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Temporary Constitutional Amendments as a Means to Undermine the Democratic Order: Insights from the Israeli Experience

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This article focuses on the adoption of temporary measures within the generally rigid constitutional sphere. Commentators frequently contemplate the extent to which temporary constitutional measures are adequate and necessary within a constitution that is meant to be perpetuated. Some writers are in favour of temporary constitutionalism, claiming that it allows flexibility and relieves the counter-majoritarian problem. Others emphasise the devastating impact of intense implementation of temporary measures on the status and legitimacy of the constitution.

The article contends that as beneficial as temporary constitutionalism may be in some circumstances, its use should be scrutinised with great suspicion, especially when it is employed in weak constitutional regimes. In outlining the history of temporary constitutionalism in the State of Israel, the article illustrates how temporary constitutional amendments can be harnessed to undermine the democratic order. The Israeli use of temporary constitutionalism since 2009 reveals a new under-explored manifestation of 'abusive constitutionalism', referred to here as 'abusive temporary constitutionalism'. With abusive temporary constitutionalism, incumbents can entrench their power against their opponents while avoiding both public accountability and judicial review of their actions. Drawing on the Israeli experience, the article outlines several signifiers (i.e. distinctive markers) which will allow judges in the future to monitor and suppress the development of the abusive employment of temporary constitutional amendments.

Keywords: abusive constitutionalism, Basic Laws, temporary, Israel

1. Introduction

It is not wisdom, but authority that makes a law.[1]

From the dawn of political thought and the days of Aristotle,[2] a constitution was deemed to be a crucial element in a democracy, as it set boundaries for the executive and prevented the incumbent officers from taking steps to undermine the democratic order. Constitutions provide legitimacy for the sovereignty conferred on the governor.[3] The existence of a constitution, particularly a rigid constitution, declares that no one within the polity is above the law. Because of the

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[1] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (University of Chicago Press 1997).

[2] Aristotle, *Politics: Books III and IV* (Richard Robinson tr, Clarendon Press 1995).

[3] eg, Roger Charlton, *Political Realities: Comparative Government* (Longman 1986) 23.

constraints it imposes on the executive branch, the general opinion is that a constitution reduces concern that the ruler would take control and transform the country into a totalitarian regime.

However, during the past few decades, in certain cases constitutions have been seen to operate in the opposite manner. Instead of shielding democracy, the constitution becomes the sword with which the incumbent governors preserve their power. By virtue of their power as incumbent leaders, would-be autocrats no longer exercise counter-constitutional measures in order to increase their dominance. They instead acknowledge the centrality of the constitution, while changing its content to suit their individual requirements. This shift in the role of the constitution has generated serious discordance between appearance and reality as, unlike the old-school transparently authoritarian practices, authoritarian leaders today use wholly democratic measures in order to obtain undemocratic objectives. This type of sophisticated anti-democratic behaviour has left legal scholarship in a serious dilemma:[4] how can we curb a ruler who undermines the democratic order while simultaneously expressing rhetorical commitment to democracy?

This article attempts to address one aspect of this complex dilemma. It offers a closer observation of 'abusive constitutionalism' – a new and increasingly common phenomenon in which the constitution is harnessed to undermine the democratic order. By focusing on Israeli constitutional law, this article identifies a unique under-explored and under-theorised manifestation of abusive constitutionalism – employing temporary constitutional provisions in order to entrench the incumbent's power over its opponents. This phenomenon will be referred to in this article as 'abusive temporary constitutionalism'. The article identifies a sharp increase in the number of temporary measures in the Israeli constitution[5] since 2009, along with the election of Benjamin Netanyahu as Prime Minister of Israel, accompanied by somewhat perplexing reasoning. Through an attempt to trace the true motivations behind the extreme keenness of the Israeli government to adopt temporary constitutional measures, this article reveals that temporary constitutionalism may offer a convenient platform for undermining democracy while being subject to reduced inspection, in terms of both judicial review and public opinion. The article suggests several signifiers that will aid future jurists in preventing the use of abusive temporary constitutionalism.

After scrutinising in Part 2 the adequacy of temporary measures within the constitutional document, Part 3 outlines the use of temporary constitutionalism from the establishment of Israel to the present day. This part will first describe the unique features of the Israeli

[4] eg, Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)' (2014) 23 *Transnational Law and Contemporary Problems* 51 (scrutinising the ability to enforce judicial review in times of 'constitutional coups' – ie when a 'constitutionally devious leader' aims to achieve anti-constitutional results through a series of wholly legal moves); David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review* 859 (discussing the possibility that would-be autocrats might use the processes of constitutional amendment for anti-democratic ends, while focusing on the particularly problematic practice of 'constitutional replacements').

[5] Israel has no single formal document known as 'the constitution'. However, the Israeli legislature has adopted a set of Basic Laws, which hold legislative supremacy. Commentators refer to the Israeli Basic Laws as an actual constitution. The implications of the unique nature of Israel constitutional law are discussed in Part 3 below.

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constitutional project and discuss whether and to what extent the Israeli Basic Laws can be referred to as a constitution. Further, it will maintain that since 2009 a new type of controversial use of temporary measures has developed in the Israeli constitution. Part 4 then proposes an explanation for the Israeli government's attraction to temporary constitutionalism, and contends that enacting constitutional amendments on a temporary basis allows the government to be less accountable for its undemocratic behaviour, both horizontally and vertically, namely in terms of both judicial review and public opinion. Part 5 portrays the phenomenon of abusive constitutionalism identified recently by scholars, while arguing that the Israeli adoption of temporary constitutional measures since 2009 is in fact a particular manifestation of this global trend. It applies the name 'abusive temporary constitutionalism' to this use and suggests several signifiers to monitor the development of abusive temporary constitutionalism in the future. Part 6 concludes.

2. TEMPORARY CONSTITUTIONALISM: INHERENT CONTRADICTION OR CUTTING-EDGE LAWMAKING?

2.1. AN ENDURING DOCUMENT CALLED THE CONSTITUTION

Constitutions are often characterised as perpetual documents which reflect society's aim to protect itself against the risk of preferring short-term political passions over long-term interests.[6] Constitutions are an attempt to regulate the future on behalf of the past. As such, they are perceived as an act of 'temporal imperialism', as the constitution allows the majority of the past to set rules that will restrict the wishes of the majority in the future. This 'temporal imperialism' is considered necessary in order to achieve some higher aspirations of the polity.[7] Constitutions are intended to prevent governments from making irrational decisions in the future, urged by the momentary whims of the majority. According to the prevailing perception, a constitution should be adopted in 'constitutional moments',[8] when all members of society actively participate in the deliberations regarding the foundations of its political system. It is these solemn moments that justify the entrenchment of the nation's fundamental norms at a higher level in the hierarchy of norms, in a way that will transcend future contradictory legislation.[9]

Amending a constitution frequently might undermine the justification for its legislative superiority. Frequent amendments could cause the constitutional text to detract from the constitutional context in which it was originally written, and transform the constitution into a set of norms which merely serves the society's wishes at a given point in time. The strive to maintain an

[6] Ozan O Varol, 'Temporary Constitutions' (2014) 102 *California Law Review* 409, 411.
[7] Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *International Journal of Constitutional Law* 636, 636.
[8] Bruce A Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013, 1020–22.
[9] ibid.

enduring constitution can also be discerned from the common threshold in many constitutions to amend the constitution only by a supermajority vote.[10]

Temporary constitutionalism forms an exception to this rule. A 'temporary provision' will be referred to in this article as one that contains a sunset clause – namely, a provision that limits the duration of its validity, be it until a given time, for a certain period, or until the occurrence of a certain event, action or circumstances that take place during a fixed period (for example, a law that applies only during the term of the 20th Knesset of Israel). Temporary legislation reverses the default rules for the continuation of policy – while ordinary rules apply for an indefinite period of time, temporary rules terminate on the sunset date.[11]

Allowing temporary provisions in constitutions is considered to be precarious as they undermine the stability of the constitution. In fact, sunset clauses undermine this stability even more than constitutional amendments, as they essentially generate two constitutional amendments in one act. First, upon the adoption of the temporary provision, the new rule amends the original rule; then, later, upon the expiry of the temporary provision, the constitution is amended yet again as the original rule comes back into force. Apart from the quantitative aspect, the 'two in one' nature of temporary provisions also raises scepticism from a qualitative aspect – namely, with regard to their adequacy within the constitutional sphere. How can a norm be both constitutional and temporary at the same time? To the extent that constitutional norms were indeed conceived in true 'constitutional moments' and reflect the society's long-term interest, how can it be justified to enact them only for a limited period? Indeed, temporary constitutionalism might be adopted as a way of self-dealing by the incumbent government – namely, as part of an effort by the incumbents to entrench their power.[12] By enacting a constitutional norm for a limited period, the incumbent government may grant itself powers that, in turn, will not be granted to the next government. Such tailored legislation can be used to avoid the generality principle: that all members of society are to be bound by the same laws.[13] Thus, self-dealing allows the ruling party to take advantage of its position and to implement temporary changes which benefit only itself for the duration of its governance.

[10] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 366 (suggesting three criteria to distinguish constitutions from ordinary legislation, one of which is the stringent amendment procedures of the constitution).

[11] For further discussion see Ittai Bar-Siman-Tov, 'Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study' (2018) *Regulation and Governance* 4 (forthcoming).

[12] For further discussion regarding political 'self-dealing' by governments see Mark A Graber and Howard Gillman, *The Complete American Constitutionalism: Introduction and the Colonial Era, Vol 1* (Oxford University Press 2015) 11. See also Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (The Free Press 1968).

[13] The generality principle is considered one of the key values of constitutionalism: see Lon L Fuller, *The Morality of the Law* (Yale University Press 1969). Fuller suggests that the law should assume the seven following conditions: generality; adequate publicity; non-retroactivity; intelligibility; non-contradictoriness; stability; consistency (that is, the practical possibility for a disposition to be followed); plus an eighth condition referring to the congruency between the behaviour of officials and what rules establish: ibid 39. See also Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239.

2.2. IN PRAISE OF TEMPORARY CONSTITUTIONALISM

Interestingly, in some cases temporary provisions are not only tolerable in the constitutional sphere but are also considered the most appropriate legislative instrument available.

Temporary constitutionalism has an extensive historical pedigree. As long ago as 1789 Thomas Jefferson wrote that every constitution expires naturally after 19 years, as the earth always belongs to the living generation.[14] Noah Webster, a renowned American political writer, shared the same view, stating that the attempt to make perpetual constitutions is an attempt to legislate 'for those over whom we have as little authority as we have over a nation in Asia'.[15] This approach, which is critical of the 'dead hand' control over living generations,[16] assumes that the building blocks of the political system are constantly evolving. The formative text that reflects them must therefore adapt itself in order to address developments in society's perceptions over time. Sunset clauses may offer a partial solution to this problem. By enacting constitutional provisions for a limited period, constitution framers encourage future generations to revise those provisions.

Another positive feature of temporary provisions is that they sanction lawmaking that is more empirically based by means of 'trial and error'. Sunset clauses allow framers to submit the new rule to a 'reality check'.[17] Framers can gather information regarding the empirical effects of the new rule, which can be revealed only through the passage of time. If an unwise norm (a norm that in hindsight proves to be unworkable in practice or produces undesirable substantive outcomes)[18] is enacted through a regular amendment, its undesirable outcome might be irreversible, especially insofar as the constitution sets a high bar for its amendment. A temporary provision reverses the default rule: while with ordinary legislation the new norm lasts in perpetuity unless it is actively repealed, with temporary legislation it terminates unless actively extended. Hence, temporary provisions are highly beneficial where the threshold for repeal of an unsatisfactory norm is high. The risk of enacting an unwise permanent rule is measured in terms of 'error costs'. The more rigid the constitution, the higher the error costs of injudicious permanent constitutional rules will become as obtaining sufficient political support to repeal these rules may be very

[14] Thomas Jefferson, 'Popular Basis of Political Authority', Letter from Thomas Jefferson to James Madison, 6 September 1789, http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html. Ironically, as part of the reasoning for his argument Jefferson assumed the human average life expectancy to be 55 years. In hindsight, this supposition, which is extremely incompatible with today's statistics, unintentionally illustrates the enormous intergenerational differences that occur as society progresses. In doing so, it vividly visualises Jefferson's point in praise of temporary constitutions.

[15] Quoted in Gordon S Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press 1998) 379.

[16] Varol (n 6) 448 (describing the 'dead hand problem': 'By etching their normative preferences into a durable constitution, constitutional framers continue to rule their unborn posterity long after their death').

[17] Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar 2014) 8.

[18] See, eg, Rosalind Dixon, 'Updating Constitutional Rules' (2009) 8 *Supreme Court Review* 319, 341 (describing potential error costs derived from rules in the Irish and the Indian constitutions governing the ratification of treaties and the size of the government).

difficult; thus, the social price derived from their long-standing application will be significantly higher. A good example of the potential for high error costs is the United States (US) constitution, which, because of the conditions set out in its Article V, is considered to be one of the most difficult constitutions to amend.[19] As a result, out of around 11,000 attempts to amend it since its original ratification, only 27 have succeeded.[20] This low rate suggests that enacting an unwise constitutional rule in the US bears significant error costs as such a rule will probably remain a permanent part of the constitution.

Sunset clauses can also address temporary constitutional needs. It would not make sense to amend a constitution permanently if the amendment being sought is needed only for a period of time as a result of particularly exceptional circumstances. This type of sunset clause is most useful when a country is facing a unique state of emergency, especially a state of war or severe terror attacks, although it can be triggered by other exceptional circumstances.[21] Usually, however, sophisticated framers will foresee those scenarios in which an exception is required, and will delegate to future legislators the power to declare a deviation from the ordinary constitutional order through 'by law' clauses, which empower the legislature to determine certain constitutional issues in the future.[22]

Temporary provisions may also assist in reducing 'decision costs' associated with the 'expensive' process of drafting a constitution. As the constitutional document requires building a consensus around the moral yardstick of society, the burden of deliberating and finalising it includes various social costs such as time, money, uncertainty, conflict, worry and the like.[23] Many constitutions – for example, that of the United States and several constitutions drafted in Arab countries in the post-Arab Spring era – suffered from prohibitive decision costs in their drafting process.[24] These costs usually derived from severe disagreements over substantial elements of the constitution, such as the question of slavery in the US, state–religion relations, and rights of women and minorities.[25] Supporters of temporary legislation contend that a temporary enactment of one optional phrasing may serve as a practical compromise that will please all the competing sectors in the short term. Hopefully, with time consensus can be reached, thus making the dispute redundant upon the expiry date of the provision.

[19] The US amendment procedure requires a two-thirds vote in both houses of Congress as well as ratification by three-quarters of the state legislatures: David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189, 224.
[20] Dixon (n 18) 342.
[21] For example, in 1985 the Knesset enacted a temporary amendment to Basic Law: The State Economy, which, in light of the economic crisis in Israel during that year, allowed the government to lay the budget bill before the Knesset later than the date specified in the Basic Law: Draft Proposal to Basic Law: The State Economy (temporary provision), 1985, *Government Draft Proposals* 1715 (Israel).
[22] Dixon and Ginsburg (n 7) 640. Much literature has scrutinised emergency clauses and the risk of the exception becoming de facto the norm. This risk is also noticeable in Israel, which since its inception extends its state of emergency on an annual basis: see discussion in Daphne Barak-Erez, 'The National Security Constitution and the Israeli Condition' in Gideon Sapir, Daphne Barak-Erez & Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013) 429, 434–36.
[23] Varol (n 6) 439.
[24] ibid.
[25] ibid.

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A further justification for temporary constitutionalism includes the weakening of cognitive biases which are often associated with constitutional moments. Constitutions are frequently drafted after a crisis; therefore, the phrasing of the constitution might emphasise short-term interests affected by the recent traumatic developments, rather than long-term interests that reflect the nation's vision and view of the future more accurately.[26] The risk of drafters being affected by cognitive biases can be explained by the 'availability heuristic', a term coined by Amos Tversky and Daniel Kahneman during their research on decision making under a state of uncertainty.[27] According to the availability heuristic, the human brain tends to assess the probability of a certain event by the ease with which this event can be brought to mind. For example, if a particular hazard materialised recently, people will tend to assume it has a higher probability of reoccurring. Drafting a constitution in a post-conflict environment might involve overestimation by the drafters of the threats imposed on society during the recent crisis, regardless of their centrality in the nation's long-term interests. A post-war society, for example, might grant broad emergency powers to the executive at the expense of protecting human rights, thus failing to serve the society's long-term constitutional goals.[28] A good example is the recent post-Arab Spring Egyptian constitution, where the strive for stability brought about a constitution that allows the government to curtail the protection of human rights.[29]

3. THE ISRAELI CONSTITUTIONAL PROJECT: A CONSTITUTION IN THE MAKING

Seventy years after its establishment, Israel has no single formal document known as 'the constitution'. Originally, Israel's declaration of independence of May 1948 provided that its constitution shall be framed by the 'Constituent Assembly'.[30] Ultimately, the Constituent Assembly, which later became the First Knesset (the first Israeli legislature), passed the 'Harari compromise', according to which the constitution would be adopted 'chapter by chapter' in stages, and each chapter would bear the title of a 'Basic Law'.[31] Until now, this process has led to the enactment of 12 Basic Laws,[32] which cover most of the institution-based aspects of a typical constitution. However, the current Basic Laws do not regulate the process of legislation or the authority

[26] ibid 415.
[27] Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124.
[28] However, it depends on the consequences of the war. Wars could also lead to the drafting of constitutions like that of post-war Germany, which are extremely considerate of human rights as a result of the painful experience of the Nazi regime: see, eg, Axel Tschentscher, *The Basic Law (Grundgesetz) 2016: The Constitution of the Federal Republic of Germany (May 23rd, 1949) – Introduction and Translation* (4th edn, Bern University 2016) 15.
[29] Varol (n 6) 428–30.
[30] Suzie Navot, 'Chapter 9: Israel' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart 2011) 191.
[31] ibid 192.
[32] Basic Law: The Knesset; Basic Law: Israel Lands; Basic Law: The President of the State; Basic Law: The State Economy; Basic Law: The Army; Basic Law: Jerusalem, the Capital of Israel; Basic Law: The Judiciary; Basic Law: The State Comptroller; Basic Law: Human Dignity and Liberty; Basic Law: Freedom of Occupation; Basic Law: The Government; Basic Law: Referendum.

of the judiciary to review primary legislation. Also, they do not entrench certain fundamental human rights, the most prominent being freedom of expression and the principle of equality.[33] Therefore, the process of enacting Basic Laws according to the Harari compromise has yet to produce a complete constitution.[34] While undoubtedly incomplete, since the *Mizrahi Bank* ruling handed down in 1995 by the Supreme Court,[35] it is indisputable that the Basic Laws hold normative supremacy and are situated above ordinary legislation in the hierarchy of norms. The *Mizrahi Bank* case held that primary legislation is subject to judicial review according to its consistency with the provisions of Basic Laws. Prior to the *Mizrahi Bank* ruling, the court saw the division between regular and Basic Laws as 'mere semantics'.[36] Thus, until 1995 judicial review over primary legislation occurred only when the legislature adopted an act that was inconsistent with a certain Basic Law, while infringing its procedural requirements (particularly its entrenchment clauses).[37] The *Mizrahi Bank* ruling was referred to as a dramatic sea change in Israeli constitutional law, igniting a 'constitutional revolution' and turning Israel, from a state based on the English model of parliamentary sovereignty, into a constitutional democracy based on a judge-made constitution.[38] Indeed, since the *Mizrahi Bank* ruling and up to the end of 2017, 17 instruments of primary legislation have been declared invalid by the Supreme Court on the grounds of inconsistency with the Basic Laws.[39]

[33] However, those rights were recognised by the Israeli High Court of Justice (HCJ): see, eg, HCJ 73/53 *Kol Ha'am Ltd v Minister of Interior* 1953 PD 7(2) 871, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\53\730\000\Z01&fileName=53000730_Z01.txt&type=4 (English translation) (acknowledging the constitutional right of freedom of expression); HCJ 98/69 *Bergman v. Minister of Finance* 1969 PD 23(1) 693, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\69\980\000\Z01&fileName=69000980_Z01.txt&type=4 (English translation) (acknowledging the constitutional right of equality). Also, in the Israeli case law, those rights are considered to be rights that derive from the human right to dignity: see, eg, HCJ 4541/94 *Miller v Minister of Defense* 1995 PD 49(4) 94, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\94\410\045\Z01&fileName=94045410_Z01.txt&type=4 (English translation) (concerning the right to equality); and HCJ 4804/94 *Station Film v Film Review Board* 1997 PD 50(5) 661, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\94\040\048\Z01&fileName=94048040_z01.txt&type=4 (English translation) (concerning freedom of speech). All references to Israeli case law in this article are in Hebrew unless otherwise stated.

[34] Suzie Navot, *The Constitutional Law of Israel* (Kluwer 2007) 35–37. See also the discussion in Justice Rubinstein's opinion in HCJ 8260/16 *The College of Law and Business v The Israeli Knesset* (6 September 2017), paras 19–22.

[35] CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* (1995) PD 49(4) 221, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\93\210\068\z01&fileName=93068210_z01.txt&type=4 (English translation).

[36] Rivka Weill, 'Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power' (2012) 39 *Hastings Constitutional Law* 457, 476.

[37] ibid 473.

[38] Navot (n 30) 198.

[39] Shimon Shetreet, *Jewish and Israeli Law: An Introduction* (De Gruyter 2017) 46 fn 51 and accompanying text (providing further details regarding the 15 judgments in which the HCJ invalidated acts of primary legislation up to the end of 2016. During 2017 the HCJ declared invalid two acts of primary legislation: HCJ 1877/14 *Movement for Quality of Government in Israel v The Knesset* (12 September 2017) (invalidating a law which introduced a new framework for the deferment and exemption of ultra-orthodox Jews from compulsory military service); and HCJ 10042/16 *Quantinsky v The Israeli Knesset* (6 August 2017) (invalidating the 'third apartment tax' provisions, which imposed a special tax on homeowners who own more than two pieces of real estate).

As detailed below, a sharp rise in the use of temporary measures within the Israeli Basic Laws has been identified since 2009. For the purpose of analysing the growing segment of temporary provisions in the Basic Laws as a local manifestation of temporary constitutionalism, it is essential to establish first whether the Basic Laws enacted thus far can be referred to collectively as a constitution. On the one hand, they enjoy constitutional supremacy, as declared by the Supreme Court, resulting in their restraining role vis-à-vis the legislature. On the other hand, they do not cover key topics which are at the heart of every standard constitution. Also, most of the existing Basic Laws do not contain entrenchment provisions; thus, most of them can be amended via the regular legislative process – namely, after three readings with a regular majority of those participating in the vote, even if only a few Members of the Knesset (MKs) are actually present.[40] The few Basic Laws which do encompass entrenchment provisions – such as Basic Law: The Government, and Basic Law: Freedom of Occupation – merely require an absolute majority (61 out of 120 MKs) for amendment, which is not a difficult threshold for the government to achieve given the Israeli parliamentary structure.[41] Insofar as the Basic Laws form the Israeli constitution, it is certainly not a rigid one. Indeed, empirically the Knesset has amended the Basic Laws on a frequent basis.[42] In stark contrast to the US constitution, for example, which stands out for its rigid nature, the Israeli constitution is one of the most unstable forms of constitutional texts. Notwithstanding its lack of rigidity, commentators still refer to the Israeli Basic Laws as an actual constitution.[43] Among the main reasons for the constitutional status of the Basic Laws, as indicated by legal scholars and judges, are its superior normative status,[44] the substantial issues regulated by them,[45] the more stringent procedures that their amendments entail,[46] society's recognition of the rigidity that should characterise them,[47] and the internalisation of their supremacy in the examination procedure performed by Knesset bureaucrats when drafting new bills, which also resonates with MKs during Knesset plenary and committee discussions.[48]

[40] Navot (n 30) 198.
[41] Basic Law: Freedom of Occupation, 1994 (Israel), s 7; Basic Law: The Government, 2001 (Israel), s 44(a). In Israel, in order to assume power the government must be approved through assembling a coalition which provides an absolute majority in the Knesset. Hence, insofar as the government is stable, it can easily obtain absolute majority for any particular vote and amend even the more rigid Basic Laws.
[42] By way of comparison, while Basic Law: The Knesset and Basic Law: The Government were each amended dozens of times in only a few decades, the US constitution has been amended 27 times since its enactment in 1776, and the Dutch constitution, the oldest in Europe, has been amended 18 times since its enactment in 1814: Navot (n 30) 200 (providing an outline of the amendments passed by the Knesset to each Basic Law); European Commission for Democracy through Law (Venice Commission), Report on Constitutional Amendment, Study No 469/2008, CDL-AD(2010)001, 19 January 2010, 6 (outlining various defining characteristics of constitutions in Europe, including the number of constitutional amendments).
[43] Especially after the 'constitutional revolution' ignited by the *Mizrahi Bank* ruling: *Mizrahi Bank v Migdal* (n 35) para 54 of Justice Barak's opinion ('A basic law is a chapter in the State constitution. It derives from the Knesset's constituent authority. In establishing a basic law, we find ourselves at the highest normative level'); see also Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Hart 2014) 32.
[44] HCJ 4908/10 *Baron v The Knesset* 2011 PD 64(3) 275, para 22 of Justice Beinisch's opinion.
[45] Elster (n 10) 366.
[46] ibid.
[47] Amnon Rubinstein and Barak Medina, *The Constitutional Law in the State of Israel* (Shoken 2005) 83.
[48] *Baron v The Knesset* (n 44) para 22 of Justice Beinisch's opinion.

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In light of these arguments, in this article the Basic Laws will be regarded as the Israeli constitution, while bearing in mind their unique features insofar as they deviate from the ordinary nature of a constitution. In particular, the unstable nature of the Israeli constitution will be of great importance in scrutinising the necessity for and adequacy of temporary provisions in the realms of the local constitutional document, raising serious concerns regarding the true motives behind their enactment.

3.1. MANIFESTATIONS OF TEMPORARINESS IN ISRAELI CONSTITUTIONAL LAW

The Israeli Basic Laws contain several layers of a temporary nature, which for their greater part demonstrate a clever application of temporary constitutionalism, exploiting the benefits described above. For example, as a result of severe political disputes ignited over the content of the future Israeli constitution during its early days, the first Knesset, which was empowered to frame the constitution, accepted the compromise proposal offered by MK Harari. As described above, under the Harari compromise, instead of enacting a unified document to include all the key elements of a constitution, initially the constitution of Israel would be partial, adopted chapter by chapter. Eventually, these chapters would be consolidated into a holistic Israeli constitution.[49] The Harari compromise proved to be beneficial in terms of decision costs as, at least with regard to its institution-based parts, the Israeli constitution is now almost complete.[50] Had the Harari compromise not been accepted, Israel might have ended up with no constitutional law until all the disagreements had been settled.[51] The absence of a constitution would have brought about high decision costs in view of the ongoing uncertainty, waste of time and constant conflict between the political factions regarding the content of the future constitution.

However, the Harari compromise did not only reduce decision costs but also addressed the 'dead hand problem'[52] and the risk of framing the constitution under a cognitive bias. Among other reasons, the Harari compromise came amid a predicted immigration wave of Jews from around the world to Israel during the following decades. The first Knesset considered it to be inappropriate to frame a constitution that would bind a large number of future citizens who were not represented in the Knesset at the time.[53] This explanation provides a good example of addressing the 'dead hand problem' through enacting a temporary norm – the temporary norm here served to avoid the problem of binding future populations by a constitution which they had no voice in the process of framing.

[49] Navot (n 34) 36–37.
[50] ibid.
[51] For a different analysis of the Harari compromise, maintaining that it actually did not help in reconciling ideological disputes but rather brought about a decline in the Israeli constitutional project, see Daphne Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective' (1995) 26 *Columbia Human Rights Law Review* 309, 314–15.
[52] See n 16 and accompanying text.
[53] Navot (n 30) 191–92.

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Further, the Harari compromise helped in avoiding cognitive biases within Israeli society in its early days, which derived from the security threat that Israel experienced after its establishment. During the situation of emergency of those days, it was not in the people's interest to limit the government's powers in relation to its citizens in any way that might paralyse its ability to defend the country from its enemies. Nevertheless, enacting a constitution with no restrictions on the government would reflect a cognitive bias that does not serve the nation's long-term interests.[54] The Harari compromise helped to reduce this bias through enacting the constitution on a fragmentary basis.

Another example of an astute application of temporary constitutionalism in Israel is the temporary provision added to Basic Law: The State Economy in 2002. This provision originated from the need to address temporary economic hardship[55] but was implemented permanently as a result of its success. Under this temporary provision, a bill that involves the allocation of a large part of the state budget may be adopted only on the votes of at least 50 MKs.[56] This new arrangement involved potentially jeopardising the ability of the opposition to legislate, as it added a new threshold for passing bills which might have been difficult for the opposition to meet, it being a minority. The extent to which the 50-member threshold would harm the opposition could not be assessed in advance. Upon the expiry of the provision, and after examining how it affected the work of the Knesset,[57] the provision was re-enacted, but this time permanently by way of an ordinary amendment to the Basic Law. This is a good example of an information-based approach to constitution framing, which helped the Israeli legislature to avoid unnecessary error costs that might have occurred otherwise in the absence of sufficient information, had the rule been implemented permanently in the first place.[58]

Generally, the amalgam of permanent and temporary aspects within Israeli constitutional law proved to be rigorous and logical during Israel's first decades. However, since 2009 the application of temporary provisions seems to have undergone a serious shift in terms of both their frequency of use and in the reasoning and motivations behind them. During its 20th term, the

[54] Barak-Erez (n 22) 430.

[55] See MK Ophir Pines-Paz, then chairman of the Constitution, Law and Justice Committee of the Knesset, 330th Meeting of the 15th Knesset (15 July 2002).

[56] Basic Law: The State Economy (Bills and Reservations whose Implementation Involves a Budgetary Cost) (Temporary Order), 2002 (Israel), s 1.

[57] Explanatory notes of Draft Proposal to Basic Law: The State Economy (Amendment No 6), 2003, *Government Draft Proposals* 25 (Israel). An illustration of the importance attached to the examination process by the Knesset was given during the third reading discussions in the Knesset plenary. The coalition representative, MK Michael Eithan, Chairman of the Constitution, Law and Justice Committee of the Knesset at the time, stated that the examination period for this provision would continue even after its permanent enactment and, for that purpose, it was enacted without any supermajority amendment requirement, although found in the original proposal: see the 25th Meeting of the 16th Knesset (26 May 2003).

[58] Ittai Bar-Siman-Tov outlines three main characteristics to classify temporary legislation as experimental legislation: (i) it is one that stems from a purpose to enact a temporary rather than a permanent arrangement in order to generate data prior to the sunset date; (ii) it contains an *ex-post* evaluation and learning mechanism, which is the most crucial component; and (iii) it is intended to be the first step towards permanent legislation (Bar-Siman-Tov (n 11) 6–7). The provision in Basic Law: The State Economy of 2002 meets those requirements, and therefore can be classified as a correct application of experimental constitutionalism.

Knesset enacted four temporary amendments to Basic Laws, three of them within a period of only two months.[59] Those amendments were claimed to be necessary to meet temporary circumstances, or in order to examine the implications of certain arrangements before their permanent entrenchment. However, the context in which those provisions were enacted raises the possibility that they were merely the outcome of narrow political desires reflecting short-term interests – exactly the type of desire that the constitution is intended to restrain. Their implementation in the form of temporary constitutional provisions raised suspicions that aside from its beneficial effect, temporary constitutionalism might also generate an abuse of the constitution. In the following sections I elaborate on the new trend of temporary constitutionalism in Israel, while trying to ascertain the difference between beneficial and abusive manifestations of this phenomenon through the Israeli experience.

3.2. Temporary Provisions in the Israeli Basic Laws

The manifestation of temporary provisions in the Israeli Basic Laws are divided in this section into two chronological periods: the first period includes all temporary provisions enacted from the time of the third Knesset, when the first Basic Law[60] came into force, until the end of the 17th Knesset (1958–2009); while the second period, starting with the establishment of the 32nd government of Israel by Benjamin Netanyahu, after winning the 2009 elections, includes all provisions from the 18th Knesset to the currently serving 20th Knesset (2009 to date). During the second period, as explained below, the use of temporary constitutionalism in Israel has undergone major transformation.

To perform the following overview I collected data from the National Legislation Database (NLD) on the Knesset website, which contains the entire body of legislation in Israel, including laws that are no longer in force.[61] I analysed the process of legislation of each temporary constitutional amendment made since the establishment of the first Knesset until 2017. In scrutinising the reasons for applying a temporary measure, I focused solely on the formally stated purpose, as derived from the explanatory notes attached to the bill and legislative records from the plenary and committee debates.

3.2.1. Temporary Provisions until 2009

From the enactment of the first Basic Law in 1958 until 2009, the instrument of temporary constitutional provisions was employed sparingly, mostly to address unique temporary circumstances which required temporary measures, or as a mechanism of experimental constitutionalism. This instrument was introduced in 1973 in order to postpone the elections for the eighth Knesset by

[59] Yaniv Roznai, 'Book Review: Sofia Ranchordás, Constitutional Sunsets and Experimental Legislation: A Comparative Perspective (Edward Elgar, 2014)' (2016) 64 *American Journal of Comparative Law* 790, 790–94.
[60] Basic Law: The Knesset, enacted in 1958.
[61] Bar-Siman-Tov (n 11) 12

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two months because of the 1973 (Yom Kippur) war, which ended only four days before the scheduled date for the election. The postponed elections formed an unavoidable exception to the provisions of Basic Law: The Knesset, which required the holding of elections on exactly the predetermined date.[62] Indeed, the first implementation of temporary constitutionalism in Israel illustrates the utmost necessity of this instrument in times of emergency.

Subsequently, in 1985 the instrument of temporary constitutionalism was used twice. It was first used in the midst of severe economic crisis in the country,[63] which required an extension of the period granted for the government to prepare the budget proposal. Therefore, Basic Law: The State Economy was temporarily amended to allow the government to lay the Budget Bill before the Knesset later than the date specified in the Basic Law. As mentioned in the previous section, this is also a clear example of the adoption of a temporary constitutional provision to address unforeseen temporary situations.

The second implementation of a temporary provision that year was enacted during the establishment of a national unity government, supported by a coalition comprising 97 out of 120 MKs. Consequently, a constitutional provision which allowed 30 MKs to force a convening of the plenary became futile as the opposition was made up of fewer than 30 MKs, and thus could not trigger this provision when it wished to do so. To address this unusual situation the Knesset enacted a temporary provision to Basic Law: The Knesset, which reduced the number of MKs required for convening the plenary to 20 during the term of the serving Knesset.[64] The very same situation triggered a similar temporary amendment in 1989, when the coalition comprised 95 MKs, an outcome of which was the inability of the opposition to obtain 30 votes to force a convening of the Knesset plenary.[65] Ultimately, upon acknowledging that such a scenario is likely to recur, the Knesset enacted a permanent amendment to the Basic Law, which lowered the bar for triggering the convening of a plenary to 25 MKs.[66] During the discussion towards the second and third readings, it was clarified that this amendment was accepted by both the coalition and the opposition at the time as it served 'all the oppositions from now until forever'.[67] This instance of temporary constitutionalism reflects a genuine commitment by all parties across the political spectrum to protect the rights of the political minority and secure a platform for its voice.

The last incident of temporary constitutionalism during the first period (until 2009) occurred in 2002, when the Knesset used this mechanism to implement a constitutional experiment. The Knesset adopted a one-year provision, which required the vote of at least 50 MKs, for the enacting of laws the implementation of which involved 'budgetary cost' (as defined by the Minister of Finance). During the pilot, the Knesset was able to examine the implications of restricting private

[62] Elections to the Eighth Knesset and to Local Government Law (Temporary Provision), 1973 (Israel), s 9.
[63] Following the 1973 war and during the 1980s, Israel underwent a severe economic crisis, which at its peak (in 1984) brought about inflation with an annual rate of over 400%. In 1985 the Israeli government embarked on a stabilisation programme, which reduced inflation significantly: Zalman F Shiffer, 'Adjusting to High Inflation: The Israeli Experience' (1986) 68 *Federal Reserve Bank of St Louis Review* 18.
[64] The Convening of the Knesset Law (Temporary Provision), 1985 (Israel).
[65] The Convening of the Knesset Law (Temporary Provision), 1989 (Israel).
[66] Basic Law: The Knesset (Amendment No 25), 2000 (Israel).
[67] See MK Silvan Shalom, 69th Meeting of the 15th Knesset (10 January 2000).

legislation in the legislation process. By the end of the pilot the Knesset had reached an information-based decision to adopt this restriction on a permanent basis.[68]

The above overview illustrates that overall five temporary constitutional amendments were adopted in Israel by 2009. Apart from the enactment of these temporary constitutional provisions, a further related constitutional development occurred in Israel before the turning point of 2009. In 1992 the Israeli constitutional regime underwent a considerable experimental project, but without predefining it as 'temporary' – in other words, not by way of a temporary provision but rather through the process of ordinary constitutional amendment. The existing electoral system was perceived as fundamentally dysfunctional as a result of its hyper-representative nature. Direct elections of the Prime Minister were claimed to have the potential of weakening the influence of smaller sectarian parties, and enhancing governability in doing so. As part of the reform, the Knesset amended Basic Law: The Government, and introduced a new system of direct election for the office of Prime Minister. However, after three sets of elections, it transpired that the direct elections only exacerbated the failures it intended to resolve, leading in 2001 to a reversion to the previous system by amending the Basic Law yet again, thus proving the value of information-based constitutionalism.[69]

In hindsight, it follows that the largest experimental constitutional project in Israel actually occurred without the involvement of any temporary provisions. As mentioned above, the absolute majority requirement for amending Basic Law: The Government did not constitute a serious obstacle when the government wished to revoke the unsuccessful experiment. The relatively low threshold for amending the constitution in Israel suggests that the error costs derived from enacting erroneous permanent constitutional provisions are somewhat low; thus, the benefits of experimental constitutionalism can be obtained also via ordinary amendment.[70]

In view of the flexible nature of the Israeli constitution, temporary constitutionalism in Israel may be considered to be redundant, at least for the purpose of information-based constitution drafting. However, that does not mean that temporary constitutionalism is always redundant in weak constitutional regimes. As described above, error costs are not the only reason to opt for temporary legislation. Other justifications still apply when error costs are low. For example, unique circumstances may serve as a good reason for enacting temporary provisions even when error costs are low, as the legislators know in advance that the provisions enacted are necessary only for a limited period. Furthermore, decision costs might still be high even when error costs are low, thus justifying the enactment of a temporary rather than a permanent provision. If legislators are concerned that an erroneous provision has been enacted, they may refuse to adopt it without a sunset clause to ensure the termination of the provision on a specific date

[68] See nn 56–58 and accompanying text.

[69] Although not officially classified as such by the Knesset, this amendment is considered in hindsight to have been a 'constitutional experiment': David Kretzmer, 'Presidential Elements in Government Experimenting with Constitutional Change: Direct Election of the Prime Minister in Israel' (2006) 2 *European Constitutional Law Review* 60.

[70] See discussion in Varol (n 6) 461–63 (stating that 'low amendment thresholds – which allow constitutional amendment through, for example, a simple legislative majority – can also relax constitutional permanence').

as a default, regardless of the ease with which they can revoke the amended provision in the future. Therefore, sunset clauses may be an effective interim solution in that they assist in adopting laws without extensive deliberation, thus saving decision costs even when error costs are low.

However important the tool of temporary constitutionalism may be in some cases, the flexibility of the Israeli constitution and its tolerance to amendment should be taken into account in deliberating the adequacy of temporary provisions within the Israeli Basic Laws in the future.

3.2.2. TEMPORARY PROVISIONS SINCE 2009

The biennial budgeting system

The 32nd government of Israel, led by the Likud party candidate Benjamin Netanyahu, came into power on 31 March 2009. After several years under the administration of the Kadima party, Netanyahu's win signified the beginning of his second premiership,[71] which has sustained over three consecutive elections until today. Since then the use of temporary constitutionalism in Israel has undergone major transformation, in terms of both quantity (the number of temporary provisions adopted) and scope (the problems that were intended to be resolved by such provisions).

Six days after its inauguration, following the recommendation by Finance Minister Dr Yuval Steinitz, the new government proposed a temporary amendment of Basic Law: The State Economy. According to Article 3 of this Law, the state budget must be approved by the Knesset on an annual basis. The proposed temporary provision sought to deviate from this rule and establish for 2009–10 a biennial budget instead.

The explanatory notes to the proposal maintained that the new model was necessary in view of the crisis that had beset the world economy in 2008, which required special arrangements.[72] By introducing a biennial budget, the government wished to lay the foundation for future growth by passing a budget backed with a comprehensive economic plan.[73] A biennial budget was necessary, according to the government, because an 'exceptional emergency situation requires exceptional emergency measures',[74] and during times of hardship it is imperative to generate stability in the market.[75]

The proposal received major criticism for a variety of economic and legal reasons.[76] Most relevant for present purposes was the concern regarding its constitutional ramifications.

[71] Netanyahu's first premiership was between 1996 and 1999.
[72] Draft Proposal of Basic Law: The State Budget for 2009–2010 (Special Provisions) (Temporary Provision), 2009, *Government Draft Proposals* 424 (Israel).
[73] Minister of Finance, Yuval Steinitz, 15th Meeting of the 18th Knesset (6 April 2009).
[74] ibid.
[75] ibid.
[76] For other sources of criticism see, eg, the First Meeting of the 18th Knesset Finance Committee (6 April 2009), including, inter alia, the following statements by MK Shelly Yachimovich ('Does it seem reasonable to you, even when we are in the middle of a massive process of economic changes, to set already now the cures for the market's flaws in 2010?'); MK Haim Oron ('The Knesset doesn't have tools to cope with biennial budgeting system, especially with the lack of clarity inherited in it'); and MK Shay Hermesh ('I'm starting to be convinced that your only

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Annual scrutiny of the state budget is considered to be one of the most powerful tools available for the legislature to monitor the work of the executive branch, and the proposed amendment was likely to upset the constitutional balance between the two branches. This is because voting on the budget is the only parliamentary occasion on which the opposition can bring down the government without obtaining an absolute majority (of 61 MKs) but merely the support of 60 MKs (half of the Knesset membership).[77] Failing to approve an annual budget in Israel is regarded as a self-dissolution decision of the legislature, which will bring about new elections within 90 days.[78] By adopting a biennial budgeting model, voting on a budget was restricted to once in two years, thereby reducing by 50 per cent the opportunities for the opposition to bring down the government without an absolute majority. Eventually, through an expedited procedure, the temporary provision was adopted by the Knesset.

In 2010, by way of another temporary constitutional amendment, the biennial budget arrangement was extended for the 2011–12 budget. The explanatory notes to the extension proposal maintained that following the biennial budget in 2009, the government realised the potential benefits of the new system, leading it to consider a permanent change in Israel's budgeting model. However, in the absence of recognised experience in other countries and the potential perils of this model, the government proposed to run an experiment during the following two years in order to scrutinise the model thoroughly.[79] The explanatory notes emphasised the need to make an informed and well-ordered decision regarding this significant issue. Thus, the new arrangement required the government to report on the outcome of the pilot to the Knesset after the beginning of the second year (2012).[80]

It turns out that the 2008 economic crisis had a silver lining: the temporary biennial budget provision, enacted as an emergency measure, was found to have positive effects. Thus, from a necessary evil it became an experimental project which aimed to enhance information-based constitution drafting. This extension formed an unprecedented manifestation of temporary constitutionalism in Israel. For the first time, a temporary constitutional provision was extended for reasons that differed from those leading to its initial promulgation, thus generating a constitutional 'mutation' that adapts itself to changing circumstances and, as it turned out later, may become permanent de facto.

In response to this unorthodox act of legislation, a petition was submitted by MK Roni Baron to the High Court of Justice (HCJ), seeking to invalidate the new arrangement based on its temporary application. The petition was considered by an enlarged panel of seven judges

goal is to say one thing – we confiscate today the power [to approve the annual budget] from this honorable committee').

[77] According to art 36A of Basic Law: The Knesset, unlike a no-confidence vote – which requires at least 61 MKs in order to trigger new elections – preventing approval of the budget is sufficient to overthrow the government: Eyal Yinon, Legal Adviser to the Knesset, 341st Meeting of the 20th Knesset Finance Committee (23 May 2016) 16.

[78] Basic Law: The Knesset (Israel), s 36a.

[79] Draft Proposal to Basic Law: The State Budget for 2009–2010 (Special Provisions) (Temporary Provision) (Amendment), 2010, *Government Draft Proposals* 498 (Israel).

[80] ibid.

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and was ultimately rejected unanimously.[81] The President of the Israeli Supreme Court at the time, Justice Dorit Beinisch, who prepared the main opinion, upheld the legality of the temporary provision but urged the Knesset to respect the status of the Basic Laws, stressing that temporary constitutionalism should be reserved only for 'exceptional, extreme and special cases'.[82] The HCJ maintained that although the act contradicts the basic idea that the constitution should be rigid, it lacks power to review constitutional acts, even when enacted as temporary provisions. However, as temporary constitutional arrangements ultimately harm the exalted status of the Basic Laws, this mechanism should be used sparingly. In addition, the HCJ stressed that in certain circumstances, which cannot be determined in advance, a Basic Law that is amended on a temporary basis may amount to a 'misuse' of the title 'Basic Law'.[83] The HCJ suggested three parameters, among others, that need to be scrutinised in order to identify a misuse of the title of Basic Law: (i) the existence of exceptional circumstances which justify the enactment of temporary rather than permanent legislation; (ii) the subject matter that is regulated by the amended Basic Law; and (iii) whether the temporary amendment violates fundamental principles of the regime or basic human rights.

In the case at hand, the HCJ found that the Knesset members had been fully aware of the problematic nature of the provision and had carried out extensive deliberations over this legal issue.[84] The HCJ underscored particularly the opinions provided by various legal counsel of the Knesset and the Ministry of Finance, who explained the severe concerns surrounding a permanent transition to a biennial budgeting system as its consequences could not be predicted in advance.[85] Justice Rubinstein strongly criticised the Knesset for diminishing the constitutional status of the Basic Laws, stating that 'temporary provisions will usually stem from coalition and political needs, which are virtually unrelated to a constitution'.[86] Nonetheless, Justice Rubinstein refrained from proposing to hold the provision invalid on the ground that in this situation the court 'cannot dignify the Knesset more than it dignifies itself'.[87]

In spite of a serious budget deficit in 2012 as a result of difficulties in forecasting government income and expenditure when approving the biennial budget of 2011–12,[88] in 2013 the biennial

[81] *Baron v The Knesset* (n 44).
[82] ibid para 29 of Justice Beinisch's opinion.
[83] ibid para 24 of Justice Beinisch's opinion. The doctrine of 'misuse of the title Basic Law' was introduced by the then President of the Supreme Court, Justice A Barak, in his opinion in the *Mizrahi Bank* judgment (*Mizrahi Bank v Migdal* (n 35) 406). In Israel there are no formal rules governing the amendment of Basic Laws apart from the judicially introduced rule that Basic Laws are to be amended only by Basic Laws, which is merely a textual and stylistic requirement: see Mazen Masri, 'Unamendability in Israel – A Critical Perspective' in Richard Albert and Bertil Emrah Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Springer, forthcoming) 1, 6–7. This doctrine is aimed at identifying an amendment to a Basic Law which meets the technical requirements, but is not sufficiently substantive to be part of the constitution. It is intended to prevent the enactment of a regular norm in the disguise of a constitutional norm, merely for the purpose of shielding it from judicial review.
[84] ibid para 25 of Justice Beinisch's opinion.
[85] ibid paras 25–26 of Justice Beinisch's opinion.
[86] ibid para 5 of Justice Rubinstein's opinion.
[87] ibid para 7 of Justice Rubinstein's opinion.
[88] The State Comptroller, 'Audit Report: Ministry of Finance – Preparing the 2011–2012 Budget and Meeting the Deficit Target', 2014 (in Hebrew), http://www.mevaker.gov.il/he/Reports/Report_258/fd3ba6e6-dcd3-4e88-bbb5-a94d36dc0210/ozar-1.pdf.

budget for 2013–14 was temporarily extended for the second time. The reasoning this time was somewhat confusing. Initially, the explanatory notes provided that the pilot for the biennial budget was yet to be completed.[89] However, the explanation then seemed to abandon that line of reasoning in favour of elaborating on the unique circumstances of the period preceding the bill, which also required biennial budgeting for the following two years. Those circumstances included the severe delay in approving the budget for 2013 as a result of the elections held at the beginning of that year, which resulted in the need to approve two consecutive annual budgets in a tight schedule, and the forecasts of the government tax revenues and expenditure in 2013–14, which required a long-term plan in order to deal with a unique and hard financial situation.[90]

During the plenary deliberations, the Minister of Finance explained that the government would not enact the biennial budget as a permanent amendment in order to avoid weakening the opposition and the Knesset.[91] Nonetheless, on this occasion a deviation from the annual budgeting rule was excused only because of the unique circumstances of the following two years. The chairman of the Finance Committee had also pledged that this provision was to be extended for the last time.[92] Those statements imply that the pilot was terminated with unsatisfactory results. This assumption was further explicitly corroborated by the Legal Adviser to the Knesset.[93] It is rather perplexing why the explanatory notes mentioned the 'unfinished' experiment, while the conclusions from the experiment had clearly already been reached.

As promised, towards the end of 2014 the government laid before the Knesset an annual budget proposal just for 2015. However, before the three readings had passed, the Knesset was dissolved and early elections were announced to be held in 2015. As a result, the budget proposal for 2015 was delayed until the investiture of the 20th Knesset. Following the elections, instead of proceeding with the annual budget proposal, the government proposed a temporary amendment to the Basic Law once again, promulgating a biennial budget for 2015–16, despite the explicit commitment to avoid this in the future. Again, the main reason was the elections, which had pushed approval of the 2015 budget to the middle of the financial year in a way that would make it inefficient to generate two separate budgets for 2015 and 2016.[94]

The biennial budget was extended again in 2016 for the 2017–18 financial years by way of another temporary provision.[95] The 2017–18 amendment introduced a new 'convergence mechanism', which was intended to assist in mitigating the budgetary gaps that might arise from the potential failure in forecasting state income and expenditure so long in advance, in a biennial

[89] Draft Proposal to Basic Law: The State Budget for 2009–2012 and 2013 (Special Provisions) (Temporary Provision) (Amendment No 3), 2013, 749 *Government Draft Proposals* 260 (Israel).
[90] ibid.
[91] Minister of Finance, Yair Lapid, 22nd Meeting of the 19th Knesset (29 April 2013).
[92] The Chair of the Finance Committee, MK Moshe Gafni, was very clear about this matter, stating that 'from 2015 onwards there will only be an annual budget. Period': 29th Meeting of the 19th Knesset (20 May 2013).
[93] Yinon (n 77) 17.
[94] Draft Proposal to Basic Law: The State Budget for 2009–2014 (Special Provisions) (Temporary Provision) (Amendment No 4), 2015, 916 *Government Draft Proposals* 590 (Israel).
[95] Basic Law: The State Budget for 2017 and 2018 (Special Provisions) (Temporary Provision) (Original Law), 2016 (Israel).

budget regime.[96] During the legislative process, the government revealed for the first time that an important factor in its desire to adopt a biennial budget was that such an arrangement enhances governability by increasing political stability.[97] Political stability can be enhanced by not having to obtain a majority of 61 MKs in the Knesset plenary, as required by the original Basic Law. Unlike constitutional experiments or unique temporary circumstances, enhancing governability does not seem to be a typical justification for temporary measures, especially when the effect of the biennial budgeting system on governability could have been scrutinised at the time of the previous adoption of such measures.

It transpires that this special arrangement, which started as an exceptional response to an unusual economic crisis, has turned into a de facto permanent arrangement intended to enhance governability and the stability of the executive. During the Finance Committee deliberations over the 2017–18 biennial budget, the Knesset's legal adviser clarified that this time the Knesset must opt for a permanent enactment as no objective justification existed for a temporary extension yet again. He stressed that in legal terms extending the biennial budgeting system on a temporary basis is far more problematic than enacting it permanently, and it would be difficult to defend this arrangement in court.[98] However, before the final vote on the 2017–18 budget the legal adviser clarified that the new arrangement entails some experimental elements, which may amount to a sufficient justification for temporary legislation.[99] Eventually, the Knesset again adopted the biennial budgeting arrangement on a temporary basis.

The inconsistent accounts of the extensions of the biennial budget model, along with refraining from officially adopting it on a permanent basis, suggest that there may be other undeclared motives for this 'constitutional mutation'. It is unclear why the government prefers a constant extension of the temporary provision rather than entrenching it in a permanent amendment. At least in terms of procedure, the former does not set a higher approval threshold than the latter.

A petition was submitted to the HCJ in October 2016, challenging the adoption of the 2017–18 budget. The main arguments made by the petitioners were, inter alia, that the adoption of the 2017–18 budget did not meet the conditions set in the *Baron* judgment for adopting a temporary constitutional provision; that there was no real experimental element in the 2017–18 budget that justified opting for temporary legislation; and that the biennial budgeting system undermined the principle of the separation of powers.[100] In September 2017 the HCJ upheld the petition in a unanimous judgment handed down by an enlarged panel of seven judges.[101] The HCJ ruled that in view of the *Baron* judgment, the adoption of a fifth temporary constitutional amendment to extend the biennial budgeting system for another two years amounted to a misuse of the constituent

[96] Draft Proposal to Basic Law: The State Budget for 2017 and 2018 (Special Provisions) (Temporary Provision), 18 July 2016, 1063 *Government Draft Proposals* 1212 (Israel).
[97] ibid.
[98] Yinon (n 77).
[99] The 422nd Meeting of the 20th Knesset Finance Committee (25 July 2016) 15–16.
[100] *The College of Law and Business* (n 34). The author represented the petitioners in this case. The petition was based on research which served as a basis for this article.
[101] ibid.

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authority.[102] Justice Rubinstein stressed that the case reflected two alarming and intertwined trends in Israeli democracy: first, a decline in the role of the Knesset as a supervising authority over governmental activity; second, a decline in the status of the Basic Laws, expressed both in various temporary provisions that seek to amend the Basic Laws temporarily, without sufficient public debate, and in the broader context of the failure to complete the state's full constitution.[103] Justice Rubinstein maintained that the legislature did not internalise the HCJ's comments in the *Baron* decision:[104]

> Time and time again, the Knesset passed a biennial budget, against the backdrop of political convenience, in contrast to the positions of professionals who emphasized the huge deficit caused by the biennial budget … and against the various statements made by decision makers cited above.

As for the remedy, the HCJ determined that the temporary amendment should not be revoked, since the court has never before intervened in a Basic Law, and also because of the potentially severe impact of revoking the state budget in the middle of the financial year. Instead, the court issued a 'revocation alert', which clarified that any future temporary amendment to the Basic Law to establish a state budget of more than one year could expect to be revoked.[105] This was the first occasion on which the HCJ has exercised judicial review over a constitutional instrument through the 'misuse of constituent authority' doctrine, while outlining several indicators of such a phenomenon.

To summarise, unlike the temporary provisions enacted before 2009, prior to Netanyahu's coming to power, the series of temporary provisions regarding the biennial budget were reasoned in a vague and inconsistent fashion, and were more readily exercised. As is illustrated by other instances below, temporary constitutionalism – which until 2009 in Israel was a straightforward tool, used by the legislature as a last resort to address clear constitutional complications – has since developed into a flexible, off-the-shelf bypass solution to a wide variety of constitutional restrictions. This crucial point will be problematised in the following section.

Limitation on the number of ministers

Since 1999, Basic Law: The Government, which regulates the confines of the executive branch, has not provided a limit on the number of ministers in the government.[106] In 2014, however, the 19th Knesset amended this Basic Law and limited the number of ministers to 19 in order to allow

[102] ibid para 32 of Justice Rubinstein's opinion.
[103] ibid para 11 of Justice Rubinstein's opinion.
[104] ibid para 33 of Justice Rubinstein's opinion.
[105] Indeed, following the *College of Law and Business* judgment, in 2018 the government promulgated an annual draft budget law for 2019 only.
[106] An earlier version of the Basic Law, which was valid between 1992 and 1999, limited the number of ministers in the government to 18 members: Basic Law: The Government, s 33. Indeed, when Benjamin Netanyahu was first elected Prime Minister in 1996, he met the limit and formed a government of 18 ministers.

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more efficient decision making within the executive and to avoid unnecessary expenditure of public funds.[107]

The 20th Knesset, in May 2015, enacted a temporary provision to Basic Law: The Government, which removed the limitation enacted only a year earlier for the duration of the 20th Knesset only. In effect, the temporary provision deferred the start of the limitation of 19 ministers to the 21st Knesset. The explanatory notes to the new provision rested mainly upon the proposition that in view of the results of the elections to the 20th Knesset, establishing a government required the inclusion of a large number of parties in the coalition. These parties were entitled to proportional representation in the government, for which the limitation of 19 ministers did not suffice.[108] At first glance, since limiting the number of ministers had not yet been implemented at the time, its mere deferral does not seem so harmful as it did not deviate from existing constitutional arrangements but merely postponed their commencement to a future date.[109] Also, prima facie, this seems like a legitimate 'unique circumstances' type of reasoning for removing the limitation through a temporary provision. Furthermore, generally it is widely agreed that the size of the government should be limited,[110] so a temporary deviation from the restricting rule is more efficient than a permanent enactment. Under those circumstances, a temporary provision in this case should have been endorsed as the lesser of two evils.

However, despite the 'unique circumstances' invoked for justifying the enactment of a temporary provision in this case, the reasoning for the provision falls short in addressing certain additional factors regarding the composition of the 2015 government. The established government was based on a coalition of five different parties, which was not an unusual composition in comparison with previous governments, and certainly not one that could not have been anticipated by the Knesset in setting the initial constitutional limitation a year earlier. Considering it as unique circumstances which required temporary measures is rather peculiar. Also, the government eventually comprised 21 ministers, only two more than the original limitation of 19. It is doubtful whether a temporary constitutional amendment can be excused merely for the purpose of appointing another two ministers to the government, especially as it did not seem to be a true governmental necessity in that some ministerial positions were created merely for the purpose of filling the government with 21 ministers, while the Prime Minister held several key ministerial

[107] Basic Law: The Government (Amendment), 2014, in force starting with the term of the following (20th) Knesset.

[108] Draft Proposal to Basic Law: The Government (Amendment No 3 and Temporary Provision for the 20th Knesset), 11 May 2015, *Government Draft Proposals* 915 (Israel).

[109] This type of temporary legislation has been coined by scholars 'sunrise clauses'. Generally speaking, such clauses are far more acceptable in the constitutional sphere as their delayed application tends to remove extraneous considerations: Daniel E Herz-Roiphe and David Singh Grewal, 'Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism' (2015) 90 *New York University Law Review* 1975, 1985 (noting that '[s]unrise lawmaking … reflects the spirit of constitutionalism: it enables contemporary majorities to cast their eyes forward and think only of the future').

[110] Such a limit seems appropriate in Israel where, compared with other countries, the size of the government is disproportionally higher than the size of the population and the legislature: see discussion in HCJ 3234/15 *Yesh Atid Party v The Speaker of the Knesset* (9 July 2015), para 1 of Justice Naor's opinion.

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positions.[111] Furthermore, unlike its predecessors, the appointed government enjoyed the support of only 61 MKs, the smallest possible coalition. It is perplexing how such a narrow coalition could justify a larger government.

Aggregately, these factors illustrate that proposing a temporary constitutional provision was not perceived as a unique and extreme constitutional measure in the eyes of the Israeli government of 2015. In the eyes of this government, ensuring its stability by offering more ministerial jobs to the political factions can amount to an exceptional situation which requires exceptional measures. The concept of 'exception' nowadays seems to stretch in Israel's constitutional law across various types of scenario, perceived in a much wider manner than before.

Upon passing three readings in the Knesset, the temporary provision was challenged in the HCJ by the former Minister of Finance, MK Yair Lapid, who initiated the original limitation in 2014 that had now been deferred. The petition was based on the *Baron* judgment, which stipulated that temporary constitutional arrangements should be adopted sparingly. The petition was rejected by the court, maintaining that this provision is not of the type to justify interference in the work of the legislature, as it holds mainly administrative/budgetary implications, and does not entail any violation of human rights or harm to any substantial principle of democracy.[112] Further, the HCJ considered this provision to be less harmful as it merely deferred the start of the new amendment rather than establish a new constitutional order for a limited period.[113]

By rejecting the petition on those grounds, the HCJ overlooked relevant factors related to the legal question at stake. The removal of the limit on the number of ministers brought about instability in relation to the structural boundaries of the government as it temporarily cancelled a structural norm that was enacted only a year earlier. The main risk of temporary constitutionalism to democracy is generated by its injection of instability into a document that inherently ought to be stable. Indeed, generating constitutional instability is a popular modern way for a democratic government to entrench its power and weaken the democratic order. Governments nowadays will usually avoid trying to entrench their power through dramatic amendments that destroy the principle values of the constitution, but rather focus on carrying out enough institutional alterations to perpetuate their own power.[114]

Thus, the analysis should focus not on how important the amended provision is but on how injurious it would be to the stability of the constitution. Setting a limit on the number of ministers in the government is clearly a structural element of the constitution, which reflects few, if any, political views or democratic repercussions. It exists solely for the purpose of setting clearly predefined limits for the power of the executive. The content of those rules is inferior to their mere long-lasting existence. In terms of the structural aspects of the constitutional document 'it is more

[111] For example, Ofir Akunis and Ze'ev Benjamin Begin were appointed as ministers without portfolio, while the Prime Minister served also as Minister for Health, Foreign Affairs, Communications, and Regional Cooperation.
[112] *Yesh Atid Party v The Speaker of the Knesset* (n 110); see also *The College of Law and Business* (n 34) para 5 of Justice Hendel's opinion, in which he compares the *Yesh Atid* judgment and the *College of Law and Business* judgment.
[113] *Yesh Atid Party v The Speaker of the Knesset* (n 110) para 13 of Justice Naor's opinion.
[114] Landau (n 19) 229.

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important that some matters be settled than they be settled right'.[115] When it comes to structural aspects of the constitution, the stability argument is stronger than it is in relation to substantive moral matters, which would probably be more suitable for periodic adjustments. As opposed to structural elements, in the domain of basic moral principles 'it is mostly truth that we value, not stability'.[116] By allowing the temporary removal of a structural constitutional limitation on the executive, the HCJ authorised the future removal of other structural limitations set by the constitution in the event that the government is not interested in adhering to them. In so doing, the court remained indifferent to the strategy of undermining the constitution through temporary constitutional amendments. That being said, it does seem that this judgment is consistent with the threefold test for identifying a misuse of the Basic Law established in the *Baron* judgment, which concentrates mainly on the content of the amendment rather than its influence on constitutional stability.[117]

Ministerial resignations from the Knesset

In July 2015 the 20th Knesset promulgated another temporary constitutional amendment, a third of its kind in a period of only two months. It sought a special arrangement, to apply only during the term of the 20th Knesset, whereby ministers who also serve as MKs may resign from their position with the Knesset and allow the next candidate in their party to take their place until their ministerial capacity terminates, after which they can return to their position as MKs. Normally, a member who resigns from the Knesset cannot revert to his or her position as an MK until the next elections, even if his or her ministerial capacity terminates. The explanatory notes provided that the arrangement was intended to allow ministers to focus solely on their governmental work, while the new MKs who replace them could focus on their party's parliamentary work.[118] It was also claimed that the law would bolster the separation of powers between the executive and the legislature.[119] The draft bill has undergone significant changes throughout the legislative process, inter alia as a result of an accusation that it was a bespoke bill, aimed solely to ensure parliamentary positions for several individuals from the coalition who had not been elected to the Knesset through the ordinary process.[120]

Initially the government promulgated the bill as an ordinary, permanent constitutional amendment. Interestingly, during deliberations in the parliamentary committee, it was the opposition members who proposed transforming the arrangement into a temporary provision, in order to

[115] David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *The University of Chicago Law Review* 877, 907.
[116] Andrei Marmor, 'Are Constitutions Legitimate?' (2007) 20 *Canadian Journal of Law and Jurisprudence* 69, 79.
[117] See also nn 81–84 and accompanying text above.
[118] Draft Proposal to Basic Law: The Knesset (Amendment No 42 and Temporary Provision (Termination of Service of a Member of Knesset who Serves as a Minister or Deputy Minister)), 20 July 2015, *Government Draft Proposals* 940 (Israel).
[119] Eyal Zandberg, Director of Public Law at the Ministry of Justice, 29th Meeting of the 20th Knesset Constitution, Law and Justice Committee (27 July 2015) 7.
[120] MK Michal Rozin, ibid 21.

reduce damage to the Israeli constitution.[121] Indeed, in order to appease the opposition, the bill was eventually promulgated as a temporary provision only for the term of the 20th Knesset. The shift to a temporary arrangement was claimed also to allow a pilot for scrutinising the consequences of this new far-reaching arrangement.[122]

In spite of the accusations regarding the bespoke nature of the amendment, the opposition members considered it preferable to enact it on a temporary basis. On the one hand, this case serves as an example of a shrewd application of temporary constitutionalism, as adding a sunset clause to the amendment allowed its swift adoption, thus reducing the decision costs it entailed. However, in this case the sunset clause added to the bill required a different reaction from the opposition: insofar as the opposition was of the opinion that it was indeed a personalised arrangement, deriving from political distress, adopting it as part of the constitution enhanced public distrust in the constitutional project. Be they perpetual or temporary, personalised arrangements cannot be claimed to align with the 'higher aspirations of the polity',[123] and thus cannot form part of the constitution. In some countries this principle is officially acknowledged. In the Czech Republic, for example, on 10 September 2009 the Constitutional Court struck down a constitutional amendment because it was designed to address a specifically designated situation. The amendment was considered by the court to be 'an individual decision, dressed in the form of a constitutional act', which amounted to a breach of the constitution and must be annulled.[124] In fact, in contrast to the opposition theory, enacting a personalised arrangement for a limited period only exacerbates the provision's potential harm to democracy as, in addition to its inadequate content, it will jeopardise the generality principle of the constitution, while undermining its stability.[125]

On a different note, the motivation behind proposing a pilot rather than permanent application raises doubts over the extent to which this proposed experiment would genuinely be observed and learned from. Insofar as the pilot was suggested merely for political reasons, it might not be regarded as a true platform for observation and learning. In such a case, there would be no objective justification for its temporary application in the first place. Ensuring the existence of a significant *ex post* evaluation mechanism is therefore key to avoiding abusive employment of experimental legislation in the future.

[121] MK Osama Saadi, ibid 22–31.
[122] MK Nissan Slomiansky, Chair of the Constitution, Law and Justice Committee, 32nd Meeting of the 20th Knesset (28 July 2015) 3.
[123] For more on the topic see nn 6–9 and accompanying text.
[124] However, unlike the Israeli case, in the Czech constitution there is a non-amendable provision protecting the 'rule of law' and the debate in that case surrounded this provision: Constitutional Court, Pl ÚS 27/09, *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*, 10 September 2019, https://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de. For a critical analysis of this judgment see Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 *Vienna Journal on International Constitutional Law* 29.
[125] See also the reference by Justice Melcer to personalised provisions in *The College of Law and Business* (n 34) and at 5.2.1 below.

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To summarise, since 2009 the Israeli government has decided to employ temporary constitutionalism with relative ease. By 2016 this instrument had been exercised on seven different occasions, four of which were during the term of the 20th Knesset, and three in a period of only two months. Compared with their prevalence until 2009, when temporary constitutional provisions were implemented five times during a period of 51 years, one can easily identify a growing trend of temporary constitutionalism in Israel, which peaked in 2015.[126] Furthermore, since 2009 the reasons for triggering the implementation of temporary constitutional measures have become much broader. Until 2009 this mechanism was used either to address exceptional and unique circumstances, such as the 1973 war, or formed part of an orderly information-based framing; today it can best be described as a target drawn around an arrow already embedded in the wall. Various extraneous political considerations, not of a constitutional nature, encourage the government to temporarily amend the constitution in order to resolve particular designated situations. Only after their proposal does the government provide an explanation for proposing them on a temporary basis. The various declared reasons for choosing the temporary instrument sometimes lack internal logic, and in some cases even contradict themselves.

Two distinguishing characteristics of the new trend have been identified during this section. First, unlike in the past, temporary constitutionalism in Israel is now mainly about empowering the government against the opposition. Second, the use of temporary constitutional provisions became a means for enacting de facto permanent norms without officially acknowledging them as an integral part of the constitution. The attraction of the tool of temporary amendment, considering the ease with which a permanent constitutional amendment can be passed in Israel, is quite peculiar. The next section will scrutinise the possible reasons behind the government's attraction to temporary measures.

4. THE DISCRETE CHARM OF TEMPORARY CONSTITUTIONALISM

As noted earlier, the main benefits of temporary legislation can easily be obtained via an ordinary amendment, which in turn can be revoked in the event of an unsatisfactory outcome or when it is no longer necessary. In fact, one of the most significant experimental projects in the Israeli constitution – the direct election of the Prime Minister – was enacted and revoked through an ordinary amendment procedure, without resorting to temporary measures.[127] Indeed, in a regime with a flexible constitution the instrument of temporary constitutionalism is suspected of being superfluous. Nonetheless, in Israel its use has become more and more prevalent in recent years. The somewhat vague, inconsistent or unconvincing reasoning provided by the government for opting for temporary arrangements suggests that there are other undeclared motivations for the government to opt for temporary constitutionalism.

[126] Interestingly, an increasing use of temporary measures was also identified recently in Israeli ordinary legislation: Bar-Siman-Tov (n 11) 14–15. Examining whether those two trends are intertwined is beyond the scope of this article.

[127] See also nn 69–70 and accompanying text.

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As maintained by Justice Rubinstein in the *Baron* judgment,[128] temporary amendments usually stem from narrow political desires, which are virtually unrelated to the transcendent nature of the constitution. For example, a temporary amendment may be triggered by a wish to satisfy the demands of various factions of the coalition. This was vividly illustrated in the removal of the limitation on the number of ministers, as well as in the enabling of ministerial resignation from the Knesset. Temporary constitutional amendments can also be triggered by a desire to entrench the government's power. For example, in the biennial budgeting case an important factor behind this initiative was the attempt to entrench 'political stability' (by reducing the opposition's ability to vote for early elections).[129] Undoubtedly, such narrow political reasoning cannot form an objective justification for amending the constitution. In fact, they are exactly the type of momentary whim of the majority that the constitution is meant to prevent.[130]

The interference of a narrow political agenda within the constitutional sphere may appear to be more reasonable with the instrument of temporary constitutionalism. Temporary constitutional amendments allow the government to be less accountable for its undemocratic nature, both horizontally and vertically.[131] Horizontally, judicial review will be more tolerant, as temporary provisions are generally deemed less harmful than permanent enactments, and thus less susceptible to intervention. The Israeli Supreme Court has thus developed a general rule according to which a temporary law is not the same as a permanent law, and 'the less we declare temporary laws void, the better'.[132] The underlying logic of this rule is proportionality: insofar as a law harms a basic principle or right, this harm is reduced when the law is enacted merely for a predefined period. Moreover, the temporary nature of the law secures future in-depth deliberations by the government and the legislature should they wish to extend it or enact it permanently.[133] This positive approach to temporary legislation resonates also among scholars who suggest that courts should apply greater deference to experimental rules in order to incentivise policy experimentation.[134] Knowing in advance that an anticipated controversial bill will be subject to reduced judicial

[128] *Baron v The Knesset* (n 44) para 5 of Justice Rubinstein's opinion.
[129] Explanatory Notes to the Draft Proposal to Basic Law: The State Budget for the 2017 and 2018 (Special Provisions) (Temporary Provision) (n 96).
[130] See nn 6–9 and accompanying text.
[131] Horizontal accountability is defined among scholars as the capacity of state institutions to check abuses by other public agencies and branches of government, while vertical accountability is the means through which citizens, mass media and civil society seek to enforce standards of good performance on officials: see, eg, Leonardo Morlino and Luiss G Carli, 'How to Assess a Democracy: What Alternatives?', Report, XV International Academic Conference on Economic and Social Development, 2014; Leonardo Morlino, 'Good and Bad Democracies: How to Conduct Research into the Quality of Democracy' (2004) 20 *Journal of Communist Studies and Transition Politics* 5; Guillermo A O'Donell, 'Delegative Democracy' (1994) 5 *Journal of Democracy* 55. Diamond and Morlino contend that both vertical and horizontal accountability form part of the 'eight dimensions of democratic quality': Larry Diamond and Leonardo Morlino, 'The Quality of Democracy, an Overview' (2004) 15(4) *Journal of Democracy* 20, 22.
[132] HCJ 7052/03 *Adalah v Minister of Interior* 2006 PD 61(2) 202, para 118 of Justice Cheshin's opinion, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\03\520\070\a47&fileName=03070520_a47.txt&type=4 (English translation).
[133] ibid.
[134] Zachary J Gubler, 'Experimental Rules' (2014) 55 *Boston College Law Review* 129.

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review in the event it is enacted on a temporary basis may incentivise the legislature to opt for temporary provisions and extend them from time to time.

That being said, the reduced scrutiny of temporary provisions in Israel referred to above addresses mainly acts of primary legislation which are inferior to the constitution, rather than amendments to the constitution itself. Regardless of their level of temporariness, judicial review of constitutional amendments is a complicated field of law. In countries whose constitutions include eternity clauses (constitutional provisions that cannot be amended)[135] such scrutiny is carried out through the 'unconstitutional constitutional amendment' doctrine.[136] An increasing number of constitutions contain explicit non-amendability clauses, which create immunity from future amendment for certain essential characteristics of the constitution.[137] Many constitutions also introduce a constitutional amendment rule which entails various voting thresholds and non-voting criteria that protect certain core values in the constitution, even if not prohibiting their amendment completely.[138] Also, in certain jurisdictions courts have acknowledged the supremacy of certain constitutional values and their immunity from future amendment, even without a formal 'eternity clause' to shield them. The Indian court, for example, developed 'the basic structure doctrine', which allows the court to strike down amendments to the constitution on the grounds that they are injurious to the basic structure of the constitution.[139] The Constitutional Tribunal of Peru has declared that it is competent to invalidate constitutional amendments that violate basic legal principles and basic democratic values;[140] and in Japan it is believed among scholars that the three basic principles upon which the constitution is built – popular sovereignty, the guarantee of fundamental human rights, and pacifism – cannot be altered through the process of constitutional amendment.[141] In Israel the authority of the court to examine the constitutionality of amendments to the constitution has been mentioned several times in obiter dicta in the case law, but has not yet been applied.[142] Thus, in the constitutional sphere the particular rule regarding reduced scrutiny of temporary legislation appears to be of low relevance because of the

[135] Eternity clauses provide immunity to certain parts of the constitution from future amendment: see, eg, art 4 of the Constitution of the Republic of Turkey; and art 79(3) of Basic Law for the Federal Republic of Germany. For further discussion regarding the tension between eternity clauses (referred to by some as 'entrenchment clauses') and popular sovereignty see, eg, Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 663; Sharon Weintal, 'The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory' (2011) 44 *Israel Law Review* 449.

[136] *The College of Law and Business* (n 34) para 35 of Justice Rubinstein's opinion; *Baron v The Knesset* (n 44) para 32 of Justice Beinisch's opinion.

[137] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 38.

[138] Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 *Wake Forest Law Review* 913, 918.

[139] Roznai (n 137) 42–47. For a review of the Indian court's decisions and further examples of judicial review of constitutional amendments see Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008).

[140] Roznai (n 137) 67.

[141] ibid 53.

[142] *Baron v The Knesset* (n 44) para 33 of Justice Beinisch's opinion; *The College of Law and Business* (n 34) para 28 of Justice Rubinstein's opinion.

limited ability of the court to review a constitutional act in any event, be it permanent or temporary. Against this backdrop, the development of a 'misuse of constituent authority' doctrine, as applied in the 2017–18 Israeli biennial budget case, is revolutionary and groundbreaking. The doctrine allows the court to intervene in a formal constitutional act, be it permanent or temporary, without acknowledging its power to review constitutional amendments, as it does not acknowledge their constitutional status in the first place.[143] Nevertheless, the Israeli Supreme Court has stressed on several occasions that the tolerance towards temporary legislation also applies with regard to temporary constitutional amendments, even more than it does in the case of permanent constitutional amendments.[144]

Vertically, public opinion is also less resistant to temporary harm to the constitution. A temporary amendment allows the legislature to create a distinction between the permanent constitution, which is drafted as a flawlessly democratic document, and its temporary provisions, which may contain its anti-democratic parts.[145] By maintaining that certain provisions which undermine the democratic order do not form an integral part of the constitution, governments can enact such provisions while still coming across as democratic from a distance.[146] Such a distinction between the permanent constitution and its temporary provisions may satisfy the general public and prevent it from fully deliberating the desirability of those provisions as their temporariness makes such deliberations seem unnecessary.

It is not only the public who tends to find temporary provisions less harmful to democracy. As can be seen from the legislative process of the special resignation procedure for ministers from the Knesset, opposition members themselves may be found more tolerant of temporary arrangements as they might perceive such arrangements to be less harmful than permanent provisions.[147] Furthermore, even if the opposition wishes to resist such an arrangement, temporary legislation is usually enacted hurriedly in a speedy legislative procedure that does not allow sufficient time for exhaustive deliberation over its necessity and desirability. In Israel the Knesset often adopts temporary constitutional bills in a swift procedure. It is not uncommon for temporary amendments to

[143] See Justice Joubran's description of this doctrine: 'As we walk along this corridor, we do not examine the Basic Law in itself, and we are not required to understand the meaning and consistency of the arrangements listed therein. The purpose of this review is to ensure that the nature of these arrangements does not contradict their coronation as basic laws and their unique normative status': *The College of Law and Business* (n 34) para 5 of Justice Joubran's opinion.

[144] ibid para 6 of Justice Melcer's opinion; HCJ 24/01 *Ressler v Israeli Knesset* 2002 PD 56(2) 699, 713–16; HCJ 1661/05 *Gaza Coast Local Council v The Knesset* 2005 PD 59(2) 481, 553.

[145] The ambiguous relationship between temporary and permanent provisions within the constitution was one of the reasons for the Hungarian Constitutional Court to strike down several 'transitional provisions' enacted in Hungary during 2012 in order to specify in detail how to phase in the new constitution, which came into force during the same year. The Hungarian court stressed that a constitutional amendment has to take the proper form and in fact be directly incorporated into the constitution. It could not be tacked on as a 'small constitution' at the end of the text, leaving the relationship between the amendment and the original text unclear: Scheppele (n 4) 80.

[146] Landau (n 19) 191.

[147] See nn 118–122 and accompanying text.

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be promulgated and voted on in three readings within a few days,[148] sometimes even in a single day.[149] Indeed, the lack of in-depth deliberation which is embedded in the enactment procedure of temporary legislation has led the Israeli Supreme Court to contemplate whether, contrary to the accepted rule which provides a more tolerant approach to temporary legislation, such provisions should actually receive more stringent judicial review.[150]

The benefits for the government in terms of public opinion are also reflected in another layer. Consider a scenario where the government wishes to amend a widely accepted constitutional norm. Suggesting a permanent amendment might raise severe objections. However, as maintained above, the public may be more amenable to a temporary amendment. Upon adopting the new norm on a temporary basis, the government may now seek to temporarily extend the recently enacted temporary provision, as in the case of the Israeli biennial budgeting system. Such an extension will be more tolerable as it will not be perceived as an extreme deviation from the current (though temporary) state of affairs. Scholars have already identified that maintaining the current state of affairs is a highly ranked factor by individuals in the process of decision making. An experiment in decision making under conditions of uncertainty has illustrated that decision makers exhibit a significant 'status quo bias' – they tend to prefer their current or previous decisions when asked to make a choice out of several options.[151] For example, applying the status quo bias to election races shows that the incumbent office holders are expected to gain significant advantage over their opponents as a result of the bias. According to this experiment, in a scenario of two candidates in an election campaign who hypothetically would be expected to divide the vote evenly if neither of them were an incumbent, if one of them was in office before the elections, he or she would be expected to win the election by a margin of 59 to 41 per cent.[152]

One explanation provided for the 'status quo bias' is the tendency of people to assume, without reasoning, the ideal nature of the current state. This idea builds on the 'naturalistic fallacy', according to which people tend to conflate matters of fact (what is) with prescription (what ought to be).[153] Applying the status quo bias in our case suggests that after enacting a problematic provision for a temporary period once, enacting it again will be much easier in terms of public

[148] For example, the temporary amendment that removed the limitation on the number of ministers (Basic Law: The Government (Amendment No 3 and Temporary Provision for the 20th Knesset)) was adopted within three days (11–13 May 2015); and the temporary amendment which allowed ministers to resign from the Knesset (Basic Law: The Knesset (Amendment No 42)) was adopted within nine days (20–29 July 2015).

[149] As was the case in the enactment of Basic Law: The State Economy for the years 2009 until 2012 (Special Provisions) (Temporary Provision) (Amendment No 2), which was first promulgated on 19 March 2013 and passed three readings on the same day; and in the enactment of Basic Law: The State Economy for the years 2009 and 2010 (Special Provisions) (Temporary Provision), which was first promulgated on 6 April 2009 and passed three readings on the same day.

[150] HCJ 466/07 *Galon v Attorney General* 2012 PD 65(2) 44, paras 24–27 of Justice Arbel's opinion.

[151] William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1 *Journal of Risk and Uncertainty* 7.

[152] ibid 9.

[153] Scott Eidelman and Christian S Crandall, 'Bias in Favor of the Status Quo' (2012) 6 *Social and Personality Psychology Compass* 270, 273.

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opinion, as it will be perceived as a mere extension of the status quo to which people are usually more favourably inclined.

The strength of the status quo bias is expected to correlate with the length of time during which the current arrangement is in force. If existence is beneficial, a longer existence should be even better. In a study that investigated this heuristic – also called 'the longevity bias' – participants were given a description of acupuncture, described as having been practised for 250, 500, 100 or 2000 years. The longer it was said to have existed, the higher the evaluation it received from participants.[154] Applying longevity bias in our case suggests that the most recent extension is more strongly affected by the status quo bias than its predecessors. While the first extension was introduced only two years after the launch of the biennial budgeting system, the fourth extension was introduced eight years after its initial enactment when, according to the theory of longevity bias, it was already established in the public consciousness as a long-lasting status quo policy. It follows that enacting a controversial constitutional arrangement will be less criticised by public opinion, as its temporariness will first come across as a minor detriment that is proportional. Afterwards, should the government wish to extend the temporary arrangement, resistance will be even weaker as the controversial arrangement will enjoy the benefits of the 'status quo bias'. It will be seen as a policy which does not introduce a dangerous precedent.

Temporary constitutionalism therefore provides an appealing legislative route for a government that seeks to increase its power while inhibiting both judicial review and public critique of its actions. The instrument of temporary constitutionalism offers a conduit to entrench the government in power without it being accountable for the influence of this instrument on the constitution and democracy.

5. ABUSIVE CONSTITUTIONALISM AND ABUSIVE TEMPORARY CONSTITUTIONALISM

Entrenching the ability to dominate the political space through constitutional change is an increasingly important phenomenon, which David Landau has named 'abusive constitutionalism'.[155] Temporary constitutionalism in Israel during the past seven years illustrates Landau's 'abusive constitutionalism'. However, the Israeli example reveals a unique manifestation of this phenomenon: abusing the constitution through the instrument of the temporary amendment.

[154] Scott Eidelman, Jennifer Pattershall and Christian S. Crandall, 'Longer is Better' (2010) 46 *Journal of Experimental Social Psychology* 993.

[155] Landau (n 19). Landau's article is part of a burgeoning literature examining the phenomenon of abusive democratic measures for entrenching the incumbent's power and insulate it from serious democratic challenges: see, eg, Ozan O Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa Law Review* 1673 (discussing how sub-constitutional methods are used to perpetuate political power); Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge University Press 2010) (describing the new trend of regimes with formal democratic institutions, but which are not truly democratic because 'the playing field is heavily skewed in favor of incumbents'); Kim Lane Scheppele, 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate"', *Newsletter of the European Politics and Society Section of the American Political Science Association*, 2013, http://www.academia.edu/2773381/Reflections_on_Democracy_in_Eastern_Europe_5_author_forum_ (applying the term 'Frankenstate' to describe regimes that perpetuate their incumbents through constitutional processes).

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The use of temporary measures for abusing the constitution will be referred to in this article as 'abusive temporary constitutionalism'.

5.1. ABUSIVE CONSTITUTIONALISM

The starting point of Landau's argument is that the number of traditional methods of overthrowing a democracy, such as military coup, has fallen sharply over the past few decades since the 1960s.[156] In the post-cold war era, the world lowered its tolerance to non-democratic regimes, and aspiring dictators now have an incentive to appear to be playing by the democratic rules.[157] The vacuum created by the decreasing amount of clear authoritarianism was filled with regimes that create authoritarianism or semi-authoritarianism through more subtle methods, which involve the employment of constitutional changes in order to make a state significantly less democratic.

Landau portrays how some current powerful incumbent rulers entrench their position in power and make themselves difficult to dislodge. In 1998, for example, the President of Venezuela, Hugo Chavez, was keen to redraft a new constitution that would grant him greater power. He decided to hold elections for the Constituent Assembly, while he himself designed the rules for the elections in a way that was favourable to him. For instance, his party, which won 60 per cent of the votes in the election, acquired 90 per cent of the seats in the new assembly. As a result of his vast control in the new assembly, Chavez simply drafted a new constitution which removed the limit on the single four-year presidential term and weakened the opposition and other state institutions.[158] The new constitution and its later amendments helped Chavez to build a 'hybrid' regime, or a 'competitive authoritarian regime', which allowed him to maintain power until his death in 2013.

Landau distinguishes between clearly authoritarian regimes that were established through constitutional mechanisms, such as the definitive example of the Nazi regime, and the newly identified phenomenon of 'abusive constitutionalism'. Even though the Nazis took power through constitutional measures, they transformed the Weimar Republic into a wholly authoritarian regime. The idea of 'abusive constitutionalism' does not include straightforward cases of the democratic state which becomes wholly authoritarian, but rather the 'hybrid' regimes where elections are held, formal democratic institutions exist and are accepted as the primary ways to gain power. However, incumbents in such regimes abuse their powerful position to gain significant advantage over their opponents.[159] A regime would be regarded as part of the 'abusive constitutionalism' phenomenon if it is characterised by a democratic appearance at both the domestic and global levels. Such a regime poses a new theoretical challenge as it entrenches its power in ambiguous measures that are hard to identify.

[156] Landau (19) 191, 197.
[157] ibid 195.
[158] ibid 206.
[159] ibid 199.

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Landau maintains that abusive constitutionalism cannot be justified as a mere act of normal constitutionalism – namely, the use of constitutional changes that occurs in various democracies from time to time. The unique characteristic of abusive amendments is their negative impact on the democratic order.[160] Focusing on the structure of the regime, abusive constitutionalism will be carried out mainly through amending institutional rather than human rights aspects of the constitutional document.

Since abusive regimes demonstrate rhetorical commitment to democracy and are not charged with clear anti-democratic ideologies, tackling their behaviour through the German concept of 'militant democracy' (namely, banning undemocratic parties from participating in the elections) is seen as futile.[161] In order to restrain the desire of incumbents to weaken their opponents or to entrench their power, other measures should be taken. Landau suggests the mechanism of the tiered constitutional amendments threshold. Since modern 'competitive authoritarian regime' movements do not try to destroy basic values and human rights but rather focus on structural aspects, it can be helpful to entrench the structural aspects of the constitution on a higher tier, in order to set a higher threshold for amending the structural parts of the constitution.[162] This suggestion is innovative in comparative constitutional law discourse, as it is usually assumed that states entrench on a higher tier their most fundamental values,[163] which are not the obvious targets for abusive constitutionalism actors. Another route for battling abusive constitutionalism is through the courts, which can exercise the 'unconstitutional constitutional amendment doctrine'. This doctrine, according to which certain constitutional amendments may be unconstitutional if they deviate from the state's core values, has been exercised by several constitutional courts throughout the world, and may serve as an effective solution for constitutional amendments that undermine the democratic order.[164] However, this doctrine is widely criticised among scholars, who claim that it reflects an extreme counter-majoritarian approach.[165] Another optional response to abusive constitutionalism may be to punish governments that undermine democracy by introducing 'democracy clauses' in international law treaties.[166] Democracy clauses provide that under certain circumstances, a transition from a democratic to a non-democratic regime will be punished by international actors in the region.[167]

All of these proposed measures cannot fully address the democratic challenge introduced by abusive constitutionalism, which in its nature is a subtle and ambiguous mechanism that appears

[160] ibid 214.
[161] ibid 219.
[162] ibid 229; see also Albert (n 135).
[163] See, eg, the eternity clauses of the German and South African constitutions, which entrench certain human rights on a higher tier.
[164] For a comparative analysis of the use of this doctrine see, eg, Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321; Gözler (n 139).
[165] Landau (n 19) 232. For an introduction to the counter-majoritarian difficulty in general, see Alexander M Bickel, *The Least Dangerous Branch*: *The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962).
[166] Landau (n 19) 249.
[167] ibid.

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to be clearly constitutional and is therefore hard to monitor and prohibit.[168] Landau concludes that there are few adequate responses to the increasing phenomenon of abusive constitutionalism.[169]

5.2. ABUSIVE TEMPORARY CONSTITUTIONALISM

The series of temporary constitutional amendments in Israel since 2009 represents a clear example of Landau's abusive constitutionalism. The underlying motivation for enacting those temporary provisions appears to be the government's intent to entrench its dominant position. The temporary constitutional amendments were designed to either weaken the opposition's ability to overthrow the government (in the case of the biennial budgeting system), or to satisfy particular narrow political demands of various parties in the coalition (in the case of the limit on the number of ministers, or the special rules for ministerial resignation from the Knesset). Exactly as depicted by Landau, the constitutional changes were subtle and ambiguous, thus not affecting the general democratic appearance of the state from a distance. Also, they were focused on structural rather than substantive elements of the constitution.

I do not claim that Israel is becoming authoritarian. However, the constitutional changes introduced since 2009 have definitely upset the balance of power in the country in favour of the incumbent government. Indeed, '[i]n the modern era, authoritarian wolves rarely appear as wolves. They are now clad, at least in part, in sheep's clothing'.[170]

The Israeli case provides a particular expression of abusive constitutionalism: abusing the constitution through the enactment of temporary measures. As explained in the previous section, temporary measures are used as a conduit for the Israeli government to undermine the democratic order below the radar of both the judiciary and public opinion. Therefore, the Israeli case in fact introduces a new, and perhaps more successful, way to apply constitutional changes in order to perpetuate the incumbent's hold on power.

5.2.1. SIGNIFIERS OF ABUSIVE TEMPORARY CONSTITUTIONALISM

The Israeli experience provides several signifiers to enable jurists to monitor constitutional environments and legislative practices that may amount to an abusive enactment of temporary constitutionalism.

Temporary provisions in a weak constitutional environment

In a weak constitutional environment, where a low threshold exists for amending the constitution, temporary amendments are more susceptible to adoption for extraneous motives. As demonstrated by the Israeli experimental project of introducing direct voting for the Prime Minister, weak constitutions allow the legislature to enjoy the advantages of temporariness merely through

[168] ibid 248.
[169] ibid 259.
[170] Varol (n 155) 1677.

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ordinary amendments, as the error costs involved are relatively low.[171] Particularly in the case of experimental amendments, a weak constitution allows the implementation of a pilot experiment also through ordinary amendment, and invalidating it later if it is found to be unsuccessful. In a weak constitutional regime, enacting constitutional experiments only through temporary measures might pay mere lip service to obtaining reduced accountability for the government's actions.

Judge Hendel, in the *College of Law and Business* judgment, contended that in a dynamic constitutional regime, which entails occasional constitutional amendments (like the Israeli regime), a temporary constitutional amendment should actually be deemed to be more tolerable; the constitution in such a regime is dynamic as it is still under development.[172] I disagree with this assertion. In my view, Justice Hendel's analysis falls short in questioning the true necessity of temporary amendment in a weak constitutional regime. This article maintains that in light of the Israeli experience, the frequent adoption of constitutional amendments in 'dynamic' constitutions should be scrutinised more closely, as a weak constitutional culture makes redundant any significant advantage acquired from temporary constitutionalism (namely, reducing error costs).

It is true, however, that temporary amendments introduce other benefits, which do not become redundant in a weak constitutional regime, such as reducing decision costs. Thus, there may still be legitimate reasons for using this mechanism in such regimes. This article does not oppose categorically the adoption of temporary constitutionalism in a weak constitutional regime, but rather advises that a regime that tolerates frequent constitutional amendment must be more suspicious of temporary constitutional amendments, contrary to Justice Hendel's assertion.

Repeated extension of a temporary provision

Another signifier for detecting abusive temporary constitutionalism taken from the Israeli experience is the enactment of repeated extensions of a temporary provision, without endeavouring to adopt the provision on a permanent basis. Continual extension of temporary legislation is usually perceived as abuse, as temporary provisions should either be terminated or adopted permanently.[173]

This article visualises this concern through an empirical overview of temporary measures within the Israeli constitutional sphere. As seen in the case of the biennial budgeting system, repeated extensions of a temporary constitutional arrangement suggest that the executive branch benefits from the temporary nature of the arrangement, despite there being no objective justification for leaving it as a mere temporary enactment. In the *College of Law and Business* judgment, Justice Melcer asserted that an experimental constitutional arrangement should be tolerable if enacted temporarily once. However, Justice Melcer emphasised that an experimental measure

[171] See 3.2.1 above.
[172] *The College of Law and Business* (n 34) para 3 of Justice Hendel's opinion.
[173] As noted by Ittai Bar-Siman-Tov, 'experimental legislation is intended to be a first step toward permanent legislation, whereas other types of temporary legislation are meant to expire': Bar-Siman-Tov (n 11) 11.

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must not be extended temporarily yet again. At the end of the experiment the legislature must opt for either permanent enactment of the experimental rule or revoke it completely.[174]

Different reasoning for each temporary extension of the same provision

Repeated extension becomes even more suspect when the reasoning for each extension changes ('constitutional mutation'). A frequent change in the form of the temporary provision calls for further scrutiny. Justice Rubinstein, in the biennial budgeting case, stressed that adding the 'convergence mechanism' to the temporary extension of the biennial budget for 2017–18 was a 'cumbersome addition without a constitutional message, aimed at achieving political comfort'.[175] Such 'cumbersome additions' are important signifiers of abusive temporary constitutionalism, and thus must be scrutinised with great caution.

Vague reasoning

Vague reasoning in general indicates that the temporary provision is susceptible to abuse. All of the temporary provisions that were enacted with a clear and predefined reasoning (such as the legislation stemming from the 1973 war) turned out indeed to be necessary and adequate. In contrast, when the temporary provisions were supported only by vague reasoning (such as in the case of the number of ministers, or ministerial resignations), it seems that the provisions were more likely to have been enacted on a temporary basis in order to harm the democratic order without being fully accountable for the consequences of such measures.

Experimental provisions which lack ex post *evaluation mechanisms*

Another important characteristic of abusive temporary constitutionalism is temporary legislation that is presented as experimental merely in order to excuse its temporary nature. In order to defeat abusive temporary constitutionalism, it is essential to verify that an experimental arrangement is adopted only if it has a carefully designed *ex post* evaluation mechanism for its outcomes.[176] The arrangement that allowed ministerial resignation from the Knesset was presented as an experiment simply to appease opposition resistance, and did not include any testing mechanism. Examining whether the arrangement includes a genuine testing mechanism prior to its enactment could generate an effective filter to prevent abuse of the constitution through 'fabricating' an experiment merely to reconcile the temporary application of the rule.

[174] *The College of Law and Business* (n 34) para 6 of Justice Melcer's opinion. This approach is compatible with the theoretical claim that a distinguishing feature of experimental legislation as a whole is that it serves as a step towards permanent legislation: Rob Van Gestel and Gijs Van Dijck, 'Better Regulation through Experimental Legislation' (2011) 17 *European Public Law* 539.

[175] *The College of Law and Business* (n 34) para 25 of Justice Rubinstein's opinion.

[176] Bar-Siman-Tov (n 11) 10 (suggesting that a proper evaluation mechanism 'should specify the purposes and goals of the legislative measure, the data to be collected, and the criteria and methods to be used to evaluate whether the legislative measure has met these goals, and define responsibilities for collecting the data and assessing results'). Bar-Siman-Tov also contends that the evaluation process should be held by 'special units', which would ideally be independent bodies.

Personalised constitutional amendments

In the *College of Law and Business* judgment, Justice Hendel portrays another signifier for misuse of the constitutional text: the enactment of personalised provisions, such as those that are tailored ad hoc for a specific person. The enactment of a norm that allows player A (the incumbent government) to overcome political hurdles, but sets a higher bar for player B (the future government that will not enjoy the benefits of the temporary amendment) carries a personalised character. It therefore undermines the generality principle of the constitution and cannot be considered a constitutional act.[177]

6. CONCLUSION

This article contends that increased use of temporary measures within the constitutional document not only detracts from the transcendent status of the constitution, but also assists the incumbent government in undermining democratic values and entrenching its power without being fully accountable for its actions. In so doing, the article aims to enrich the exiguous literature containing empirical research on abusive constitutional practices. As maintained by David Landau, empirical research is essential in order to develop mechanisms to protect the constitution against abusive practices.[178]

Since 2009 Israel's constitutional law has been undergoing an injection of temporary amendments, which have upset the balance between the state authorities in favour of the incumbent government. The growing trend of temporary constitutionalism in Israel introduced the 'misuse of the constituent authority' doctrine by the High Court of Justice in the *College of Law and Business* judgment. This doctrine assisted the HCJ in revoking a constitutional act without acknowledging its constitutional status in the first place. It was applied as a result of the court's concern over the dangers involved in abusive temporary constitutionalism, as raised in this article.

Despite the positive progress, in the two judgments that have dealt with temporary constitutional amendments so far, the court did not fully address all of the problems of applying this instrument. The threefold test in the *Baron* judgment focuses more on the subject matter of the temporary amendment rather than its potential effect on the democratic order. I suggest a different approach. The abusive use of constitutional measures is more likely to occur in amendments that relate to structural rather than substantive parts of the constitution. Therefore, judicial review of temporary constitutionalism should concentrate more on the effect of the temporary amendment on the status of the constitution and the democratic order rather than on the importance of the constitutional norm it is amending.

[177] *The College of Law and Business* (n 34) para 6 of Justice Hendel's opinion. See also the discussion at n 124 and accompanying text regarding the judgment of the Czech Constitutional Court of 10 September 2009.
[178] Landau (n 19) 229.

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Also, as seen in Justice Hendel's opinion in the *College of Law and Business* judgment,[179] the court still acknowledges the notion that a temporary constitutional amendment is less harmful than a permanent amendment. I suggest that in a weak (or dynamic) constitutional regime this approach should be abandoned. A regime that tolerates frequent constitutional amendment must be more suspicious of temporary constitutional amendments, as the true motivation behind them is doubtful. In weak constitutional regimes it is better to leave temporary constitutional provisions only for specific situations in which they are truly needed. In all other instances temporary constitutional measures must be denounced in order to prevent their abuse by the government and to save democracy from the new authoritarian phenomenon of abusive temporary constitutionalism.

[179] See Section 5.2.1 above.

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