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We the Fourth Branch? The People as an Institution Protecting Democracy

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Introduction

Democracy around the world is in crisis.¹ In attempts to establish how constitutional democracy can survive, scholars have focused on courts and on constitutional design.² What type of governmental institutions are required in order to protect democracy? Is the traditional separation of powers between the three branches of government sufficient, in an era of populism and democratic erosion, to protect democracy? In a series of studies, Mark Tushnet provided the first general theory of a new “fourth branch” of government: a group of institutions, such as electoral committees, anticorruption agencies, and ombuds audit agencies, whose role is to protect constitutional democracy.³

These institutions can serve as protectors of democracy due to their distinct independence and forms of expertise, even though—as Tushnet shows—they do not always succeed in protecting constitutional democracy, as they can be abused or involved in partisan and intraparty struggles. In this short chapter I take on Tushnet’s concept of fourth branch institutions protecting democracy and apply it to the people. To demonstrate how the people can protect democracy, I describe the civil protest that took place in Israel in 2023 against the government’s proposed judicial overhaul plan. In their study, Ginsburg and Huq argued that “[c]onstitutions cannot save democracy: Only democrats can.”⁴ The Israel case shows that determined and organized citizens can, if acting effectively, save democracy even when it is under severe threat from a populist government.

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¹ CONSTITUTIONAL DEMOCRACY IN CRISIS (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

² See, e.g., TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

³ MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY 5 (2021).

⁴ GINSBURG & HUQ, *supra* note 2, at 240.

In the next section, the concept of fourth branch institutions is reviewed. The chapter then describes the civil protest movement against the judicial overhaul. It goes on to raise the idea of the people as an institution protecting democracy.

Fourth Branch: Institutions Protecting Democracy

In democratic regimes, the function of protecting democracy can be distributed between different institutions.⁵ Tushnet shows how the South African Constitution, for example, identifies different institutions, such as the public protector, the state auditor, and the election commission as “institutions supporting constitutional democracy.”⁶ According to his definition, institutions protecting democracy are “institutions whose *specific* charge is to protect one or another dimension of democratic functioning, such as electoral fairness or the use of public funds for public purposes.”⁷ Electoral commissions, for example, aim to ensure that the electoral process is free and fair, and its results accurate. In his pioneering work, Tushnet explored the design features as well as the actual functions of such institutions protecting democracy, as well as the risks associated with their actions.⁸

In a somewhat similar vein, Tarunabh Khaitan recently claimed that fourth branch institutions can be best understood as guarantor institutions: “a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof).”⁹ Khaitan’s framework encompasses electoral commissions, human rights commissions, central banks, probity bodies (such as anticorruption bodies), attorneys general, auditors general, and what Vicki Jackson terms “knowledge institutions” such as statistics bureaus and census boards, information commissioners, and the like.¹⁰

I do not here aim to glorify the ability of fourth branch institutions to protect democracy or to critically question this ability. Obviously, as Tushnet shows, there are success stories and failure stories, of fourth branch institutions.¹¹ What I wish

⁵ Mark Tushnet, *Institutions Protecting Democracy: A Preliminary Inquiry*, 12 LAW & ETHICS HUM. RTS. 181, 182 (2018).

⁶ *Id.* at 183, referring to S. AFR. CONST. 1996, ch. 9.

⁷ *Id.*

⁸ *Id.* See also Mark Tushnet, *Institutions for Protecting Constitutional Democracy: An Analytic Framework, with Special Reference to Electoral Management Bodies*, 16 ASIAN J. COMPAR. L. S10 (2021); Mark Tushnet, *Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries*, 70 UNIV. TORONTO L.J. 95 (2020); Rosalind Dixon & Mark Tushnet, *Democratic Constitutions, Poverty and Economic Inequality: Redress through the Fourth Branch Institutions?*, 51 FED. L. REV. 285 (2023).

⁹ Tarunabh Khaitan, *Guarantor Institutions*, 16 ASIAN J. COMPAR. L. S40, S42 (2021).

¹⁰ *Id.* See Vicki Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CAN. J. COMPAR. & CONTEMP. L. 156 (2021).

¹¹ Tushnet, *supra* note 5, at 167–75.

to do is to raise the option of conceptualizing also “the people,” when acting as an ad hoc massive and organized civil protest movement, with the aim to deal with a major offense of liberal democracy in order to block it as another, unique, type of fourth branch institution.

For Tushnet, institutions protecting democracy are all “public institutions with some degree of responsibility, usually indirect, to the electorate.”¹² This is not true, almost by definition, of civil society organizations, although one could include them within the scope of the study by focusing on the legal arrangements—freedom of the press and freedom of association—that are used to preserve their ability to protect constitutional democracy.¹³ Their study, Tushnet claimed, “would require examination of the ways in which and the degree to which actors within them are socialized to take preserving constitutional democracy as one of their goals.”¹⁴ In the next section I provide a relatively detailed account of events occurring in Israel in 2023 in order to show how the civil society movement managed to create sufficient power to slow down, and perhaps even to block, a significant and dangerous attempt to undermine the democratic order. The connection to institutions protecting democracy seems natural because the main goal of the civil protest movement was preserving Israel’s democracy.

The People as an Institution Protecting Democracy: The 2023 Protest Movement and the Judicial Overhaul in Israel as a Case Study

Between 2018 and 2022, usually the period of a single government, Israel experienced a political crisis with five elections taking place. None of the prominent political figures involved managed to assemble a sufficiently robust coalition government capable of effectively governing the nation. This prolonged political instability (caused also by Benjamin Netanyahu’s criminal indictment) concluded with Netanyahu, the leader of the Likud party, forming a new coalition in December 2022 which signified a dramatic shift to the right on the Israeli political spectrum, particularly in its religious composition.

Soon after the formation of the government, on January 4, 2023, Minister of Justice Yariv Levin announced in a special press conference “a judicial reform.” In this speech, Levin outlined four pivotal topics of the reform: (1) “the Override Clause,” which would grant the Knesset the authority to override Basic Laws and Supreme Court rulings; (2) restructuring the judicial selection committee in a manner that would provide the coalition the authority to appoint judges to the

¹² TUSHNET, *supra* note 3, at 5.

¹³ *Id.*

¹⁴ *Id.*

Supreme Court and to other, lower, courts; (3) limiting judicial review, by removing courts' authority to hear petitions or appeals that challenge governmental decisions on ground claim of being "unreasonable," by limiting constitutional review only to the Supreme Court sitting *en banc* and striking down unconstitutional laws by a supermajority of 12 out of 15 judges, and removing courts' authority to review basic laws, shielding them from judicial review; (4) authorizing ministers to choose their own legal counsel, instead of appointment by independent committees and providing that legal advice of governmental lawyers will not be binding.¹⁵ The coalition agreement between all parties stated that they will support the judicial reform. The implications of the so-called reform¹⁶ were to weaken the judicial and the attorney general, precisely the two independent bodies that can block governmental power, thereby strengthening the already extremely strong executive and providing the coalition absolute powers of legislation, turning the government into an unlimited one. Even many of those who believe that reform of the judicial system is required¹⁷ thought that this revolutionary reform went too far.

Criticized for its potential impact on the democratic character of the state, on separation of powers and checks and balances, the announcement led to protests on January 7 in Tel Aviv, attended by 20,000 people. The momentum carried into the following week. A few days later, on January 12, in an unusual speech delivered at the annual conference of the Israeli Association of Public Law, Supreme Court President Esther Hayut strongly criticized the proposed reform, describing it as an "unrestrained attack on the legal system" and accusing it of undermining judicial

¹⁵ For a thorough analysis of the so-called judicial reform, see the group of articles all published in a special symposium of the 56 Israel Law Review 289–540 (2023): Iddo Porat, *Political Polarisation and the Constitutional Crisis in Israel*; Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*; Tamar Hostovsky Brandes, *The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?*; Yaniv Roznai, Rosalind Dixon, & David E. Landau, *Judicial Reform or Abusive Constitutionalism in Israel*; Guy Lurie, *The Attempt to Capture the Courts in Israel*; Tom Ginsburg, *The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective*; Mordechai Kremnitzer, *Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness*; Manal Totry-Jubran, *Constitutionalising Israel's Constitutional System*; Gábor Halmai, *Is There a 'Constitutional Moment' in Israel and Hungary?*; David Kretzmer, *The "Constitutional Reform" and the Occupation*; Joshua Segev, *Reforming the Israeli High Court of Justice: Proposed Versus Desirable*; Daniel Friedmann, *Politics in Legal Disguise*; Ofra Bloch & Barak Medina, *The Two Revolutions of Israel's National Identity*; Yoav Dotan, *Israel's Constitutional Moment*.

¹⁶ Since its proposal, I refused to call the reform a "reform" but rather a judicial overhaul or a revolutionary change, because its implications on the legal system were revolutionary; it was by no means a reform that keeps the constitutional framework intact. For a conceptualization of revolutionary constitutional change, see GARY J. JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* (2020). In a recent judgment the European Court of Human Rights also referred to "the so-called 'reform of the judiciary'" and not judicial reforms, as these were violations of rule of law. I thank Laurent Pech for highlighting this: *Wałęsa v. Poland*, App. No. 50849/21 (Nov. 23, 2023), <https://hudoc.echr.coe.int/eng?i=001-229366>.

¹⁷ For such an argument see, e.g., Yonatan Green, *The Peculiar Case of the Israeli Legal System*, 24 *FEDERALIST SOC'Y REV.* (Sep. 1, 2023), <https://fedsoc.org/fedsoc-review/the-peculiar-case-of-the-israeli-legal-system>.

independence.¹⁸ Attorney General Gali Baharav-Miara also expressed concerns in a comprehensive legal opinion, highlighting substantial problems related to the so-called reform: “Every one of the proposed arrangements raises substantial problems that go to the root of the principle of the separation of powers, judicial independence and the professionalism of the judicial branch, protection of individual rights, the rule of law, and the preservation of proper governance.”¹⁹ The “Brothers and Sisters in Arms” (“Achim Laneshek”) organization, composed of reserve members from several Israeli Defense Force (IDF) units working together to stop the judicial overhaul and protect Israel’s democracy due to concern that it might impact the IDF (for example by weakening the judicial or legal oversight of military actions), was founded around the same time. As the legislation was accelerated, thousands of former IDF soldiers, including reserves, pilots, special combatants, and individuals from various other units, joined in the space of weeks.²⁰

On January 21, the protests expanded to major cities such as Haifa, Jerusalem, and again Tel Aviv, now with more than 130,000 participants. As the so-called reform gained rapid momentum on a weekly basis, the corresponding protest grew in parallel. A pivotal shift occurred on January 28 when the protesters relocated to Kaplan Junction, a central point at the entrance to Tel Aviv. During this period the Israeli Law Professors’ Forum for Democracy was founded, comprising around 150 permanent faculty members from law faculties in Israeli academic institutions.²¹ Concerned about the legal reform, they volunteered to give lectures, write position papers, record videos, and talk at rallies about how the reform will affect Israel’s democracy.²² Also in the legal field, in a response to the judicial overhaul, a group of private lawyers from the leading law firms in Israel—known as the “The Black Robes”—organized a massive billboard campaign against the “override clause” and various protests near the Tel Aviv Court. In addition to this group, the then chair of the Israeli Bar Association, Avi Himi, protested very vocally against the judicial overhaul, claiming that it would destroy Israel’s democracy.

On February 8, MK Simcha Rothman, chair of the Knesset’s Constitution, Law and Justice Committee announced his plans to vote swiftly on approval of the bill concerning the judicial selection committee for its first reading in the Knesset on February 13. In response, Brothers in Arms organized a three-day march to

¹⁸ See Yaniv Roznai & Shani Shnitzer, *Navigating the Ship in Stormy Waters: President Esther Hayut and the Israeli Constitutional Crises 2018–2023* INT’L J. CONST. L. (forthcoming).

¹⁹ Jeremy Sharon, *Attorney General: Judicial Overhaul Plan “Would Give Government Unrestrained Power,”* TIMES OF ISRAEL (Feb. 2, 2023), <https://www.timesofisrael.com/attorney-general-judicial-overhaul-plan-would-give-government-unrestrained-power>.

²⁰ For further information, see Brothers and Sisters for Israel, <https://www.brothersandsistersforisrael.org/>.

²¹ See Israeli Law Professors’ Forum for Democracy, <https://www.lawprofsforum.org/en>.

²² For an elaboration on the work of legal scholars against the judicial overhaul, see Ittai Bar-Siman-Tov, Tamar Hostovsky Brandes, Eliav Lieblich, Yaniv Roznai & Adam Shinar, *Scholactivism in the Service of Counter-Populism: The Case of the Constitutional Overhaul in Israel* INT’L J. CONST. L. (forthcoming).

Jerusalem, involving influential figures such as former directors of the Mossad and retired generals, in an aim to create public pressure that might prevent such voting. The march ended in a mass demonstration in Jerusalem—held on the same day as a national general strike—outside the Knesset building during the voting. More than 100,000 people gathered in the demonstration. While the demonstration unfolded outside the Knesset, inside the Knesset’s Constitution, Law and Justice Committee passed the amendment to “Basic-Law: The Judiciary” concerning changing the composition of the judicial selection committee. The changes were approved with nine votes in favor and seven against, and the bill was placed for vote at the plenary.

These events marked the rise of another important and unexpected movement—the Start Up protest. High-tech companies account for 25 percent of Israeli taxes and more than 50 percent of Israeli exports. The Start Up protest group claimed that the judicial overhaul would affect the economy, would put the right to property at risk, and would therefore affect investors. Protests began on January 24, in the form of a one-hour strike led by tech company executives. Within a month, it evolved from an initiative of individuals into an organized movement, with thousands of tech employees actively participating. On the day of the national strike, 300 Israeli high-tech companies allowed their employees to join the strike. By the end of February, more than 150,000 people were demonstrating in Tel Aviv, with thousands more participating across the country. During that period, a central headquarters was established to unite the majority of organizations protesting against the judicial overhaul.

The criticism went beyond the so-called reform’s content to also take in the pace of the process. Fundamentally transforming the legal system should involve a deep and extended procedure, involving in-depth deliberations and learning, with broad public support. However, the Knesset Constitution, Law and Justice Committee debated the bill rapidly, excluded inputs from the Committee’s legal counsel and ignored opinions of experts throughout the process. As a result, the opposition then chose to abstain from the Committee’s debates.

On March 1, the Knesset’s Constitution, Law and Justice Committee was scheduled to discuss and vote on the bill, which included an override clause and constrained the High Court’s judicial review power. This led to a “national disruption day” with many large demonstrations and protests across the country throughout the day. Ultimately, after heated debates, the Committee approved the bill with the support of nine members as the opposition chose to boycott the vote. One week later, on March 9, the central headquarters declared a “day of resistance,” involving actions such as blocking highways, protesting at Ben Gurion International Airport, and organizing a major demonstration in Tel Aviv. The protesters stated that the total number of participants across the nation was approximately 400,000.

On March 14, the bill easily cleared its first plenum vote of the Knesset by a margin of 61–52. In a special speech a day later, on March 15, President Isaac Herzog announced a compromise proposal for a judicial reform (“the people’s

directive”).²³ Although President Herzog has no formal constitutional role in the process, he believed it necessary for him to intervene to stop the ongoing crisis. Faced with a divided nation and escalating tensions, the president engaged with individuals, scholars, and civil society organizations from diverse backgrounds to in order to bridge the gap between the opposing sides and navigate an end to Israel’s crisis. However, President Herzog’s proposal was rejected by the coalition only a few minutes after its announcement.²⁴

On March 25, Minister of Defense Yoav Gallant publicly announced his opposition to the so-called reform, urging his coalition members to halt the proposed legislation, which he said could threaten Israel’s security, and calling for negotiations between the ruling coalition and the opposition. In response, on March 26, Prime Minister Netanyahu announced Gallant’s removal from office. This was a significant moment in the ongoing protests. Thousands of demonstrators filled the streets of Tel Aviv, Haifa, and Jerusalem, blocking main roads and igniting multiple fires on Tel Aviv highways. The protesters demanded Gallant’s reinstatement and an end to the passage of the legislation. On March 27 the chairman of Israel’s General Federation of Labour (“Histadrut”), Arnon Bar David, declared a general strike until Gallant was reinstated as Minister of Defense and demanded a halt to the legislative process. The chairman of the Israel’s Airports Authority announced a strike and the Israel Medical Association followed suit. On March 27, President Herzog called for the legislation to be halted. In response to this growing public pressure, the legislation was put on hold, in order to try and reach a compromise. In addition, Gallant’s dismissal did not come into effect, and he retained his position as Minister of Defense. The unprecedented public pressure succeeded in its aim. For the time being, at least.

On March 28, representatives from both the coalition and the opposition were appointed for negotiations at the president’s residence. They were accompanied by legal experts.²⁵ The objective was to engage in in-depth discussions on key reform topics, seeking broader agreements. However, between March and May the negotiations started to falter, with the two sides unable to find common ground. The lack of trust between the parties was extremely acute and influenced the process. The fact that the bill concerning the judicial selection committee was still on the Knesset’s agenda and was ready for a second and third vote at the plenary at any time only aggravated the situation, as the opposition feared it was negotiating with

²³ An English version of the proposal is available at https://www.mitve-haam.org/_files/ugd/f35a26_8eb0f820ae1b4d32bd178cc2b7cf4352.pdf. For a comparison between the government’s proposal and the President’s proposal, see *The People’s Framework: Understanding President Herzog’s Judicial Compromise Proposal*, ISRAEL POLICY FORUM, <https://israelpolicyforum.org/wp-content/uploads/2023/03/The-Peoples-Framework.pdf>.

²⁴ For full disclosure, this author was one of the professional consultants of the President’s team working on the proposal.

²⁵ For full disclosure, this author was one of the experts appointed by one of the opposition parties to participate in the negotiations.

a gun to its head. Throughout this period the protesters continued to demonstrate every Saturday night.

Two important elections took place in June. The first was the Israeli Bar Association election, which saw a record turnout: 50.8 percent of about 77,000 eligible voters. There were two main candidates: Efi Neve, who supported the coalition's so-called reform, and Amit Becher, an antijudicial reform candidate. Becher received 73 percent of the vote, against just 20 percent for Neve, and was chosen as the chairman of the Bar Association. This vote was a clear statement by the legal profession that it objects to the judicial overhaul. In response, a few days later the coalition promoted a bill that would eliminate the Bar's licensing authority, its power to sanction lawyers for misconduct, and its representations in the judicial selection committee.²⁶

The second important election came when the Knesset voted for its representatives for the judicial selection committee: two out of nine members, with the custom that one member of Knesset is from the coalition and the other from the opposition. The Knesset indeed selected an opposition representative, Karine Elharrar, but failed to select a representative from the coalition, in a clear attempt to postpone the entire process. In response, the opposition announced that they would pause negotiations until such a representative had been selected. The coalition took advantage of this announcement and decided to continue and promote the so-called reform unilaterally—only this time, instead of attempting to enact the entire package in a quick “blitz,” it would do so incrementally. In the language of the protest movement, this shift was “from the Hungarian Blitz to the Polish Salami.” The coalition decided that the first salami slice would be to abolish the “reasonableness” standard, which it believed it would be the least contentious element in the so-called reform.²⁷

Accordingly, on June 26, the Knesset's Constitution, Law and Justice Committee met to discuss the bill removing from the courts the authority to apply the “reasonableness” standard when reviewing decisions or actions of the Cabinet, the prime minister, or ministers. Accordingly, the protesters stepped up their demonstrations. On July 3, demonstrations unfolded place across the country, with people blocking high roads and the entrance to the airport. Commissioner of Police Yaakov “Kobi” Shabtai notified Tel Aviv police chief Amichai Eshed that he would be removed from his job and moved to a different position. Eshed announced his resignation, saying the removal was due to “political considerations” and that he had been asked by Minister of National Security Itamar Ben-Gvir to order police officers to handle those protesting against the judicial reform more forcefully but

²⁶ Michael Bachner, *Knesset Passes Preliminary Reading of Bill to Sap Bar Association of Key Powers*, TIMES OF ISRAEL (July 5, 2023), <https://www.timesofisrael.com/knesset-passes-preliminary-reading-of-bill-to-sap-bar-association-of-key-powers/>.

²⁷ Kremnitzer, *supra* note 15.

had refused. Following this resignation, thousands of protesters across the country spontaneously took to the streets.²⁸

On July 19, more than 1,000 Air Force reservists, including 500 pilots, announced that they would stop their volunteer service. Similar announcements were made by the intelligence reserve and combat reserve. On July 22, 100 leaders from the secret service organizations in Israel, including the Mossad and the Israel Security Agency (“Shabak”), including former Chiefs of Staff and retired generals, sent a letter to Prime Minister Netanyahu calling for the suspension of the reform. They were concerned that the removal of the reasonable standard would affect the independence of important gatekeepers, would weaken judicial supervision on governmental decisions, and would leave them vulnerable to prosecution in the International Criminal Court.

Less than a month after the bill was brought for deliberation in the committee, on July 24, the Knesset voted on the part that removes the reasonableness standard from the judicial toolkit when it comes to decisions of the Cabinet and the ministers (in contrast with the unelected bureaucracy). On that day, thousands of protesters arrived in Jerusalem from Tel Aviv after a four-day march. Meanwhile, the opposition boycotted the third vote and the bill passed by a vote of 64–0, while thousands of protesters gathered in front of the Knesset. Former Supreme Court President Aharon Barak issued an exceptional statement stating that the reasonableness law will “damage the fundamental values of Israel as a Jewish and democratic state.” In his view, “it threatens to undermine the rule of law, proper administration, the purity of morals in government, and the basic rights of every person in Israel.”²⁹ The Israeli Business Forum, representing Israel’s largest private sector companies, declared an impending strike, urging an immediate halt to the legislation.³⁰

Various petitions were submitted to the High Court of Justice challenging the constitutionality of this law. But in this chapter I am interested not in the court’s authority to review this constitutional amendment but in the public protest. It was an unprecedented collective action by the civil society and the public at large, unique both in its size—hundreds of thousands of protests every week—and in its endurance—the demonstrations persisted every week for 39 weeks in a row. They were halted only due to the horrifying October 7 massacre and the war that broke out in Gaza in response.

²⁸ Carrie Keller-Lynn & TOI Staff, *Thousands Take to the Streets, Block Roads after Tel Aviv Police Chief Steps Down*, TIMES OF ISRAEL (July 5, 2023), <https://www.timesofisrael.com/thousands-take-to-the-streets-block-roads-after-tel-aviv-police-chief-steps-down/>.

²⁹ Michael Starr, *Aharon Barak: Reasonableness Bill Will Damage Israel’s Values*, THE JERUSALEM POST (July 23, 2023), <https://www.jpost.com/israel-news/article-752083/>.

³⁰ TOI Staff, *Business Forum, Tech Companies to Strike Ahead of Final Votes on Reasonableness Law*, TIMES OF ISRAEL (July 24, 2023), <https://www.timesofisrael.com/business-forum-tech-companies-to-strike-ahead-of-final-votes-on-reasonableness-law/>.

The People as a Fourth Branch?

Separation of powers is a basic idea within constitutional theory.³¹ The principle of separation of powers, as described by Montesquieu in his *The Spirit of the Laws*, famously centered on three governmental branches: legislative power; executive power; and judicial power. This separation of powers was needed in order to prevent abuse of power, because “*c’est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser.*”³² In order to prevent this abuse of power it would be necessary, according to Montesquieu, to organize the government in such a way that power would check power. In other words, this separation of governmental powers results in a power block.³³

In a famous article entitled “The New Separation of Powers,” Bruce Ackerman argues against exporting the American separation of powers system of an independently elected presidency to check and balance a popularly elected congress, but rather calls in favor of a “constrained parliamentarianism” model, in which a prime minister and his or her cabinet are authorized to remain in power as long as they can retain the support of a democratically elected chamber of deputies. Other independent institutions, including a constitutional court, must perform a checking function.³⁴

These theories and models focus on *horizontal separation of powers* between different political actors and governmental branches. And likewise, other institutions supporting constitutional democracy presented earlier in the chapter, such as election commissions or ombudsmen, are horizontal institutions. I have elsewhere briefly argued that there is another type of separation of powers: a *vertical* one, between *the people and the government*. This separation of powers is the oldest but at the same time the newest one, recently flourishing in constitutional design.³⁵

In traditional constitutional theory a distinction is made between *constituent power* and *constituted power*, formulated by Sieyès in his famous pamphlet “What Is the Third Estate?” on the eve of the French Revolution.³⁶ Constituent power is the power to create a constitution. Constituted power is a power created by the constitution. A constitution cannot constitute itself and it presupposes a

³¹ For a comparative reconstruction see CHRISTOPH MOELLERS, *THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS* (2013).

³² CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *I DE L’ESPRIT DES LOIS* 162 (Gonzague Truce ed., 1961).

³³ See, e.g., James T. Brand, *Montesquieu and the Separation of Powers*, 12 OR. L. REV. 175 (1933).

³⁴ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634 (2000). Cf. Clindy Skach, *The ‘Newest’ Separation of Powers*, 4 INT’L J. CONST. L. 93 (2007) (arguing that the constitutional model being imported by new democracies around the world is neither the constrained parliamentary model nor American Presidentialism model but rather semipresidentialism, most often associated with the French Fifth Republic).

³⁵ Yaniv Roznai, *The Newest-Oldest Separation of Powers*, 14 EUR. CONST. L. REV. 430 (2018).

³⁶ Emmanuel-Joseph Sieyès, *What Is the Third Estate?*, in *POLITICAL WRITINGS* 136 (Michael Sonenscher ed., 2003).

constitution-making power. This power cannot itself be constituted. Tushnet has written extensively on how the theory of constitution-making power should be conceptualized and comprehended.³⁷ This separation between constituent and constituted powers is the very first separation of powers, which is prior to the separation of constituted powers.³⁸ One method for the people to act as another blocking power or a “gatekeeper” is through various formal or informal direct participation mechanisms that provide citizens the tools and option to approve or reject constitution-making or constitutional reform proposals.³⁹ It can provide a check on the other governmental branches. As Andreas Auer stated, “the governing bodies, particularly government and parliament, have to accept the fact that the people . . . may make binding decisions they disapprove and dislike.”⁴⁰ Indeed, when constitutional reforms reach the people for their consideration, they often vote with the government, but sometimes they vote against the government’s proposals.⁴¹

Consider the following examples in which major constitutional reforms were rejected by the people: In 2005 Kenyans rejected a proposal for a new constitution that would have entrenched presidential powers, even though many government officials, including President Mwai Kibaki, had campaigned for its adoption.⁴² In 2013 a slim majority of Irish voters rejected a proposal to abolish the Senate and re-constitute the legislature as a unicameral parliament.⁴³ In Italy in December 2016, voters overwhelmingly decided against a major constitutional reform that would have modified the Senate’s structure, the constitutional status of the regions, and the confidence relationship between the government and parliament.⁴⁴ That same year, in Colombia, a majority of voters rejected a peace plan carefully negotiated by the political elites to end decades of civil war.⁴⁵ This trend seemed to represent “a rebuke to the governing elite.”⁴⁶ This manifests the revival of the vertical separation

³⁷ See, e.g., Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1982 (1984); Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639 (2015); Mark Tushnet, *Amendment Theory and Constituent Power*, in *COMPARATIVE CONSTITUTIONAL THEORY* 317 (Gary Jacobsohn and Miguel Schor eds., 2018).

³⁸ ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER* 76 (2017).

³⁹ Zachary Elkins, Tom Ginsburg & Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMPLE L. REV. 361, 367 (2008).

⁴⁰ Andreas Auer, *Editorial—The People Have Spoken: Abide? A Critical View of the EU’s Dramatic Referendum (In)experience*, 12 EUR. CONST. L. REV. 397, 402 (2016).

⁴¹ See Matt Qvortrup, *Western Europe*, in *REFERENDUMS AROUND THE WORLD* 19 (Matt Qvortrup ed., 2018).

⁴² Catherine O’Regan, *The Political Paradox of African Constitutionalism Revisited: Kenya’s BBI Case* (this volume).

⁴³ John Fitzgibbon, *Ireland’s Decision to Retain the Seanad Is Not the End of the Country’s Political Reform Process*, LSE EUR. POL. & POL’Y (EUROPP) BLOG (Oct. 9, 2013).

⁴⁴ Gianfranco Pasquino & Marco Valbruzzi, *Italy Says No: The 2016 Constitutional Referendum and Its Consequences*, 22 J. MOD. ITALIAN STUD. 145 (2017).

⁴⁵ Aila M. Matanock & Miguel García-Sánchez, *The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites*, 146 DAEDALUS 152 (2017).

⁴⁶ *Id.*

of powers between constituent and constituted powers, placing the people themselves as a check on the power of governments. As Qvortrup writes, referendums have tended to have the effect of “a democratic safeguard” against overzealous politicians and hasty legislation.⁴⁷

A second method for the people to act as a check on governmental power, as another blocking mechanism, is through the “right to resist and protest” movement, as we have seen in Israel. While the future of the so-called judicial reform is still unclear, what seems to be clear is that the massive public protests and civil resistance managed to block, or at least delay, vast parts of the government’s judicial overhaul plan. On its facts, this is remarkable. The most rightwing homogeneous coalition Israel has ever had possessed a clear majority—64 out of 120 members of the Knesset—and in theory could have easily enacted the judicial overhaul. If not for the protest movement, the judicial overhaul would have been enacted swiftly, especially considering the extremely weak mechanisms of checks and balances in the Israeli system: no bicameralism; no president with veto power; no regional element in the elections; a unitary system and not a federal one in which a vertical separation of powers exists; neither part of a supranational institution such as the EU nor subordinated to a supranational tribunal such as the European Court of Human Rights, as are members to the European Convention on Human Rights.⁴⁸ Furthermore, there is a relatively small and weak legislature, controlled by the relatively strong and large executive. And other fourth branch institutions are weak: the state comptroller is a relatively weak institution without real teeth, there is no human rights ombudsman, and the central elections committee is politically dominated. The only strong institutions are the Supreme Court and the Attorney General, which is precisely why the judicial reform targeted these two institutions. With the Knesset being controlled by the executive, there are hardly any political checks on governmental power. And in this case, the people acted as a fourth branch—an institution, aside from the judiciary, that managed to function as a speed bump and a stop sign vis-à-vis a populist constitutional project, and protected democracy.

True, the protest movement did not succeed in completely stopping the judicial overhaul; after all, part of the reform was enacted. However, consider events in late March 2023, when the coalition negotiated the reform with the opposition, as equals, under the auspices of the President: This exceptional political event was enabled only thanks to the protest movement. The opposition itself had no real power without the public protest. At the time of the writing of this chapter, almost a year has passed since the new government announced its judicial overhaul but failed, eventually, in promoting it in its entirety. The civil protest, which made the national flag its symbol (implying that this protest protects the identity of the

⁴⁷ See Matt Qvortrup, *Two Hundred Years of Referendums*, in Qvortrup, *supra* note 41, at 263.

⁴⁸ See Roznai & Cohen, *supra* note 15, at 18.

state), had huge success. It managed to convince a large percentage of the public of why the so-called reform was objectionable, as opinion polls consistently showed. And, as aforementioned, it also had the support of trade unions, business leaders, leading academics, and—more critically—thousands of military reservists, including fighter pilots, who threatened to refuse to volunteer for military service.

It is important to note that the civil protest movement included many different groups with diverse aims; some groups aimed to promote various democratic values such as gender equality, ending the military occupation, or changing the religious status quo in Israel. However, the main and general claim of the protest movement, and the reason why the protest managed to remain all-inclusive and broad, was to protect democracy. In that respect, it was portraying itself as a conservative movement: it was not necessarily, at least in the early stages of the protest, about *promoting* Israel's democracy but about *protecting* it against what was perceived as a significant threat to the democratic order.

The right to resist is nowadays recognized in many constitutional documents.⁴⁹ For example, Article 20(4) of the German Basic Law anchors the “Right of resistance” and provides that “All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.”⁵⁰ This provision, Tushnet correctly notes, complements the eternity clauses (Article 79(3)).⁵¹ The fundamental constitutional values of the state are protected by formal unamendability. If the constitution-amender violates this unamendability, the court can block the constitutional reform by striking it down as unconstitutional. But apart from the judiciary, also the people themselves—if no other remedy is available—have the right to resist the abolishment of the constitutional order, and so protect the democratic order. Interestingly, this amendment did not appear in the original Basic Law of 1949 but was inserted as an amendment in 1968 as a counterweight to constitutional amendments granting the government extensive emergency powers.⁵²

Tom Daly has elaborated on how the citizen can function as “democracy-defending,” not only through rights of resistance but also through constitutionalizing civic education and citizens’ assemblies.⁵³ As for civic education, Daly writes:

If the right of resistance is a measure of last resort . . . an alternative approach is the preventive measure of ensuring adequate civic education, which . . . can arm the citizens with enough knowledge to appreciate the fundamental values of the

⁴⁹ See, e.g., Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 U.C.L.A. L. REV. 1184 (2013).

⁵⁰ Art. 20(4), Basic Law for the Federal Republic of Germany.

⁵¹ Tushnet, *Constitution-Making: An Introduction*, *supra* note 37, at 2005.

⁵² Georg Gesk, *Right to Resistance and Terrorism—the Example of Germany*, 13 GERMAN. L.J. 1075, 1078 (2012).

⁵³ Tom Gerals Daly, *Designing The Democracy-Defending Citizen*, 6 CONST. STUD. 189 (2020).

democratic state, discern the falsity in the siren song of the authoritarian populist, and identify unconstitutional . . . threats against the system.⁵⁴

In order for citizens to act as democracy-defenders they must have some kind of constitutional education, some constitutional literacy.

Constitutional literacy is of great importance to sustaining constitutional democracy.⁵⁵ Also in that respect, the Israeli case provides a very interesting illustration. In order to counter the populist judicial overhaul and the often abusive borrowing rhetoric behind it, legal scholars played a vital role in providing reliable information on the judicial system, on case law and on comparative law, through accessible means, such as videos, op-eds, short papers, and speeches in rallies and in homes, to provide the greater public with much more constitutional knowledge regarding what they are protesting about and why.⁵⁶ Liora Lazarus correctly notes that

[t]he fight to stem the tide of authoritarianism depends on establishing a defense of the rule of law which has real purchase on the public imagination. This narrative must be capable of persuading the broader public of the essential value of constitutionalism. If we fail to establish this counter-narrative, liberal democracy as a whole is threatened.⁵⁷

The Israeli protest against the judicial overhaul succeeded in providing such a narrative.

The main claim I wish to make in this chapter, therefore, is that the people themselves, when acting collectively, are another type of *branch*, which is vertically separated from governmental-instituted organs and which may be regarded as an institution protecting democracy that can block or slow attempts by populist governments to undermine the democratic order. Constitutional regimes organize all society's fundamental political institutions.⁵⁸ "The people" may be regarded as another type of institution.⁵⁹ Of course, "the people" is very different in many aspects

⁵⁴ *Id.* 202. On civic education and constitutional design, see also Mark Tushnet, *Constitutional Design as if Civic Education Mattered*, 41 SOC. PHIL. 210 (2010).

⁵⁵ Maartje De Visser & Brian Christopher Jones, *Unpacking Constitutional Literacy* 13 GLOB. CONSTITUTIONALISM 1 (2023); Vicki C. Jackson, *Law Schools and Civic Education*, AALSNEWS (Fall 2019), <https://www.aals.org/about/publications/newsletters/aals-news-fall-2019/law-schools-and-civic-education/>.

⁵⁶ Bar-Siman-Tov, Brandes, Lieblich, Roznai & Shinar, *supra* note 22.

⁵⁷ Liora Lazarus, *Brexit in the Supreme Court: When Populists Attack the Rule of Law, Everyone Loses*, THE CONVERSATION (Sept. 27, 2019), https://theconversation.com/brexit-in-the-supreme-court-when-populists-attack-the-rule-of-law-everyone-loses-124302?fbclid=IwAR2GsL_g3HozjmRNv7eL-efq9Tft8K7dL_RE4-merzceWcXA7vjb8ob28s.

⁵⁸ Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 36 (1999).

⁵⁹ There is an old tradition of considering the people of Rome as an institution—*populus Romanus*. See Tim Cornell, *Populus*, in OXFORD CLASSICAL DICTIONARY (2016), <https://oxfordre.com/classics/display/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-5248>. When the people are regulated by the constitution—for example, for a referendum—they should be regarded as a

from what Tushnet regards as institutions protecting democracy or from what Khaitan describes as guarantor institutions. In contrast with fourth branch institutions, the people neither have special expertise nor are accountable to any actors.⁶⁰ They are, however, independent, at least when it comes to independence from the ruling party or coalition. Yet, being dependent upon fundraising, the people are not independent from economic influence by other financial actors. So, there is a great risk of manipulation. However, those who care about democracy must stand up for its protection. Protecting democratic values cannot be left only to the courts; it must also be done in the streets.⁶¹ In that respect this idea also corresponds with Tushnet's general approach, urging the people themselves to take responsibility for protecting their liberties and the constitution and not rely solely on the judiciary.⁶²

Conclusion

In a *Guardian* article about the Israeli protests against the judicial overhaul, Jonathan Freedland wrote: "everyone who cares about democracy, including those who are distant from Israel, should desperately want those protesters to succeed. We need them to win."⁶³ We need them to win because this will be an optimistic sign that people can object against populist governments and counter populist constitutional projects. And if in Israel, with this unprecedented protest movement, the people do not win, then it would be hard to see how other, smaller and less determined protests will prevail.

Without overly romanticizing it, I think that the Israeli case study shows that a collaborative and coordinated effort by large segments of the society allows the people themselves to act an institution protecting democracy. On November 18, 2023 the John McCain Prize was awarded to "the People of Israel." The Prize was accepted by a representative of the abovementioned Achim Laneshek, the non-governmental organization of reserve men and women from units in the Israeli Defense Forces which was founded to protest against the judicial overhaul but, since the October 7 terrorist attack, has focused its activities on providing aid and relief to many communities all over Israel. "Members of Achim Laneshek,"

constitutional organ. See Yaniv Roznai, *We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments*, 110 SUP. CT. L. REV. 103 (2023).

⁶⁰ Khaitan, *supra* note 9, at S44.

⁶¹ Julian Scholtes, *The Complacency of Legality: Constitutionalist Vulnerabilities to Populist Constituent Power*, 20 GERMAN L.J. 351 (2019).

⁶² MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

⁶³ Jonathan Freedland, *Israelis' Defiance of Netanyahu Holds a Lesson for Anyone Who Cares about Democracy*, THE GUARDIAN (July 28, 2023), https://www.theguardian.com/commentisfree/2023/jul/28/israelis-benjamin-netanyahu-democracy-protests-donald-trump?CMP=Share_AndroidApp_Other.

the press release states, “have gone from demonstrating for democracy in the streets to demonstrating their commitment to democracy by mobilizing to assist the country’s fight against terrorism.” Eyal Nave, the representative from Achim Laneshek, said: “Democracy is fragile. It requires constant vigilance and attention. We are a team of action so when the people of Israel needed us the most, we answered the call.”⁶⁴ This was an institution protecting democracy.

Tushnet writes that “[a] nation with enough institutions supporting constitutional democracy might be able to protect against specific threats as they arise.”⁶⁵ In Israel there was a specific threat but not enough institutions supporting democracy, and this is when the people came to play a significant role. The unprecedented and unexpected protest movement was especially important in light of the relatively weak political mechanisms of checks and balances in the Israeli system. It is true that there is a strong and independent Supreme Court in Israel. But the court can do only so much. Alexander Hamilton famously wrote that “[t]he judiciary . . . has no influence over either the sword or the purse.”⁶⁶ Interestingly, in the Israel case, the two most influential bodies in the protest movement were Achim Laneshek and the Start Up protest, two bodies that represent, in many ways, the sword and the purse.⁶⁷ Indeed, the Israeli case demonstrates how “people acting in and through civil society’s institutions might effectively influence and constrain the government.”⁶⁸

Which brings me to a word of caution for comparative constitutional law. Because of the dominance of these two bodies in public life in Israel—the high-tech industry being so dominant for the economy, and the military reserves playing such an important role in society—their involvement in the protest movement was significant in ways that could make Israel a unique case. It might be difficult to draw analogies for countries without compulsory enlistment and whose economies do not depend so much on a particular industry.

To conclude, if Frank Vibert labeled administrative institutions protecting democracy as “the rise of the unelected,”⁶⁹ in this chapter I wish to emphasize “the rise of the people” as the old-new power that can protect democracy. Tushnet is accurate in his instinct that institutions protecting democracy “is an interesting and useful one for studying constitutional structures comparatively.”⁷⁰ I believe that the role of the people themselves in protecting democracy is an important

⁶⁴ The HFX John McCain Prize for Leadership in Public Service Presented to The People of Israel, Nov. 18, 2023, <https://halifaxtheforum.org/press/the-hfx-john-mccain-prize-for-leadership-in-public-service-presented-to-the-people-of-israel/>

⁶⁵ TUSHNET, *supra* note 3, at 22.

⁶⁶ FEDERALIST NO. 78.

⁶⁷ I thank Ronit Levine-Schnur, the founder and chair of the Israeli Law Professors Forum for Democracy, for providing this important observation.

⁶⁸ Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379, 412 (2000).

⁶⁹ FRANK VIBERT, *THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS* (2007).

⁷⁰ TUSHNET, *supra* note 3, at 201.

and interesting inquiry, both theoretically and comparatively, and I hope that the Israeli case can provide a useful starting point for future inquiries.

I cannot conclude this chapter without thanking Mark Tushnet, who has been a great source of inspiration for me and for many others in the field. We all owe Professor Tushnet a great deal, and for this we say: Thank you.