

Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Counter-Majoritarian Difficulty

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This Article shows how, in the two decades since the “constitutional revolution,” Israel’s constitutional regime has become fixed in the mold designed by the Supreme Court, which is based on judicial supremacy in constitutional interpretation, with practically no reaction by the Knesset seeking to change, undo, or otherwise challenge it. This is a striking reality because formally the Knesset is capable of modifying the constitutional revolution regime through simple majority legislation, and given that at least at certain times during this period there were ostensible political majorities who were highly critical of the Supreme Court’s model of judicial review or its use in particular cases.

The Article employs methods of institutional analysis and namely the notion of path dependence, in order to explain this reality. It reveals how distinct institutional characteristics have enabled the Supreme Court to turn initial constitutional legislation by the Knesset into a new normative status quo, which has gradually become entrenched in the institutional culture of Israel’s constitutional politics, substantially limiting the ability of the Knesset to produce an alternative constitutional vision to the one designed by the Court.

The Article contributes to an understanding of the political conditions and institutional qualities that underlie the establishment of a certain normative structure as the status quo, and as such also to the appreciation of the conditions for breaking away from an existing regime. In the Israeli context, it adds to the ongoing discussion on the legitimacy of Israel’s version of judicial review, and reflects on the possibilities of reform in Israel’s constitutional future.