



Override: Balancing the constitutional revolution

An override law would enhance the standing of the Supreme Court and confer legitimacy on its power to annul laws

THE JUDICIAL revolution which began in the early 1980s significantly strengthened the power of the judiciary at the expense of the executive and the legislature. The Supreme Court extended its authority, determining that everything or nearly everything was justiciable, that it was authorized to examine the reasonableness of government decisions and that anyone could petition the High Court of Justice, even without legal standing or a personal stake in the matter at hand.

The Mizrahi Bank ruling in 1995 was another dramatic step in a process that placed the Supreme Court above all other organs of state. In that precedent-setting case, the Supreme Court ruled that the Basic Law: Human Dignity and Liberty authorized it to annul Knesset legislation – if the legislation in question was passed after the basic law’s enactment in 1992 and ran counter to its provisions. The authority to annul stemmed solely from the court’s interpretation; the basic law did not include a specific proviso authorizing the court to annul laws. Nor did it claim to constitute a “higher law” to which “ordinary legislation” is subordinate.

The Basic Law: Human Dignity and Liberty is not “entrenched” – it does not stipulate that it can only be amended by an absolute Knesset majority (at least 61 Knesset Members). Moreover, until the Mizrahi Bank case, the legal norm was that basic laws did not take precedence over ordinary laws, and that if such a law contradicted a basic law, the newer law would hold sway.

The Basic Law: Human Dignity and Liberty was passed with a modest majority of 32 Knesset Members against 21, and one abstention. Many of the participating Knesset Members did not think for a moment that they were enacting a major constitutional change. Likud Knesset Member Michael Eitan quipped that “it was the first revolution carried out without the public knowing about it;” Shas leader Arye Deri claimed that the religious and Haredi communities had been misled over the implications of the legislation.

Given these lacunae and misgivings, many Knesset Members question the legitimacy of the Supreme Court’s self-arrogation of authority to annul laws passed by the Knesset. The current state of affairs – in which the Supreme Court unilaterally altered the balance of state power, where in both government and the Knesset there is fierce opposition to the court’s move, including rejection of its very legitimacy – is not desirable and undermines the court’s standing.

One of the ways to rectify this problematic situation is through an “override law,” based, with certain modifications, on the Canadian model. Under this system, if the court were to annul a law passed by the Knesset, the Knesset would be able to reenact it on



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condition that it obtains a clear, specified majority. Advocates of this solution differ over the desired majority and whether the validity of the reenacted law should be limited in time.

Supreme Court supporters seek to curb the chances of a successful override by conditioning it on a majority of at least 70 or even 80 of the 120-member Knesset. In practice that would render any Knesset override of the court virtually impossible.

In my view, there are serious doubts over whether the Knesset has the power to limit itself and any future Knesset by setting large special majorities that exceed 61, partly because once the principle is agreed it could be taken *ad absurdum* – for example, by stipulating that a certain law can only be amended by a majority of, say, 100, or perhaps even 120 Knesset Members.

My position on the override legislation is that a majority of 61 would suffice, as long as its Knesset opponents in any specific case number no more than 55. A proposal along these lines was prepared during my term as justice minister.

I assume that in most instances in which the court annuls a law, the Knesset will respect its decision and won’t hurry to enact overriding legislation, except in extreme cases. In my view, an override law would enhance the standing of the Supreme Court and confer legitimacy on its power to annul laws, while the use of the override in practice would be very rare. ■

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