opinion).
34 Id. at 449 (Justice Barak’s opinion).
support religious education and offered some help to the ultra-orthodox community, which feared that, if not for this decision, no one would study Torah (Jewish scripture). At the time, there was no need to appease the ultra-orthodox community to form a government.\footnote{Daphe Barak-Erez, \textit{The Military Service of Yeshiva Students: Between the Citizenship and Justiciability Dilemma}, 22 BAR-ILAN U. L. REV. 227 (2006).}

Until 1977, the right-wing political parties never formed a government. With the rise of Likud Party to power that year, elections finally determined which major political party would form a government coalition.\footnote{The National Library of Israel, Election Chronicles: The 1977 Elections-Core Issues, \url{http://web.nli.org.il/sites/NLI/English/collections/treasures/elections/all_elections/Pages/E1977.aspx}.} Corresponding with the growing necessity to form a coalition that satisfied the ultra-orthodox society’s demands, the army deferment became general with no limit on the number of students or institutions.

In 1970, an Israeli student, Baker, petitioned the Israeli High Court of Justice (HCJ) for the first time against the special treatment awarded to ultra-orthodox men, who were \textit{de facto} exempt from the army. The Court found that he lacked standing to bring the case before the Court.\footnote{HCJ 40/70 Baker v. Minister of Defense, P.D. 24 (1) 238 (Isr.).} The standing requirement is a judicially developed doctrine intended to limit access to the courts in public law matters. In the U.S., it is grounded in the constitutional requirement for a “case or a controversy.”\footnote{US CONST. Art. 3.} In Israel, the Court developed in commonlaw the concept of “standing” as both a time-management tool to maximize its limited resources and a fence between the branches of government to avoid intervening in political matters. It was a self-defense tool intended to protect the Court from the wrath of the political branches. At the same time, it was designed to preserve and maintain the legitimacy of the Court as an apolitical professional institution.\footnote{Nicholas W. Barber, \textit{Self-Defence for Institutions} (2013) 72 CAMB. L. J. 558-577 (2013).}

Why was Baker denied standing? The Court found in 1970 that he did not succeed in showing that the government's policy had caused him substantial, personal harm; harm that was distinguishable from the general grievance caused to the public at large by the deferment of military service to the ultra-orthodox students. The Court held, “the more that the topic of the complaint is of a public nature, is among the issues commanding attention in the political arena, and serves as a topic of deliberation in the Government and the Knesset, the more it is necessary strictly to enforce the requirement that the complainant should suffer actual harm in his private domain in order to be granted the right of standing before the Court.”\footnote{Baker, supra note 37, at 247 (Justice Vitkon).} The Court held the view that public issues, as distinguished from private grievances, should be addressed by the political branches.

Beginning in 1981, Advocate Ressler, who was an officer in the army, petitioned the Court repeatedly against the legality of the special treatment awarded to the ultra-orthodox men. At first, however, the Court repeatedly refused to hear the cases on standing and justiciability grounds.\footnote{HCJ 448/81 Ressler v. Defense Minister, 36(1) P.D. 81 (Isr.); FH 2/82 Ressler v Minister of Defence, 36(1) PD 81 (Isr.); HCJ 179/82 Ressler v. Defense Minister, 36(4) P.D. 421 (Isr.).}
A. The Standing Revolution

In the famous 1988 Ressler decision, however, the Court with the (then) Justice Barak writing the court opinion, decided to expand the cases in which it recognizes the right to a standing before the HCJ. The petitioners brought affidavits from high-ranking army personnel stating that the length of reserve service for all soldiers (including petitioners) would be shortened if ultra-orthodox men served in the army. On this basis, they sought to establish an individual interest in the petition; one that was no different from the interest of other members of the general public. They argued that denying their petition on standing grounds would de facto prevent this matter from being decided by the Court, because no individual could ever show a more personal stake in the issue.

The Court was not persuaded that were the ultra-orthodox men to serve in the army, the petitioners’ military service would become shorter. While Barak did not recognize the right of any public petitioner to raise an issue before the Court, he held that if a person raises an important issue pertaining to the rule of law, then the Court has the discretion to hear the petition. One should first understand the importance of this decision and then Barak’s justification for it.

A Court in Aharon Barak’s terms is like a clock that needs a person to stretch its springs to work. That is, a judge cannot wake up in the morning and decide which issues of public life to tackle. That kind of power to set the national agenda belongs to the political branches alone. In contrast, the Court needs people to petition it to decide an issue. By broadening the standing doctrine to allow practically any public petitioner to bring a case before the Court, the Court comes closest to the political branches. The Court’s ability to exercise discretion to hear the public petitioner makes it de facto almost like the politician who wakes up in the morning and decides what issue to tackle.

Though the highest court in the Israeli legal system, petitioners may access immediately and directly the Supreme Court in its capacity as the HCJ to challenge governmental and legislative decisions. The HCJ has its roots in the British mandate period. The British did not trust the local courts—that is, the local indigenous judges—to deal with public matters, and they thus created the HCJ as a unique institution controlled by British judges to address petitions against the exercise of public authority. The British intended that it would protect the interests of the British mandate rather than enhance the protection of individual rights. It was further erected to enable the judiciary

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42 HCJ 910/86 Ressler v. Minister of Defense, 42(2) P.D. 441 (1988) (Isr.).
43 Id. at 472 (Justice Barak’s opinion).
44 Since 2000, the HCJ enjoys concurrent jurisdiction with the District Courts on some administrative matters. The justices of the Supreme Court instigated this reform through commonlaw to reduce their case load and it was later codified by the Knesset in Administrative Matters Courts Law, 5760-2000. The justices concluded that administrative law was well developed in many fields, and involved mere application of existing doctrine. It did not need their constant direct attention.
to monitor the executive execution of judicial decisions and to enable the British to supervise the judicial branch occupied also by local judges.

After the establishment of the State of Israel, the State entrusted the Supreme Court, which is the highest hierarchical court of the judicial system, with the functions of the HCJ at the insistence of the justices. The Court maintained its unique characteristics in the sense that a citizen could petition it directly to challenge state action and did not need to have the case discussed in the lower courts first. Also, a petitioner does not need formal legal representation and may submit evidence through affidavits alone. The fees to access the Court are minimal as well. These “user-friendly” access rules to the Court enabled the Court over time to develop a robust commonlaw protecting individual rights. Remarkably, an institution intended to restrict rights became the means for a robust development of rights.46

This uncommon feature of the Israeli Supreme Court sets it apart from other Supreme Courts (as distinguished from constitutional courts) around the world that may typically be accessed through appeal alone. Judicial review over primary legislation is decentralized in the sense that constitutional claims may be raised and adjudicated in any court as an incidental matter to a civil, criminal or family case. It is centralized in the sense that, if the central issue is the constitutional challenge, it can be addressed directly to the Supreme Court sitting as a HCJ. This hybrid system strengthens the protection of rights in comparison to centralized systems since politicians cannot just “pack” the Supreme Court through judicial appointments to reset the entire legal framework.

Indeed, after the Ressler decision, the type of petitioners to the Supreme Court began to change. Many of the most important constitutional law decisions now bear the name of NGOs that specialize in petitioning the courts. It became worthwhile for interest groups to establish NGOs that keep a permanent legal staff and specialize in petitioning the HCJ to shape Israeli legal landscape. These NGOs are repeat players, promoting well defined social and political agendas. They are funded through private as well as foreign money. Politicians from the opposition regularly petition the Court to undo legislation, as well as executive decisions. What they cannot achieve through elections, they try to accomplish via the Court. Also, the nature of the judicial decisions changed, and the Court started tackling all facets of Israel’s public life.47

How did Barak revolutionize the standing doctrine? Barak held that the Ressler decision did not present a revolution but rather an evolutionary development. Rather than looking at stare decisis, Barak was counting opinions of justices on the Court. In fact, he was asserting that the majority of justices, in individual opinions or dicta, were already in favor of liberalizing the standing doctrine to allow cases that alleged corruption or fundamental breaches of constitutional principles, such as violations of free speech or the rights to democratic and equal elections. The Ressler decision was merely broadening the understanding of “corruption” to embody other

46 Weill, Reconciling, supra note 3.
47 Yoav Dotan and Menachem Hofnung, Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court?, 38 COMP. POL. STUD. 75 (2005).
violations of the rule of law more generally. Barak further claimed that comparative law was already trending in this direction in the administrative law context.

He also articulated his judicial philosophy in support of broadening the standing doctrine: Without a Court that may adjudicate a case, there is no law, since there is no reliable enforcement mechanism. Separation of powers means checks and balances exercised through judicial review. For the Court to exercise judicial review over government action, it must liberalize the standing doctrine. A Court should further create rights through judicial adjudication. Thus, a person may petition to remedy an infringement of his interest, and if the Court accepts the petition and decides to protect that person’s interest, then the interest rises to the level of a right. This is why a person may petition based on an infringement of interests, and not just rights. The petition facilitates the mechanism for the formal legal recognition of rights.

Barak further suggested that, even if some of his arguments were not persuasive, the cumulative effect was certainly persuasive. He also undermined opposing views as immoral: “What is the moral basis for the approach that he who claims that his money was unlawfully stolen can apply to the court, but he who claims that the public’s money was unlawfully stolen cannot do so?” In short, Barak based his decision on commonlaw evolutionary development, comparative law, judicial philosophy, logic, and morals.

One should remember that when Barak decided Ressler, Israel still operated under the assumption that it had no formal supreme Constitution. Judicial review meant, at most, invalidating executive actions, not statutes. The Court abolished statutes only when they infringed upon section 4 of Basic Law: the Knesset, which guaranteed equal proportional democratic elections and required 61 MKs’ support to amend its provisions.

B. The Justiciability Revolution

In this decision, Barak also tackled the issue of justiciability—the “political question” doctrine. Non-justiciability is a judicial doctrine that developed in public law to demarcate the kind of issues that the Court will not hear on prudential grounds. Barak distinguished between two kinds of justiciability issues: normative and institutional. “Normative justiciability answers the question of whether legal standards exist for the determination of the dispute before the court. Institutional justiciability answers the question of whether the court is the appropriate institution to decide a dispute, or whether perhaps it is appropriate that the dispute be decided by a different institution, such as the legislative or executive branches.”

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48 Ressler, supra note 42, at 460-472 (Justice Barak’s opinion).
49 Id. at 464 (Justice Barak’s opinion).
50 Id. at 462 (Justice Barak’s opinion).
51 Id (Justice Barak’s opinion).
52 Id. at 464 (Justice Barak’s opinion).
53 Id. at 465 (Justice Barak’s opinion).
54 Weill, Reconciling, supra note 3.
55 Ressler, supra note 42, at 474 (Justice Barak’s opinion).
Barak held that there are always norms to decide the issue, even in spheres of war and peace, diplomacy and foreign relationships, and composition of the government. “Every act is permitted or forbidden in the world of law. There is no act to which the law does not apply…There is no ‘legal vacuum.’”56 To paraphrase, there are no black holes where no law applies. If there is no other norm to decide the issue, the Court can always inquire whether the governmental/executive decision was reasonable. Here is where the Yellow Pages precedent was crucial, and Barak indeed cites Yellow Pages for this proposition.57 Barak further argues that, when the Court in the past had decided that an issue was not justiciable, what it really meant and should have decided was that the governmental/executive decision was reasonable and legal.58 Barak thus rejected the concept of normative non-justiciability.

When it comes to institutional non-justiciability, Barak viewed this issue as a matter of appropriateness rather than judicial capabilities.59 In this context, Barak considered three arguments typically raised in favor of the recognition of institutional non-justiciability: separation of powers; democracy; and public confidence in the judicial system. But for him, separation of powers required judicial supervision—that is, judicial review over governmental bodies’ exercise of authority and discretion.60 Democracy meant not just majority rule, but also individual rights. This again demanded judicial supervision to see that the balance between the two was maintained by the other branches of government.61 As to public confidence in the courts, Barak would typically be more concerned that, if the courts do not intervene, the public will lose confidence in the law, but he did not dismiss the possibility of special cases where judicial intervention might lead to loss of public confidence in the system. In such a case, he would support the recognition of institutional non-justiciability.62 But he did not indicate for which cases this would be true. Instead, the decision would have to be context-driven.

Barak made sure to distinguish the Israeli public law from its American counter-part. He acknowledged that there was a mature doctrine of non-justiciability in the United States. But he argued that it had emerged in a different context—that of judicial review over primary legislation.63 The only context relevant to Israel at the time was judicial review over administrative law. But, he never revisited the justiciability revolution in light of the constitutional revolution. Quite the reverse: the justiciability revolution was a building stone that enabled the next constitutional revolution.

While broadening its authority, the Court did not utilize it to abolish the de facto exemption of ultra-orthodox students from army service, as was actually requested by Ressler. Thus, Ressler was denied a remedy. But, the Court did suggest in dicta that it may be a matter of time before it intervened. That is, with time, as the number of Yeshiva students subject to exemption grows both

56 Id. at 477 (Justice Barak’s opinion).
57 Id. at 479-483 (Justice Barak’s opinion).
58 Id. at 484 (Justice Barak’s opinion).
59 Id. at 488-489 (Justice Barak’s opinion).
60 Id. at 491 (Justice Barak’s opinion).
61 Id. at 492 (Justice Barak’s opinion).
62 Id. at 492-496 (Justice Barak’s opinion).
63 Id. at 494-495 (Justice Barak’s opinion).
in absolute terms and as a percentage of the population, the Court will have to reexamine its decision and may find that the Minister of Defense’s decision to defer their service is unreasonable.\textsuperscript{64}

It was typical of the Barak Court to enact its judicial revolutions gradually, in stages, in a \textit{Marburian} strategy.\textsuperscript{65} The political branches received their carrot in the form of a continuation of the exemption, while the stick was a far-reaching decision that broadened and democratized access to the Court. The decision should be seen as the tremor before the constitutional earthquake, since it enabled the rise of the Israeli Supreme Court as a potent political player. Arguably, this rise of the Court was done in \textit{dicta} in \textit{Ressler}, just as the constitutional revolution was declared in \textit{dicta} in the \textit{United Mizrahi Bank}. Since Ressler was denied a remedy, arguably there was no actual need to decide the issues before the Court: standing and justiciability.

The denial of Ressler’s petition achieved an added benefit. Barak wrote the first opinion in \textit{Ressler}. Had he decided to intervene and accept the petition, his opinion might have been a dissenting opinion. Because the other justices joined him in the result, his opinion became the opinion of the Court. The reasoning later became the prevailing approach of the Barak Court on issues of standing and justiciability, although in the \textit{Ressler} decision the other two justices wrote concurring opinions that differed from his in substantial ways with regard to standing and justiciability.

The (then) Deputy President Ben-Porat emphasized that she did not support a result in which the public petitioner would become the typical petitioner, rather than the exception.\textsuperscript{66} President Shamgar emphasized that, when the dominant thrust of the case was political, the issue might be best left to the other branches of government. He held that the Court should avoid concentration of power in the judicial branch. When the legal issue is marginal, it is better to dismiss the petition as non-justiciable, so as not to lend legitimacy to the governmental decision itself.\textsuperscript{67}

In a later decision, Justice Elon, who was an NYU visiting law professor for many years and a specialist on Jewish Law, fiercely criticized Barak’s approach to justiciability. He wrote that Barak’s approach to reasonableness was unreasonable in his eyes.\textsuperscript{68} He found that the difference between examining the reasonableness of the decision and examining its wisdom was thin.\textsuperscript{69} He argued that Barak’s approach amounted to treating law as a form of religion, with something to say on all aspects of life, including moral decisions,\textsuperscript{70} and that Barak lacked humility in his presumption that justices should have the ability to issue decisions on all matters.\textsuperscript{71} He further argued that this development represents the rule of justices instead of the rule of law.\textsuperscript{72} But these

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\item \textsuperscript{64} Id. at 505-509 (Justice Barak’s opinion).
\item \textsuperscript{66} Ressler, supra note 42, at 509-512 (Deputy President Ben-Porat’s Opinion).
\item \textsuperscript{67} Id. at 523-524 (President Shamgar’s Opinion).
\item \textsuperscript{68} HJC 1635/90 Zarzevski v. The Prime Minister, 45(1) PD 749, 771 (1991) (Deputy President Elon’s opinion).
\item \textsuperscript{69} Id. at 770-771 (Deputy President Elon’s opinion).
\item \textsuperscript{70} Id. at 767 (Deputy President Elon’s opinion).
\item \textsuperscript{71} Id. at 771 (Deputy President Elon’s opinion).
\item \textsuperscript{72} Id. at 813 (Deputy President Elon’s opinion).
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criticisms did not prevent the expansion of Barak’s influence on the Court. He was the brilliant future President of the Court, a position decided by seniority and guaranteed to him from the moment of his initial appointment to the Court in light of his young age.

So far, Aharon Barak transformed Israeli public law in stages, with each revolution serving as a basis for the next but all portrayed as mere constitutional evolution. Requiring all administrative decisions to be reasonable (*Yellow Pages*) meant that all issues could be justiciable (*Ressler*).

**V. Mid 1990s: The Judicial Review over Primary Legislation Revolution**

Once it opened its doors to public petitioners and treated the non-justiciability doctrine as belonging to a bygone era, the Court would become a major political player. It had a working doctrine of reasonableness/proportionality to review governmental/administrative decisions. It was now ready to seize the next opportunity to strengthen the protection of individual rights in Israel.

During its founding, Israel had intended to adopt a supreme formal Constitution. This inspiration and a plan of action with a timetable were included in its Declaration of Independence. But the war of independence broke out, and, lacking political will after the war, this plan was never acted upon. Instead, the first Knesset decided in the *Harrari Resolution* to adopt Basic Laws in stages that would ultimately form Israel’s formal Constitution. It was not decided what would be their intermediate status: would they become supreme upon their enactment or only once they are consolidated into a fully formed constitution. Until 1992, Israel adopted Basic Laws in stages that dealt with the structure of government. It thus enacted various Basic Laws, which carried the title of the government institutions they were regulating, such as the legislature, the government, the judiciary, and so forth. The Knesset enacted these laws through regular legislative processes, with simple majorities and no quorum requirement.

Over many years, those supporting the adoption of a Bill of Rights proposed different drafts of Basic Laws regulating rights that did not garner majority support in the Knesset. But, in 1992, MK Amnon Rubinstein tried a new tactic as a private MK. Rather than adopt an entire Bill of Rights, he proposed five separate bills dealing with different constitutional rights. The idea was to put each bill before the Knesset separately and maximize its chance of passage, even though this might mean the incorporation of a partial Bill of Rights. The Knesset adopted two Basic Laws dealing with individual rights with the presence and support of extremely slim majorities of MKs during the time of a lameduck government and Knesset. Of the 120 members of the Israeli legislature, only a minority of MKs was present. Basic Law: Freedom of Occupation passed its

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74 See DK (1950) 812–820 (Isr.).
75 Weill, Reconciling, supra note 3.
first reading with a vote of twenty-one to sixteen, and the final reading passed with the support of twenty-three MKs and none against. Basic Law: Human Dignity and Liberty passed its first reading with the vote of forty to twelve, and the final reading with the support of thirty-two MKs and twenty-one against. As the Knesset was voting on this privately-initiated partial bill of rights, many MKs were electioneering in light of the looming elections.

These two Basic Laws provided for a limited set of rights. Basic Law: Freedom of Occupation protected freedom of occupation, as its name entails. Basic Law: Human Dignity and Liberty lists the rights to human dignity, liberty, life, bodily integrity, property, privacy, and movement in/out of country. The drafts of three other Basic Laws did not garner legislative support and they would have provided for equality, freedom of religion, freedom of speech, social rights and others.

At the time of enactment, in 1992, the Court treated Basic Laws just like any other regular legislation. From the Court’s perspective, the legislature could amend Basic Laws through regular laws. A later regular law prevailed over an earlier Basic Law. The Court exercised judicial review over primary legislation only to protect the democratic, equal and proportional nature of the election system from infringement without absolute majority support in the Knesset, as was required in the entrenched section 4 of Basic Law: The Knesset.

But in November 1995, a few days after the assassination of PM Yitzhak Rabin, the Court published its United Mizrahi Bank decision, holding that Israel’s Basic Laws amounted to its formal Constitution and as a result the Court has the power of judicial review over primary legislation. The Court seized upon the opportunity presented by the 1992 enactment of the Basic Laws to declare that Israel had undergone a constitutional revolution. The Court stated that by the United Mizrahi Bank decision, it was joining the Knesset in recognizing the occurrence of the revolution. Israel’s constitutional development should accordingly be divided to “before” and “after” 1992.

No one paid notice to the decision in real time, as the nation was mourning the assassination of its Prime Minister. But the Court had to hand down the decision at that sensitive timing because President Shamgar had to retire from the bench. The decision had to be handed down by two presiding Presidents of the Court: President Shamgar, the retiring President, and Aharon Barak, the incoming President. Aharon Barak needed Shamgar to legitimize the revolutionary decision. Shamgar was a consensual persona who enjoyed the legitimacy of being “Mr. Security,” having served as the Military Advocate General before becoming an Attorney General and later Justice and President.

It is interesting to understand the Court’s tactics in this scenario. The decision is consensual in the sense that all justices denied the petition. In this sense, the entire decision is dicta. There is

78 Weill, Reconciling, supra note 3; Rivka Weill, Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1381 (2012).
79 Weill, Hybrid Constitutionalism, supra note 3.
80 Weill, Reconciling, supra note 3.
no direct confrontation with the Knesset over the validity of its statute--unlike *Marbury*, in which the Court found a statute invalid. Yet, it is similar to *Marbury* in the sense that both outcomes aligned with the political branches’ expectations. In the *Marbury* case, invalidating the statute (rather than upholding it) meant curtailing the judicial power and legitimating the new anti-federalist President.

The justices were all in agreement that the Court enjoys the power of judicial review over primary legislation. This unanimity was crucial to build legitimacy to the decision. But there was bitter disagreement in the reasoning that justified judicial review. Just as in previous judicially-led revolutions, the consensus on the outcome helped to make Barak's reasoning prevail in the long run, and this tactic also helped cement in legal academia the perception that his opinion is the law.82 But, a careful reader will notice that Barak’s opinion in *United Mizrahi Bank* was a plurality, and the Court never re-opened the theoretical debate regarding the theory that best explained judicial review power over primary legislation.83

Barak used the language of revolution rather than evolution to capture the essence of this legal development.84 This is a deviation from previous judicially-led revolutions and marks his awareness of the historical moment. He consciously spoke of the *United Mizrahi Bank* decision in *Marbury*-v--*Madison* terms.85 He wrote a lengthy decision of hundreds of pages, in which he constructed in *dicta* a new regime of constitutional law. He enumerated how public law should emerge from this moment forward in terms of proportionality review, notions of basic structure and eternity doctrines, etc. This full-throated elaboration attests to the unique nature of the decision.

Barak used a few tactics to lend legitimacy to his earth-shattering decision. He suggested that judicial review over primary legislation was prevalent worldwide and, indeed, taken as a given in democracies. Israel would not want to be an outlier in comparative terms.86 He offered alternative theoretical bases for his decision, relying on philosophical giants such as Hart, Kelsen, and Dworkin. This suggested to the readers that it was enough for them to be persuaded by one of these three alternatives to justify the decision.87 Barak reinterpreted past judicial decisions to align with this development.88 He suggested that all political actors agreed--or at least expected--that the Basic Laws would be treated as Israel’s Constitution, and thus the decision should be treated as

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83 For a detailed account of the possible theories that may explain the power of judicial review over primary legislation in Israel, see: Weill, Sui Generis, supra note 3.
84 United Mizrahi Bank, supra note 4, at 353.
85 Id. at 416.
86 Id. at 417-418.
87 See Weill, Sui Generis, supra note 16.
88 Id. at 418-419.
He also formulated a judicial philosophy that states that democracy and rule of law necessitate judicial review over primary legislation. He warned that any other approach would mean a disaster to Israel’s constitutional development in that it would lead to an impasse and a failure to adopt a formal supreme Constitution. There was no reason to reach a crisis when the Basic Laws could be treated as the formal Constitution. He delegitimized his opponents by suggesting that those who rejected his theory should be treated as opponents of individual rights. He even soothed possible fears of judicial overreach, since the Knesset has an override power and, in any case, the legislature may amend most Basic Laws by majority vote. He hinted that there was thus no counter-majoritarian difficulty and no need to import the American debates into the Israeli legal system.

The only two decisions to invalidate statutes in the 1990s dealt with esoteric matters that could not have evoked the anger of the political branches. One invalidated a provisional section in a statute setting licensing requirements for securities consultants. The other judicial decision required the army to present a detained soldier in front of a judge within 48 (rather than 96) hours when the army had already agreed to such a move and only asked for some extra-time to implement the reform.

VI. Late 1990s: The Emergence of the Non-Delegation Doctrine

Two hotly contested issues were on the Court’s docket in the late 1990s and refused to go away: the deferral of army service of ultra-orthodox men; and allegations of use of torture by the security services against suspects of terrorism. The deferral of army service was done through executive action with the Minister of Defense exercising discretion under section 36 of the Security Service Law. The interrogation techniques were regulated in a confidential report by the Landau Public Commission enjoying the status of internal executive memos. Both issues dealt with long established behavior of the executive branch and matters at the heart of security considerations. Arguably, both could not be invalidated under the newly-proclaimed Constitution, as they were

89 Id. at 356-358.  
90 Id. at 419-427.  
91 Id. at 392.  
92 “It may be said that whoever argues that judicial review is undemocratic is in effect arguing that the constitution itself is undemocratic. To maintain that judicial review is undemocratic is to maintain that safeguarding human rights is undemocratic. To maintain that judicial review is undemocratic is to maintain that defending the rights of the individual against the majority is undemocratic.” Id. at 424.  
93 Id. at 424-425.  
saved from invalidation under section 10 of Basic Law: Human Dignity and Liberty.98 This section is a savings clause of pre-existing laws that guaranteed their continued validity despite the adoption of the Basic Law. If not for the savings clause, the Basic Law would not have been adopted, since both military personnel and religious segments worried inter alia about possible effects of the Basic Law on pre-existing laws. Religious political parties wanted to save discriminatory practices in matters of marriage and divorce, while security personnel wanted to preserve harsh security measures, especially those inherited from the British mandate period, like detention, curfews, demolition of houses, and so forth.99

The Court could not challenge deferrals of military service nor interrogation techniques under Basic Law: Human Dignity and Liberty. It thus opted to use the non-delegation doctrine, rather than the Basic Law, to invalidate these administrative decisions. This non-delegation doctrine arguably arises from commonlaw, though one may also anchor it in an implied interpretation of Basic Law: the Knesset which designates the Knesset as the legislature. The Court held in the 1998 Rubinstein decision, that the special treatment of ultra-orthodox men cannot be provided through an exercise of discretion of the Minister of Defense.100 Instead, the legislature by statute must detail the scheme of special treatment for the ultra-orthodox men. Similarly, the Court held in the 1999 torture case, that torture is absolutely forbidden, and even lesser physical force cannot be used in interrogation without the Knesset’s explicit and detailed statutory authorization.101

The Court did not invent the non-delegation doctrine in these decisions. But the doctrine had been only sporadically and inconsistently used, since in the modern regulatory state it is quite common for the executive branch to exercise great discretion over issues that are beyond the expertise of the legislature.102 The Court used the non-delegation doctrine in both decisions to upset the status quo that allowed for such executive discretion.

The tactics of the Court were fascinating. The Court could not invalidate these pre-existing practices on constitutional grounds; indeed, the Court did not even mention the savings clause in its opinions. Instead, the Court used the less potent tool of non-delegation to invalidate these executive actions in order to protect the legislature’s authority to decide first order issues. As a weaker tool, the doctrine does not rule out these practices but rather requires the legislature to enact statutes to authorize them. Because the Court merely insisted that the political parties exercise power through the legislature rather than the executive, the confrontation between the judicial and executive branches was mitigated. In Israel’s parliamentary system, the same political parties control both the legislature and the executive.

But, employing the non-delegation doctrine in this context had an added meaning and impact. Its effect was not only to require a statutory enactment, but also to impose the Basic Law on any

98 Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 10 (Isr.).
99 See Weill, Bills of Rights with Strings, supra note 14.
101 HCJ 5100/94 Public Committee against Torture v. Israel, 53 P.D. 817 (1999) (Isr.).
such statute. While the invalidated executive acts, as “old law,” had enjoyed the protection of the savings clause, any new statute would be outside the purview of the savings clause.

In response, the Knesset enacted a statute to regulate the investigatory powers of the security services but, of course, did not include any open authorization for the use of physical force in light of international law and public opinion.\(^\text{103}\) The Knesset also enacted the Tal Statute, offering ultra-orthodox men special treatment regarding army service.\(^\text{104}\) Its enactment presented the next big legal drama.

**VII. Mid 2000s: The Constitutional Rights Revolution**

The Knesset explicitly decided not to include in the 1992 Basic Laws some of the most important constitutional rights one would expect to find in a Constitution. The rights to equality, freedom of speech, freedom of religion, freedom of movement within Israel, and others were not enumerated. There was simply no consensus in the Knesset for their inclusion in the Basic Laws. MKs were fearful of the effects of the incorporation of such rights on the Law of Return, religious marriage and divorce, Shabbat laws (equivalents of Sunday laws) etc. This is where the Barak Court made a final contribution. The opportunity arose in a discussion of the ultra-orthodox deferment treatment from serving in the army.

It was 2006 and the eve of the retirement of President Barak and Deputy President Cheshin who had both reached the mandatory retirement age of 70. The Movement for Quality Government (MQG) in Israel, an NGO, petitioned the Court against the Tal statute that allowed the ultra-orthodox community to defer service for four years and then have a time-off year in which they could decide whether to serve in the army or continue their studies. The MQG argued that the statute was unconstitutional because it discriminated against the majority of secular people who were subject to conscription. They argued that, even though equality was not an explicit constitutional right enumerated in Basic Law: Human Dignity and Liberty, it nonetheless should be read into this Basic Law because human dignity, by definition, also means equality of treatment.\(^\text{105}\)

The Court denied the petition, which satisfied the political branches. Had the Court invalidated the statute, as Deputy President Cheshin held in his minority opinion, the government would have had to face elections, since the ultra-orthodox political parties would have resigned in protest against the judicial decision. But the judicial revolution embodied in the decision was far more important than the question of ultra-orthodox service in the army. In his ruling, Barak laid the ground to interpret human dignity as embodying equality. He found that the statute infringed human dignity by discriminating against the general secular population.\(^\text{106}\) However, he did not

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104 Deferral of Service to Yeshiva Students That Torah Is Their Work Act, 5762-2002, SH No. 1862 p. 521 (Isr.).
105 HCJ 6427/02 Movement for Quality Gov’t v. Knesset 61(1) PD 619 [2006] (Isr.) (MQG decision).
106 Id. at paras 26-43 of President Barak’s opinion.
find the statute disproportional, as the time had not yet arrived to conclude that this new statute could not bring about social change in due course. It was still an experiment.  

The tactics should be familiar by now: Barak presented the ruling as an evolutionary development in line with previous judicial decisions. He even suggested that this was a moderate interpretation, as he did not interpret human dignity to include all aspects of equality but only those that implicated a person’s autonomy over the fundamental decisions of his life. As the political tension was high, the decision was accepted with relief by the political branches. The bite of the decision was not felt at the time.

The long-term objective was more important than the specifics of the case at hand. Thus, in the decision, one will not find any substantial discussion about whether the ultra-orthodox community is different from the general community in a way that may justify treating them differently. Equality after all is about treating similarly situated people alike and treating differently those who are substantially different. The question is the relevance of the distinctions between people for the governmental act at stake. Thus, for example, the Court did not discuss whether the ultra-orthodox community would be "fit" for army service in light of their self-imposed isolation from the broader community and their closed educational system. It did not discuss whether the costs to the army as a result of accommodations required outweigh the benefits. It did not address whether incorporating their service might be at the expense of integrating and promoting women in the army and the like.

Reading a right to equality into the enumerated right to human dignity was no less than revolutionary. Until this decision, the Court had discussed the possibility that discriminatory practices infringed on human dignity by humiliating people. For example, the Court held that discrimination amounted to humiliation when it ascribed inferior traits to people based on nationality or ethnicity or other group characteristics. But these discussions were mainly in the administrative law context and did not amount to inclusion of general equality notions into the Basic Law. They also did not incorporate a general right to equality, separate from humiliation, which is at the core of human dignity.

After the MQG decision, Israeli scholars would toy with the question what aspects of equality are not incorporated under Barak’s understanding of human dignity. One suggestion was discrimination against corporations, as they do not have human dignity, but even this example is contentious because it is easy to pierce the veil and see the people operating behind the corporation. Barak’s Court left a perception of human dignity that is like “love your neighbor” of Hillel the Elder. This one constitutional right could summarize all the other rights, because they all rest on human dignity. This premise became the primary engine for reviewing the constitutionality of statutes.

107 Id. at paras 68-70 of President Barak’s opinion.
108 Id. at para 34 of President Barak’s opinion.
109 Id. at para 40 of President Barak’s opinion.
110 See e.g. HCJ 4541/94 Alice Miller v. The Minister of Defense, 49(4) P.D. 94 (1995) (on women’s right to be pilots in the Israeli army).
When Barak was appointed Attorney General in 1975, he conditioned his acceptance, in his conversation with the Minister of Justice, on the abolishment of the dependence of the Israeli legal system on the British commonlaw. Though Israel declared independence in 1948, it maintained its ties with the British legal system through section 11 of the Law and Ordinance Act 1948, enacted within a week of independence. This Act incorporated into the legal system all existing law to avoid chaos and legal vacuum, but the incorporation was subject to the necessary alterations resulting from the establishment of the State. This section incorporated by way of reference British commonlaw as the prevailing law, when no other law applied. The incorporation included not just old commonlaw, but also new commonlaw developed after Israel’s independence.

Israel’s legal system lacked independence of its own free choice, fearful to stand on its own. Only in 1980, when Barak was already a Supreme Court Justice, the government acted upon his request and enacted Foundations of Law Act, 1980 that abolished the continued incorporation of the British law into the Israeli legal system. But even after 1980, Israeli judges enjoy independent power of commonlaw—that is the power to create law—as part of the commonlaw nature of the Israeli legal system, or maybe even as part of the powers inherited through section 11 of the Law and Ordinance Act, 1948.

Barak insisted that Israel’s commonlaw should become independent, but conditioning his appointment to the Attorney General on achieving this goal revealed the importance he attached to the power of judges to create commonlaw. In fact, many of his judicially-led revolutions surveyed, were revolutions in doctrines originated in the commonlaw: the revolutions of reasonableness, standing, and justiciability. If the doctrines originated in commonlaw, commonlaw could also reshape them.

Ultimately, Barak relied on judges, not politicians, to guarantee the nature of the constitutional system as Jewish and democratic. This is why the judicial power of commonlaw was crucial to him. In judicial decisions, he laid the theoretical foundations for judicial review even over the adoption of the constitution or amendment thereof as well as in the absence of a formal constitution. Before the Israeli Marbury v. Madison decision, he raised, only to dismiss, the possibility of commonlaw constitutionalism as higher law capable of abolishing repugnant

112 Law and Ordinance Act, 1948, §11.
113 The existing law at the time of independence included section 46 of the Palestine Order in Council which stated that where no other law was applicable then the following law applied: “and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty’s jurisdiction permit and subject to such qualification as local circumstances render necessary.”
outrageous statutes. He stated that the Israeli society lacked the consensus to grant the courts such power at that time.

This *dicta* appeared in the *Tnuat Laor* decision, decided in 1990, during the session of the 12th Knesset, which enacted the 1992 Basic Laws.\(^{115}\) The occasion was the fact that this Knesset, so keen on promoting democracy and individual rights, enacted a statute to retroactively reimburse political parties for outspending on their campaigns during election time. This retroactive reimbursement meant inequality in real time, since other political parties--that could not rely on their political power to change the rules of the game after the fact--remained within their allotted budgets and were at a disadvantage during the campaign. The Court, in a majority opinion, invalidated this law for violating the norm of equal elections without the necessary majority of 61MK, as required in section 4 of Basic Law: the Knesset. This was the natural judicial stance in light of previous precedents on the subject.

But, the strategic justice Aharon Barak, knowing that the outcome was guaranteed, opted for a minority opinion that upheld the statute. He held that there was no need for the support of 61MKs at the preliminary hearing of a private bill and thus the Knesset did not violate an entrenched provision of the Basic Law (section 4). He could thus write an important *dicta* that offered theoretical bases for commonlaw constitutionalism as a constraint on primary legislation, during a time when the Israeli legal system operated under a parliamentary sovereignty model. It was *dicta*, as he acknowledged that the time was not ripe to use this power, but he asserted this judicial power nonetheless. Thus, Barak offered the following normative pyramid in 1990 from high to low: Commonlaw constitutionalism → Statutes (within it maybe a differentiated tier of entrenched Basic Laws) → regulation and secondary legislation.

After the *United Mizrahi Bank* decision, Barak *in dicta* in various decisions seems to have created a two-tier system of supra-constitutional law. Already in *United Mizrahi Bank*, he suggested in *dicta* that the Court may resort to the doctrine of the “unconstitutional constitutional amendment” or “misuse of constituent power” to invalidate Basic Laws or amendments thereof.\(^{116}\) The first doctrine anchors supra-constitutional law in the Basic Laws themselves, identifying the “Jewish and democratic” identity of the State as an implied eternal value. The second is even more radical, as it constraints the original constituent power, and not just the amendment power. The more radical version is based on commonlaw constitutionalism. Barak did not guide the Court when to resort to each of these tools. How do we identify that this is an exercise of original constituent power or amendment thereof? This is an especially pertinent question in the Israeli context with an ongoing process of constitutional adoption of over 70 years.

In the *MQG* decision handed down on the eve of Barak’s retirement, Barak returned to this issue.\(^{117}\) While Deputy President Cheshin, in a minority opinion, was willing to invalidate the statute deferring military treatment to the ultra-orthodox men based on commonlaw constitutionalism, Barak *in dicta* insisted that the judiciary should resort to the Basic Laws first. Only as a last resort may they use commonlaw constitutionalism. From Barak’s perspective, while

\(^{115}\) HCJ 142/89 'Laor' Movement v. Speaker of the Knesset, 44(3) PD 529 (1990).

\(^{116}\) For elaboration and support, see Weill, Hybrid Constitutionalism, supra note 3.

\(^{117}\) MQG decision, supra note 105.
Cheshin adhered to the normative pyramid existing before the constitutional revolution, he was able to offer the Court a more nuanced and elaborated tool kit with escalating intensity. One can thus draw the following normative pyramid after the constitutional revolution from high to low: Commonlaw constitutionalism → Unconstitutional constitutional amendment (implied eternity clause) → Basic Laws as the Constitution → Statutes → regulation and secondary law.

Since his retirement, in academic work, Barak has continued to lay foundations for commonlaw constitutionalism. He promoted the idea that infringement of rights may be based on commonlaw, not just statute. “Commonlaw” is equal in status to “statute” for the sake of infringement of constitutional rights. Proportionality requires first a statute or authorization in a statute to infringe upon constitutional rights. Without Barak’s proposal, the courts may violate the Basic Laws in developing law, as they too must act with proportionality. Barak’s academic proposal was adopted by a plurality opinion of the Supreme Court.

Barak recently suggested that the Declaration of Independence may serve as a constraint on the constituent powers of the Knesset. Since the Declaration envisioned the adoption of the Constitution and the elections to a Constituent Assembly, it also set substantive limits to it in the form of the Jewish and democratic character of the state. It supposedly granted a limited mandate to the constituent assembly. Barak is not bothered by the fact that Israel did not act according to the Declaration’s plan. Nor is he troubled by the fact that the Court had consistently treated the Declaration as non-binding before the constitutional revolution. Barak insists on grounding commonlaw constitutionalism in a text.

IX. The Effectiveness of These Tactics

While Barak revolutionized every aspect of Israeli public law, his Court weathered the political storms that some of the decisions or their cumulative effect generated. During Barak’s period on the bench, the politicians ventilated and blamed Barak for the aggrandization of judicial power but they refrained from curtailing the Court. This is due in large part to Barak’s unique and outstanding charisma as one of the greatest jurists of our time. It was also due to the effectiveness of his jurisprudence.

118 AHARON BARAK, PROPORTIONALITY IN LAW (2010).
120 Aharon Barak, The Declaration of Independence and the Knesset as a Constituent Assembly, HUKIM (forthcoming).
121 In 1999, for example, the Ultra-Orthodox community organized a demonstration of 350,000 people in Jerusalem against the Court’s involvement in religious matters. ISRAEL AT THE POLLS 1999 87, 122-132 (Daniel J. Elazar & M. ben Mollov eds. 2001).
Barak was at the center of political decision-making for 28 years while on the Court. Israeli governments lasted on average 22 months during this period due to the unstable combination of a parliamentary system with a proportional representation election system. His revolutionary decisions surveyed had all satisfied the short-term needs of the coalition at stake, and ended up denying the petitions. The “bite” of his theoretical approach was aimed at future administrations, not those present in the courtroom. In a way this was a “carrot and stick” tactic: the carrot was immediate and the stick postponed for later times.

Moreover, Barak’s Court served at a time when governments routinely changed from right-wing to left-wing coalitions, and thus the guardian role of the Court was more acceptable to all sides. During Barak’s term on the Court, Israel had the following Prime Ministers: Menachem Begin (right), Yitzhak Shamir (right), Shimon Peres (left), Yitzhak Shamir (right), Yitzhak Rabin (left), Shimon Peres (left), Benjamin Netanyahu (right), Ehud Barak (left), Ariel Sharon (center), Ehud Olmert (left). In Barak’s decade-plus tenure as President of the Court, the last five served as Prime Ministers. Coalition forces could easily envision themselves in the opposition, enjoying the benefits of a strong Court.

In part, the Court’s strategy in this regard resembled the experiment with the Invisible Gorilla. While the audience is instructed to concentrate on counting how many times a ball passes between the players, they do not even notice the invisible gorilla that walks in and out of the game. When your political attention is focused on the ultra-orthodox draft, you sigh in relief when deferment is not jeopardized and fail to notice that the fundamental rules of the game changed under your nose.

Barak served on the Court during the difficult years of the Intifada. The Israeli State during those years was desperate for international recognition and respect. With the spread of judicial review worldwide, the growing acceptance of a universal jurisdiction for serious human rights violations, and the birth of the International Criminal Court (ICC)—it was important for the political branches to have the Court watch their back. Politicians and generals were afraid to board planes headed to Spain or Britain for fear of criminal prosecution of war crimes. This meant accepting the Barak Court’s decisions and a curtailment of their power. Barak was well aware of this dynamic, and he made sure in all his decisions to emphasize that they were in line with the developing comparative and international law.

123 Weill, Constitutional Transitions, supra note 78.
126 The First Intifada (Palestinian Uprising) was in 1987-1993, the Second was in 2000-2005.
The decisions also reinforced each other. With the expansion of the right to standing and the elimination of non-justiciability, it became worthwhile to NGOs to invest in acquiring petitioners’ skills and keeping a staff of trained lawyers. These NGOs would in turn contribute to a culture that puts the Court at the center of political action.

At times, political branches welcomed judicial involvement, since it was sometimes convenient to pass the burden of decision-making to the Court and avoid the political costs of deciding certain “hot potato” issues on the agenda. The political branches would drag their feet, appoint public committees with no deadlines, and blame the Court for their impasse. This dynamic showed itself time and again in controversial issues, such as Jewish conversion, which revealed serious tensions between the Israeli orthodox community and Jews in the diaspora; the draft of the ultra-orthodox community, which revealed heavy tensions between ultra-orthodox and the general population; and other complex cases. Thayer once warned that we might come to expect and even prefer that the courts do the job of the political branches.\(^\text{129}\)

\textit{X. The Legitimacy of the Strategic Court}

Hamilton has famously captured in the \textit{Federalist Papers} the limitation of the judicial power. It commands neither the power of the purse (legislature) nor the power of the sword (executive) and thus must ultimately rely on public confidence to survive.\(^\text{130}\) A strategic court must ensure that judicially-led revolutions gain legitimacy among the wider population and political powers. It is interesting to examine the way Barak’s strategic Court managed to gain legitimacy.

For starters, the Barak Court invalidated only five statutes or provisions thereof in an 11-year period. Two cases discussed above dealt with a minor transitional provision or did not run against the political will. One case that invalidated a statute legalizing an illegal right-wing radio channel in Israel (\textit{Arutz Sheva}) did involve a political confrontation with the political branches, but there was an empirical way to get around the decision and continue the broadcasting of the channel.\(^\text{131}\) Two other decisions imposed only marginal financial burdens on the political branches by requiring them to better compensate either Jewish settlers evacuated from the Gaza strip or Palestinian victims of civil operations of the army.\(^\text{132}\) So, the Court’s intervention was even-handed toward both sides of the political spectrum. In all cases, the legislature responded by amending the statutes to accord with the judicial rulings.


\(^{132}\) HCJ 1661/05 \textit{Hamoeza Haezurit Hof Aza v. Israeli Knesset}, 59(2) P.D. 481 (2005) (Isr.) (finding the compensation provisions for evacuation of Gaza settlements unconstitutional); HCJ 8276/05 \textit{Adalah—The Legal Center for Arab Minority Rights in Israel v. Minister of Defense} (2006) 62(1) P.D. 1 (2006) (finding a provision in a statute exempting the State from tort liability for acts done in hostility areas, that are not war acts, unconstitutional).
The Court influenced public life mainly through the potent threat of invalidating statutes which was enough to influence the drafting of statutes to begin with. In that sense, the Court spoke softly but carried a big stick. Similarly, the Court exerted influence through its supervision of administrative decisions—even intervening in the "reasonableness" of political appointments, coalition agreements, and war and peace issues. But these decisions potentially could have been overturned by legislative action. The Court also engaged in robust judicial interpretations of statutes through “purposive interpretation” that gave a very broad definition to the constitutional avoidance doctrine. In this way, the Court could essentially rewrite a statute through interpretation and avoid the need to invalidate it.

But, as the Court’s bite was primarily through interpretation and administrative law, it had a more customary and familiar flavor, even for those accustomed to parliamentary sovereignty traditions. One should bear in mind that until the United Mizrahi Bank revolution, Israel operated under the premise of parliamentary sovereignty, even though the Court had invalidated statutes that infringed the value of equal elections four times.

Not only did the Court exert influence through traditional engines of administrative law and interpretation, the Court also brought about revolutions in doctrines that had initially been self-imposed. Administrative grounds for intervention are part of the commonlaw of Israel, and it was only natural that the reasonableness doctrine would be developed by courts, not legislatures. Standing and justiciability were originally self-imposed mechanisms developed by the Court. It should come as no surprise that the Court would eventually decide to undo these limitations. Outside the traditional boundaries of parliamentary sovereignty, the Court prompted a constitutional revolution by asserting a general judicial review power over primary legislation. This is why Barak made sure the United Mizrahi Bank decision was unanimous in its outcome, as well as in the claim that the Court enjoys this power. He also made sure to portray it as a revolution co-sponsored by both the legislature in 1992 and the Court in 1995. The only remaining question was the nature of the judicial review power that the Court held.

Moreover, the legal revolutions that did not originate in the commonlaw, were framed by Barak as matters of “interpretation.” It was a matter of interpretation how to treat the Basic Laws from 1992, and this was why Barak could invoke Dworkin’s theory of interpretation in his aid in United Mizrahi Bank. It was also a matter of interpretation whether equality was part of the explicit constitutional right to human dignity. While interpretation is a different judicial power from commonlaw, the theory of interpretation—whether textualism, purposive or otherwise—is a

135 Zarzevski, supra note 68.
136 Weill, Constitutional Transitions, supra note 78.
137 See e.g. HCJ 9098/01 Genis v. Ministry of Construction and Housing, 59 P.D.241 (2004).
138 Weill, Reconciling, supra note 4.
139 DAPHNE BARAK-ÈREZ, ADMINISTRATIVE LAW 67-83 (Vol. 1, 2010).
140 United Mizrahi Bank, supra note 4, at 353.
141 Weill, Hybrid Constitutionalism, supra note 3.
matter for commonlaw to develop. Though Barak never put it in quite these terms, Barak’s jurisprudence suggests that for him parliamentary sovereignty was a doctrine originating in the commonlaw and constrained by the commonlaw.

The use of *dicta* was crucial for the effectiveness of the Court’s revolutionary enterprise. Barak’s Court repeatedly used *dicta* to bring about judicially-led constitutional revolutions, and this may be criticized as judicial activism. If the issue was not needed to decide the case, why lay theoretical grounds for future intervention? This is a justice playing the legislative game. One possible answer is that the reasoning stated in *dicta* was needed to reach the final outcome even in cases where the petition was denied. In this sense, the revolutionary underpinnings were arguably part of the *ratio decidendi* of the cases, rather than *dicta per se*. Thus, for example, one may argue that the Court had to first decide in *United Mizrahi Bank* whether it had the power of judicial review over primary legislation before it could reject the petition. Or, for example, one may argue that, even if Ressler was denied a remedy, the Court could not have reached that decision without first deciding standing and justiciability questions.

A different line of defense may be that this method of development aligns better with basic principles of the rule of law.\textsuperscript{142} The Court pronounces its new approach but enables the different political actors to adjust to this new holding by postponing its bite to future cases. The rules of the game change through the judicial holding, but their implementation is future-oriented. In the interval, the academia as well as the political actors may respond to this new approach, by accepting or criticizing it. The Court can then take these responses into account in future decisions as it gives actual effects to its new judicial approach.

But a serious shortcoming of the Barak Court may be the erosion of the power of *stare decisis* in the Israeli legal system. Stare decisis is an important feature of a commonlaw system and helps cement the power of the Supreme Court *vis-a-vis* the other branches of government. Judicial decisions are not arbitrary because they are given within a legal system that protects legitimate expectations of the public. *Stare decisis* plays a role in judicial nominations to the US Supreme Court and is a consideration in the US Supreme Court’s decisions to uphold precedents on abortion, death penalty and other contentious issues.\textsuperscript{143} While the Israeli Supreme Court is authorized to deviate from its own precedents,\textsuperscript{144} it is crucial for Barak’s own legacy that *stare decisis* be resurrected as a substantial constraint on the Court.

\section*{XI. Current Trends of the Israeli Supreme Court}

The Supreme Court that followed the Barak Court does not enjoy the prestige of its predecessor domestically or globally, at least not yet.\textsuperscript{145} This Court is characterized by frequent

\begin{itemize}
\item \textsuperscript{142} LON L. FULLER, THE MORALITY OF LAW (revised ed. 1964).
\item \textsuperscript{143} On the role of *stare decisis* in US law, see e.g. Rivka Weill, *Constitutional Statutes or Overriding the Court—On Bruce Ackerman’s We the People: The Civil Rights Revolution*, THE JERUSALEM REVIEW OF LEGAL STUDIES 1 (2016).
\item \textsuperscript{144} Basic Law: the Judiciary, §20.
\item \textsuperscript{145} In the 1980s, the Court enjoyed the trust of 80% of the public. When Barak left the Court in 2006, it enjoyed the trust of 67% of the public, while the 2017 Court enjoys the trust of only 57% of the Jewish population and 54% of
turnover of the Presidency as a result of mandatory retirement age of 70. Four presidents have presided over the Court in over a decade since Barak’s retirement: President Beinish, President Grunis, President Naor and the current President Hayut. The Presidents came from the State Attorney’s Office or the judicial branch, with no international academic reputation. At the same time, the Court almost tripled its pace of invalidating statutes: while the Barak Court abolished five statutes or provisions thereof in 11 years, this Court abolished 14 statutes or provisions thereof within the same time frame. Moreover, within a three months period (February through May 2012), the Court invalidated three statutes or provisions thereof, enabling President Beinish to retire with a major impact. One of these decisions finally invalidated the statute deferring military service to the ultra-orthodox men. Another intervened in the tax code.

The Court also did not hesitate to invalidate statutes that were politically charged and led to political outrage. The judicial decision to invalidate the statute providing for special treatment to ultra-orthodox men was one of the contributing factors that led to the fall of the government and elections in 2012. The Court also did not feel the need to abolish statutes in large panels and invalidated a statute with a five-member panel, thus raising doubts about whether the same result would have been reached had it been decided by a larger representative panel of the 15 member Court.

The Court was also willing to invalidate statutes more than once in the same subject area on high stakes issues: Within a two-year period, it invalidated three legislative enactments that dealt with the length of detention of people who entered Israel through a non-recognized entry point on the border. Each time the Court found that the legislative response to the judicial ruling did not meet the test of proportional detention and required the Knesset to redraft the statute. This was a repeated direct intervention in Israel’s immigration policies. At the same time, none of these decisions brought the representative branches to accountability regarding the most basic the Arab population. See Yedidia Z. Stern, Decade in Review: A Rocky Road for Israeli Courts, January 30, 2010, The Israel Democracy Institute, available at: https://en.idi.org.il/articles/10229; Tamar Hermann et al., The Israel Democracy Index-2017: Summary, The Israel Democracy Institute, available at: https://en.idi.org.il/media/9837/israeli-democracy-index-2017-en-summary.pdf.

See Yuval Yoaz, Supreme court Decisions that abolished primary legislation, available at: https://yuvalyoaz.com/%D7%A4%D7%A1%D7%A7%D7%99-%D7%93%D7%99%D7%9F-%D7%A9%D7%9C-%D7%91%D7%99%D7%94%D7%9E%D7%A9-%D7%94%D7%A2%D7%9C%D7%99%D7%95%D7%9F-%D7%A9%D7%91%D7%99%D7%98%D7%9C%D7%95-%D7%97%D7%A7%D7%99%D7%A7%D7%94/.

Id (abolishing a statute discriminating against the non-Ultra-Orthodox population in the draft to the army); HCJ 10662/04 Hassan v. National Insurance Institute (February 28, 2012), Nevo Legal Database (by subscription) (Isr.) (abolishing a section of the National Insurance legislation); HCJ 8300/02 Nassar v. the Government of Israel (May 22, 2012), Nevo Legal Database (by subscription) (Isr.) (abolishing sections of the IRS statute on equality grounds).

HCJ 6298/07 Ressler v. Israeli Knesset (February 21, 2012), Nevo Legal Database (by subscription) (Isr.).

HCJ 10042/16 Quantiski v. the Israeli Knesset (August 6, 2017), Nevo Legal Database (by subscription) (Isr.).

HCJ 7146/12 Adam v. the Knesset, 64(2) P.D. 717, 745 (2013); HCJ 7385/13 Eitan – Israeli Immigration Policy v. The Government of Israel (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew); HCJ 8665/14 Desta v. The Knesset (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew).
issue: whether these undocumented entrants were refugees or economic migrants.\textsuperscript{152} The Court also twice invalidated legislative schemes that regulated the draft of the ultra-orthodox community, even though this is a fundamental issue of coalition agreements.\textsuperscript{153}

The Court intervened in budget laws,\textsuperscript{154} and even declared its intent to invalidate Basic Law: The Budget (temporary provisions), if it were reenacted by the Knesset. The Basic Law authorized the Knesset to enact a budgetary statute that would cover a two-year term. The Basic Law was temporary in nature and any additional two-year budget would have required a reenactment of the Basic Law.\textsuperscript{155}

The Court held that it was a misuse of the Knesset’s constituent power to enact a \textit{temporary} Basic Law rather than a permanent Basic Law. However, the process of enactment of temporary Basic Laws and permanent Basic Laws is identical in Israel. The Court also criticized the content of the Basic Law in \textit{dicta}. In enabling a two-year budget statute, the Basic Law circumvented the need in a parliamentary system to actively check parliamentary confidence in the government through an annual budget.\textsuperscript{156} The Court, however, did not caution itself from intervening in budgetary matters, which are in the representative branches’ purview. Lastly, the Court utilized the doctrine of “misuse of constituent powers” to reach its outcome, hesitating to treat the doctrine of the “unconstitutional constitutional amendment” as more than \textit{dicta}. But, it did not acknowledge that the doctrine of misuse of constituent power involved greater assertion of judicial power than unamendability, since it constrained the very power to adopt a constitution to begin with.

By providing for a two-year budget, the Knesset did not abolish its ability to vote non-confidence in the government. When the Knesset votes non-confidence in the government, the vote must pass with the support of 61 MKs. When the government must pass the budget or hold elections, it must master 61 MKs. The difference between the two mechanisms is the vote of one MK. This is not the case to use supra-constitutional law principles whether anchored in unamendability or commonlaw constitutionalism.\textsuperscript{157}

The cumulative effect of these decisions suggests that the Court is not acting strategically. It has too frequently intervened in areas that are traditionally treated as within the epitome power of the representative branches such as immigration, coalition agreements, budgets, and the very power to amend a constitution. The bite is strong, yet these decisions do not typically lay ground-

\textsuperscript{152} Rivka Weill and Tally Kritzman-Amir, \textit{Refugees or Economic Migrants? Strategic Ambiguity and Its Human and Legal Prices} (on file with author).

\textsuperscript{153} HCJ 1877/14 Movement for Quality Government v. the Knesset (September 12, 2017), Nevo Legal Database (by subscription) (Isr.); Ressler 2012, supra note 149.

\textsuperscript{154} HCJ 4124/00 Yekutieli v. Minister of Religious Affairs (June 14, 2010), Nevo Legal Database (by subscription) (Isr.). For discussion: see Weill, Hybrid Constitutionalism, supra note 3.

\textsuperscript{155} HCJ 8260/16 The Academic center for Law & Business v. Israeli Knesset (September 6, 2017), Nevo Legal Database (by subscription) (Isr.).

\textsuperscript{156} While I was the first to raise awareness to the problematic nature of this Basic Law in the press, it is doubtful whether this is the case to use the unamendability doctrine. See Rivka Weill, Basic Law as a Stealth Constitutional Enactment, \textit{HAARETZ}, June 21, 2009, available at: https://www.haaretz.co.il/opinions/1.1266983.

\textsuperscript{157} See Rivka Weill, Judicial Invalidation of Constitutional Provisions on Budgetary Matters, November 1, 2018, SSRN (based on a lecture given in honor of the memory of Justice Cheshin).
breaking theories for future law. The legacy of Barak should have been not just the content of his decisions, but also the prudent and brilliant use of the tools he so carefully established for future Courts.

At the same time, the Court has misread the political map. Its counterparts in the political arena are not shifting coalitions of right- and left-wing political parties, as was true during Barak’s years. Rather, there is a stable coalition of right-wing parties. Since 2009, Benjamin Netanyahu has been the Prime minister of Israel. This enables the political branches to respond more effectively to the Court. The political branches are involved in attempts to “pack” the Court through judicial appointments as well as permanently reduce its power through the enactment of a general legislative override power that will enable the Knesset to undo constitutional decisions with absolute majority support of 61 MKs. While the politicians anchor their frustration in Barak days, they now feel more empowered to de facto intervene and restrain the Court.

This dynamic is especially dangerous in light of the fact that there are no substantial legislative barriers protecting the judicial branch from the wrath of the political branches. True packing of the Court through expansion of its size is possible through mere resolution of the Knesset. The independence of the Court, the judicial appointment system and the jurisdiction of the HCJ are tenets of Basic Law: the Judiciary, but this Basic Law may be formally amended by a 2 to 1 majority. Ultimately, the Court might be left with the power of commonlaw constitutionalism as its last line of defense.

The legacy of Barak is on the line. The constitutional tracks he so carefully laid for future judiciaries are threatened by the political branches, and the price for this profligacy will be borne by Israeli society. In a small country in size and population, a pluralist society with perpetual minorities, and no separate executive and legislative bodies, a strong Court is a necessity for the protection of liberty.

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159 I criticized the expansive notions of militant democracy of this government in Rivka Weill, Revisiting Israel’s Militant Democracy Perception, 10 HAIFA L. REV. 345 (2017).
160 Shaked, supra note 5.
162 The Minister of Science and Technology, Ofir Akonis, for example, said: “The Court has adopted a “disproportional” perception of constitutional revolution…the Supreme Court is abolishing the existence of the legislative and executive branches…there is a danger to democracy.” Minutes of Session No. 325 of the 20th Knesset (April 4, 2018) (Isr.), http://fs.knesset.gov.il/20/Plenum/20_ptm_492846.doc. President of State Reuven Rivlin accused Barak of no less than a coup d’état. A constitutional revolution should come from below, from the people, and not from the judicial branch. Minutes of Session No. 263 of the 20th Knesset (Oct. 23, 2017) (Isr.), http://fs.knesset.gov.il/20/Plenum/20_ptm_381657.doc.
163 Courts Law section 25 provides that the number of justices of the Supreme Court will be determined by the Knesset in resolution.