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Letters from the Editors

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Introduction

Running a law review firmly committed to double-blind peer review is as rewarding as it is painful. It is rewarding, evidently, because the expertise of our referees contributes significantly to further improving the fantastic pieces, we as editors-in-chief have the privilege to select for review (and eventual publication) from the huge number of submissions we receive on a rolling basis (the Journal's acceptance rate is around 11 %. Taking into account that we will not be in a position to publish more than 20 pieces per year on average, it is easy to figure out how many great submissions – and admittedly some that are not so great – we have to turn down every week, which is painful in its own right. But I guess we can't escape that). As our referees greatly contribute to the Journal's overall quality as an academic periodical, we are immensely grateful for their time and their dedication. Be assured: We take neither for granted.

We are, thus, aware that it takes pains to write a review (at least one that is helpful in the sense that it goes beyond scolding an anonymous author). Just as we, consistently, concede that it is typically painful to do so. The problem, of course, is that things that are painful to write, typically are painful to solicit as well. We are, therefore, grateful not only to our referees who undertake the pains of writing their reviews nevertheless but also to our great team of managing editors who assist us in soliciting reviews from individuals who, being experts in their field, have enough on their plate even without us asking for their guidance.

And yet, there is another dimension to what makes our firm commitment to double-blind peer review painful at times: Peer review is an unmatched method to ensure academic excellence. As indicated above, it is a method, however, that is immensely time-consuming; not only for the referee, but also for the author, and for us here working at the journal. And being time-consuming, our commitment to

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this method oftentimes bars us from accepting manuscripts addressing topical issues that, thus, need to be published in a timely manner, so that they can contribute to an ongoing debate, rather than being outdated at the moment they are shared with the wider public. That leaves us with two choices: Either to live with the frustration by accepting that this is just the price you have to pay for academic excellence or by cutting some corners from time to time.

We here at the Journal have decided to do neither, but to square the circle by tapping into a resource we may have neglected to use in the past: ourselves; this is, in particular, the members of our Board of Corresponding Editors. Starting with this issue, these outstanding academics from all over the world will share their views on topical issues in a newly created section 'Letters from the Editors' (and yes: from time to time the Editors-in-Chief, so me in the worst case, will do so too) at irregular intervals.

We are immensely pleased that Yaniv Roznai who has contributed so frequently to the Journal in the past is the corresponding editor to kick off this new section. While Yaniv has to say a lot about a lot of things, there is one thing he knows more about than even well-informed commentators: The judicial overhaul in Israel. Few academics (in Israel and internationally) have been more outspoken when it comes to this topic, few voices have shaped the relevant discourse (in Israel and internationally) as significantly as his. This not only makes his insights presented in this issue all the more valuable for us and our readers, but it also makes a strong case for how valuable our new section will prove to be in the future.

Christoph Bezemek

The Judicial Overhaul and the Gaza War

The Oct. 7 massacre and the war in Gaza that followed seemed to be dramatic events that would reshape Israeli politics. Until then, and since the formation of the 37th Israeli government on December 29, 2022, Israel's political landscape, and in fact the entire public sphere, were occupied by the attempts of Benjamin Netanyahu's government to overhaul the judiciary, which many in Israel saw as an attempt to undermine the country's democracy.

In January 2023, the Minister of Justice, Yariv Levin, presented his plan to weaken judicial independence in Israel and to remove checks and limitations that are imposed on the government, turning it to an unlimited government.¹ In

¹ We have elaborated on this plan in our editorial of Part I of a Special Issue on: The Most Endangered Branch. Christoph Bezemek and Yaniv Roznai, 'Introduction: The Most Endangered Branch' (2023) 17(3) Vienna Journal of International Constitutional Law 203.

many ways, this plan was similar to the populist constitutional project, aimed at emptying democracy of its values, we see in other countries, but unlike the incremental and subtle process of democratic erosion in other countries, this was an open and detailed frontal attack on democracy.

The extreme nature of the judicial overhaul allowed the public to understand, clearly and relatively quickly, what was at stake. And the public reacted accordingly with an unprecedented resistance and protest movement, which succeeded in delaying and moderating the legislation until last summer, when one element of the judicial overhaul – that of removing Court’s authority to review the ‘reasonableness’ of the actions of ministers and of the cabinet – was enacted.² Various petitions were made against the constitutionality of this constitutional law and the High Court of Justice assembled *en banc* – all 15 judges – to hear the petitions.

At that time, it seemed like the judicial overhaul will continue, incrementally, as members of the coalition announced that the ‘reasonableness’ law was merely the *amuse-bouche* that would open the appetite for other parts of the judicial overhaul.

But reality took a different path. On 7 October 2023, the war in Gaza erupted following Hamas’s dreadful massacre in which 1145 Israelis were killed, more than 2000 were injured, and 253 hostages were taken. The still ongoing war has caused massive loss of life, displacement and destruction in Gaza, as well as immense displacement in Israel. The war has dramatic implications for the region as a whole and will surely affect politics in Israel.

The Israel-Hamas war has led to the suspension of the formal aspects of the judicial overhaul. This was due to the formation of an emergency government which includes centrist elements. But more than that, in the weeks following October 7, there was a sense – wishful thinking perhaps – that the government has abandoned its plans to undermine democracy; that it realized that its obsessive preoccupation with a so-called reform in the judicial system instead of dealing with the real problems – security, economy and health – was a mistake. As Education Minister Yoav Kisch said: ‘We were busy dealing with nonsense; we forgot where we were living.’³

Unfortunately, such hopes were quickly proven wrong. The events of October 7 did not cause the architects of the judicial overhaul to change their course of action.

2 See, e.g., Yaniv Roznai, ‘We the Fourth Branch? The People as an Institution Protecting Democracy’ in Vicki Jackson and Madhav Khosla (eds.), *Comparative Constitutional Law: Redefining the Field* (Oxford University Press, forthcoming 2024).

3 Allison Kaplan Sommer, ‘Israel’s Government “Will Be Held Accountable” for Hamas Attack, Education Minister Says’ *Haaretz* (Tel Aviv, 12 October 2023) <<https://www.haaretz.com/israel-news/2023-10-12/ty-article/israels-government-will-be-held-accountable-for-hamas-attack-education-minister-says/0000018b-2407-dd34-afdf-f587246d0000>> accessed 11 April 2024.

Those who asked to be exempt from the obligation to act reasonably have not abandoned their attack on judicial independence and the rule of law.

On 1 January 2024, the Supreme Court struck down the law, which was actually a constitutional amendment, holding it unconstitutional for violating core principles of Israeli democracy, especially rule of law and separation of powers (by a slim majority of 8–7).⁴ This was the first time in Israel that an amendment to a basic law was invalidated. This judgment, in which 12 out of 15 judges declared that the Supreme Court has the authority to review and strike down basic laws if they violate core values of the State, such as being Jewish and Democratic, marked a peculiar closure for the protest movement: It started in January 2023 with Minister Yariv Levin asking to weaken the Court, and it ended in January 2024 with the Court stronger than ever. Levin criticized the judgment, saying that it would not ‘stay our hand,’ without elaborating, and accused the judges of ‘taking into their hands all the authorities that are supposed to be divided between the three branches of government in a democracy.’⁵

While this judgment serves as an important check on any future constitutional reform, which is especially important in light of Israel’s weak system of checks and balances, it may only intensify the attacks on the Court. First, it may serve as an indication for the supporters of a reform in the judicial system that they were right: you see, the argument goes, the Court has become too strong and has been taking more and more powers to itself, without authorization. Second, now that the Court has the authority to strike down even constitutional provisions, the incentive to capture the Court has strengthened.

Indeed, while attempts to damage the legal system through formal constitutional reforms are apparently behind us, for now, the judicial overhaul continues with all its might. As Dahlia Scheindlin correctly observed ‘The most far-right government in Israel’s history never gave up its battle against liberal democracy. And war is a great time for a takeover.’⁶ It is perhaps not as visible as Levin’s direct and transparent

4 HCJ 5658/23 Movement for Quality Government v. the Knesset, Nevo Legal Database (Jan. 1, 2024) (Isr.). An English translation of the judgement’s abstract is available at: <<https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-knesset>> accessed 11 April 2024.

5 TOI Staff and Jeremy Sharon, ‘Levin declares High Court “will not stay our hand” after justices annul overhaul law’ *Times of Israel* (Jerusalem, 2 January 2024) <<https://www.timesofisrael.com/levin-declares-high-court-wont-stay-our-hand-after-justices-annul-overhaul-law/>> accessed 11 April 2024.

6 Dahlia Scheindlin, ‘In Netanyahu’s Israel, the Gaza War Is Wrecking What Remains of Democratic Values’ *Haaretz* (Tel Aviv, 20 March 2024) <<https://www.haaretz.com/israel-news/2024-03-20/ty-article/.premium/in-netanyahus-israel-the-gaza-war-is-wrecking-what-remains-of-democratic-values/0000018e-5cdd-d411-a3df-dcdfbad90000>> accessed 11 April 2024. See also Adam Shinar, ‘Constitutional Overhaul, the War in Gaza, and the Puzzle of Civic Mobilization in Israel’ (on file with author).

plan, but it is no less dangerous. And the fact that it is partly covert, or does not receive adequate media coverage, requires a special attention from those who wish to protect democracy.⁷

The examples of political takeover and undermining independent bodies are too many to count: increasing the number of representatives of government ministries on planning and building committees; political appointments to the Council for Higher Education; ongoing attempts by a Likud minister, David Amsalem, to make political appointments at Government Companies, causing the director of the Government Companies Authority to resign; the Minister of National Security, Itamar Ben-Gvir's, endless interference in the professional activities of the police; attempts to transfer local authorities' power to appoint local rabbis to the Religious Services Ministry; attacks on freedom of the press and on freedom of expression and of protest, and more.⁸

Furthermore, efforts to undermine judicial independence continue. MK Simcha Rothman, the Chairman of the Constitution, Law and Justice Committee, and one of the promoters of the judicial overhaul, wants to promote the appointment of an Ombudsman for Judges who is not a retired Supreme Court judge, as it is today and as it has been for the past 20 years. More importantly, after the attempts of Justice Minister Levin to change the structure and composition of the Judicial Appointments Committee have failed, he abuses his administrative authority in order to capture the Court by other means: for months, he delayed convening the committee throughout 2023 notwithstanding the wide judicial vacancies. And when he finally convened the committee (after petitions were filed to the High Court of Justice), he refused to fill two Supreme Court vacancies or appoint a permanent President of the Court according to the seniority principle, basically holding the position 'hostage' in the negotiation to ensure the appointment of government-friendly justices; and also refused to vote on candidates he did not want, while blocking, together with the far-right members in the committee, candidates seen as too lenient on the Arab community.

In its 2024 annual global democracy index report, V-Dem Institute has downgraded Israel, for the first time in over 50 years, from its top-tier 'liberal democracy' category to an 'electoral democracy'. The report states the following reasons: 'This is primarily due to substantial declines in the indicators measuring the transparency and predictability of the law, and government attacks on the judiciary. Among other things, Israel's Knesset passed a bill in 2023 stripping the Supreme Court of the power to declare government decisions unreasonable. Indicators that are in substantive

7 Noa Sattath, 'Don't Confuse – The Regime Coup is Still Continuing' *Ynet* (Rishon LeZion, 3 January 2024) <<https://www.ynet.co.il/news/article/b1il89zoa>> accessed 11 April 2024 [in Heb.].

8 Scheindlin (n 6).

decline also include freedom from torture.⁹ It is important to note that the report did not take into consideration the 2024 judgment of the Court invalidating the ‘reasonableness law’ and also that in its original report, it was mistakenly stated that the law removed Court’s authority to strike down legislation – this is incorrect and undermines the accuracy of the index. In fact, the civic opposition to the judicial overhaul and its partial success demonstrates the strength of Israel’s society, but also, the anti-democratic tendencies and weaknesses of the governing system.

Instead of the architects of the judicial overhaul resigning for their disastrous policies, they will distract from their failures or continue to hold others responsible for them, including the High Court of Justice and legal advisors. This is already happening. Justice Minister Levin accused the approach and conception of the judicial system for ‘tying the hands of the IDF [Israel Defense Forces]’: ‘There is a need to change the approach and to change the perspective of the justice system, including in connection with the IDF. So that when someone approaches the border fence, it’s unthinkable that soldiers should be scared to shoot at them ...’.¹⁰ And at a cabinet meeting, Israeli Regional Cooperation Minister David Amsalem called Israel’s Attorney General, Gali Baharav-Miara, ‘an enemy of the people’, blaming her for the demonstrations outside the prime minister’s house.¹¹ This tactic must fail. We, the people, must ensure that Israel will have a new government that will focus not on delusional elimination of the judiciary, but on the reconstruction of the country, and on creating a better, liberal-democratic, and stable, constitutional order.

Yaniv Roznai

⁹ *Democracy Report 2024 – Democracy Winning and Losing at the Ballot* (V-Dem, 2024) 14 <https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf> accessed 11 April 2024.

¹⁰ Jeremy Sharon, ‘Judiciary slams Levin for claiming High Court tightened IDF open-fire rules at Gaza border’ *Times of Israel* (Jerusalem, 10 November 2023) <https://www.timesofisrael.com/liveblog_entry/judiciary-slams-levin-for-claiming-high-court-tightened-idf-open-fire-rules-at-gaza-border/> accessed 11 April 2024.

¹¹ Jonathan Lis, ‘Netanyahu Minister Labels Israel’s AG “Enemy of the People” Amid Anti-govt, Hostage Protests’ *Haaretz* (Tel Aviv, 5 April 2024) <<https://www.haaretz.com/israel-news/2024-04-05/ty-article/.premium/netanyahu-minister-labels-ag-enemy-of-the-people-amid-anti-govt-hostage-protests/0000018e-aed2-d9e9-a9af-eff2b6130000>> accessed 11 April 2024.