

Impeachment by Judicial Review: Israel's Odd System of Checks and Balances

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This paper focuses on a doctrine that the Israeli Supreme Court has developed since the early 1990s under which the Court removes officeholders from their position by ordinary judicial review proceedings. Although this doctrine is not founded on any formal constitutional settings, nonetheless it has had a significant influence on the relationships between the judiciary and the political branches, as it was the basis for the removal of several major political figures — including ministers and top bureaucrats — from office.

The substantial rise of judicial power in Israel since the early 1980s has been documented by the literature of comparative constitutionalism. Yet this rise took place despite the lack of any meaningful formal constitutional guarantees of judicial autonomy in Israeli constitutional law. I argue that this doctrine of removal can serve to explain this gap. This practice of 'impeachment' by judicial review is unique to Israel. Therefore, it has hardly been studied by the comparative literature. It is, however, extremely common and influential in Israeli constitutional and political life. It also enjoys massive support from legal elites and the general public alike. I argue that one cannot understand the relationships between the courts and politics in Israel without taking this component into account. In this Article, I describe the development of this practice by the Israeli Supreme Court and its influence on the relationships between the courts and politics in Israel. I also provide a critical evaluation of the doctrine.

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INTRODUCTION

One of the most intriguing questions in contemporary constitutional theory is why political powerholders are willing to bestow power on courts and to acknowledge the autonomy of the judicial system. According to conventional wisdom, judges of high courts seek to maximize their influence on governmental policies.¹ Consequently, judicial institutions compete with the other branches over political power, and their interference with governmental decisions may well limit the ability of governments to achieve their policy goals. Courts need also to worry about their institutional autonomy, since over-interventionist judicial policies may trigger retaliation by the political branches to weaken their powers and infringe on their autonomy.² On its face, the feasibility of such retaliatory moves depends largely on the firmness of the guarantees of judicial autonomy in the relevant system. The more formally entrenched judicial autonomy is in the constitution, and the more stable the constitutional arrangements are – the more difficult it will be for the political branches to infringe on judicial autonomy.

However, the degree of acquiescence by the political branches to the manifestation of judicial power does not depend solely on the formal constitutional settings. The study of comparative constitutionalism suggests that political elites are willing to bestow power on courts and to refrain from retaliation against the judiciary even when they hold formal powers to do so. Constitutional theorists have offered many explanations for this phenomenon. Some theories refer to the importance of the rule of law from the point of view of state leaders. Since an autonomous judiciary is vital for the preservation of the rule of law, power holders are slow to infringe on it.³ Other explanations focus on considerations on the international level, i.e., the importance of judicial autonomy to international trade, to the ability to attract

1 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 744-46 (Wolters Kluwer Law & Bus. 9th ed. 2014).

2 See, e.g., Mark Ramseyer, *The Puzzling (In) Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); For a discussion of the development of judicial independence in the United States, see Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. (forthcoming 2018) (manuscript at 25-26) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963683.

3 See, e.g., Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91 (2000).

foreign investments, and to the international status of states in general.⁴ Yet another line of thinking raises strategic explanations. Judicial independence under a stable constitutional order may serve as a kind of ‘insurance policy’ for current power holders to preserve their fundamental political rights in case they are replaced in power by their political opponents.⁵ Others argue that bestowing power on courts enables politicians to avoid uneasy or unpopular decisions and to shift the blame to the judiciary in such matters.⁶

In this Article, I do not aim to downplay the importance of any of the above explanations, or to question their relevancy to the Israeli context. Rather, I seek to offer an additional explanation. It focuses on a doctrine that the Israeli Supreme Court has developed since the early 1990s under which the Court removes officeholders from their position by ordinary judicial review proceedings. Although this doctrine is not founded on any formal constitutional settings, nonetheless it has had a significant influence on the relationships between the judiciary and the political branches.

The substantial rise of judicial power in Israel since the early 1980s has been documented by the literature of comparative constitutionalism.⁷ Yet this rise took place despite the lack of any meaningful formal constitutional guarantees of judicial autonomy in Israeli constitutional law.⁸ This gap requires

4 For a discussion of the various theories of judicial expansion see Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)*, 62 AM. J. COMP. L. 613 (2014).

5 See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 25 (2003); Mathew C. Stephenson, *When the Devil Turns: The Political Foundations of Independent Judicial Review*, 23 J. LEGAL STUD. 721 (1994).

6 See, e.g., Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary*, 13 INT’L REV. L. & ECON. 349 (1993).

7 See, e.g., Yoav Dotan & Menachem Hofnung, *Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements*, 23 L. & POL’Y 1 (2001); DANIEL FRIEDMANN, *THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL’S LEGAL REVOLUTION* 54-56 (2016).

8 The principle of judicial independence is embedded in Basic Law: The Judiciary, 1110 LSI 78 (1984) (as amended) (Isr.), *translated in Basic Laws*, THE KNESSET, https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm. §2 of the Basic Law provides that “A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law.” Other provisions of the Basic Law guarantee judges’ salaries and working conditions (§ 10), tenure (§ 7), and protect against arbitrary suspension (§ 13). For a discussion of judicial independence in Israel, see, for example, SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE*

an explanation. I argue that the doctrine of removal and other related informal practices may serve this purpose. To the best of my knowledge, this practice of ‘impeachment’ by judicial review is unique to Israel.⁹ Therefore, it has hardly been studied by the comparative literature. It is, however, extremely common and influential in Israeli constitutional and political life and it enjoys massive support from legal elites and the general public alike. I argue that one cannot understand the relationships between the courts and politics in Israel without taking this component into account.

On its face, the removal practice can be viewed as the product of the existing constitutional structure in Israel, in particular the strong (*de facto*) autonomy of the judicial system. At the same time, I suggest that the development of this practice should also be seen as a vital *component* in the same constitutional structure.

The discussion will proceed as follows. In Part I, I briefly review different arrangements for removing powerholders for cause, and locate the Israeli practice within the context of impeachment proceedings. In Part II, I describe the general developments in judicial review that serve as a background to the rise of the removal practice. In Part III, I present in some detail the legal doctrine that constitutes the removal practice as well as some major cases in which this practice has been shaped. In Part IV, I discuss the removal practice from a critical point of view. I argue that the doctrinal foundations of this practice are shaky and cannot be easily reconciled with the other major principles of Israeli public law. In Part V, I discuss the removal practice from

ISRAELI JUDICIARY 175, 201-08, 211-18, 222-23 (1994). However, the Basic Law itself is subject to changes by the Knesset in a regular statutory process with no need for a special majority (even though it has only been amended twice, and both times as an indirect amendment). See Ariel L. Bendor, *The Purpose of the Israeli Constitution*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 51 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013); Menachem Hofnung, *Israeli constitutional politics: The fragility of impartiality*, 5 ISRAEL AFF. 34, 48 (1998). In addition, various informal practices have developed over the years that also buttress judicial independence, such as the practice that the Chief Justice is appointed on the basis of a seniority system and that the justices on the judicial appointments committee coordinate their position with all the justices of the Supreme Court (see YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* 21-23 (2014)). Additional informal practices have evolved in the relationships between the judiciary and the Office of The Attorney General. See *Id.* at 76-78).

9 See Ariel Bendor & Michal Tamir, *The Reciprocal Engulfment of Law and Ethics in Israel: The Case of Appointments to Senior Positions*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 229, 233 (2014); see also *infra* note 71.

a sociopolitical perspective. My main argument will be that the practice is a vital tool that enables the Israeli judiciary to preserve its institutional autonomy *vis-à-vis* the political branches in the absence of strong formal constitutional guarantees. I conclude with some brief remarks on the importance of informal constitutional mechanisms.

I. IMPEACHMENT AND REMOVAL PROCEEDINGS

The issuance of criminal proceedings against the head of a state (or any other senior officeholder) is a notable event in the life of any political community. In authoritarian regimes, charges of corruption against prominent politicians are either inconceivable (regardless of their merits), or constitute a move by the true powerholders to get rid of their opponents.¹⁰ In democratic systems, however, such developments bring about a media storm, astound public opinion, destabilize political coalitions, and may determine the fate of upcoming elections. The recent dismissal of the Head of the FBI, James Comey, by President Donald Trump amidst an FBI investigation against Trump himself may serve as just one, albeit prominent, example of the potential repercussions of such incidents.¹¹ Confrontations between law enforcement agencies and political leaders, however, recently have become a commonplace in many countries,¹² justifying the study of this phenomenon from a theoretical and

10 See, e.g., Alan P. L. Liu, *The Politics of Corruption in the People's Republic of China*, 77 AM. POL. SCI. REV. 602, 615 (1983); ROBERT HARRIS, POLITICAL CORRUPTION: IN AND BEYOND THE NATION STATE 65 (2003).

11 See Stephen Collinson, Jeff Zeleny & Jeremy Diamond, *Trump Fires FBI Director James Comey*, CNN (May 10, 2017), <http://edition.cnn.com/2017/05/09/politics/james-comey-fbi-trump-white-out/index.html>.

12 See, for example, In South Korea, Justin MuCurry, *Park Geun-hye: South Korean court removes president over scandal*, THE GUARDIAN (Mar. 10, 2017), <https://www.theguardian.com/world/2017/mar/10/south-korea-president-park-geun-hye-constitutional-court-impeachment>; in Brazil, see Thomas C. Bruneau, *The Impeachment of President Dilma Rousseff: Old Politics Meets New Standards in Brazil*, PRESIDENTIAL POWER, WITH MATTHEW DICKINSON (June 20, 2016), http://calhoun.nps.edu/bitstream/handle/10945/48949/bruneau_the_impeachment_of_president_dilma_rousseff_2016-06.pdf?sequence=1; in Guatemala, see Refael Romo, *Guatemala's top court approves bid to impeach President amid scandal*, CNN (Aug. 26, 2015), <http://edition.cnn.com/2015/08/26/americas/guatemala-president-scandal/index.html>; in Paraguay, see Rebecca Szucs, *A Democracy's Poor Performance: The Impeachment of Paraguayan President Fernando Lugo*, 46 GEO. WASH. INT'L L. REV. 409 (2014); in Lithuania, see Aurelija Grigoraviciute, *Lithuanian Constitutional Court: The Eligibility Ban*

comparative perspective.¹³

Law enforcement's battles with state leaders, however, are not only significant political events. Often they also pose a serious challenge to the constitutional framework of the relevant system. They compel law enforcement agencies to face pressures and threats from their superiors, thereby testing the boundaries of judicial autonomy and the state of the rule of law in the relevant system. As criminal proceedings move forward, they may prompt a call for impeachment or other proceedings designed to terminate the tenure of the head of the state.¹⁴ Since the political stakes are high, and since formal rules regarding the division of powers are not always devoid of ambiguity, jurisdictional and constitutional 'showdowns' are not rare on such occasions.¹⁵

for Those Removed under Impeachment Procedure, 8 VIENNA J. INT'L CONST. L. 112 (2014).

- 13 See Vidal Romero, *The Politics of Elite Punishment: Why Some Corrupt Presidents are Prosecuted But Not Others?* (Instituto Tecnológico Autónomo de México [Autonomous Tech. Inst. Mex.] Working Paper No. 2013-001, 2011); Brian C. Kalt, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTING CONST. L.Q. 7 (1992); Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000). For a comparative analysis of the ability of anti-corruption agents to function (therefore, their ability to act against public officials) around the world, see OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (OSISA), EFFECTIVENESS OF ANTI-CORRUPTION AGENCIES IN SOUTHERN AFRICA (2017), <http://www.africanminds.co.za/wp-content/uploads/2017/04/OSISA-ACC-Text-29MAR1130-WEB.pdf>; EU Anti-Corruption Report, Commission to the Council and the European Parliament, COM (2014) 38 (Feb. 3, 2014); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], PUTTING AN END TO CORRUPTION (2016), <https://www.oecd.org/corruption/putting-an-end-to-corruption.pdf>.
- 14 For a definition of impeachment, see, for example, Ronald Ray K. San Juan & Bryan Dennis G. Tiojanco, *Impeachment*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW § 1 (Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum eds., 2016) (defining impeachment as "a formal proceeding instituted by a public body (usually the legislature) for determining through a trial whether a public official – usually although not necessarily high ranking, and who has a fixed term of office or protected tenure – must be either removed from office or held accountable in other ways.")
- 15 Prominent examples: Nixon tapes, *United States v. Nixon*, 418 U.S. 683 (1974); Brazil's battle over jurisdiction, see Dias Toffoli, *Democracy in Brazil: The Evolving Role of the Country's Supreme Court*, 40 B.C. INT'L COMP. L. REV. 245

Due to their grave repercussions for the political system, impeachment proceedings are usually entrenched in states' constitutions.¹⁶ To ensure a proper balance between the criminal and political aspects of the process, in many systems impeachments are carried out through some trial-type proceedings by the legislature (or one of its organs), or proceedings that involve representatives of both the legislative body and the judiciary.¹⁷ Moreover, due to its grave implications for the political system, the decision to initiate impeachment proceedings usually requires the approval of either a legislative body (sometimes with a special majority) or a special judicial organ (or some combination of both).¹⁸

(2017). For the discussion of constitutional 'showdowns,' see Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

- 16 See, for example, in the USA, U.S. CONST. Art. I, § 2–3; Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291 (1999); or in Brazil, see CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 85; ANIBAL PEREZ-LINAN, PRESIDENTIAL IMPEACHMENT AND THE NEW POLITICAL INSTABILITY IN LATIN AMERICA 14 (2007); in Austria, see BUNDES-VERFASSUNGSGESETZ (B-VG) [CONSTITUTION], art. 60, ¶6; in the Czech Republic, see Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 65; Jan Kudrna, *Responsibility for Acts of the President of the Czech Republic*, 56 ACTA JURIDICA HUNGARICA [HUNGARIAN J. LEGAL STUD.] 39 (2015); in Bulgaria, see Constitution of The Republic of Bulgaria, art. 103. In some U.S. states, however, a practice of removal of officeholders was developed in common law. This practice, known as 'amotion,' enables municipal authorities to remove officeholders for just cause in the absence of statutory provisions that regulate the process. See, Cathryn M. Little, *Putting Amotion in Motion: Removal of an Elected Official by Municipal Governing Body for Just Cause*, 32 CAMPBELL L. REV. 75 (2009). Amotion proceedings are subject to judicial review to ensure that fundamental procedural rights are preserved, see Little, *supra*, at 98–100.
- 17 See generally Ray et al., *supra* note 14 at § 22–24 (distinguishing between a model of impeachment that involves the legislature exclusively, and a model that combines the legislature and the judiciary); Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1449 (2008). For a comparison of the court's involvement during impeachment in Eastern Europe, see WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 26 (2d ed. 2008). *But see* the law of Mongolia, in which the constitutional court shall determine whether there are legal grounds for impeachment (*see* The law of Mongolia on the Constitutional Court (Tsets) (1992), https://conscourt.gov.mn/home/home/?page_id=850&lang=en).
- 18 See, for example, in the United States, according to the Constitution, a decision to impeach is within the sole power of the Senate, and it requires the approval

Israel has no formal constitution. Accordingly, the institution of impeachment (*stricto sensu*) does not exist in Israeli law. Instead, the Israeli Supreme Court has developed since the 1990s a practice under which officeholders can be removed by regular proceedings of judicial review if they are indicted for criminal charges or otherwise accused of improper behavior. Although this practice has no strict basis in statutory law, nonetheless it has been applied on several occasions to remove officeholders or block appointments and has had a significant influence on political and bureaucratic life in the country. While it is certainly a prominent manifestation of the development of judicial review in Israel, it has been relatively neglected in the academic literature,¹⁹ necessitating a detailed description here. That will be done after providing the proper legal background to its development.

II. BACKGROUND: DEVELOPMENTS IN JUDICIAL REVIEW

Israeli public law is largely judge-made law created and shaped by the decisions of the Supreme Court. The principal forum for judicial review is the Supreme Court itself, sitting as the High Court of Justice (HCJ). In this capacity, the HCJ serves as the first (and last) instance for most major public law cases.²⁰ Until

of 2/3 of the members present. See U.S. Const. Art. I, § 2-3; in Germany, a request to impeach the president requires a majority of at least 2/3 of the federal parliament. See Grundgesetz [GG] [Basic Law], https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0289; the Czech Republic's constitution requires similar conditions. See Constitution of the Czech Republic, *supra* note 16. However, in Croatia, impeachment is first suggested by a majority of 2/3 of the parliament, and then requires the approval of the constitutional court. See Constitution of the Republic of Croatia, art. 105, <http://www.constitution.org/cons/croatia.htm>.

19 In this respect, Daniel Friedmann's book is a welcome exception. See FRIEDMANN, *supra* note 7, at 148-56.

20 The High Court of Justice (HCJ) is one of the functions of the Supreme Court of Israel. When a civil or criminal dispute arises in Israel it normally makes its way into a County Court and then – on appeal – to a District Court. Only a handful of such cases reach the Supreme Court as a third instance of *cassation*. The Supreme Court also sits as an appellate court for cases involving serious criminal offenses or civil disputes where the value of the claim is very high. Such cases are referred directly to a District Court and then, on appeal, to the Supreme Court. Prior to 2000, all cases involving public agencies exercising their legal powers (other than decisions of tribunals) were brought directly before the Supreme Court (sitting as the HCJ) and resolved by the HCJ with no further appeal. A law passed in 2000 (The Administrative Affairs Courts Law, 5760-2000

the late 1970s, the HCJ tended to impose strict limitations on the ability of litigants to raise political issues in court. To meet the requirement of *standing*, the petitioner had to show a direct and genuine personal interest in the state action at stake. Moreover, the petitioner's standing was likely to be in danger if the same action caused similar harm to a large group of people or to an entire sector of which she formed a part. This narrow concept allowed the Court to refrain from interfering in sensitive political issues in general,²¹ and in particular with respect to petitions pertaining to law enforcement against high-ranking officials and political figures.²²

Another concept with similar effects on the accessibility of courts was *justiciability*. Until the late 1970s, the Supreme Court adopted a narrow conception of justiciability, under which it decided that petitions involving issues of foreign policy, military actions or other sensitive political issues were considered "unsuitable" for judicial determination and therefore non-justiciable.²³

In addition, even as regards those petitions that met the threshold requirements of standing and justiciability, the Court adhered to a narrow concept of review.

(2000) (Isr.) routed less important administrative cases to the District Courts (referred to as administrative courts for the purposes of this function). However, important cases involving public agencies exercising their legal powers are still brought directly before the Supreme Court, and resolved by this Court with no possibility of appeal. Accordingly, the Supreme Court in Israel serves three different functions: as a court of cassation, as a court of appeal, and as a court of first (and last) instance for the more important administrative law judicial review cases. The Supreme Court has fifteen judges who normally sit in panels of three (except in unusually important cases).

21 See, for example, matters related to the separation of religion and state, HCJ 287/69 Meiron v. Minister of Labour PD 24(1) 337 (1970); HCJ 11/79 Mirkin v. Minister of Interior PD 33(1) 502 (1979).

22 See HCJ 26/76 Bar-Shalom v. Zore'a PD 31(1) 796 (1977).

23 See HCJ 186/65 Reiner v. Prime Minister of Israel PD 19(2) 485 (1965); HCJ 561/75 Ashkenazi v. Minister of Defense PD 30(3) 309 (1976); MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 56 (2011). The doctrine of justiciability has been applied by the Israeli courts in a way that is roughly equivalent to the use of the doctrine of *political question* in the United States. See *Baker v. Carr*, 369 U.S. 186 (1962). The term 'justiciability' in the U.S. jargon refers to all access doctrines and not only political questions, see, for example, Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911 (1990). For a comparative discussion of justiciability in Israel vis-à-vis the U.S. and the U.K., see Margit Cohn, *Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. CONST. L. 675, 679-82 (2011).

Following in the footsteps of English law, judicial review was largely based on the examination of legality under the traditional framework of *ultra-vires*. In some cases, this concept was somewhat broadened to include constraints against improper motives by administrative officials and discrimination.²⁴ Still, however, there were areas of administrative decision-making that enjoyed a particularly lenient standard of review, such as actions taken by military agencies²⁵ and prosecutorial discretion.²⁶

The 1980s saw a major shift in almost all the abovementioned aspects of judicial review. There was a dramatic change in the principles concerning access to the courts. By the early 1980s, the Court was already willing to acknowledge the standing of a petitioner who was substantially harmed by a certain state action even if she belonged to a larger group of people that suffered similar harm.²⁷ The scope of judicial review was further expanded in the landmark decision in *Ressler v. Minister of Defense*. There, the Supreme Court reversed its prior rulings on the issues of both standing and justiciability. On justiciability, Justice Aharon Barak (later the Chief Justice) stated: "... Any [human] action is susceptible of determination by a legal norm, and there is no action to which there is no legal norm determining it."²⁸

The Court in *Ressler* also presented a new and ambitious concept of standing (known as the "public petitioner standing"), completely revising the older case law. It decided that whenever a petition raises an issue of important constitutional merit, or there is a suspicion of serious executive violations of the principle of the rule of law, *any* person is entitled to bring the petition into court, *regardless* of her personal interest in the outcome of the litigation.²⁹ As we shall see, the reform in the principle of standing had a dramatic impact on

24 See, e.g., HCJ 98/54 Lezarovitz v. Food Supplies Inspector 10 PD 40 (1956); Crim. App. 217/58 Isramex Ltd. v. State of Israel 22(2) PD 343 (1958); HCJ 262/62 Peretz v. Kfar Shmaryahu 15 PD 2101 (1962).

25 See, e.g., HCJ 46/50 Elayubi v. Minister of Defense 4 PD 222 (1950); HCJ 415/81 Ayub v. The Commissioner of Jerusalem District 38(1) PD 750 (1984).

26 HCJ 156/56 Schor v. Attorney General 11 PD 285 (1957); see also Yoav Dotan, *Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and in Israel*, 3 PUB. L. 513 (1997).

27 HCJ 217/80 Segal v. Minister of Interior 34(4) PD 429 (1980); HCJ 1/81 Shiran v. Broadcasting Authority 35(3) PD 365 (1981).

28 H.C. 910/86 Ressler v. Minister of Defense 32(2) PD 441, 477 (1988), *translated in PUBLIC LAW IN ISRAEL* 275 (Itzhak Zamir & Allen Zysblat eds., 1996), <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ressler%20v.%20Minister%20of%20Defense.pdf>.

29 *Id.* at 34.

developments in judicial review in the field of appointments and removals, since it enabled anyone to seek judicial review in order to attack governmental appointments or in actions for removal. It also allowed free access to judicial review to attack decisions by law enforcement agencies to decline to investigate or indict high-ranking officials.³⁰

The reforms described above in the access doctrine were supplemented by similar revisions in the substantive principles of judicial review. *First*, the court developed new and expansive doctrines of judicial review, including an extensive requirement of procedural fairness,³¹ an elaborated requirement of rationality in decision-making,³² and the doctrines of proportionality³³ and reasonableness.³⁴ Since the latter doctrine is the most important for the current discussion, it is worthwhile to examine it in some detail. Prior to 1980, Israeli administrative law acknowledged a narrow concept of unreasonableness. This concept largely followed in the footsteps of the English doctrine as presented in the well-known *Wednesbury* decision.³⁵ It enabled the court to interfere and strike down administrative decisions that were ‘flatly’ unreasonable. The Court rarely used reasonableness and only as a residual ground for judicial review.³⁶

30 The Israeli approach stands in contrast to the wide immunity that law enforcement decisions enjoy in the UK. *See* Dotan, *supra* note 26, at 514; Osita Mba, *Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law*, OXFORD U. COMP. L.F. 2 (2010), <https://ouclf.iuscomp.org/judicial-review-of-the-prosecutorial-powers-of-the-attorney-general-in-england-and-wales-and-nigeria-an-imperative-of-the-rule-of-law/#more-113>; and in the U.S., see *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985); Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”*: *When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

31 *See, e.g.*, H CJ 531/79 Likud Faction v. Municipality of Petach Tikva 34(2) 566 (1980) (expanding the scope of conflict of interests rules), *translated in* Zamir & Zysblat, *supra* note 28, at 169; H CJ 2159/97 Regional Council Hof Ashkelon v. Minister of the Interior 52(1) PD 75, 88 (1998) (applying hearing duty to some policymaking decisions).

32 *See* H CJ 297/82 Berger v. Minister of the Interior 37(3) PD 29 (1983) (per Justice Shamgar); H CJ 987/94 Euronet v. Minister of Communication 48(5) PD 412 (1994).

33 H CJ 5510/92 Turkeman v. Minister of Defense 48(1) PD 217 (1993); H CJ 3477/95 Ben-Atia v. Minister of Education, Culture and Sports 49(5) PD 1 (1996).

34 H CJ 389/80 Dapei Zahav Ltd. v. Broadcasting Authority 35(1) PD 421 (1981).

35 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

36 *See, e.g.*, H CJ 332/62 Shpanir v. Treasury Minister 17 PD 574, 577 (1962); H CJ 156/75 Daka v. Minister of Transportation 30(2) PD 94, 105 (1976).

The new concept of reasonableness presented by Justice Aharon Barak in 1980 was starkly different. It required the administration to meet the standard of reasonableness through the judicially constructed test of ‘the realm of reasonableness.’ This test required agencies to conduct a ‘balancing’ process of all relevant considerations that was subject to judicial review on an *ad hoc* basis for each individual case.³⁷ It was designated to serve as the principal tool of judicial review to generate a wide-ranging reform in judicial review.³⁸ Indeed, it generated a complete revolution in administrative judicial review.³⁹

Second, the expansion of judicial review related also to the types of administrative actions and areas of governmental action subjected to review. I mentioned above that up until the early 1980s there were various areas of executive activities that were either completely exempt from judicial review or enjoyed a very lenient standard of review. These included national security and military actions, actions of the secret services, foreign relations, and prosecutorial decisions.⁴⁰ In addition, the Court demonstrated great restraint with regard to the review of regulations and other means of secondary legislation.⁴¹ In practical terms, decisions and actions in these areas were sometimes non-justiciable (such as in the case of foreign relations),⁴² or else they were subject to review only on the basis of clear *ultra-vires* or *mala-fides* by the

37 H CJ 389/80 Dapei Zahav; Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in PUBLIC LAW IN ISRAEL, *supra* note 28, at 327.

38 Accordingly, this expansive concept of reasonableness has been strongly criticized by some of the justices on the bench, such as Chief Justice Landau (*see* H CJ 389/80 Dapei Zahav at 431) and Deputy Chief Justice Elon (*see* H CJ 1635/90 Zerzevsky v. The Prime Minister 45(1) P.D. 749, 770 (1991)).

39 See, e.g., Michael Asimow & Yoav Dotan, *Open and Close Judicial Review of Agency Action: The Conflicting US and Israeli Approach*, 64 AM. J. COMP. L. 521, 549–50 (2016); Ronen Shamir, *Ha'Politika shel Ha'Svirut [The Politics of Reasonableness]*, 5 TEORIA U'BIKORET [THEORY & CRITIQUE] 7 (1994) (Isr.); Michal Shaked, *He'arot al Bikoret Hasvirut ba Mishpat ha-Minhali [Notes on the Review of Reasonableness in Public Law]*, 12 MISHPATIM [HEBREW U. L.J.] 102 (1982) (Isr.); Joshua Segev, *The Changing Role of the Israeli Supreme Court and the Question of Legitimacy*, 20 TEMPLE INT'L & COMP. L.J. 4-5 (2006).

40 *See supra* text accompanying note 24.

41 *See, e.g.*, CA 311/57 Attorney General v. Dizingof 13 PD 1026 (1959); CA 6/66 Kalo v. Municipality of Bat Yam 20(2) PD 327 (1966); CA 780/70 Municipality of Tel Aviv v. Sapir 25(2) PD 486 (2014). *See also* H CJ 156/75 Daka; H CJ 10/80 Zilka v. Mayor of Holon 34(4) PD 651 (1980).

42 *See, e.g.*, Reiner, *supra* note 23.

administrative decision-maker — but not on the ground of reasonableness (such as in the case of national security and prosecutorial decisions).⁴³

As of the early 1980s, all the above limitations on judicial review were rapidly swept away while the Court developed the new doctrine. As the Court eradicated the concept of non-justiciability in *Ressler*, it proclaimed that *all* areas of state activity are subject to judicial review, including national security, military operations, and even actions by the secret services.⁴⁴ Moreover, under the decisive and influential leadership of Justice Aharon Barak, the Court also eliminated all internal categorizations based on the type of the relevant official action at stake. According to the new doctrine, all administrative actions were subject to *the same requirements* of judicial review, and with no prior determinations that might limit the scope of review on the basis of the type of action or type of agency that was subject to judicial review.⁴⁵

Most importantly for our purposes, the Court swept away all the restraints that referred to prosecutorial or other decisions made by law enforcement agencies throughout criminal proceedings. It ruled that prosecutorial decisions by the Attorney General (AG) (or any other agency) are subject to judicial review to full extent, including the test of reasonableness (as shaped by the new case law of the early 1980s). It also ruled that the AG (and his office) are ‘independent’ *vis-à-vis* the political branches, but subject to the close

43 See *supra* text accompanying notes 24-25.

44 See, HCJ 428/86 Barzilai v. Executive of Israel 40(3) PD 505 (1986) (stating that the actions of the secret service are subject to judicial review); HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 617 (1989) (ordering the government to reveal the name of the Head of the Mossad secret service); HCJ 2056/04 Council of Beit Surik v. Government of Israel 58(5) PD 807 (2004) (ordering the government to change the location of the security barrier between Israel and the West Bank); HCJ 8397/06 Eduardo v. Minister of Defense 62(2) PD 198 (2007) (*translated in* <http://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense>) (ordering the government to build shelters at schools and kindergartens in southern Israel against rockets fired at this area from the Gaza Strip). See also FRIEDMANN, *supra* note 7, at 55.

45 See, e.g., HCJ 840/79 Constructors & Builders Center v. Government of Israel 34(3) PD 729 (1980) (Barak J., alternative holding, at ¶ 4) (dismissing the distinction between general policy decisions and individual actions as relevant for the application of the reasonableness doctrine). See also, HCJ 297/82 Berger v. Minister of the Interior 37(3) PD 29 (1983) (opinion of Barak J., at ¶ 4-5) (dismissing the distinction between policy and individual decision and between action and inaction).

supervision of the Court itself in judicial review.⁴⁶ These developments were paramount in the process of turning the Office of the Attorney General (OAG) and the AG himself into a powerful gatekeeper of the rule of law, who is in charge of enforcing the rule of law on all governmental agencies.⁴⁷ As we shall see, these developments carried wide-ranging implications for the developments in the law regarding appointments and removals that will be discussed in the next Part.⁴⁸

Lastly, to complete the description of the expansion of judicial review, one should mention that during the 1990s the court also began to develop judicial review on the constitutional level. Following the enactment of the Basic Law: Human Dignity and Liberty in 1992 the Court ruled that the judiciary holds the power to strike down the legislation of the Knesset if it contradicts the provisions of the basic law.⁴⁹ The development of judicial review on the

46 *See, e.g.*, H CJ 329/81 Nof v. Attorney General 37(4) PD 326 (1993); H CJ 935/89 Ganor v. Attorney General 44(2) PD 485 (1990). The Attorney General of Israel is appointed by the government upon the recommendation of the Minister of Justice. By a government decision, however, the government can only appoint candidates recommended by a special committee headed by a former Justice of the Supreme Court. For a detailed account of some major public events that shaped the appointment process, see FRIEDMANN, *supra* note 7, at 85-89, 245-49. *See also* Itzhak Zamir, *The Attorney General: A Public Servant, Not a Government Servant*, in THE KLINGHOFFER BOOK ON PUBLIC LAW 451 (Itzhak Zamir ed., 1993).

47 For an extended discussion, see DOTAN, *supra* note 8, at 54-64.

48 This status of the AG as a powerful gatekeeper on behalf of the judiciary was further bolstered by Supreme Court decisions that referred to his advisory and representation powers. Under statute, the AG holds the power to represent the government in any legal proceedings. The H CJ ruled that while the AG holds a complete monopoly over the representation of government agencies in court, he is entitled to refuse representation if he believes that the government position is illegal or otherwise not worthy of being defended. *See, e.g.*, H CJ 3094/93 Movement for Quality in Government in Israel v. State of Israel 47(5) PD 404 (1993) (*translated in*, http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf) (hereinafter: *The Deri Case*); DOTAN, *supra* note 8, at 59. Likewise, the Court ruled that advisory opinions by the AG are legally binding on all government agencies unless and until a court of law rules otherwise (CA 3350/04 General Manager of the Ministry of Interior v. Shenan (June 13, 2007), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>). For a detailed discussion of the rise in the power of the AG *vis-à-vis* the Cabinet, see also FRIEDMANN, *supra* note 7, at 237-51.

49 CA 6821/93 Bank Ha'mizrachi v. Migdal 39(4) PD 221 (1995).

constitutional level is, of course, important in its own right, but its relevance to the current discussion is limited and therefore I shall not discuss it in detail.⁵⁰

To sum up this Part, as of the early 1990s the general contours of the new and expansive doctrine of judicial review, as developed by the Supreme Court, had been largely shaped. This new doctrine enabled *anybody* to bring before the HCJ a petition for judicial review with regard to *any* executive action — no matter how high-ranking the agency that produced the action or how sensitive the issue from a political point of view.⁵¹ Moreover, the Court would apply the same standard of review to any such action, and that standard included the expansive version of reasonableness described above. In addition, access to judicial review by the Supreme Court was also enhanced by the fact that the way to the HCJ was extremely fast (as the Court serves, in essence, as a trial court), easy (in terms of procedural simplicity) and low-cost (due to low

50 See SUZIE NAVOT, CONSTITUTIONAL LAW IN ISRAEL (2nd ed. 2016); ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013); Aharon Barak, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015); Amnon Reichman, *Judicial constitution making in a divided society: the Israeli case*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 233 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585 (1996). For the effect of constitutional law development on administrative law in Israel, see Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001).

51 This Israeli doctrine stands in sharp contrast to the situation in almost every common law system, even today. See Daniele Amroso, *A Fresh Look at the Issue of Non-Justiciability of Defence and Foreign Affairs*, 23 LEIDEN J. INT'L. L. 933, 944 (2010); see, for example, in the United States, Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 INDIAN J. CONST. L. 11, 21 (2008) (see there also a comparison to standing doctrines in other countries); Tumai Murombo, *Strengthening locus standi in public interest environmental litigation: Has leadership moved from the United States to South Africa?*, 6 LAW ENV'T & DEV. J. 163 (2010). In the United Kingdom, despite recent developments that extended the standing requirement, it is still narrower, see Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 LAW & SOC. REV. 523, 539 (2012). For a comparison between Canada, the United States and Israel regarding standing among other impacts on judicial review, see Malvina Halberstam, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZO L. REV. 2393 (2010).

court fees and minimal risk of court expenses).⁵² As a result, from the point of view of a third party that wishes to attack a decision to appoint or dismiss public officials, this seems to be an ideal setting.

III. APPOINTMENTS AND REMOVALS

In 1993 the then Minister of Housing sought to appoint a new general manager for the Ministry. The prospective candidate, Yossi Ginosar, was considered a very able and experienced public official. However, a shadow lay over the appointment. Ginosar was one of the key figures in a major scandal known as “The Shin Beit Affair” (also known as the “Bus 300 Affair”) that had taken place a few years earlier. The scandal broke out after it was revealed that top officials in the Israeli Secret Service (Shin Beit) were involved in a wide cover-up operation to hide the fact that some of them were directly responsible for the killing of two suspected terrorists after they had been arrested following a terror incident in southern Israel.⁵³ Ginosar specifically had taken a series of actions that allegedly constituted perjury and obstruction of justice, although he was never brought to justice because he (as well as some other top Shin-Beit officials) was pardoned by the President of Israel before trial.⁵⁴

Soon after the appointment was announced, a private citizen named Eisenberg filed a petition with the H CJ challenging the legality of the appointment.⁵⁵ The government argued that there was no statute that prohibits the Minister from appointing Ginosar (who had not even been convicted of any crime), and that he had all the necessary qualifications to successfully fill the position. The Court, however, was unimpressed. It ruled that considerations of efficiency should be balanced against the acute infringement of the rule of law and ‘the principle of good character in public service’ if a person that committed such severe offences were to be appointed to a top executive position. Accordingly, it struck down the appointment as unreasonable.⁵⁶ Thus, this ‘*principle of the*

52 For a detailed discussion of the ease of access to judicial review, see DOTAN, *supra* note 8, at 36-44.

53 For a detailed description of the Shin Beit Affair, see FRIEDMANN, *supra* note 7, at 79-83; DOTAN, *supra* note 8, at 58.

54 An attempt to attack the pardon decision in court failed. *See*, H CJ 428/86 Barzilai v. Executive of Israel 40(3) PD 505 (1986).

55 H CJ 6163/92 Eisenberg v. The Minister of Building and Housing 47(2) PD 229 (1993), *translated in* http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf;

56 *Id.* at 57.

rule of law and good character' was introduced into Israeli public law as a basis for judicial intervention in governmental appointments and removals.⁵⁷

Shortly after the *Eisenberg* decision, and following a police investigation, the AG decided to bring charges of bribery against the then Minister of the Interior, Arie Deri. Following the indictment, Deri was called upon by many to resign, but refused to do so. The then Prime Minister, Yitzhak Rabin, also decided to ignore the public outcry and refrain from using his statutory power to discharge Deri from his cabinet. Rabin based his position on the fact that there was no statutory requirement for the resignation of a minister following criminal indictment. (In fact, the statute in force specifically required resignation only *after a conviction* by a final judgment that entailed imprisonment).⁵⁸ It was also clear that Rabin's position was influenced by the fact that Deri was the leader of the powerful Shass party, which was a key component of his coalition, and that a decision to discharge Deri could seriously shake this coalition.⁵⁹

Soon after the Attorney General's announcement, a petition was filed with the HCJ by a judicial watch group asking the Court to order the Prime Minister to use his statutory power and discharge Deri.⁶⁰ The petitioners argued that although there is no statutory provision that mandates the resignation of a minister under such circumstances, the continuance of his tenure would severely breach the public trust in government and therefore it would be wholly unreasonable for the Prime Minister not to discharge him. The government argued that, contrary to the case of Ginosar, Deri was not an executive officer but an elected official, and that in the absence of any clear statutory provision

57 While the Court normally uses the term '*rule of law and good character*' for this principle, I shall hereinafter call it '*the principle of good character*' for two reasons. First, the term 'rule of law' is used in Israeli law for many purposes, while the term 'good character' is unique to the current doctrine. Second, as I shall demonstrate below, the relationships between the removal practice and the principle of rule of law are entangled, and arguably this practice contradicts at least some aspects of the rule of law.

58 See Basic Law: The Government, 5728-1968, Section 6(c), *translated in* https://knesset.gov.il/laws/special/eng/basic14_eng.htm.

59 Shass, the ultra-orthodox religious party, is traditionally important to Israeli prime ministers when forming coalitions. See Doron Navot & Nissim Cohen, *How Policy Entrepreneurs Reduce Corruption in Israel*, 28 GOVERNANCE 61, 70 (2015). See also Rivka Amado, *Checks, Balances, and Appointments in the Public Service: Israeli Experience in Comparative Perspective*, 61 PUB. ADMIN. REV. 569, 573-76 (2001).

60 *Supra* note 57. Section 21A authorizes the Prime Minister to discharge a cabinet minister for any reason.

that bans him from continuing to serve, his removal would be an infringement of democratic principles. It also argued that since Deri had yet to be convicted, his removal would infringe on the presumption of innocence. Once again, the Court was not impressed. It stated that the Prime Minister's power to remove cabinet ministers (under the Basic Law: The Government) is indeed discretionary in nature. However, given the seriousness of the allegations against Deri, the Prime Minister's refusal to dismiss him amounts to patent unreasonableness and calls for judicial intervention. Accordingly, the Court ordered the Prime Minister to remove Deri from office.⁶¹

The *Eisenberg* and *Deri* cases were the earliest in a long series of cases, in which the Court developed and applied the principle of good character in its supervision over appointments and removals of both politicians and high-ranking public officials.⁶² While in early decisions the Court's interference was based on allegations of serious criminal offences by the appointees,

61 HCJ 3094/93 *The Movement for Quality in Government in Israel v. The State of Israel* 47(5) PD 404 (2014). Deri was later convicted and sentenced to 3 years in prison. *See also* HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* 47(5) PD 441(1993).

62 *See, e.g.*, HCJ 2533/97 *Movement for Quality of Government v. Government of Israel* 51(3) PD 46 (1997) (petition to require the Prime Minister to fire the Minister of Justice due to his involvement in a sleaze scandal); HCJ 932/99 *Movement for Quality of Government v. Chairman of the Board of Appointments* 53(3) PD 769 (1999) (petition to defeat the appointment of a Chairmen of a Governmental Corporation who provided false information in his curriculum vitae); HCJ 4668/01 *Sarid v. Prime Minister* 56(1) PD 265 (2001) (petition to overturn the appointment of the Head of the Anti-Terror Agency due to his involvement in the *Shin-Beit Affair*, *see* DOTAN, *supra* note 8 ; *supra* note 52 and accompanying text); HCJ 5853/07 *Emunah – the Movement of National Religious Women v. The Prime Minister* 62(3) PD 445 (2007) (petition against the appointment of a minister due to a past conviction for indecency) (*translated in* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Emunah%20v.%20Prime%20Minister.pdf>); HCJ 1993/03 *Movement for Quality Government in Israel v. The Prime Minister* 57 PD 817 (2003) (petition to defeat the appointment of Tzachi Hanegbi, a Knesset member who has been investigated by the Israeli police several times, to the position of Public Security Minister) (*translated in* http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Movement%20for%20Quality%20Government%20in%20Israel%20v.%20Sharon_0.pdf); HCJ 232/16 *Movement for Quality Government in Israel v. The Prime Minister* (May 8, 2016), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (petition to defeat the appointment of Knesset member Aryeh Deri to the position of Interior Minister, after he'd been convicted of bribery while acting as Interior Minister years before) (*translated in* <http://>

the Court soon made it clear that its unreasonableness analysis may capture cases in which the candidate's behavior is tainted by some moral defect, even when such behavior does not constitute a criminal offence. For example, if a candidate for a high bureaucratic post was quoted in the media as having used racial expressions, this may be a sufficient justification to remove his candidacy, even if such expressions do not amount to a criminal offence.⁶³ Likewise, if the Court believes that the candidate was involved in behavior that is morally reprehensible (such as sexual harassment), it may interfere in the appointment even when the behavior was not considered serious enough to justify criminal charges (but was disposed of through disciplinary proceedings, etc.).⁶⁴ In a number of more recent cases, senior appointments in the IDF were challenged before the Court on the basis of expressions made by the candidate in the media, which the petitioners found to be offensive to the ideals of human rights or to other fundamental constitutional rights. While most of these petitions ultimately failed, in all of them the Court reiterated its role in ensuring that senior appointees meet its requirements for high moral standards in the public service.⁶⁵

The development of this ambitious doctrine of review over appointments and removal decisions led to a growing flow of petitions to the Supreme Court. During the last two decades, the Court has dealt with petitions against the appointments of ministers, deputy-ministers, top administrative officials, and high-ranking (or even medium-level) positions within the military, the police and other government departments.⁶⁶ Recently, judicial intervention seems to have reached another peak when the Court struck down the candidacy of three mayors of prominent cities less than one month before the municipal elections, after the AG announced that he intended to indict them for corruption. The fact that — unlike other officeholders in Israel — city mayors are elected

versa.cardozo.yu.edu/sites/default/files/upload/opinions/Movement%20for%20Quality%20Government%20in%20Israel%20v.%20Prime%20Minister1.pdf).

63 See H CJ 4646/08 Lavi v. The Prime Minister (Oct. 12, 2008), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (dismissing an attempt by the candidate to attack the disqualification decision of the Attorney General). See also FRIEDMANN, *supra* note 7, at 242-43.

64 H CJ 1284/99 Plonit v. Chief of Staff 53(2) PD 62 (1999).

65 See, e.g., H CJ 5757/04 Hess v. Deputy Chief of Staff 59(6) PD 97 (2005); H CJ 8707/10 Hess v. Minister of Defense (Feb. 3, 2011), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>.

66 See *supra* note 59.

in direct personal elections did not constitute a good enough reason for the Court to exempt them from the application of the doctrine.⁶⁷

Although most petitions against senior appointments (or refusals to remove) fail, the impact of the Court's supervision over Israeli politics and administration cannot be underestimated. In the case of prospective appointments, even if the Court dismisses the petition, it usually does so only after a thorough investigation into the facts. Moreover, the petitions are usually followed by extensive coverage in the media, which by itself may bring about the failure of the appointment due to decisions by the appointing agency to back off — in order to save itself the political costs of pursuing the process through litigation. Similarly, the appointees may prefer to withdraw in order to save themselves the embarrassment and negative publicity ensuing from the public exposure during prolonged litigation. The intensity and impact of the Court's supervision can be demonstrated by the fact that in 2011 all the leading candidates for the three top positions of IDF Chief of Staff, Chief Commissioner of Police and Chief Commissioner of the Prison Service were forced to withdraw their candidacy after allegations of financial or sexual misbehavior were published in the media, and after the AG announced that he would find it difficult to defend these appointments in Court.⁶⁸

67 H CJ 4921/13 OMETZ – Citizens for Proper Government & Social Justice v. Rochberger (Oct. 14, 2013), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (*translated in* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ometz%20%E2%80%93%20Citizens%20for%20Proper%20Administration%20and%20Social%20Justice%20in%20Israel%20v.%20Rochberger.pdf>) (hereinafter: *The Three Mayors Case*). See also H CJ 6549/13 OMETZ – Citizens for Proper Government & Social Justice v. Mayor of Bat-Yom (Oct. 20, 2013), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>. For a detailed discussion of these cases, see text accompanying *infra* note 81.

68 DOTAN, *supra* note 8, see the discussion above regarding the power of the AG to refuse representation. Interestingly enough, in none of the above cases were criminal charges issued against the relevant figures, and at least in one of the three the allegations were found to be largely without merit long after the appointment was undermined. See Edna Adato & Hadas Shteif, *The Attorney General Decides to Terminate the Investigation in the Bar-lev – Orly Innes Affair*, ISRAEL HA'YOM (Apr. 4, 2011), http://www.israelhayom.co.il/site/newsletter_article.php?id=10804; and in another the claims against the appointee were settled as a civil dispute; Sari Roth, *Too Late: Yoav Galant was cleared in the Land Affair*, BECHADREI HAREDIM (Dec. 19, 2012), <http://www.bhol.co.il/article.aspx?id=48337>. See also Avi Ashkenazi, *The Appointment of Eli Gavision for Chief Commissioner of the Prison Service Was Reversed*, NRG-MAARIV (Mar. 27, 2011), <http://www.nrg.co.il/online/1/ART2/226/312.html>.

IV. IMPEACHMENT BY JUDICIAL REVIEW – SOME QUERIES

The introduction of the ‘principle of good character’ into Israeli public law is no doubt one of the most important developments in Israeli public law during the last three decades. It has been applied by the HCJ in many dozens of cases. By enforcing this principle, the Supreme Court has ended the tenures (or foiled the appointments) of ministers, top-level bureaucrats, senior military officers and other public officials. It has shaped (or reshaped) public life and political reality in the country. It is a permanent component of the discussion of almost any political scandal in the media.

However, despite its paramount importance from both a legal and political point of view, it remains surprisingly undeveloped, even neglected, when one looks at it from a scholastic or critical point of view. The doctrine was presented in the *Eisenberg* case without detailed elaboration, and discussions among the justices as to its foundations or justifications are rare.⁶⁹ The literature that deals with it from a theoretical or comparative point of view is scant.⁷⁰ It seems that everyone in Israel (and that includes the justices, the public and even the executive branch) simply *assumes* that the practice — whereby the HCJ in judicial review removes politicians without any defined constitutional procedure or express statutory basis — is a ‘natural’ component of the rule of law, which does not require any elaborated analytical examination. This reality is astounding, in particular if one considers that — to the best of my knowledge — this practice does not exist in any other legal system, including systems of public law (such as the UK, Canada, etc.) which are roughly similar (or at least close) to Israeli law in their origins, the structure of the judiciary, and the law enforcement regime.⁷¹

69 This somewhat changed in 2013 in the *Three Mayors Cases* when the Court had to confront the ‘public trust’ rationale against the background of the extreme circumstances of these cases, see *infra* text accompanying note 81.

70 The notable exception is Friedmann’s book, see FRIEDMANN, *supra* note 7. For other academic writings that deal with some aspects of the principle, see Avigdor Klagsbald, *Tafkid Tziburi*, “Avar Plili” *Ve’Re’aya Minhaliit* [Public Office, “Criminal Record” and Administrative Evidence], 2 HAMISHPAT 93 (1995); Ariel Zemach, *The Eligibility of Felons to Hold Elective Office* (2001) (unpublished LL.M. thesis, The Hebrew University of Jerusalem); see also Amado, *supra* note 59; Bendor, *supra* note 9.

71 To the best of my knowledge, the only reference in the case law that is roughly equivalent is *Narula v. Union of India*, (2014) 9 SCC 1. There, the petitioners argued that even in the absence of any basis in the text of the Constitution or in statutory law, the Court can acknowledge an implied limitation on the right of political candidates for cabinet position or Parliament due to past criminal

The explanation for both the proliferation of this practice and the lack of serious discussion of its foundations seems to lie in the political dynamics that accompanies its application. The Court is usually called upon to intervene amid a public scandal that is heavily covered by the media, and elicits a public outcry for the resignation (or against the appointment) of the relevant officeholder. Due to the coalition structure of Israeli politics, and perhaps also due to a low sense of public accountability, Israeli politicians and other officeholders are not quick to draw conclusions and to resign of their own will after a scandal breaks out. Judicial intervention aimed at ending a tenure that is doomed is often regarded by the public as a welcome, even essential, judicial move.

Yet the above sociopolitical analysis (to which I shall return below) should not exempt this practice from a serious examination. In the following, I shall argue that the doctrinal foundations of the good character principle are shaky, that it is applied contrary to (or in disregard of) major constitutional doctrines of Israeli law, and that from a public policy point of view its benefits are questionable.

A. Shaky Normative Foundations

The impeachment of high-ranking public officials, let alone state leaders, is a process of grave importance. Normally, we assume that in democratic systems the composition of the government and its policies are formed and shaped on the basis of democratic processes through elections. Impeachment and similar

convictions. The Indian Supreme Court rejected the argument (notwithstanding the fact that almost one quarter of the candidates for political positions in recent elections won the election despite having some kind of criminal record). The Court said: “The incidence of criminalization of politics is thus pervasive making its remediation an urgent need. While it may be necessary, due to the criminalization of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by this Court.” (See *supra*, at ¶ 34). Cf. also *Niazi v. Sharif*, (not yet reported) (2017) (Pak.) (Translated in http://www.supremecourt.gov.pk/web/user_files/File/Const.P._29_2016_28072016.pdf) in which the Supreme Court of Pakistan removed prime minister Muhammad Nawaz Sharif from office following an investigation of the *Panama Papers case* (see Aeed Shah, *Pakistan Prime Minister Upgrades Probe Into Panama Papers Affair: Premier calls for a commission of inquiry made up of sitting judges, instead of retired*, WALL STREET JOURNAL (Apr. 22, 2016), <https://www.wsj.com/articles/pakistan-prime-minister-upgrades-probe-into-panama-papers-affair-1461344499>). This removal was based on the specific provisions of the Pakistani Constitution.

processes are an exception to this general rule, since they overturn the outcomes of the regular democratic process by way of trial-type proceedings. Such procedures should therefore come into force only in exceptional circumstances, and only in well-designed, carefully crafted proceedings, entrenched in some clear preexisting fundamental norms of the constitutional system. Accordingly, in many systems such procedures are elaborated in detail in the constitution or, at the very least, in primary legislation.⁷² Moreover, due to the exceptional character of such procedures and their acute interference with democratic choices, systems that have a constitutional process of impeachment often ensure the democratic accountability of the process by bestowing the power to impeach on the legislative branch (or some part of it), or on some combination of the legislature and the judiciary.⁷³

The existing practice of the Israeli Supreme Court features none of the above-described guarantees. It is based solely on judge-made law, without any reference to solid, express statutory authorization, let alone constitutional norms. In fact, if anything, this judicially made doctrine stands in contrast to the statutory law that does cover the field, because in most cases there are statutory provisions that deal specifically with the removal of public officials for cause. For example, in the case of cabinet ministers the law specifies that their tenure should end in case they have been *convicted* of felony with turpitude and imprisoned by a final verdict (i.e., after appeal).⁷⁴ As mentioned above, the judicial doctrine usually dictates court intervention immediately after *indictment* by the AG, i.e., long before the conditions stipulated by statute are met. The Court, however, bridged this gap by drawing a distinction between what the relevant authority (in the case of ministers, the Prime Minister (PM))⁷⁵ ‘must’ do, and what he is *authorized* to do. Accordingly, in case of conviction and imprisonment, the PM *must* fire the condemned minister by statute. However, since the PM is authorized by law to remove the minister (for any reason), an indictment means that the PM should execute his responsibility, for otherwise his inaction would amount to unreasonableness.⁷⁶

72 See *supra* note 15.

73 Ray et al, *supra* note 14, § 22-24.

74 Basic Law: The Government, *supra* note 58, § 6(c)(2)

75 *Id.* § 21A.

76 See H CJ 6163/92 Eisenberg v. The Minister of Building and Housing 47(2) PD 229 (1993), ¶ 37-38. (opinion of Barak J.):

[T]he Appointments Law... does not include provisions about the appointment of an employee with a criminal past. It does not contain any provision restricting the Government’s power of appointment, or disqualifying a person from being appointed as a civil servant if he has a criminal past... Notwithstanding, we must distinguish between questions of competence (or

The above line of reasoning — which is fundamental to the whole jurisprudence of the ‘principle of good character’ — seems to be questionable at best. First, as argued above, the impeachment of public officials (let alone elected officials) is a matter of great constitutional significance. Accordingly, courts should be extremely cautious in developing a doctrine in this field of judge-made law without any reference to clear constitutional or statutory norms. Second, the statutory provisions that do regulate the removal of public officials are specific and explicit. It seems quite difficult to accept that when the legislature has set a specific procedure and specific threshold requirements for removal, those provisions should be read as enabling the judiciary to supplement (and in fact circumvent) the statutory threshold with a different, judge-made one. Lastly, according to the accepted canons of interpretation, statutory provisions should be interpreted in accordance with the need to defend fundamental human rights. As we shall see, the removal of public officials (in particular elected officials) is an infringement on the fundamental democratic rights (such as the right to elect one’s representatives and to be elected).⁷⁷ Therefore, even if the statutory framework were ambiguous or lacking, it is hard to see how the Court would be entitled to fill in the gaps — contrary to the requirement that statutes be read in favor of human rights.

authority) and questions of discretion. The absence of an express statutory provision regarding the disqualification of someone with a criminal past establishes the candidate’s competence, but it does not preclude the possibility of considering his past within the framework of exercising the administrative discretion given to the authority making the appointment.

See also, HCJ 5853/07 Emunah – the Movement of National Religious Women, ¶ 13 (Dec. 6, 2007), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (opinion of Procaccia J.):

Compliance with the minimal qualifications provided by law for the purpose of an appointment to public office or the inapplicability of statutory restrictions to such an appointment still leaves the authority making the appointment with a duty to exercise discretion with regard to the propriety of the appointment. Compliance with formal qualifications for holding a position does not necessarily mean that a candidate is suited to a public office in various respects, including in terms of his personal and moral level and in terms of his basic decency. The authority making the appointment should exercise its discretion with regard to the appointment in accordance with the established criteria of public law; its considerations should be relevant, fair and made in good faith, and they should fall within the margin of reasonableness.

HCJ 1993/03 Movement for Quality Government in Israel v. The Prime Minister 57 PD 817, 312 (2003); HCJ 232/16 Movement for Quality Government in Israel v. Prime Minister of Israel (Aug. 5, 2016), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>.

⁷⁷ *See infra* text accompanying note 93.

B. Democracy – The Tormented Concept of ‘Public Trust’

I pointed above to the fact that judicial intervention to remove public officials from their positions — based on a judicially created concept — does not easily resonate with principles of self-government and democratic accountability. Paradoxically, however, the main rationale that the Court provides for the principle of good character is based on democratic aspirations. Judicial decisions that resort to the principle seldom elaborate the rationales for the doctrine or its relations to other principles of public law. One point that the Court always does emphasize, however, is that its intervention is essential to protect the public’s trust in government.⁷⁸ The doctrine assumes that an official’s continuation in public tenure amidst serious allegations of corruption may be immediately damaging to public trust. Hence, the Court cannot wait until the official is tried and convicted by a final verdict, since the very continuation of his tenure amidst the mounting scandal would severely impair public trust in governmental institutions.⁷⁹

The rationale of defending public trust as the basis for the principle of good character seems to carry strong intuitive appeal. If an officeholder sticks to his position despite mounting allegations in the media, investigations and indictments, the Court’s assumption that such behavior is detrimental to public trust does not seem far-fetched. This is particularly the case in Israel, since criminal investigations and proceedings may last several months or

78 See H CJ 6163/92 *Eisenberg*, at ¶ 46: “Without public trust Government authorities cannot function...” (citing H CJ 727/88 *Awad v. Minister of Religious Affairs* 42(4) PD (1988)); H CJ 5853/07 *Emunah* ¶ 32 (opinion of Procaccia J.):

This examination is bound up with the question whether public confidence in the person holding office and the government may be significantly impaired by the appointment. An improper act always depends upon the circumstances, and it should be assessed and evaluated against a background of the conditions in which it was committed and in view of an overall examination of the qualities of the candidate, his personal and professional record, and the needs of the governmental network in which he is being asked to serve

H CJ 4921/13 *OMETZ – Citizens for Proper Government & Social Justice v. Rochberger*, ¶ 10 (Oct. 14, 2013), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (*translated in* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ometz%20%E2%80%93%20Citizens%20for%20Proper%20Administration%20and%20Social%20Justice%20in%20Israel%20v.%20Rochberger.pdf>) (opinion of Arbel J.): “Without public trust, public authorities would be hard-pressed to perform their duties and the entire democratic structure would be eroded.”

79 See H CJ 6163/92 *Eisenberg*.

even years, until a final judicial verdict. Nonetheless, a careful examination of the way in which this rationale has been applied raises serious questions.

First, it is not at all clear from the case-law whether the judicial desire to defend public trust is based on some real-life, *empirical* analysis, or whether it is some kind of moral desideratum that the Court would resort to *regardless* of any empirical evidence to the contrary. Accepting the latter possibility means that the good character principle is no more than a judge-made moral requirement, enforced on the democratic system with no solid basis in legislation, thus raising serious questions of democratic legitimacy.⁸⁰

Not surprisingly, then, the Court seemed to stick to the first option when it initially introduced the principle. It is clear from the *Eisenberg* case that when the Court discussed the danger to public trust it envisaged an actual, factual decline (even collapse) of public trust in government that would take place if the offenders were allowed to hold public positions.⁸¹ The Court could convincingly sustain this line of reasoning early on, in particular with regard to the application of the doctrine to unelected officials. However, as the doctrine was expanded to political figures and elected officials, it became increasingly difficult to refer to public trust as an empirical construct. The opinions of the Court began to fluctuate considerably between an empirical and a normative concept of ‘public trust.’⁸²

80 See FRIEDMANN, *supra* note 7, at 152, arguing that “...the court appointed itself as the nation’s pedagogue...” See also discussion *supra* accompanying note 70.

81 HCJ 6163/92 *Eisenberg*. Similar references to the danger to public trust as an empirical conjuncture can be found in many other cases, see, for example, HCJ 5853/07 *Emunah* ¶ 14, 32 (“This examination is bound up with the question whether public confidence in the person holding office and the government may be significantly impaired by the appointment.”) (opinion of Procaccia J.); HCJ 1993/03, *Movement for Quality Government*, Cheshin J. dissenting, at ¶ 27:

The duty of trusteeship owed by the Prime Minister and other ministers is inextricably linked to public confidence in the government. A trustee who behaves appropriately wins trust; a trustee who does not live up to the required standards will not enjoy the public’s confidence. The government needs the trust both of the Knesset and of the public as a whole. If it behaves as a trustee should, it becomes the repository of public confidence. Where the government betrays its trusteeship, public confidence in the government is shattered, and the Court will intervene.

HCJ 1400/06 *The Movement for Quality Government in Israel v. The Prime Minister Deputy* (Mar. 6, 2006), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> ¶ 9-11 (opinion of Rivlin J.).

82 HCJ 5853/07 *Emunah*. While Justice Procaccia (¶ 20 & 32) sticks to the concept of public trust as an empirical conjuncture, Justice Arbel (dissenting) is much less consistent and discusses ‘public trust’ in the context of balancing between

The tension between the good character principle and democratic accountability reached its peak in the *Three Mayors Cases*.⁸³ There the Court was called upon to remove three mayors of prominent cities against whom the Attorney General had decided to bring criminal charges for fraud, bribery and breach of trust. One reason for the heightened contrast between the doctrine and democratic accountability was the fact that, unlike other officials and officeholders in Israel, city mayors are elected directly by the public on a personal basis. No less important, however, was the timing of the judicial intervention. The allegations in the press against all three mayors had lingered for years before the indictment, and the police investigation against them was ongoing for many months.⁸⁴ The AG, however, decided to issue the indictment about one month before the municipal elections in which all three mayors were running for reelection. Accordingly, the case raised serious questions regarding the relationship between the principle of good character and representative democracy. One question was whether the Court should apply the doctrine to directly elected officials. The Court answered this question affirmatively. However, this raised another, even more serious question: on the one hand, the Court removed the mayors one month before the upcoming elections (by ordering the relevant city councils, which hold the power to remove them, to do so). On the other hand, the Court had no authority to stop the mayors from running for reelection. Accordingly, the names of all three were on the ballots (and they showed no willingness to voluntarily give up their right to rerun).

Besides the confusing message that the Court's decision conveyed to the general public, this peculiar scenario posed a serious challenge, then, to the ability of the Court to justify its intervention by resorting to 'public trust.' After all, the public trust in the mayors was about to be tested in democratic elections just a few weeks following the Court's decision, and the justices were well aware that all three incumbents had good chances of being reelected despite their intervention.⁸⁵ How could the Court claim that it was stepping in to preserve public trust if the relevant public were to decline the judicial interference and reelect the removed mayors? In short, to the extent that 'public trust' served the Court as an empirical assumption, the peculiar facts of the

the need to "allow the public to be represented as it wishes...and the need to preserve the public confidence in government institutions and *the proper moral standards of elected representatives*" (*supra*, at ¶ 18, emphasis added).

83 *Supra* note 67.

84 See, for example, Eli Senior, *Police Raid over the Home of the Mayor of Bat-Yam*, YNET (Dec. 28, 2009), <http://www.ynet.co.il/articles/0,7340,L-3826086,00.html>; Walla News Desk, *The Police: Mayor of Upper Nazareth Should Be Indicted*, WALLA NEWS (Mar. 28, 2011), <https://news.walla.co.il/item/1810069>.

85 In fact, all three mayors were indeed reelected.

case posed a serious challenge to the Court's ability to consistently hold to this assumption. In any case, this scenario forced the Court to confront directly the question of the true meaning of 'public trust' in this context.

Indeed, the opinions of the justices on the bench well reflected these difficulties. Some of the justices adhered to the concept of public trust as empirical. They acknowledged the fact that the public may ignore the judicial condemnation of the mayors and reelect them. While lamenting the fact that the public often has "only one eye open, while the other is closed" in the face of corruption, they explained that the public may have other considerations in mind when casting its vote.⁸⁶ Accordingly, the judicial intervention may still be justified 'to correct' the public 'mistakes' in this respect.⁸⁷ For these justices, then, the Court in essence knew better than the public what is essential for preserving the public's own trust in its representatives. Other opinions held that 'public trust' is still an empirical construct, but such that is not specifically related to the view or level of trust of any specific group of voters. Rather, it is a broader notion of the trust of the general public in government.⁸⁸ The Deputy Chief Justice, Justice Rubinstein, however, openly admitted that the Court could no longer retain the 'public trust' conception as an empirical presumption. Accordingly, he called for the complete abandonment of public trust as the rationale for the doctrine.⁸⁹

86 This assumption receives some support in the literature on corruption, which points to the fact that under some conditions voters may be willing to continue to lend their support to politicians despite revelations of corruption, see, for example, Oskar Kurer, *Why Do Voters Support Corrupt Politicians*, in *THE POLITICAL ECONOMY OF CORRUPTION* 63 (Arvind K. Jane ed., 2001); Luigi Manzetti & Carole J. Wilson, *Why Do Corrupt Governments Maintain Public Support*, 40 *COMP. POL. STUD.* 949 (2007).

87 See HCJ 4921/13 *OMETZ – Citizens for Proper Government & Social Justice v. Rochberger* ¶ 6 (opinion of Zilbertal J.), ¶ 10 (opinion of Arbel J.) (Oct. 14, 2013), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (*translated in* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ometz%20%E2%80%93%20Citizens%20for%20Proper%20Administration%20and%20Social%20Justice%20in%20Israel%20v.%20Rochberger.pdf>).

88 See HCJ 4921/13 *OMETZ* (opinion of Hayut J., at ¶ 3; opinion of Arbel J., at ¶ 6-7).

89 *Id.* at opinion of Rubinstein J., at ¶ 10: "I would have been overjoyed were we able to come together around 'an agreed public trust'... as an 'objective public trust' of sorts, but ultimately this goal simply falls under the trust of the Court who is setting the standard – and what if the public should re-elect the person in question, can we then continue to speak of the 'public's trust'? I, myself, would, therefore, avoid using the expression regarding public trust in our case...".

The *Three Mayors Case* does not mark the end of the use of public trust as the rationale for the good character principle, nor do the facts of the case demonstrate that one cannot develop a concept of public trust that provides some support for the current doctrine. What the case does demonstrate, however, is that the development of the doctrine was entirely based on judicial intuition and moral sentiment rather than on solid, coherent, legal analysis. As we shall see, this incoherence persists when one examines the principle of good character in relation to other principles of public law.

C. The Presumption of Innocence and the Interface with the Criminal Process

One of the arguments raised against the principle of good character is that the development of the principle infringes upon the presumption of innocence. This is because the principle, as applied by the Court, enables administrative agencies (or the judiciary) to remove an officeholder, who is suspected of having committed an offence, long before she is convicted in trial. The Court dismissed this argument at a very early stage.⁹⁰ It pointed to the fact that removal from office is not a criminal conviction, but rather an administrative move designed to protect the integrity of the public service and the quality of the people serving in governmental positions. An accepted principle of public law is that an administrative action need not be based on evidence beyond doubt, but rather on ‘reasonable’ or ‘substantial’ evidence.⁹¹ Accordingly, removal decisions, like any other administrative decision, can be based on substantial evidence and need not meet the threshold of criminal conviction.⁹²

This line of reasoning may serve as an answer to the specific objection regarding the presumption of innocence. It seems, however, to neglect two important factors. First, it ignores the fact that in most cases of removal, statutory law specifically provides for removal only after conviction. This means that the legislature, after balancing the relevant considerations, chose

See also id. (opinion of Hendel J., at ¶ 3): “I will note that I do agree with the President that the factor of the public’s trust – *certainly as an empirical factor – is irrelevant to the decision*” (emphasis added).

90 *See* HCJ 4267/93 Amitai, Citizens for Good Government and Integrity v. Prime Minister 47(5) PD 441(1993).

91 *See* HCJ 442/71 Lanski v. Minister of the Interior 26(2) PD 337, 357 (1972); HCJ 987/94 Euronet v. Minister of Communication 48(5) PD 412 (1994) ¶ 10 (opinion of Zamir J.).

92 For a (roughly) similar test of ‘substantial evidence’ in U.S. administrative law, see, for example, *Universal Camera Corp. v. NLRB.* 340 U.S. 474 (1951); *Dickinson v. Zurko,* 527 U.S. 150 (1999).

to preserve in essence the presumption of innocence in removal cases — a choice that the Court ignores. Second, the judicial approach ignores the wide-ranging effects of the principle of good character on the integrity of the criminal process in general.

One of the central features of the rule of law is that criminal proceedings are conducted by a court of law that is autonomous and independent from governmental pressures or any influences of the political system.⁹³ The reality created by the massive intervention of the Supreme Court in the removal of officials casts a shadow on the integrity of the criminal process for a number of reasons. *First*, criminal processes are conducted (usually in the lower courts) after the Supreme Court (sitting as the HCJ) has already ruled — in the course of the removal — on issues related to the validity of the accusations and the weight of evidence against the indicted official. Indeed, the HCJ has emphasized that when it orders removal, it only examines the quality of the *prima facie* evidence against the relevant officials, and its rulings are not binding on the criminal court before which the criminal trial takes place. It would be naïve, however, to think that the lower court that disposes the criminal charges is capable of completely ignoring a decisive decision by the HCJ on the matter before it.

Second, the current doctrine of the HCJ produces a reality in which the most important phase in the criminal proceedings is the indictment, because an indictment will almost certainly bring about judicial intervention for removal.⁹⁴ This means that the decision to indict by the AG signals the end

93 See JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O'Brien eds., 2001); JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002); Julio Rios-Figueroa & Jeffrey K. Staton, *An Evaluation of Cross-National Measures of Judicial Independence*, 30 J. L., ECON. & ORG. 104 (2012).

94 In principle, the removal decision is always the product of an *ad hoc* balancing of the specific circumstances. The decisions of the Court over the years, however, suggest that indictment is the crucial phase in triggering judicial enforcement of the removal. The most prominent demonstration of this is the case of Tzachi Hanegbi, who has served as a minister in several governments during the last two decades. He has been subject to investigations for several allegations of misbehavior and sleaze and has been on the verge of being indicted in some cases. The Movement for Quality of Government petitioned the Court five times over the years to bring about his removal. While the justices were split in some of these cases, all the attempts to enforce removal ultimately failed. See HCJ 2533/97 Movement for Quality Government in Israel v. The Government of Israel 51(3) PD 46 (1997); HCJ 1993/03 Movement for Quality Government in Israel

of the tenure (and in many cases the end of the public career) of the official or politician involved. Since the indictment carries such grave — and often irreversible — consequences, it puts enormous pressure on the prosecution to achieve a conviction. Otherwise, in case of acquittal, the AG and the OAG may face accusations of unwarranted interference with the political process and unjustified prosecution of public figures for political or otherwise illegitimate motives. The experience of the two last decades suggests that such pressures led to improper practices by the OAG in criminal proceedings against top-level politicians, which ended up in allegations against and investigations of the OAG and a decline of public trust in the office.⁹⁵

Lastly, the doctrine of good character brings about a distortion of the criminal process in an additional way. According to the doctrine, a decision to indict a public official entails (in most cases) removal. The removal decision itself should be based on a ‘balancing’ of conflicting considerations — some of which are related to the criminal process, e.g., the nature of the allegations, the strength of the evidence, etc., but others have nothing to do with it. These considerations include ‘political’ factors such as the impact of the decision on the political process, the time lag between the indictment and elections (that may end the tenure of the official in any case), etc.⁹⁶ This means, in essence,

v. The Prime Minister 57 PD 817 (2003); H CJ 8192/04 Movement for Quality Government in Israel v. The Prime Minister, 59(3) PD 145 (2004); H CJ 1400/06 Movement for Quality Government in Israel v. The Prime Minister Deputy (Mar. 6, 2006) Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>; H CJ 3997/14 Movement for Quality Government in Israel v. The Minister of Foreign Affairs (Feb. 12, 2015), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>.

95 The most notable example is the case of Haim Ramon who was indicted for committing an indecent act and forced to resign from his post as Minister of Justice. The practices used by the OAG and the police in this case drew strong public criticism and calls for investigations of the OAG. For a detailed description, see FRIEDMANN, *supra* note 7, at 284-302.

96 See H CJ 5853/07 Emunah – the Movement of National Religious Women v. Prime Minister 62(3) PD 445 (2007) (opinion of Procaccia J., at ¶ 17, 21-27; Arbel J., dissenting at, ¶ 20). See Justice Grunis (¶ 7) criticizing the Court for what he regards as a futile attempt to ‘balance’ between political and rule of law considerations. See also H CJ 4921/13 OMETZ – Citizens for Proper Government & Social Justice v. Rochberger ¶ 38 (Oct. 14, 2013), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (*translated in* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ometz%20%E2%80%93%20Citizens%20for%20Proper%20Administration%20and%20Social%20Justice%20in%20Israel%20v.%20Rochberger.pdf>) (opinion of Naor J.); H CJ 1400/06 *Movement for Quality Government*, ¶ 18 (opinion of

that the principle of good character inadvertently requires prosecutorial officials to take into account all kinds of political considerations that have nothing to do with the original framework of the criminal process. In other words, it requires prosecutors to take into account non-prosecutorial considerations because they know that the prosecutorial decision bears direct consequences for the continuation of the tenure of the relevant officeholder. Here again, the blurring of the lines between the criminal process and the political process has undesirable consequences for both.

D. The Disregard of Constitutional Principles and Human Rights

The doctrine of good character stands as a notable outlier in Israeli public law, since it has been developed in a way that largely ignores considerations of human rights and related doctrines, which are paramount in every other field of Israeli public law. A decision to remove an officeholder carries potential infringement of human rights. These include fundamental democratic rights, such as the right to vote for one's representatives and the right to be elected.⁹⁷ This is particularly the case when the removal applies to elected officials such as cabinet ministers or city mayors.

Under Israeli constitutional law, the infringement of any basic human right must meet certain requirements, including clear statutory authorization, a worthy purpose and proportionality — all entrenched in the provisions of the Basic Law: Human Dignity and Freedom.⁹⁸ The Court applies this combined framework of legality and proportionality across the board in any case of infringement of human rights.⁹⁹ Not so in the case of the good character principle. Indeed, the Court has heard and dismissed the arguments against

Rivlin J.); H CJ 3997/14 *The Movement for Quality Government* ¶ 34 (opinion of Grunis Chief J.).

97 See, e.g., H CJ 4267/93 Amitai, *Citizens for Good Government and Integrity v. The Prime Minister* 47(5) PD 441(1993) ¶ 61 (opinion of Barak J.); H CJ 4921/13 *OMETZ*, at ¶ 67 (per Chief Justice Naor).

98 Basic Law: Human Dignity and Liberty, § 8. https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

99 SUZIE NAVOT, *THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS* 61 (2014); Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, 57 *McGILL L.J.* 781, 785 (2012); Miriam G. Arye & Thomas Weigend, *Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives*, 44 *ISR. L. REV.* 63, 67 (2011). For an elaborated description of the way the Israeli Supreme Court addresses the human rights which are considered constitutional (even if not mentioned in the Basic Laws), see AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

removals based on the infringement of democratic rights.¹⁰⁰ But it has never referred to the general constitutional framework while doing so. Instead, the Court has applied the principle of reasonableness, which normally serves for regular administrative cases that do not involve infringements of human rights.

Had the Court applied the regular constitutional framework in removal cases, it seems that it would not have had much difficulty meeting the abovementioned requirements of legal authorization, worthy purpose and proportionality (at least in most cases). However, the fact that the Court did not even bother to do so — as it does in any other human rights case — points to the anomalous nature of the doctrine. It also buttresses the impression that the doctrine has been laid and developed more on the basis of judicial guts and intuitions rather than on solid analytical legal reasoning.

E. Enforcing Bare Morality on Governmental Processes

So far, I have focused mainly on the Court's intervention in appointments and removals on the basis of criminal indictments. In fact, however, the development of the good character principle has gone far beyond this. The doctrine, as developed, did not set a clear line past which a removal is obligatory or an appointment forbidden. Instead, the Court adopted a flexible and vague balancing methodology, according to which the relevant authority is required to balance *ad hoc* all relevant considerations. This means that in essence, even if there is no indictment against the official, and even if his behavior is not criminal in nature, in principle, the doctrine may still be applied to effect removal because the balance of considerations (including the improper behavior) renders the continuation of his tenure unreasonable.

The Court has applied this approach in particular to block appointments. Examples are numerous. In one case, the Court struck down the promotion of a high-ranking military officer to the rank of Major General because he had been disciplined by a military tribunal for improper behavior (due to having a sexual relationship with a woman soldier under his command). The Court, however, did not interfere with his promotion to the command of a larger unit, since the 'balancing' — in the Court's view — did not reach beyond the aspect of rank.¹⁰¹ In another case, the Court was called upon to interfere in the appointment of General Dan Halutz to the position of Chief of Staff of the IDF, due to one sentence that Halutz said during an interview in the press, from which it could be understood that he did not sufficiently respect

100 See *supra* note 95.

101 H CJ 1284/99 Plonit v. Chief of Staff 53(2) PD 62 (1999). See FRIEDMANN, *supra* note 7, at 149-50.

the duty to preserve the life of civilians during military operations.¹⁰² The Court dismissed this petition, but not before Halutz was forced to provide a lengthy affidavit with a courteous apology.¹⁰³ Many dozens of appointments of military commanders, high-ranking officials and cabinet ministers have been dragged into court on the basis of similar contentions, not a few of which were frustrated by a court order.¹⁰⁴

This moralistic doctrine has a huge impact on governmental appointments in Israel, which goes far beyond what the Court's decisions themselves reveal, for two main reasons. First, appointment decisions, let alone those involving some kind of scandal (financial, sexual, etc.), are made amidst a huge storm in the media. This puts enormous pressure on the decision-makers, which is amplified by the judicial process. Even in the earlier stages of the litigation, any remark off the bench draws huge media attention and intensifies the pressure on the appointing agency. Attempts by the candidate or the appointing authority to argue that the allegations are inaccurate, baseless, or that the candidate's other qualities compensate for them, are doomed to being lost in the public storm that is magnified by the (often preliminary and exaggerated) inputs of the legal system.

Second, and correspondingly, the doctrine is not applied only by the Court itself, but also by the legal apparatus of the government, i.e., the AG. I mentioned above that the AG holds the power to refuse to represent the government in court, and that his opinions are binding on all agencies.¹⁰⁵ In fact, due to the huge public storms under which appointment proceedings take place, the AG need not even officially refrain from defending the appointments. It suffices, in many cases, if he announces that he 'finds difficulties' in the appointment, or that he needs to 'thoroughly study' the allegations against the appointee — this will usually bring about an immediate decision by the candidate or by the appointing authority to save itself the expected ordeal and back off.¹⁰⁶

102 H CJ 5757/04 Hess v. Deputy Chief of Staff 59(6) PD 97 (2005). See FRIEDMANN, *supra* note 7, at 150.

103 H CJ 5757/04 Hess.

104 See, e.g., H CJ 8707/10 Hess v. Minister of Defense (Feb. 3, 2011), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (attacking the appointment of Yair Nave as Deputy Chief of Staff); H CJ 6770/10 The Green Party v. Government of Israel (Feb. 7, 2011), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx> (attacking the appointment of Yoav Galant as Chief of Staff). See FRIEDMANN, *supra* note 7, at 150. See also *supra* notes 62 & 64.

105 See *supra* notes 46-47 and accompanying text.

106 See, for example, in the case of the appointment of Yoel Lavi for General Manager of the Land Authority, H CJ 4646/08 Lavi v. The Prime Minister (Oct.

Thus, a large number of top appointments in Israel, including those of the IDF Chief of Staff and the Police Commissioner in 2011, have been frustrated, on the basis of allegations that at a later stage were found to be either baseless or much milder than as initially portrayed (i.e., noncriminal).¹⁰⁷

The expansion of the judicial supervision from purely criminal allegations to all kinds of disciplinary, administrative or purely ‘moral’ allegations seems to be the result of two main factors. The first is the inadvertent, casuistic way in which the doctrine was developed under the flexible umbrella of balancing and reasonableness. The second is the fact that cases reach the court amidst a public storm in which more allegations and news about the candidates’ deeds are published. This atmosphere of ‘moral panic’ serves as a fertile ground for more moralistic and purist expressions from the justices, which serve to push the doctrine further, and so on.¹⁰⁸

V. DISCUSSION

When one looks at the history of the development of the principle of good character over the last three decades, one cannot ignore some fundamental realities. A significant number of officeholders in critical positions (such as the Minister of Justice or the Minister of Public Security), some of whom had been considered critics of the activist disposition of the judicial apparatus, have been removed from office by virtue of this doctrine (thus exerting, at the very least, a significant chilling effect against criticism of the judicial establishment).¹⁰⁹ In some cases, these removals were based on light or even petty offences, many of which ended up being determined as baseless or as

12, 2008), Israel Supreme Court Database (in Hebrew), <https://supreme.court.gov.il/Pages/fullsearch.aspx>. See also *supra* note 67. For the frustration of the various appointments (or removals) of ministers, see FRIEDMANN, *supra* note 7, at 214-19.

107 See *supra* note 68.

108 See Nachman Ben Yehuda, *The Sociology of Moral Panic: Towards a New Synthesis*, 27 Soc. Q. 495 (1986); Erich Goode & Nachman Ben Yehuda, *Moral Panics: Culture, Politics and Social Construction*, 20 ANNUAL REV. SOCIOLOGY 149 (1994). See also YOSSEI SHAIN, SFAT HASHCHITUT VE'TARBUT HAMUSAR HA'ISRAELI [WHO CONTROLS MORALITY IN DEMOCRACIES: THE LANGUAGE OF CORRUPTION AND ITS CONSEQUENCES] (2010) (Isr.), translation in WHO CONTROLS MORALITY IN DEMOCRACIES: THE LANGUAGE OF CORRUPTION AND ITS CONSEQUENCES (unpublished manuscript) (on file with Cambridge University Press).

109 See *infra* discussion accompanying note 114.

justifying a sanction much lighter than the statutory threshold for removal.¹¹⁰ To summarize the overall impact of this doctrine, suffice it to mention that all six recent Prime Ministers of Israel were subject to lengthy police investigations (and accordingly to the threat of removal), although so far only in one case did the investigation yield an indictment.¹¹¹

There is hardly a more telling example of this state of affairs than the situation of the current Prime Minister, Benjamin Netanyahu. Netanyahu is, to date, the PM with the longest tenure in Israeli history. He is also considered the most powerful politician in Israel for decades. He faces hardly any serious competition within his party (the Likud), and even less so from any opposition party. Netanyahu, however, was subject to prolonged police investigations during his first tenure as PM in the mid-1990s (which did not yield an indictment). He has also been subject to numerous investigations during his fourth and current tenure. In both cases, most of the offences related to him are relatively light and refer largely to his hedonist style of living or to some tricky moves with regard to the media market, the criminal nature of which is dubious.¹¹²

110 For a description of the removal of Yaakov Neeman from the position of Minister of Justice, see FRIEDMANN, *supra* note 7, at 214-15; For the removal of Avigdor Kahalany (Minister of Internal Security) and Refael Eitan (a candidate for the same position), see FRIEDMANN, *supra* note 7, at 216-17 (all three cases ended in acquittals). Similarly, a police investigation struck down the candidacy of Reuven Rivlin (currently the President of Israel) for Minister of Justice. The investigation did not yield any indictment, see FRIEDMANN, *supra* note 7, at 221-22.

111 See FRIEDMANN, *supra* note 7, at 218-21.

112 Allison Kaplan Sommer, *Bibi's Baggage: A Guide to the Criminal Investigations Casting a Shadow on Netanyahu's Trump Meeting*, HA'ARETZ (Feb. 14, 2017), <http://www.haaretz.com/israel-news/.premium-1.771514>; Eliyahu Kamisher, *Netanyahu Investigation Entering Final Stages*, THE JERUSALEM POST (Mar. 6, 2017), <http://www.jpost.com/Israel-News/Benjamin-Netanyahu/Netanyahu-investigation-entering-final-stages-483348>; Oren Liebermann, *Netanyahu's Criminal Investigation Drags on into the Summer*, CNN (May 10, 2017), <http://edition.cnn.com/2017/05/09/middleeast/netanyahu-criminal-probe/index.html>; Stuart Winer, *Netanyahu Gifts Investigation to Drag on Until Autumn – Report*, THE TIMES OF ISRAEL (June 15, 2017) <http://www.timesofisrael.com/netanyahu-gifts-investigation-to-drag-on-until-autumn-report/>. Recently, however, the police began to investigate allegations that during 2015-2016 Netanyahu, who serves also as Minister of Communications, gave regulatory favors to a media tycoon (Shaul Alovitz) in return to favorable media coverage in a major internet hub that was owned by Alovitz (see Amitai Ziv, *Exposure: The Document at the Heart of File 4000 – The Permit that Netanyahu Issued Arranged Huge Benefit to Alovitz* (Mar. 1, 2018) <https://www.themarket.com/technation/1.5865421>).

As these lines are being written, there is only one person that seems to be able to end the political career of Netanyahu: it is the Attorney General (and he is answerable only to one organ in the state: the Supreme Court). Accordingly, the whole political discussion regarding the continuation of Netanyahu's tenure — instead of dealing with his policies, etc. — revolves around the expected moves of the legal system. As a result, instead of demonstrating against the government's policies, opposition demonstrations in Israel currently focus on the AG as their principal target.¹¹³

There is no doubt in my mind that the principle of good character was developed by the Israeli judiciary due to a genuine concern for the integrity of public service and politics in the country. There is also little doubt that judicial intervention has been the reaction to an unhealthy political culture with a weak appointments system and lacking a sense of accountability of officeholders, who are slow to give up their seats even in the face of serious allegations or findings of wrongdoing.¹¹⁴ As described above, due to both structural and cultural features, there is a low degree of accountability in the Israeli political system.¹¹⁵ Not surprisingly, the general public often applauds the Court when it steps in to 'correct' the failings of the political system. The end product of this judicial creativity is, however, a state of affairs under which the political and bureaucratic systems live under constant threat of intervention by the legal apparatus to end the public career of any officeholder. This threat is exerted by a flexible and somewhat opaque legal doctrine, the exact parameters and counters of which depend largely on the discretion of the organ that applies it (i.e., the AG or the Court) and on an *ad hoc* basis. Moreover, even though the judicial system does not see this doctrine as a threat directed at the political branches, there is hardly any doubt that the political apparatus is well aware of it.¹¹⁶

113 Oded Shalom, *From A Small Petah Tikva Square to A Nationwide Protest*, YNET (July 10, 2017) <https://www.ynetnews.com/articles/0,7340,L-4987006,00.html>; Raviv Drucker, *And Israel's Attorney General Remains Silent*, HA'ARETZ (May 30, 2017) <http://www.haaretz.com/opinion/.premium-1.792655>; Yonah Jeremy Bob, *Is The Right to Protest Diminishing in Israel?*, THE JERUSALEM POST (June 10, 2017), <http://www.jpost.com/Israel-News/Is-the-right-to-protest-diminishing-in-Israel-496407>.

114 See Amado, *supra* note 59, at 576.

115 See discussion *supra* text accompanying note 70.

116 For a discussion of the possible criminalization of a ministerial refusal to obey the advice of the AG, see FRIEDMANN, *supra* note 7, at 251. For a description of the fear Israeli ministers feel towards the AG, see DANIEL FRIEDMANN, *THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL'S LEGAL REVOLUTION* 581 (2013).

I should reiterate and emphasize that I am not claiming that this state of affairs is the result of any pre-plan, and I am certainly not espousing any ‘conspiracy theory’ in that respect. The judicial doctrine here discussed was developed on the basis of legal principles and as a reaction to many ‘hard cases’ brought before the Court. The Court has applied it evenhandedly against various officeholders regardless of their political affiliations. All this, however, does not change the bottom line. The doctrine constitutes a powerful check wielded by the judicial branch over the political branches. As such, it also serves as a powerful ‘balance’ which helps the judiciary to preserve its autonomy and current status within Israeli politics. Unlike in Chekhov’s famous saying, the gun that is presented by the legal apparatus in the first act does not have to shoot in the third act. That the gun is always present is enough.

Moreover, even if one is unwilling to acknowledge any link between the removal practice and the actual balance of power between the judiciary and the political branches, there can hardly be any doubt that this doctrine dramatically influences the public image of the Court *vis-à-vis* the political branches. Judicial institutions depend heavily on the support of the general public, as courts always try to preserve this ‘reservoir of good will’ in public opinion in order to maintain their status in the political arena.¹¹⁷ The Israeli Supreme Court has suffered a continuous decline in public support during the last two decades. This decline can be related, at least in part, to the Court’s continuing willingness to counter majoritarian policies that infringe on fundamental rights of minorities (particularly in the context of the Israeli-Palestinian conflict).¹¹⁸ While counter-majoritarian decisions may contribute

117 See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZEN, COURTS AND CONFIRMATIONS 38, 42 (2009).

118 See, e.g., H CJ 390/79 Dawikat v. Government of Israel 34(1) PD 701 (1979), translated in http://www.hamoked.org/files/2010/1670_eng.pdf; H CJ 2056/04 Beit Sourik Village Council v. The Government of Israel 58(5) PD 807 (2004), translated in http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf; H CJ 9593/04 Morar v. IDF Commander in Judaea and Samaria 61(1) PD 844 (2006), translated in <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Morar%20v.%20IDF%20Commander%20in%20Judaea%20and%20Samaria.pdf>; H CJ 7957/04 Mara’abe v. The Prime Minister of Israel, 60(2) PD 477 (2005), translated in <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Mara%27abe%20v.%20Prime%20Minister.pdf>; Orly Rachmilovitz, *The Israeli Supreme Court on Military Demolition of Palestinian Homes*, VERSA

to the decline in the Court's public status, other decisions may improve its public image.¹¹⁹ The Court's decisions in the field of 'good character' usually enjoy massive public support. They enable the Court to present itself as an unbiased and brave combatant against governmental corruption. At the same time, these decisions highlight the political sleaze and corruption within the other branches. As such, the doctrine of good character enables supporters of judicial empowerment to depict any discussion of the place of the judiciary in the public sphere as part of the struggle against corruption.

CONCLUSION

The term 'checks and balances' may refer to the formal constitutional arrangements that define the relationships between the different branches in a democratic system. From a wider, and less formalistic perspective, however, this term may also encompass a broader net of informal legal and political arrangements that are not always easy to detect from the text of the constitution. In reality, the relationships between the different powers in a democracy depend not only on formal, constitutional provisions, but also on this delicate array that combines legal doctrine with subtle bureaucratic practices and sociopolitical conventions. When one looks for the true balance of political power, one cannot ignore the latter type of checks and balances.

In this Article, I have pointed to the notable gap between the prominent position that the judiciary enjoys in Israeli politics and the seemingly fragile guarantees of judicial autonomy that are found in the formal constitutional arrangements. I have sought to fill this gap by describing the development and application of the idiosyncratic principle of good character during the

(Jan. 17, 2016), <http://versa.cardozo.yu.edu/viewpoints/israeli-supreme-court-military-demolition-palestinian-homes>.

For a discussion on the possible disadvantages of the Supreme Court's rulings as a way to protect human rights, see Assaf Meydani & Shlomo Mizrachi, *The Politics and Strategies of Defending Human Rights: The Israeli Case*, 39 *ISR. L. REV.* 39 (2006). For a discussion of the decreased Israeli public support for the Supreme Court, see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 70 (2004). For an example of such critique, see Martin Sherman, *Into The Fray: Juristocracy in Israel, When Legality Loses Legitimacy*, *THE JERUSALEM POST* (Oct. 2, 2014), <http://www.jpost.com/Opinion/Into-the-fray-Juristocracy-in-Israel-when-legality-loses-legitimacy-377972>.

119 See Or Bassok & Yoav Dotan, *Solving the Counter-majoritarian Difficulty?*, 11 *INT'L J. CONST. L.* 13, 31 (2013).

last three decades. Without discarding alternative explanations, I argue that when one examines the relationships between the judiciary and the political branches in Israel, the impact of this principle should not be overlooked.