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## A JEWISH AND (DECLINING) DEMOCRATIC STATE? CONSTITUTIONAL RETROGRESSION IN ISRAEL

NADIV MORDECHAY\* & YANIV ROZNAI\*\*

### INTRODUCTION

*“President Trump is right. I built a wall along Israel’s southern border. It stopped all illegal immigration. Great success. Great idea.”*<sup>1</sup>

The rhetoric is identical. Anyone who follows President Donald Trump on Twitter can easily identify the populist style.<sup>2</sup> Sentences are short; the message is unequivocal. Authority is eminent and the target audience is clear. The electoral harvest is immediate even if it often leads to direct diplomatic crises. The political strategy is the same—targeting the lowest commonality of the part of the electorate that had, until recently, been regarded as excluded from decision-making focal points and institutions. The means to achieve the political goals are similar, as well: distrust of the law, disregarding professionals, contempt for bureaucracy and existing institutions, and a desire to “roll back the state.” A central, common feature is the disregard of, and even offensive approach towards the media. As Freedom House’s *Freedom of the Press 2017* report states, “Like Trump, Israeli prime

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1. Benjamin Netanyahu (@netanyahu), TWITTER (Jan. 28, 2017, 10:55 AM), <https://twitter.com/netanyahu/status/825371795972825089?lang=en>.

2. See Alon Harel & Noam Kolt, Constitutionalism in the Shadow of Populist Politics (on file with authors); David Enoch, *The Masses and the Elites: Political Philosophy for the Age of Brexit, Trump & Netanyahu* (Hebrew Univ. of Jerusalem Legal Studies Research Paper Series, Paper No. 17-13, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906292](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906292); Naama Weiss Yaniv & Keren Tenenboim-Weinblatt, *Israel: Right-Wing Populism and Beyond*, in POPULIST POLITICAL COMMUNICATION IN EUROPE 207 (Toril Aalberg et al. eds., 2017) (discussing populism in Israel). See generally JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016).

minister Benjamin Netanyahu and his spokespeople frequently insult and denounce members of the domestic media, and the prime minister rarely takes questions from reporters.”<sup>3</sup>

One element separates the two cases. Contrary to President Trump, in office since January 20, 2017, Benjamin Netanyahu has been serving continuously as Prime Minister for an unprecedented eight years in a row, thus surpassing the tenure of Israel’s founder, David Ben-Gurion. And contrary to President Trump, whose policies are still deeply contested,<sup>4</sup> Netanyahu has been perceived in Israel, at least until recently, as the lone candidate for the prime-ministership, and as the only leader who can deal with the complicated challenges Israel faces.<sup>5</sup>

In recent years, Israel has been transformed. If in the past its reputation as “the only democracy in the Middle East” was a truism taken for granted, nowadays it is questionable.<sup>6</sup> Netanyahu’s era has been analyzed in a framing that recognized the political change and the power shift to new elites and decision-making hubs. However, few have examined the democratic implications of his long tenure.<sup>7</sup> It is imperative to focus the spotlight on the consequences of Netanyahu’s political dominance—in recent years, hegemony—and its implications for the Israeli democratic system and, most particularly, Israel’s fragile constitutional order.

This Article describes and analyzes an increasing trend of contemporary democratic hybridization and constitutional retrogression in Israel. We seek to reconstruct the Israeli case as a state of affairs where a strong leadership, coupled with rising political elites, are leading to a wide-ranging political risk

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3. Jennifer Dunham, *Press Freedom’s Dark Horizon*, in FREEDOM OF THE PRESS 2017, FREEDOM HOUSE (2017), <http://freedomhouse.org/report/freedom-press/freedom-press-2017>.

4. See generally WILLIAM L. BENOIT & MARK J. GLANTZ, PERSUASIVE ATTACKS ON DONALD TRUMP IN THE 2016 PRESIDENTIAL PRIMARY (2017).

5. Already five years ago, in the *Time* cover story, Netanyahu was described as follows: “He has no national rival. His approval rating, roughly 50%, is at an all-time high. At a moment when incumbents around the world are being shunted aside, he is triumphant.” Ishaan Tharoor, *Cover Story: Why Bibi Netanyahu Is King of Israel*, TIME (May 17, 2012), <http://world.time.com/2012/05/17/cover-story-why-bibi-netanyahu-is-king-of-israel/> (quoting Richard Stengel, *Will Israel’s Netanyahu Make Peace or War?*, TIME (May 28, 2012)).

6. See, e.g., Nahum Barnea, Opinion, *The Future of Israeli Democracy Is in Our Hands*, YNETNEWS (Apr. 4, 2017, 9:21 PM), <http://www.ynetnews.com/articles/0,7340,L-4943757,00.html> (“Our government . . . takes every opportunity to remind the world that we are the only democracy in the Middle East. . . . The moves initiated by its members are . . . eating into the democratic rules of the game, violating minority rights and preventing anti-government criticism.”).

7. Recently, there are calls in Israel to limit the Prime Minister’s term in office. See, e.g., Sharon Pulwer, *Israel Mulls Setting Term Limit from Prime Ministers—but Not for Netanyahu*, HAARETZ (Jan. 22, 2017), <http://www.haaretz.com/israel-news/.premium-1.766551>.

to the constitutional liberal-democracy,<sup>8</sup> to an erosion of its democratic institutions, and to an incremental democratic backslide.<sup>9</sup>

This Article contributes to the evolving recent literature in comparative constitutional law on the constitutional implications of democratic retrogression<sup>10</sup> by characterizing the Israeli case as one that might be categorized as constitutional retrogression. This, as we argue, carries greater normative and descriptive implications. Descriptively, our analysis sheds new light on Israeli constitutionalism in general and on the constitutional revolution in particular. Instead of regarding the Israeli constitution-making as a western liberal-democratic success story, we argue it is closer to that which is termed in the literature the “Global South.”<sup>11</sup> Normatively, the understanding that the Israeli constitutional order is much more fragile than its prevailing image, prospective constitutional adjudication (and scholarship) should put greater emphasis on Israel’s “institutional constitution”—the constitutional set of norms that protects the democratic rules of the game, elections, separation of powers, representation, etc. Our overall argument is that there is a danger and an ongoing, systematic deterioration of the Israeli constitutional model, which requires a systemic political and juristic response.

This contribution to American and foreign scholarship is twofold. First, a symposium on “the constitutional crisis of liberal democracies” is a virtuous occasion to call comparative constitutional scholars’ attention to the democratic costs of recent events in Israel, and an opportunity to urge them to further analyze Israel in future comparative studies of constitutional retrogression. Second, at least to some extent, a comparison between the Israeli and the American cases is appropriate. It seems that for the first time, the

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8. On the understanding of constitutional rulemaking as a means for the management of political risks, see ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* (2014).

9. The incremental aspect is imperative. As Kim Lane Scheppele puts it, “The Frankenstate, too, is composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together.” Kim Lane Scheppele, *Commentary, The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 *GOVERNANCE* 559, 560 (2013).

10. See, e.g., Richard Albert, *Constitutional Amendment and Dismemberment*, 43 *YALE J. INT’L L.* (forthcoming 2018), <http://ssrn.com/abstract=2875931>; Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* (forthcoming 2018), <http://ssrn.com/abstract=2901776>; David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L. REV.* 189, 211 (2013); William Partlett, *Courts and Constitution-Making*, 50 *WAKE FOREST L. REV.* 921, 922–23 (2015); Mark Tushnet, *Authoritarian Constitutionalism*, 100 *CORNELL L. REV.* 391, 396 (2015); Ozan O. Varol, *Stealth Authoritarianism*, 100 *IOWA L. REV.* 1673, 1685 (2015).

11. See generally *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* (Daniel Bonilla Maldonado ed., 2013); *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* (Roberto Gargarella et al. eds., 2006); *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (Oscar Vilhena et al. eds., 2013); *TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE* (Armin von Bogdandy et al. eds., 2017).

young and shaky Israeli democratic tradition can teach some lessons to its much older and established “sister” across the Atlantic. Within the global democratic recession,<sup>12</sup> and against countries that seem to have already crossed the competitive authoritarian Rubicon,<sup>13</sup> the joint visions of the two leaders and the strange dance they dance, between a commitment to democracy and threats to the erosion of constitutional and social orders that strengthen it, can lead the Israeli case to be highly relevant for the understanding of the local “constitutional crisis” here already or soon to be.<sup>14</sup>

Part I of this Article describes the Israeli constitutional revolution to demonstrate how the prevailing image of Israel’s reputation as a liberal-democratic success story was anchored. Part II describes and analyzes recent events in Israel that, in our minds, manifest the weakening of competitive elections, liberal rights, and adjudicative and administrative rules of law, and taken together, point to a process of constitutional retrogression. Part III lays out the descriptive and normative implications of this retrogression. Part IV concludes.

## I. THE 1992 CONSTITUTIONAL (REVOLUTIONARY) ORDER

Israel’s constitutional story is rather complicated as in many ways the constitution-making is still in process.<sup>15</sup> Israel’s constitutional model is based on an incomplete constitution due to the original decision not to complete the constitutional design at the time of the establishment of the state, but rather to leave it as an incremental enterprise in which the Knesset (the Israeli Parliament) would enact the constitution in stages through a series of

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12. See, e.g., Amichai Magen, *The Democratic Entitlement in an Era of Democratic Recession*, 4 CAMBRIDGE J. INT’L & COMP. L. 368 (2015). But see Steven Levitsky & Lucan Way, *The Myth of Democratic Recession*, 26 J. DEMOCRACY 45 (2015). For an exploration of and competing viewpoints on the world’s state of “democratic recession,” see DEMOCRACY IN DECLINE? (Larry Diamond & Marc F. Plattner eds., 2015).

13. See, e.g., Yusuf Sarfati & Aviad Rubin, *Introduction: Israel and Turkey in Comparative Perspective*, in THE JARRING ROAD TO DEMOCRATIC INCLUSION 1, 5 (Aviad Rubin & Yusuf Sarfati eds., 2016) (comparing Israel and Turkey, “[t]here is no doubt, however, that the fairness of political contestation has significantly eroded in Turkey in the past five years and, if we consider democracy and authoritarianism as a continuum, the Turkish political system has moved towards the latter”).

14. See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 160 (2017) (concluding “[t]he language of constitutional rot is a better way to understand people’s recurrent use of ‘constitutional crisis’ in describing the Trump Administration. There is currently no actual constitutional crisis in the United States. But if constitutional rot continues, we are living on borrowed time.”); see also Michaela Hailbronner & David Landau, *Introduction: Constitutional Courts and Populism*, I-CONNECT (Apr. 22, 2017), <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/> (“Time will tell whether, for example, the deeply ingrained culture of U.S. constitutionalism actually serves as a form of protection against potential threats to courts and other institutions posed by the Trump presidency . . .”).

15. See generally ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013).

Basic Laws.<sup>16</sup> The Knesset, in other words, holds both legislative and constituent powers.<sup>17</sup> Since the early years of independence through the early 1990s, the Israeli Constitution included several Basic Laws that regulate governmental structure and institutions. Moreover, the High Court of Justice (“HCJ”) has had a respectable tradition of judicial protection over unwritten common law rights and freedoms.<sup>18</sup>

In 1992, the Knesset enacted two Basic Laws on fundamental rights: Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation, that together constitute a partially entrenched bill of rights.<sup>19</sup> Three years later, the *United Mizrahi Bank v. Migdal Cooperative Village*<sup>20</sup> case asserted the authority of judicial review, comparable to the “*Marbury*” model.<sup>21</sup> Therefore, the Israeli constitutional story is rather unique as it applies American-style judicial review of primary legislation, yet its constitutional laws are enacted through ordinary legislation procedures, in the British-style.<sup>22</sup>

Israel is also particularly unique due to the inverse ratio between the thin written Constitution and the constitutional role of its court. The HCJ hears petitions about Knesset legislation and administrative decisions as the first instance of review, and its constitutional review model is very close to an “abstract” review. The HCJ takes a very broad interpretation of justiciability

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16. See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 51–52 (2011); Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 207, 207 (Denis J. Galligan & Mila Versteeg eds., 2013).

17. See Suzie Navot, *Israel*, in HOW CONSTITUTIONS CHANGE 191–95 (Dawn Oliver & Carlo Fusaro eds., 2011).

18. Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 421–23 (1983).

19. See Aharon Barak, *A Constitutional Revolution: Israel’s Basic Laws*, 4 CONST. F. 83, 83 (1993); David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238, 238 (1992); Gideon Sapir, *Constitutional Revolutions: Israel as a Case-Study*, 5 INT’L J.L. CONTEXT 355, 362 (2009); SUZIE NAVOT, *Mizrahi Bank Case (Isr)*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW, <http://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e597?rskey=9d8OP8andresult=32andprd=MPECCOL>

20. CA 6821/93 49(4) PD 221 (1995) (Isr.).

21. *Id.*; see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 326–27 (1995); Yoram Rabin & Arnon Gutfeld, *Marbury v. Madison and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT’L & COMP. L. REV. 303, 303 (2007).

22. Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT’L L. 349, 356 (2012).

as it adjudicates issues often considered political; it also maintains broad individual standing in administrative and constitutional petitions (also from protected populations in the occupied territories).<sup>23</sup>

The Israeli revolutionary model was perceived worldwide as a success story. The well-known constitutional status of the new Basic Laws on human rights, coupled with the bold reputation of the HCJ under the leadership of Justice Aharon Barak, led to the perception of the Israeli constitutional project as a democratic, liberal-Western success story.<sup>24</sup>

In contrast to the outstanding reputation of the constitutional revolution, the Israeli constitutional project has been controversial in the domestic arena since its inception.<sup>25</sup> Naturally, the judicial dominance of the constitutional project raised the question of its democratic legitimacy. Wojciech Sadurski noted that Israel is a distinctive case in this regard because there is a big difference between a situation where constitutional judicial review was created through a contractual constitution, or with a significant constitution-making stage preceding it, and a situation (as in the history of the United States and especially as in Israel) where the court has given itself constitutional authority in conflict with the parliament or the public. The latter situation leads to the existence of judicial review in a strong, political and social contestation. Accordingly, the role of the constitutional court is always being exercised “in the shadow of this ‘original sin.’”<sup>26</sup>

Indeed, from the early “constitutional spring”<sup>27</sup> of the mid-1990s, the existence and scope of constitutional judicial review in Israel has been harshly contested.<sup>28</sup> What began, at the end of the 1990s, as a public and

23. See Eli Salzberger, *Judicial Activism in Israel*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217, 240–43 (Brice Dickson ed., 2007); Daphne Barak-Erez, *Judicial Review of Politics: The Israeli Case*, 29 J.L. & SOC’Y 611, 611 (2002); Meir Shamgar, *The Observance of International Law in the Administered Territories*, in 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 262 (Yoram Dinstein ed., 1971).

24. Cf. NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY 171 (2015) (mentioning that the judicial opinions of former Israeli Supreme Court Chief Justice Aharon Barak were “frequently analyzed and borrowed abroad” (citing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–82 (2004))).

25. See, e.g., Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 216 (1999) (“The Supreme Court and the President of the Supreme Court enjoy great acclaim and respect within Israel and abroad, but have recently come under attack from a variety of sources.”).

26. Wojciech Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization* 4 (Sydney Law Sch. Legal Studies, Research Paper No. 11/53, 2011).

27. We use the term “constitutional spring” as a metaphor to denote a “time of renewal” or blooming of the constitutional order. See Ludmila Torlakova, *Metaphors of the Arab Spring: Figurative Construals of the Uprisings and Revolutions*, 14 J. ARABIC & ISLAMIC STUD. 1, 6 (2014) (“[T]he notion of ‘spring’ is a universal symbol standing for a fresh beginning, new growth, and new life.”).

28. See, e.g., Gary Jeffrey Jacobsohn, *After the Revolution*, 34 ISR. L. REV. 139, 154 (2000); Amnon Reichman, *Judicial Constitution Making in a Divided Society: The Israeli Case*, in

political criticism of the “Constitutional Revolution,” among narrow circles in the Israeli society and politics, has become a widespread and consolidated political criticism in the early 2000s,<sup>29</sup> and a very powerful political front in the last half-decade, whose members are senior political figures in the Executive and the Knesset. Yoav Dotan writes:

The wave of opposition to the court’s activist policies intensified throughout the 2000s and reached its pick [sic] (at least for now) toward the end of that decade. Open attacks on the court’s activism became commonplace within the Israeli media by politicians, bureaucrats, top columnists, and even law professors. This wave of criticism has been accompanied by a sharp decrease in public trust in the court.<sup>30</sup>

In addition, it is important to stress the fact that the constitutional project was characterized, at least by its opponents, as an elite’s project that included the creation of a constitution without the people. Whether it was the “former hegemonic”<sup>31</sup> elite or the new judicial elite, the legend of a constitution that was enacted without the people hovered in the upbringing of the 1992 constitutional order. It presented a narrative of a judicial, leftist elite promoting universal values.

However, despite the public and political criticism and the increase in the political threats regarding its scope,<sup>32</sup> judicial review—which was considered far-reaching in comparative terms even in the 1990s<sup>33</sup>—has not weakened.<sup>34</sup> Throughout the first two decades of the constitutional revolution, the institutional equilibrium remained stable, and those who objected to judicial review did not lead a significant change that would weaken the

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CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 233, 245–58 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

29. RUTH GAVISON ET AL., JUDICIAL ACTIVISM: FOR AND AGAINST, THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY (2000) (as interpreted by the authors).

30. YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL 49 (2014) (footnote omitted) (citing M. MAUTNER, LAW AND CULTURE IN ISRAEL AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY (2008)).

31. MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 110 (2011); *see also* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 214 (2004).

32. GAROUPA & GINSBURG, *supra* note 24, at 117 (“Judicial activism by the Supreme Court under retired president Aharon Barak . . . has prompted fierce debate over whether the system needs revision. . . . Many believe that the Israeli Supreme Court has been too activist, and we have begun to observe renewed calls for structural reforms to rein in the judiciary.” (footnotes omitted)).

33. *See* MAUTNER, *supra* note 31, at 160.

34. Although, as we later describe, the HCJ has developed various judicial institutional tools which replace invalidation of unconstitutional legislation (such as issuing a nullification notice), that express, to our mind, judicial restraint.



court's authority or change the institutional balances created by the constitutional revolution.

In fact, despite the harsh criticism of its opponents, the constitutional revolution was accepted by many Israeli political actors in the decades following the *Mizrahi* judgment. The more intensive involvement of legal gatekeepers in political decisionmaking processes and the judicial defense of rights and freedoms were established in Israel through tacit political consent. For various reasons, the Basic Laws on Human Rights have not been repealed,<sup>35</sup> and the Knesset, in fact, accepted the idea that it has constitutional limits and considers these limits during the legislative process.<sup>36</sup> Even among right-wing governments (such as Netanyahu's first term in 1996) there was a certain commitment to the democratic-liberal order of judicial review and the strong institutions accompanying it. Even though many of the political right wing identified with the strong opposition to the constitutional revolution, they also understood its legal, political, and social advantages.

However, the last few years' rise of new elites signifies the attack on those symbolic values of the constitutional revolution—a counter-revolution to the constitutional revolution.<sup>37</sup> We argue that, considering the changing landscape of Israeli constitutionalism in recent years and especially since 2015, the comprehension of the Israeli constitutional system should be revisited. Our proposed depiction of Israeli constitutionalism may even lead to rethinking the way, in previous decades, Israeli constitutionalism was understood.

## II. CONSTITUTIONAL RETROGRESSION

*“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 . . . .”*<sup>38</sup>

The preservation of Netanyahu's rule over an exceptional period in Israeli politics and the growing influence of the deep commitment to an alternative and more nationalist vision of the state in the last few years has led to

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35. Ori Aronson, *Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Counter Majoritarian Difficulty*, 37 TEL AVIV U. L. REV. 509 (2016) (as interpreted by the authors).

36. Yaniv Roznai, *The Basic Laws on Human Rights and the Legislative Process in the Knesset—You've Got to Practice What You Preach*, 14 IDC L. REV.—LAW & THE MAN: FESTSCHRIFT FOR AMNON RUBINSTEIN 199 (2012).

37. Doron Navot & Yoav Peled, *Towards a Constitutional Counter-Revolution in Israel?*, 16 CONSTELLATIONS 429, 429 (2009).

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

a significant erosion in the constitutional order of 1992, and can lead to a severe deterioration in the rule of law and separation of powers. This political dynamic, which at first did not lead to a significant constitutional change, is currently evolving into an increase in electoral demand for populist politics and into a straightforward political confrontation with the formal symbols of the 1992 constitutional revolution, which is perceived in Israel as an elite's project imposed on the people and not as a unifying project.<sup>39</sup> To this, one should add the fact that the need to legitimize Israel's rule over the occupied territories and the growing international criticism of the Israeli use of force have made the constitutional enterprise in Israel somewhat indispensable<sup>40</sup>—even in the new reality of political convergence to a right-wing illiberal model—and for those reasons, the venture has become much more fragile, even though it has not completely eroded.

The past few years symbolize a sharp political and social turning point. The strategic strengthening of the right wing in Israel and the relative decline of the political left; the inability to settle the Israeli-Palestinian conflict; the increase in economic inequality considering the previous decade's government's liberalization policies; and, above all, the consolidation of political power around Benjamin Netanyahu's leadership created a new constitutional climate.<sup>41</sup> The political dominance of the right has become a much stronger, discursive fact with a greater commitment to the values of nationalism and the territorial integrity of the country, alongside the rise of the electoral power of religious Zionism as a social and political group.<sup>42</sup> This new political reality led to a renewed political focus on traditional right-wing values in Israel, leaving the unresolved Israeli-Palestinian conflict and maintaining the military control over the occupied territories on one hand and a neo-liberal ideological commitment on the other hand. These, in turn, led to an increase in international pressure on the State, which is reflected in the intensification of international involvement in the conflict and its legalization, as well as internal pressure for socio-economic reform, which has not received a political response and became more acute in the social protest of the summer of 2011.<sup>43</sup> These are the environments that underlie the rise of populist politics

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39. See Yaniv Roznai, *Internally Imposed Constitutions*, in *IMPOSED CONSTITUTIONALISM* (Xenophon Contiades et al. eds., forthcoming 2018) (on file with authors).

40. Nativ Mordechay, *Loosening the Purse by Shielding the Sword: Linking the Judicialization of War and That of Social Justice in Israel* (Apr. 28, 2017) (unpublished manuscript) (on file with authors).

41. Aluf Benn, *The End of the Old Israel: How Netanyahu Has Transformed the Nation*, *FOREIGN AFF.*, July–Aug. 2016, at 16, 16.

42. See AMI PEDAHZUR, *THE TRIUMPH OF ISRAEL'S RADICAL RIGHT* 210 (2012).

43. On the 2011 social protest in Israel, see, for example, Eitan Y. Alimi, 'Occupy Israel': A Tale of Startling Success and Hopeful Failure, 11 *SOC. MOVEMENT STUD.* 402 (2012).

that have focused, over the past two years, on a direct attack on the constitutional order.

Constitutional retrogression is defined by Huq and Ginsburg as an “incremental (but ultimately substantial) decay in three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the adjudicative and administrative rule of law necessary for democratic choice to thrive.”<sup>44</sup> All three bases are under constant threats. Although their decline is incremental—by analyzing the state of affairs in an aggregated manner—we ultimately claim that recent developments put Israel on a dangerous route to a constitutional retrogression.<sup>45</sup> We distinguish between two types of anti-constitutional performances: direct and second-order instances of anti-constitutionalism.

#### A. *Direct Anti-Constitutionalism*

Direct anti-constitutionalism is defined as direct, abusive political clashes with existing Israeli constitutional structures, with the declared purpose of changing or severely eroding the existing constitutional order. A notable example is the government’s recurring attempts to enact “Basic Law: Israel as the Nation-State of the Jewish People,” which would change the fundamental character of the Israeli State, bringing it closer to a model of a “nation-state of the Jewish people,”<sup>46</sup> with an explicit intention to change the constitutional balance between the basic values of the states as “Jewish and democratic” so that, in case of a conflict, the former would prevail over the latter.<sup>47</sup> While there have been several repeated attempts to enact such a Basic Law in years past, it appears that the bill has recently received strong support from Prime Minister Netanyahu, who called for “all Zionist parties”

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44. Huq & Ginsburg, *supra* note 10, at 610.

45. In this short Article, we cannot thoroughly and rigorously analyze all these developments; each requires a deep analysis, but we briefly mention the main developments in order to give a certain sense to the recent trends.

46. Joel Greenberg, *Israel Takes First Step Towards ‘Jewish Nation-State’ Law*, FIN. TIMES (May 10, 2017), <https://www.ft.com/content/c0d7b0d2-35b6-11e7-bce4-9023f8c0fd2e> (quoting Prime Minister Netanyahu).

47. See, e.g., Amir Fuchs & Mordechai Kremnitzer, Opinion, *Basic Law: Israel as the Nation State of the Jewish People—A Danger to the Zionist Enterprise*, ISR. DEMOCRACY INST. (May 12, 2014), <http://en.idi.org.il/articles/6443> (“Let us not be naïve. This proposal [to enact Basic Law: Israel as the Nation State of the Jewish People] is not intended to reflect the status quo but to alter it in a fundamental way—to puff up the state’s Jewish-national character and diminish and curtail its democratic character.”); Aeyal Gross, Opinion, *Israel’s Nation-State Bill Is Undemocratic*, HAARETZ (May 11, 2017, 5:55 PM), <http://www.haaretz.com/opinion/.premium-1.788553> (arguing, “this bill seeks to undermine the principle that stands at the foundation of democracy: the principle of equal citizenship”).

to support it and for acceleration of the legislative process.<sup>48</sup> At present, the proposal is being discussed by a special Knesset committee and politically promoted by most of the coalition parties. Even if the bill does not pass in its current form, the constitutional debate that develops around it reflects an electoral, social, political, and national desire to redefine the equilibrium between democratic principles and national principles.

The ever-increasing threats to the judiciary are another source of concern. These include legislative proposals to limit the court's competence to review legislation and invalidate unconstitutional laws,<sup>49</sup> to insert an override clause into Basic Law: Human Dignity and Freedom,<sup>50</sup> to limit standing for petitioning the HCJ,<sup>51</sup> to change the manner of voting in the judicial election committee,<sup>52</sup> or to change the seniority principle, according to which the most veteran Supreme Court justice takes over when the Court's president retires.<sup>53</sup> In addition to these legislative proposals, politicians from the coalition have even spoken out publicly against the Court.<sup>54</sup> In a "critical speech given at the annual conference of the Israeli Bar" in 2016, the Minister of Justice herself, Ayelet Shaked, warned the HCJ against intervention in matters beyond its jurisdiction and stated that, in the future, judicial appointments will be based on their approach toward judicial activism.<sup>55</sup> In another speech, Minister Shaked criticized the HCJ for prioritizing individual rights over Zionist

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48. Lahav Harkov, *Netanyahu Fast-Tracks Jewish Nation-State Bill*, JERUSALEM POST (May 14, 2017, 3:19 PM), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Netanyahu-fast-tracks-Jewish-nation-state-bill-490690> (quoting Prime Minister Netanyahu's remarks).

49. See, e.g., Uzi Baruch, *Proposed Law Aims to Give Knesset Full Authority*, ARUTZ SHEVA (Feb. 11, 2017), <http://www.israelnationalnews.com/News/News.aspx/224789>; Editorial, *Israel's Anti-Constitutional Revolution*, HAARETZ (July 9, 2017, 12:11 AM), <https://www.haaretz.com/opinion/editorial/1.800257>; Tova Tzimuki & Moran Azulay, *Bennett, Shaked Move to Bypass High Court Rulings*, YNETNEWS (Sept. 15, 2017), <https://www.ynetnews.com/articles/0,7340,L-5017044,00.html>.

50. See, e.g., Amir Fuchs, *Opinion, Overriding the Supreme Court: A Breach in the Wall of Democracy*, ISR. DEMOCRACY INST. (Oct. 28, 2014), <https://en.idi.org.il/articles/6242>.

51. Moran Azulay, *Bill to Limit Standing for Petitioning High Court of Justice*, YNETNEWS (May 12, 2017), <http://www.ynetnews.com/articles/0,7340,L-4961151,00.html>.

52. Marissa Newman, *Chief Justice Slams Minister over Bid to Change Selection Process for Judges*, TIMES OF ISR. (Nov. 3, 2016), <http://www.timesofisrael.com/justices-snob-minister-over-bid-to-limit-their-power-to-select-judges/>.

53. See Editorial, *Respect the Seniority Principle at the Supreme Court*, HAARETZ (June 1, 2017, 2:14 AM), <https://www.haaretz.com/opinion/editorial/1.793012>.

54. See, e.g., Gideon Allon & Yori Yalon, *Minister Blasts Supreme Court's Legislative Meddling*, ISR. HAYOM (Feb. 15, 2017), [http://www.israelhayom.com/site/newsletter\\_article.php?id=40369](http://www.israelhayom.com/site/newsletter_article.php?id=40369) (quoting the tourism minister, "I believe the time has come for the Knesset to speak its piece in a sharp and clear manner. . . . [I]t is fitting for the Knesset to stand and say, as clearly as possible: Remove your hand from the legislation. In a democratic state, the legislation is determined in parliament by representatives of the people, and not by a court whose composition does not reflect the composition of Israeli society in its entirety.").

55. Sarfati & Rubin, *supra* note 13, at 6.

and Jewish considerations: “Zionism should not continue, and I say here, it will not continue to bow down to the system of individual rights interpreted in a universal way that divorces them from the history of the Knesset and the history of legislation that we all know.”<sup>56</sup> As *The Economist* described not long ago:

[The ruling party] Likud is run by a leader who has sworn to break the power of the “old elites” and whose colleagues see the Supreme Court judges as remnants of a privileged left-wing establishment which disregards Jewish values in favour of secular and universal principles. The struggle to limit the powers of the Supreme Court is part of a broader contest over the nature of Israel—pitting religious and nationalist activists against advocates of a more liberal and secular-minded country.<sup>57</sup>

The strength of the Supreme Court, nowadays under the largest political attack in its history, has not broken yet. One cannot overstate the importance of the Israeli Judiciary. There is hardly any public affair which does not come before the Court’s scrutiny, and the Court actively adjudicates on political, military, and religious issues no matter how contentious. It seems that it still retains a model of strong judicial review and judicial independence, despite serious concerns for curtailing the powers of the judiciary by appointing judges considered to be relatively conservative.<sup>58</sup> In 2016 alone,<sup>59</sup> the HCJ demonstrated judicial activism, for example, when nullifying a stability

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56. Revital Hovel, *Justice Minister Slams Israel’s Top Court, Says It Disregards Zionism and Upholding Jewish Majority*, HAARETZ (Aug. 29, 2017), <https://www.haaretz.com/israel-news/1.809617>.

57. Editorial, *Netanyahu v. The Supreme Court*, ECONOMIST (May 2, 2015), <http://www.economist.com/news/middle-east-and-africa/21650159-prime-minister-takes-judiciary-netanyahu-v-supreme-court>.

58. On February 22, 2017, four new Israeli Supreme Court Justices were appointed to office. See Uzi Baruch, *Four New Judges Appointed to Supreme Court*, ARUTZ SHEVA (Feb. 22, 2017), <http://www.israelnationalnews.com/News/News.aspx/225508>. These appointments were viewed by some as a “victory” for the right political wing. See Peter Beaumont, *Israel’s Rightwing Justice Minister Hails Supreme Court Appointments*, GUARDIAN (Feb. 23, 2017), <https://www.theguardian.com/world/2017/feb/23/israel-appoints-three-conservative-judges-to-supreme-court>; Shmuel Rosner, Opinion, *How Israel Got Its Supreme Court Right*, N.Y. TIMES (Mar. 9, 2017), <http://www.nytimes.com/2017/03/09/opinion/how-israel-got-its-supreme-court-right.html?mcubz=0>.

59. See Uzi Vogelmann et al., *Developments in Israeli Constitutional Law: The Year 2016 in Review*, in THE I-CONNECT-CLOUGH CENTER 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW (Richard Albert et al. eds., 2017), <https://ssrn.com/abstract=3014378>; Uzi Vogelmann, et al., *Developments in Israeli Constitutional Law: The Year 2016 in Review*, I-CONNECT (Oct. 4, 2017), <http://www.iconnectblog.com/2017/10/developments-in-israeli-constitutional-law-the-year-2016-in-review/>.

clause in a governmental “Gas Outline”<sup>60</sup>; recognizing conversions to Judaism by private ultra-Orthodox rabbinical courts for the Law of Return;<sup>61</sup> and giving a “validity notice” to the prime minister for holding several cabinet positions.<sup>62</sup> On the other hand, the court also demonstrated restraint—for example, it allowed the re-appointment of Aryeh Deri as the Minister of Interior,<sup>63</sup> even though he had committed bribery, breach of trust, and other criminal offenses during his tenure as Minister of Interior in the late 1980s; permitted the policy of home demolitions;<sup>64</sup> and approved a law which reduces and limits the salaries of high officials in financial companies.<sup>65</sup>

Furthermore, in recent years—and especially in the second and third decades following the constitutional revolution—the HCJ has developed judicial tools which allow it to act cautiously and with restraint, as part of its dialogue with the Knesset.<sup>66</sup> For example, it developed the remedy of suspension of declaration of invalidation,<sup>67</sup> increased its use of the “ripeness doctrine,”<sup>68</sup> and developed—and has been increasingly using in politically sensitive decisions—the remedy of “notice of validity.”<sup>69</sup>

Nonetheless, the impact of the HCJ on Israeli constitutional law, as well as on society remains crucial.<sup>70</sup> Moreover, the HCJ has recently demonstrated signs of “dynamic” jurisprudence,<sup>71</sup> in some confrontations with the

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60. HCJ 4374/15 Movement for Quality of Government v. Prime Minister of Israel (Mar. 27, 2016) (Isr.).

61. HCJ 7625/06 Ragachuva v. The Ministry of Interior (Mar. 31, 2016).

62. HCJ 3132/15 Yesh Atid v. Prime Minister of Israel (Apr. 13, 2016) (Isr.).

63. HCJ 232/16 Movement for Quality of Government v. Prime Minister of Israel (May 8, 2016) (Isr.).

64. See e.g., HCJ 1125/16 Meri v. Military Commander of IDF Forces in the West Bank (Mar. 31, 2016) (Isr.); Masudi et al. v. Military Commander of IDF Forces in the West Bank (Mar. 23, 2016) (Isr.).

65. HCJ 4406/16 Association of Banks in Israel v. Knesset (Sept. 29, 2016) (Isr.).

66. Suzie Navot, *The Constitutional Dialogue: A Debate Through Institutional Mechanisms*, MISHPATIM ONLINE (forthcoming) (on file with authors).

67. See, e.g., Yigal Mersel, *Suspending the Declaration of Invalidity*, 9 MISHPAT U’MIMSHAL—LAW AND GOVERNMENT 39 (2005) (Heb). See generally Anthony Niblett, *Delaying Declaration of Constitutional Invalidity*, in *THE TIMING OF LAWMAKING* 299 (Frank Fagan & Saul Levmore eds., 2017).

68. Ariel L. Bendor, *The Israeli Judiciary-Centered Constitutionalism* (on file with authors).

69. On validity notice, see Ittai Bar-Siman-Tov, *Time and Judicial Review: Tempering the Temporal Effects of Judicial Review*, in *THE EFFECTS OF JUDICIAL DECISIONS IN TIME* 207 (Patricia Popelier et al. eds. 2014); Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, WIS. L. REV. 683 (2016).

70. Ruth Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 REV. CONST. STUD. 345, 346 (2006) (“[T]he Israeli legislature has not taken—for a variety of reasons—a clear and firm position on constitutional issues, letting the court be the driving agent of the process.”).

71. Cf. David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1503 (2014) (explaining that much of the judicial effort in the contexts of fragile democracies of the Global

Israeli executive branch and some progressive approaches in the institutional sphere.<sup>72</sup> A notable example is a recent judgment from August 2017, in which the HCJ struck down a law taxing owners of three or more homes on legislative-procedural grounds. This was the first time that Knesset's legislation was invalidated on legislative-procedural grounds. In a majority opinion, written by Justice Noam Sohlberg, the HCJ held that the law passed in a rushed process, close to midnight, with Knesset Members from both the coalition and opposition claiming they did not have time to properly examine the bill. In these circumstances, there was a flaw in the very root of the legislative process. The court thus returned the proposed law to the Knesset Finance Committee to be prepared anew for second and third readings.<sup>73</sup> With this decision, the HCJ puts itself in the role of protector of the democratic process, guardian of the Knesset, and ensures that it acts with due process and is not overrun by the government. According to the Court's conception, by this interference with the legislative process, the HCJ vindicates—not violates—separation of powers.

This dynamic jurisprudence, however, has not effectively internalized the new reality of dominant political leadership and its potential democratic consequences, because political consolidation is a central feature of recent years. Governmental powers and government departments are concentrated in the hands of Prime Minister Netanyahu, reducing the weight of his coalition partners. At a certain point, Prime Minister Netanyahu has simultane-

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South is oriented to improve the quality of the political-democratic systems, which are regarded as deficient).

72. See, e.g., Susan Hattis Rolef, Opinion, *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-High-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. The three court rulings concern the scandalous manner in which the government gets certain sections of the notorious Economic Arrangements Law (EAL) through, gets approval of budgetary transfers through the Knesset Finance Committee after the budget has been passed, and gets its biennial (two-year) budgets approved.").

73. HCJ 10042/16 Kventinsky v. Knesset (Aug. 6, 2017) (Isr.). See Zvi Zrahiya, *In Blow to Finance Minister, Israel's High Court Quashes Tax on Owners of Three Homes*, HAARETZ (Aug. 6, 2017), <https://www.haaretz.com/israel-news/business/1.805515>.

ously been Israel's Prime Minister, Foreign Minister, Communications Minister, Economy Minister, and Regional Co-operation Minister. While the HCJ opined that the Prime Minister's holding these cabinet positions was not conducive to democracy, it was technically legal.<sup>74</sup>

Coupled with this concentration of power is the weakening of opposition powers. An example is state budget reform that is controlled substantially by the executive. According to the established constitutional principle, the government must ordinarily submit an annual budget for the approval of the Knesset.<sup>75</sup> This is a central mechanism for the Knesset to supervise the government. As of 2009, however, a temporary constitutional amendment (which is continually prolonged) established a *biennial budget*, thereby circumventing the annual budget principle.<sup>76</sup> Whereas this was meant to be a one-time amendment due to the global economic crisis, it has since been prolonged to the years 2011–2012, 2013–2014, 2015–2016 and, most recently 2017–2018.<sup>77</sup> This amendment further limits the oversight capacity of the Parliament, which is already limited in light of the constructive vote of no

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74. However, subject to Deputy President Rubinstein's opinion (Justices Hendel and Meltzer, in their alternate opinion, concurring), the decision was served a "validity notice," whereby if at the end of an eight-month period the situation remained as it was, the case could be appealed again. See HCJ 3132/15, *supra* note 62; see also Itamar Eichner, *High Court's Deadline to Netanyahu over Multiple Ministries Approaching*, YNETNEWS (Nov. 3, 2016), <http://www.ynetnews.com/articles/0,7340,L-4874005,00.html>.

75. 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").

76. 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>.

77. See the recent BASIC LAW: THE STATE BUDGET FOR THE YEARS 2017 AND 2018 (special provisions, temporary provision), <http://knesset.gov.il/laws/special/eng/BasicLawTheBiennial-Budget.pdf>.



confidence which exists from 2014.<sup>78</sup> Indeed, temporary or ad hoc constitutional amendments have been recently used to upset the balance of power in the country in favor of the incumbent government.<sup>79</sup>

In response to a challenge concerning the biennial budget for the years 2011–2012, the HCJ ruled that while the use of temporary ordinances to establish the biennial budget is indeed problematic, it 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 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 detract from the status of the Basic Laws and should accordingly be used sparingly.<sup>80</sup> In a more recent case, an expanded seven-judge panel of the HCJ faced yet another challenge to the biennial budget, in light of the fact that since the first biennial budget was

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78. “A constructive vote of no-confidence severely limits the legislature’s ability to bring down the government since it requires two elements that do not exist in a regular vote of no-confidence: the support of an absolute majority of MPs and an agreement on a candidate to lead an alternative government. . . . 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 thus 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. On March 11, 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 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. See Reuven Y. Hazan, *Analysis: Israel’s New Constructive Vote of No-Confidence*, Knesset (Mar. 18, 2014), [https://knesset.gov.il/spokesman/eng/PR\\_eng.asp?PRID=11200](https://knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=11200).

79. See Yaniv Roznai, *Sofia Ranchordás, Constitutional Sunsets and Experimental Legislation: A Comparative Perspective*, 64 AM. J. COMP. L. 790, 792 (2016) (book review); see also Susan Hattis Rolef, Opinion, *Think About It: The Use of Temporary Orders to Amend Basic Laws*, JERUSALEM POST (July 31, 2016), <http://www.jpost.com/Opinion/Think-About-It-The-use-of-temporary-orders-to-amend-basic-laws-462887> (“[T]he greater problem is the continuous, cynical use made of temporary orders to amend or pass basic laws. All the constitutional lawyers I know agree that the use of temporary orders in this way turns the Basic Laws—the closest thing we have to a constitution—into a dishrag used by the government to clean up the messes it gets itself into, and is problematic and unconstitutional.”). 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. Both constitutional amendments apply only to the current 20th Knesset Biannual. Taken together with the budgeting temporary basic law, this means that between May 13, 2015 and July 30, 2015, the Knesset enacted three temporary Basic Laws which apply temporarily only during the term of the twentieth Knesset. On the increasing tendency of the Israeli legislature to use temporary legislation, see Ittai Bar-Siman-Tov, *Temporary Legislation, Better Regulation and Experimental Governance: An Empirical Study*, in REGULATION AND GOVERNANCE (David Levi-Faur et al. eds., forthcoming 2017), <http://onlinelibrary.wiley.com/doi/10.1111/rego.12148/full>.

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

submitted by the government in 2009, it was since prolonged by means of temporary ordinances. Justice Elyakim Rubenstein, 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.<sup>81</sup>

Justice Rubenstein accepted the petition's claim that the Knesset abused its constituent authority in approving the amendment, holding that the Knesset had undermined its responsibility to supervise government activities and the authority of the Basic Law by repeatedly "temporarily" amending it.<sup>82</sup> Notwithstanding the discontent, Justice Rubenstein dispensed with the manner by which the government circumvents Knesset oversight, and the holding that there was no more justification to use temporary ordinances for the biennial budget, the HCJ refrained from invalidating the Basic Law but rather issued a nullification notice—a warning that would not allow temporary amendments to the Basic Law for budget that extends beyond a single year.<sup>83</sup> In light of the challenges posed by the current period, this process, of expanding the power of the executive in the budget sphere and a gradual judicial intervention to prevent this aggrandizement, well reflects the rise of the structural constitution in the making.

Finally, there are increasing attempts to change the legal status of the occupied territories through domestic legislation, with aims to change the

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81. HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (Sept. 6, 2017) (Isr.) (as translated by the authors). See generally Efrat Neuman, *Israel's High Court Serves Notice: No More Two-Year Budgets*, HAARETZ (Sept. 7, 2017), <https://www.haaretz.com/israel-news/business/1.811011>; Rolef, *supra* note 72.

82. HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (2017) (Isr.), para. 63.

83. *Id.* 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 (2017).

customary status of the occupied territories and to unilaterally annex parts of them into Israel.<sup>84</sup>

These “direct anti-constitutionalism” changes or threats relate to the basic democratic structure. Additionally, as of 2011, Netanyahu’s various coalitions adopted a series of laws designed to limit the ability of the opposition to resist constitutional reforms, out of aspiration to entrench some illiberal administrative regimes in the political and civil arena. Among these are: legislation raising the electoral threshold required for an election to the Knesset;<sup>85</sup> legislation that allows for the dismissal of Knesset Members (“MKs”) who support the struggle of a terrorist organization, which de facto weakens Arab Knesset members;<sup>86</sup> an amendment to Section 7(a) of Basic Law: The Knesset, which extends the standards for banning candidates for election, by clarifying that these include not only actions but also speeches;<sup>87</sup> the “Boycott Law,” which prohibits individuals and organizations from boycotting Israel and imposes economic sanctions on citizens and organizations engaging in such activities, thereby limiting the freedom of expression;<sup>88</sup> a law which denies state funding to institutions that view the establishment of the State of Israel as a tragedy (“*Nakba* Law”),<sup>89</sup> legislation imposing various disclosure obligations on civil-society organizations funded by foreign countries;<sup>90</sup> and

84. See, e.g., Naomi Zeveloff, *Since Trump Won, All Israel Is Talking About Annexation. Why?*, FORWARD (Feb. 11, 2017), <http://forward.com/news/israel/362047/since-trump-won-all-israel-is-talking-about-annexation-why/>.

85. See, e.g., Jonathan Lis, *Israel Raises Electoral Threshold to 3.25 Percent*, HAARETZ (Mar. 12, 2014), <http://www.haaretz.com/israel-news/1.579289>.

86. According to the law,

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 to 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 favor, the MK would be ousted.

The deposed lawmaker could then appeal the decision with the Supreme Court.

Marissa Newman & Times of Israel Staff, *Knesset Approves Controversial Law to Remove Lawmakers from Office*, TIMES OF ISR. (July 20, 2016), <http://www.timesofisrael.com/knesset-approves-bill-to-remove-lawmakers-from-office/>; see also Amir Fuchs, Opinion, *MK Suspension Bill: Anti-Democratic to the Core*, ISR. DEMOCRACY INST. (June 6, 2016), <https://en.idi.org.il/articles/2357>. A petition against this law is currently in proceedings before the HCJ. See HCJ 10214/16, MK Yousef Jabareen v. Knesset.

87. Basic Law: The Knesset, amendment no. 46 of March 14, 2017, Hebrew version, [https://www.nevo.co.il/law\\_word/law14/law-2618.pdf](https://www.nevo.co.il/law_word/law14/law-2618.pdf).

88. Avirama Golan, *The Boycott Law Is Unconstitutional and Undemocratic*, HAARETZ (July 12, 2011), <http://www.haaretz.com/the-boycott-law-is-unconstitutional-and-undemocratic-1.372728>.

89. Roy Konfino & Mordechai Kremnitzer, Opinion, *Implications of the ‘Nakba Law’ on Israeli Democracy*, ISR. DEMOCRACY INST. (June 22, 2009), <https://en.idi.org.il/articles/10132>.

90. In its editorial board op-ed, the *Washington Post* described this legislation as “[a] danger to Israeli democracy.” Editorial Board, *A Danger to Israeli Democracy*, WASH. POST (Jan. 2, 2016),

legislation permitting suburban communities to “filter” candidates who wish to join these communities by special selection committees, thereby strengthening the ability of these communities to officially exclude Arab citizens.<sup>91</sup>

### B. *Second-Order Instances of Anti-Constitutionalism*

Recent years also reveal what we term second-order instances of “anti-constitutionalism.” These are political, legal, and cultural changes—which take place in secondary spheres such as civil society, media and communication sectors, culture and education sectors, the Israeli-Arab minority, and the public sphere—that contribute to constitutional retrogression. Although these instances do not directly relate to the “Capital-C” Constitution, these social, political, and regulatory processes are noteworthy due to their aggregate effect on the Israeli constitutional order and democracy. Such effect is sometimes even more dramatic than formal legal and constitutional reforms described earlier in this Article.

Among these changes is the social delegitimization of the Arab minority that was clearly expressed by the Prime Minister’s 2015 election day speech portraying the voting of the Israeli-Arab citizens as a danger.<sup>92</sup> In the same vein is the administration’s assault on civil society organizations in pursuit of establishing their status almost as “enemies of the public,” and the administration’s declared intention to restrict civil society organizations’ ability to criticize governmental policy.<sup>93</sup> At the same time and to influence public

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[https://www.washingtonpost.com/opinions/a-danger-to-israeli-democracy/2016/01/02/22f90a2e-af3d-11e5-b711-1998289ffcea\\_story.html?utm\\_term=.6f6742240137](https://www.washingtonpost.com/opinions/a-danger-to-israeli-democracy/2016/01/02/22f90a2e-af3d-11e5-b711-1998289ffcea_story.html?utm_term=.6f6742240137) (noting “Israel’s democracy has been a pillar of strength through years of siege. It is not always easy to tolerate or defend groups that criticize the state or those in power, but allowing them to function normally is an important test of democracy, and, ultimately, the mark of an open and free society.”); *see also* Huq & Ginsburg, *supra* note 10, at 50 (noting that “even a democracy like Israel is now requiring disclosure of foreign funding. Critics of the recent Israeli law argue that it is one sided, designed to restrict funding for pro-Palestinian NGOs but not for settlements in the Occupied Territories. Even if not so designed, selective enforcement of such laws allows the state to shape the environment for public discourse” (footnotes omitted) (citing Peter Beaumont, *Israel Passes Law to Force NGOs to Reveal Foreign Funding*, *GUARDIAN* (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding>)).

91. Seth J. Frantzman, Opinion, *Ten Reasons Acceptance Committees Are Bad for Israel*, *JERUSALEM POST* (Sept. 28, 2014), <http://www.jpost.com/Opinion/Ten-reasons-acceptance-committees-are-bad-for-Israel-376527>.

92. Ishaan Tharoor, *On Israeli Election Day, Netanyahu Warns of Arabs Voting ‘in Doves’*, *WASH. POST* (Mar. 17, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/03/17/on-israeli-election-day-netanyahu-warns-of-arabs-voting-in-doves/?utm\\_term=.f57a15b28b82](https://www.washingtonpost.com/news/worldviews/wp/2015/03/17/on-israeli-election-day-netanyahu-warns-of-arabs-voting-in-doves/?utm_term=.f57a15b28b82) (“The right-wing government is in danger. . . . Arab voters are coming out in droves to the polls. Left-wing organizations are busing them out” (quoting a Facebook video post by Netanyahu)).

93. Sarfati & Rubin, *supra* note 13, at 6 (“[C]ivil society organizations have come under attack by consecutive right-wing governments and right-wing organizations. In recent years the Israeli government has pursued a series of anti-NGO initiatives, including proposed bills that called for

discourse, the current government has strengthened its control over the media,<sup>94</sup> and also conducted a nationwide campaign to prevent the establishment of the public broadcasting bureau.<sup>95</sup> In addition, the Minister of Culture, Miri Regev, proposed cultural loyalty tests in which institutions can be denied funding if they harm the Israeli State or its symbols.<sup>96</sup> Therefore, the government explicitly promotes a link between public funding and cultural loyalty to state values that are aimed at effectively silencing critical positions.<sup>97</sup> Also, one can add to the list of government practices aimed at centralized control in the education system, and a desire to hobble the public discourse in the field of democratic citizenship.<sup>98</sup>

What leads Israeli democracy to such a retrogression? There are multiple reasons. For example, a relatively large Israeli public (mainly the extreme religious groups) has no real commitment to a liberal democracy.<sup>99</sup> Other

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revoking certain organizations' tax-exempt statuses, denying NGO registration on political grounds, requiring governmental preapproval for donations from foreign funders, and labeling certain NGOs funded by foreign money as "foreign agents." (footnote omitted) (quoting Lihi Ben-Shitrit, *The Israeli Government and Civil Society Organizations*, ALJAZEERA CTR. FOR STUD. (Feb. 17, 2016), <http://studies.aljazeera.net/en/reports/2016/02/201621791234701755.html>)).

94. *Id.* at 6–7 (“[T]he changing public discourse is influenced by the economically shaky situation of the media market in Israel and Prime Minister Netanyahu’s practical control over the popular daily *Israel Hayom* which is owned by Netanyahu’s patron U.S. billionaire Sheldon Adelson.”). In Freedom House 2016’s “Freedom of the Press” report, Israel was downgraded to “Partly Free” status “due to the growing impact of *Israel Hayom*, whose owner-subsidized business model endangered the stability of other media outlets, and the unchecked expansion of paid content—some of it government funded—whose nature was not clearly identified to the public.” FREEDOM HOUSE, ISRAEL (2016), <https://freedomhouse.org/report/freedom-press/2016/israel>. Freedom House’s 2017 report stated that “[i]n 2016, Netanyahu used his Facebook page to excoriate two high-profile investigative journalists, prompting several top reporters to sign a petition objecting to his conduct. He has also been accused of colluding with key media owners to shape favorable coverage. While Israel has historically enjoyed a vibrant and pluralistic media sector, these and other problems have caused press freedom in the country to decline in recent years.” FREEDOM HOUSE, FREEDOM OF THE PRESS 2017: PRESS FREEDOM’S DARK HORIZON 9–10 (2017), <https://freedomhouse.org/report/freedom-press/freedom-press-2017>.

95. For example, the Culture and Sports Minister, Miri Regev, publicly questioned the point of establishing a new public broadcasting corporation if it would not be controlled by the government. See Barak Ravid, *Miri Regev: Why Set Up New Broadcasting Corporation if We Don’t Control It?*, HAARETZ (July 31, 2016), <https://www.haaretz.com/israel-news/1.734527>.

96. Marissa Newman, *Culture Minister Pushes Bill to Condition Funding on ‘Loyalty’*, TIMES OF ISR. (Jan. 26, 2016), <http://www.timesofisrael.com/culture-minister-to-push-bill-to-hinge-funding-on-loyalty/>.

97. See Benjy Cannon, Opinion, *5 Frightening Attacks on Israel’s Democracy*, JSTREET (Feb. 1, 2016), [http://jstreet.org/blog-5-frightening-attacks-on-israels-democracy\\_1/#.WdlTOGiCw2w](http://jstreet.org/blog-5-frightening-attacks-on-israels-democracy_1/#.WdlTOGiCw2w).

98. Akiva Eldar, *Israel’s Education Minister Takes on Role of Political Censor*, AL-MONITOR (Jan. 12, 2017), <http://www.al-monitor.com/pulse/originals/2017/01/israel-naftali-bennett-education-occupation-human-rights-idf.html> (noting, “Israeli Education Minister Naftali Bennett is promoting a law barring representatives of any anti-occupation organizations from entering high schools, effectively censoring students from information that contradicts the state’s narrative”).

99. For example, according to the 2016 Israeli Democracy Index, almost sixty percent of the ultra-orthodox think that Jewish citizens should have greater rights than non-Jewish citizens. See

main reasons, according to Mordechai Kremnitzer, appear to include a conceptual maneuver, which identifies critical voices in society with de-legitimizing the state and the difficult public environment surrounding the Israeli-Palestine conflict.<sup>100</sup> The endless challenges of security threats coupled with the hopeless struggle are lethal to democracy, which requires optimistic winds of hope.<sup>101</sup> The optimistic state of mind was severely harmed by the extreme right-wing success in creating an identification of the left wing with values such as democracy, liberalism, and human rights.<sup>102</sup> It seems that Carl Schmitt's overarching understanding of the political realm—"the specific political distinction to which political actions and motives can be reduced is that between friend and enemy"<sup>103</sup>—is, alas, the generative force behind Israeli politics. On one occasion the enemy is Iran, sometimes it is the media, and very often it is left-wing human rights organizations or the left wing in general.<sup>104</sup>

A comparison of the Israeli situation to some of the more familiar recent comparative cases reveals, to our opinion, several troubling characteristics of populism, political centralization of powers, a continuing risk for the competitiveness of the political system,<sup>105</sup> and "executive aggrandizement."<sup>106</sup> Not to be mistaken, the characteristics of the erosion of democratic institutions in Israel are more moderate compared to other relevant places, and the Israeli case is far from more advanced cases of constitutional retrogression

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TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 2016 HIGHLIGHTS 16 (2016), <https://en.idi.org.il/media/7839/democracy-index-2016-abs-eng.pdf>. In the 2012 Israeli Democracy Index, over eighty percent of the ultra-Orthodox stated that the Jewish aspect is more important than the democratic aspect of the state. See TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 2012, at 31–32 (2012), <https://en.idi.org.il/media/5645/index2012eng.pdf> (stating also that "among the ultra-Orthodox, the haredi-leumi, and the Orthodox, the clear preference was for the Jewish component").

100. For the interview of Professor Mordechai Kremnitzer, see Hagar Buchbut, *Is There a Risk to Israeli Democracy?*, YNETNEWS (May 31, 2016), <http://www.ynet.co.il/articles/0,7340,L-4803112,00.html>.

101. *Id.*

102. *Id.*

103. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., University of Chicago Press ed. 1996) (1932).

104. Sarfati & Rubin, *supra* note 13, at 6 ("Philanthropic funds like the New Israel Fund and pro-peace organizations like *Betsalem* and *Shovrim Shtika* are accused of being anti-Zionist and disloyal. Right-wing organizations *Im Tirzu* and NGO Monitor supervise contents delivered in institutions of higher education and conduct shaming campaigns against scholars identified with leftist ideas.").

105. See generally SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

106. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 10–13 (2016).

recently investigated, such as in Hungary, Poland, Turkey, Romania, Venezuela, and South Africa.<sup>107</sup> Israel is still a functioning democracy with strong judicial and democratic institutions.<sup>108</sup> Nevertheless, the Israeli case is an *incrementally* ongoing constitutional crisis and not just a form of legitimate constitutional hardball.<sup>109</sup> This constitutional retrogression is characterized

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107. See, e.g., Miklós Bánkuti et al., *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 138–40 (2012). See generally CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (Armin von Bogdandy & Pál Sonnevend eds., 2015); ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810–2010* (2013).

108. The Economist Intelligence Unit's 2016 Democracy Index report classifies each country as one of four types of regimes—full democracy, flawed democracy, hybrid regime, or authoritarian regime—based on five factors: electoral process and pluralism; civil liberties; functioning of government; political participation; and political culture. See THE ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2016: REVENGE OF THE "DEPLORABLES"* 3, 6 (2017), <http://felipesahagun.es/wp-content/uploads/2017/01/Democracy-Index-2016.pdf>. In the Democracy Index 2016, Israel is characterized as a flawed democracy. *Id.* at 7. It is still ranked first in the Middle East and North Africa region. *Id.* at 44. The report notes,

The best performer in the region was Israel, climbing five places and rising to 29th place globally. Israel has worked to strengthen various public institutions—such as the offices of the attorney general and the accountant general—to ensure that the government remains accountable to the public between elections. However, the improvement in Israel's ranking masks a huge disparity between the rights enjoyed by its Jewish citizens and the rapidly growing Muslim-Arab population. Overall, the higher score was not sufficient to propel Israel into the ranks of the world's "full democracies".

*Id.* at 44.

109. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (explaining that constitutional hardball "consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings"). For a scholarly analysis of the current state of affairs see the collected essays in the 2017 symposium held by I-CONNECT on Constitutional Capture in Israel?. Some approaches are consistent with our analysis. See, e.g., Alon Harel, *The Triumph of Israeli Populism*, I-CONNECT (Aug. 22, 2017), <http://www.iconnectblog.com/2017/08/the-triumph-of-israeli-populism> (focusing on the role of Populism in the deterioration of Israel's liberal democratic culture); Gila Stopler, *Constitutional Capture in Israel*, I-CONNECT (Aug. 21, 2017), <http://www.iconnectblog.com/2017/08/constitutional-capture-israel> (emphasizing the process of constitutional capture in the Israeli context). Others see things in a different way, even if still somewhat disturbing. See Barak Medina, *The Israeli Liberal Democracy: A Critical Assessment*, I-CONNECT (Aug. 24, 2017), <http://www.iconnectblog.com/2017/08/the-israeli-liberal-democracy-a-critical-assessment> ("I do not share the view that Israel has already slid into a process of 'constitutional capture,' similar to the trend against liberal democracy evident in countries like Turkey, and even E.U. members such as Hungary, Poland, and others. But the risk does exist..."); Iddo Porat, *Is There Constitutional Capture in Israel?*, I-CONNECT (Aug. 25, 2017), <http://www.iconnectblog.com/2017/08/is-there-constitutional-capture-in-israel> (viewing these developments as a legitimate democratic response by the political Right to the dominance of the Left in several public spheres); Ruth Gavison, *Some Concluding Comments: What Is the State of Democracy? How to Defend It?*, I-CONNECT (Aug. 26, 2017), <http://www.iconnectblog.com/2017/08/some-concluding-comments-what-is-the-state-of-democracy-how-to-defend-it> ("Israel is not on the path to becoming a de-facto one party democracy or even a one-bloc government. Even if all the allegedly anti-democratic bills are passed (highly unlikely) – this in itself will not perpetuate the rule of one man or party or bloc. Moreover,

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*inter alia* by a strong ideological opposition to the 1992 constitutional revolution and the liberal-universal values it represents: populist and separatist political rhetoric, continuous attempts to undermine the state's liberal character, direct hostility to constitutional institutions identified with the Israeli constitution, and to civil society organizations associated with Palestinian's rights. The weakening of the political market starting in 2009 and the dominance of the right-wing Netanyahu's coalitions is leading to an erosion of the judicial and democratic institutions.

In this brief Article, our goal is not to thoroughly analyze each of these changes but to flag the current changes in the Israeli political and constitutional order in an idiosyncratic manner—still not fully corresponding with a complete backslide towards a non-liberal democracy, but in a perilous path that might end in such a model.

### III. SO WHAT? DESCRIPTIVE AND NORMATIVE IMPLICATIONS

#### A. *Israel and the Global South*

Emerging scholarship emphasizes the activist role of courts in “fragile” and transformative democracies.<sup>110</sup> 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. American constitutionalism, these studies argue, cannot fully explain the activity of courts in emerging democracies.

Alongside some work that has already become fundamental,<sup>111</sup> new comparative constitutional literature is blurring the difference between liberal constitutional models (primarily 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

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present-day elections do require a measure of ‘populism’ in the sense of identifying what the ‘people’ wants and needs and catering to it to some extent. This is as it should be, and why it is important to point out and celebrate this core of democracy rather than condemn it outright as anti-democratic”).

110. ISSACHAROFF, *supra* note 105, at 9.

111. *See supra* note 10 and accompanying text.



horizontal application of constitutional rights in private disputes.<sup>112</sup> 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,<sup>113</sup> 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.<sup>114</sup>

This new understanding also works in the opposite direction. Southern models of constitutional adjudication, which do not make a clear distinction between law and politics, are called to be inspired by the experience of more established democracies in maintaining this separation. Thus, for example, Hailbronner, in her important study and provocative comparison between India and Germany, poses the question: “Is there a way forward that might be able to combine the advantages and avoid the downsides of both models, the collaborative Indian approach with its destructive consequences for legal autonomy and the ‘legal’ German with its exclusionary hierarchical conception of judicial authority?”<sup>115</sup>

We wish to join these scholars and to reconstruct Israel as a case of a transformative constitution that has been dealing with backlash in recent

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112. Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65(3) AM. J. COMP. L. 527 (2017), <https://academic.oup.com/ajcl/article-abstract/doi/10.1093/ajcl/avx016/4158464/Transformative-Constitutionalism-Not-Only-in-the?redirectedFrom=fulltext>

113. Michaela Hailbronner, *Overcoming Obstacles to North-South Dialogue: Transformative Constitutionalism and the Fight Against Poverty and Institutional Failure*, 49 VERFASSUNG UND RECHT IN ÜBERSEE VRÜ 253, 259 (2016) (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”).

114. See, e.g., Hailbronner & Landau, *supra* note 14 (“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.”).

115. Hailbronner, *supra* note 112, at 48.

years. To us, it seems that the Israeli case can benefit from this conversation, both on a positive and normative level. According to us, the well-known reputation of the constitutionalization of the Basic Laws on Human Rights has influenced the perception of the Israeli constitutional project, in the eyes of many, as a western-liberal success story. However, it seems that the success story regarding the constitutional revolution is somewhat false. As Ran Hirschl has already insisted, the Israeli project has made a great effort to be portrayed as a liberal one when, in fact, it has grown in a much more unliberal, religious, and sub-democratic climate.<sup>116</sup> We mostly agree with this claim,<sup>117</sup> and recent events support the challenge of the traditional understanding. All this should lead to a new view of Israeli constitutionalism—which is similar to what current research characterize as the Global South.

We introduce a reconstructed reading of Israeli constitutional jurisprudence and constitutional culture, primarily as a democracy-facilitating endeavor and not as a western-liberal project of counter-majoritarian protection on liberal rights. Our suggested new reading of the constitutional revolution is more of a transformative project that aims to strengthen democratic institutions, basic norms of government, and the rule of law, and to ensure deliberative decisionmaking processes and to consolidate democratic institutions, alongside the well-known human rights jurisprudence, that also was used to strengthen institutional and democratic facilitating interests.<sup>118</sup>

Israel's branding as a constitutional liberal success story was missing.<sup>119</sup> Current scholarly perception is evolving in a troubling gap. While traditional scholarly perception of the constitutional revolution is a one of a liberal project, in reality, it is much more reasonable to perceive it as a transformative one. The surrender of the constitutional revolution designers (and of Israeli literature) to a liberal narrative of the constitutional revolution was a self-fulfilling prophecy. It led the Court itself and the academic arena to perceive Israeli constitutionalism as a liberal-Western project and, most particularly, allowed critics of the constitutional revolution to criticize it in terms of anti-liberalism, localism, and revisionism. While a functional examination of what the Court actually did in these decades might have produced a different

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116. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 60–61 (2014).

117. Hirschl also argued that an important origin of the constitutionalization of the Basic Laws were the hegemonic and Ashkenazi elite aspiration to maintain its political power by transferring institutional power from the political arena to the court. See HIRSCHL, *supra* note 31, at 50–51. We have some reservations about the ethnical element of this argument.

118. Cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1, 1–2 (2004).

119. Recently, the image of the court has begun to erode in other areas as well. See Adam Shinar, *Idealism and Realism in Israeli Constitutional Law*, in *CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM* 257, 279 (Maurice Adams et al. eds., 2017).

picture of a project similar in character to that of the Colombian Constitutional Court or the Indian Supreme Court, our argument is that the Court was more transformative than the liberal image attributed.<sup>120</sup>

### *B. Israel's Structural Constitution*

The second argument is that although the project was more transformative than it was characterized, it was not sufficiently satisfactory to fit Israel's democratic challenges, as reflected in the recent retrogression.

The constitutional revolution was a human rights revolution. Its constitutional tools are characterized by anti-majorities' protection of individuals. Although the constitutional protection was spread over a narrow range of rights, the constitutional methodology leads us to look at each problem in terms of rights violations. At the doctrinal level, the narrative of liberal constitutionalism is a narrower lens through which the jurists in Israel see the world—the constitutional protection of human rights. However, the Constitution is also composed of an entire institutional sphere that protects the ability to defend human rights, and we believe is a relatively neglected aspect of Israeli constitutional theory.

While the constitutional revolution led constitutional system designers, mainly judges and academics, to focus on constitutional anti-majoritarian judicial review and to develop a robust concept of human rights, it also led them to neglect (or at least to insufficiently develop) important institutional and participatory elements that could strengthen the democratic foundations and legitimacy of the constitutional revolution. Over the past decades, the “liberal bias” of the constitutional venture has led the Supreme Court to become progressive—perhaps one of the most progressive courts in the world in the field of counter-majoritarian constitutional review. However, this characteristic was built on the Court's activism and strong reputation, and 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 strengthening of the constitutional ethos in the public sphere.<sup>121</sup>

The problem is the current challenges do not relate exclusively to the protection of rights,<sup>122</sup> but rather relate to the law of democracy—constitutional identity, separation of powers, and social justice. There is a need for a

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120. We elaborate on this point in another, still in-process, project entitled “Israel and The Global South – Israel's Transformative Constitutionalism.”

121. Moshe Cohen-Eliya, *Israeli Case of a Transformative Constitution* (Mar. 3, 2012) (unpublished manuscript), [https://works.bepress.com/moshe\\_cohen-eliya/1/](https://works.bepress.com/moshe_cohen-eliya/1/).

122. Even current challenges in balancing human rights are intensively tangled with the need to secure a *democratic public sphere*. For example, a recent ruling of the H CJ enabled protesters to

new theoretical understanding of Israeli constitutionalism, as reflected in the past, by the fragile democracies' literature that included Israel only as a case-study for a militant democracy<sup>123</sup> and not as a case-study of hyper-executiveism.<sup>124</sup> Thus, prospectively, while thinking of ways to recalculate the constitutional track, institutional aspects of the Israeli constitution must be at the forefront.<sup>125</sup>

We call for a new understanding of this challenge, considering what the Global South has to offer, and without any reservations about the implications of approaching such new boundaries, which we believe is inevitable. We call for democratic-facilitating judicial review, which includes the protection of democratic institutions—especially the Knesset and legal and bureaucratic gatekeepers—and the use of “basic structure” doctrines in order to protect the basic principles of the constitutional order, if necessary.<sup>126</sup> In that respect, 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.”<sup>127</sup>

#### IV. CONCLUSION

Considering the evolution of the constitutional revolution after its first two decades, we acknowledge that the current dynamics it has created are the opposite of what it was trying to create. What we are now experiencing is a counter-revolution. Instead of strengthening the Israeli government's commitment to democracy in the long run, it led to an erosion of democracy and to question the legitimacy of the constitutional discourse, especially by new elites who are not committed to the original constitutional project and who

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maintain the right to protest against the attorney general and Prime Minister Netanyahu. See H CJ 6536/17 Movement for Quality of Government v. Israel Police (Oct. 8, 2017) (Isr.).

123. See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1447–50, 1457–58 (2007).

124. See GARGARELLA, *supra* note 76. Gargarella describes and evaluates the longstanding political, legal, economic, and popular process of centralization of authority vs. expansion of rights in Latin-American constitutional history, and he examines the post 1990s new constitutions, which had a strong emphasis on rights reform but which have “left the traditional vertical organization of power almost untouched” ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860*, at 148–151 (2010).

125. For a contemporary and thorough depiction of structural constitutionalism, see generally Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016).

126. On the basic structure doctrine, see generally SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009); Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in *JUDICIAL ACTIVISM IN INDIA—A Festschrift in Honour of Justice V. R. Krishna Iyer* 240 (Malik Lokendra ed., 2012).

127. Hailbronner, *supra* note 112, at 262.

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have their own democratizing agenda.<sup>128</sup> The result, these days, is a lack of commitment to the constitutional culture and a view of political presentation of rights arguments as disloyal. There is a need for revisiting existing narratives in relation to Israeli constitutionalism, considering the presented changing political landscape as reflected in the recent constitutional retrogression.

Emerging scholarship emphasizes the activist role of courts in fragile and transformative democracies.<sup>129</sup> Focusing strongly on courts in the democratically fragile settings of the Global South, new research suggests courts deviate from standard models of counter-majoritarian review and aim to preserve and strengthen democratic processes and institutions within difficult political environments, hence, improving the quality of deficient political systems. We argue that current times make this body of literature to be much more relevant to the Israeli political climate. The Israeli case, in other words, is slightly removed from the “liberal North” and closer to the Global South.

Such a rereading not only allows a better perception of the changing landscape of Israeli constitutionalism, but provides better tools to face instances of constitutional retrogression. The current declining democratic shift calls for changing the balance toward protection of the basic Israeli constitutional structure. Judicial review and scholarly writings alike should focus on facilitating democracy and protecting democratic institutions.

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128. Various sections of the Israeli public hold a very thin understanding of democracy which is purely procedural or majoritarian. In a recent speech at judicial swearing-in ceremony, Supreme Court Chief Justice Miriam Naor addressed such understanding by stating, “Democracy cannot be identified by the rule of the majority. Not every decision or law passed by a majority is inherently democratic. History teaches us that when there is no restraining factor on the majority it can turn into a tyranny.” See Yoel Domb, *Not Every Law Passed by Majority Is Democratic*, ARUTZ SHEVA (April 26, 2017), <http://www.israelnationalnews.com/News/News.aspx/228656>.

129. See *supra* notes 109–110.