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# A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review

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# A CONSTITUTIONAL COURT IN THE ABSENCE OF A FORMAL CONSTITUTION? ON THE RAMIFICATIONS OF APPOINTING THE ISRAELI SUPREME COURT AS THE ONLY TRIBUNAL FOR JUDICIAL REVIEW

Guy E. Carmi\*

## INTRODUCTION

Israel does not have a formal Constitution. Nonetheless, recent developments over the last decade in the arena of Israeli constitutional law, which are widely referred to as the “Constitutional Revolution,” have ushered in dramatic and fundamental change. In 1995, the set of Basic Laws, which were enacted in piecemeal fashion over the years without previously receiving much attention,<sup>1</sup> were proclaimed by the Israeli Supreme Court to have a constitutional nature. Consequently, those laws invite judicial review.<sup>2</sup> As Chief Justice Barak refers to them, these Basic Laws serve as a “Crippled Constitution.”

The Israeli Supreme Court serves as a constitutional tribunal through its capacity as the High Court of Justice (HCJ). Since the establishment of the State of Israel in 1948, the HCJ has been responsible for adjudication of constitutional matters, yet it was neither appointed as a “Constitutional Court,” nor was it provided exclusive jurisdiction over constitutional matters. It developed a “common law” protection of human rights throughout the years, which is notable considering the lack of a written Constitution and the state of security Israel has been in since the day of its establishment.

A side effect of the Constitutional Revolution was a decrease in the legitimacy of the Court, since it created a judicially made constitution. This shook the balance of powers between the legislature and the judiciary by introducing judicial review

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1. For the only exception in this regard see *infra* note 22 and accompanying text for the discussion; HCJ 98/69 Bergman v. Minister of Finance [1969] IsrSC 23(1) 693, available at <http://www.court.gov.il/heb/index.htm> and Itzhak Zamir, *Judicial Review of Statutes*, 1 MISHPAT UMIMSHAL 395, 396 (1993).

2. See CA 1908/94 Mizrahi Bank v. Migdal [1995] IsrPD 49(4) 221. The “Constitutional Revolution” was further broadened and entrenched by subsequent rulings of the Supreme Court. See *infra* note 49 and text accompanying notes 47-50.

to the Israeli legal system through the judiciary's own initiative.<sup>3</sup> This created tension, which resulted in counter initiatives to take from the Supreme Court its role as a constitutional arbitrator, and to establish a separate constitutional tribunal: a Constitutional Court in the absence of a formal Constitution. Also, the Supreme Court has become extremely unpopular among certain groups, mainly the Jewish orthodox and some parts of the political right, due to rulings that related to religious matters and to religious tribunals in the last fifteen years.<sup>4</sup> These phenomena generated doubts regarding the powers invested in the Supreme Court for the first time in its relatively short history.

Many initiatives to create a separate Constitutional Court have not borne fruit.<sup>5</sup> Chief Justice Barak has even personally advocated against the need for a separate Constitutional Court, both in public and in writing,<sup>6</sup> and it seems that the Supreme Court has a sufficient amount of support among liberal members of the Knesset (the Israeli parliament) to avoid a drastic measure to remove this power – a power the Court currently holds.

Nonetheless, it seems that the straw that broke the camel's back has turned out to be not the Supreme Court, but rather the lower courts. The Supreme Court has demonstrated moderation<sup>7</sup> in its use of judicial review, striking down only a handful of statutes to date,<sup>8</sup> and has been quite cautious in avoiding irresponsible use of its new powers. Since judicial review was a product of the Supreme Court's ruling, and was not formally restricted to the Supreme Court, there have been limited occasions recently where lower courts applied judicial review<sup>9</sup> and aroused

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3. Legislative attempts to bestow the Supreme Court with the authority to serve as a Constitutional Court and to strike down Knesset legislation were undermined in the late 1970s and early 1990s. See *infra* text accompanying notes 66-72. The Supreme Court took for itself powers that the legislative branch was still reluctant to give it.

4. See, e.g., H CJ 1000/92 Bavli v. Religious Tribunal [1994] IsrSC 48(2) 221.

5. See *infra* note 15 at 122 for elaboration of many of the older proposals. Some of these proposals suggested that the Constitutional Court will be assembled by some of the Supreme Court's Justices, in addition to other appointed judges, from different backgrounds (*i.e.* academia, politics, etc).

6. See Aharon Barak, *The Supreme Court as a Constitutional Court*, 6 MISHPAT UMIMSHAL 315, 315 (2003) [hereinafter Barak] and Chief Justice Barak's speech in front of the Israeli Democracy Institute on November 1, 2001. It seems that, at first, Chief Justice Barak's view was in favor of sustaining the status quo, as in, for example, leaving all courts with the ability to strike down laws. Barak views this as the preferable alternative and the option of judicial review solely by the Supreme Court as less favorable. See, e.g., *id.*, at 321-23. As illustrated below, political reasons will result in Barak endorsing what he viewed as a less favorable alternative. Cf. *infra* text accompanying notes 84-88. See also Aharon Barak, *The Foundations of Judicial Review on Knesset Legislation*, in BAREKET BOOK 277 (1977) [hereinafter Barak, *The Foundations of Judicial Review on Knesset Legislation*].

7. Some even claim that the Supreme Court is *too* moderate in its use of judicial review. See Zeev Segal, *Constitutional Review of Statutes – Questions Following the British Model*, 6 MISHPAT UMIMSHAL 337, 338-39 (2003).

8. The Supreme Court has deemed only five statutes unconstitutional so far. For a full list, see Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 698 n.106 (2002); H CJ 1661/05 Aza Shore Reg'l Council v. Israeli Knesset [2005]. See also, *infra* note 61 at 139 (showing that the tendency to overrule statutes by qualified courts in countries where judicial review has not been rooted has generally been modest).

9. See CC (TA) 4696/01 Israel v. Hendelman [2003] (decided on April 14, 2003 by Judge Rosen of the Tel-Aviv Magistrate Court); CC (Jer) 4050/01 City of Jerusalem v. Hashem Mahamid [2002] (decided on 7/16/2002 by Judge Agmon-Gonen of the Jerusalem Magistrate Court), *vacated by*

the anger of the legislature. The lower courts do not enjoy the reputation and prestige that the Supreme Court holds, and it seems that for the legislature, judicial review by lower courts was a degradation it was not willing to tolerate.

Reuven Rivlin, the Knesset Speaker, was among the leaders of the protest against judicial review by lower courts. The tension between the judiciary and the legislature seemed to reach unprecedented heights when the Knesset Speaker and the Chief Justice publicly criticized one another while speaking at a public event at the president's residence.<sup>10</sup>

The result of this tension was an "unofficial" compromise between these two branches endorsing a legal initiative to restrict judicial review only to the Supreme Court.<sup>11</sup> This compromise is *politically* a "win-win situation" that prevents lower courts from striking down laws of the Knesset, on the one hand, while both legitimizing and entrenching judicial review by the Supreme Court through Basic Law legislation (an equivalent to a constitutional amendment) on the other hand.

Although this compromise has not yet been implemented, its spirit was captured in private draft bills,<sup>12</sup> and a governmental draft bill is currently in the early preparatory stages, being discussed by the Constitution, Law and Justice Committee of the Knesset.<sup>13</sup> The Constitution, Law and Justice Committee has relied on a draft prepared by a public committee, known as the "Neeman Committee,"<sup>14</sup> and its recommendation is the foundation for a governmental draft bill ["the proposed model"].

The identity of interests between the leaders of the legislature and the judiciary makes it most probable that this governmental initiative will be implemented. In this paper I have decided to focus on this initiative and its ramifications.

CA (Jer) 3350/02 Attorney General v. City of Jerusalem [2003] (decided on 7/14/2003 by Judges Adiel, Okun, and Ben-Ami of the Jerusalem District Court); and decision of Judge Baruch of the Magistrate Court of Tel-Aviv, dated 1/15/2001, *vacated by* CrimA (TA) 70570/01 Attorney General v. Katabi [2003] (decided on 2/5/2003 by Judges Berliner, Hamer, and Ahitov of the Tel-Aviv District Court).

10. This occurred on May 22, 2003. See <http://www.makorishon.co.il>; <http://www.nfc.co.il/archive/001-D-22598-00.html?tag=6-10-13>; another prominent Knesset Member who, at that time, criticized the rulings by lower courts was Michael Eitan, the Chair of the Knesset's Constitution, Law and Justice Committee.

11. See generally Zvi Lavi, Ahron Barak: *Only the Knesset Can Annul in a Basic Law Judicial Review on Its Decisions*, GLOBES, Nov. 10, 2003, <http://archive.globes.co.il/ENGLISH/>.

12. See private draft bill by MK Pinnes-Paz (no. 1779), 2003: Basic Law: The Judiciary (Statute Annulment by the Supreme Court); see also private draft bill by Gidon Saar and Dalia Itzik (no. 3146), 2003: Draft bill amending the authority to annul a statute, where it specifically notes that: "in light of incidents, among which a ruling by a Magistrate Judge that a statute is void, we see importance in anchoring the authority to use judicial review. The purpose of the bill is to avoid a situation in which every judge in every instance will be able to overrule an act of the legislature." (Author's translation). See <http://www.knesset.gov.il/main/eng/home.asp>.

13. Currently the Committee has finished its initial discussions before submitting the draft bill for a first vote (out of three) in the Knesset. See the protocols of the Constitution, Law and Justice Committee, <http://knesset.gov.il>.

14. The Neeman Committee was headed by leading jurist and former minister Ya'akov Neeman, and had some prominent Israeli jurists and politicians among its members. For the Neeman Committee's proposed draft bill, see CONSTITUTIONAL LAW 16-19 (Dalumi & Cohen eds., Machshavot Publishing 2005).

Scholarly discussion on these issues is scarce and predates the current controversy, which resulted from the lower court's rulings.<sup>15</sup> No serious scholarly work has yet been done on the ramifications of the proposed model, which is relatively new and still in the preliminary processes.

I will offer a comparative analysis that reviews the appropriateness of the proposed model of the Israeli legal system through an examination of other legal systems, while considering the special traits of the Israeli legal system. Part I reviews this system in order to provide sufficient background for analysis offered in the second and third parts of the article. This background includes an explanation regarding the lack of a formal Constitution, the constitutional adjudication pre-dating the Constitutional Revolution, and the process of appointing justices subsequent to the Revolution. Part II places a special emphasis on the latest controversy in this field that reignited the constitutional court debate – judicial review by lower courts, and offers a brief analysis of this phenomenon. Part III reviews the proposed model's pros and cons and suggests a reform regarding some of its provisions or directly related issues. These include the proposed model's referral mechanism, the issue of judicial appointments, reform of the court structure, and the number of justices presiding over constitutional cases.

## I. BACKGROUND

### A. *The Lack of a Formal Constitution*

The State of Israel was established on May 14, 1948. The Declaration of the Establishment of the State of Israel ("The Proclamation of Independence"), set a deadline for the adoption of a Constitution by the Elected Constituent Assembly not later than October 1, 1948.<sup>16</sup> This deadline was not met, and not by coincidence. From the day of its establishment, Israel was in a state of war. The young democracy was unable to reach a consensus regarding many issues, including, for example, the extent to which the Jewish religion would play a role in the new Jewish-democratic state, and the fear that anchoring human rights would infringe on the abilities of the new state to defend itself.<sup>17</sup>

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15. See, e.g., Yoav Dotan, *Does Israel Need a Constitutional Court?*, 5 MISHPAT UMIMSHAL 117 (1999) [hereinafter Dotan] which does not deal with the specific proposed model. Please note that most, if not all, the writings on this issue are in Hebrew, probably since this is a contemporary ongoing procedure, with many uncertainties, and the process of translating articles is slower than the speed with which changes occur. Also, the writings on the issue were done before the proposed model was drafted and therefore referred to other models (either hypothetical models or models that were rejected, such as establishing a separate Constitutional Court).

16. Official Gazette: Number 1; Tel Aviv, 5 Iyar 5708, 14.5.1948, page 1, available at <http://www.mfa.gov.il>.

17. For further elaboration on the reasons Israel does not have a Constitution, see Daphne Barak-Erez, *From An Unwritten To A Written Constitution: The Israeli Challenge In American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312 (1995); Amos Shapira, *Why Israel Has No Constitution*, 37 ST. LOUIS U. L.J. 283, 285 (1993); Zaharah R. Markoe, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L & COMP. L. 319, 346 (2000). Also, the recent developments

A compromise known as the “Harari Proposal” was brought to the Knesset by MK Yizhar Harari of the Progressive Party in 1950, according to which, instead of enacting a full constitutional document in the form of a written Constitution, Basic Laws would be enacted as chapters of the future Constitution.<sup>18</sup> The Knesset enacted ten Basic Laws between 1958-1992, which by and large did not receive special consideration, and were not looked upon as a significant constitutional document.<sup>19</sup> These Basic Laws did not address weighty “substantive” issues like human rights; instead they primarily dealt with procedural issues such as the structure of the powers of government.<sup>20</sup> In 1992, two “new” Basic Laws were enacted, which, for the first time, dealt with “substantive” issues, and listed a very partial fundamental rights charter.<sup>21</sup> The enactment of these two “new” Basic Laws, and in particular *Basic Law: Human Dignity and Liberty*, marked the starting point of the Constitutional Revolution. The landmark *Mizrahi* decision in 1995 declared the “revolution” and officially elevated the Basic Laws to a quasi-constitutional level. Before 1995, however, Basic Laws were not considered to be of much importance,<sup>22</sup> and were not viewed as a constitutional document that enabled judicial review of statutes that conflicted with them.

Prior to the *Mizrahi* case declaring the Basic Laws as a constitutional document and the introduction of judicial review to the Israeli system, there was no substantial public debate regarding the need for a constitutional court and it had no “urgent” character.<sup>23</sup> Now, after the judiciary was able to strike down acts of the legislature, the balance of powers between the judiciary and the legislative branches was disturbed.<sup>24</sup> Questioning the legitimacy of the new status quo and attempting to redistribute powers that were claimed by the Supreme Court, either back to the legislature or to a new separate body, was inevitable.

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surrounding the adoption of a constitution in Iraq may demonstrate the difficulties in reaching a consensus while drafting a Constitution.

18. See D.K. (1950) 1743. For more on the Harari Proposal, see [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_hoka.htm#4](http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4).

19. See *infra* note 22.

20. Among these Basic Laws were Basic Law: The Legislature, Basic Law: The Judiciary, Basic Law: The Executive, etc. For a complete listing of the Basic Laws, and their English translation, see Knesset, at [www.knesset.gov.il](http://www.knesset.gov.il).

21. Among the rights specifically enumerated in the new Basic Laws were: privacy, property, freedom of movement and the right to pursue an occupation. Freedom of Expression, for example, is not mentioned, and many other fundamental freedoms are not mentioned as well.

22. The only exception was a limited recognition that Article 4 of Basic Law: The Legislature, 1958, S.H. 69, which deals with the principle of equal elections and requires a special majority vote for infringement of this principle, enables striking down statutes that did not withstand that demand. See HCJ 98/69 Bergman v. Minister of Finance [1969], IsrSC 23(1) 693, and Itzhak Zamir, *Judicial Review of Statutes*, 1(2) MISHPAT UMIMSHAL 395, 396 (1993).

23. Some initiatives to establish a “Constitutional Court” as part of a broader reform that recognizes the constitutional nature of the Basic Laws by the legislature failed in the late 1970s and early 1990s. These initiatives do not bear many similarities to the current debate since they were held under a different legal regime. See *infra* text accompanying notes 66-72.

24. The introduction of judicial review to the Israeli legal system, which rested on British legal foundations, symbolizes a shift from the traditional “British model” of “Legislative Supremacy” to a more “Americanized” model of a “Constitutional Democracy.” Cf. Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 40-2 (2002).

*B. The History of Constitutional Adjudication in the Pre-Constitutional Revolution Era*

The Israeli Supreme Court stands at the summit of the judicial system in the state and is the final legal authority. The Court's bench usually consists of three justices, depending on the issue being reviewed. The Supreme Court acts as a court of appeals from the rulings of the District Courts in criminal, civil, and administrative cases. Normally, access to the Supreme Court does not require a *writ of certiorari* unless the District Court served as a court of appeal in the case at hand (see Diagram I). In addition, the Supreme Court may address various other legal and quasi-legal decisions, including appeals from other tribunals (such as the labor courts, military courts, and religious tribunals).<sup>25</sup> On rare occasions and under certain circumstances, the Supreme Court may also review its own decisions with a broad panel of justices.<sup>26</sup> The Supreme Court may also sit as a High Court of Justice, which to date has served as a *de facto* constitutional tribunal, due to the residual nature of its jurisdiction. As the High Court of Justice, the Supreme Court may deal with matters involving issues of justice that do not fall under the jurisdiction of any other court.<sup>27</sup>

The High Court of Justice may issue orders, including: (1) orders to release persons who have been illegally detained or imprisoned (*e.g.*, *habeas corpus*); (2) orders to avoid acting for state authorities, local authorities, their officials and other bodies that fulfill public functions, where persons have been appointed or elected contrary to the law; (3) orders to perform an act or refrain from performing an act, while performing their tasks in accordance with the law; and (4) orders to courts and to bodies and persons with legal or quasi-legal powers under the law (for example the Knesset, when it lifts the immunity of a Knesset member). Appeals to the High Court of Justice are made by means of a petition. In the first stage of its deliberation, a justice on the High Court of Justice decides whether there is any *prima facie* basis for the petition. If the justice's decision is positive, an *order nisi* is issued. After substantial deliberation on the petition, usually in a panel of three justices, the High Court of Justice decides whether the *order nisi* should be made permanent or whether the petition should be rejected. Turning the *order nisi* into

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25. See Article 15(d)(3) of Basic Law: The Judiciary, 1984, S.H. 78 (also available at [http://www.knesset.gov.il/laws/special/eng/basic8\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm)), and Diagram I.

26. See Article 30 of the Courts Act, 1984, S.H. 198. This process is analogous to the "*en banc*" procedure in the United States.

27. Article 15(c) of Basic Law: The Judiciary, *supra* note 25 ("The Supreme Court shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court or tribunal."). This article is reminiscent of the equity system, and replaced a similar provision of British Mandate legislation. This article is the source of the Supreme Court's jurisdiction to handle, *inter alia*, constitutional matters. There is an understanding that the Supreme Court's jurisdiction to handle constitutional issues was not specifically granted by law, and looking from a positivistic point of view, the Supreme Court was never specifically authorized to strike down Knesset legislation. Compare with discussion on other legal systems, *infra* Part I.C.

an absolute order means that the authority against which the order was issued must comply. If the justice's decision is negative, the petition is turned down.<sup>28</sup>

The High Court of Justice is, in fact, reminiscent of the British Mandate that preceded the Israeli State, and its statutes served as the foundation for the young State.<sup>29</sup> The Supreme Court served as an administrative court and dealt with all matters that had an impact on the government, including constitutional issues, as part of the conservative perception that did not allow every court to review governmental actions or to give writs or rulings directed at the executive.<sup>30</sup> Petitions against the state were in the exclusive jurisdiction of the Supreme Court until the year 2000, when the Administrative Courts were established as separate chambers of the District Courts. Nonetheless, the transfer of jurisdiction is being made gradually, and the Supreme Court still holds original jurisdiction for all administrative petitions that have not yet been specifically reassigned to the new tribunal.<sup>31</sup>

The Supreme Court has served as the leading institution in Israeli society for the promotion of human rights, democratic values, and the rule of law, from the early days of the young democracy until today.<sup>32</sup> Its rulings shaped and buttressed protection of fundamental rights even as it lacked a formal Constitution.<sup>33</sup> Through “common law” development of human rights jurisprudence, the Supreme Court has formulated an “Unwritten Bill of Rights,”<sup>34</sup> and Court-protected fundamental rights, such as freedom of expression, using strict standards often borrowed from the American jurisprudence.<sup>35</sup>

A good example of the Supreme Court's jurisprudence on human rights protection is illustrated by its approach to draconian legislation. The Israeli book of statutes still contains restrictions originating from the British Mandate, which

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28. For a more extended overview of the Supreme Court, see The High Court of Justice, [http://www.knesset.gov.il/lexicon/eng/bagatz\\_eng.htm](http://www.knesset.gov.il/lexicon/eng/bagatz_eng.htm).

29. See The Regulation of Governance and Law Ordinance, Article 11 (1948).

30. This conservative perception of sovereign immunity principles limited the scope of judicial intervention in governmental affairs used to characterize basic legal perceptions in most western legal systems and affected issues such as executive immunity from tort claims. See generally Guy I. Seidman, *The Origins of Accountability: Everything I Know About Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393 (2005).

31. See Administrative Courts Act, 2000, S.H. 190. Every few months the Appendix to this act is amended to broaden the Administrative Courts jurisdiction, but many administrative issues are still at the original jurisdiction of the Supreme Court.

32. Of course, like any other similar institution, the Israeli Supreme Court is not infallible or immune from criticism. Cf. *Korematsu v. United States*, 323 U.S. 214 (1944). Nonetheless, by and large this depiction is correct.

33. Democracies that do not have a formal Constitution, like Great Britain or Israel, provide robust protection of human rights as compared to other states with a Constitution. Indeed, even though the former Soviet Union had a quite enlightened Constitution on paper, in reality, it did not have a substantial effect on human rights protection. See, e.g., Robert M. O'Neil, *Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?*, 22 FED. L. REV. 1, 6 (1994) (Austl.).

34. This prevalent metaphor in regard to the Israeli human rights' protection doctrines is attributed to Justice Landau in his decision, HJC 243/62 Israeli Filming Studios Ltd v. Gari [1962] IsrSC 16 2407, 2415.

35. See, e.g., HJC 73/53 Kol Ha'Am Ltd v. Minister of the Interior [1953] IsrSC 7 851.

requires the licensing of newspapers, enables censorship, allows the closing of newspapers, as well as other stringent measures.<sup>36</sup> Although most of this legislation was not annulled by the Knesset, the Supreme Court interprets it very narrowly, applying high standards as appropriate for a democracy, which largely disarms their seemingly threatening nature.<sup>37</sup> Thus, the court found creative ways to circumvent its lack of power to disqualify acts of the legislature.

### C. *Constitutional Adjudication and the "Constitutional Revolution"*

As previously noted, during the 1990s the Israeli constitutional law arena changed dramatically as a result of a process known as the "Constitutional Revolution." This term generally refers to a process that started with the enactment of two Basic Laws in 1992. Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, were the first (and so far the only) Basic Laws that dealt with substantive rights. This partial "Bill of Rights" enumerates only a handful of fundamental rights,<sup>38</sup> and not necessarily the most important ones.<sup>39</sup> The two Basic Laws did not introduce new rights that did not previously exist; at the time of their enactment, there was no celebration of the kind that one might expect for an historical moment of this magnitude. The reason for this was that the legislature did not fully understand the future implications of the enactment of these two laws.<sup>40</sup> Three years after their enactment they were "proclaimed" by the Court as the starting point of the Constitutional Revolution, referring to them as a Constitution, or at least a "Crippled Constitution."<sup>41</sup>

The "proclamation" was made by the Supreme Court in the landmark *Mizrahi* case. In an eight-to-one decision spanning more than 500 pages, the justices primarily explained why the Basic Laws serve as a constitutional document.<sup>42</sup> Justice Heshin, in a dissenting opinion, was the only justice who did not concur that the Basic Laws can serve as a Constitution.<sup>43</sup>

36. See, e.g., the Press Ordinance (1924) and the Defense Regulations (Emergency)(1945).

37. *Kol Ha'Am*, *supra* note 35; HJC 680/88 Schnitzer v. The Chief Military Censor [1989] IsrSC 42(2) 617.

38. The two Basic Laws explicitly enumerate the following rights: Life, Dignity, Liberty, Property, Freedom of Movement, Privacy, and the right to pursue an Occupation.

39. For example, the basic rights such as freedom of expression or religious freedoms are not explicitly enumerated. See *supra* text accompanying notes 21 and 38.

40. See Judith Karp, *Basic Law: Human Dignity and Liberty – A Biography of Power Struggles*, 1(2) MISHPAT UMIMSHAL 323, 325 (1993). Cf. Chief Justice Shamgar's concurring opinion in CA 1908/94 Mizrahi Bank v. Migdal [1995] IsrPD 49(4) 221.

41. The term "Crippled Constitution" has been used many times by Chief Justice Barak when describing the status of the Basic Laws.

42. One may view the *Mizrahi* case as a long plagiarism of the United States Supreme Court's decision in *Marbury*. See *infra* note 44.

43. I will not go into detail regarding the legal reasoning of the Court in *Mizrahi*, but it is important to note that it derived the ability to conduct judicial review in accordance with the "General Limitation Clause" (Article 8 of Basic Law: Human Dignity and Liberty, 1992, S.H. 150, and Article 4 of Basic Law: Freedom of Occupation, 1994, S.H. 90). This nuance has lost much of its importance in regard to the general ability to apply judicial review after the *Herut* case. For a brief discussion, see *infra* note 49 and accompanying text.

Unlike Chief Justice Marshall in *Marbury v. Madison*,<sup>44</sup> who operated under a formal constitution with a supremacy clause,<sup>45</sup> the Israeli Basic Laws are far from a tangible constitutional document. In the absence of explicit authorization to deploy judicial review in a constitutional document, such as in the Canadian example,<sup>46</sup> it is not surprising that the justices spent so many pages of the *Mizrahi* case arguing that the Basic Laws serve as a constitutional document. One may take the position that any argumentation requiring so much explanation is inherently weak.<sup>47</sup>

By and large, academics and practitioners have not seriously contested the Court's ruling, and the few critical voices within the profession were soon outnumbered and marginalized.<sup>48</sup> The Constitutional Revolution became an uncontested reality shortly after the court announced it. Today, no serious jurist would challenge the underpinnings of *Mizrahi*.

The Constitutional Revolution is not based solely upon the *Mizrahi* case, however. The Constitutional Revolution has been further entrenched by subsequent Supreme Court decisions that have broadened its scope.

The Supreme Court in the *Herut* case expanded judicial review to all twelve Basic Laws (as opposed to only the two new ones), and adopted a "Kelsenian" approach to judicial review, according to which any norm that contradicts a higher norm (*i.e.* a statute that contradicts a Basic Law) is void.<sup>49</sup>

Today the Constitutional Revolution has enabled this expansive scope of judicial review. Since this power has not been confined to the Supreme Court, the ability to apply it rests implicitly in the hand of every court of the land.<sup>50</sup>

#### D. Justice's Appointment Process and Diversity

The Supreme Court's members are appointed and the appointment method is not political in nature. The "Judicial Appointment Committee" makes all appointments to judicial positions, in all the Israeli courts. The Committee is comprised of nine members: three Supreme Court Justices (the Chief Justice and two other justices), two Ministers (the Minister of Justice and another minister), two Knesset Members (one from the coalition and one from the opposition), and

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44. *Marbury v. Madison*, 1 Cranch 137 (1803).

45. U.S. CONST. art. VI, § 2.

46. See Part I of the Constitution Act, 1982, Schedule B to the Canada Act, ch. 11 (U.K.), as reprinted in R.S.C., Appendix II, No. 44, Sched. B, Pt. VII, § 52 (1985).

47. For example, compare *Mizrahi* with the relatively short length of *Marbury*.

48. See *e.g.*, Ruth Gavison, *The Constitutional Revolution: A Description of Reality or a Self-Fulfilling Prophecy?*, 28 MISHPATIM 21 (1997) [hereinafter Gavison].

49. See generally, HCJ 212/03 *Herut v. Elections Comm.* [2003] IsrSC 57(1) 750. For more on the entrenchment and scope widening of the Constitutional Revolution, see Ariel L. Bendor, *Four Constitutional Revolutions?*, 6 MISHPAT UMIMSHAL 305 (2003). For an explanation on the "Kelsenian" approach, see Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365 (2003).

50. See CA 1908/94 *Mizrahi Bank v. Migdal* [1995] IsrPD 49(4) 221, 418; Dotan, *supra* note 15, at 124; Ahron Barak, *Judicial Review of the Constitutionality of Statutes: Centralism v. Decentralism*, 8(1) MISHPAT UMIMSHAL 13, 14 (2005) [hereinafter Barak, *Judicial Review of the Constitutionality of Statutes*].

two members of the Israel Bar Association.<sup>51</sup> While this appointment method has proven to be quite effective for lower courts, it has been subject to some criticism with respect to Supreme Court appointments.<sup>52</sup>

Newspapers and political commentators have remarked that the last Supreme Court appointments were, in fact, decided in advance between the Chief Justice and the Minister of Justice.<sup>53</sup> A troubling issue with the current appointment system is that the key to judicial appointments to the Supreme Court lies in the hands of the justices themselves. This might help to perpetuate the hold of the current “legal elite” in this incredibly important institution.<sup>54</sup>

The controversies regarding the recent appointments are also a consequence of the Constitutional Revolution, since past appointments to the Supreme Court were less controversial. As the recent nominations to the United States Supreme Court affirm, the more powerful an institution is perceived to be, the more the composition of its members matters. Interestingly enough, the non-politicized conception of the Supreme Court is very prevalent in Israeli society, and is one of the main sources of the court’s legitimacy. This is an important trait that should play a significant role in reform proposals.<sup>55</sup>

So far I have reviewed the background of the Israeli legal system in the constitutional arena, its evolution from “common-law” protection of human rights, to a “judicially made Constitution” in the Constitutional Revolution. I have also reviewed the Justices’ appointment procedure. The next part of this article will analyze the judicial review by lower courts, which stands at the center of the current controversy.

## II. THE CONTROVERSY OF JUDICIAL REVIEW BY LOWER COURTS

As mentioned previously,<sup>56</sup> lower courts have used their power of judicial review three times so far. Magistrate Courts decided all of these rulings. However, it is important to distinguish between the one case that was not contested and the other two, which were overruled by the District Courts. In the first case, the defendant’s attorney had petitioned the Supreme Court as a High Court of Justice, and challenged the constitutionality of the statute at hand (in that case, a provision

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51. The structure of the Committee is determined in Article 4 of Basic Law: The Judiciary, *supra* note 25, and in the “Judges’ Regulations.”

52. See Mordehai Heler, *Justices’ Appointment – The Solution to the Supreme Court’s Crisis*, 8 TCHELET 54 (1999).

53. The practice has been that the justices usually decide in advance which candidates are most appealing to become their peers, and the justices’ vote is always unanimous. This practice has been widely discussed by the Israeli media. Cf. Daniel Polisar, *The Constitution in Motion*, 20 TCHELET 13, 15-6 (2005); Heler, *supra* note 52, at 54-55.

54. Many of the justices in recent years were considered personal friends. For example, according to Chief Justice Barak’s biography, he appointed three of his close friends to the Supreme Court’s bench (Justices England, Heshin, and Zamir). See generally NOMI LEAVITSKYI, *YOUR HONOR* 42, 113-25 (2001). Also, the last (and somewhat controversial) appointment to the Supreme Court was that of Edna Arbel, former chief prosecutor, who is known to have very close personal ties to Justice Beinisch. Justice Beinisch had to disqualify herself in voting on the appointment.

55. See discussion *infra* Part III.B.2.

56. See CC (TA) 4696/01 Israel v. Hendelman [2003].

of the Income Tax Code).<sup>57</sup> The Magistrate Judge postponed the hearings in the case, an action similar to a referral process to constitutional courts in other systems. The Supreme Court suggested that the constitutionality issue would be discussed as part of the proceedings at the Magistrate Court, and dismissed the claim.<sup>58</sup> Thus, the grounds were set for the Magistrate Judge to rule on the issue, without being accused of “activism.” In the two other cases, the Attorney General stepped into the proceedings and appealed to the District Court.<sup>59</sup> Both cases were reversed on the grounds that the trial judges had raised the issue of the statute’s constitutionality on their own initiative, and no claims regarding the constitutionality of the legislation at hand were brought by the parties themselves. This judicial initiative contradicts the adversarial nature of the legal system, and was the main basis of the appellate decision in both cases. Here “activism” by lower courts in constitutional matters was frowned upon by politicians, the Attorney General, and the appellate court.<sup>60</sup>

An important point to note regarding Israeli judges is that they resemble their common law colleagues much more than their civil law ones.<sup>61</sup> By and large, judges are highly experienced and enjoy great esteem.<sup>62</sup> This is especially true the higher the judge is on the scale. However, one of the main impediments to the implementation of the “Or Committee”<sup>63</sup> suggestions to reform the court structure is that at least some of the lower court judges, in particular Magistrate Courts, are not perceived as competent enough to handle complex cases that are currently being brought directly to the District Courts (the second out of three court levels—see Diagram I).

The underlying point I wish to assert is that the characteristics of judges in the Israeli legal system resemble many characteristics of their American colleagues in the sense that they can be similarly entrusted with the power of judicial review.<sup>64</sup>

Some arguments can also be made regarding the incapacity of lower court judges to rule on the constitutionality of statutes. The Israeli legal system has some

57. *Id.*

58. See HCJ 8424/01 Hendelman v. IRS and Attorney Gen. [2002].

59. CC (Jer) 4050/01 City of Jerusalem v. Mahamid [2002], *vacated by* CA (Jer) 3350/02 Attorney Gen. v. City of Jerusalem [2003]; CrimA (TA) 70570/01 Attorney Gen. v. Katabi [2003].

60. The parties did not raise the constitutionality issue by themselves, and therefore, as a basic principle of the adversarial system, the judge is not supposed to raise the issue on his own initiative. Robert Post refers to such considerations as “managerial arguments,” meaning that they have an independent influence on court rulings that have no ideological agenda, but rather a more professional one. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 4-6 (1995) (Harvard Univ. Press, 1995).

61. For the general characteristics of judges in both systems, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION*, 34-9 (Stanford Univ. Press 1985) [hereinafter MERRYMAN].

62. Unlike most of the Civil Law countries, judges in Israel are appointed only after at least five years of experience (whether in legal practice or in law teaching) for a Magistrate’s Court position, seven years for the District Courts, and ten years for the Supreme Court (see Articles 2-4 The Courts Act, *supra* note 26). In most cases, the experience of the judges surpasses the required minimum and judicial posts are extremely competitive, prestigious, and financially rewarding.

63. See *infra* note 106.

64. Cf. Barak, *supra* note 6, at 319-20. “The Continental approach [to the judges’ stand] is not our own. The judge in Israel is not perceived as a bureaucrat. On the contrary, he is outside of the bureaucratic framework. He is selected from among the finest jurists, when his personality, viewpoints, and professional experience train him for constitutional adjudication.” *Id.*

additional tribunals to the “regular” system. These tribunals include labor courts, military tribunals, and religious courts, which principally deal with matrimony and divorce. All these tribunals are subject to the authority of the Supreme Court, but they are not an integral part of the core judicial system. One may argue that if Magistrate Court judges are not to be entrusted with the power to apply judicial review, the same argument can be made to an even greater degree judges in the other above-mentioned tribunals – some of whom lack legal education and are not qualified jurists. Another significant argument against empowering lower courts with judicial review is the uncertainty in primary legislation that might result due to determinations by lower courts on the constitutionality of statutes. This fear stems from what Louis Favoreu refers to as the “relative” (*inter partes*) effect that lower courts possess, as opposed to the *erga omnes* effect that either the Supreme Court or a Constitutional Court possesses.<sup>65</sup> The “relative” power of lower courts may work both ways, serving as a counterargument to those who object to judicial review by lower courts, since the relative effect lessens the possible negative effects of “bad” lower-court rulings and blunts their potential “devastating” effects.

In conclusion, an Israeli lower court judge is probably better equipped to handle judicial review than his Continental counterpart, and resembles, in his main characteristics, his American colleague. Nonetheless, the Israeli legal culture still views judicial review as an extraordinary tool and hesitates to invest this power in the hands of every judge. Therefore, although there are no compelling reasons to deny lower court judges the ability to apply judicial review, the broader cultural and political picture, as described in this article, may justify endorsing the proposed model. Thus, unlike most Supreme Courts, the Israeli Supreme Court is accustomed to serve as a court of original jurisdiction through its capacity as a High Court of Justice. Therefore, referring constitutional issues directly to the Supreme Court will be similar to current procedures.

### III. THE SUPREME COURT AS A CONSTITUTIONAL COURT AND SOLE JUDICIAL REVIEWER

#### A. *The Pros and Cons of the Proposed Model*

The concepts of the proposed model are not new. In the late 1970s and early 1990s the government attempted to initiate enactment of “*Basic Law: Legislation*” as part of the overall process of completing the endeavor of the Basic Laws as an assembled Constitution.<sup>66</sup> This proposed Basic Law was supposed to deal with various legislative issues. These included enactment and amendment procedures of

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65. See Louis Favoreu, *American and European Models of Constitutional Justice*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 114-15 (David S. Clark ed., 1990) [hereinafter Favoreu]; see MERRYMAN, *supra* note 61, at 133-41.

66. See the following official draft bills: 1976 HH, 133; 1978 HH, 326; 1992 HH, 147. The endeavor was in fact a part of the ongoing implementation of the “Harari Proposal.”

Basic Laws, establishment of judicial review and the appointment of the Supreme Court as a Constitutional Court.<sup>67</sup> The proposed Basic Law was not passed in the Knesset, principally due to strong opposition on behalf of the religious parties, which objected to the notion of judicial review.<sup>68</sup> Some of those who sided with the proposed Basic Law did so by claiming that judicial review is such a significant action that it should not be done by any tribunal other than the Supreme Court, and even then, not by any random three judge panel, but by the majority of the justices.<sup>69</sup> Professor (and later Supreme Court justice) Zamir held similar views, endorsing the model proposed by the draft Basic Law, referring to it as “an intermediate model” as opposed to the American “decentralized” model and the European “centralized” model.<sup>70</sup>

After a period of stifled debate following the enactment initiatives, the controversy quieted down. Judicial review became a systematic, legal reality.<sup>71</sup> Even before lower courts started using judicial review, the debate on a Constitutional Court was revived. Still, it took about six years for lower courts to start utilizing judicial review, thereby triggering the outrage of the Knesset.<sup>72</sup> The initiatives are not likely to be stifled again. While the result of failing to complete these measures in the past was simply a lack of judicial review, their incompleteness now will mean rampant judicial review in the eyes of the legislature.

The political and business elite, combined with basic democratic conventions, do not support the abolition of judicial review altogether, and liberal Knesset members will not be willing to engage in a head-to-head battle with the Supreme Court. The proposed model is a compromise that appeals to all interests. With the endorsement of the Supreme Court’s Chief Justice and liberal Knesset Members on the one hand, and reactionary Knesset Members on the other, reaching the necessary majority is a realistic, attainable goal.

#### 1. “The Pros”

Among the leading rationales supporting the proposed model is the argument that leaving judicial review in the hands of the Supreme Court will not be far-

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67. See Dan Meridor, *Principles of the Proposed Basic Law: Legislation*, 1(2) MISHPAT UMIMSHAL 387 (1993) [hereinafter Meridor]; Zamir, *supra* note 1, at 395.

68. See Zamir, *supra* note 1, at 395 n.4. One should bear in mind that the debate regarding the proposed Basic Law was held prior to the landmark *Mizrachi* case, at a time when there was no judicial review in the Israeli system.

69. See Meridor, *supra* note 67, at 392-93.

70. See Zamir, *supra* note 1, at 408-10; see also Dotan, *supra* note 15, at 120-26. Favoreu, *supra* note 65, at 105-06, offers a similar taxonomy of American and European models.

71. See *supra* Part I.C. for discussion on the Constitutional Revolution.

72. The most recent commentary on the issues presented in this paper were written prior to the lower courts’ implementation of judicial review. Although some of these writings addressed the issue of judicial review by lower courts, they were published when this issue was still theoretical and prior to the major controversy in response to which realization of this “theoretical issue” erupted. The controversy of lower courts’ judicial review was generally underappreciated by commentators. See, e.g., Dotan, *supra* note 15, at 161-63; Zeev Segal, *The Way to Judicial Review on the Constitutionality of Statutes – the Authority to Disqualify Acts – To Whom?*, 28 MISHPATIM 239 (1997).

reaching, nor will it impede the Supreme Court's prestige as would a "disownment" of this power by its transfer to an independent and separate Constitutional Court. Also, by giving judicial review powers to the Supreme Court by legislative action, the Knesset will be able to save face from the embarrassing fact that the Court was not willing to wait for what the Knesset hesitated to render on its own. This "if you can't beat them – join them" argument is not very strong, but still carries some weight. However, the proposed model's greatest advantage, in my view, is in the legitimacy it may bestow upon the current use of judicial review.

The United States serves as a good analogy for the importance of mooring judicial review in a nation's constitutional documents for preserving the legitimacy of the judiciary while deploying judicial review. There are scholarly claims that the legitimacy of judicial review in the United States is still somewhat shaky in certain respects, due to the absence of any explicit authorization in the US Constitution for judicial review, and the fact that the United States Supreme Court itself assumed these powers.<sup>73</sup> The court's legitimacy in deploying judicial review and its realm of deliberation would increase in a system in which judicial review is enumerated in the Constitution, rather than assumed by the court.<sup>74</sup> In this sense, the tradeoff of limiting judicial review to the Supreme Court for the increased legitimacy of its application is a win-win situation both for the judiciary and the legislature for the reasons previously mentioned.

As I have shown, the "activist" manner in which the Supreme Court unilaterally assumed these powers, the shaky rationale at the base of its legal reasoning, and the tension created between the two branches of power, overshadowed the Court's achievement in protecting human rights' with its move. The Supreme Court may regain some of its lost legitimacy,<sup>75</sup> and legitimacy is currency for supreme courts.

In fact, one could look at the pre-Constitutional Revolution reality in which the Supreme Court was the only *de facto* constitutional tribunal as an implicit "intermediate model" similar to the proposed model. During that time, constitutional matters were solely adjudicated by the Supreme Court, even in the lack of an official constitutional jurisdiction. There was not much sense to

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73. See generally, *Marbury v. Madison*, 1 Cranch 137 (1803).

74. See Fredrick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, 20, Feb. 18, 2005 (KSG Faculty Research Working Paper Series RWP05-019), [http://www.ksg.harvard.edu/research/working\\_papers/](http://www.ksg.harvard.edu/research/working_papers/). Schauer notes that the very fact that it [judicial review] is implied rather than explicit has produced more of a continuing debate in the United States than elsewhere about the very legitimacy of the power . . . . Thus, although judicial review itself may be so well entrenched in the United States as to occasion few wholesale challenges, there is more of a concern in the United States than there is in most other countries with strong judicial review about a court that might be closely and continuous monitoring the details of government action, and about a court that might be intimately involved with the empirical and policy issues that such monitoring and evaluation necessarily entails.

*Id.*

75. For an opposing view, see Dotan, *supra* note 15, at 159-62 (arguing that the legitimacy gained by such a move is marginal, and does not justify the overall move).

officially assigning the Supreme Court as a Constitutional Court, since there was no Constitution. It is true that lower courts were not prohibited from handling constitutional issues that *incidentally* arose during cases they decided as part of their jurisdiction,<sup>76</sup> but a lower court's decision is confined only to the case at hand and has a limited *res judicata* effect, even to the parties at hand.<sup>77</sup>

If we adopt this viewpoint, then the proposed model, or any other similar "intermediate model," bears more similarity to a codification of the basic conventions that existed prior to the *Mizrahi* ruling than to a major change in the legal system.

## 2. "The Cons"

One should ask if the proposed model is appropriate in the first place. Although the Israeli legal system is usually categorized as a "mixed system"<sup>78</sup> in its core and origin, it is a common law legal system.<sup>79</sup> Constitutional Courts and restriction of judicial review to specific tribunals is atypical in common law systems, and the main rationales which created those institutions in the first place do not apply to the Israeli system.<sup>80</sup>

The opponents of the proposed model may argue that even if it has its merits on the *political level*, it does not seem to be the case on the *theoretical-juristic level*. Indeed, some academics object to the changing of the status quo, claiming that the proposed model is appropriate for the Israeli system, and that the benefits of the formal recognition by the Knesset of the Supreme Court's ability to review the constitutionality of its statutes are outweighed by the potential damages.<sup>81</sup>

Opponents of the proposed model further argue that the Basic Laws serve as a Constitution, and that the constitutional aspects infuse all fields of law. This also has educational effects on the judicial system as a whole, and helps entrench a constitutional mode of thinking. Thus, the accessibility of every judge to the constitutional documents serves an educational purpose within the judiciary; so all judges are submerged in the new constitutional jargon.<sup>82</sup>

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76. Article 76 of the Courts Act, *supra* note 26; cf. Dotan, *supra* note 15, at 128-29.

77. The court's ruling and findings, according to Article 76 of the Courts Act, *supra* note 76, does not prevent the parties from petitioning to a court that has original jurisdiction on the issue, and to receive its ruling regarding the issue, despite the preceding ruling by the previous court. See Dotan, *supra* note 15, at 128-29.

78. See Ahron Barak, *The Israeli Legal System – Its Tradition and Culture*, 40(2) HAPRAKLIT 197 (1992).

79. Cf. Barak, *supra* note 6, at 320, who, in the context of the Constitutional Court debate emphasizes the common-law traits of the Israeli system.

80. Among these reasons are distrust of the judiciary in the post World War II era. The courts were perceived as accomplices to the totalitarian regimes and judges on the continent were perceived as civil servants and technicians, as opposed to their common law counterpart who were perceived as "culture heroes." See MERRYMAN, *supra* note 61, at 133-40.

81. Cf. Dotan, *supra* note 15, at 161-63.

82. See generally Barak, *supra* note 6, at 321-22 (arguing that there would be difficult consequences in removing the Constitution from the regular courts).

Although much of this criticism is substantial and well-argued, the considerations in favor of the proposed model outweigh those in favor of the current status quo, even despite the unresolved issue of how appropriate the proposed model is for the Israeli system. It should not be ignored that the proposed “hybrid” model has substantial merits. Also, some prefer the (continued) adoption of the American decentralized model. However, despite Israel’s common law tradition and heavy American influence, a complete imitation of the American model might be inappropriate as well, since, in the words of Favoreu:

[A]s comparative law teaches us, each country and society adapts legal or political mechanisms and institutions to its particular needs. As the effort to transplant the American model in Europe demonstrates, one system – no matter how well perfected, or perhaps because of this – is not necessarily transposable into different societies than the one from which it springs.<sup>83</sup>

Chief Justice Barak recently expressed a similar view.<sup>84</sup> According to Barak’s most recent position, although both models are similarly appropriate to the Israeli system, and the choice between the two models is not clear-cut, the decisive consideration in favor of a centralist-European model is that the adoption of the decentralist-American system would be an overly sharp transition from a parliamentary democracy to a parliamentary-constitutional democracy.<sup>85</sup> Yet, Barak expressed hope that after judicial review is entrenched in the Israeli system, the Knesset will consider shifting back to the decentralized model.<sup>86</sup> Although claiming consistency, Barak’s views on the centralized versus the decentralized model waver over time, and his most recent view favoring a gradual process of shifting from a centralized to a decentralized model is an attempt to reconcile his current position with his former views.<sup>87</sup> Barak was politically savvy enough to refrain from ever fully committing to a certain model, as well as to conceal the primary motivation behind his position change. While it is more reasonable that Barak shifted his viewpoint on the issue in order to gain legitimacy retroactively for the controversial introduction of judicial review he led a decade ago in *Mizrahi*, at the expense of the lower courts, he uses other justifications cloaked in legal reasoning. From a legal realism analysis, Barak is leveraging the Knesset’s discomfort with judicial review by lower courts to reach a *political* compromise that entrenches the Constitutional Revolution he initiated. This move facilitates the power transitions between the Knesset and the Supreme Court that resulted from the Constitutional Revolution, prevents a confrontation with the Knesset on the

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83. Favoreu, *supra* note 65.

84. Barak, *Judicial Review of the Constitutionality of Statutes*, *supra* note 50. Barak’s article was published after this article had already been submitted to the editing process. I thank the *Connecticut Journal of International Law* for enabling me to supplement additional comments at late editing stages.

85. *Id.* at 21-2.

86. *Id.*

87. *Cf.* Barak, *supra* note 6, at 15-6.

broader issue of judicial review, reinforces the Court's legitimacy, and in the long run broadens the Court's leeway when deploying judicial review.<sup>88</sup> Therefore, the analysis offered earlier regarding the proposed model and its political background may shed light on the real reasons for the compromised embodied by the proposed model, rather than the ones Barak offered for his change of mind.

### B. Reform Proposals for the Proposed Model

Since the final product of the proposed model is yet to be determined, and it will probably look like a "camel" (a horse assembled by a committee), it is extremely difficult to assess the final outcome of the legislation. Additionally, there is no guarantee that the legislation will bear fruit or be completely altered, although, as I have shown, it is reasonable to believe that this time the proposed model will be passed as law.<sup>89</sup> Given these uncertainties, I have decided to focus on four major issues that are at the core of the ongoing debate concerning the proposed model, offer a short analysis, and suggest needed reform of some of the proposed model's aspects, or issues that are directly linked to its implementation.

Thus far, not enough attention and thought has been given to address the ramifications of the proposed model's implementation, and no academic writing has addressed this *specific* model. Rather, all writing related to this topic has focused on older proposals that are no longer on the table or on hypothetical scenarios.

#### 1. The Referral Process

The referral process (also known as "*renvoi*" or "*Richiervorlage*") is a procedure in which lower courts pass constitutional issues that come before them and are beyond the scope of their jurisdiction, to the appropriate tribunal. This process reflects a system with a separate constitutional tribunal. The "Neeman Committee" proposed the following "three tier" referral process:<sup>90</sup>

1) The lower court shall refer to the Supreme Court only issues that cannot be resolved unless the question of the statute's constitutionality is resolved, and there is a "*real doubt*" regarding the constitutionality of the act at hand;

2) The Supreme Court shall then sit in a panel of three justices who need to validate the lower court's findings regarding the necessity of the

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88. See Schauer, *supra* note 74.

89. My point of reference in this paper is that the proposed model will eventually be adopted by the Knesset. Therefore, even if I were to agree with the premise that the status quo is better left untouched, I would favor "damage control" by recommending modifications to the proposed model, which will not contradict it, but moderate its effects.

90. See art. 24 of the Neeman Committee draft bill, *supra* note 14.

resolution regarding the constitutionality issue, and the “*real doubt*” regarding the act’s constitutionality;

3) The case shall then be referred to an extended panel of *at least* nine justices, who will have final jurisdiction to rule on the constitutionality of the act.

I believe that this proposed mechanism is *too restrictive*, and puts too many unnecessary burdens on judicial review, which might have a chilling effect on the adjudication of constitutional matters.

The object of the proposed model is to create a “rule of thumb” regarding the constitutionality of a statute by creating a parallel to a presumption of constitutionality with the “*real doubt*” standard.<sup>91</sup> This is a desirable goal, and the need for mechanisms that will prevent misuse of the referral process, as a stalling technique, is understandable. Such mechanisms exist in other systems as well.<sup>92</sup> Nonetheless, it is hard to understand the merits of this two-filter process and believe it is incompatible with the Israeli legal culture. The “three-tier mechanism” might prove to be overkill and result in underutilization of the important tool of judicial review.

In addition, since the Supreme Court would still serve as a High Court of Justice in which constitutional petitions may be brought to the court when it has original jurisdiction, there will be a big and unnecessary discrepancy between the Court’s ability to review constitutional matters when it sits as a High Court of Justice and when it sits over referred cases in the referral procedure.<sup>93</sup> This dual function of the Supreme Court does not resemble most other European constitutional tribunals, and in the name of harmonization (*i.e.*, that all procedural paths to the Supreme Court should bear similar difficulties) justifies that the referral process will not be over-restrictive.

Therefore, in order that the referral process serve as a screening device without being too restrictive, much can be said for omitting either the deliberation of the referring judge at the first stage (the “*real doubt*” standard), or the second stage of the three-justice reviewing panel altogether.

## 2. Judicial Appointments to the Supreme Court

Since, according to the proposed model, the Supreme Court will not only serve as a Constitutional Court but will continue serving in its current positions (*i.e.*, as

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91. The “*real doubt*” standard is not something that already exists in Israeli jurisprudence, and it is probably taken from the German referral process. *See, e.g.*, DONALD P. KOMMERS, THE FEDERAL CONSTITUTIONAL COURT 6-14 (1994) [hereinafter KOMMERS].

92. Favoreu, *supra* note 65, at 119 (describing the German referral process).

93. *Cf.* HERBERT HAUSMANINGER, THE AUSTRIAN LEGAL SYSTEM 154 (2d ed. 2002) [hereinafter HAUSMANINGER] (criticizing the discrepancies between the referral process in the Austrian system, *vis-à-vis* the referral process to the European Court of Justice).

an appellate tribunal for lower courts in civil, criminal, and administrative case, and as a High Court of Justice on some administrative cases and constitutional matters that do not arise as part of proceedings in other courts), it is important to maintain a high level of professional expertise among the Supreme Court justices. Constitutional adjudication is often perceived to involve more politics than law,<sup>94</sup> and therefore, when appointing constitutional court justices, it makes more sense to include political factors in the appointment process and even to appoint justices who are not professional judges or jurists.<sup>95</sup> Since the proposed model does not offer a constitutional tribunal that deals exclusively with constitutional matters, it would be unwise to neglect the other, more professional, considerations in the appointment of the Supreme Court justices.

European models of judicial appointments to Constitutional Courts are not good analogues in that respect, because of their political character,<sup>96</sup> and because these courts are exclusive constitutional tribunals that do not deal with other issues.

The American model might look more relevant, since the American Supreme Court serves as the high court of the land, and not only as a constitutional tribunal. Yet, I believe that the American appointment method is an inappropriate mechanism to import to the Israeli system.

Israel, for example, is unique in having an adversarial system without a jury. Judges of all courts, prosecutors, and other public officials are always appointed. Election to these positions is unthinkable under the Israeli mentality.<sup>97</sup> The same rationale would extend to an open public debate in regard to the capacity, personal views, and private life of judicial nominees. Justices in Israel enjoy great prestige, and the judicial process is usually regarded as professional, not political. Judges and justices are supposed to leave their opinions behind when presiding, and the rhetoric of the courts' rulings reflects this approach. Justices are usually not known to have a certain agenda, and are not politically affiliated. Judicial appointment nominees are not thought to have fixed ideas on controversial issues, so there is no equivalent to a "litmus test" on the abortion issue, which was a major issue in the last American presidential campaign and recent judicial nominations. Also, the Israeli prime minister does not hold powers similar to those held by the American president. Under the Israeli parliamentary system, the Israeli government is built upon a coalition of parties, so it is unclear how the executive will be able to reach an agreement on preferable nominees. For these reasons it is hard to imagine how a mechanism similar to the American appointment system would be either appropriate or applicable to the Israeli system.

An issue that is relevant and important is that the justices should reflect most sectors in the Israeli society. Yet this seems to already exist to some extent. Out of the current fifteen justices five are women, three are religious or observant, and one

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94. See Dotan, *supra* note 15, at 138-39, *but see* HAUSMANINGER, *supra* note 93, at 151-52.

95. Cf. KOMMERS, *supra* note 91, at 18-24 (describing the German appointment system).

96. Cf. HAUSMANINGER, *supra* note 93, at 151-52 (describing the Austrian appointment system).

97. See Dotan, *supra* note 15, at 138-41 (showing the strong public faith in the Supreme Court is based on professional, apolitical and nonrepresentative character).

is Arab. The principle of “reflection”<sup>98</sup> is already being implemented, and should continue being implemented to an even greater extent. Yet, public polls and studies show that the vast majority of the Israeli public would not be interested in an appointment method that totally reflects the different segments in the population, at the expense of professional legal fitness. The Supreme Court enjoys great legitimacy, which mainly stems from its perception as an *apolitical professional* body.<sup>99</sup> Whether this perception is built upon shaky foundations, as critical legal studies scholars might argue, even in the Israeli context, or whether it is genuine, it is still the dominant perception among the Israeli public.<sup>100</sup>

The current appointment system is far from being flawless,<sup>101</sup> yet it seems to be the least problematic when considering other options. Therefore, I would recommend leaving the status quo in the appointment system, because it leaves politics at the court’s doorstep.

### 3. Reform of the Court’s Structure

The Israeli Supreme Court is one of the busiest courts of its kind in the world. The Israeli Supreme Court, in many cases, does not require *certiorari*. The Supreme Court serves as court of appeals for the District Courts in civil, criminal, and administrative matters. The Israeli judicial system provides for an automatic right of appeal once, and requires *certiorari* only for the second appeal. Many cases start at the District Court level and have an automatic right to appeal to the Supreme Court (see diagram I). In addition to its role as an appellate court, the Supreme Court handles thousands of cases annually as a High Court of Justice,<sup>102</sup> where it has original jurisdiction, and, unlike some European Constitutional Courts, does not limit petitions from “ordinary citizens.”<sup>103</sup>

Currently the Supreme Court handles more than 6,000 cases per year.<sup>104</sup> One should note that the Israeli Supreme Court manages this enormous workload with

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98. A similar recommendation regarding the principle of reflection was made by the “Zamir Committee” (Report of the Committee on Judges Appointment (2001)), which examined the judges’ appointment method in Israel a few years ago, although not within the context of the proposed Constitutional Court. It seems that the Israeli Court better reflects the Israeli population than many other supreme courts. For example, the Austrian Constitutional Court has a smaller proportion of women while one third of the Israeli Supreme Court Justices are women. See HAUSMANINGER, *supra* note 93, at 152. In this respect, the Israeli Court is more representative of women than the American Court, both by absolute numbers (five as opposed to two) as well as proportionally. Both American and Israeli Supreme Courts have one justice from a minority group (the African-American Justice Thomas and the Arab-Israeli Justice Jubran), but by percentage, the American Court is more representative in this respect since it has fewer justices (nine as opposed to fifteen).

99. See Dotan, *supra* note 15, at 138-39. Even though the Constitutional Revolution impacted the court’s legitimacy, the Supreme Court still maintains relatively high approval ratings *vis-à-vis* other branches of power and other major institutions.

100. See *id.* at 137.

101. See *supra* Part I.D.

102. See *supra* Parts I.A-B.

103. Cf. Favoreu, *supra* note 65, at 110.

104. See The Israeli Supreme Court, <http://www.court.gov.il/heb/index.htm> (last visited Nov. 1, 2005).

relatively great success, and has the reputation of being one of the best Supreme Courts worldwide.<sup>105</sup>

Attempts have been made in recent years to ease the burden on the Supreme Court. For example, as stated above, Administrative Courts were established as chambers of the District Courts to handle some of the administrative issues that were previously handled exclusively by the Supreme Court as High Court of Justice. Not all administrative issues have been transmitted to the Administrative Courts, however, but since their establishment in the year 2000, they have gradually been given more authority.<sup>106</sup>

Another example is the “Or Committee,”<sup>107</sup> which recommended a reform in the structure of the courts, similar to the American federal model, so the Magistrate Courts would serve as courts of first impression in all criminal and civil cases. Also, the District Courts will serve as courts of appeals, and the Supreme Court will require *certiorari* for all criminal and civil cases, as the second appellate level. The committee’s recommendation to appoint the District Courts to serve as Administrative Courts has already been implemented to some extent as I described above, yet not all administrative cases have been transferred to this new tribunal.<sup>108</sup> The full implementation of the recommendations of the Or Committee seems far away and in the meantime the Israeli Supreme Court’s workload is stretched to its limit.

Recently, the number of Supreme Court Justices was increased from twelve permanent justices and two acting justices to a total of fifteen. It seems that there is reluctance to further expand the number of justices, for fear of inconsistent rulings.<sup>109</sup>

Not enough attention was given to the additional workload that will stem from the court’s new position as the constitutional court. One should not underestimate the possible burden on the Supreme Court as a consequence of accepting the proposed model. Other legal systems, such as the European Union’s Court of Justice (ECJ), have experienced a considerable increase in their workload due to referral processes. This resulted in a reform that added the Court of First Instance

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105. An interesting comparative cultural note is that there has been no open debate in the Israeli legal system regarding the role played by attorneys and law clerks that work in the court. When I clerked for a judge, the professor I had been closely working with for several years (Italian in origin and American in education) suggested that we should co-author an article on the issue. After careful thought, we decided that this issue is too sensitive and might harm my future career, so we put the idea to rest. The Israeli legal system is probably not open enough to joke about the legal staff as the “small senate,” as the Germans do. Cf. HAUSMANINGER, *supra* note 93, at 153; also CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT, 175-216 (Ralf Rogowski & Thomas Gawron eds., Berghahn Books 2002).

106. See Administrative Courts Act, *supra* note 31 and accompanying text.

107. The Committee for Revision of Israeli Courts Infrastructure, headed by Justice Or, was the most serious attempt to recommend a reformation of the court’s structure in order to reduce the Supreme Court’s workload.

108. Cf. HAUSMANINGER, *supra* note 93, at 153 (describing a similar proposal in the Austrian System).

109. See Protocol 110 of the Knesset’s Constitution, Law and Justice Committee (Dec. 9, 2003), available at <http://knesset.gov.il>.

in 1989 and all suits brought by individuals have been transferred to the first instance court since the early 1990s.<sup>110</sup>

The German Constitutional Court is another good example of a “busy” constitutional tribunal that has experienced a steady and substantial increase in the number of cases it handles.<sup>111</sup> It seems that, at the current time, this issue is not perceived as a serious concern, and the volume of referrals from lower courts will probably not be substantial during the first years. Nonetheless, as the process of referral becomes embedded in the system, their volume will most likely increase, as has happened in other legal systems.<sup>112</sup>

The implementation of the proposed model without hastening a reform in the court structure might have disastrous effects and result in a dysfunctional Supreme Court. Therefore, there should be a clear linkage between implementing the proposed model and effectuating the recommendation of the “Or Committee.” The absence of such a link will result in a lack of a proper infrastructure for the implementation of the proposed model and might cause more harm than good.

#### 4. The Desirable Number of Justices to Preside Over Constitutional Cases

The proposed model requires a minimum *quorum* of nine justices to preside over cases involving judicial review of statutes.<sup>113</sup> At a certain point in my research, I started to wonder why the requirement was nine justices when the Supreme Court currently consists of fifteen jurists. It seems that this “magic number” characterizes almost all past proposals that resemble the proposed model, starting in the late 1970s.<sup>114</sup> When earlier draft bills to establish a constitutional court as part of the existing Supreme Court were put forth over twenty years ago, the number of justices in the Supreme Court was eleven. Since then, the number of justices has increased, but the number in the *quorum* requirement was not updated accordingly. Consequently, the requirement for a nine-justice *quorum* simply follows the old draft bills.

If the rationale behind the minimum *quota* of nine justices is indeed to ensure that a maximum number of justices shall preside over these cases, then there are better mechanisms to ensure this purpose. The proposed model sets a floor but does not set a ceiling. A better way to ensure a maximum number of presiding justices might be a rule that requires a full panel yet sets a minimal *quorum*.<sup>115</sup>

110. HAUSMANINGER, *supra* note 93, at 86.

111. See KOMMERS, *supra* note 91, at 13–4. See also Claude Klein and Eliezer Cohen, *Opinions*, 6(2) MISHPAT UMIMSHAL 349, 352 (2003) [hereinafter Klein and Cohen] (commenting that in the year 2000, more than 5,000 petitions were handled by that court).

112. Klein and Cohen, *supra* note 111, at 352.

113. See Article 24(c) of the Neeman Committee draft bill, *supra* note 14.

114. See official draft bills from 1979 and 1992, *supra* note 66. Compare an even earlier draft bill of Basic Law: Legislation from 1975 (1976, HH, 135), where the minimum *quorum* was set at seven justices. Barak, *supra* note 50, at 15. In the subsequent draft bill, dated from 1978, the minimum *quorum* was elevated to nine justices at the request of Prime Minister Begin. *Id.* at 16.

115. Compare HAUSMANINGER, *supra* note 93, at 86, and the requirements of the European Court of Justice when it sits in a full panel, with the American Supreme Court’s *quorum* requirement; see also Klein and Cohen, *supra* note 111, at 349.

In this context, one should take into account the delicacy and subtlety required by constitutional cases, especially when the use of judicial review is something to which the system is unaccustomed. These cases require special attention and need stable expectations regarding the ruling that may be better reached by a full panel.<sup>116</sup>

Due to a long and extensive familiarity with the Israeli Supreme Court's rulings, there is little concern that if only some of the justices preside over a constitutional case, the outcome might change due to personal *ideological* preferences of specific justices.<sup>117</sup> Rather, the main concern is with *legal* inconsistencies.

There is an academic view that supports the random manner in which the Supreme Court's panels are selected, especially in constitutional cases, since this random factor may increase the public's trust in the court's professional and apolitical image.<sup>118</sup> It is troubling that, on the eve of the last general election, the Supreme Court reached different decisions in two relatively similar cases. These cases involved parties' election propaganda. The rulings might have been the same if they were adjudicated under the same three justices.<sup>119</sup> This analysis of the foregoing discrepancy is legal, not political. Still, it may show the problematic potential of the three justices random panel routine in major constitutional cases, especially those that involve judicial review.

Although this is not to express a complete disagreement with the notion of a random vetting process for selecting the presiding justices, it would be preferable that the Supreme Court sits in a *full panel*, adopting a mechanism similar to the United States Supreme Court. Therefore, I recommend basing the Court's composition requirements on a *full panel* of the Court and to demand an updated minimal *quorum* of eleven justices.<sup>120</sup>

## CONCLUSION

During the last decade, the Israeli legal system has experienced unique processes that have shaken its basic infrastructure and fundamental understanding of constitutional law conventions. The legal developments have resulted in political implications; a legislature that felt threatened by the judiciary and felt compelled to take action in order to maintain at least some of its powers and

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116. In this regard, the American system may set a good example as to how a fixed panel sets relatively stable expectations in cases litigated in front of the Federal Supreme Court on the ability to predict the case outcome and to prepare the litigation accordingly.

117. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members").

118. See Dotan, *supra* note 15, at 149. However, there are also voices in the Israeli academia that support my argument. Professor Claude Klein believes that in order to avoid coincidence, a full (or nearly full) panel of the Supreme Court should examine the constitutionality of a statute.

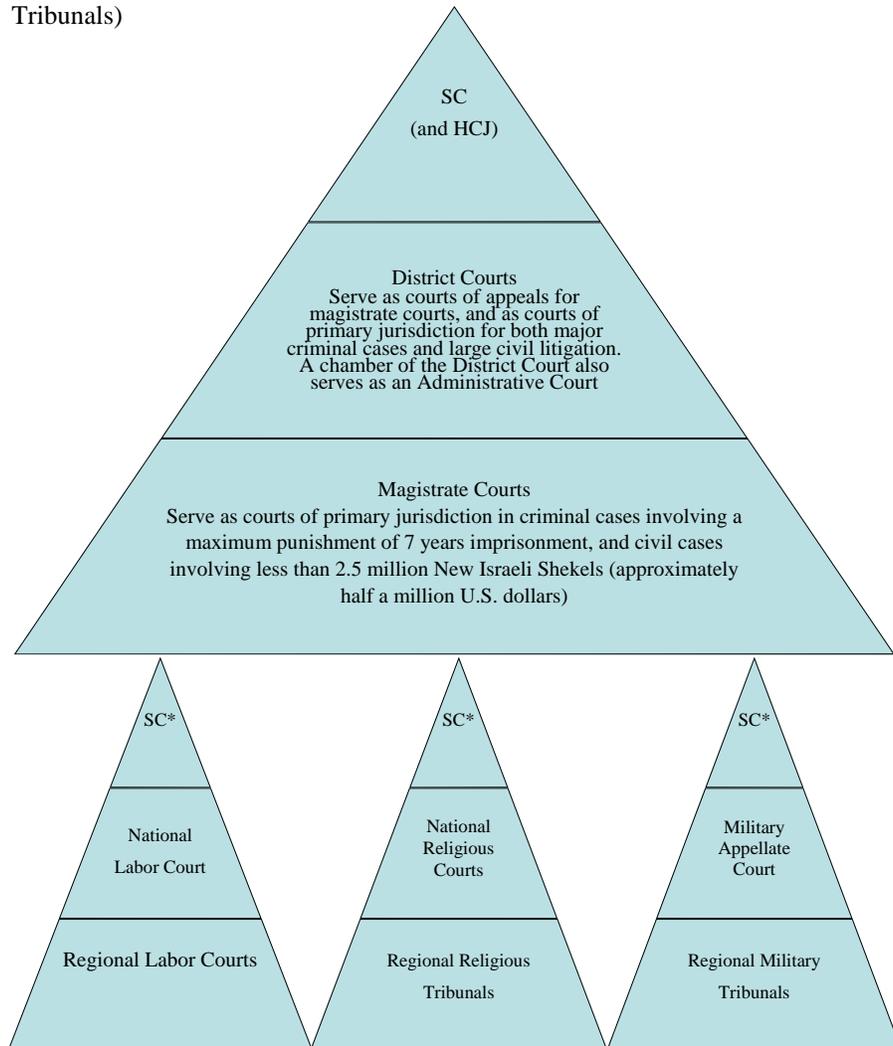
119. See generally Gavison, *supra* note 48; see also HCJ 651/03 Association for Civil Rights in Israel v. Elections Comm. [2003]. For the sake of fairness, please note that the later case did mention the former case and differentiated it.

120. Cf. Segal, *supra* note 72, at 251-52.

dignity. The Knesset's outrage from the application of judicial review by lower courts and the proposed model encompass the "instincts and urges" of this struggle.

Israel has distinct qualities that may well justify tailoring an "intermediate model court," positioning the Supreme Court as a Constitutional Court, as the proposed model prescribes. Nonetheless, as this article has shown, the proposed model and its ramifications have some flaws. This article has addressed some of these shortcomings and offered ways to ameliorate and optimize the manner in which judicial review should be conducted in Israel in the future.

**Diagram I:** The Basic Structure of the Israeli Judiciary (General Courts and Special Tribunals)



\* The Supreme Court serves as an appellate court on these tribunals only under specific circumstances, prescribed in Article 15(d)(3-4) of Basic Law: The Judiciary, requires *certiorari*, and does not serve as appellate court on their decisions on an ordinary basis or in the absence of special circumstances.