**Chapter III**

**‘Overriding’ the Supreme Court – A Blank Check with No Balance?**

On June 15, 2020, MK Ayelet Shaked, a former minister of justice in Netanyahu’s government (2015-–2019), submitted a private member’s bill to the Knesset aimed at curtailing the Supreme Court’s power of judicial review. The explanation attached to her proposed Basic Law: Legislation asserts:[[1]](#footnote-1)

In recent years, the status of the Knesset and the Supreme Court has eroded. Laws enacted by the Knesset have been overturned time and time again by the courts … without establishing a procedure or composition for the disqualification of laws and without the supremacy of the legislature being enshrined in a basic law, as a representative of the sovereignty of the people, to establish laws and basic laws that are not subject to judicial review.

Shaked’s bill did not merely seek to fine-tune the checks and balances between the branches of government. Instead, accusing the judiciary of overstepping its bounds, it unabashedly sought to establish the supremacy of the legislative branch, the Knesset. The explanatory section of the bill continues: “The public standing of the Supreme Court… has suffered in recent years from a sharp decline in public trust due to its intervention in core issues of dispute… and due to its decisions that conflict with Knesset laws and the will of the people.”

According to Shaked, the will of (Jewish) Israelis was being trampled by the court. In her proposal, the votes of 61 members of Knesset would be sufficient to override a Supreme Court ruling that a law is unconstitutional and violates civil rights. Her proposal pitted the legislature against the courts, raising the specter of governance without checks and balances, serving the interests of the majority of the moment, ultimately undermining the court’s role of determining when a law violates human or civic rights. Shaked’s bill was one of the most radical of several legislative proposals that sought to curb judicial power, including initiatives by the Likud’s May Golan and Yamina’s Betzalel Smotrich. It stipulated that only a full panel of eleven Supreme Court justices could strike down legislation as unconstitutional, and that a two-thirds majority of the justices was needed. The Knesset would then be entitled to override the court’s judgment with a simple majority of MKs. More than half of the eleven Supreme Court justices at the time had been appointed by Shaked herself, with much pride, based on their conservative views. She and like-minded politicians were eager to advance an anti-constitutional revolution by empowering the Knesset with this “override clause.” Her proposal would leave Israel without effective judicial review that could strike down unconstitutional laws, thereby enabling the government to violate human and civil rights at its or the majority’s will. This was as close as a democracy can get to the tyranny of the majority. Israel might not have remained a democracy if this override clause had become law.

Shaked’s bill was rejected in the Knesset on August 5, 2020. Its enactment would have meant the end of the national unity government that had just been formed between the Likud and the Blue and White parties. During the negotiations on forming a right-wing government in those hyper-election years of 2019–2020, of paramount concern to Benjamin Netanyahu, a prime minister on trial for corruption, was passing legislation that might help him in his legal battles: the override clause, the immunity law, and the French law. It was Avigdor Lieberman, identified with the right-wing bloc, who vowed not to provide Netanyahu with an “immunity government.”[[2]](#footnote-2)

The override clause was key to Netanyahu’s attempts at that point to defer his trial because he realized that immunity granted by the Knesset was highly unlikely to stand up in court. Curbing the court’s power of judicial review thus became Netanyahu’s primary objective in his serial attempts to achieve a right-wing majority (without Lieberman’s party) in the 2019-2020 election cycles. The hard core of his “natural partners” – the national-religious and ultra-Orthodox parties – had been fighting for years to limit the Supreme Court’s ability to adjudicate the constitutionality of laws enacted by the Knesset. This chapter reviews the “override” campaign waged by the ultra-Orthodox (in their case, with respect to legislation on IDF conscription), the Jewish settlers and their supporters, the anti-immigrant lobby, and other opponents of the courts. Ironically, Netanyahu was a latecomer to the “override” camp, having originally blocked attempts to enact the override clause, viewing himself as a protector of the courts.

The override clause, more than any other law, demonstrates the way right-wing backbenchers worked their way into the limelight by proposing extremist laws, eventually becoming key ministers in Netanyahu’s government. Those extremist initiatives, designed to garner media attention and win support in party primaries, ultimately became government policy. Override proposals came exclusively from the right-wing parties, and thus provided a good indicator of what it meant to be part of Netanyahu’s ethno-religious bloc. The first such proposal was submitted in 2007 by MK Esterina Tartman of Yisrael Beiteinu (ironically led by Avigdor Leiberman who would come to oppose any such initiative). The bill, supported by fifty MKs, states: “Despite what it says in the Basic Law, the only authority that can amend, revoke, or limit a law is the Knesset.”[[3]](#footnote-3) The table below shows the number of override proposals submitted by the right during Netanyahu’s terms as prime minister, starting in 2009.

**Table 1: Override bills submitted by right-wing parties under Netanyahu, 2009–2020**

|  |  |
| --- | --- |
| Party | Number of legislative proposals |
| United Torah Judaism | 5 |
| Shas | 2 |
| Likud | 5 |
| Jewish Home/Yamina | 7 |
| Yisrael Beiteinu | 3[[4]](#footnote-4) |
| Total proposals by right-wing parties 2009-2020 | 22 |

The salience of the override clause in Israeli right-wing ideology in recent years reflects the transformation from Menachem Begin’s respect for judicial authority and the democratic system of checks and balances, to a complete lack of confidence in the judiciary and accusations of an unauthorized constitutional revolution carried out by an activist court. The path the Likud traveled from Dan Meridor (minister of justice under Yitzhak Shamir) to Shaked and Amir Ohana (Netanyahu’s ministers of justice) is evident when examining the evolution of Basic Law: Legislation, which sought to redefine the checks and balances between the judicial and legislative branches. In particular, the various versions of the override clause included in the different legislative proposals reflect the transformation both of Likud’s ideology and the evolving constitutive framework of Israeli democracy under Netanyahu’s rule.

1. **Basic Law Legislation: Attempting to Enact the Override Clause**

Before analyzing the particular reasons why each component of the right-wing bloc (the ultra-Orthodox, the settlers, the anti-immigrant lobby and opponents of a “judicial revolution”) were so eager to empower the Knesset to override Supreme Court rulings, we begin by comparing the four major governmental proposals for Basic Law: Legislation, none of which were enacted. Two earlier attempts were made by justice ministers Haim Zadok (1975) and Shmuel Tamir (1978), but were not seriously considered by the governments at the time. The proposals discussed below were submitted by ministers of justice, with the exception of the proposal put forward in 2004 by the Neeman Committee and Shaked’s latest proposal in 2020 as an opposition MK. The stark differences between the Neeman versions and the more daring and radical proposals by Shaked are another indication of the accumulated rage against the Supreme Court within the right-wing bloc. It is instructive to note that Neeman (then serving as minister of justice) did not even show his proposal to the Supreme Court president, Asher Gronis, before submitting it to the Knesset. The proposal’s sole purpose was to define the subtle relations between the three branches of government. The relations between the Justice Ministry and the courts became more complex and antagonistic as the years passed. The proposals outlined in Table 2 below include those presented by Meridor under Shamir (1992), the Neeman Committee under Sharon (2004), Neeman as minister of justice under Netanyahu (2012), Shaked as minister of justice under Netanyahu (2017), and Shaked’s private member’s bill as an opposition MK (2020).

The various proposals for Basic Law: Legislation expose the constitutional changes and structural mechanisms their proponents sought to institute in an effort to change the rules of the game. From a neo-conservative perspective, this was not a revolution but a counterrevolution against the role the courts were said to have assumed in the wake of the 1992 basic laws, which were intended to serve as the Israeli bill of rights. We first analyze the structural mechanisms and then the substantive justifications for Basic Law: Legislation. In the structural parts, the elements were quite diverse. This included specifying which court was authorized to overrule a law (ranging from any court to the Supreme Court only); the number of judges required to hear such cases; the majority of judges needed to overturn a law; the majority of MKs needed to reinstate the overturned decision; the number of years the reinstated law would remain in effect and the ability to re-legislate the law; and the majority required in each reading of the proposed law in the Knesset. (See Table 2.)

**Table 2: Proposals by Meridor, Neeman, and Shaked for Basic Law: Legislation**

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Justice minister proposing the law Justice minister proposing the legislation** | **Prime minister** | **Year** | **No. of justices required to overturn** | **Majority of justices required quired required** | **No. of MKs required to reinstate an overturned law** | **No. of years the reinstated law is valid** | **Ability of the Knesset to re-legislate it** | **No. of readings to enact a basic law**  | **Knesset majority for each readingkne4ss** |
| **Meridor**Likud Party | ShamirNational Unity Govern-ment | 1992 | 9 | Simple majority | 80 | -- | -- | 3 | 2/3 all three readings |
| **Neeman Committee** | Ariel Sharon | 2004 | 9 | Simple majority | 70 | 5 | -- | 4 | 3rd reading 61; 4th reading 70 |
| **Neeman**Appointed by Netanyahu  | Netanyahu | 2012 | 9 | Simple majorityjority | 65 | 5 | Recurr-ing indefin-itely  | 4 | First 2 readings a regular majority; 3rd reading 614th reading 65 |
| **Shaked**Jewish Home Party | Netanyahu | 2017 | 9at least | 2/3 majority | 61 | 5 | Every 5 years | 3 | 61 majority |
| **Shaked**(opposition member, Yamina party) | Netanyahu | 2020 | 11at least | 2/3 majority | 61 | 5 | Every 5 years | 3 | 61 majority |

Meridor’s proposal was anchored in the need “to shape the constitutional basis and the judicial framework” of Israeli law. The novelty of his proposal was in giving the basic laws priority over regular legislation. It also “authorizes the Supreme Court as a constitutional court to overturn a law… It proposes to extend the judicial review of the constitutional court in a way that would also include the question of whether a law contradicts one of the basic principles of the State of Israel – and if so – to disqualify it.”[[5]](#footnote-6) It is important to note that the “revolution” in making the Supreme Court a constitutional court and endowing it with the ability to overturn legislation (under certain conditions, if it violates the basic principles of the State of Israel) was supposed to be anchored in legislation by the Knesset. This was the essence of the basic law proposed by Shamir’s national unity government and led by Meridor as a Likud minister of justice. This came just weeks before the enactment ofBasic Law: Human Dignity and Liberty, which serves as Israel’s bill of rights.

In testimony before the Knesset committee on the Nation-State Law, Meridor asserted:

Exactly 25 years ago, in 1992, the Knesset enacted the basic laws of human rights, and I am proud to say I was the minister of justice who initiated that move – on behalf of the Likud… As I entered the Justice Ministry, we prepared two laws: a comprehensive human rights law and Basic Law: Legislation, which the government approved but the Knesset did not. Why? Not due to a mistake, but because there was a grave rejection of equality.[[6]](#footnote-7)

The chair of the committee was Ohana, a keen supporter of the override clause who was later appointed minister of justice by Netanyahu. Ohana asked Meridor whether he endorsed the Supreme Court’s expansive interpretation of the concept of equality, which was not included in Basic Law: Human Dignity and Liberty. Meridor replied that it would have been better if the Knesset had legislated the expansive interpretation of equality. Meridor continued: “It’s the Knesset’s passivity, not the court’s activism, that is the problem; the court has no choice but to interpret – that’s what courts do.”[[7]](#footnote-8) Thus, the inability of the Knesset, despite the approval of the unity government, to legislate equality into the basic law was the reason why the courts, reflecting the direct intention of the unity government, took it upon itself to function as a constitutional court when a regular law contradicted a basic law, or when a law contradicted the basic values of the State of Israel. But it is much easier to attack the Supreme Court than the Knesset, as judges cannot really express their views freely in the public media. Thus, the narrative of a “constitutional revolution” fostered by the courts was propagated by the right. The fact that this so-called revolution was led by a Likud justice minister shows the distance the ruling party had traveled from its days as the Herut (Liberty) party and Revisionism, to becoming the instrument of Netanyahu’s anti-liberal creed.

The two Neeman proposals reflect the government’s change of direction, and the difference between the days of Sharon and Netanyahu. The Neeman Committee (2004) sought to resolve issues of the basic laws and the relations between the legislative and judicial authorities, and emphasized the difference between a basic law and a regular law by demanding four readings, not just three, and the support of 70 MKs in the fourth reading to pass a basic law. This was considered crucial in order to distinguish the basic laws from government-sponsored legislation, because a 70-MK majority requires broad support that usually extends beyond the members of the coalition and therefore guards against tyrannical measures adopted by a slim parliamentary majority. However, as Netanyahu’s minister of justice in 2012, Neeman proposed only a regular majority for the first two readings, 61 MKs for the third and 65 for the fourth only. This dramatically improved the chances of passing basic laws that represent the government only and do not enjoy broad support. In addition, the Knesset would be empowered to override a Supreme Court ruling on a law’s constitutionality and reinstate the law every five years. (The Neeman Committee’s proposal allowed for a one-time, five-year reinstatement only.) Likud MK Benny Begin commented: “It sounds like the Knesset wants to reinstate a law that harms basic rights, thus re-legislating a foul law overturned by the courts again and again and again.”[[8]](#footnote-9) The critique against the Neeman proposal in 2012 came from the liberal members of the Likud.

This was no longer the case with Shaked’s bill, which was even more radical. Her proposal ostensibly speaks the language of the Neeman Committee, adopting the normative hierarchy and the focus on basic laws. However, the judicial review authorized by Shaked is far from Meridor’s idea of endowing the Supreme Court with the power to strike down any law that violates human rights and the basic principles of Israel. In fact, Shaked’s proposal limits judicial review substantially, allowing the Supreme Court to rule on the constitutionality of laws only in “cases of a fault in the process of their legislation… for example, when they did not have a proper majority.” Far from enshrining the protection of human rights, judicial review became a technical matter. The Knesset would be entitled to pass legislation overriding the court’s judgment and could do so repeatedly. Thus, a government with the slimmest of majorities could pass legislation that unconstitutionally infringes upon human rights in the eyes of the court. This radicalization is even more dramatic in Shaked’s proposal for the override clause, which raises the number of required justices to eleven, and requires a two-thirds majority on the judicial panel to rule a law unconstitutional; her proposal also lowers the threshold for parliamentary approval to three Knesset readings and a final vote of a simple majority.

Even more telling is the justification for Basic Law: Legislation. Shaked’s proposal in 2017 used the same explanation as the Neeman (2012) proposal, emphasizing that basic laws cannot be changed by the courts, but only by the Knesset. This was important for her because Basic Law: Israel as the Nation-State of the Jewish People was coming to a vote and Shaked wanted to prevent the courts from commenting on it. Shaked’s agenda is more transparent in her private member’s bill of 2020, which blames the courts for the erosion of the status of both the Knesset and the courts: “Laws enacted by the Knesset have been overturned time and time again by the courts … without the supremacy of the legislature being enshrined in a basic law, as a representative of the sovereignty of the people, to establish laws and basic laws that are not subject to judicial review.”

Since her bill required only a simple majority of 61, it would enable the enactment of partisan legislation as basic laws. This was a divisive mechanism that even Neeman and his predecessor as justice minister, Daniel Friedmann did not propose, despite their severe criticism of the Supreme Court. What is even more telling is the example cited by Shaked and her Yamina co-sponsors in the explanation of the law: the destruction of (illegal) settlements in Judea and Samaria. This situation “forces the executive branch to act against its priorities… dictating in fact the working arrangements of the executive branch by petitioning the Supreme Court, bypassing the will of the voters… and harming the separation of powers.”[[9]](#footnote-10)

Shaked was soundly defeated: 71 MKs voted against her private member’s bill, while only five voted for it. Speaking to the Knesset after the vote, she insisted there were 61 MKs in favor of the override clause and that her initiative had failed due to coalition constraints. She then quoted senior members of Netanyahu’s government who had spoken in support of the override clause:

* “The High Court has lost it. It has turned itself into the legislature, the executive, and the judicial authority simultaneously. We have to end this. The way to do it is through the override clause.” Minister Yuli Edelstein.
* “It is necessary to enact the override clause because the Supreme Court continues to interfere time and again in laws enacted by the Knesset.” Minister Ze’ev Elkin.
* “The override clause is important today more than ever. We have reached a moment when the people have to decide between the public’s representatives and the judicial junta.” Coalition chair Miki Zohar.
* “The first mission of the new government is to enact the override clause.” Minister Ya’akov Litzman (United Torah Judaism). [[10]](#footnote-11)

Shaked concluded her speech by citing an old interview with Netanyahu, where he boasted: “There were proposals to reduce the power of the Supreme Court – I have prevented all of them. I shelved them all.”[[11]](#footnote-12) Indeed, Netanyahu was a latecomer to the political camp that championed the override clause. However, once he joined the club, he became its most ardent and extreme leader, delegitimizing the courts, the police, and the civil service, and directly lashing out against them. It should be noted that he was driven by his personal legal predicament, while his “natural partners” had deep ideological and historical reasons for supporting the override clause.

1. **Politics, Public Committees, Court Rulings, and Overriding: Deferring Army Service for Yeshiva Students**

The relations of religion and state have presented serious challenges for Israel since its inception. One of the major issues of controversy is exemption from military service for ultra-Orthodox yeshiva students. This issue has also galvanized the ultra-Orthodox against judicial activism and the constitutional revolution, which they view as threatening the very essence of religious Judaism. In their eyes, a Jew’s highest calling is to devote himself “to the tent of Torah,” and the constitutional principle of equality is of lesser importance. This perspective motivates their struggle against the courts, including their support for override legislation. It is also apparent that the ultra-Orthodox leadership has become more combative against the courts as the courts’ public legitimation weakens. MK Moshe Gafni (United Torah Judaism) thus took “revenge” against Netanyahu for not blocking a particular law by calling for an immediate vote on the override clause.[[12]](#footnote-13)

1. Politics without Judicial Interference: 1948–1976

The leadership of the nascent State of Israel agreed to defer national military service for yeshiva students following the devastation of the Torah world in the Holocaust. David Ben-Gurion’s affirmed this decision in 1951, recognizing that “their Torah is their calling.”[[13]](#footnote-14) This was also the basis for the arrangement reached in 1958 between Shimon Peres, then director-general of the Defense Ministry, and the Torah world: three months of basic training and no military service for those who studied Torah until they were 25 years of age. A committee headed by Moshe Dayan in 1968 – the first of many parliamentary committees to review the issue – decided not to rock the boat, but set the exemption quota at 800 students per year. The first court petition against this policy came in 1970. The court rejected the petition because the petitioner was not directly affected by the law – that is, he did not have the “right of standing” to bring the suit.” The court also ruled that it was a political matter and not the kind of issue to be settled by the court. This was a crucial step in defining the relations between the judicial and legislative branches. Both of these justifications, the right of standing and justiciability, would change over time and become a major bone of contention between the politicians and the courts. At this formative stage, the authority to exempt yeshiva students from conscription into the IDF rested solely in the hands of the defense minister. (Article 12 of the Defense Law grants the minister this general authority, with no specific mention of yeshiva students.[[14]](#footnote-15)) The five components of the controversy were already present in the first act: political pressure, laws, public committees, the courts, and a surging number of exemptions.

1. Politics, Illegal Arrangements, and Legislation – 1977–2002

The year 1977 was not one of political turnover in Israel, but also marked a change in the party system. On the one hand, this change made Israeli politics more akin to European nation-states, with two major parties, the Alignment (Labor) on the left and the Likud on the right. But on the other hand, the change turned the ultra-Orthodox into a pivotal party, as it became virtually impossible to form a coalition without them. Although the ultra-Orthodox Ashkenazi had only five MKs in 1977, they were in the position of kingmakers and coalition builders. Their role became even more pivotal ten years later when Shas, an ultra-Orthodox Sephardi party, founded in 1984, gained significant representation in the Knesset. Their newfound power led then-Prime Minister Begin to eliminate the exemption quota for yeshiva students. The Likud-Agudat Yisrael coalition agreement not only abolished the numerical limitation, but also opened the exemption arrangement to those teaching in yeshivas and substantially expanded the list of eligible institutions.[[15]](#footnote-16) Begin also had ideological reasons for eliminating the exemption quota: According to Aryeh Naor, Begin’s cabinet secretary, the prime minister bitterly recalled the Jewish quotas imposed in higher education when he was a young man in Warsaw.[[16]](#footnote-17) But no one foresaw the exponential increase in the number of yeshiva exemptions in the following years.

In view of the soaring increase in IDF exemptions in the ultra-Orthodox community, a parliamentarian committee was formed in 1986 following the formation of a national unity government of Likud and Labor. This became a recurrent feature: Every time a non-rightist government came into power, the exemption issue would come to the fore and a parliamentary committee was formed. The conclusions and policy recommendations of these committees were almost never implemented. In 1988, the HaCohen Committee recommended returning to the pre-1975 situation and reestablishing quotas. Given the political pressures, this was not to be. The number of exemptions continued to soar, as did the political power of the ultra-Orthodox parties.

In 1986, IDF Major Yehuda Ressler petitioned the High Court against the exemption arrangement. While previous petitions had been rejected on grounds of standing and non-justiciability, Ressler’s petition met the threshold of both of these criteria. Ressler argued that as an IDF reservist, he personally had a stake in the exemption from IDF service for ultra-Orthodox Israelis.[[17]](#footnote-18) Section A of the court’s ruling acknowledges that the petitioner was not suffering personal damage, but that the court was entitled to extend the right of petition to him as a representative of many other potential petitioners. A “public petitioner,” according to section B of the ruling notes, may be granted the right of petition when they bring before the court a matter of public importance. Section C affirms the petition’s justiciability, explaining that the court was not violating the separation of powers by hearing the case. Section C (5) argues that the exemption of yeshiva students is a public issue of constitutional character, and thus should be discussed by the court. Section G specifically claims that it is “wrong at the core” to argue that “a problem of a political nature must be determined by a political institution and therefore is institutionally non-justiciable.”[[18]](#footnote-19) Section G (2) emphasizes that the court was focusing only on the judicial aspect of this political issue, and section J claims that it is a matter of normative justiciability for the court to determine whether it is within the authority of the executive branch (defense ministry) to decide on IDF exemptions.[[19]](#footnote-20)

However, after agreeing to hear the case, the court denied the petition on its merits. Justice Barak determined that it was within the power of the defense minister to determine policy on this issue; hence the denial. Nevertheless, Barak also claimed that at a certain point, “quantity becomes quality” – that is, there may be a time when the numbers would call into question the legality of the defense minister’s exemption policy. The fact that the court had extended the right of standing to a public petitioner and determined that the exemption issue was justiciable placed the ultra-Orthodox at the heart of the struggle against the court’s judicial activism.

Ten years later, after two other public committees appointed by the minister of defense (1988, 1992), two critical reports by the state comptroller (1988, 1997), and no change of policy on the ground (that is, the number of exampt yeshiva students continued to grow), two new petitions were submitted to the Supreme Court. One petition, submitted by MK Amnon Rubinstein (HCJ 3267/97), asked the court to order the minister of defense to set a maximum quota, while a second petition by Ressler (HCJ 715/98) argued that the minister of defense has no authority to grant these exemptions, which are unconstitutional and violate the principle of equality. In section 41 of the court’s ruling on the two petitions, the justices note the changing constitutional structure in Israeli law[[20]](#footnote-21) and cite the growing number of exemptions. In 1987, when the court heard the first Ressler case, 17,017 yeshiva students received exemptions, representing 5.4% of their age cohort; in 1997, this number had jumped to 28,772, or 8% of the cohort.

The ruling is crucial for understanding the “constitutional revolution” from the Supreme Court’s perspective. The court argued that public law is anchored in primary legislation and that secondary regulations should be derived from primary legislation. The court noted three reasons for this: 1) the separation of powers between the legislative and executive branches (section 20); 2) primary legislation determines the secondary legislation (section 21); and 3) the democratic principle – that is, essential democracy (section 22). One of the foundations of essential democracy is the will of the people. This is manifested in the parliament as the representative of the sovereign. In essential democracy, the majority must refrain from infringing upon human rights. Essential democracy is also based on three values: separation of powers, rule of law, and human rights. “Separation of powers is not a value in and of itself. Its purpose is not to ensure efficiency. The goal of separation of powers is to increase liberty and prevent the concentration of power in the hands of one sovereign authority in a way that is liable to violate individual freedom.”[[21]](#footnote-22) Section 23 of the ruling concludes: “Human rights are therefore the central tenet of democracy. There can be no democracy without human rights. It is not a democracy if the majority deprives the minority of its rights.”[[22]](#footnote-23) Human rights are not absolute, but essential democracy condones the infringement of human rights only if the violation is consistent with the values of the state, for a worthy purpose, and not disproportionate.

The ruling therefore holds that sensitivity to human rights must be anchored in primary legislation by the parliament and not by the executive branch. “Therefore, the democratic principle in all its aspects – representative and normative – leads to the conclusion that the principal measures should be determined in primary legislation.”[[23]](#footnote-24) In the Israeli context, the justices distinguish between primary legislation before and after the basic laws enacted in 1992: “With the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, a substantial transformation in the status of human rights occurred. They received a super-legal constitutional status” (section 31, p. 30). The significance of this constitutionalization, Justice Barak wrote, is that all judicial norms are influenced by the constitutional arrangements of human rights. The justices therefore ruled (section 43) that the minister of defense was no longer authorized to exempt yeshiva students because the primary legislation should be determined by the Knesset and not by a government ministry.

This line of argument is based on the constitutional revolution. Once human rights are a factor in all legislation, any infringement of these rights requires primary legislation by the Knesset; the decision by a government minister is no longer sufficient. The 1992 “Bill of Rights” empowered the Supreme Court to change its reasoning from that applied to the previous petitions against the IDF exemptions and order the Knesset to enact primary legislation. The Supreme Court thus recognized Israel as an essential democracy, anchored in human rights. This recognition was based on the court’s interpretation of the 1992 Basic Laws and not on primary legislation. (Basic Law: Legislation was never enacted.)

From the perspective of the ultra-Orthodox community, the court placed equality and liberty above the freedom of religion and what they considered a core belief in life-long Torah study. Therefore, they viewed the court – rather than the Knesset, the sovereign – as determining the very values of Israel. For them, this is a double helix: their defense of sacrosanct Torah study, and their struggle against the court’s interpretation of human rights and the main principle of Israeli democracy.

In 1999, then-Prime Minister Ehud Barak established a committee headed by retired Justice Zvi Tal to propose legislation to resolve the question of army exemptions in light of the court’s latest ruling. The committee recommended that yeshiva students be given “a year of choice,” when they could decide whether to continue their Torah study or serve an abbreviated period of national service (military or civilian) and begin working. The main impetus of the committee was to enable ultra-Orthodox men to enter the job market. Those who opted not to perform national service were not allowed to work; they were expected to devote all their time to Torah study as a condition for their exemption.[[24]](#footnote-25) The Exemption of Military Service for Yeshiva Students Law (“the Tal Law”), which implemented the committee’s recommendations, was finally enacted in 2002, and later extended for an additional five years to enable the examination of its effects on civic service, employment, and exemption numbers. However, the law did not stem the rising tide of ultra-Orthodox exemptions. It had been designed to create a window of opportunity – a short period of national service and entrance into the job market. In fact, it worked in the opposite direction, with the linkage of national service and work resulting in the ultra-Orthodox men who opted not to serve now being officially denied the opportunity to work because they did not serve

1. An Unconstitutional Law and Overriding – 2002–2020

Now, finally, there was a law authorizing the minister of defense to grant exemptions to yeshiva students for whom “Torah is their calling.” However, the political leverage of the ultra-Orthodox parties enabled them to coerce the various government coalitions not only to continue funding yeshivas, but to support tens of thousands of families in which the men did not work. The Tal Committee’s main concern was with this growing number of impoverished ultra-Orthodox families that were dependent on the state. The Tal Law, approved by the Knesset in 2002, was intended to stimulate employment among ultra-Orthodox men, offering them one year to decide whether they wanted to remain in the yeshiva, enter the workforce, or enlist in the IDF. However, it failed to have any effect. While the Tal Committee charted a path to gradually integrate the ultra-Orthodox into all walks of Israeli life, including work and national service, the core belief of the ultra-Orthodox leadership was to live as a disengaged community.[[25]](#footnote-26)

The rift grew sharper with the appointment of Netanyahu as minister of finance. As a neoliberal minister, he did what no one else had dared: He reduced the child allowances paid by the state. In an interview in 2003, Netanyahu explained:

This is the most important thing we’ve done… which I believe wholeheartedly in. The reason for … the prolonged poverty cycle is the policy of extended stipends that removed entire generations, not just one generation, from the job market. A person stops working, stops believing in his ability to make a living, and becomes dependent on state benefits. This is a horrible blow… The child allowance made entire populations – mainly in the Arab and ultra-Orthodox communities – accustomed to think that a man’s life work is to produce children. He makes children and raises them to believe that their role is to make more children. Since the allowance grows with the number of children, there’s an incentive here that will bring us to collapse, both economically and socially.[[26]](#footnote-27)

There was no enemy more hated by the ultra-Orthodox parties than Finance Minister, Netanyahu. Yet his political nadir – leading the Likud to a record-low twelve Knesset seats in 2006 – was to be their turning point, and his as well. It would take a decade for him to cultivate the ultra-Orthodox as his “natural allies” by subordinating his economics to his politics.

While the cuts in the child allowances had almost an immediate effect – reducing the size of ultra-Orthodox families within a year and a half – this was not the case with the Tal Law, as noted. The failure of the legislation became increasingly apparent as the years passed and the law was extended, first for five years and then for another five, to no avail. In light of this failure, several petitions challenging the Tal law were submitted, including petitions by the Movement for Quality Government in Israel, the Meretz and Shinui parties, and Ressler (for the third time). This time, the question before the Supreme Court was whether the Tal Law itself was constitutional.[[27]](#footnote-28)

President Aharon Barak’s court ruled on the petitions in 2006. The petitions were denied, but the panel of nine justices provided a rationale for striking down the law in the next round. The court’s reasoning is crucial as it goes to the heart of the right-wing thesis that the constitutional revolution was based on the Supreme Court’s subjective interpretation of the principle of equality – a principle that was deliberately excluded from the Basic Laws of 1992. It demonstrates how the debate over deferring the service of ultra-Orthodox men was framed as a battle for Jewishness versus equality in the eyes of the ultra-Orthodox right.

In its 2006 ruling, the court develops the concept of constitutional protection of human rights and anchors equality at its core. Does the Tal Law violate human rights and is therefore unconstitutional? Justice Barak first determines that the constitutional arrangement should not be read literally, but should be viewed as part of the Basic Laws that govern long-term arrangements (section 20). Does exemption of military service for yeshiva students violate the right to equality and constitute an infringement of Basic Law: Human Dignity and Liberty (section 25)? Curiously, the State of Israel replied to the petition by asserting that since equality is not anchored in a basic law, violating equality is not unconstitutional. This is exactly why the religious parties refused to agree to include equality in the basic laws. However, by using this argument, the state acknowledged that the Tal Law indeed violated the principle of equality. President Barak rejected the state’s argument, anchoring the right to equality in Israel’s Declaration of Independence (which has no constitutional standing apart from the status accorded to it in court rulings), and describing equality as integral to human dignity: “The Supreme Court has regarded it [the right to equality] as the most important of human rights. It is the soul of our constitutional regime itself” (section 26). Though he recognizes that equality may be interpreted in many ways, Barak relies on the interpretation provided by the state itself: “The respondent agrees that the arrangement does not create equality between the majority, for whom military service is compulsory, and the minority, which is exempt from it” (section 28). Therefore, the conclusion is that the Tal Law infringes upon equality (section 28). And since equality is protected by Basic Law: Human Dignity and Liberty, such infringement is therefore unconstitutional (sections 29, 44).

Does this mean the Tal Law is unconstitutional? Basic Law: Human Dignity and Liberty includes a “limitation clause” stating that a human right may be compromised for a worthy cause, in a proportional way (section 47). Can the exemption of yeshiva students be considered a worthy cause? President Barak does not answer this question. Instead, he addresses the question of whether the Tal arrangement, which seeks to gradually integrate the ultra-Orthodox in military or civic service and the labor force, is worthy. In Barak’s judgment, even though the Tal Law is unconstitutional, it falls within the scope of the limitation clause because it was enacted for a worthy purpose. But is it also proportional?

The question of proportionality raises another crucial element of the constitutional revolution: the test of reasonableness. Based on the proportion between those who defer service (tens of thousands a year) and those who use the “year of decision” to perform national service or join the work force (only dozens a year), the court ruled that the Tal Law was not proportional. The state does not achieve its worthy goal of integrating the ultra-Orthodox through the Tal Law (section 66). Why, if so, was the petition denied? In section 70, the justices explain: “Deferment of service, we rule today, is not yet unconstitutional, but should the trend persist and no viable change … becomes apparent, the day may come when it will be ruled unconstitutional.” Thus, on May 11, 2006, the Supreme Court denied the petitions but laid down the foundations for reconsidering the constitutional status of the arrangement in the future. In 2007, the Tal Law was extended for another five years without any changes, despite the court’s ruling. The mechanisms for achieving the worthy goal of integration were still lacking.

As the number of exemptions continued to rise, ultra-Orthodox lawmakers became increasingly concerned that the Supreme Court might rule the Tal Law unconstitutional in the next round of petitions. This was one of the reasons prompting United Torah Judaism MKs Moshe Gafni and Uri Maklev to propose an override law already in 2009. This was the first of many such private member’s bills, all from the political right. One such initiative was approved by a ministerial committee, but none reached a preliminary reading in the Knesset. Gafni and Maklev thus represented the hardcore right-wing in Israel, as seen through the lens of the override clause, even before Netanyahu embraced the concept of “blocs” as part of his strategy of distinguishing between the nationalist right and the democratic left. The fact that the ultra-Orthodox MKs were the first to demand an override clause indicates that Netanyahu’s adoption of the ultra-Orthodox as his “natural partners” was actually double-edged: He made them his allies in the wake of his colossal electoral defeat in 2006, but they were the ones who led the battle over the character of Israel. The ultra-Orthodox leaders indeed became very involved in Israeli politics, but this integration was not aimed merely at sustaining the ultra-Orthodox community and maintaining Israel’s Jewish-democratic balance. Instead, their integration in the political arena was focused on shaping the state’s Jewish character and changing the Jewish-democratic balance. It was an all-out war over the character of Israel, and they were, for the first time, a major player.

The proposal by Gafni and Maklev called for adding an override clause toBasic Law: Human Dignity and Liberty, similar to the one attached to Basic Law: Freedom of Occupation. Their proposed override provision would allow a law to be enacted for four years – even if it contradicts a Basic Law, infringes on a human right, and does not meet the criteria of the limitation clause. The idea was to block the Supreme Court from interfering with the Knesset’s work, even if human rights were violated in a manner the court deems unconstitutional.[[28]](#footnote-29) Their override bill did not pass a preliminary reading, but paved the way for the override clause to become the mantle of the anti-constitutional revolution in Israeli politics. The ultra-Orthodox Ashkenazi parties were at the forefront of this camp, seeking to defer national service indefinitely for their community. It was a clash of values, not just power politics. The next petitions to the Supreme Court came in 2012 as the end of the Tal Law’s five-year extension approached.

In adjudicating this round of petitions, the Supreme Court, now presided over by President Dorit Beinisch, relied on the foundation laid out in Barak’s 2006 ruling. It considered whether the infringement upon the human right to equality was proportional by examining the exemption data. (See Table 3.)

**Table 3: Exemption Data, 1987–2012**

|  |  |  |
| --- | --- | --- |
| **Year** | **Percentage of the 18-year-old cohort** | **Number of exemptions for ultra-Orthodox students** |
| 1987 | 5.4% | 17,017 |
| 1996 | 7.4% | 28,547 |
| 2003 | 11% | 38,449 |
| 2007 | 14.2% | 46,900 |
| 2012 | 15% | 59,880 |

The number of 18-year-old ultra-Orthodox men choosing to enlist in abbreviated military or civic service and then join the workforce remained very low, reaching at best a few hundred. It was later discovered that the IDF regularly fudged the numbers of ultra-Orthodox men who supposedly joined the army – doubling or even tripling the figures for 2011-2019.[[29]](#footnote-30) Even before this, President Beinisch ruled on February 21, 2012 that the Tal Law was unconstitutional based on the proportionality test and its failure to achieve the worthy goal of integrating the ultra-Orthodox.[[30]](#footnote-31) The Knesset was therefore barred from extending the law beyond its expiration date in August 2012. “We again emphasize that legislation that perpetuates the disparities and the flaws of inequality to the extent we see in the current state of affairs cannot stand.”[[31]](#footnote-32)

The formal reason for ruling the Tal Law unconstitutional was its lack of reasonableness: It was unable to fulfill the worthy purpose of integration and thus contributed to the perpetuation of inequality.[[32]](#footnote-33) In May 2012, as part of the coalition agreement with Kadima and in light of the court’s recent ruling, Prime Minister Netanyahu appointed a public committee headed by MK Yohanan Plessner (Kadima). The mission of the new committee, officially dubbed the Promoting the Integration in Service and Equality of Burden Committee, was to enact a law that would end exemptions for yeshiva students. Its recommendations included conscripting 80% of draft-age ultra-Orthodox men, and imposing sanctions on those who did not comply with the law. Non-compliant yeshivas would also be subject to sanctions. However, the committee was plagued by disagreements as new elections loomed, and Netanyahu dismissed the committee before its report was submitted.[[33]](#footnote-34) The IDF independently prepared a plan to draft all ultra-Orthodox men.[[34]](#footnote-35)

The Supreme Court’s ruling in February 2012 and the deliberations of the Equality of Burden Committee came on the heels of Israel’s largest-ever social justice protest, which posed a serious challenge to the pivotal position of the ultra-Orthodox parties in Israeli politics. The social justice protest waged from July through October of 2011 was ostensibly an economic protest against the high cost of living. Yet leaders of the protests railed against the identity politics that had placed sectoral interests before the public interest.[[35]](#footnote-36) “It’s not a mistake; it’s policy” was one of the central slogans of the social protest, as well as “the people demand social justice.” Indeed, it became a struggle over the interests and character of “the people.” While the for the ultra-Orthodox, their integration into Israeli society meant an ethno-religious model of a Jewish state, the main concept that emerged from the half a million protesters in 2011 was “the new Israelis.” This was to be the new dividing line of Israeli politics: religious Jews to the right, secular Israelis to the center-left.

The new Israelis was a central mantra of protest leaders like Itzik Shmueli, who went on to become a Labor MK, and of Yair Lapid, then a TV anchor and journalist, who later founded the Yesh Atid party, the red flag of the ultra-Orthodox parties. Lapid was associated with the second wave of the protest, which began in 2012 with a protest by IDF reservists. They complained about the inequality in the burden of military service (the sweeping exemptions for the ultra-Orthodox and the Arabs in Israel), as well as the inequality in the economic burden (because the ultra-Orthodox who didn’t work paid no income tax). This was a direct confrontation with the ultra-Orthodox parties. Their pivotal position in power politics, along with the issue of equality, became the focus of Yesh Atid, as it had been for Lapid’s father, Tommy Lapid, a decade earlier as leader of the Shinui party. The result was astounding: A coalition was formed without the ultra-Orthodox parties. It was a short-lived coalition (2013–2015), but left a scar among the ultra-Orthodox and turned Lapid into their most hated enemy. The transgressions of the “little Satan” Netanyahu as finance minister were forgiven (even if not forgotten), now that a greater devil, Lapid, had entered the arena. Politically, the years outside of the ruling coalition further anchored the ultra-Orthodox parties in the right-wing bloc. As noted, this trend had already intensified in the wake of the Supreme Court’s ruling on the Tal Law in early 2012. The coalition without the ultra-Orthodox in 2013–2015 reflected the social atmosphere and its expression in politics. For the ultra-Orthodox parties, it was a bitter experience and marked a turning point. Their direct reaction was to submit, yet again, an override clause to the Knesset. This time Gafni co-sponsored a private member’s bill with Shaked that sought to attach an override clause to Basic Law: Human Dignity and Liberty. This was the same Shaked who later headed the ministerial committee that drafted Amendment 19 to the Security Service Law, the only amendment that actually proposed sanctions, including prison, for those who unlawfully evade national service.

The new coalition in 2013, featuring the “brothers” Lapid and Naftali Bennett (HaBayit HaYehudi), together with Netanyahu’s Likud, was committed to addressing the equality of burden. A ministerial committee headed by Yaakov Peri (Yesh Atid*)* demanded a more equal conscription of the ultra-Orthodox and the imposition of sanctions – fines and prison sentences – on those who broke the law. The final wording of the amendment to the Security Service Law was delivered to a special committee headed by Shaked and became known as Amendment 19.[[36]](#footnote-37)

In 2014, the Knesset enacted the Equality of Burden Law, which set a new collective enlistment quota – some 5,000 ultra-Orthodox men would have to join the IDF by 2017. Failing to meet this quota would trigger a mandate to draft every 21-year-old yeshiva student. Those who did not comply with the law would be subject to fines and risk imprisonment. The quota for outstanding yeshiva students eligible for draft exemptions was set at 1,800 students per year.

The ultra-Orthodox leaders called the new law “a historic crime.” MK Menachem Moses (United Torah Judaism) said: “Yesterday, another chapter in the horrible history of religious persecution was written. This is a black day that will be forever condemned. Only a vicious government declares a whole community of Torah learners criminals. This is a divorce warrant between the government and the ultra-Orthodox. We will not forget and will not forgive. The Torah learners will keep doing what they do, regardless of the law.”[[37]](#footnote-38) This was just a part of what the ultra-Orthodox called “Lapid’s decrees.” Lapid, who served as finance minister, oversaw dramatic cuts in state funding for yeshivas, lowered the child allowances, and imposed a core curriculum in math, science, and humanities for state-funded ultra-Orthodox schools.[[38]](#footnote-39)

Yet the government served for such a short time that none of its policies achieved substantial change. The Netanyahu-Lapid-Bennett government fell in 2015 against the backdrop of the proposed Israel Hayom Law. Gafni claimed that Lapid made him a proposal he could not accept: that the ultra-Orthodox parties join a coalition without the Likud. Gafni and Aryeh Deri (Shas) both hurried to Netanyahu and closed a deal with him, signing the coalition agreement – and the full revocation of the Lapid decrees – even before the elections.[[39]](#footnote-40)

The 2015 elections were held in mid-March. In June, the ultra-Orthodox MKs Gafni and Maklev again proposed their override legislation. This time, the override clause was part of the coalition agreement, with all of parties signed on to it – except one, Moshe Kahlon’s Kulanu party. Nonetheless, the private member’s bill did not pass. Immediately after the coalition agreement was signed, a new amendment was enacted: Amendment 21 deferred implementation of the Equality of Burden Law until 2023. The amendment re-authorized the minister of defense to determine quotas and grant exemptions to the ultra-Orthodox, regardless of whether the enlistment quotas were met. It was a complete reversal of the Equality of Burden Law, which had been enacted just a year earlier. The petitions were soon to follow.

Supreme Court President Miriam Naor begins her September 2017 ruling on HCJ 1877/14 and three other petitions with a critical note regarding judicial review: Judicial review of legislation must be restrained because the Knesset represents the will of the people. However, she continues, the Supreme Court has a mission of no lesser importance: protecting human rights in Israel and seeing that they are respected by all governmental authorities (section 40).[[40]](#footnote-41) In section 42, Naor rules that Amendment 21 of the Security Service Law clearly violates the constitutional right of equality. But does it meet the criteria of the limitation clause? While the cause of integrating the ultra-Orthodox is worthy, the legislation provides no reasonable means of achieving this goal (section 59). Furthermore, the court found structural flaws in the arrangements (section 65). For example, Amendment 21 is a temporary order and not primary legislation. In fact, the amendment includes no mention of any final goals or targets (section 68). The new arrangements do not constitute any reasonable linkage between the goals and their fulfilment, and therefore the limitation clause does not stand (section 95). Moreover, the legislation constitutes severe discrimination with the effect of social polarization (section 105) – or, in the word of Justice Elyakim Rubinstein, it reflects “desperation.”

The ultra-Orthodox MKs responded promptly by preparing another override proposal, which was submitted by MKs Smotrich (Jewish Home) and Moses (United Torah Judaism). Their proposal allowed for a regular majority of MKs to override a Supreme Court judgment; it also stipulated that once the Knesset re-legislates a law that had been struck down by the court, the law would remain in effect indefinitely. This constituted a dramatic lowering of the threshold conditions prescribed in previous override proposals. The proposal did not win Knesset approval.

The next stage in this saga was a bill submitted in 2018 by MK Michael Malkieli (Shas) – the first proposal to be explicitly called “the Override Clause.” The bill, which relates specifically to the deferral of military service for ultra-Orthodox men,[[41]](#footnote-42) declares: “In a Jewish state, it is imperative to allow and encourage Torah learners to study with security and peace… However, on September 12, 2017, the Supreme Court ruled that this law is unconstitutional… This proposal comes to legislate the arrangement and establish the State of Israel’s commitment to Torah learners.” However, another round of elections intervened, the Knesset failed to legislate, and the court postponed ruling on equal service by all Israeli citizens, including the ultra-Orthodox. Later, when serving as defense minister, Lieberman tried to push the IDF to propose its own version of the Security Service Law; he resigned from the government when the legislation did not pass.

The exemption arrangement for the ultra-Orthodox was a key element in the coalition negotiations following the April 2019 elections, and relations of state and religion became a focal point in the round of elections held just five months later. Blue-White’s campaign slogan trumpeted a “secular state,” while *Yisrael Beiteinu’s* campaign called for a “liberal state.” The ultra-Orthodox, along with the national-religious camp, became the core of Netanyahu’s right-wing bloc. The deferral of IDF service remained a festering issue for the next government to address. We now turn to the other stronghold of the deep right: the settlers and their struggle against the Supreme Court.

1. **Settling the Settlements in Court or Abstaining from Judgment?**

“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies,” according to Article 49 of the Fourth Geneva Convention.[[42]](#footnote-43) The Jewish settlements in the territories occupied by Israel since the 1967 war are at the heart of the debate in Israeli politics. Israel’s peace accord with the United Arab Emirates – which was conditional upon foregoing the annexation envisioned in President Trump’s “deal of the century” (which had been enthusiastically endorsed by the right-wing bloc in Israel) – may very well have led to Netanyahu’s political downfall. The leaders of the Jewish settlers and their political patrons, who had shielded Netanyahu from any alternative government, became more vocal and resolute in exploring other options. This was reflected in the rise of Bennett, the leader of Yamina, to 23 seats in the polls in the fall of 2020. This was partly attributable to disappointment with Netanyahu’s handling of the Covid-19 pandemic, but also clearly related to his backtracking on annexation.[[43]](#footnote-44)

The struggle over the Jewish settlements, initially identified with the extreme and religiously zealous Gush Emunim movement in the 1970s and 1980s, became a key issue for the right-wing parties. In the Likud primaries, for example, candidates competed for the support of a growing number of pro-settlement party members. This issue also became a battleground with the Supreme Court after the dust settled from the 1967 and 1973 wars, and settlements began popping up like mushrooms after the rain on the arid, Palestinian-populated land beyond the Green Line. In its role as an arbiter of Israel’s compliance with democratic norms and international conventions on human rights, the Supreme Court became the bitter enemy of the settlers and their political representatives – both in the national-religious parties and within the Likud. As early as September 18, 1967, the court cited Article 49 of the Fourth Geneva Convention in advising the government on the legality of settling Jewish civilians in the newly conquered territories. The answer then was a resounding “no.”[[44]](#footnote-45)

Surprisingly, there have been relatively few Supreme Court rulings regarding the legality of the settlements. The first three rulings, in the 1970s, set the rules for establishing Jewish settlements in the territories. They must serve a security need and must be built on state land, without infringing upon land privately owned by Palestinians. Did the Supreme Court’s minimal involvement provide quiet authorization for the settlements and the gradual transfer of almost half a million Jews to the occupied territories? This question remains a subject of dispute. Justice Meir Shamgar, for one, thought this was a political matter and that the court should refrain from ruling on it. Others have contended that the court’s non-intervention has indeed legalized the settlements.[[45]](#footnote-46)

An initial petition (HCJ 302/72) against the settlements was submitted in 1970, after Israel evicted Bedouin tribes from the Rafah area. The petitioners argued that Israel evacuated the local population because it wanted to build settlements at the site. The court denied the petition, ruling that there was a security imperative for the evacuation. It did not address the question of why the evacuated area was of a specific shape that had no apparent military justification.[[46]](#footnote-47) The first principle was established. A security need was required for evacuating Palestinians and building Jewish settlements in the occupied territories.[[47]](#footnote-48) On a second issue – the justiciability of establishing settlements – there was some disagreement among the judges on whether this entailed primary legislation (in which case the court should not interfere) or administrative rulings by the military commander (in which case the court may intervene). However, both positions ultimately rendered the issue justiciable. The practice became that the court could in fact adjudicate these issues based on international conventions and its own precedential rulings. Yet, the court tended to take the IDF’s assurances when it came to “security considerations” and most of the settlements in the 1970s and 1980s were established near military bases to provide a so-called civilian rearguard to the military bases. The issue of justiciability would later become a crucial component in what the right-wing leaders characterize as the constitutional revolution. It is noteworthy that already in 1972, twenty years before the Basic Laws on human rights came into effect, the court was “activist” in its rulings regarding the occupied territories. The settlements preceded the actual constitutional revolution by two decades, yet the rage against the courts focused on the 1992 legislation.

The settlement policy of the Alignment (Labor) government at the time was not openly discussed. However, then-Foreign Minister Abba Eban told the Knesset in 1974: “The reason there are no settlements in the Shechem [Nablus] area and its vicinity is not a coincidence, but a consistent policy of Israel’s governments.”[[48]](#footnote-49) In general, the decade after 1967 saw mainly settlements in the Jordan Valley, Sinai, Gaza Strip, and the Golan Heights. These settlements were designed to fortify the envisioned borders of Israel, leaving the populated Palestinian territories on the Judea-Samaria ridge for future negotiations with the Arabs.[[49]](#footnote-50)

The turnover of power and the rise of the Likud as the ruling party had a dramatic impact on the occupied territories. The Begin government not only marked a turnover of power, but also a radical change in policy and ideology. Only two days after entering office, Begin traveled to the Elon Moreh settlement near Nablus and declared: “There will be many Elon Morehs.”[[50]](#footnote-51) The Likud endorsed the discourse of the “Greater Land of Israel” and adopted Gush Emunim’s plan for twelve new Jewish settlements.[[51]](#footnote-52) Yet given the negotiations with the Americans on peace with Egypt, Begin felt his hands were tied. Noting the limitations imposed by the United States, Begin advised Hanan Porat, the leader of Gush Emunim, to act independently and establish facts on the ground without official governmental authority. The prime minister assured him that Gush Emunim could proceed with his full blessing and resources, because he believed in establishing Jewish settlements.[[52]](#footnote-53) The settlers rejected this offer. They argued that a right-wing government was in power and therefore it should be the formal policy of the government to promote Jewish settlements. Meanwhile, on the ground, Gush Emunim decided to allow each individual group of settlers to establish a settlement on its own.

The second round of petitions (HCJ 606/78 and HCJ 610/78) against Jewish settlements came in 1978, when the Likud was already in power and a few thousand Jewish settlers were already living in the occupied territories. Knowing that these petitions would be submitted to the court the next day, a group of settlers decided to create facts on the ground at a biblical site that was to become the settlement of Beit El, though there was still no infrastructure for sewage, electricity, or water at the site.[[53]](#footnote-54) On their way to Beit El, the settlers stopped at Rabbi Zvi Yehuda Kook’s yeshiva to receive his blessing. Kook responded that he would give his blessing only if the prime minister did the same. It took a while that long night of November 1, 1978, but the founders of Beit El finally received the go-ahead from both men.

Kook, who spoke about “redeeming” the biblical land, was the highest rabbinical authority to inspire the messianic Gush Emunim movement. The connection between the rabbi and the prime minister symbolized the new nexus between the national-religious camp and the liberal-nationalist party. The replacement of the founding fathers’ secular Zionist narrative by a more traditional one that placed Judaism at its core began with Begin, not Netanyahu. The latter exploited the new religious-cum-national narrative for his political needs after his 2012 defeat.

In both HCJ 606/78 and HCJ 610/78, submitted on November 2, 1978, the Palestinian petitioners complained 1) that their lands had been confiscated; 2) that they were being denied access to their lands; and 3) that civilian Jewish settlements were being built on their lands. In its response, the court cited the 1972 precedent (HCJ 302/72) and international law (both the Geneva Convention and 1907 Hague Regulations) in assessing the state’s claim that the land was needed for security reasons. Justice Alfred Witkon distinguished between “requisition” and “confiscation” and argued that the Palestinian land was under requisition in the Beit El case– that is, the owners were being compensated for its use, and its requisition was therefore “permissible under a plea of military necessity.”[[54]](#footnote-55) Again, the court did not consider whether military necessity was being used as a pretext for a civilian, religious act of settlement. In addition, the justices noted that the Geneva Convention relates to occupied territories in dispute between two states, and the territories did not belong to any sovereign state. Consequently, they based their ruling on Israeli judicial precedent rather than international law. From this point onward, the Supreme Court adopted this approach regarding the legal status of the occupied territories.

The issue of justiciability arose again in the Beit El case. Justice Witkon wrote:

I would like to comment on the respondents’ additional argument that the issue at hand is not “within the court's jurisdiction” since it is about to be discussed in the context of peace negotiations and that the court does not discuss political issues which are to be decided by the government. I am not at all impressed by this argument… Clearly, in foreign affairs matters – as in several similar matters – the power to decide is vested with the political authorities rather than with the judicial authority. But given the assumption – which was not substantiated in this case – that a person's property had been damaged or taken from him unlawfully, it is hard to believe that the court will avoid helping that person in view of the fact that the latter’s right may be the subject of political negotiations. [[55]](#footnote-56)

Thus, the ruling established two key principles in the legal battle over Jewish settlements in the occupied territories. Requisition of Palestinian land is justified if presented as a military necessity, and the court is entitled to rule on political issues if the petition concerns an alleged violation of human rights.

The Elon Moreh settlement was the subject of a third petition a few months later. This time, there was a dramatic ruling. The case was ostensibly similar to the one involving Beit El: Palestinians were petitioning against the state’s seizure of their privately owned land and its use for a Jewish civilian settlement. However, the court this time ordered the evacuation of the Elon Moreh settlement within thirty days.[[56]](#footnote-57) What made the difference?

First, there was an internal Israeli dispute over the military necessity of the requisition. The IDF chief of staff, Lt. Gen. Rafael Eitan, claimed the land seizure was for security reasons, but the defense minister, Ezer Weizman, and a number of other former generals argued that it was done for political reasons.[[57]](#footnote-58) Deputy President Moshe Landau was not convinced that the state’s action was motivated by security concerns, which is the sole justification for such land requisition under international law. Since the decision to settle Elon Moreh was based on political interests rather than military needs, it did not meet the conditions required for the court’s consent.

Secondly, the argument for requisition assumes that it will be temporary, and that the land will eventually be returned to the owners. However, in the Elon Moreh case, two of the settlers told the court about their plans to permanently settle on the requisitioned land. Elon Moreh was not intended to be temporary. Landau cites the settlers in his ruling: “In all the contacts and the many promises we were made by government ministers, and above all by the prime minister himself – and the seizure order in question was issued as per the prime minister’s personal intervention – everyone sees the Elon Moreh community as a permanent community of Jewish settlement, no less than Degania or Netanya.”[[58]](#footnote-59)

The court had now ruled against the establishment of permanent Jewish settlements in the occupied territories – in direct opposition to the agenda of Begin’s government. In the cabinet meeting following the judgment, Begin said: “We will of course make no statements, which would be completely superfluous. That means the ruling of the court will be respected, and that goes without saying.”[[59]](#footnote-60) Begin nevertheless proposed looking for an alternative site for Elon Moreh. The attorney general stated at the same meeting that the court’s ruling only concerned settling on privately owned Palestinian land and noted two other ways to establish Jewish settlements in the occupied territories: on state land and on land that was purchased from its owners. Indeed, these would become the primary ways of building Jewish settlements in the territories. Elon Moreh, however, was established following another route, based on the Ottoman law concerning “dead land” (*muwat*). This unproductive land – where the crowing of a rooster at the edge of the closest village cannot be heard – could be confiscated by the state and cultivated. If the cultivation stopped, the land would return to its previous owner. A new site for Elon Moreh was found, as Begin had proposed, on such *muwat* land. And since the settlers never stopped cultivating the land, it never had to be returned to its former owners.[[60]](#footnote-61)

Another petition (HCJ 285/81), submitted in 1981, was denied by the Supreme Court because the settlement in question was built on state land. Justice Shamgar dismissively addressed the question of confiscation, noting that while the state cannot confiscate land, it may lease it indefinitely.[[61]](#footnote-62) In this ruling, the court came close to legalizing Jewish settlements in the occupied territories. Nonetheless, after the Elon Moreh ruling, the settlers and their supporters remained hostile toward the Supreme Court for generations to come.

Once the court had set the rules, the settlers and their political representatives in government operated in ways designed to avoid superfluous petitions. During the next thirty years, most of the petitions concerned several main issues: the treatment of Palestinian suspects; state taxes applied to the territories; compensation for Jewish settlers uprooted in the disengagement from Gaza (2005); and the security fence (the physical barricade built between Israel and the Palestinian territories designed to keep suicide bombers from infiltrating into Israel). Yet once the political dynamic changed, with the right-wing camp becoming dominant and secure in power, the demand arose to override the court’s basic ruling regarding settlements built on private Palestinian land. Politicians from the nationalist camp became emboldened and proposed redesigning the constitutional rules of the game. The Knesset would authorize settlements on privately owned land and this legislation would override the court’s rulings. This was the underlying logic of what came to be known as the Regularization Law (also translated as the Regulation Law). The override proposals included in the legislation galvanized the support of the entire right-wing bloc.

The table below outlines the proposals for the Regularization Law, the MKs behind them, and their parties to illustrate the concrete attempt to enact what was clearly an unconstitutional law. The law, endorsed by Netanyahu’s government and enacted in 2017, was struck down by the Supreme Court in 2020.

**Table 4: Regularization Law, 2012-2017**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Year** | **Type of legislation** | **Main idea** | **Status** | **Sponsoring MK(s)** | **Party** |
| **2012** | Private member’s bill P/4383/18 | Legalizing settlements, including those built on private Palestinian land | Submitted for preliminary discussion; was not discussed | Z. Orlev | Jewish Home |
|  | Private member’s bill P/3643/18 | Following petitions concerning privately owned land | Preliminary discussion in the Knesset; did not advance | Y. KatzZ. ElkinD. RotemM. RegevY. Levin | National UnionLikudYisrael BeiteinuLikudLikud |
|  | Private member’s bill P/3900/18 | Preventing evacuation of outposts, based on prior experience of finding arrangements to allow them to remain | Submitted for preliminary discussion; was not discussed | M. Regev | Likud |
|  | Private member’s bill P/4278/18 | Legalizing settlements, including those built on private Palestinian land and providing compensation | Preliminary discussion in the Knesset; did not advance | Y. LevinZ. ElkinA. EldadU. OrbachZ. OrlevH. KatzD. DanonY. Shmuelov-BerkowitzZ. FinianH. AmsalemM. Ben-AriU. ArielN. ZeevY. KatzF. KirshenbaumY. Eichler | LikudLikudNational UnionJewish HomeJewish HomeNational UnionLikudKadima/LikudLikudShasNational UnionNational UnionShasNational UnionYisrael BeiteinuUnited Torah Judaism |
| **2013** | Override clauseP1944/19/ | Allowing the Knesset to override Supreme Court rulings with a 61-MK majority | Halted before first reading | A. ShakedS. OhayonM. GafniR. ElituvZ. KalfaSh. Mualem-RefaeliO. StrookM. Regev | Jewish Home,Yisrael Beiteinu UTJ Yisrael Beiteinu,National Union Jewish HomeNational UnionLikud |
| **2014** | “Norms” private member’s billP2834/19/ | Any law enacted by the Knesset would also apply, within 45 days, to the Jewish settlers in the occupied territories | Approved by the ministerial committee on constitutional issues in Nov. 2014; did not advance due to alternative government proposal | O. StrookY. Levin | National Union Likud |
| **March 19, 2014** | Referendum Law2443 | Any parliamentary or government proposal to evacuate land where Israeli law applies would have to be approved in a referendum | Passed with 68 supporters |  |  |
| **October 26, 2014** | Override clauseapproved by the ministerial committee on constitutional issues  | A 61-MK majority could override a Supreme Court ruling | Passed by the ministerial committee on constitutional issues | 8 for, 3 against | Jewish HomeLikudYisrael Beiteinu |
| **2015** | Override clauseP2115/20/  | 61-MK majority  | Halted before first reading | N. SlomianskiB. SmotrichY. Magal | Jewish HomeNational HomeJewish Home |
| **2016** | Regularization Law1973/20 |  |  | Y. KishB. SmotrichM. ZoharS. Gal | LikudNational HomeLikudNational Home |
| **2016** | Regularization Law 3549/20 |  | Passed ministerial committee  | Y. Kish | Likud |
| **2016** | P4005/20/ |  |  | B. Smotrich | Jewish Home |
| 2017 | Regularization Law2604  |  | Enacted by the Knesset |  |  |

The processes outlined in the table reflect the evolution of the right-wing bloc in Israel and can be classified into three main categories: embracing the annexation of the settlements (and the associated battle with the judicial branch) as the ideological centerpiece of the right-wing bloc in Israel; the transition from private members’ bills submitted by opposition MKs from National Union and Jewish Home to mainstream endorsement by the Netanyahu government and leading Likud ministers (with encouragement from the Trump administration); and the emerging conflict with the courts. As noted, Netanyahu was once a staunch defender of the courts, but later began unleashing vehement attacks against the judicial authorities.

The Regularization Law was conceived in response to several petitions from Palestinians that asked the court to order the demolition of settlers’ houses that were built on privately owned Palestinian land. That is, the prospect of an unfavorable ruling on these petitions was the impetus for the legislation. The contents of the law had changed very little since first being introduced to the Knesset a decade earlier. It stipulated that if a settlement was built in “good faith” on privately owned Palestinian land, the State of Israel would compensate the owner with a sum equal to 125% of the land’s worth, or with alternative land – and legalize the settlement. The most adamant critics of this law, both from within the government and outside it, were the “princes” – the children of the Likud’s Revisionist precursors. According to hawkish Benny Begin, the legislation constituted “a dark stain on the settlements and imposed a grave cost on the State of Israel.”[[62]](#footnote-63) He accused the law of aiming to retroactively authorize the theft of land from private Palestinian owners. The law was enacted just after the long-delayed evacuation of the Amona outpost, whose evacuation the court had ordered several years earlier. It was designed to be the first Israeli legislation enacted with the express purpose of overriding the Supreme Court. Begin asked the 27 Likud MKs who supported the legislation: “This is your leader? The headquarters of Amona?” hinting that his father, Menachem Begin, would never have lent a hand to violating constitutional human rights. He called upon both coalition and opposition parties to vote against the law. The Supreme Court is sure to strike down this law because it is unconstitutional, Begin added. However, he was the only Likud member to openly oppose the law. In the end, 60 MKs voted in favor and 52 against. MK Shuli Mualem (Jewish Home), the law’s sponsor, declared:

This is a historic day with the enactment of a historic law. The homes of settlers who built them with the encouragement of the Israeli government will no longer be targeted by extreme left-wing organizations that seek to demolish the settlements. The president of the Supreme Court needs to understand that the court must not interfere in a law that is clearly a political matter. If the court intervenes, we will promote the override clause and the law to include the settlements under Israeli law.[[63]](#footnote-64)

The settlers’ agenda had become dominant in the Likud. Mualem and Yariv Levin, a senior Likud minister and Netanyahu’s right-hand man, jointly led a twofold agenda: annexing the settlements and waging a counterrevolution against the Supreme Court. In addition to the Jewish Home and Likud, the supporters of this agenda included the ultra-Orthodox parties and Yisrael Beiteinu.

Thus, what had changed since the first proposal in 2012 was the intensity of the proposals of this unconstitutional law and its transition from the margins of the opposition to the declared policy of the right-wing government. While the initial bill was proposed by the settler-affiliated Jewish Home party, the MKs sponsoring the Regularization Law in 2016 were from the Likud and Yisrael Beiteinu. One of the private member’s bills (P/4278/18) in 2012 already included sponsors from the ultra-Orthodox parties Shas and United Torah Judaism. With three ultra-Orthodox settlements established in the West Bank (Modi’in Illit, Beitar Illit, and Immanuel), the ultra-Orthodox became an integral part of the right-wing bloc. They not only believed in the sanctity of the biblical Land of Israel, but also supported empowering the Knesset to override constitutional rights protected by the Supreme Court.

Netanyahu had adamantly opposed the proposed law in 2012 and declared that any government minister or deputy minister who supported it would be fired.[[64]](#footnote-65) The attorney general said he could not defend the legislation in court. The state would hire a private lawyer to defend itself, realizing that the legislation violated a constitutional right and international law. Netanyahu was not present at the final vote on the Regularization Law in 2017 due to a delayed flight from London. His science minister, Ofir Akunis, defended the law in the Knesset: “The debate tonight is about whose land this is, and is about our own natural right to our land. We vote tonight on our right to our country. We vote on the connection between the Jewish people and its land.”[[65]](#footnote-66) The fact of the matter, of course, was that the law was designed to sanction the theft of private land by settlers. Naftali Bennett, head of Jewish Home, said: “Our determination has won. I congratulate the prime minister and our friends in the Likud and in the government for their support of the Regularization Law. To our friends in the opposition who wonder how a national government passes a law for the settlements I say: This is democracy. The government realizes exactly the purpose for which it was chosen: to govern.”[[66]](#footnote-67)

According to this view, it was the national government’s role to annex Palestinian land – even privately owned land – for Jewish settlements. Netanyahu’s initial rejection of the proposed law was not due to its infringement on the right of private ownership. Rather, he was concerned that the International Court of Justice in The Hague would intervene. However, Netanyahu met the settlers of Amona before the Knesset vote in February 2017, and decided to support the law. This is why Begin asked: “Is this your leader? The headquarters of Amona?” Netanyahu finally decided to endorse the Regularization Law after it became clear that both the attorney general and the Supreme Court would not approve it: Instead of the prime minister being perceived as the one who had blocked a national law to support the settlements, the Supreme Court could be blamed for the downfall of the law. The law would be overruled by Israeli’s highest court and would never reach the International Court in The Hague. In addition, this would generate more right-wing hatred toward the attorney general and the Supreme Court – two institutions that became the focus of Netanyahu’s own attacks on the judicial system as his corruption trial approached.[[67]](#footnote-68) This was exactly what happened after the Supreme Court finally overturned the law in 2020. But was this only a token the prime minister tossed to the settlers and their supporters in his own party? Trump’s Plan of the Century, composed in close collaboration with Netanyahu’s men, was founded on the following principles: Israel is the Holy Land of the Jewish people; no Jew (or Palestinian) will be removed from his or her home in the occupied territories; Israel will be able to annex the settlements if the Palestinians fail to recognize Israel as a Jewish state and fulfill other conditions. Trump disregarded international conventions and recognized the occupied territories as part of the biblical Land of Israel, belonging to the Jews. Netanyahu’s inner voice guided Trump’s hand. The reign of the right in Israel received international endorsement by the U.S. president.

1. **The Supreme Court as a Collaborator with Infiltrators and Human Rights Organizations**

“The immigration policy is the biggest stain on Netanyahu’s rule as prime minister, because here it is not about our enemies… It is about compassion for the foreigner and the asylum seeker,”[[68]](#footnote-69) the poet and literary critic Menachem Ben wrote in an op-ed. Yet the immigration policy was the glue that held together the right-wing camp under Netanyahu. As described above, other issues had already positioned the Supreme Court as the ideological enemy of the hardcore right in Israel and sparked efforts to change the constitutional balance between the legislative and judicial branches. For example, the battle over draft exemptions for ultra-Orthodox men dated back to the state’s birth in 1948, and the debate over Jewish settlement in the occupied territories began in 1967 – long before Netanyahu became the leader of the right. The ultra-Orthodox resentment toward the courts gave birth to the first override clause proposal in 2009; the ultra-Orthodox joined hands with the settlers on both the override proposals and the Regularization Law. Nonetheless, the issue that galvanized the right-wing bloc under Netanyahu was definitely the issue of illegal immigrants. We have already discussed several dimensions of the political reactions to the infiltrators. In this chapter, the focus is on three fronts: the connection between the court’s rulings and the government’s reactions, which exemplifies the power struggle between the judicial and executive arms of democracy; the unification of the right around the resentment toward the illegal immigrants; and the creation of public sympathy for the social cause of the poor neighborhoods in south Tel Aviv, stirring nationalist sentiment that portrayed the court as acting against Israel’s interests.

Israel does not have clear borders to its east, and did not have a physical border to its southwest. The infiltration of Africans through the Egyptian-Israeli border was overlooked by the Israeli authorities for years. This negligence had nothing to do with the courts. The belated decision to build a fence and guard the Israeli border with Egypt was a political issue. Tens of thousands of illegal immigrants had managed to enter the state before the barrier was erected, and most of them lived in the south Tel Aviv area. Once they were in Israel, the question of how to treat them became not only a political issue, but a legal issue as well. The salient feature of the relations between the government and the judicial system in this matter was a back and forth over what was legal and what was unconstitutional, with the lawmakers and law interpreters seldom seeing eye to eye.

1. Back and Forth – Un-justiciable or Unconstitutional?

The Knesset enacted Amendment 3 of the Prevention of Infiltration Law (1954) in January 2012 in an attempt to stem the tide of about 1,000 illegal immigrants crossing the Egyptian border into Israel each year. By the time the court ruled on a petition (HCJ 7146/12) against this amendment (on September 16, 2013), the barrier was already built; in 2013, only 36 illegal immigrants entered Israel from Egypt. But there was still the question of what to do with the 54,000 people, mainly from Eritrea and Sudan, who could not be returned to their countries because of the non-refoulement principle in international law. This included 1,811 such individuals who were being held in a detention facility in the Negev. Amendment 3 allowed the state to keep them in a detention facility for three years. The Supreme Court unanimously ruled that Article 30a of the amendment indisputably “violates the right of the infiltrators to freedom. The right to freedom is a constitutional right, anchored in Article 5 of Basic Law: Human Dignity and Liberty. It is one of the most fundamental, important rights of man.”[[69]](#footnote-70) While the justices concurred that the prevention of infiltration was a worthy cause, some of them questioned the deterrent effect of the legislation. All of the nine justices viewed three years of detention as disproportional and unconstitutional.

From the perspective of right-wing politicians, the infiltrators case provided clear proof of the constitutional revolution. The justices’ commitment to lawbreakers (based on a basic law in which the term “equality” had been deliberately excluded by the Knesset) constituted an all-out war between the Supreme Court and the national interest, as represented by those elected by the people of Israel.

Ayelet Shaked, who founded the My Israel movement with Bennett and was then planning her political career, declared that the government had completely failed; she warned and that within ten years there would be half a million infiltrators. “We need to understand that cultural pluralism has failed all over the world… In the end, we will lose our Jewish character.”[[70]](#footnote-71) She also claimed that jihadist terror organizations were paying Bedouins in the Sinai to lead infiltrators into Israel. “People do not understand that these infiltrators are Muslims… they thicken the Muslim and Arab population here in Israel.”[[71]](#footnote-72) This nationalistic, ethno-Jewish populist ideology was embraced by the right-wing bloc and resonated with voters. The linkage of illegal immigrants with jihadist terror organizations and the Arabs in Israel was typical of the anti-liberal rhetoric that flourished under Netanyahu’s rule.

The Knesset blamed the court for the problems in south Tel Aviv. Amendment 4 of the Prevention of Infiltration Law was approved by the ministerial committee on legislation and enacted on December 10, 2013 – ironically on International Human Rights Day. A petition against the amendment was soon to follow, and the Supreme Court ruled on the petition (HCJ 8425/13) on September 22, 2014. The amended legislation reduced the period of detention for new detainees to one year and the court judged this infringement of a person’s freedom to be proportional. However, the court ruled against the indefinite detention of those who were already being held. Yariv Levin, one of Netanyahu’s loyalists, asserted in a radio interview:

This is the reality – the Supreme Court simply undermined the process of getting the infiltrators out of the country and deliberately undermined the government’s policy. One needs only to look at the numbers. Until the first law regarding the imprisonment of the infiltrators was overturned, the rate of those leaving the country was more than 1,500 infiltrators a month, and was growing rapidly. The minute the Supreme Court overturned the law, the infiltrators understood their chances of staying in Israel was high and the rate dropped immediately to almost zero. And so it was with the rest of the laws that the Supreme Court has overturned.[[72]](#footnote-73)

His argument is that by deliberately undermining the government’s policy, the court was jeopardizing the deterrence of future infiltrators and impeding the expulsion of those already in Israel. Yet the facts show this to be untrue: About 200 infiltrators left Israel in the months prior to the court’s September 2013 ruling on Amendment 3, and approximately the same number departed in the months following the court ruling. In fact, the highest monthly total in 2013 was in December, when 329 infiltrators left Israel.[[73]](#footnote-74) The same holds for the ruling on Amendment 4 a year later: The number of monthly departures remained steady – approximately 250 – in the months before and after the ruling.[[74]](#footnote-75) Thus, it was a political argument between the government and the court that served a populist agenda; the argument was not based on facts. The right-wing campaign portrayed the Supreme Court as directly and deliberately intervening in government policies, and therefore as an independent player in the political arena. Levin, hoping to become the justice minister in Netanyahu’s government, said already in 2012: “When a certain group of people attempts to appropriate for itself the ability to determine what is proportional and what is not, what is reasonable, what is enlightened and what is not, this is the essence of dictatorship – and today there is such a radical leftist group that dominates the Supreme Court.”[[75]](#footnote-76) Levin was Netanyahu’s favored candidate for minister of justice in 2019.

This did not deter the Supreme Court. Its ruling on Amendment 4 states:

Our departure point for the constitutional review is that we are dealing with a law enacted by the Knesset, representing the will of those elected by the people. As such, the court needs to respect it and be cautious in reviewing its constitutionality. This caution is not to say, however, that the court is thereby exonerated from its duty in our constitutional regime. We must ensure that Amendment 4 does not unlawfully violate human rights anchored in the basic laws. The cautious nature of this review derives from the delicate balance of the principle of majority rule, the principle of separation of powers, and the court’s duty to protect human rights and the basic values at the foundation of our regime.[[76]](#footnote-77)

The justices ruled that holding a person in a detention facility for an entire year – when the person has done no harm, has no means of improving his or her legal status, and has no prospect of deportation at the end of the one-year detention – is both disproportional and unconstitutional.[[77]](#footnote-78) Justice Uzi Fogelman also addressed the legislative branch directly, noting that the law’s use of the term “infiltrator” – as intended in the original 1954 law, which was directed against militants intent on committing hostile acts against the state – is problematic. The court is dealing with asylum seekers who have no a priori hostility towards the state, his opinion notes, while the Knesset chose to use a term that criminalizes them.[[78]](#footnote-79) Amendment 4 is not very different from Amendment 3 and the legislature knew the ruling on the previous amendment, the ruling emphasizes.

The third time the Supreme Court ruled on the Prevention of Infiltration Law involved the deportation of detainees to a third country. Since the majority of the infiltrators to Israel were from Eritrea or Sudan and could not be deported to those countries because of the non-refoulement provision, Israel struggled to find a third country that would agree to accept them. On April 2, 2018, Israel signed an agreement with the UN to place about half of the asylum seekers in Western countries, while offering legal status to others in Israel. But after Netanyahu reneged on the deal the next day, the only other legal option was to deport the detainees to a willing third country. In its ruling on HCJ 8101/15 (August 28, 2018), the court did not reject the idea of deportation to a third country. However, since it emerged that Israel had made a secret agreement with Rwanda, and Rwanda had conditioned its agreement on the detainee’s consent to be deported to Rwanda, the court ruled that indefinite detainment pending the detainee’s “agreement” to be deported was disproportional and did not meet the condition of deportation out of free will.[[79]](#footnote-80) Interior Minister Deri (Shas) declared that since the court had crippled the main option for deporting infiltrators who were willing to go to a third country, he would now advance legislation to enable their coerced deportation from Israel.[[80]](#footnote-81) Former Shas minister Eli Yishai denounced the court’s ruling and called for enactment of the override clause to limit the court’s power:

This is a very difficult ruling, a severe one in my eyes, an aggressive intervention in the Knesset; they were elected, not the court. On such essential issues, the court cannot change the legislation… Once you impose less time in a detention facility, it is worthy for the infiltrators to come to Israel. The thing that prevents them is the long imprisonment and the detention facilities. It is impossible to use the Human Dignity and Liberty Law to change the character of Israel. If I hadn’t initiated the fence… we would have lost the Jewish majority.[[81]](#footnote-82)

Following the court’s partial rejection of the law, ruling that twenty months in a detention facility constitutes a disproportional infringement of Basic Law: Human Dignity and Liberty, the government reluctantly decided to reduce the period of detention to one year – in line with what the court deemed proportional. The government remained unpersuaded by the court, but since the Holot detention facility would have to close down if the law was not changed, it complied with the court’s interpretation of proportionality – for now at least. It was this series of events that triggered the override clause proposal. This time it was not merely proposed as a private member’s bill, but was formulated by a ministerial committee chaired by the justice minister, Shaked. The override clause, riding a wave of public support in protest against the court’s rulings, was approved by the government. However, it had yet won the Knesset’s approval when new elections were called. The discussion on the override clause dominated the coalition negotiations after the April 2019 election, but mainly because of Netanyahu’s upcoming trial. Undoubtedly, the infiltration issue and the public perception that the court’s sympathy lay with the asylum seekers rather than with the poor neighborhoods of south Tel Aviv united the right-wing bloc in support of the override clause.

The infiltration issue is emblematic of the “deep state” argument: The infiltrators were the ultimate strangers, not Jewish, not Israeli, not Zionist, not Caucasian. The unelected Supreme Court justices were seen as detached from the concrete reality in Israel, shaping Israel’s policy based on universal values rather than Jewish values. The court was relying on a basic law that did not include the term “equality,” yet affirmed that equality is a constitutional right based on two tests – reasonability and proportional harm. In doing so, it was clearly acting contrary to a clear government policy. In a nutshell, this was the constitutional revolution the Supreme Court was accused of fomenting, according to this argument.

It should be emphasized that the infiltration dispute was clearly between the government and the Supreme Court. While most of the proposed legislation on IDF exemptions and Jewish settlements in the occupied territories came in the form of private member’s bills, the back and forth on the infiltration issue was between government-backed legislation and the court. According to the thesis of governability held by Netanyahu’s government, more and more responsibility and authority should be appropriated by the government as the gatekeeper of democracy. The judicial system, the civil service, and the attorney general were perceived as unelected, biased bureaucrats acting in opposition to the government. If the legislative proposals came from the government, what was the status of the override clause?

1. The Override Clause – from Coalition to Government and Back to Private Member’s Bills

Already in 2014, as a direct response to the Supreme Court’s rulings on amending the Prevention of Infiltration Law, Shaked presented an override clause to the ministerial committee on legislation.[[82]](#footnote-83) In section 23 of the 2015 coalition agreement, the coalition partners (Likud, Jewish Home, Yisrael Beiteinu and the ultra-Orthodox parties) committed themselves to promoting an override clause. The only party exempted from coalition discipline on this issue was Kulanu, the self-appointed gatekeeper of the rules of the democratic game in Netanyahu’s 2015–2019 right-wing government. Shaked’s override initiative came in direct response to the Supreme Court’s ruling in HCJ 8665/14, which set a one-year limit on holding asylum seekers in detention. Bennett, her partner in the Jewish Home party, said: “The override law, or balancing law, creates a balance between the legislative and executive branches, and the judicial authority. This is the most important law in decades. Regrettably, the Supreme Court has made everything justiciable during the last generation. It struck down the Prevention of Infiltration Law three times and limited the government’s ability to deport illegal infiltrators from the State of Israel.”[[83]](#footnote-84) Shaked declared: “The government today began building the separation wall between the three authorities.” The case of the infiltrators and the override clause became one, thus cementing the right bloc in building this “wall.” While Kahlon’s Kulanu party had blocked the override clause, he now changed his mind on the specific issue of the infiltrators. Kahlon informed the prime minister that he would support any law that provided a comprehensive solution for the infiltration problem.[[84]](#footnote-85) When the matter came before the cabinet in 2018, the other reluctant coalition partner – Netanyahu himself – was now leading the charge toward an extensive override clause.[[85]](#footnote-86) It was only the timing that prevented the government from enacting a law curbing the Supreme Court’s power of judicial review; new elections were called before the override legislation was enacted.

The rage of the right-wing bloc was expressed in three override proposals aimed at addressing the infiltration issue by amending Basic Law: Human Dignity and Liberty. Bill 5497/20 submitted by MK Mualem (Jewish Home) targeted the Supreme Court’s rulings on this issue, adding an override clause to Basic Law: Human Dignity and Liberty.[[86]](#footnote-87) The proposed legislation was later resubmitted by two prominent Likud MKs – first Yoav Kish and then Gideon Sa’ar,[[87]](#footnote-88) who were from what was considered the liberal wing of Netanyahu’s Likud. While such “liberal” Likud MKs may have been critical of Netanyahu, their support for these bills showed they were also part of the new anti-liberal Likud.

The policy towards the African infiltrators brought the conflict between the government and the court to a peak. Politically, it generated two other significant processes: It united the ethno-religious coalition around Netanyahu, and it was instrumental in generating broad public support for the government and against the infiltrator-friendly court. On the coalition front, this was the issue that placed the ultra-Orthodox at the heart of the right-wing bloc. The minister of interior, Yishai, took an extreme right-wing stance on infiltrators; Deri was less extremist, but was attuned to the feelings in his camp that the court had wronged the poor Mizrahi neighborhoods once again. Shaked and Bennett were at the forefront of the anti-immigration camp, adopting increasingly radical positions against the Supreme Court, while Levin and Miri Regev, now senior government ministers and personal loyalists to Netanyahu, led the multi-pronged attack against the infiltrators, the human rights organizations that represented them, and the Supreme Court that defended their rights.

The anti-Court narrative was making headway in the wider public. In 2017, the Democracy Index, an annual poll conducted by the Israel Democracy Institute, asked a sample of Jewish Israelis whether they agreed with the following statement: “Although the majority of Israelis voted Right, the Leftist court system, media, and academia hamper the Right’s ability to govern.” About 46% of the respondents “strongly” or “somewhat” agreed. However, a clearer picture emerges when distinguishing between respondents who identified as right-wing, centrist or left-wing: 72% of the right-wingers agreed with the statement, compared to only 22% of the centrists and 11% of the left-wingers. Another question asked the respondents whether they agreed with this statement: “The Supreme Court should be denied the authority to nullify laws passed by Knesset members who were elected to their posts by the country’s citizens.” Some 36% of the respondents said they agreed. But once again, the political distinction made a real difference. A majority (53%) of right-wingers concurred with the statement, compared to only 25% of centrists and 9% of left-wingers. In terms of religiosity, 73% of the ultra-Orthodox respondents and 63% of the national-religious Jews agreed, compared to approximately 30% of traditional (religious and non-religious) and secular Jews.[[88]](#footnote-89) That is, a majority of right-wing voters, and an overwhelming majority in the ultra-Orthodox and national-religious communities, supported curtailing the Supreme Court’s power of judicial review – the very goal of the override clause.

1. **The Constitutional Counterrevolution**

“Israel today is not a state that has a court, but a court that has a state. The judicial system and not the Israeli government runs de facto the national policy on immigration, security, religion and state, the war on terror, and other issues,”[[89]](#footnote-90) Adam Gold claims in the introduction to *The Ruling Party of Bagatz [the High Court]: How Israel Became a Legalocracy* by MK Simcha Roth (Religious Zionism). Gold continues: “The exclusivity on interpreting the principles made the judges into super-legislators with formidable forces that spring their wings above and beyond the democratic process.”[[90]](#footnote-91) The constitutional revolution is embodied in judicial activism,[[91]](#footnote-92) with the Supreme Court assuming the role of super-interpreter. Citing President Barak (“The language of the text must be interpreted by its purpose… according to the judgment of the interpreter”[[92]](#footnote-93)), Rothman concludes that judicial activism continually expands the interpretative space of the judge. The justices have also overturned laws by applying competing value judgments, he notes. In particular, Basic Law: Human Dignity and Liberty has enabled different normative readings of “Jewish and democratic,” “worthy purpose,” and “proportional violation of rights.”[[93]](#footnote-94) Another tool of the activist court is to extend the right of standing. While in the past only a person who directly suffered harm could file a petition, the Supreme Court came up with notion of a “public petitioner” who does not need to prove direct damage. The next point in Rothman’s indictment of judicial activism pertains to justiciability. Here he argues that the court has intervened in essentially political issues such as military exemptions and infiltration. Finally, the criteria of reasonableness and proportionality provide further leeway for the court to intervene and strike down laws enacted by the Knesset.[[94]](#footnote-95) The consequence of this judicial activism, claims the author, is erosion of the public’s trust in the judicial system.

Measures aimed at countering the alleged constitutional revolution and restoring the proper balance between the different branches of government are ostensibly predicated on the Supreme Court’s abuse of judicial review. However, in over seventy years, Israel’s Supreme Court has overturned only nineteen laws. These laws are outlined in the table below, followed by a discussion of why these few cases in a long judicial tradition have stirred so much outrage over “judicial activism” and a “constitutional revolution.”[[95]](#footnote-96)

**Table 5: Laws Overruled by the Court 1948-2020[[96]](#footnote-97) and Override Proposals**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Year** | **Subject** | **Petition** | **Justification** | **Override clause proposals** | **Proposing parties** |
| 1 | 1969 |  | Bergman petition | Unconstitutional  |  |  |
| 2 | 1989 | Party financing | Laor petition | Violation of equality, violation of a basic law |  |  |
| 3 | 1997 | Investment managers | 1715/97 | Conflict with basic law |  |  |
| 4 | 1999 | Detention of soldiers before trial | 6055/95Sagi-Zemach petition | Violates Basic Law: Human Dignity and Liberty |  |  |
| 5 | 2002 | Piratic radio broadcasting | Oron petition1030/99 | Violates Basic Law: Freedom of Occupation |  |  |
| 6 | 2005 | Compensation for Gaza Strip settlers | 1661/05 | Disproportional damage (Basic Law: Human Dignity and Liberty) |  |  |
| 7 | 2006 | Compensation for Palestinians hurt by the security forces | Adalah petition 8276/05 | Violates human life, equality and private ownership (Basic Law: Human Dignity and Liberty) |  |  |
| 8 | 2007 |  |  |  | Override clause, private member’s bill | 1975/17 Yisrael Beiteinu |
| 9 | 2009 | Privatizing prison | 2605/05 | Disproportional damage to dignity and freedom of prisoners;Basic Law: Human Dignity and Liberty | Override clause, private member’s bill | 1891/18United Torah Judaism |
| 10 | 2010 | Extension of detention without the prisoner’s presence | 8823/07 | Disproportional; Basic Law: Human Dignity and Liberty |  |  |
| 11 | 2012 | Exemption of conscription for yeshiva men | Ressler petition6298/07 | Disproportional, violates equality; Basic Law: Human Dignity and Liberty |  |  |
| 12 | 2012 | Car ownership as justification for stipend cancellation | Hassan petition19662/04 | Basic Law: Human Dignity and Liberty |  |  |
| 13 | 2012 | Reduced income tax for specific settlements | Nasser petition8300/03 | Violates equality; Basic Law: Human Dignity and Liberty |  |  |
| 14 | 2013 | Amendment 3 of Prevention of Infiltration Law  | Adam petition7146/12 | Unconstitutional law, unreasonable, violates Basic Law: Human Dignity and Liberty | Override clause, private member’s bill | 1406/19United Torah Judaism, No.???Jewish Home, Yisrael Beiteinu, United Torah Judaism, National Union |
| 15 | 2014 | Amendment 4 of Prevention of Infiltration Law | Gavrisalsi petition | Basic Law: Human Dignity and Liberty | Override clause,ministerial committee | **Np.???**Jewish Home, Yisrael Beiteinu, Likud |
| 16 | 2015 | Boycott Law | Avnery petition5239/11 | Overruled compensation without proof of damage; Basic Law: Freedom of Occupation |  |  |
| 17 | 2013-2015 | Detention of infiltrators  | Tamosha petition8665/14 | Amendment 3 of Prevention of Infiltration Law |  |  |
| 18 | 2014 | Stipend for yeshiva students who received IDF exemption | Students’ Union petition | Violates equality; Basic Law: Human Dignity and Liberty | Override clause, private member’s bill | 1374/20United Torah Judaism |
| 19 | 2015 |  |  |  | Override clause, private member’s bill | No???Jewish Home |
| 18. | 2017 | Taxing a third apartment  | Kewitinsky petition | Process of legislation | Override clause, private member’s bill | 4005/20Jewish Home, Likud, United Torah Judaism, Yisrael Beiteinu, Shas |
|  | 2018 |  |  |  | Override clause, private member’s bill | 5219/20Shas |
| 19. | 2020 | Expropriation of privately owned Palestinian land | Silowad petition; Regulariza-tion Law | Basic Law: Human Dignity and Liberty |  |  |

What can we learn from the laws struck down by the court? First, only two of them preceded the 1992 basic laws. Another five years passed before the court found a law to be in violation of a basic law. A grand total of seventeen laws were overturned by the court from 1997 to 2020. Second, thirteen of the overturned laws were found to violate Basic Law: Human Dignity and Liberty, and two were deemed inconsistent with Basic Law: Freedom of Occupation. Only one law was struck down on procedural grounds. Third, the common justifications were that a law was unconstitutional, violated equality, or caused disproportional harm. The court’s opponents consider all of these justifications as expressions of “judicial activism.” Fourth, two of the nineteen overturned laws pertained to the military exemptions of ultra-Orthodox yeshiva students, three were related to the infiltration issue and four involved the occupied territories. That is, nine of the nineteen cases dealt with issues of great importance to the three political communities composing the right-wing bloc in Netanyahu’s governments. All of their representatives in the Knesset – in the two ultra-Orthodox parties, the national-religious camp, and the Likud – grew stronger during the last decade of Netanyahu’s rule and moved up from the back benches of the Knesset to fill key ministerial roles. They became, in fact, the powerful rulers of Israel. In their eyes, governability meant allocating more power to the executive branch, and they waged a fierce ideological battle against the professional echelons – the judicial system, the civil service, the attorney general, and the gatekeepers of democracy.

The attacks against the court, and against the Supreme Court in particular, were vocal and vicious. The justices seldom responded to the charges. The powerful politicians who led the campaign against the constitutional revolution also planned a counterrevolution. They included justice ministers Shaked and Ohana, Levin (whom Netanyahu had planned to appoint as justice minister), and Knesset Speaker Yuli Edelstein. The latter said after the Regularization Law was ruled unconstitutional: “The Supreme Court has turned itself into the legislative, executive, and judicial arm simultaneously… this must be ended by the override clause.”[[97]](#footnote-98)

The override clause was introduced as a tool in this tug of war a decade after the first law was overturned by the court in the post-1992 constitutional revolution era, in 2007. A rapid succession of override clause proposals followed in response to legislation struck down by the court. The ultra-Orthodox parties submitted override proposals in 2009, 2013, and 2014 to counter rulings on military exemptions for yeshiva students, and five override proposals were directed against the court’s rulings on the infiltration issue. The override clause became closely identified with the constitutional counterrevolution.

In light of all the above, the blueprint of the counterrevolution can be fully understood as the ongoing project of the neo-conservative right in Israel.[[98]](#footnote-99) To resolve the conflicting systems of values and challenge the court’s interpretation of “equality” as the supreme democratic value, Netanyahu’s government enacted Basic Law: Israel as the Nation-State of the Jewish People in July 2018. The law was intended to constitutionally anchor Israel’s Jewish character in a basic law, alongside the state’s democratic character (which was already grounded in basic laws). In fact, the new basic law is widely viewed by neo-conservatives as outweighing the “bill of rights” established in earlier basic laws. In this view, any legislation that favors the Jews and violates the principle of equality might very well come under the protection of the Nation-State Law and thus be deemed constitutional. Hovering over this neo-conservative achievement, however, is the question of whether Israel can still be considered a democracy if collective rights are assigned a higher status than individual rights.

A key strategy for reducing the Supreme Court’s purview is the appointment of conservative judges who narrowly interpret the right of standing, reasonableness, and proportionality. In particular, a conservative court can limit the number of overturned laws by ruling non-justiciable petitions that are made on political grounds. In order to accelerate the process of loading the bench with conservatives, the system of appointing judges is being challenged, including the seniority system and the composition of the committee that chooses the judges. Another front that is closely connected to the constitutional counterrevolution involves the selection of legal advisors in government ministries. The transition from professional trustees of the rule of law to political appointees loyal to their minister is weakening the judiciary’s influence within the executive branch.

Finally, the override clause is the primary tool of the constitutional counterrevolution in curtailing the Supreme Court’s role as the interpreter of legislation. In its radical form proposed by Shaked, judicial review was allowed only in the event of a procedural flaw in a law’s enactment. Her override proposal left virtually no room for the Supreme Court to interpret laws. The accelerated rate of override proposals submitted by the right-wing parties; the thresholds that were crossed as they evolved from being perceived as extremist proposals by ultra-Orthodox parties, settlers, or anti-infiltrators to being embraced by a majority of the coalition MKs; their inclusion in the 2015 coalition agreement and approval by the ministerial constitutional committee; and above all, the fact that supporting an override provision was Netanyahu’s primary condition for joining his government after the April and September 2019 elections – all indicate that a future right-wing government may indeed continue attempts to enact an override clause. The fine line between calibrating a democracy’s checks and balances and handing the government a blank check with no real balance is the line between a true democracy and a form of tyranny.

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98. See Ilan Saban, "The Reaction to the "'Constitutional Revolution'", *Public Shpere* 13 (2017). and also Gur Megido, "Yariv Lavin Suggests: Take a Tranquillizer before Reading This Interview," *The Marker*, April 3 2019. [↑](#footnote-ref-99)