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,

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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

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

63 *See* HCJ 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 HCJ 1284/99 Plonit v. Chief of Staff 53(2) PD 62 (1999).

65 *See, e.g.*, HCJ 5757/04 Hess v. Deputy Chief of Staff 59(6) PD 97 (2005); HCJ 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]

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67 HCJ 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* HCJ 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]

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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 Minhalit* [*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

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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]

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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 HCJ 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

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78 *See* HCJ 6163/92 *Eisenberg*, at ¶ 46: "Without public trust Government authorities cannot function…" (citing HCJ 727/88 Awad v. Minister of Religious Affairs 42(4) PD (1988)); HCJ 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

HCJ 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* HCJ 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]

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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 Case*s.[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

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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]

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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

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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

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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,

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v. The Prime Minister 57 PD 817 (2003); HCJ 8192/04 Movement for Quality Government in Israel v. The Prime Minister, 59(3) PD 145 (2004); HCJ 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; HCJ 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* HCJ 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* HCJ 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.); HCJ 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

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

97 *See, e.g.*, HCJ 4267/93 Amitai, Citizens for Good Government and Integrity v. The Prime Minister 47(5) PD 441(1993) ¶ 61 (opinion of Barak J.); HCJ 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

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100 *See supra* note 95.

101 HCJ 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]

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

103 HCJ 5757/04 *Hess*.

104 *See, e.g.*, HCJ 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); HCJ 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, HCJ 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

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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. Sociol. 149 (1994). *See also* Yossi 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]

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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 Liebernann, *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.themarker.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]

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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

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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.*, HCJ 390/79 Dawikat v. Government of Israel 34(1) PD 701 (1979), *translated in* http://www.hamoked.org/files/2010/1670_eng.pdf; HCJ 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; HCJ 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; HCJ 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

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(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 Countermajoritarian 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.