

The High Stakes Israeli Debate over the Override

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Following the 2022 elections to Israel's legislature (Knesset), [a hardcore right wing coalition](#) is in the process of forming. Each of the potential partners in this coalition fantasizes about introducing an override clause into the Israeli constitutional system for different political motivations. However, the result would be the same. It would allow the Knesset to disproportionately infringe upon constitutional rights.

The Override Clause – Background

A constitutional override clause empowers a legislature to enact laws that substantially deviate from the constitutional text, as long as it does so explicitly. The Israeli Constitution consists of the Basic Laws, which gained the status of a supreme constitution in the [United Mizrahi Bank](#) decision of 1995, even though they were enacted via the same legislative procedure as any other Israeli law, with the support of a simple majority. Since the *Mizrahi* decision, considered by many as amounting to a [constitutional revolution](#), the courts are authorized to exercise judicial review over primary legislation to protect the supreme status of the Basic Laws, and may even declare statutes or provisions thereof invalid.

Of these laws, [Basic Law: Human Dignity and Liberty](#) is the [main mechanism](#) for protecting constitutional rights. It explicitly requires the Knesset to respect the rights to life, liberty, bodily integrity, dignity, privacy, and property. The Court has also read the Basic Law as [implicitly](#) embodying other rights like free speech and equality.

The Knesset can enact a law that infringes upon one of these constitutional rights only if the law 1) complies with the values of a Jewish and democratic state, 2) is intended for a proper purpose and 3) meets a threefold test of proportionality – a) rationality, b) necessity and c) a balancing test. The override clause that the incoming coalition is set on introducing to Basic Law: Human Dignity and Liberty would enable the Knesset to infringe on constitutional rights with no need to meet proportionality requirements.

Political Motivations

Each of the parties in the incoming coalition has its [own political motivation](#) to pursue an override clause. The Ultra-orthodox *Shas* party wants to ensure that its chairman, Knesset member Aryeh Deri, would be allowed to serve as a minister, even though he was convicted in 2022 for tax fraud, and was sentenced to one year on probation. The Attorney General opined that it's within the Chairman of Israel's Central Election Committee's discretion to decide whether Deri's conviction involves

moral turpitude. If the Chairman determines that it does, Deri will be prevented from serving as a minister.

Both the *United Torah Judaism* and *Shas* parties require the Knesset to re-enact a statute, which would practically grant an exemption for ultraorthodox Jewish men from [military conscription](#). This law would override a decade-long Supreme Court's ruling which found that such a law disproportionately infringes on the [constitutional right to equality](#), since most of Israel's population must serve in the army (though Israeli Arabs may opt but are not required to serve).

The Bloc of Religious Zionism seeks to override a Supreme Court's ruling from 2020 that invalidated a law that sought to legalize settlements that were built on private Palestinian land. Finally, it is convenient for the *Likkud* party to see the judicial branch weaker, since a [criminal trial](#) against prospective PM Benjamin Netanyahu is underway.

The Ongoing Debate in Israeli Society

While the 2022 elections have brought this controversy back to the spotlight with a new sense of urgency, the override clause has [long been a subject of public debate](#) in Israeli society. There are three dimensions to the [debate](#).

First, there is a *principled debate* on who should enjoy the final say in constitutional matters: the Knesset or the judiciary. [This dispute can be seen](#) as a dispute between a majoritarian conception of democracy in which the will of the majority should prevail, and a substantive approach that emphasizes the need to protect constitutional rights, even if it means compromising on majoritarian policies.

Second, [there is a strategic element to the debate](#). Many of the fierce opponents of the override, including former President of the Supreme Court, Aharon Barak, would be willing to accept its adoption as part of an overall package deal. As part of the bargain, Israel would adopt [Basic Law: Legislation](#), under which the Knesset will explicitly both recognize the Basic Laws as Israel's supreme Constitution and that the courts enjoy judicial review power over primary legislation. In essence, the Knesset will accept the legitimacy of the *Mizrahi* decision. In addition, this new Basic Law will entrench the current Basic Laws, so that they cannot be easily amended by simple majorities. As a concession, proponents of such a deal would agree to include an override legislative power, but demand that its exercise will require the consent of a legislative supermajority, to ensure the support of some Opposition members.

Third, [the debate is also waged at the comparative level](#). Supporters of the override clause [rely on the Canadian experience](#) with [Section 33](#) of the Charter of Rights and Freedom to suggest that what is good for the Canadians should also work for Israelis. Opponents argue that the override is rarely used in Canada, and, regardless, there are dramatic differences both between the human rights situation and the overall system of political checks and balances in Canada and Israel.

The Historical Origins of the Israeli Override Power

Many believe that the origins of the Israeli override power is Canadian in the sense [that in 1994 Israel amended Basic Law: Freedom of Occupation](#) to include an explicit override clause, after studying the Canadian Charter and explicitly referencing to it in legislative debates. The override's adoption was done [on the advice of the Israeli Supreme Court](#) to allow a prohibition on importation of non-kosher meat. The exercise of this override power requires the support of an absolute majority of Knesset members and the statute lapses after four years. To allow the prohibition to become permanent, Israel ultimately amended Basic Law: Freedom of Occupation to provide for it. Since the override clause allows to override only the right to freedom of occupation, and the constituency mostly affected by infringing statutes is the industrial and business sectors, the override is not used. [This constituency fears customers' rage](#) and thus does not challenge infringing statutes.

However, it is a mistake to attribute the origins of the Israeli override power to Canada. Israel used override power [even before the adoption of Article 33](#) of the Canadian Charter. Before the *Mizrahi* decision, on [four different occasions](#) the Supreme Court nullified laws or ordered the executive not to enforce a law because it contradicted the principle of equality in elections as enshrined in [Section 4 of Basic Law: The Knesset](#). In each of the cases, the Court found that members of the outgoing Knesset sought to give themselves a competitive advantage in financing elections or in election propaganda over candidates who were not represented in the Knesset or who belonged to minority factions. The Court demanded that the Knesset meet equality requirements or enact the infringing law with the support of 61 Knesset members, as required in Section 4.

These decisions did not prompt political conflict. Rather, [the Knesset usually effectively overrode](#) the Court's ruling without awareness of the technique of "override." It accomplished this by re-enacting infringing laws, stating that "to remove any doubt" – which is a language resembling formal overrides – the following list of statutes were valid from the time of their enactment. The Court, too, cooperated with this override technique and considered it legitimate. [I argue that in this sense, Israel was an anomaly](#) in comparative law. On the one hand, the Supreme Court repealed laws. On the other, Israel remained faithful to legislative sovereignty. [It is usually thought that](#), if courts have the authority to annul laws, then the legal system no longer adheres to legislative sovereignty.

However, [I show that the constitutional dialogue](#) between the branches of government before and after the *Mizrahi* decision is fundamentally different. Before the *Mizrahi* ruling, the Knesset paid lip service to the status of section 4 of Basic Law: the Knesset. Afterward, and for the past twenty-seven years since the *Mizrahi* decision, when the Court annulled legislation, the Knesset substantively obeyed the Court's rulings. It usually re-enacted the infringing legislation, if at all, in a way that infringed less on constitutional rights. Adoption of an explicit override power in Basic Law: Human Dignity and Liberty will fundamentally change the current constitutional dialogue. Rather than [taking rights seriously](#), the Knesset will use the "right" procedure to overrule them.

Failed Shaming

Supposedly, Israeli citizens should not fear the adoption of the override. The Knesset may use it sparingly, as in Canada, or so do the override's supporters argue.

However, the override is a type of ["shaming" mechanism](#). The idea is to discourage the legislature from using override because it would be forced to explicitly "tell" the public that it intends to disproportionately infringe upon constitutional rights. Such a legislature would fear electoral retaliation as well as international condemnation and would thus carefully consider whether the legislation justifies the political costs. The shaming mechanism works relatively well in Canada not only because of its political culture but also because of Quebec's abuse of the override power.

[Quebec did not agree to the Charter's adoption](#). In response, in a single Act, Quebec repealed all of its laws and re-enacted them with retroactive validation through reference while applying a sweeping override clause. It basically sought to immunize all its laws from the application of the Charter. The Canadian Supreme Court left Quebec's sweeping override intact, intervening only in its retroactive force. Quebec's mockery of the Charter together with its [secessionist tendencies](#) led the Canadian people to treat the override as an inappropriate act of defiance. In contrast, Israel's political culture lost all shame, with politicians running for office and winning even if indicted or convicted of serious crimes. A shaming mechanism will not work well in Israel as a constraining constitutional device.

Moreover, in Canada, the provinces sought the override on principled grounds, to protect their power from being trampled by the central government. Currently, Israeli politicians seek the override to overrule particular judicial decisions. The birth of this override power will be tied to getting around the Court. There is no doubt that those supporting the adoption of the override treat it as a reaction to [Barak's legacy](#). They view it as a counter constitutional revolution that would largely set Israel's constitutional law back twenty-seven years, not attributing any weight to the [legitimacy bestowed on the constitutional revolution through the passage of time](#).

