


SYMPOSIUM ARTICLE

The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective

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Abstract

There are many ways in which to examine the current Israeli constitutional crisis. This article uses the lens of anti-corruption, a global movement which has changed politics in many countries. The long empowerment of the legal system in Israel arguably has its origins in policing corruption, which may be a particularly powerful motivator for the current governing coalition's efforts to assert more control over the Supreme Court. The dynamics of anti-corruption in Israel are somewhat distinct from those of other countries in ways that may bode well for the Court in its confrontation with the government.

Keywords: Supreme Court; populism; anti-corruption; democracy

1. Introduction

It is tempting to view Israel's constitutional crisis as unique, reflecting distinct dynamics and conditions. From this perspective, the forces in conflict might represent an effort to rein in a uniquely powerful Supreme Court, or perhaps an act of revenge by a coalition focused on personal grievances against the justice system, or even alternative visions of Zionism that predate the founding of the State of Israel. From this point of view, to paraphrase Tolstoy, one might say that every happy democracy is alike, but all unhappy democracies are unhappy in their own way.¹ Another line of thought places Israel in the

¹ Leo Tolstoy, *Anna Karenina* (The Russian Messenger 1878) 1. I bracket the issue of whether Israel can be called a democracy in the light of its permanent rule over millions of non-citizens in the Occupied Territories.

company of backsliding democracies, including Hungary and Poland, in which a temporary majority seeks to undermine the rules of the game to lock itself into power.² This perspective emphasises commonalities across countries, and invites comparison.

In this short article I want to pursue a version of the second strategy, but from a distinct angle. My focus is less on democracy and the general problem of inter-branch constitutional relations, and more on the politics of anti-corruption across time. Corruption politics have been a potent force in many countries in the world, and one common consequence is to increase the stakes of politics.³ Anti-corruption initiatives can sometimes lead to an escalation of political conflict, transforming ordinary politics into a battle over fundamental institutions. Anti-corruption institutions – be they courts, prosecutors or specialised bodies – play an essential role in accountability but also can generate backlash, such as that which Israel is experiencing at the moment. This account raises important normative questions about the extent to which anti-corruption efforts should be pursued without accounting for politics. Like law itself, a politically neutral view of anti-corruption institutions may be naïve, counselling for greater analytic focus on this area. The question raised by anti-corruption movements is who decides political morality, which is what is at stake in the current crisis.

To set the stage, consider alternative temporal lenses through which we can examine recent developments. The immediate proximate cause for the current constitutional crisis was the Knesset election of November 2022, which finally delivered a workable coalition after an extended period of political deadlock beginning in 2019. The new coalition included parties hostile to the Supreme Court, and some of these parties had run on a court-packing platform. A longer view, favoured by the government itself, might trace the developments back to 1995, when the Israeli Supreme Court used the *Bank Mizrahi* case to establish judicial review over primary legislation. Drawing on the 1992 passage of the Basic Laws on Occupation and on Human Dignity, the Court declared the Basic Laws themselves as a source of higher law and implemented the constitutional revolution. The Court inserted itself more deeply into Israeli political life, paralleling developments in other jurisdictions.⁴ It is this ‘undemocratic’ move that must be reversed, according to the government and its allies.

I suggest that we go back even further to the 1970s, when anti-corruption efforts began to pervade Israeli politics in the aftermath of Golda Meir’s

² The Editors, ‘Israel’s Democracy Is at a Breaking Point’, *Bloomberg News*, 26 March 2023, <https://www.bloomberg.com/opinion/articles/2023-03-27/netanyahu-s-judicial-reforms-put-israeli-democracy-at-risk>; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 87–89.

³ See Mari Aburamoto, ‘The Politics of Anti-Corruption Campaigns in Putin’s Russia: Power, Opposition, and the All-Russia People’s Front’ (2019) 71 *Europe-Asia Studies* 408; Fábio De Sá e Silva, ‘From Car Wash to Bolsonaro: Law and Lawyers in Brazil’s Illiberal Turn (2014–2018)’ (2020) 47(S1) *Journal of Law and Society* S90; Marco Garrido, ‘The Ground for the Illiberal Turn in the Philippines’ (2022) 29 *Democratization* 673.

⁴ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 173–78.

resignation.⁵ Let us not forget that Aharon Barak's initial foray into politics was as Attorney General, prosecuting Leah Rabin for having a stray bank account in the United States in violation of Israeli law.⁶ The 'Dollar Account' case, over what might be seen by contemporary standards as a trivially small violation of law, led to the rise of the Likud. This party has held the prime ministership for all but 13 of the succeeding 46 years, and so its rise can be seen to mark a shift in the cycles of political time.⁷ The phase of Likud dominance has featured significant institutional changes, including a major expansion in the role of the Supreme Court, the adoption of new Basic Laws, and a backlash against the judicialisation of politics. The current conflict over the relationship between the government and the Supreme Court marks an important juncture in the trajectory of the country. Perhaps it will be the end of an era, perhaps not. The analytic point is that our temporal frame matters for how we understand the current crisis, and a broader lens, I argue, helps to clarify dynamics that might be at work in other countries as well.

The article is organised as follows. First, we describe the Israeli crisis in brief (Section 2), aware that fuller accounts are available elsewhere in this Symposium. We then trace the crisis through the lens of anti-corruption politics (Section 3), noting how these interact and feed into constitutional politics in the Israeli case. We speculate on how anti-corruption efforts interact with democratic backsliding, and evaluate whether the reforms mean the end of Israel's democracy (Section 4). We conclude (Section 5) with some thoughts on the implication of the anti-corruption lens for our understanding of the current crisis, and for examining constitutional politics elsewhere.

2. The crisis of 2023

The Israeli constitutional crisis is both similar to and different from those erupting in other countries. On the one hand, we have the familiar attacks on judges as elite and out of touch, and the invocation of 'the people' as the interest in whose name the attacks are made. This has been a common strategy in our era in countries like Hungary, Poland and Mexico, as well as the United States going back to President Roosevelt's court-packing plan. The attacks have led to proposals to trim the sails of the Supreme Court, which is not uncommon, even if the particular proposals offered in Israel are rather extreme. What is truly unusual in comparative terms is the response, which has been a mass mobilisation over technical issues of judicial appointments that are usually not well understood by members of the public. Perhaps the closest analogue in recent memory was the 2007 Lawyer's Movement in Pakistan, in which the legal profession turned out *en masse* to protest against government

⁵ Daniel Friedmann, *The Purse and the Sword: The Trials of Israel's Legal Revolution* (Oxford University Press 2016) 33.

⁶ Friedmann, *ibid* 37–39.

⁷ Jack Balkin, *The Cycles of Constitutional Time* (Oxford University Press 2020).

interference with the Supreme Court, but even that successful movement lacked the level of mass mobilisation seen in Israel in recent months.⁸

Start with the attacks. The current government, led by Minister of Justice Yariv Levin, has made a point of going after the Court. The initial reform proposals were several: to adjust the composition of the judicial election commission, so as to include more representatives from parliament; to allow for an override by simple Knesset majority of judicial decisions interpreting the Basic Laws; to allow ministers to reject the opinions of their own legal advisers; and to end judicial review on the basis of 'reasonableness', which, among other things, has played a role in the judicial assertion of the power to disqualify candidates for office.

Many of these proposals are somewhat technical in character, and the proponents point out that each of them has analogues in other democracies. The United Kingdom, Canada and New Zealand have parliamentary override clauses which give the legislature the last word in constitutional interpretation; appointments to the United States Supreme Court are made directly by politicians; and other countries allow political appointments to ministerial legal offices. Opponents of the reforms argue that, in the Israeli context of a unicameral parliament with very limited checks and balances, the changes would allow temporary coalitions to trample the rights of individuals without constraint.

Most public debate focused initially on the proposed system for the appointment of judges; but the first bill to be introduced focused on the end of reasonableness review, which is perhaps the key reform from the perspective of anti-corruption movements. As documented by Yoav Dotan, for some decades the Israeli Supreme Court has required candidates for high office to meet a judicially crafted concept of 'good character'.⁹ Expanding on statutory law, the Supreme Court has developed a set of rules that prevent those convicted of certain crimes from serving in some offices, including the cabinet.¹⁰ Many of the politicians subjected to these rules have been accused or convicted of corruption. In the application of these rules, the Supreme Court has come to assert a power that neither Dotan nor I have encountered anywhere else in the world. A mere indictment means that a politician cannot serve as a minister in cabinet, and so the stakes of prosecutorial decisions are of great importance. This power is especially irritating to the current coalition, because Prime Minister Netanyahu and a number of prospective cabinet ministers have themselves been targets of investigation and even indictment. Most notable here was Aryeh Deri, who had been convicted of corruption on multiple occasions over the course of his political career. In his latest scandal, Deri had resigned from the Knesset in January 2022 as part of a plea deal for tax offences. Because he resigned voluntarily, he was not determined to have engaged in acts of 'moral turpitude', which would have barred him from election to the

⁸ Shoiab Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 *Law and Social Inquiry* 985.

⁹ Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19 *Theoretical Inquiries in Law* 705.

¹⁰ *ibid* 727.

Knesset. He ran again in November 2022 and returned to the Knesset. In January 2023, the Court ruled, consistent with current doctrine, that Deri could not serve in the cabinet, and Netanyahu reluctantly complied, vowing to push forward with his judicial reform.¹¹

Netanyahu himself, of course, has been subject to extensive investigation for corruption since 2016. While, under current statutory law, the prime minister cannot be disqualified from office for mere indictment, a conviction would lead to his removal from office. The trial has been repeatedly delayed, and Netanyahu's supporters discussed seeking to end the trial altogether, or legalise some of his actions.¹² Many believe that the trial explains Netanyahu's personal motivation for attacks on the legal system, as well as his tolerance of the even more aggressive efforts of coalition partners.

It would not be fair to say that revenge for overly zealous corruption prosecution is the *only* motive for the current proposed judicial reform programme. Some assert that it is designed to prevent the Court from interfering with settlement expansion in the Occupied Territories, or even annexation. Others say the reforms are a reasonable response to judicial overreach in substantive policy making. However, examining the crisis through the lens of anti-corruption efforts pays dividends, as I will argue in the next section.

3. The long roots of anti-corruption efforts

At the time of Golda Meir's resignation in 1974, the Mapai party had headed coalition governments continuously for 26 years, since the founding of the state. Extended rule by a political party tends to lead to corruption and favouritism, as we have seen recently with the Congress Party in India or the African National Congress in South Africa. In response to rising concerns about these issues, Attorney General Meir Shamgar initiated a series of investigations of top officials, and this mantle was taken up by his successor, Aharon Barak, when Shamgar was appointed to the Supreme Court in 1975.

Barak made the decision to investigate Asher Yadlin, who was a candidate for a directorship of the Bank of Israel, on suspicion of receiving bribes. Barak coined what became a famous phrase, that 'the law for Yadlin is the same as the law for Buzaglo', a Mizrahi name meant to communicate that the rule of law applied equally to all. Yadlin was ultimately convicted and sent to prison. Barak also continued a corruption investigation into a government minister, Avraham Ofer, who committed suicide in 1977 before the investigation could be completed. Most consequentially, he prosecuted Leah Rabin, wife of the Prime Minister, for having bank accounts in the United States, in violation of Israeli law. The accounts, which contained around US\$10,000,

¹¹ Eliyav Breuer, 'Netanyahu Fires Arye Deri from Israeli Gov't after High Court Disqualification', *The Jerusalem Post*, 23 January 2023, <https://www.jpost.com/israel-news/politics-and-diplomacy/article-729224>.

¹² Yonette Joseph and Patrick Kingsley, 'Netanyahu Will Return with Corruption Charges Unresolved: Here's Where the Case Stands', *The New York Times*, 3 November 2022, <https://www.nytimes.com/2022/11/03/world/middleeast/netanyahu-corruption-charges-israel.html>.

were left over from the time Yitzchak Rabin had served as ambassador in Washington, DC. Although Leah Rabin asserted that the accounts belonged to her alone, Yitzchak Rabin was sanctioned and resigned over the affair, which was followed by the election of Menachem Begin of the Likud in 1977. Barak declined to prosecute Rabin himself, on the grounds that he had been forced to resign and this was already a severe punishment. Leah Rabin never forgave Barak, but Begin appointed him to the Supreme Court in 1978.

This was the most consequential Supreme Court appointment in the country's history. First as a justice and eventually as Chief Justice, Barak went on the advance the constitutional revolution, relaxing constraints on standing and justiciability, and inserting the Court into many parts of Israeli life. This story has been well told by both critics and advocates, and has created a new judicial politics.¹³

Along the way, Barak used the old common law doctrine of reasonableness to justify enhanced scrutiny over government decisions. Reasonableness is the default standard for review of the exercise of administrative discretion under British administrative law, and so was inherited as part of Israeli law from the common law legal system of the Mandate era. Beginning in the 1980s, the judiciary developed a test requiring actions to be within 'the realm of reasonableness', which was assessed by balancing multiple relevant considerations.¹⁴ This test empowered courts to engage in close scrutiny of government actors, including decisions of the Attorney General on whether to prosecute.

This doctrine became the basis for ensuring that government officials, including those in the cabinet, must have 'good character' as determined by the Court. In an early case, in 1993, the Court ordered the Prime Minister to dismiss Aryeh Deri from cabinet during his first indictment for corruption, saying that it would be unreasonable for the Prime Minister not to do so.¹⁵ The Court later extended its scrutiny to mayors of large cities. More broadly, the Court has prohibited appointments within the government or military based on behaviour demonstrating poor character, even when no criminal charges were formally filed.¹⁶

In such decisions the Court has relied on administrative and disciplinary records, and media reports. Under its doctrine, disqualification need only meet an administrative law standard of 'substantial evidence'.¹⁷ Several recent petitions targeted media statements made by prospective appointees as potential grounds for disqualification. Use of the doctrine is becoming more frequent, which is either a sign of rising corruption or of rising anti-corruption efforts (or possibly both).¹⁸ There were 18 cases in the 1990s; 25 in the

¹³ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006); Friedmann (n 5) 37–39; Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements' (2001) 23 *Law and Policy* 1.

¹⁴ Dotan (n 9) 716.

¹⁵ *ibid* 722.

¹⁶ *ibid* 723.

¹⁷ *ibid* 733–34.

¹⁸ Tom Ginsburg, Aziz Z Huq and David Landau, 'The Law of Democratic Disqualification' (2023) 111 *California Law Review* (forthcoming).

2000s, and already 21 in the first half of the 2010s alone.¹⁹ Meanwhile, the high-profile trial, conviction and imprisonment of ex-Prime Minister Ehud Olmert for bribery ensured that the issue of corruption remained politically visible.²⁰

Enter Netanyahu. Allegations of bribery and fraud had accelerated during his fourth and fifth terms in office, with investigations beginning in 2016 and culminating in an indictment in November 2019. The allegations include receipt of expensive cigars and other gifts, and conversations with two media magnates about regulatory benefits to be given in exchange for more favourable coverage. Whether these are large or small matters in comparative perspective, I leave to others, but in the Israeli context they produced a strong push for accountability. Anti-corruption protests began during the investigation phase, but the Court did not directly block Netanyahu from taking office.²¹ The Knesset passed a statutory exception to allow the Prime Minister to sit even if under indictment and, in March 2023, the Knesset passed a bill making it more difficult to remove a prime minister from office.²² This left in place the restriction for potential cabinet appointments.

In short, the rise of judicial power in Israel began with, and was coextensive with an ongoing programme of anti-corruption efforts. This programme has accelerated in recent years. The Court has put itself forward as the guardian of good behaviour among politicians, who naturally dislike the associated discipline. The doctrines used by the Court in this respect happen to overlap with substantive constraint on government action, and so the rise of judicial power is associated in the public eye with the judicial role as guardian of probity. The strategy of bolstering the Court's judicial reputation in this way has been effective.²³ Although we can only speculate, it is possible that without this active role in the political system, protestors would not have been so eager to defend the Court.

4. The anti-corruption lens

Seen in this light, the Israeli case may fit a broader global pattern of anti-corruption efforts. In recent years, an anti-corruption movement has spread around the world.²⁴ This has involved the development of multilateral

¹⁹ Data from Dotan (n 9) (on file with author).

²⁰ 'Ehud Olmert Jail Term: Israel Ex-PM Begins Sentence for Bribery', *BBC News*, 15 February 2016, <https://www.bbc.com/news/world-middle-east-35576495>.

²¹ Alexander Fulbright, 'Protesters Call for PM to Resign after Netanyahu Derides Anti-Corruption Demos', *The Times of Israel*, 2 September 2017, <https://www.timesofisrael.com/protesters-call-for-pm-to-resign-after-netanyahu-derides-anti-corruption-demos>.

²² Hadas Gold and Amir Tal, 'Israel Passes Law Shielding Netanyahu from Being Removed amid Protests over Judicial Changes', *CNN*, 24 March 2023, <https://www.cnn.com/2023/03/23/middleeast/israel-judicial-reforms-prime-minister-law-intl/index.html>.

²³ See generally Nuno Garoupa and Tom Ginsburg, *Judicial Reputation* (University of Chicago Press 2015).

²⁴ Marina Zaloznaya and William Reisinger, 'Mechanisms of Decoupling from Global Regimes: The Case of Anti-Corruption Reforms in Russia and Ukraine' (2020) 28 *Demokratizatsiya: The Journal of Post-Soviet Democratization* 77; Steven Sampson, 'The Anti-Corruption Industry: From Movement to Institution' (2010) 11 *Global Crime* 261.

conventions to suppress corruption and related soft law instruments directed at states, businesses and citizens, as well as the creation of non-governmental organisations such as Transparency International.²⁵ Anti-corruption has become something of a ‘transnational legal order’, a concept developed by sociologist Terence Halliday and legal scholar Gregory Shaffer to understand how the dynamics of national and supranational orders interact to create and apply legal norms, changing the politics of both.²⁶

In political discourse, corruption is often equated with the moral decay of a person or an institution. Indeed, in its pre-modern meaning, corruption referred to the disintegration of the body politic from the inside.²⁷ In modern politics, the term has been deployed to construct the narrative of deservingness and moral fitness through accusations of corruption.²⁸ Anti-corruption politics are thus morally infused efforts, and they have had significant political consequences in many countries ranging from China to the Ukraine to the United States, and beyond.

In our current moment, a particularly important manifestation of anti-corruption efforts is found in populist discourse. Populists from Donald Trump to Jaroslaw Kaczynski rail against the corruption of their opponents, even as they sometimes engage in it openly.²⁹ Populist demagogues use the alleged corruption of elites to gain power. The image of ordinary people being swindled by elites is as potent now as it was in ancient Greece.

However, it is also the case that unelected judges and bureaucrats use the alleged corruption of politicians to exercise power, with potentially disruptive consequences. Recall how, in the 1990s, crusading judges in Italy indicted virtually the entire political class in the *tangentopoli* scandal.³⁰ In the process, several of the judges themselves were vaulted into office. The resulting void in Italian politics led to the rise of Silvio Berlusconi, who became the longest-serving prime minister in the postwar history of that country, but arguably presided over an extended period of institutional sclerosis. Another example was found in Brazil, when demagogue Jair Bolsonaro, previously a fringe figure, was elected president in 2019. Bolsonaro’s rise followed an extended period of anti-corruption politics, prompted by the so-called *Lava Jato* (Car Wash) scandal that led to the imprisonment of three former presidents. The crusading judge in that case, Sergio Moro, later joined Bolsonaro’s cabinet and became a presidential candidate himself. The perception of the ruling class as corrupt

²⁵ Régis Bismuth, Jan Dunin-Wasowicz and Philip M Nichols, *The Transnationalization of Anti-Corruption Law* (Taylor & Francis 2021).

²⁶ Gregory Shaffer and Terence C Halliday, *Transnational Legal Orders* (Cambridge University Press 2015) 18–21.

²⁷ Mark Knights, ‘The History of Corruption and the Benefits of a Historical Approach’ in Jane Ellis (ed), *Corruption, Social Sciences and the Law: Exploration Across the Disciplines* (Routledge 2019) 25, 33.

²⁸ Nicholas Hoover Wilson, *Modernity’s Corruption: Empire and Morality in the Making of British India* (Columbia University Press 2023) 145.

²⁹ Wojciech Sadurski, *A Pandemic of Populists* (Cambridge University Press 2022) 5.

³⁰ David Nelken, ‘The Judges and Political Corruption in Italy’ (1996) 23 *Journal of Law and Society* 95.

led to a void in the political system. In both of these countries, anti-corruption politics pursued by prosecutors and judges led to major earthquakes in the political system, and the rise of populist outsider candidates.

One can view these stories as a reputational contest between a legal system and politicians, with two general dynamics. Sometimes, as in the cases of populist mobilisation, new political forces run directly against the legal system, accusing it of elitism and corruption. Trump sought to enhance his own reputation at the expense of judges and FBI Director James Comey. In other cases, the courts pursue corruption charges against politicians, leading to the personal entry of some judges into politics. In this dynamic, the individual reputation-building efforts of judges may be the driving factor.

Israel's case fits neither of these trajectories. To be sure, Israeli politicians have adopted anti-elitist and populist rhetoric. As Levin put it, '[w]e go to the polls, vote, and time after time, people we did not elect decide for us. Many look up to the judiciary, but their voices are not heard. This is not democracy'.³¹ Yet, no one would describe the current government as made up of insurgent populist outsiders. Netanyahu is the embodiment of a professional politician, and himself a product of the dominant establishment. Nor is the coalition made up of anti-corruption crusaders; they did not run on a platform of clearing the judicial temple of the moneylenders.

Nor does Israel fit the model of judicial reputation-building to leverage personal ambition. Israeli judges have not tried to enter the political sphere directly, but instead have remained comfortably ensconced on the bench. While the personal reputation of Barak as a towering judge is important, the developments he led were ultimately institutional and transformative of the constitutional order.³²

When compared with dynamics in other countries, the Israeli case stands out because it is not connected to a change of power or a struggle among political parties. It appears to be a 'pure' case of a struggle between the legal system and political system, in which there are few connections across them. One can thus view the current crisis as part of a long battle among institutions, in which the anti-corruption tools of the legal system have been one of the weapons.

As noted already, anti-corruption politics in the country have deep roots, motivated by institutional considerations over the authority to decide political morality. The judges, rather than politicians, are constructing the abstract moral concept of 'good character'. The judges, along with other legal institutions, are those who wield it. There are many other bases of judicial legitimacy in Israel, of course, but the anti-corruption strand has surely been one of them. One can thus characterise anti-corruption politics as one of the bricks on which judicial power in Israel has been constructed, and in which the ultimate effect has been to constrain, but not completely sideline other institutions.

³¹ France24 English, 'Israeli Justice Minister Presents Plan for Judicial Reform', https://www.youtube.com/watch?v=cORUX_07GUk

³² Alon Harel, 'Barak's Legal Revolutions and What Remains of Them: Authoritarian Abuse of the Judiciary-Empowerment Revolution in Israel' in Rehan Abeyaratne and Iddo Porat (eds), *Towering Judges* (Cambridge University Press 2021) 174.

As in all cases of judicial empowerment, there is the possibility of backlash. Political forces targeted by anti-corruption investigations and prosecutions can lash out at courts and bureaucrats, and seek to dismantle their tools of accountability. This is a dynamic which has been observed in countries ranging from Ukraine to Indonesia, in which the putatively corrupt equilibrium could not be dislodged.³³ Instead, backlash weakened the instrumentalities of anti-corruption and in some cases they were dismembered. This has resulted in many cases in rising illiberalism.

It is this backlash dynamic that we seem to be seeing in Israel, a phase of recalibration among institutions. At stake are the relationships among the Knesset, the executive and the Court, and the outcome is not known at the time of this writing. The initial proposal from the government was severe, seeking essentially to transform the role of the Court beyond recognition. Open politicisation of appointments tends to lead to lower quality judges, and I would rebut those who look to the United States as a model by saying that our best judges are not found among the nine members of the Supreme Court, but rather in various appellate courts. The proposed combination of more politicised judicial appointments with the use of an override clause is particularly pernicious. Politically aligned jurists of lesser quality would seek to implement the policies of their political masters, and if they ever sought to exercise a modicum of independence, 61 members of the Knesset could simply overrule their decisions or dismiss them from office. It would lead to a truly docile Court, leaving a unicameral parliament without any significant constraint.

We can draw from this story one particular example of the way in which anti-corruption efforts interact with democratic government. It is a story of zealous enforcement by a Supreme Court in the face of a leader and political party that continue to enjoy significant popularity. It is not surprising that anti-corruption efforts generated backlash, but the Supreme Court's reputation, built up over three decades, may yet insulate it from the most radical attacks. This is in part because the judges have not sought to transform their legal authority into direct wielding of political power. Israel's political class has done it the favour of continuing to keep corruption in the news, meaning the public may not be willing to jettison anti-corruption instrumentalities.

5. The end of Israeli democracy?

Seen in this light, the conflict appears to be the kind of constitutional crisis that is somewhat normal in democratic politics – a struggle over institutional power. Yet, it involves very high stakes, reflecting what we might now recognise as a long escalation between the legal system and the political system on the question of who defines political morality.

Would the proposed reforms amount to the 'end of Israeli democracy'? Not on their own, but they might facilitate and accelerate that process. In considering claims about democracy, I rely on the definition developed in my

³³ eg, Simon Butt, *Corruption and Democracy in Indonesia* (Routledge 2012).

co-authored work with Aziz Z Huq in which we emphasise three inter-related features.³⁴ Constitutional liberal democracy, in our view, requires elections, along with a certain set of core rights, such as freedom of speech and freedom of assembly, to make those electoral contests meaningful. It also requires what we call the 'bureaucratic rule of law': namely, a set of civil servants who will follow the rules regardless of who is in power. This is crucial not only for the integrity of elections but also for the administration of government. Only with an insulated civil service that strives for neutrality can the stakes of elections be lowered sufficiently to incentivise rotation in office. If appointments are matters for patronage, giving up office becomes harder.

With this definition in mind, the proposed reforms raise three concerns. First, the substitution of political appointees for government legal advisers means that the interpretation of the law will inevitably be more politicised, undermining our criterion of the bureaucratic rule of law. Second, the reforms would remove a check against restrictions on rights of free speech and association. Members of the Knesset have already proposed amendments to the Basic Law on the Knesset to reduce the Court's role in ensuring the integrity of elections. The Basic Law on the Knesset already requires candidates for office to swear allegiance to the 'Jewish and democratic' character of the state to compete for office, and to forswear support for anti-state activities, which are broadly interpreted by the majority to target minority Arab parties.³⁵ It also prohibits Knesset candidates who have incited racism. The Knesset majority has sought to ban certain Arab candidates on the former basis, which the Court has prevented; while the Court has prohibited racist Jewish candidates from running. The proposed amendment would remove judicial oversight, allowing the political curation of candidates and the further subjugation of the Arab minority.

Finally, and most relevant for our analysis, it is not really clear what the end of reasonableness analysis would mean for levels of corruption among the Israeli political class. The Court might develop new doctrinal tools to police cabinet members, but the coalition might in turn modify the Basic Laws on the Knesset and Government to insulate appointment processes from judicial review. A weaker, more compliant Court would surely allow this and many other aspects that are detrimental to 'good governance' in Israel. The stakes are high, and liberal values are under threat.

6. Conclusion

Anti-corruption provides a novel angle from which to view the Israeli constitutional crisis. A conventional lens views the situation as a struggle for power between two visions for Israeli society: that of a secular pluralist country, and that of a religious state dominated by conservatives. Each emphasises a different word in the famous formulation of the Declaration of Independence of a

³⁴ Ginsburg and Huq (n 2) 10.

³⁵ Sawsan Zahar, 'The Israeli Right is Planning to Ban Palestinian Parties: Here's How', 972 Magazine, 23 March 2023, <https://www.972mag.com/israeli-right-palestinian-parties-ban>.

'Jewish and Democratic State'. Others characterise the situation as a rightful correction of an over-zealous court.

Viewing the situation through the lens of corruption politics asks us to broaden the time horizon, to see how the struggle is not simply about the future of the country but about which institutions will play the major role in society and in defining political morality. Anti-corruption moves have been a central plank of judicial empowerment for the past several decades, and constitute a major source of judicial reputation. While Aharon Barak plays a central element in the story, anti-corruption efforts have been institutionalised in the legal system more broadly. Fighting corruption can be about individual empowerment or institutional empowerment, and Israel fits the latter model: it is not a case like Brazil or Italy in which individual judges sought to parlay it into political careers.

No doubt the governing coalition has many motivations in trying to rein in the Supreme Court, but the backlash against corruption prosecutions is a serious factor. This can be seen in the initial proposals under consideration at the time of this writing, which target review of reasonableness rather than the appointment process. The government is proposing a bill in which judicial review of reasonableness would not apply to decisions of elected officials, including ministers.³⁶ To be sure, the backlash has greater ambitions, and the stakes are now very high indeed.

Whereas in some countries, populist leaders accuse the courts of corruption, the allegations all go in the other direction in Israel, from the legal establishment to the governing coalition. This is an important distinction between the Israeli case and others, and may bode well for the Court's ability to withstand some of the attacks, as it suggests that the public may see it as playing an important role. Only time will tell whether this constitutional crisis is a garden variety recalibration of institutional power, or something more profound and dark.

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³⁶ Carrie Keller-Lynn, 'Knesset Restarts Judicial Overhaul with Bill to Broadly Outlaw "Reasonableness" Test', *The Times of Israel*, 25 June 2023, <https://www.timesofisrael.com/knesset-restarts-judicial-overhaul-with-bill-to-broadly-outlaw-reasonableness-test>.

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