

From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel

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Abstract

Israel has no one official document known as ‘the Constitution’ and for nearly half a century was based on the principle of parliamentary sovereignty. Still, since the ‘constitutional revolution’ of the 1990s, Israel’s supreme norms are expressed in its basic laws and laws are subject to judicial review. This situation is the result of the enactment of two basic laws dealing with human rights in 1992 – which included a limitation clause – and of a judicial decision of monumental significance in 1995, the Bank Hamizrahi case. In that decision, the Supreme Court stated that all basic laws – even if not entrenched – have constitutional status, and therefore the currently accepted approach is that the Knesset indeed dons two hats, functioning as both a legislature and a constituent authority. The novelty of the Bank Hamizrahi decision lies in its notion of a permanent, ongoing constituent authority. The Knesset actually holds the powers of a constitutional assembly, and legislation titled ‘Basic-Law’ is the product of constituent power. Though it is neither complete nor perfect, Israel’s constitution – that is, basic laws – addresses a substantial number of the issues covered by formal constitutions of other democratic states. Furthermore, though this formal constitution is weak and limited, it is nonetheless a constitution that defends the most important human rights through effective judicial review.

Still, given the ease with which changes can be made to basic laws, the special standing of basic laws differs from the standing generally conferred on a constitution. Most basic laws are not entrenched, which means that the Knesset can alter a basic law by a regular majority. Over the past few years, there has been a tendency towards ad casum amendments of basic laws. These amendments are usually adopted against a background of political events that demand an immediate response on the part of the Knesset. The latter then chooses the path of constitutional – not regular – legislation, which is governed by a relatively smooth legislative passage procedure. Even provisional constitutional amendments were passed with relative ease followed by petitions presented to the Supreme Court, arguing that the Knesset’s constituent power is actually being ‘abused’.

These petitions, as well as Israel’s peculiar constitutional development, presented the Supreme Court with several questions as to the power for judicial review of basic laws. Thus far, the Court’s endorsement of judicial review was based on the limitation clause found in both basic laws on human rights, but limitation clauses

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do not establish the criteria for a constitutional violation by constitution provisions. Does this mean that the Knesset's constituent power is omnipotent?

This article examines the almost unique position of Israeli jurisprudence in relation to the doctrine of 'unconstitutional constitutional amendments'. It focuses on the possibility of applying the doctrine in the Israeli case laws, the often-raised notion of 'supra-constitutional' values that would limit the Knesset's constituent power, and a third – newly created – doctrine of abuse (or misuse) of constituent power. A central claim of this article is that in light of the unbearable ease with which basic laws can be amended in Israel, there is an increased justification for judicial review of basic laws.

Keywords: unconstitutional constitutional amendment, constitutional law, constitutional principles, constituent power, Israel, judicial review.

A Israel's Constitutional Background

Israel's brief constitutional history can be divided into before and after the 1990s, what has come to be called Israel's 'constitutional revolution' that includes two components: the enactment, without a wide public participation and awareness, of two basic laws on fundamental rights that for the first time imposed substantive limits on the Knesset's legislative powers, coupled with a strong judicial enforcement of these basic laws through substantive judicial review.¹

Upon the establishment of the State, in 1948, Israel's Declaration of Independence determined that "the establishment of the elected, regular authorities of the State" would be "in accordance with the Constitution which shall be adopted by the Constituent Assembly". The Constituent Assembly, elected as both a constituent and legislative body, and later renamed "The First Knesset",² conducted extensive debates on the future constitution. However, after deep political disagreements over the need to adopt a constitution at that stage, on 13 June 1950, the Knesset (the Israeli Parliament) adopted the 'Harari Decision'; according to this, instead of completing the constitutional project at once, the Knesset, which holds both legislative and constituent powers, would enact basic laws in stages, and those would eventually comprise the Israeli constitution.³

Until the early 1990s, the Knesset enacted several basic laws that regulated governmental structure and institutions. Moreover, the High Court of Justice

1 Much has been written on the Israeli constitutional revolution, so we decided to keep this description short. For further discussion on the Israeli constitutional history and revolution, see G. Sapir, *The Israeli Constitution: From Evolution to Revolution*, Oxford University Press, 2018; S. Navot, *The Constitution of Israel: A Contextual Analysis*, Hart Publishing, 2014; G. Sapir, D. Barak-Erez, & Aharon Barak (eds.), *Israeli Constitutional Law in the Making*, Hart Publishing, 2013.

2 'Knesset' is the name of the Israeli Parliament, comprised of one elected body of 120 members.

3 See e.g., H. Lerner, *Making Constitutions in Deeply Divided Societies*, Cambridge University Press, 2011, Ch. 3; A. Shinar, 'Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel', in D.J. Galligan & M. Versteeg (Eds.), *Social and Political Foundations of Constitutions*, Cambridge University Press, 2013, p. 207.

(HCJ)⁴ served as a legal defender of unwritten common law rights and freedoms even without an entrenched bill of rights. Yet the prevailing approach was that of legislative supremacy.⁵

By 1992, almost all of the basic laws dealing with governmental institutions had been adopted, but the proposal to pass a basic law dealing with human rights provoked great controversy in the Knesset. Therefore, another political compromise split the proposal of Basic Law: Human Rights into a number of separate basic laws. This process made it possible for the Knesset to agree and support the constitutional entrenchment of consensual human rights, while leaving pending the discussion of ‘problematic’ rights, such as freedom of religion, speech and conscience, equality, etc. Following this new ‘compromise’, two basic laws dealing with human rights were enacted in 1992: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. These two basic laws provide substantive limits on the legislative powers of the Knesset in the form of a ‘limitation clause’ that stipulates conditions for infringing protected constitutional rights.⁶ Three years later, in the pioneer judgement of *United Mizrahi Bank v. Migdal Cooperative Village*,⁷ the Supreme Court held that the basic laws hold a normative constitutional status superior to ordinary laws, and that the court has the power to conduct judicial review and invalidate unconstitutional legislation. The constitutional revolution then reached a peak. Both basic laws on human rights and this Supreme Court decision were later known as the ‘constitutional revolution’.⁸

Since then, the HCJ has consistently ruled that Israel has a constitutional regime and that there is judicial review in Israel, which is a position that follows from the supremacy of the basic laws.⁹ The *Mizrahi Bank* verdict mainly established that effective judicial review exists in Israel, but that the ‘constitution’ itself contains numerous flaws. It actually resembles a selection of institutional

4 The Supreme Court is the highest court in the State of Israel, and it plays two roles: it is the court of final resort for appeals against verdicts handed down by district courts, and thus rules on civil, administrative and criminal matters. In addition, it sits as the High Court of Justice (HCJ) and hears petitions against state authorities and other tribunals. Following the constitutional revolution in the 1990s, it has the power of judicial review of legislation that is inconsistent with “constitutional” norms.

5 See e.g., A. Shapira, ‘Judicial Review without a Constitution: The Israeli Paradox’, *Temple Law Quarterly*, Vol. 56, No. 405, 1983, pp. 421-423.

6 See A. Barak, ‘A Constitutional Revolution: Israel’s Basic Laws’, *Constitutional Forum*, Vol. 4, No. 83, 1993; D. Kretzmer, ‘The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law’, *Israel Law Review*, Vol. 1992, No. 238, 1992.

7 ‘CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village’, *PD*, Vol. 49, No. 4, 1995, p. 221. See C. Klein, ‘Basic Laws, Constituent Power and Judicial Review of Statutes in Israel: Bank Hamizrahi United v. Kfar Chitufi Migdal and Others’, *European Public Law*, Vol. 2, No. 2, 1996, p. 225.

8 G. Sapir, ‘Constitutional Revolutions: Israel as a Case-study’, *International Journal of Law in Context*, Vol. 5, No. 4, 2009, p. 355; G.J. Jacobsohn, ‘After the Revolution’, *Israel Law Review*, Vol. 34, No. 2, 2000, p. 139.

9 Y. Rabin & A. Gutfeld, ‘Marbury v. Madison and its Impact on the Israeli Constitutional Law’, *University of Miami International and Comparative Law Review*, Vol. 15, 2007, p. 303; D. Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli challenge in American Perspective’, *Columbia Human Rights Law Review*, Vol. 26, 1995, p. 309.

rules of procedure, which is a 'slim' constitution that is not necessarily valid as a real statement of coexistence or national credo.¹⁰

The constitutional revolution started a new era in Israel's constitutional law – a textual period, in which there allegedly exists a constitutional text and the Supreme Court has the power of judicial review. In the following years, judicial review was conducted with restraint. Still, the HCJ removed the traditional requirement of legal standing (*locus standi*), and allowed petitions brought by 'public petitioners' as long as they concerned significant rule of law or constitutional questions. It developed the 'reasonableness' ground for reviewing and invalidating governmental decisions,¹¹ and finally, in a series of judicial decisions that followed the *United Mizrahi Bank* case, the HCJ broadly interpreted 'human dignity' to include certain aspects of the right to equality and freedom of expression, according them a constitutional status even though these rights were intentionally excluded from the basic laws on human rights.¹²

The basic laws form nowadays the Israeli constitution. It is not a complete constitution, but rather a lame and restricted one. The Supreme Court has nullified less than twenty laws (mainly specific sections) over the past two decades, stating that these laws disproportionately impaired human rights.

Still, the task of completing the constitution remains difficult. Since the *Bank Mizrahi* case, with very few exceptions, Israel has actually experienced 'constitutional silence': the refusal by the Knesset to enact further basic laws on human rights. As the Supreme Court put it, "It seems that certain parts of the Knesset are displeased with the constitutional powers of this Court and fear that additional constitutional texts would further enhance its power".¹³ It appears that the strong divisions in Israeli society serve to undermine the possible completion or enactment of a written constitution, without even referring to other challenges such as security, war and the occupied territories.¹⁴ Prof. Gavison argues that the more divided a society is, the greater the importance of a constitution to its political stability. However, the more divided a society is, the less likely it is to agree to

- 10 On Israeli unique constitutional law system, see R. Weill, 'Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care', *Berkeley Journal of International Law*, Vol. 30, 2012, p. 349.
- 11 See D. Barak-Erez, 'Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint', *Indian Journal of Constitutional Law*, Vol. 3, 2009, p. 118; D. Freidmann, *The Purse and the Sword: The Trials of Israel's Legal Revolution*, Haim Whatzman trs., Oxford University Press, 2016, pp. 54-56; R. Gavison, 'The Israeli Constitutional Process: Legislative Ambivalence and Judicial Resolute Drive', *Review of Constitutional Studies*, Vol. 11, 2006, p. 345, p. 370.
- 12 'HCJ 6427/02 Movement for Government Quality in Israel v. The Knesset', Vol. 61, No. 1, 2006, p. 619 (regarding equality); 'HCJ 10203/03 The National Census Ltd v. Attorney General', *PD*, Vol. 62, No. 4, 2008, p. 715, (regarding political expression). See Navot, 2014, p. 235.
- 13 'HCJ 4908/10 Bar-On, MK v. Knesset', *PD*, Vol. 64, No. 3, 2011, p. 275, para. 4 of Justice Rubinstein's verdict.
- 14 J. Segev, 'Who Needs a Constitution? In Defense of Non-Decision Constitution-Making Tactic in Israel', *Albany Law Review*, Vol. 70, No. 2, 2007, p. 409.

a constitution. This is especially true for the ‘substantive’ parts of the constitution, such as the bills of rights and the basic principles.¹⁵

B Amending the Basic Laws

Two decades after the constitutional revolution, the basic laws are still shrouded in uncertainty, as legal issues concerning their status have not yet been fully clarified. Certain basic laws include a formal entrenchment clause stating that they may only be amended by another basic law or a special Knesset majority; other basic laws contain mainly substantively entrenched clauses, but are not formally entrenched by that majority; and a third kind of basic laws is not entrenched at all and thus can be amended by a regular Knesset majority.

One thing all of the basic laws have in common is that they are formally titled ‘basic’ laws. They are mentioned without reference to their enactment year (as is the case with other laws and acts). According to this view, a single, unique feature is enough to identify a law as basic. This ‘morphological’ characteristic means that a basic law is a law whose name bears the words ‘Basic Law’. Otherwise, there is no explicit way to identify basic laws in Israel, since *Basic Law: Legislation* – proposed by several Ministers of Justice over the years in different versions – which was to address the manner in which basic laws are to be enacted, has not yet been passed by the Knesset. Ruling on the *Biennial Budget* issue,¹⁶ for example, Supreme Court President Beinisch stated that “over the years, the various Israeli Knessets and this court identified [basic laws] by their morphological characteristic” and that “the morphological test was further validated by the *Bank Hamizrahi* judgment.” The majority of judges agreed that the morphological characteristic is the test by which basic laws are identified. At the same time, Justice Beinisch argued that the morphological test is ‘too simplistic’. Currently, in the absence of a basic law that defines legislative procedures, the question of whether a combined (morphological and substantive) test should apply remains open.

Given that most basic laws do not include entrenchment clauses or a majority requirement, it would seem that theoretically any non-entrenched basic law might be modified or even nullified by a majority of only two Members of Knesset. This, in fact, is the biggest weakness of the current Israeli constitutional

15 R. Gavison, ‘Constitutionalism and Political Reconstruction? Israel’s Quest for a Constitution’, *International Sociology*, Vol. 18, No. 1, 2003, p. 55. As for the situation nowadays, almost two decades after the constitutional revolution, Justice Elyakim Rubinstein provided (in 2011) a fine description of what has happened since: “The most recent basic laws were introduced in 1992, but the *Bank Hamizrahi* verdict that arranged the constitutional powers was handed down in 1995 and ever since then, [the Knesset has observed SN] an operative ‘constitution silence’ – which it did not in other legislative issues. ... Why do I believe it is important to complete the constitution when in fact we live under a semi-constitutional regime? We need it for educational reasons, to instill Israel’s values as a Jewish and democratic state, to serve as a text to be studied, one that would serve as a flowing historic stream of human and national values ... A complete constitution will promote and improve the education of generations to come, which is why it should materialize in this world.”

16 Bar-On case (n. 13), para. 10 to President Beinisch’s opinion.

structure: amendment of the basic laws requires no clear or special majority, so that a vote with just a few MKs present could modify or amend a basic law, or even enact one. Not only ordinary but also constitutional legislation is passed relatively easily.¹⁷

In the formal sense, the procedure for voting on a basic law is identical to that of a regular law, and the process of enacting basic laws does not require any special procedure. All of the basic laws were enacted in accordance with the procedure required for enacting regular laws, and most of them do not prescribe any special proceeding for their amendment or variation. The exceptions are Basic Law: The Knesset, which specifically limited the MKs' ability to vary particular sections thereof,¹⁸ Basic Law: Freedom of Occupation, Basic Law: the Government, Basic Law: Referendum and recently Basic Law: Israel as the Nation State of the Jewish People; all of them include an 'entrenchment clause' under which that basic law cannot be varied other than by a basic law passed by a majority of 61 MKs.¹⁹

Addressing this issue in the *Mizrahi* case, Supreme Court President Shamgar ruled that "there is no need for a special majority of members of Knesset in order to vary a basic law, save if this is expressly required, as a precondition, in the basic law being amended"²⁰ and that "it is now possible to apply a standard legislative criterion according to which a basic law can only be amended by another basic law."²¹

In a similar way, President Barak ruled in *Bank Mizrahi* that "A basic law may not be changed except by another basic law".²² Insofar as the 'rigidity' [entrenchment] of basic laws is expressed in only a few of the basic laws, "we may conclude that in the absence of a 'rigidity' provision, a basic law may be amended by a basic law adopted by a regular majority".²³ However, President Barak stressed that "the absence of entrenchment does not lower the status of the basic law to the level of regular law. A non-rigid basic law is still a basic law. It is not a 'regular' law and cannot be amended by regular legislation."²⁴ This comment is significant for it means that, for the purposes of most of the basic laws, a constitutional amend-

17 This is what Ariel Bendor calls "the unbearable lightness with which changes can be made in basic laws". See A. Bendor, 'Flaws in the Enactment of the Basic Laws', *Law & Government*, Vol. 2, 1994, p. 443 (Hebrew). For an elaboration, see S. Navot, 'Israel', in D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, 2011, p. 191.

18 Section 46 provides that a direct change (amendment) of sections 4, 44 and 45 must be done by way of a basic law adopted by a majority of 61 votes in three readings. Mention should also be made of section 9A, which states that the extension of the term of the Knesset must be anchored in a law passed by a majority of 80 members, although this particular section is not entrenched (so that in principle, the Knesset can change this law by a regular majority, and that the majority required for an extension of its term is smaller). Regarding this, see *Mizrahi Bank* (n. 7), pp. 274-275 (President Shamgar) and 407 (President Barak), and pp. 544-445 (Justice Cheshin).

19 Section 7 of Basic Law: Freedom of Occupation, SH 5754, No 1454, at 90 (from 1994). See also *Bank Mizrahi*, *ibid.*, pp. 273-274 (President Shamgar) and p. 547 (Justice Cheshin).

20 Basic Law: Freedom of Occupation, *ibid.*, 321, para. 64d.

21 *Mizrahi Bank* (n. 7).

22 *Ibid.*, para. 60.

23 *Ibid.*, 408 (President Barak, para. 63).

24 *Ibid.*

ment can be introduced by enacting a law through regular procedure, provided the law enacted bears the title 'basic law'. A basic law may thus be amended or changed by virtue of the vote of some few Knesset members.

C The Option (and Rejection?) of the 'Basic Structure Doctrine'

As we have seen, since the constitutional revolution, the legislature is limited in its ability to infringe protected constitutional rights. But, what if the Knesset would enact a constitutional statute – a basic law – that would infringe on a constitutional right? Would the new basic law be limited by the limitation clause? Arguably, if the Knesset is prohibited from infringing on protected rights not according to the conditions stipulated in the limitation clause, this may also apply to basic laws enacted by the Knesset.²⁵ However, in the *Porat* judgment, the HCJ responded on this question in the negative:

The aim of the limitation clause is to limit the ordinary legislation... the limitation clause is not aimed towards the Knesset when it amends basic laws through the established constitutional procedure specially designed for that matter. Indeed, one has to distinguish between infringement or limitation of a basic right that is not derived from amending basic laws (for example, infringement by a regular law) and infringement or limitation of a basic right while amending the basic law itself. The constitutionality of the former is set by the conditions of the limitation clause. The constitutionality of the latter is conditioned in fulfilling the requirements of the procedural conditions for amendment.²⁶

In other words, the Knesset's constituent authority is limited by the formal procedures for amendments and not by the substantive requirements of the limitation clause that apply only to the sub-constitutional level.

Moreover, it is important to note that unlike some other jurisdictions,²⁷ the basic laws do not include any explicit limitation on constitutional amendments.²⁸ Does this mean that the Knesset's authority in its 'constituent hat', when amending or enacting basic laws, is unlimited?

25 For example, in a recent case from Papua New Guinea, the Supreme Court ruled that section 38(1) of the Constitution, which limits the power of Parliament to make laws restricting fundamental rights, applies also to constitutional amendments. See *Namah v. Pato* [2016] PGSC 12; SC1497, available at: <http://pacific.org/pg/cases/PGSC/2016/13.html> (last accessed 22 March 2019).

26 'HCJ 1398/94 Shay Porat v. The Government of Israel', *PD*, Vol. 57, No. 5, 1994, p. 913, p. 914.

27 See e.g., Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017, ch. 1.

28 Section 7A of Basic Law: The Knesset bans the participation of any party in the elections if its goals and actions, expressly or by implication, include 'the negation of the existence of the State of Israel as the state of the Jewish people'. One may claim that this is another form of unamendability as it places a bar at an earlier stage. On the link between constitutional unamendability and banning political parties, see R. Weill, 'On the Nexus of Eternity Clauses, Proportional Representation and Banned Political Parties', *Election Law Journal*, Vol. 16, 2017, p. 237.

In some countries, such as India, courts have developed the idea of ‘implied unamendability’; implied limitations on the constitutional amendment power – even without explicit limitations – which derive from the basic structure of the constitution and from its identity.²⁹ It is a holistic or structural reading of the constitution in an attempt to discover its philosophical underpinnings, from which one may infer implied limits to formal constitutional change in order to preserve the constitution.³⁰ Another model for implied limitations on constitutional amendments in order to preserve the constitution is the Colombian ‘constitutional replacement doctrine’ that prohibits the replacement of the constitution via the ordinary amendment procedure.³¹ Do such implied unamendability doctrines such as the Indian ‘basic structure doctrine’ or the Colombian ‘constitutional replacement doctrine’ apply in Israel?

Five years after his retirement from the bench, Prof. Aharon Barak explored in an academic article, the question of limits to constitutional amendments, comparatively and in Israel. Prof. Barak argued that the Knesset’s constituent authority is not unlimited. It is limited, as we elaborate in the next section, by supra-constitutional principles, yet these limitations are narrower than accepted in comparative constitutional law because the constitution-making process in Israel is still ongoing:

Under the comprehensive and full meaning of this doctrine as it is accepted in comparative law, this question indeed has no place in Israel. The reason for this is that the concept of an ‘amendment’ to the constitution is itself problematic in Israel. The constitutional project in Israel is a work in progress. The mission has not yet been completed. The ‘whole’ has not yet been completed, and, in any case, the arrangements for amending it have not yet been developed. In Israel, we have a process of enacting basic laws. From time to time, a new basic law is enacted in an area in which there was no previous basic law. From time to time, an amendment to an existing basic law is performed by

- 29 See Roznai, 2017, ch. 2. On the Indian Basic Structure Doctrine see, S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford University Press, 2009. The doctrine originates in early 20th century German constitutional thinking but has since migrated to various jurisdictions. See Y. Roznai, ‘The Migration of the Indian Basic Structure Doctrine’, in M. Lokendra (Ed.), *Judicial Activism in India - A Festschrift in Honour of Justice V. R. Krishna Iyer*, Universal Law Publishing Co., 2012, p. 240. It has even migrated to Israel, where it was mentioned in the writings of Prof. Aharon Barak. See Y. Roznai, ‘Constitutional Unamendability in Israel: Remarks Following Professors Baxi, Hoque and Singh’, *Indian Journal of Constitutional & Administrative Law*, Vol. 33, 2018.
- 30 On the various rationales behind limits to constitutional change, see P.J. Yap, ‘The Conundrum of Unconstitutional Constitutional Amendments’, *Global Constitutionalism*, Vol. 4, No. 1, 2015, *Global Constitutionalism* 114; O. Doyle, ‘Constraints on Constitutional Amendment Powers’, in R. Albert, X. Contiades & A. Fotiadou (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing, 2017, p. 73.
- 31 See for example, C. Bernal, ‘Unconstitutional Constitutional Amendments in the case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine’, *International Journal of Constitutional Law*, Vol. 11, 2013, p. 339; M.A. Cajas-Sarria, ‘Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016’, *The Theory and Practice of Legislation* Vol. 5, No. 3, 2017, p. 245.

enacting an amending basic law. ... In my opinion, the Knesset is not omnipotent as regards the establishment of a new basic law or the amendment of an existing basic law. In both cases, the Knesset, as the constitutional assembly, must act within the framework of fundamental principles and fundamental values of the constitutional structure. It must act within the framework of the principle-based standards upon which Israel's Declaration of Independence and the entire constitutional project are based However, in Israel we are in the middle of a constitutional process, based on basic laws, which has not yet been completed. Even if one accepts the basic approach that there are restrictions on the establishment of a constitution in Israel or on the power to amend it, my opinion is that, as long as the project of enacting basic laws has not yet been completed, these restrictions operate in a narrower framework than is customary in comparative law.³²

How can Israel have a 'basic structure' doctrine if there is no full 'structure'? How can there be a 'constitutional replacement doctrine' if there is not complete constitution yet? In other words, how can the court infer implied limitations on amendments and act as 'guardian of the constitution'³³ if the constitutional project is still in the making?

Prof. Barak's approach regarding a limited application of limitations to formal constitutional change in the context of the still continuing constitution-making process in Israel was echoed in a recent judgement by the HCJ. The judgement concerned a constitutional amendment that allows the removal from the legislature of lawmakers whose actions constitute incitement to racism or support for an armed struggle against the State of Israel.³⁴ The constitutionality of the amendment was challenged to the HCJ by MK Yousef Jabareen who argued that the amendment to Basic Law: the Knesset, notwithstanding its constitutional status, is unconstitutional and void due to its infringement upon the right to be elected and on the principle of democracy itself. However, in its decision, a nine-judge panel unanimously rejected the petition against the law. The President of the Supreme Court, Esther Hayut, who was joined by the other eight judges, wrote in the verdict that although the amendment "seriously infringes basic rights", it contains a system of checks and balances and "it cannot be said that it contradicts the core of state's democratic identity", especially when one considers the com-

32 See A. Barak, 'Unconstitutional Constitutional Amendments', *Israel Law Review*, Vol. 44, No. 3, 2011, p. 321.

33 See R. O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms', *Journal of Civil Liberties*, Vol. 4, 1999, p. 4; G. Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Court as Guardians of the Constitution?', *Constellations*, Vol. 19, 2012, p. 182.

34 According to the amendment, 70 Knesset members – 10 of whom must be from the opposition – may file a complaint with the Knesset speaker against any lawmaker who supports armed struggle against Israel or incites racial hatred, kicking off the impeachment process. The Knesset House Committee would then debate the complaint before clearing it with a three-quarter majority in the committee. The motion to dismiss the lawmaker would then be sent to the plenum, where, if 90 of the 120 Knesset members vote in favour, the MK would be ousted. The deposed lawmaker could then appeal the decision with the Supreme Court.

plementing constitutional provision regarding the ban on political parties.³⁵ As for the question of limits to the Knesset's constituent power and the unconstitutional constitutional amendment doctrine, President Hayut cited Prof. Barak and wrote,

For now, and considering the unfinished stage in which the Israeli constitutional enterprise is at, and especially as there are no established procedures for enacting and amending basic laws, there is a great difficulty in adopting a comprehensive doctrine concerning unconstitutional constitutional amendments such as we find in comparative law. It is worthy that the doctrine to be applied in this context in the Israel law ought to be set upon the completion of the basic law enterprise towards a full constitution.³⁶

At any event, President Hayut continued, even if we had examined the amendment according to any of the doctrines accepted in the world regarding limits to constitutional amendments, it appears that this amendment would pass the various standards. Accordingly, it is better to leave the complex question regarding the applicability of the doctrine in Israeli law undecided for now.³⁷ Other judges as well have left this issue undecided.

Thus, the option of implied limits on constitutional amendments in the form of the Indian basic structure doctrine has been raised but was never applied, as it is believed that it is unsuitable for the Israeli context. This, however, does not mean that the Knesset's constituent power is unlimited.

D Fundamental Values as Limits to Constitutional Amendments

For several years now, the Israel Supreme Court has stated, in various obiter dicta, that there are basic constitutional principles that might limit even the Knesset's constituent power.³⁸ The corner stone was established already in 1965, in the *Yardor* case when the Israeli Supreme Court acknowledged, for the first time – and borrowing from the German post World War I jurisprudence – that

35 According to Section 7a(2) and (3) of Basic Law: The Knesset, “A candidates’ list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the objects or actions of the list or the actions of the person, expressly or by implication, include ... incitement to racism; support of armed struggle, by a hostile state or a terrorist organization, against the State of Israel.” See generally, S. Navot, ‘Fighting Terrorism in the Political Arena - The Banning of Political Parties Party Politics’, *Party Politics*, Vol. 14, No. 6, 2008, p. 745.

36 HCJ 10214/16 MK *Yousef Jabareen v. Knesset* (27 May 2018), para. 25.

37 *Ibid.*

38 See, for elaboration, M. Masri, ‘Unamendability in Israel - A Critical Perspective’, in R. Albert & B.E. Oder (Eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies*, Springer, 2018, p. 169; S. Weintal, ‘The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory’, *Israel Law Review*, Vol. 44, No. 3, 2011, p. 449.

there are basic supra-legal principles above positive law.³⁹ In the *La'or* case, Barak noted that “theoretically, there is a possibility that a court in a democracy would declare the invalidity of a law that violates basic principles of the legal system; even if these are not entrenched in a rigid constitution.”⁴⁰ However, in that case, Barak held that for that time, in light of the existing sociolegal understanding in Israel, it is not for the court to take on itself the authority to declare invalid a law that violates basic principles.

In the *Meatrael* case, President Barak noted that

without deciding upon the matter, even if there are basic principles that a law cannot infringe, these are surely basic principles upon which our entire constitutional structure, including the basic laws themselves, rest upon, and such infringement in order to be prohibited must be substantive and severe.⁴¹

In a later case, *The Movement for the Quality of Governance in Israel*, the HCJ faced a challenge to a law that deferred mandatory military service for ultra-orthodox yeshiva students. President Barak referred to his book *A Judge in a Democracy*,⁴² and stated, again in an obiter, that

There is room for the view that a statute or a basic law that negates the character of Israel as a Jewish and democratic state is not constitutional. The people, the sovereign, did not authorize our Knesset to do so. The Knesset was authorized to act within the framework of the basic principles of the regime. It was not authorized to annul them. This case before us does not fall within that narrow frame.⁴³

In that matter, it was the Deputy Chief Justice, Mishael Cheshin who was more inclined to acknowledge and apply the idea of supra-constitutional principles, but he was in a minority opinion.⁴⁴

39 ‘EA 1/65 Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset’, *PD*, Vol. 19, No. 3, 1965, p. 365, p. 378, p. 390. See S. Guberman, ‘Israel’s Supra-Constitution’, *Israel Law Review*, Vol. 2, No. 4, 1967, p. 455.

40 ‘HCJ 142/89 La’or Movement v. Speaker of the Knesset’, *PD*, Vol. 44, No. 3, 1990, p. 529, pp. 553-554.

41 ‘HCJ 4676/94 Meatrael Ltd v. Knesset’, *PD*, Vol. 50, No. 5, 1994, p. 15, pp. 28-29.

42 A. Barak, *The Judge in a Democracy*, revised ed., Princeton University Press, 2006, p. 62 (In his book, Prof. Barak mentions the Indian Basic structure doctrine, which places implied limitations on the Parliament’s power to amend the constitution.)

43 ‘HCJ 6427/02 Movement for Quality Government v. Knesset’, *PD*, Vol. 61, No. 1, 2005, 619, para. 74.

44 According to Justice Cheshin, the legal pyramid is built on society’s basic values. During extraordinary situations, these basic values could resurrect “like an exploding volcano” and directly dictate a certain legal outcome. Justice Cheshin regarded the exemption from military service as violating the Jewish character of the state, democracy and equality. Due to the violation of these principles, Justice Cheshin held that the law was void. However, he was in a minority opinion. The majority opinion held that there is evidence of infringement on equality but upheld the constitutionality of the statute.

A certain inclination to accept the notion that the Knesset's constituent authority is limited by supra-constitutional principles, mainly the core principles of Israel as a Jewish democratic state, was further pronounced by various other Supreme Court judges in different cases, for example by President Beinisch, and Justices Joubbran, Hendel, Vogelman and Rubinstein, but always with due precaution and as obiter dicta and thus as non-binding statements.⁴⁵ There was no precedent regarding the limits to the Knesset's constituent authority, and a fortiori no basic law was ever invalidated for violating basic constitutional values.⁴⁶

More recently, Prof. Barak has further developed his idea regarding the limits of the Knesset's constituent authority. According to Barak, the interpretation of the Declaration of Independence establishes the 'genetic code' of the Constituent Assembly, which is intended to establish a constitution that will realize the vision of the people and its creed. It is not authorized to act contrary to the vision. Accordingly, Barak claims, even when one accepts the view that the Knesset possesses constituent authority, it is unauthorized to nullify the character of the State of Israel as a Jewish and democratic state.⁴⁷

In a somewhat similar line of argument, Prof. Ariel Bendor claimed that the core values of the state as Jewish and democratic impose limits to possible formal constitutional change. Instead of providing an interpretive reading of the Declaration of Independence, as Barak, Bendor argues that only the People's Council of 1948, which adopted the Declaration of the Establishment of the State, held 'original constituent power'. The Knesset holds only a 'derived constituent power' that is limited by the values of the Declaration of Independence, mainly, the Jewish and democratic characters of the State.⁴⁸

While the question of whether the Knesset possesses original or derived constituent power is a thorny one,⁴⁹ we find merit in the argument that the Knesset does not possess unlimited constituent authority. It is the people who are sover-

45 See *Bar-On* case (n. 13), para. 34 to President Beinisch's opinion; HJC 8260/16 *Ramat Gan Academic Center of Law and Business v. Knesset* (6 September 2017) (Isr.), para. 4 to Justice Hendel's opinion; para. 29 to Justice Vogelman's opinion; para. 13 to Justice Joubbran's opinion, and para. 35 to Justice Rubinstein's opinion.

46 Summarizing the status of recognizing basic values of the system as independent criteria for constitutionality, Justice Levy wrote that "...it seems to me that resorting to these constitutional or quasi-constitutional tools has not yet found a firm foothold in our law. Adopting an approach of this kind amounts to the beginning of a new constitutional era, a fourth age, whose boundaries have not yet been sufficiently outlined, and the same is true of the criteria on which it is based and on the operative consequences of a decision within that framework." HJC 2605/05 *Academic Center of Law and Business v. Minister of Finance*, PD, Vol. 63, No. 2, 2009, p. 545, para. 19.

47 A. Barak, 'The Declaration of Independence and the Constituent Assembly', (forthcoming 2018) *Hukim – Journal on Legislation* (Hebrew).

48 A. Bendor, 'The Legal Status of the Basic Laws', in A. Barak & C. Berenson (Eds.), *Berenson Book*, Vol. 2, Nevo Publishing, 2000, p. 119 (Hebrew).

49 For a discussion see e.g., C. Klein, 'The Constituent Power in Israel', *Mishpatim*, Vol. 2, 1970, p. 51 (Hebrew); C. Klein, 'Is There a Need for an Amending Power Theory?' *Israel Law Review*, Vol. 13, 1978, p. 203; C. Klein, 'After the Mizrahi Bank Case – The Constituent Power as Seen by the Supreme Court', *Mishpatim*, Vol. 28, 1977, p. 341 (Hebrew).

eign, not the Knesset, and the people have not authorized the Knesset members to decide that Israel is no longer a democratic or a Jewish State.⁵⁰

At any event, the possibility that there are certain supra-constitutional principles that limit even the Knesset's constituent authority, and which can be derived from the declaration of independence, still remains a theoretical possibility, never applied by the courts. Nonetheless, a more interesting development concerning the limits to the Knesset's constituent authority recently occurred, with the willingness of the court to conduct judicial review of basic laws not based on basic constitutional principles but based on the doctrine of an abuse of constituent power.

E The Abuse of Constituent Power Doctrine

The issue of a possible abuse or misuse of constituent authority was raised already in the *Mizrahi Bank* case. President Barak then asked what if the Knesset abuses the term 'basic law' by designating as such regular legislation with no constitutional content. According to President Barak,

this question is by no means simple; its answer extends to the very root of the relationship between the constituent authority (of the Knesset) and the judicial authority (of the courts). This question, as well, I would like to set aside for further consideration.⁵¹

Thus, the question was raised but was left unanswered.

The issue was raised once again, years later in the context of the annual budget. In the Israeli legal system, the Knesset supervises the government's activities. One of the main supervisory roles is the approval of the annual budget. The budget approval process is based on an important relationship between the Knesset and the government, which reflects separation of powers and the Knesset's supervision over the government. According to the established constitutional principle, the government must ordinarily submit an annual budget for the approval of the Knesset.⁵² This is a central mechanism for the Knesset to supervise the government. The importance of this constitutional rule is evident in light of the constitutional consequences of the budget proposal being rejected: dissolution of the Knesset.

Notwithstanding this established rule, considering the global economic crisis, in 2009 the Ministry of Finance proposed a biennial budget for the years 2009–2010, which meant that the government expenditures for the two-year period would be determined in advance, with the entire budget voted and approved by the Knesset only once. The Minister of Finance made it clear that this was a one-

50 On the idea that the Parliament holds only limited constituent authority, see Y. Roznai, 'Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers', *Jus Politicum – Revue de Droit Politique*, Vol. 18, 2017, p. 5.

51 *Mizrahi Bank*, 2012, para. 57.

52 Basic Law: The State Economy, Sec. 3(a)(2), § 5735-1975, SH No. 777 p. 206 (Isr.).

time modification, deriving from a real case of urgency, and accordingly, the law passed as a Temporary Order, that would amend Basic Law: The State Economy.

After this one-time temporary constitutional amendment, the government amended the basic law yet again, through another temporary amendment, for an additional two years. This was aimed to be an experimental legislation, a 'pilot' so to speak, in order to study whether the mechanism of a biennial budget should be adopted permanently.⁵³

This amendment was challenged before the HCJ in *MK Roni Bar-On v. The Knesset*. A seven-judge panel rejected the petition. President Beinisch, who wrote the court's primary opinion, held that

in an ideal state of affairs, in which there exists a regulated and rigid mechanism for changing and amending the constitution, it is doubtful whether amendment of the constitution by way of a temporary provision would be possible.

However, in Israel:

[I]n the absence of Basic Law: Legislation, the restrictions on the procedures for legislation or amendment of the basic laws are few, and in order to enact a basic law in Israel there is no need for special procedures in the Knesset. In these circumstances, it cannot be said that the very fact that the basic law was enacted by way of a temporary provision fundamentally disqualifies it or places it on a normative rung that is lower than a regular law, as the petitioners contend. At the same time, it may also not be said that this practice is problem-free. Setting a temporary constitutional arrangement indeed denigrates the status of the basic laws, and it should be done only sparingly, if at all. In certain circumstances, which cannot be determined in advance, it is possible that the enactment of a basic law as a temporary provision may amount to 'misuse' of the title 'basic law'. In considering each case on its merits, attention must be paid, inter alia, to the existence of exceptional circumstances that justify the making of a temporary arrangement rather than a permanent one; the subject being regulated by the basic law must be examined; and an assessment must be made of the extent of damage wrought by the temporary basic law on the principles of the regime and other basic rights. ... in certain, exceptional circumstances, the very recourse to a temporary provision may justify intervention in the basic legislation.⁵⁴

Thus, at this time, the Court would not intervene, because the government was justified in experimenting with the unconventional biennial budget before deciding whether to adopt it as a permanent arrangement. While the HCJ reasoned that biennial budgets do not constitute a serious danger to democracy, it did

53 For a comparative study on temporary experimental legislation, see S. Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective*, Edward Elgar, 2014.

54 *Bar-On* case (n. 13), para. 24.

harshly criticize the use of temporary basic laws, declaring that such instruments contradict the fundamental concept that states that constitutional provisions are enduring and detract from the status of the basic laws. Accordingly, temporary constitutional amendments should be used sparingly and in extreme circumstances.⁵⁵

Unfortunately, this warning from the Supreme Court was ignored by the Knesset. Over the past few years, there has been a tendency in Israel towards *ad casum* amendments of basic laws.⁵⁶ These amendments are usually adopted against a background of political events that demand an immediate response on the part of the Knesset. The latter then chooses the path of constitutional – not regular – legislation, which is governed by a relatively smooth legislative passage procedure. These amendments are exceptional and may be of interest to comparative constitutionalists.

For example, between 13 May 2015 and 30 July 2015, the Knesset enacted three temporary basic laws, which apply temporarily only during the term of the twentieth Knesset. According to one constitutional amendment, a minister who also serves as an MK can resign from his position at the Knesset and allow the next candidate in his party to take his place until his ministerial capacity terminates. Another temporary provision to Basic Law: The Government, enacted only a year before, removed the limitation on the number of ministers.⁵⁷

The use of temporary amendment to basic laws done time after time, without public deliberation, has a wide impact on the constitutional framework of the country. The result of these actions is a continued decline in the status of the basic laws. As Ofer Kenig argued regarding the temporary constitutional amendment increasing the number of ministers in the government:

cancelling the limit would reflect a political culture that is motivated by narrow, short-term interests and considerations. Even worse, frequent changes in the rules of the game, as they are defined in Israel's basic laws, lead to disrespect for the legal framework of the State of Israel.⁵⁸

55 *Ibid.*, at para. 28.

56 On this trend see N. Dishon, 'Temporary Constitutional Amendments as a Means to Undermine the Democratic Order - Insights from the Israeli Experience' *Israel Law Review*, Vol. 51, No. 3, 2018, p. 389; S. Navot, 'Israel', in D. Oliver & C. Fusaro, (Eds.), *How Constitutions Change – A Comparative Study* (n. 13). On the increasing tendency of the Israeli legislature to use temporary legislation more generally, see I. Bar-Siman-Tov, 'Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study', forthcoming 2019, *Regulation and Governance*, available at: <http://onlinelibrary.wiley.com/doi/10.1111/rego.12148/full> (last accessed 22 March 2019).

57 Y. Roznai, 'Sofia Ranchordás, Constitutional Sunsets and Experimental Legislation: A Comparative Perspective', *American Journal of Comparative Law*, Vol. 64, 2016, p. 790, p. 792 (book review); S.H. Rolef, Opinion, 'Think About It: The Use of Temporary Orders to Amend Basic Laws', *Jerusalem Post*, 31 July 2016, available at: <http://jpost.com/Opinion/Think-About-It-The-use-of-temporary-orders-to-amend-basic-laws-462887> (last accessed 22 March 2019).

58 O. Kenig, 'Don't Increase the Number of Cabinet Ministers', *IDI*, 28 April 2015, available at: <https://en.idi.org.il/articles/5189> (last accessed 22 March 2019).

Indeed, the context of these amendments raises the fear that these are not necessary due to some urgent need but derive solely from short-term interests and political considerations, precisely those meant to be limited by a constitution.⁵⁹ For example, on 10 January 2018, the Fifth Amendment to Basic-Law: The Government, concerning a deputy minister with a status of a minister, was adopted. This amendment passed first reading on Monday morning after a quick debate in the committee (which was set a day earlier), and passed second and third readings the following afternoon. In other words, the legislature used its constituent authority hat to amend the basic law for a personal political necessity, in a day and a half, without a serious political or public debate.⁶⁰

This brings us back to the budget saga. After the *Bar-On* judgement, and at the end of the experimental period, it became clear that the budget deficit had only increased. As a result, the Minister of Finance and the Chairman of the Finance Committee announced that there would be no further amendments to the basic law and that future budgets will be approved year by year. Even so, biennial budgets were approved for 2013–2014 and 2015–2016, against professional opinions from within the Finance Ministry and the Knesset legal adviser's office. In 2017, the government decided, for the fifth time, to approve a biennial budget for 2017–2018 by way of another Temporary Order. The constitutionality of this temporary amendment was challenged before the HCJ.

In the case of *Ramat Gan Academic Center of Law and Business*, delivered on 6 September 2017, an expanded panel of seven judges engaged with the thorny constitutional question.⁶¹ Justice Elyakim Rubinstein, writing the majority opinion, opened the judgment with the following statement:

[T]he case before us raises two worrying trends within Israeli parliamentary democracy, which are intertwined: one, the decreasing importance of the Knesset as a body responsible for supervising the government actions. The second, the undermining of the basic laws status, constitutional texts, which finds its expression both in various temporary orders which seek to temporarily amend the basic laws and without a due public debate, as if it was a regular law rather than a constitutional document, and—on a broader context—by not completing the constitution-making process of the state constitution in accordance with the Harrari decision of 1950.⁶²

According to the HCJ, the Knesset is the Israeli legislature and the government is the executive. One of the Knesset's main jobs, in its role as supervisor of the government's activities, is approving the state budget. Although the government shapes the budget, it is the Knesset that approves it. Without this approval, the Knesset will be dissolved, and new elections will be held. The state budget is

59 Dishon (2018).

60 A. Fuchs, 'Only in Israel the Constitution is Amended in a Bizarre Way', *Haaretz*, 17 January 2018, (Hebrew), available at: <https://haaretz.co.il/opinions/.premium-1.5744040> (last accessed 22 March 2019).

61 HCJ 8260/16 *Ramat Gan Academic Center of Law and Business v. Knesset* (6 September 2017) (Isr.).

62 *Ibid.*

largely based on taxes collected from the public, and from this stems the fundamental principle of democracy by which the parliament decides on taxing policy and expenditure priorities, which the government then implements. The state budget and its approval are essential and lie at the root of democracy. A biennial budget denies the Knesset one of its most essential tools of supervising the government. In addition to the decline in the role of the Knesset, the HCJ notes a decline in the status of the current basic laws. The use of temporary orders to amend basic laws is yet another example of the intolerable triviality with which the legislature and the executive authority consider the constitutional documents of the state.

In his ruling, Justice Rubinstein stated that the amendment of the basic law by temporary orders, time after time and under the current circumstances, constitutes a misuse of constituent power:

the repeated use of a temporary order to amend the Basic Law not only overrides the public debate, but also undermines the status of the basic laws in a way that justifies a judicial action.⁶³

Justice Neal Hendel adds to Justice Rubinstein's ruling an important emphasis, according to which the current use of temporal orders cannot be detached from the broader aspects of the decision:

this is a formalization of a deep and long-lasting change in the relationship of the Knesset and the government in the debate over the budget. Yet there is no public declaration of this change, and without putting it to the public test. The temporary became permanent – for almost a decade – and has buried the arrangement spelled out by Basic Law: The State Economy.⁶⁴

As for the judicial remedy, instead of striking down the amendment, Justice Rubinstein declares a 'nullification notice'. The practical meaning is that the HCJ maintained the validity of the amendment yet forbade another future temporary amendment of the basic law. The reasons for choosing this relief are twofold: first, the court has yet to invalidate basic laws and therefore would rather practise extreme caution when doing so; second, striking the budget at that point of time would have far-reaching implications on the government and the economy.⁶⁵

Thus, the Israeli Supreme Court has developed a doctrine of misuse of constituent power in order to protect basic principles of the Israeli Constitutional Order. As Justice Rubinstein stated in the biennial budget case, "when there is a majoritarian misuse of the constitutional text, the political need retreats before the constitutional core and sanctity, its legal and principle importance."⁶⁶ With

63 *Ibid.*, at para. 33.

64 *Ibid.*, at para. 5.

65 *Ibid.*, at para. 34.

66 *Ibid.*, at para. 30. See Y. Roznai, 'Misuse of Basic Laws', in *Judge Elyakim Rubinstein Book* (forthcoming 2019) (Hebrew).

this dramatic judgement, the HCJ not only protected the basic principle of the annual budget but also placed himself as guardian of the Knesset vis-à-vis the government.⁶⁷

F Judicial Review of Basic laws

Following the *Ramat Gan Academic Center of Law and Business* judgement, and as a direct response to it, the Minister of Justice proposed a draft for Basic Law: Legislation in which, inter alia, the court is prohibited from conducting substantive judicial review of basic laws.⁶⁸ The Minister of Justice pronounced a similar reluctance regarding the ability of courts to review basic laws in the debate surrounding the Basic-Law: The Nation State.

Briefly stated, on 19 July 2018, the Knesset enacted a new basic law stating that Israel is the Nation State of the Jewish people. While supporters of the basic law state that this basic law is mainly declarative and does not change the existing situation, its opponents argue that the lack of mentioning either the democratic character of the state or the principle of equality is highly problematic, alienates the non-Jewish minority in the state and aims to shift the balance in the 'Jewish and Democratic' character of the state towards the former.⁶⁹ After several petitions were submitted against this new basic law,⁷⁰ the Minister of Justice, Ayelet Shaked wrote an op-ed in which she claimed that the Israeli Supreme Court lacks the authority to review basic laws, and that such an idea is dangerous as it would turn the court into the constituent assembly.⁷¹ The Minister also interviewed on the radio and claimed that if the Supreme Court would invalidate Basic Law: The Nation State, this would be "an earthquake that would start a war between the branches."⁷² In the meanwhile, due to the significance of the case, the HCJ

67 See Y. Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset', *Verfassung und Recht in Übersee*, Vol. 51, No. 4, 2019, p. 415.

68 Y. Roznai, 'Israel – A Crisis of Liberal Democracy?', in M.A. Graber, S. Levinson & M. Tushnet, (Eds.), *Constitutional Democracy in Crisis?* Oxford University Press, 2018, p. 355.

69 For preliminary analyses, see: S. Navot, 'A New Chapter in Israel's "constitution": Israel as the Nation State of the Jewish People', *VerfBlog*, 27 July 2018, available at: <https://verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people/>; E. Benvenishti & D. Lustig, "'We the Jewish People' – A Deep Look Into Israel's New Law', *Just Security*, 24 July 2018, available at: <https://justsecurity.org/59632/israel-nationality-jewish-state-law/> (last accessed 22 March 2019); A. Harel, 'Shifting towards a Democratic-Authoritarian State: Israel's New Nation-State Law', *VerfBlog*, 31 July 2018, available at: <https://verfassungsblog.de/shifting-towards-a-democratic-authoritarian-state-israels-new-nation-state-law>.

70 See e.g., T. Pileggi, 'Israeli Arab Leaders Petition High Court Against 'Racist' Nation-State Law', *The Times of Israel*, 7 August 2018, available at: <https://timesofisrael.com/israeli-arab-leaders-petition-high-court-against-racist-nation-state-law/> (last accessed 22 March 2019).

71 A. Shaked, 'The Basic Law of All of Us' *Israel Hayom*, 2 August 2018, <https://israelhayom.co.il/opinion/576425> (last accessed 22 March 2019). (Hebrew).

72 R. Hovel & N. Shpigel, 'Israel's Justice Minister Warns of 'An Earthquake' if Top Court Kills Nation-state Law' *Haaretz*, 5 August 2018, available at: <https://haaretz.com/israel-news/premium-justice-minister-warns-of-earthquake-if-court-kills-nation-state-law-1.6343122>.

ordered that an extended panel of eleven judges will hear the arguments on the constitutionality of the Jewish Nation-State Law.⁷³

We understand that the question of judicial review of constitutional amendment is a complex issue, involving theoretical and practical difficulties. We are also aware that in some states there is a natural resistance to such a practice.⁷⁴ However, we believe that the intensity of judicial scrutiny of constitutional amendments should be connected to the amendment process.⁷⁵ An extremely flexible amendment procedure, where a dominant executive controls the amendment process, coupled with short-term political interests and temporary majorities increases the fear of abuse of the amendment power. Indeed, the risk of abuse of the amendment power arises especially when the constitutional amendment body is the same body that decides the everyday political decisions. The identity of bodies causes the mingling of longer-range issues of constitutional planning with short-term interests of political power.⁷⁶

In Israel, where the legislature is composed of a single chamber, when basic laws are easily amended, coupled with the dominance of the government in the legislative process, there is a greater fear of an abuse of constituent power. Judicial review of basic laws, especially in the absence of any supra-national court, seems necessary. Otherwise, the Knesset that possesses two hats – the ordinary legislature and the constituent authority – would practically be omnipotent and would be able to render immune any law from judicial review simply by labelling

73 Y.J. Bob, 'High Court Broadens Panel Hearing of Nation-State Law', *JPost*, 1 January 2019, available at: <https://jpost.com/Israel-News/High-Court-broadens-panel-hearing-of-Nation-State-Law-in-petition-to-11-justices-576053> (last accessed 22 March 2019).

74 See Y. Roznai, 'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability', in R. Albert & B.E. Oder (Eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies*, Springer, 2018; R. Albert, M. Nakashidze, & T. Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments', *Hastings Law Journal*, forthcoming 2019, p. 70.

75 See Y. Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in R. Albert, X. Contiades & A. Fotiados (Eds.), *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing, 2017, p. 23.

76 See D. Grimm, 'The Basic Law at 60—Identity and Change', *German Law Journal*, Vol. 11, No. 1, 2010, p. 33, p. 40; D. Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration', *Delhi Law Review*, Vol. 6-7, No. 1, 1977-1978, pp. 14-16.

it as a 'basic law'.⁷⁷ As Justice Rubinstein noted in the *Ramat Gan Academic Center of Law and Business* judgement,

the restraint that the constituent authority takes in amending the constitution obliges also restraint from the court; but the natural continuation is that the less restraint by the constituent authority when it amends basic principles, the wider the willingness of the court to review basic law.⁷⁸

G Conclusion and Looking Ahead

Following the enactment of Basic Law: Israel as the Nation State of the Jewish People, several petitions were filed to the HCJ, arguing that the Nation-State Basic Law is anti-democratic as it negates basic democratic principles to the point of damaging the constitutional structure. Furthermore, it violates the very essence of human rights, and in particular the principles of prohibition of discrimination and human dignity, as well as those prohibiting racism. Therefore, the petitioners argue that this basic law should be judicially reviewed and declared null according to both the doctrine of the 'unconstitutional constitutional amendment' and the abuse of constituent powers.

The outcome of these petitions at the Supreme Court remains to be seen. Still, this case poses crucial questions before the court. Is the new basic law 'unconstitutional' to such an extent that it calls for the use of the 'non-conventional power' of judicial review of a basic law? We doubt it. Is it problematic and highly controversial? Yes. But, is it a basic law that clearly negates the character of Israel as a Jewish and democratic state? Does it violate the core of constitutional principles so fundamental that they bind the Knesset itself as a constituent authority? This is a completely different question.

⁷⁷ M. Kremnitzer, 'Israel's War on Democracy Is Here – and the Justice Minister's Leading the Charge', *Haaretz*, 1 August 2018, available at: <https://haaretz.com/misc/writers/WRITER-1.5601695> (last accessed 22 March 2019) ("Israel of all countries needs to recognize the court's authority to intervene when a constitutional (i.e., Basic) law is involved – to the point of overruling it. Israel has no system of checks and balances like other democracies have, such as having two legislative houses, decentralization of power between states or regions, an obligation to be subject to international treaties or international courts, and so on. There is no real separation between the legislative and executive branches in Israel, and the Knesset's oversight of the government is not worth much either. The executive branch controls legislation by dint of its majority. The Knesset, and in effect the government, is both the legislative branch and the constitutive authority. Enactment of constitutional (Basic) laws can be accomplished by a regular majority and ordinary legislative procedures. The only element in the legal system with the power to impose checks and balances is the Supreme Court. No wonder those aspiring to absolute rule are acting to castrate it. Let's say the Knesset were to enact a law enshrining the supremacy of men over women, of heterosexuals over homosexuals, of whites over blacks, of soldiers over people who do not serve in the military and so on. According to Shaked's approach, the court would have to say 'Amen.' How much does the nation-state law – which is in effect a Jewish supremacy law – differ from these examples? And if this is so, our judicial system has become wide open to tyranny, arbitrariness and discrimination, unfettered and unrestrained.")

⁷⁸ *Ramat Gan Academic Center of Law and Business v. Knesset* (n. 45), at para 35.

Still, this case may be an important opportunity for the Supreme Court of Israel to establish that it has the authority for judicial review of basic laws. We argue that the Court is empowered to strike down a basic law. This inexplicit power derives from the unique constitutional legal system in Israel according to which, as mentioned above, a simple majority of the Knesset may enact any law or basic law whatsoever, the government de facto controls the legislative process, where there is a greater fear for an abuse or misuse of constituent power. In Israel, the only real balancing authority to the power of the majority is the Supreme Court.

The Nation State Basic Law' case poses a real challenge for the evolution of this topic. The Court may further develop the 'unconstitutional constitutional doctrine' and the different models of judicial review of constitutional amendments (such as abuse of constituent power, a 'new Constitution in disguise' as was the theory underlying the Indian Supreme Court's idea of the 'basic structure doctrine'⁷⁹ or a significant violation of the fundamental constitutional principles of the State of Israel). Even if the petitions are rejected, we think that the opportunity for a further interpretation and development of these approaches for judicial review should not be missed.

79 R. Albert, 'How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments', *Maryland Law Review*, Vol. 77, 2017, p. 181, p. 189.