ABHANDLUNGEN / ARTICLES

Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset

By *Yaniv Roznai*[*]

A. Introduction

Since the establishment of the State of Israel, executive governance has been expanding the consolidating in a manner that the Israeli legislature, the Knesset, is "in a decidedly inferior institutional position in terms of national policy making."[1] In recent years, we are witnessing even greater consolidation of powers by the executive on the expense of the legislature in a manner that calls for the strengthening of institutional aspects of the Israeli constitution.[2]

Since the 1990s constitutional revolution,[3] the Israel Supreme Court has demonstrated 'judicial activism' by exercising a strong judicial review of legislation, in addition to allowing constitutional challenges by 'public petitioners', adjudicating also 'political questions' without restrictions of justiciability, and reviewing governmental and administrative decisions based upon the ground of 'reasonableness'.[4] Yet, the court's progressiveness was built

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1 *Asher Arian, David Nachmias, and Ruth Amir*, Executive Governance in Israel, Springer 2001, p. 147.

2 See *Nadiv Mordechay and Yaniv Roznai*, A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel, Maryland Law Review 77 (2018), p. 101-127. For a thorough focus on structural constitutional law, in the American context, see generally *Daryl J. Levinson*, Foreword: Looking for Power in Public Law, Harvard Law Review 130 (2016), p. 31.

3 Much has been written on the Israeli Constitutional Revolution see, e.g. *Gideon Sapir*, The Israeli Constitution: From Evolution to Revolution, Oxford University Press 2018.

4 On Judicial Activism in Israel see e.g. *Gary J. Jacobsohn*, Judicial Activism in Israel, in: Kenneth Holland, (ed.), Judicial Activism In Comparative Perspective, New York 1991 ; *Yoav Dotan*, Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism, Isreal Affairs 8 (2002), p. 87; *Menachem Mautner*, Law and the Culture of Israel, Oxford 2011; *Zeev Segal*, Judicial Activism Vis-a-Vis Judicial Restraint: An Israeli Viewpoint, Tulsa Law

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on the Court's own pro-activism, independence and strong reputation. It did not rely on stronger institutional foundations—a structural constitution, separation of powers, a development of the supervisory capacity of the parliament, or the strength of the constitutional ethos in the public sphere, which was – and is still– lacking.[5]

A significant judicial attempt to strengthen the Israeli structural constitution occurred in 2017 with two dramatic judicial decisions of the Israeli Supreme Court sitting as High Court of Justice. First, the Israeli Supreme Court, for the first time in its history, invalidated a law based upon flaws in the legislative process.[6] Second, again for the first time, the court issued a nullification notice to a temporary Basic Law that - for the fifth time in a row - changed the annual budget rule to biennial one, by applying a doctrine of "misuse of constituent power".[7]

Following these two highly controversial judicial decisions, the Minister of Justice, Ayelet Shaked, recently proposed to enact Basic Law: Legislation that would regulate the relationship between the branches of government and establish the process for enacting and amending Basic Laws, which is currently similar to the ordinary legislative process.[8] Whereas the proposed Basic Law explicitly authorizes the Supreme Court to conduct judicial review, at the same time it aims to restrict the court's authority in comparison to the current extent of authority.[9] Most importantly for our matter, as a direct response to the two controversial decisions, the proposal includes a "non-justiciability clause", according to which the court would lack the authority to: 1. invalidate legislation due to flaws in the legislative process; or 2. to conduct substantive judicial review of Basic Laws. When present-

Review 47 (2013), p. 319; *Eli Salzberger*, Judicial activism in Israel, in: Brice Dickson (ed.), Judicial Activism in Common Law Supreme Courts, Oxford 2007, p. 217; *Daphne Barak-Erez*, Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint, Indian Journal of Constitutional Law 3 (2009), p.118.

5 *Moshe Cohen-Eliya*, Israeli Case of a Transformative Constitutionalism, in: Gideon Sapir, Daphna Barak-Erez, and Aharon Barak (eds.), Israeli Constitutional Law in the Making, Oxford 2013, pp. 173, 174 (noting that "the Israeli case is … a unique instance of a transformative constitutionalism, in that the ambitious project is undertaken by the Supreme Court in the absence of a nationally defining moment and without legitimacy from the constitutional text.").

6 HCJ 10042/16 Quantinsky v. Knesset (August 6, 2017). See, on this case, *Ittai Bar-Siman-Tov*, A Necessary Decision or an Unjustified "Major Deviation" from the Case Law?: Commentary on HCJ 10042/16 Quantinsky V. The Israeli Knesset in the Matter of the Third Apartment Tax, Bar-Ilan Univeristy Law Review 32 (forthcoming 2018), available at https://ssrn.com/abstract=3050539 (Hebrew).

7 HCJ 8260/16 Academic Center of Law and Business v. Knesset (September 6, 2017). On this case see *Yaniv Roznai*, Misuse of Basic Laws, in: Judge Elyakim Rubinstein Book, Ramat Gan forthcoming 2018 (Hebrew); *Suzie Navot and Yaniv Roznai*, From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel, European Journal of Law Reform (forthcoming 2019).

8 See *Suzie Navot*, Israel, in: Dawn Oliver and Carlo Fusaro (eds.), How Constitutions Change – A Comparative Study, Oxford 2011, p. 191.

9 *Moran Azulay and Tova Tzimuki*, Basic Law proposal seeks to limit Supreme Court's ability to strike down laws, Ynet (December 20, 2017), https://www.ynetnews.com/articles/0,7340,L-5059358,00.html (Last accessed on 08 January 2019).

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ing the proposed Basic Law, Minister Shaked criticized judicial activism that has "harmed Israeli democracy" saying that "from the current judicial chaos there will be order and a balance will be achieved between the three branches of government." Education Minister Naftali Bennett, the Chair of HaBayit HaYehudi ("The Jewish Home") political party, of which Minister Shaked is also a member, added that "today we tell the court …. The government ought to govern and the judges ought to judge."[10]

In contrast with this criticism, I wish to claim that in these two dramatic cases, the Israeli Supreme Court neither harmed separation of powers nor undermined the status of the Knesset but did just the opposite. In these two cases, the Supreme Court protected separation of powers, acting as guardian of the Knesset against encroachment by the executive branch. I further claim that this exercise of judicial activism, not in a traditional counter-majoritarian role of the court as guardian of individual rights but as guardian of the legislature in a conflict between the branches, resembles courts' activities in the Global South geared to protecting fragile democratic processes.

This Article describes these two cases, introducing them to external audiences, and analyzes how in these two cases, by applying creative judicial mechanisms such as judicial review of legislative proceedings and limits to the Knesset's constituent authority, the court is in fact exercising a dynamic role,[11] acting as a guardian of the Knesset in its legislative and supervisory roles for improving, more generally, the Israeli political-democratic system. It proceeds in the following structure: Part B. of this Article describes the court as guardian of the Knesset's legislative role. Part C. describes the court as guardian of the Knesset's supervisory role. Part D. lays out the normative implications of the recent judgment which portray the dynamic role of the court. Part E. concludes.

B. The court as guardian of the legislative role of the Knesset

In the Israeli legal system, the Knesset is the primary legislature.[12] Article 1 of Basic Law: The Knesset provides that "The Knesset is the parliament of the State." One of the means by which the court protects the legislative role of the Knesset is through the basic rule regarding 'primary arrangements' (or 'non-delegation'), which is already an established doctrine in Israeli constitutional law.[13] According to this rule, primary arrangements, that is,

10 Cited ibid.

11 See *David Landau*, A Dynamic Theory of Judicial Role, Boston College Law Review 55 (2014), p. 1501 (demonstrating how courts in the global south have sought to improve the performance of political institutions).

12 *Gregory S. Mahler*, The Knesset: Parliament in the Israeli Political System, Rutherford 1981. On the Knesset's roles, structures and procedures see also Naomi Chazan, The Knesset, Israel Affairs 11 (2005), p. 392.

13 For a discussion on this rule, see *Sapir Gideon*, Nondelegation, Tel-Aviv University Law Review 32 (2009), p. 5 (Hebrew); *Yoav Dotan*, Non Delegation and the Revised Principle of Legality, Mishpatim 42 (2012), p. 379 (Hebrew); *Barak Medina*, The No-Delegation Doctrine—A Reply to Dotan and Sapir, Mishpatim 42 (2012) p.449 (Hebrew).

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general policy and fundamental criteria must be prescribed in principle legislation (statutes) whereas secondary arrangements such as administrative regulations or administrative acts, based upon legislation, must set forth the manner in which statutes are to be implemented. The ‘primary arrangements’ rule aims to ensure that as the legislature, the Knesset is the body which outlines in legislation the main arrangements according to which governmental authorities act. The primary arrangements rule is based on the general aspiration that essential decisions concerning state policies and society’s needs are made by the nation’s elected representatives. The Knesset is the body elected to make laws and accordingly it enjoys the social legitimacy to do so. Therefore, the Knesset, elected by the people for that purpose, should be the body that makes the decisions that are essential to the citizens’ lives. Consequently, in certain instances, the Supreme Court has invalidated secondary legislation or administrative decisions regarding general policies stating that it is up to the Knesset to deal with issues of a great social importance through primary legislation.[14]

The judicial enforcement of the ‘primary arrangements’ rule is one mechanism for the court to protect the role of the Knesset as the primary legislature. Another, newer, mechanism is through judicial supervision of the legislative process.

There is no elaborated regulation of the legislative process at the constitutional level. Basic Law: The Knesset simply provides in Article 19 that “The Knesset shall itself prescribe its procedure; in so far as such procedure has not been prescribed by Law, the Knesset shall prescribe it by its Rules; so long as the procedure has not been prescribed as afore-

14 *Suzie Navot*, The Constitution of Israel: A Contextual Analysis, Oxford 2014, p. 84-5. For example, in a case regarding exemption of religious full-time students of the Tora from military service, the Israeli Supreme Court has held that such exemption cannot be decided solely at the discretion of the Minister of Defense. Such matters that involve moral dilemmas, divide the society or concern fundamental rights must be decided by the people’s elected representatives. See HCJ 3267/97 Rubinstein V Minister of Defense PD 52(5) 481 (1998), paras.20-22 to President Aharon Barak’s opinion: “The reasons underlying this basic rule are threefold: the first is enshrined in the doctrine of Separation of Powers…. According to this doctrine, the enactment of statutes is the province of the legislative branch. … It is by virtue of this principle that the power to legislate is vested in the Knesset. Indeed, a strict understanding of this principle would necessarily mean that the Knesset cannot delegate any kind of legislative power to the executive branch. … The second reason for the basic rule regarding primary arrangements is rooted in the Rule of Law. … legislation must establish guidelines and principles according to which the executive branch must act. Legislation must establish primary arrangements, and administrative regulations and individual acts must deal with implementation. … The third reason for the basic rule targeting primary arrangements is rooted in the notion of democracy itself. … The people’s elected representatives must adopt substantive decisions regarding State policies. This body is elected by the nation to pass its laws, and therefore benefits from social legitimacy when discharging this function. Hence, one of the tenets of democracy is that decisions fundamental to citizens’ lives must be adopted by the legislative body which the people elected to make these decisions.”.

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said, the Knesset shall follow its accepted practice and routine." And indeed, the Knesset has prescribed its own manual of rules of procedure.[15]

While the Israeli Supreme Court regularly conducts judicial review of legislation, and since 1995 has invalidated eighteen statutory provisions for their unconstitutionality,[16] it has never (until the recent developments) invalidated a law basic upon flaws in the legislative process.[17] To be more precise, while the Israeli Supreme Court has not recognized the ground of a lack of 'legislative due process' to judicially intervene, it had formally asserted and established its power to invalidate legislation based upon flaws in the legislative procedure, whenever there is a flaw that "goes to the heart of the process", i.e. a flaw that involves a severe and substantial violation of the basic principles of the legislative process in Israel's parliamentary and constitutional system.[18]

In one of the most important judgments handed on the topic, *Poultry Farmers Association v. Government of Israel* of 2004,[19] the Supreme Court criticized omnibus legislation enacted as part of the "Economic Arrangements Law" for violating separation of powers.[20] As Justice M. Cheshin stated:

> *The principle of the separation of powers and the decentralization of power is not a theoretical principle that is learned in esoteric seminars in remote universities; it is a principle that is learned from life and from the bitter experience of countries that did not have either the separation of powers or the decentralization of power. What is the decentralization of power? For optimal decentralization of power, the chosen formula — which also comes from experience — is that of checks and balances. The essence of the formula is this: each of the three powers involved in governing has its*

15 Knesset Rules of Procedure, unofficial translation available at https://www.knesset.gov.il/rules/eng/contents.htm; for a debate on the legal status of the rules see *Ariel Bendor*, The Constitutional Status of the Rules of Procedures of the Knesset, Mishpatim 22 (1994), p. 571 (Hebrew).

16 *Guy Lurie*, Invalidating Legislation: Is Israel an Anomaly?, IDI (April 26, 2018), https://en.idi.org.il/articles/23372.

17 On judicial review of legislative process, more generally, see *Ittai Bar-Siman-Tov*, The Puzzling Resistance To Judicial Review of The Legislative Process, Boston University Law Review 91 (2011), p. 1915.

18 See e.g. HCJ 5131/03 Litzman v. Knesset Speaker 59(1) PD 577 (2004); HCJ 4885/03 Isr. Poultry Farmers Ass'n v. Gov't of Isr. 59(2) PD 14, 46-48 (2004). See generally *Suzie Navot*, Judicial Review of the Legislative Process, Israel Law Review 39 (2006), p. 183.

19 HCJ 4885/03, ibid.

20 See *Yaniv Roznai* and *Liana Volach*, Law Reform in Israel, The Theory and Practice of Legislation 6 (2018), p. 291, 308-309: "The arrangements law is a government-sponsored bill that incorporates legal reform that are needed for the government to fulfil its economic policy. It is presented to the Knesset each year, alongside the State Budget Law, as a single proposal. Over the years, the arrangements law was criticised for various reasons, but mainly because it is usually passed in an accelerated process that does not allow the Knesset Members sufficient time. to study the reforms, discuss and formulate their positions on the issues at hand. Additionally, it very often contains extensive reforms that are not essential for passing the State Budget. Third… it was mostly the executive branch who took the initiative for introducing legislation.".

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> *own branch, in which it has sole power — the legislative branch, the executive branch and the judicial branch. At the same time, the system of checks and balances evolves around the mutual control of the powers, which ensures the separation and independence of the different branches. The powers are therefore separate from one another, but also connected to one another. We are speaking of a kind of roundabout with three seats. The art of statesmanship is to maintain balance, and for the roundabout to rotate gently for the benefit of all. However, when one of the powers tries to exceed its authority, or when one of the riders on the roundabout upsets the balance, arrangements are undermined and the whole system of government is shaken. I fear that the Economic Recovery Program Law — like the various Arrangements Laws — is capable of shaking the system far more than desired. This continental drift brought about by the Economic Recovery Program Law and the various Arrangements Laws — a de facto transfer of the legislative branch to the executive — involves many great and terrible risks, the implications of which require study.*[21]

The Supreme Court developed a novel legal framework that would allow judicial review of statutes to be enacted via this legislative process, even in the absence of formal rules limiting the legislature's power to use omnibus legislation. According to the Supreme Court, in addition to formal constitutional or internal parliamentary rules, the legislative process is also subject to unwritten fundamental democratic principles. Among these principles, the Court developed the "principle of participation", which guarantees the right of each member of Knesset to participate in the legislative process. The court emphasized that this MK's right of participation, is not limited to the ability of legislators to be physically present in the plenum and vote but entails, more broadly, at least a minimal ability to know what the legislation is about. The length and complexity of omnibus laws, the Court stated, coupled with their extremely accelerated legislative process, might infringe upon the principle of participation.

With that said, the Court relaxed its holding by stating that it would use this judicial review power, if at all, only in rare and extreme situations in which MKs have been denied any practical possibility of knowing what they are voting on and formulating their position regarding the proposed bill. Only in such extreme and rare cases, which hopefully are not to be predictable in our parliamentary reality, the conclusion would be that there was a substantial violation of the principle of participation in the legislative process.

Accordingly, since the *Poultry Farmers* judgment, the Supreme Court routinely rejected procedural challenges against omnibus laws, holding that none of which had reached the high threshold set in that case. For example, in the *Movement for Quality Government* case of August 2016,[22] the court faced a challenge to a legislative process of a reform in the electricity sector, which was aimed to fulfil the governmental policy regarding the Gas Out-

21 HCJ 4885/03 (n 18), paras. 5-6 to Justice Cheshin's opinion.

22 HCJ 8612/15 The Movement for Quality Government v. The Knesset (17 August 2016).

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line. The reform passed as part of the rapid omnibus "Economic Arrangements Law", presented to the Knesset each year alongside the Budget Law. The petitioners claimed that the reform chapter should be invalidated due to flaws in the legislative process. They opposed the Arrangements Law as the appropriate legal framework for reform, and criticized the Coalition's decision to legislate the bill in an Ad-hoc Select committee that was assembled outside the Knesset's Economic Affairs Committee so to avoid the Chairman's refusal of the Minister of Energy's request to legislate the reform "as is".

The Supreme Court rejected the petition. It has been the consistent ruling of the Supreme Court that legislating under the Arrangements Law does not amount, in itself, to an independent cause for striking down legislation. The Supreme Court ruled that holding the legislation outside the Committee – the "natural habitat" for the legislation – due to the Chairman's position, was "inappropriate and unacceptable".[23] The Supreme Court emphasized that it prevents effective discourse and parliamentary scrutiny, and thus infringes the principle of parliamentary independence which is crucial to a proper functioning democratic regime. The Supreme Court stressed that if the petitioners would have proved that the bill was indeed legislated "as is", it would have declared that this was a "severe and substantial defect at the root of the legislative process", which justifies annulment. However, after examining the legislative process, it concluded that the legislation at hand did not pass "as is" since legislative deliberations took place, deliberations which resulted in the modification of the bill. Therefore, the legislative infringement did not meet the "severe and substantial" threshold for judicial intervention and both process and outcome were deemed valid.[24]

Returning to the *Poultry Farmers* case, however, the decision's dicta urged the Knesset to amend its legislative procedures in a way that would bring them more in line with the court's preferred outcomes, thus shifting the solution from the court to the Knesset:

> *...the Knesset should address the very problematic nature of this legislative mechanism and ensure that use of this mechanism, if at all, is made in an intelligent and sparing manner. According to our approach that was set out above, the solution to the situation created by the excessive use made of this legislative mechanism does not lie with the court, but first and foremost with the legislature.* [25]

This judicial restraint may have sent the message to the legislature that "anything goes". However, in the recent *Quantinsky v. Knesset* case, the court drew the line, holding that

23 Ibid., para. 13 of Justice Hayut's judgment.

24 This summery is taken from *Justice Uzi Vogelman, Nadiv Mordechay, Yaniv Roznai,* and *Tehilla Schwartz*, Developments in Israeli Constitutional Law, in: Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), 2016 Global Review of Constitutional Law, Austin 2017, pp. 105-109.

25 HCJ 4885/03 (n 18), para. 31 of Justice Beinisch. See *Susan Rose-Ackerman, Stefanie Egidy, James Fowkes*, Due Process of Lawmaking, Cambridge 2015, p. 94 fn 249.

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"enough is enough" and intervened, for the first time, within legislative procedure and invalidated a law due to a procedural flaw.[26]

The judgment, delivered on August 2017, dealt with a law imposing a tax on owners of three or more homes, legislated as part of the omnibus "Arrangements Law". As aforementioned, this was the first time that the Supreme Court invalidated a Knesset law on legislative-procedural grounds. Justice Noam Sohlberg, who wrote the majority opinion, explained that the legislation process with the Finance Committee was rushed, the discussion took place close to midnight, with Knesset Members claiming they did not have time to properly examine the bill.[27]

In his decision, Justice Sohlberg explained that the principle of separation of powers stands above all. In a democratic state, sovereignty belongs to the people. As the Knesset represents the people, it has the highest standing among the branches. Its status is especially strong regarding legislation, which is its main function as a legislature and as an independent authority. The status and independence of the legislative branch must be maintained. It requires the Supreme Court to be restrained and cautious in its judicial review. However, the separation of powers does not grant the Knesset an absolute sovereignty, especially when it harms the legislators themselves. Therefore, the Knesset is not immune from judicial review. Separation of powers is about checks and balances, and sometimes an intervention of one branch in the other's dealings is critical for maintaining the appropriate status of

26 Ittai Bar-Siman-Tov remarks that: "To the best of my knowledge, this is the first precedent in the world of invalidating the law solely for this reason (as opposed to semiprocedural review, in which a faulty process and insufficient deliberation are just an additional consideration for invalidating a law whose content infringes upon the constitution)." See *Ittai Bar-Siman-Tov*, In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation, International Journal of Constitutional Law Blog (December 13, 2017), http://www.iconnectblog.com/2017/12/in-wake-of-controversial-enactment-process-of-trumps-tax-bill-israeli-sc-offers-a-novel-approach-to-regulating-omnibus-legislation.

27 On November 21, 2016 there was a first debate at the committee. On November 30 the Ministry of Finance sent a copy of the bill with various changes, and another new copy of the bill on December 11. Another debate at the committee was set to December 15. On December 15, at 11:31 the Ministry of Finance sent the Legal Advisor of the committee a draft of provisions added to the bill. Throughout all that day (after the previous day of debates ended around 03:00 in the morning) the committee was debating other sections of the arrangement law. At 18:59 the Ministry of Finance sent the Legal Advisor of the Committee an updated version of the bill. This was circulated to the committee members at 21:02, while the committee was deliberating other topics. Only near midnight the committee started deliberating the proposal. As the debate started, and during the debate, several committee members asked to postpone it a bit so that they can study the new version and its details. Likewise, the legal advisor of the committee raised the difficulty of conducting a debate when the members and legal advisory practically had no time to study the proposed version. Notwithstanding these claims the chair decided to continue with the debate. Consequently, and as a protest, several committee members from the opposition left the committee room. After several hours, in the morning of December 16, at 07:05, the committee approved the bill for a second and third reading. Throughout the debate, the Government's representatives in the committee were urging the Knesset Members to quickly read and approve the version. On December 21, in a debate that went on through the night, the arrangement law was approved in a second and third readings.

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all government authorities, and for preventing misuse of power. Hence, separation of powers necessitates the Supreme Court to be restrained on the one hand and critical on the other.

Another issue raised by Justice Sohlberg is the essential role of the Knesset as a supervisor of the government. This role is expressed clearly in the practice of Knesset's committees, where the option to demand, investigate and get clarifications from the government about proposed bills is granted to the committee members, and the members of the opposition in particular.[28] Therefore, the judicial branch must ensure that the Knesset fulfills its role, *inter alia* by creating a proper, productive legislative process. These things have even greater significance in the Israeli parliamentary system, where most of the legislative branch members belong to the executive branch. In this situation, it becomes increasingly important to supervise the propriety of the legislative process – and if so in a "regular" legislation procedure, then even more so in the case of an exceptional legislative procedure such as the Arrangements Law. The combination of the Arrangements Law and the practice in which the coalition controls the Knesset, requires vigilance and attention during the scrutiny of the legislative process, to ensure that the balance of powers between the executive and legislative branches has not been violated.

Judicial review of the legislative process is not a simple matter. The difficulty is compounded by the fact that there is no document that anchors concrete obligations of the Knesset with respect to the legislative process, other than the procedural and basic provisions of the Knesset regulations. This is not a trivial matter, but rather a matter that touches upon the heart of the legislative branch. In this situation, the lack of regulation cannot lead the issue to be avoided from judicial review. However, the lack of regulation requires the subject to be carefully examined.

Justice Sohlberg held that it is not enough that the legislative process is designed so that Knesset members could "know what they vote for"; i.e. be able to read the bill, to hear about it and to superficially understand the law they are about to vote on. The legislative process should enable members of the Knesset to formulate a substantive position, if only in the most limited manner, regarding the proposed draft law. If there is no discussion, there is concern that the Knesset will become a rubber stamp for the initiators of the bills, which is often the executive branch that enjoys a majority in the Knesset.[29] Separation of powers requires the court to be vigilant, so that the government does not overshadow the Knesset.

Justice Menachem Mazuz disagrees with the majority opinion as written by Sohlberg. One of his claims relates to the absence of any explicit constitutional authority to conduct

28 On the oversight role of the Knesset committees see *Reuven Y. Hazan*, Political Reform and the Committee System in Israel: Structural and Functional Adaptation, in: Lawrence D. Longley and Roger H. Davidson (eds.), The New Roles of Parliamentary Committees, London 2012) pp. 163, 172-173; *Chen Freidberg*, Legislative Oversight and the Israeli Committee System: Problems and Solutions, in: Rick Stapenhurst et al (eds.), Legislative Oversight and Budgeting: A World Perspective, Washington 2008, p. 217.

29 On the role of the executive in the legislative process in Israel see Roznai and Volach (n 20).

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judicial review of the procedural aspect of primary legislation. There is simply no constitutional limitation that applies in this case. According to Justice Mazuz, in the absence of constitutional authority or infringement of basic laws, the court should refrain from dealing with the issue. To this claim, Justice Sohlberg responds that in accordance with the previous ruling of *Poultry Farmers*, judicial review of the legislative process derives its authority from a clear basic principle of the legal system - separation of powers. The right to participate in legislation is derived from this principle, which is expressed in practical terms by granting the Knesset the possibility of conducting legislative processes at its discretion, and the duty of the judiciary to supervise the fact that this possibility indeed stood up to the Knesset and was not thwarted.

In his dissent, Justice Mazuz further held that Solberg's ruling violates the principle of separation of powers. Justice Mazuz explains that the Israeli constitution explicitly entrusts the Knesset with the power to determine its working procedures. The court should not trespass the Knesset's authority in this matter, to the extent that it is not a substantial violation of a constitutional norm. This consideration of separation of powers and mutual respect between the branches was emphasized with respect to the legislative process, which is the core of the Knesset's role as the legislature of the State of Israel. In Justice Solberg's opinion, the opposite is true. The ruling does not violate the principle of separation of powers, but rather strengthens it. The decision to order the relative nullity of the tax arrangement was not given *despite* the high status of the legislature, but precisely *because* of it. The difficulty that arose in relation to the law is not whether the Knesset members had an optimal legislative process, but whether the government's conduct prevented them from taking a real part in the legislative process, despite their desire to do so. The then President of the Supreme Court, Justice Miriam Naor, agreed with Justice Solberg and stated in her opinion that his judgment preserves the proper separation of powers, and protects the legislative branch from the view that it must answer "Amen" to any proposal brought before it.

C. The court as guardian of the Supervisionary role of the Knesset

Apart from its main role as the legislature, the Knesset has an additional important supervision role. As Chazan notes, "one of the key roles of the Knesset, like most modern assemblies, is to monitor the activities of the government. In this respect, the parliament is the public's watchdog over the executive and the key institutional check on its use (or abuse) of power."[30] Recently, the Supreme Court not only protected the legislative role of the Knesset from being surpassed by the executive, but has also protected the Knesset's supervisory role. The Government owns trust duties toward the Knesset.[31] Basic Law: The Government

30 Chazan (n 12), 404. On this role, see also *Chen Friedberg*, From a Top-Down to a Bottom-Up Approach to Legislative Oversight, The Journal of Legislative Studies 17 (2011), p. 525.

31 *Yigal Mersel*, The Government's Confidence Duties toward the Knesset, in: Ruth Plato-Shinar and Joshua Segev (eds.), Duties of Loyalty in Israeli Law, Tzafririm, 2016, p. 185 (Hebrew).

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states that “The Government holds office by virtue of the confidence of the Knesset”[32] and that “The Government is collectively responsible to the Knesset.”[33] The Knesset supervises the government’s activities and one of the main supervisory roles is the approval of the annual budget. Just as the ability to express no-confident in the government, which in turn results in the government’s dissolvement, is a crucial element in the parliamentary regime,[34] so thus the budget approval process is based on an important relationship between the Knesset and the Government, which reflects the 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.[35] 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: dissolvement of the Knesset.

Notwithstanding this rule, in 2009, considering the global economic crisis, the Ministry of Finance proposed a biennial budget for the years 2009-2010.[36] Accordingly, due to special circumstances, the government decided that the biennial budget would be enacted as a temporary amendment to Basic Law: The State Economy. The Minister of Finance made it clear that this was a one-time amendment, stemming from a true case of urgency. This meant that government expenditures for the two-year period would be determined in advance, with the entire budget voted and approved by the Knesset only once.

After this one-time temporary amendment, the government amended the Basic Law again, in another temporary amendment, proposing that the new temporary amendment is meant to be an experimental legislation, a “pilot” to examine whether the mechanism of a biennial budget should be permanent.[37]

This amendment was challenged before the Supreme Court in *MK Roni Bar-On v. The Knesset*,[38] but the petition was rejected by a seven Judges panel. Writing the main opinion of the court, the then President of the Supreme Court, Dorit Beinisch, held that the use of

32 Basic Law: The Government (2001), art. 3, https://www.knesset.gov.il/laws/special/eng/basic14_eng.htm.

33 Ibid, at art. 4.

34 *Claude Klein*, The Legal Definition of the Parliamentary Regime and the Parliamentary Regime of Israel, Mishpatim 5 (1976), p. 308, 313 (Hebrew).

35 Basic Law: The State Economy, Sec. 3(a)(2), § 5735-1975, SH No. 777 p. 206 (Isr.) (“The Budget shall be for one year and shall set out the expected and planned expenditure of the Government”); see also id. Sec. 3(b)(1) (“The Government shall lay the Budget Bill on the table of the Knesset at the time prescribed by the Knesset or by a committee of the Knesset empowered by it in that behalf.”).

36 Basic Law: the State Budget for the years 2009 and 2010 (special provisions, temporary order), Hebrew version, http://www.knesset.gov.il/Laws/Data/law/2196/2196.pdf.

37 For a comparative study of temporary and experimental legislation see *Sofia Ranchordás*, Constitutional Sunsets and Experimental Legislation: A Comparative Perspective, Cheltenham 2014.

38 HCJ 4908/10 Bar-on, MK v. Knesset 64(3) PD 275 (2011).

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temporary ordinances to establish the biennial budget is problematic and there may be certain cases in which a temporary amendment to a basic law will be considered a misuse of the title "basic law". However, at this time, the Supreme Court would not intervene, because the government was justified in temporary experimenting with the unconventional biennial budget before deciding whether to adopt it as a permanent arrangement. While the court reasoned that biennial budgets do not constitute a serious danger to democracy, it did harshly criticize the use of temporary basic laws, declaring that such instruments contradict the fundamental concept which states that constitutional provisions are enduring and detract from the status of the Basic Laws. Accordingly, temporary constitutional amendments, President Beinisch urged the legislature, should be used sparingly and in extreme circumstances.

This advice, as we shall see, was ignored. 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, according to the established constitutional rule. 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 by way of another Temporary Order,[39] which was challenged before an expanded panel of seven-judges of the Supreme Court in the case of *Ramat Gan Academic Center of Law and Business v. Knesset,* which was delivered on September 6, 2017.[40]

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 temporary 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.*[41]

The Supreme Court reiterated the presuppositions that the Knesset is the Israeli legislature, according to Article 1 of Basic Law: The Knesset, and that the government, on the other hand, is "The Executive Authority of the State", according to Article 1 of Basic Law: The

39 Basic Law: The State Budget for the years 2017-2018 (Special Provisions) (Temporary Order).

40 HCJ 8260/16 (n 7).

41 HCJ 8260/16, ibid (as translated by the author). The Harai decision of 1950 stated that the Israeli constitution would be enacted, in stages, in the form of Basic Laws. See Sapir (n 3), pp. 15, 17.

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Government. One of the Knesset's main supervisory roles of the government's activities is approving the state budget. Although the government shapes the budget, it is the Knesset which approves it. Without this approval, the Knesset will be dissolved, and new elections will be held.

The state budget is largely based on taxes collected from the public, and from this stem the fundamental principle of democracy by which the parliament decides on taxing policy and expenditure priorities, which the government then implements. More than just technical issues, the state budget and its approval are essential and lie at the root of democracy. When the Knesset lost its ability to frequently monitor the budget – it has lost its power. Approving a biennial budget does just that, by denying the Knesset one of its most essential tools of government supervision.

Beside the decline in the status of the Knesset, the Supreme Court notes also a decline in the status of the basic laws. The increasing use of temporary orders to amend basic laws is an example of the intolerable triviality with which the legislature and the executive authorities consider the constitutional documents of the state.[42]

The use of temporary orders is prevalent in the Israeli landscape regarding ordinary laws and other legislation,[43] yet the court fails to understand how amendments with a wide impact on the constitutional framework of the country are done time after time, without public deliberation, through temporary orders amending basic laws. The result of these actions is a continues decline in the status of the Basic Law. As the concept of temporary orders itself contradicts the basic principle of a constitutional democracy, the use of temporary order in cases such as these should be done very cautiously.

In his ruling, Justice Rubinstein used the doctrine of misuse of constituent power. This doctrine, which was already discussed in the case of *Bar-On*, centers on whether the use of temporary orders to amend basic laws, is, in itself, a "wrongful use of constituent power, in a way which withholds the validity of the Basic Law via Temporary Orders as a basic law".[44] In the case of *Bar-On*, as mentioned, it was ruled that under certain and extreme circumstances, the use of temporary order to amend Basic Laws could justify judicial intervention.

Justice Rubinstein stated that the amendment of the basic law by temporary orders, time after time and under the current circumstances, constitutes a misuse: "the repeated use of a

42 On the trend of using temporary constitutional amendments in Israel see *Nadav Dishon*, Temporary Constitutional Amendments as a Means to Undermine the Democratic Order - Insights from the Israeli Experience, Israel Law Review 51(3) (2018), p. 389..

43 On the increasing tendency of the Israeli legislature to use temporary legislation, see *Ittai Bar-Siman-Tov*, Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study, Regulation and Governance (forthcoming 2018), http://onlinelibrary.wiley.com/doi/10.1111/rego.12148/full.

44 HCJ 4908/10 (n 38), para. 17 of Justice Beinisch Judgment.

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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."[45]

As for judicial remedy, Justice Rubinstein adopts the Knesset's position and instead of striking down the amendment he declares a "nullification notice". The practical meaning was that the court allowed the current amendment yet forbade another future amendment of the basic law by a temporary order. If in the future such a temporary amendment would be passed, it will be struck down. The reasons for choosing this relief were twofold: first, the court has yet to invalidate Basic Laws and therefore would rather practice extreme caution when doing so; second, the state budget has been enacted long before this verdict. Striking the budget at that point in time would have had far-reaching implications on the government and the economy.[46]

Justice Neal Hendel adds an important emphasize to Justice Rubinstein's ruling 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".[47]

Now, one must understand the temporary amendments to the annual budget rule in a broader context. Until 2001, Israel had a regular vote of no-confidence, which was based on the Basic Law: The Government enacted in 1968. In 2001, Israel adopted a 'quasi-constructive' vote of no-confidence. The new Basic Law of 2001 established the requirement of an absolute majority in a vote of no-confidence and added a second criterion—the need to agree on an alternative candidate who would be entrusted with the task of forming a new government. In 2014, the Knesset amended the Basic Law: The Government, adopting Article 28B which states: "An expression of no confidence in the Government will be by a Knesset decision, adopted by the majority the members, to express confidence in an alternative Government that has announced its policy platform, its makeup and distribution of roles among the Ministers . . . ." In other words, it adopted a complete constructive vote of no-confidence that severely restricts the legislature's ability to bring down the government. [48] With the move to constructive vote of no-confidence, approval of the annual bud-

45 HCJ 8260/16 (n 7), para. 33 of Justice Rubinstein's judgment.

46 Ibid., at para. 34. While this seems to be another institutional mechanism for self-restraint, this judgment is rather an expression of judicial activism as the HCJ declares that the Knesset holds limited constituent power and that it has the authority to review constitutional amendments to the basic laws. On this thorny issue, see generally *Yaniv Roznai*, Unconstitutional Constitutional Amendment: The Limits of Amendment Powers, Oxford 2017.

47 Ibid, at Para. 5 of Justice Hendel's judgment.

48 See *Reuven Y. Hazan*, Analysis: Israel's New Constructive Vote of No-Confidence, The Knesset (Mar. 18, 2014), https://knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=11200.

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get remained the main supervisory instrument, an instrument drastically weakened with the change of the annual budged to a biennial one.

D. The Dynamic Role of the Israeli Supreme Court

In 2001, Prof. Eyal Benvenisti claimed that as of the early 1990s, the Israeli Supreme Court has been sensitive to the power-relations between the Knesset and the Government and sought to balance the increasing power of the government through institutional decisions that concern the division of authorities between the branches and aim to strengthen the status of the Knesset as the main forum for public debates and decision-making.[49] According to Benvenisti, judicial policy that is attentive to the gap between the theoretical model of checks and balances in a democracy and its realization in reality has a potential for contributing to the development of a stable regime of checks and balances. It may also define an appropriate role of the Supreme Court in designing the institutional structure suitable to the Israeli democracy.[50]

2017 marks a pivotal year in which through two major constitutional decisions, Israel has demonstrated transformative constitutionalism in which the court takes a central role in strengthening Israeli democracy. In these two judgments, the Supreme Court was activist, not in its human rights protection, but rather in consolidating Israel's institutional constitution - basic norms of governance, separation of power, and ensuring deliberative decision-making processes.[51] It is a new era of democratic-facilitating judicial review.

A first notable link between the two judgments is the focus on formality and procedure rather than substance: in the *Quantinsky* case, the court does not focus on whether the arrangements of the law itself are problematic in any way but concerns solely with the procedural flaws of the law's enactment process. To a smaller extent, the *Academic Center of Law and Business* case, is also concerned with form: whether the Knesset can use its constituent authority to enact temporary measures and give a temporary order a title of a basic law (although here, the main issue was not only the temporality of the measure taken but the constitutional principle which was undermined). Thus, the two judgments can perhaps signal a certain move from substantive justice to procedural justice. On a deeper level, in light of the expanding power of the executive vis-à-vis the legislature, the gradual judicial intervention to prevent this aggrandizement, as manifested in these two dramatic judgments, in which the Supreme Court bravely confronted the Israeli executive branch,[52] re-

49 See *Eyal Benvenisti*, Judicially Sponsored Checks and Balances, Mishpatim The Hebrew University Law Review 32 (2001), p. 797, 813-7 (Hebrew).

50 Ibid., at 817.

51 Compare this with *Samuel Issacharoff* and *Richard H. Pildes*, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, Theoretical Inquiries in Law 5 (2004), p. 1, 1–2.

52 See, e.g., *Susan Hattis Rolef*, Think About It: The High Court of Justice and Government-Knesset Relations, Jerusalem Post (Sept. 10, 2017), http://www.jpost.com/Opinion/Think-about-it-The-Hig

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flect an increasing dynamic role of the Israeli Supreme Court in protecting the institutional constitution and the Israeli democracy, and the beginning (or perhaps the climax) of transformative constitutionalism.

David Landau recently explained how much of the judicial effort in the contexts of fragile democracies of the Global South is oriented to improve the quality of the political-democratic systems, which are regarded as deficient. He calls this "dynamic" jurisprudence. Landau shows that:

> *judicial role and constitutional design in new democracies often work off of the premise that democratic institutions should be distrusted, and not just to protect insular minorities but also to carry out majoritarian will. Judges and constitutional drafters in these countries are notably unconcerned with the classic countermajoritarian difficulty or the dilemma of courts imposing on democratic space and taking on legislative roles. This is because they are focused on a different problem: how to make democratic institutions work better. Courts and other non-democratic institutions often see their role within such a regime as dynamic in nature: they aim to improve the performance of political institutions through time.*[53]

Indeed, emerging scholarship emphasizes the activist role of courts in "fragile" and transformative democracies.[54] Heavily focusing on courts in countries with fragile democracies in the Global South, such as Colombia, India, and South Africa, new research suggests that to improve the quality of deficient political systems, courts deviate from standard models of judicial review in an aim to preserve and strengthen democratic processes and institutions within difficult political environments.

Alongside some work that has already become fundamental,[55] new comparative constitutional literature is blurring the difference between liberal constitutional models (primarily

h-Court-of-Justice-and-government-Knesset-relations-504733 ("Within a single month (August 6 to September 6 [2017]) the High Court of Justice issued three important rulings connected with the Knesset's oversight function vis-à-vis the government, which has weakened significantly in the past decade. It should be noted that in parliamentary democracies the oversight function is deficient by definition, since the system is based on the government commanding a majority in the parliament, so that with the help of coalition discipline it is almost always able to get its way. In Israel, coalition discipline is used in the current government in an increasingly cynical manner, as coalition chairman MK David Bitan (Likud) uses influence (by means of the allocation of personal coalition funds to individual MKs) and threats against members of his own party ('if you fail to "toe the line" you will pay a price in the next primaries') to secure government control. Under the circumstances it is not surprising that MKs and parliamentary groups from the opposition, and outside bodies concerned about malfunctions in the government system, frequently resort to petitions to the High Court.").

53 Landau (n 11), 1502-1503.

54 *Samuel Issacharoff*, Fragile Democracies: Contested Power in the Era of Constitutional Courts, Cambridge 2015, p. 9.

55 See e.g. Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013; Roberto Gargarella et al. (eds.),

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the United States, with its liberal focus on negative constitutional freedoms protection) and "southern" constitutional models, characterized by transformative and aspirational ambition to create social change through constitutional design and adjudication. Among these southern components, Michaela Hailbronner mentions the commitment to fundamental state-driven change; participatory governance; material redistribution; symbolic recognition; justiciable state duties or positive rights; and horizontal application of constitutional rights in private disputes.[56] Normatively, this new scholarship presents a robust model of judicial review where democratic deliberation is defective or where weak democratic institutions are facing a dominant executive. This literature has developed in recent years under the understanding that the constitutions of the Global South have evolved in light of the challenges faced by countries such as India, Colombia, and South Africa—primarily democratic instability and the need to establish a stable rule of law in renewed and transitional democracies, as well as the need to bring the challenge of inequality to the institutional element of constitutional law.

The mere existence of constitutional models which are different from those in North America or Britain is not new. However, what is being renewed in recent times is the South-North dialogue,[57] which refers to the scholarly insight, according to which models that were previously attributed only to the Global South countries could be relevant (as a positive analysis) and should be relevant (as a normative substance) even in well-established democracies, and that the models can help these democracies cope with current challenges such as populism, inequality, multiculturalism and democratic instability.[58]

And, it is here, where the recent Israeli development resembles to a great extent the dynamic role of courts in the Global South in bettering political dysfunction. Consider, firstly, the Israeli case of *Quantinsky* and judicial review of legislation based upon procedural flaws. As Landau demonstrates, the Colombian Constitutional Court has been striking down laws where the congress did not follow its own internal legislative procedures or where it deliberately avoided debating major issues at one stage of the debate in order to

Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?, London 2006; Oscar Vilhena et al (eds.), Transformative Constitutionalism: Comparing The Apex Courts of Brazil, India and South Africa, Pretoria 2013; Armin von Bogdandy et al (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017.

56 *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Coparative Law 65 (2017), p. 527.

57 *Michaela Hailbronner*, Overcoming Obstacles to North-South Dialogue: Transformative Constitutionalism and the Fight Against Poverty and Institutional Failure, Verfassungs und Recht in Übersee 49 (2016), p. 253, 259 (noting, "differences between North and South are here a matter of degree rather than being categorical, and there remains plenty of room for mutual learning").

58 See, e.g., *Michaela Hailbronner* and *David Landau*, Introduction: Constitutional Courts and Populism, I-CONnect (Apr. 22, 2017), http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/ ("The challenge of populism is thus ripe for Global South-Global North dialogue, perhaps indeed with the rich experiences of the Global South serving as a major source of ideas for the north.").

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add them in at a later stage. Through such cases, the Constitutional Court was aiming to rationalize congress' legislative behavior and attempting "to improve the quality of legislative deliberation by constitutionalizing some issues of legislative procedure".[59] Referring to cases in which the Colombian Constitutional Court invalidated a law "because of weaknesses in democratic deliberation" or a tax reform which was not the product of ""a minimum of rational deliberation", Landau writes that "in Colombia, Constitutional Court justices openly treat the weaknesses in political institutions—and particularly in the Congress—as a justification for their choice to take on a protagonist's role."[60] Add to this, the development by the Constitutional Court of restrictions on what lawmaking powers Congress can delegate to the President – which is very much similar to the Israeli 'primary arrangement rule' – it is clear that the Constitutional Court aims to improve the legislative role and performance of the Congress, just as the Israeli Supreme Court attempts to protect and improve the legislative performance of the Knesset. And like the Colombian Constitutional Court, in *Quantinsky,* the Israeli Supreme Court takes a paternalistic role, educating the Knesset regarding its due – or at least minimal – deliberative requirements.

Likewise, the biennial budget case, as an attempt by the judiciary to be robust against the threat of abusive constitutionalism, resembles the jurisprudence of many countries in the global south:

> *In an increasing number of countries, courts have invented this doctrine on their own, arguing that the "basic structure" or "fundamental principles" of the constitution may not be changed by amending the constitution. This doctrine of unconstitutional constitutional amendments is, for most American lawyers, a stunning display of judicial overreach, but it has been adopted by courts in countries including India, Colombia, Brazil, Pakistan, Bangladesh, Nepal, Portugal, the Czech Republic, Taiwan, and Peru. Uses in Colombia and India suggest that it may have at least limited value in protecting democracy against some kinds of threats.*[61]

The doctrine against abuse of constituent power emerged in India as part of the "basic structure" doctrine of implied limitations on constitutional amendment powers,[62] and has since migrated to various other countries.[63] Just like the Indian use of the "basic structure"

59 Landau (n 11), 1522 ("When the legislature fails to debate a key issue at all stages of debate, for example because a provision is added as part of an amendment very late in the legislative process, the Court will strike down the resulting law.).

60 Ibid., at 1514.

61 Ibid., at 1519. For an elaborate see *Yaniv Roznai*, Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea, American Journal of Comparative Law 61 (2013), p. 657.

62 On the basic structure doctrine, see generally *Sudhir Krishnaswamy*, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, Oxford 2009.

63 See *Yaniv Roznai*, The Migration of the Indian Basic Structure Doctrine, in: Malik Lokendra (ed.), Judicial Activism in India—A Festschrift in Honour of Justice V. R. Krishna Iyer, New Delhi 2012, p. 240.

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doctrine in order to protect the basic principles of the constitutional order against abuse of constituent power, the Israeli Supreme Court has developed the doctrine of 'misuse of constituent power', in the biennial budget case in order to protect the basic constitutional principle of annual budget and the status of the basic laws themselves. 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."[64] But this doctrine seems appropriate considering the structure of Israeli constitutional law. As Landau and Bilchitz remark:

> *courts working in systems with flexible amendment rules but in contexts where there are powerful and unrestrained executives or political forces may feel pressure to police the use of the constitutional amendment rule itself. This is consistent with evidence… that the unconstitutional constitutional amendment doctrine, allowing courts to strike down attempted constitutional changes if they are inconsistent with the 'basic structure' of the existing constitution... has proven to be one of the most successful recent exports in the field of comparative constitutional law.*[65]

In light of Israel's extreme flexible rules of constitutional change, the adoption of the idea of implied limitations on amendments in the Israeli systems seems correct if not even necessary: "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 for an abuse of constituent power. Judicial review of basic laws, especially in the absence of any supra-national court, seems necessary."[66]

The Israeli Constitutional order resembles the Constitutional Order of the Global South in another important aspect: the constitutional culture. Theories of American style constitutionalism, Landau notes, according to which "constitutional principles should be realized in the political realm, rather than through judicial elaboration, requires an assumption that members of the public themselves care about constitutionalism. Much of the case for reining in judiciaries in the name of popular constitutionalism depends, then, on the existence of constitutional culture"; Such US constitutional theories rest on the notion that "the constitution is taken seriously as an object of social and political discourse."[67]

Israel, in contrast, is a young democracy without a long and established constitutional culture or tradition. Additionally, some sections of the Israeli public have no actual commitment to a liberal democracy and the mere idea of constitutionalism is contentious and under

64 HCJ 8260/16 (n 7), para. 30 of Justice Rubinstein's judgment.

65 *David Landau* and *David Bilchitz*, The evolution of the separation of powers in the global south and global north, in: David Bilchitz and David Landau (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global North, Cheltenham 2018, pp. 1, 6.

66 Navot and Roznai (n 7).

67 Landau (n 11), 1512.

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dispute.[68] Israelis cannot even decide the basic question "does Israel have a constitution"?[69] Moreover, due to the lack of a rigid constitution, when the basic laws are easily amended, it is institutionally, a fragile democracy. As Dorner states: "Israeli democracy is fragile because it has no constitution, no foundation, no checks and balances and politicians can and do just completely change the rules of the game when they want . . . if there is power, they use it . . . ."[70] Accordingly, Israeli constitutional order may learn from the experience of the global south or at least, constitutional developments that occur in Israel can be better understood through the perspective of the global south and transformative constitutionalism. Thus, Hailbronner is certainly correct in her statement that the Global South experience can "help us see things at home in a different light, help challenge long-accepted truths and give us a sense of our own blind spots."[71]

E. Conclusion: On Transformative Constitutionalism and Constitutional Paternalism

With the legislative process and the biennial budget decisions, the Supreme Court places itself in the role of protector of the democratic process, guardian of the Knesset, ensuring that it is not overrun by the government.[72]

Prima facie, one my think that with these two cases the Supreme Court undermines or violates the principles of separation of powers: in one case, it intervenes in the legislative procedure and in another case, it intervenes in a pure institutional relationship between the legislature and the executive. However, this is a narrow vision of separation of powers according to which the judiciary must never intervene in the work of the other branches.

Whereas separation of powers means the existence of three equal powers: legislative, executive and judicial, each carries its own functions, separation of powers does not mean that each branch can act ultra vires without the other branches' interference. As Aharon Barak writes, "separation of powers is not dictatorship of powers"; it means that each power is independent within its area as long as its acts within its authority. Separation of powers thus necessitates a mechanism for deciding whether one of the branches is overstepping its

68 *Yaniv Roznai*, Israel – A Crisis of Liberal Democracy?, in: Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), Constitutional Democracy in Crisis?, Oxford forthcoming 2018, 355.

69 See *Dalia Dorner*, Does Israel Have a Constitution?, Saint Louis University Law Journal 43 (1999), p. 1325; *Daniel Friedmann*, Does Israel Have a Constitution and Who Writes It?, IDC Law Review (2012), p. 117 (Hebrew).

70 *Yonah Jeremy Bob*, Israel's Fragile Democracy Would End If Not for Supreme Court, Jerusalem Post (April 18, 2017), http://www.jpost.com/printarticle.aspx?id=488274 (quoting former Supreme Court Justice Dalia Dorner's comments to the Jerusalem Post).

71 Hailbronner (n 57) 262.

72 For a similar interpretation of these cases, see *Gila Stopler*, The Supreme Court as a Barrier against a Hostile Takeover of the Powers of the Knesset by the Government, ICON-S-IL Blog (March 25, 2018) (Hebrew).

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jurisdiction. Accordingly, judicial review is a primary mechanism to fulfill separation of powers.[73]

Consequently, by the Supreme Court's supervision of the legislative process and by not allowing a further by-pass of the annual budget rule, the court vindicated—not violated—separation of powers. It intervened in order to protect the legislative branches' superiority and sovereignty.

Writing prior to these developments, Hagay Kalay and Guy Raveh argued that the Israeli Supreme Court should move beyond the *Poultry Farmers Association* judgment and scrutinize the legislative process in the Knesset, and interpret narrowly exceptions to the primary arrangement rule, which would allow the executive to decide upon important policy matters. The combination of these two moves would allow the development of the institutional constitutional law in Israel, and the Knesset would restore to itself the decision-making capacity. This would be a move towards a second constitutional revolution, that would protect the status of the Knesset as "first among equals".[74]

Indeed, in these two cases the Supreme Court defends functions that are part of the Knesset's duty, in effect, re-shifting the constitutional balance which is at the base of the separation of powers, to its proper location. One has to comprehend the two judgments on the legislative process and the biennial budget precisely with regard to the central status of the Knesset. In one of his articles, Aharon Barak wrote that "democracy needs a strong, brave and accountable Parliament. The immersing of Parliament is dangerous for democracy. The flourishing of Parliament is essential to the democratic order. … I hope that a proper balance between the Parliament and the Executive will be found, in deciding the central social and policy questions of society, and that the Parliament will not pass on to the executive decisions that ought to be made in the Parliament. A strong executive needs a strong legislature."[75]

The year 2017 should be marked as a turning point year for Israeli constitutional order, in which the Supreme Court manifested transformative constitutionalism, by adopting a dynamic jurisprudence and acting as a guardian of the Knesset, in order to promote Israeli democracy. It acted in an activist manner precisely to protect the status of the Knesset as "first among equals".

Of course, as Cohen-Eliya remarks, transformative constitutionalism is "a double-edged sword for courts… for every political action, there is a reaction. There is often public backlash against judicially transformative constitutionalism".[76] The proposed bill of Basic Law:

73 *Aharon Barak*, Judicial Review of the Constitutionality of the Law, Law and Government 3 (1995-1996), p. 403, 408.

74 *Hagai Kalai* and *Guy Raveh*, Towards the Second Constitutional Revolution – The Role of the Knesset in the Constitutional Process following HCJ 4491/13 College of Law and Business v. The Government of Israel, Mishpat Online 36 (2014), p. 4, 42-45.

75 *Aharon Barak*, The Parliament and the Supreme Court – a Look to the Future, Hapraklit 55 (2000), p. 1, 5.

76 Cohen-Eliya (n 5) 188.

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Legislation that seeks to restrict the power of the court from invalidation legislation based upon procedural flaws, and from reviewing the substance of Basic Laws is one such political backlash. While it is my belief, that in these two cases the Supreme Court was correct in its judicial intervention, one has to understand that this judicial activism does not come without a price. Thus, one has to understand the proper role of the court in improving political failures. As Landau notes, there are "limits on what courts can accomplish", and "relying on judicial action alone will…frustrate the constitutional project over time", judicial role must act as a catalyst; "it must be aimed at ensuring that the political branches start to gain capacity, and to pay more attention to the constitutional claims that they have previously overlooked."[77] In the Israeli context, the Supreme Court has shifted the focus to the ongoing deterioration in the status of the Knesset as the legislature; it has spoken. Now, it is for the political branches to take their roles seriously.

77 *David Landau*, Institutional failure and intertemporal theories of judicial role in the global south, in: David Bilchitz and David Landau (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global North, Cheltenham 2018, pp. 31, 45.

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