Georgia Law Review

Volume 58 | Number 3 Article 10

6-3-2024

The Israeli High Court of Justice During the COVID-19 Crisis: The Model of Continuous Judicial Review

Yoav Dotan
Hebrew University, yoav.dotan@mail.huji.ac.il

THE ISRAELI HIGH COURT OF JUSTICE DURING THE COVID-19 CRISIS: THE MODEL OF CONTINUOUS JUDICIAL REVIEW

Yoav Dotan[*]

In this Article, I seek to review the reaction of the Israeli High Court of Justice (HCJ) to the social and political pressures created by the spread of the virus in Israel amidst a constitutional crisis that Israel went through during 2020-2021. The HCJ is regarded by many as a strong and interventionist judicial institution. Often, critics argue that the degree of supervision exerted by the HCJ over both the Israeli bureaucracy and the political branches goes way beyond the traditional role of the judiciary, as envisioned by theorists of judicial review. My aim is to use this analysis of judicial review during the coronavirus times as a test case to examine if, and to what extent, this critique is valid. In addition, I examine how the coronavirus crisis influenced the tense relationship between the judiciary and the political branches in Israel. I find that, in general, the HCJ showed considerable deference regarding governmental policies during the pandemic and kept its intervention to cases in which executive decisions threatened fundamental political rights. Nevertheless, the indirect effects of the Court's tight, routine supervision over decision-making processes by the Israeli bureaucracy remained significant.

[*] Yoav Dotan is the Edwin A. Goodman Professor of Law at the Hebrew University of Jerusalem. Contact: yoav.dotan@mail.huji.ac.il.

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I. INTRODUCTION

The role of the judiciary within democratic systems has been subject to proliferated literature and heated debates among jurists, political scientists, and politicians alike. There seems to be a consensus among theorists of judicial review that, in democracies, courts are in charge of reading the constitution and providing solid guarantees to fundamental human rights—particularly in times of emergency. Beyond this, however, there is little agreement about the boundaries of judicial review. Some theorists who embrace a minimalist approach argue that the counter-majoritarian nature of judicial review requires courts to be slow to question the judgement of elected officials and do so only in rare occasions of clear democratic failure.[1] Accordingly, Ely's "process" theory, perhaps the most well-known example of such an approach, suggests that the judiciary should step in to overturn legislation only when the "channels of political change" are blocked by the current power-holders or when the fundamental rights of "discrete and insular" minorities are clearly infringed upon.[2] Others, however, justify a much more ambitious role for the judiciary in democracies stressing the "republican" virtues of the judiciary and the contribution of judicial review to the quality of democratic decision-making.[3]

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[1] *See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Rethinking the Balancing Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1764 (2004) ("Laying the groundwork not only for contemporary minimalism bust also for the neutral-principles tradition, the judiciary's defenders . . . highlighted that judges would exercise 'judgment' based on legal principles and would not substitute their 'will' for that of political officials." (emphasis omitted)).

[2] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 100–03 (1980).

[3] *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1535 (1988) ("[I]n a republican perspective, a matter of constitutive political concern [is an] underpinning [in] the independence and authenticity of citizen's contribution to the collective determinations of public life . . . ."); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 8 (1993) ("The problem with the prevailing conception of interpretive neutrality is that it denies the role of interpretive principles in giving meaning to texts, and thus hides the inevitability of judicial reliance on substantive commitments."); David A. Strauss, *Modernization and Representation Reinforcement: An Essay in the Memory of John Hart Ely*, 57 STAN. L. REV. 761, 762 (2004) ("The idea is that the courts' task is to identify areas where the laws on the books no longer reflect popular opinion.").

The purpose of this Article is to discuss the role of judicial review in Israel during the coronavirus crisis. The spread of COVID-19 brought about an unprecedented wave of regulation by governments all over the globe in order to mitigate the effects of the pandemic.[4] Israel was no exception.[5] However, in Israel the judiciary is ordinarily deeply involved in shaping governmental policies.[6] The High Court of Justice (HCJ) is considered to be one of the most activist courts in the world.[7] Accordingly, the coronavirus crisis provides an opportunity to examine the role of the judiciary in general, and the judiciary in Israel in particular, in shaping executive policies and defending human rights in periods of national and international crisis.

II. JUDICIAL REVIEW IN ISRAEL—THE HIGH COURT OF JUSTICE (HCJ)

Israel has no formal written constitution.[8] Instead, the Knesset's (Israeli Parliament's) legislation of basic laws over the years is attributed a constitutional status in the sense that any regular

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[4] *See* Ian Bremmer, *The Best Global Responses to the COVID-19 Pandemic, 1 Year Later*, TIME (Feb. 23, 2021, 6:07 PM), https://time.com/5851633/best-global-responses-covid-19/ [https://perma.cc/3ZS3-K538] (exploring how various governments responded to the COVID-19 crisis).

[5] *See* Eran Lerman, *Israel's Response to COVID-19: Strengths, Weaknesses and Opportunities*, NEAR E.S. ASIA CTR. FOR STRATEGIC STUD., https://nesa-center.org/israels-response-to-covid-19-strengths-weaknesses-and-opportunities/ [https://perma.cc/TQ8Z-UNY8] (explaining Israel's four strategies to combat COVID-19 were medical staff's knowledge, innovation, well-endowed security forces, and severe social, economic, and travel restrictions).

[6] *See* Martin Edelman, *The Judicialization of Politics in Israel*, 15 INT'L POL. SCI. REV. 177, 182–83 (1994) ("[J]udges . . . believe that the civil courts must be active policy-makers . . . .").

[7] *See id.* at 177 ("The judicialization of politics has probably proceeded further in Israel than in any other democratic country. . . . [T]he civil judiciary in Israel, particularly the Supreme Court justices sitting as members of the High Court of Justice, are exercising power at the expense of politicians and administrators."); Eli Salzberger, *Judicial Activism in Israel*, *in* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217, 217 (Brice Dickson ed., 2007) ("The Israeli judiciary is portrayed by both Israeli and non-Israeli scholars as one of the most activist judiciaries in the world . . . .").

[8] *See* Edelman, *supra* note 6, at 179 ("The clash of partisan and ideological values has . . . prevented Israel from adopting a written constitution." (citation omitted)).

statute not conforming with them can be struck down by the courts.[9] Nevertheless, despite their constitutional status, these basic laws are susceptible to the possibility of amendment or repeal by the Knesset at any time (with no requirement for a special majority or extraordinary procedure in most cases).[10] Moreover, in the absence of constitutional constraints, parliamentary reaction to an unfavorable judicial decision may also take the form of a statute which would directly curtail the powers of the Supreme Court itself.[11] Some fundamental civil rights are included in two basic laws enacted by the Knesset in 1992: *Basic Law: Human Dignity and Liberty*[12] and *Basic Law: Freedom of Occupation*.[13] The Knesset, however, can infringe upon most liberties included in these laws through legislation approved by a simple majority.[14]

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[9] *See* CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Village, 49(4) PD 221 (2005) (Isr.), *translated in* 1995-2 ISR. L. REPS. 1, 322 (1995) ("If this balance has not been struck, the legislation is unlawful and may be struck down unless some other escape route can be found . . . .").

[10] *See* Amir Fuchs, *The Frequent Changes in Israel's Basic Law*, ISR. DEMOCRACY INST. (Aug. 10, 2023), https://en.idi.org.il/articles/39441 [https://perma.cc/AKH8-J93R] ("[I]n Israel, passing an amendment to a Basic Law requires no more than a simple majority in the Knesset . . . .").

[11] *See* Amir Fuchs, *The Override Clause Explainer*, ISR. DEMOCRACY INST. (Nov. 11, 2022), https://en.idi.org.il/articles/46387 [https://perma.cc/P83Q-34UW] ("[A]n override clause, if introduced, would allow the Knesset to re-enact the law that was struck down, despite the Supreme Court's explicit ruling that it is incompatible with a Basic Law . . . .").

[12] *See* Basic Law of 1992: Human Dignity and Liberty, SH 1391 (1992) 1 (Isr.*), translated in Israel: Basic Law of 1992, Human Dignity and Liberty*, REFWORLD, https://www.refworld.org/docid/3ae6b52618.html [https://perma.cc/3L3Z-ZHZB] ("The purpose of this Basic Law is to protect human dignity and liberty . . . .").

[13] *See* Basic Law of 1994: Freedom of Occupation, SH 1454 (1994) 1 (Isr.), *translated in Israel: Basic Law of 1994, Freedom of Occupation*, REFWORLD, https://www.refworld.org/docid/3ae6b52610.html [https://perma.cc/4K52-KP3Y] ("Fundamental human rights in Isael are founded upon recognition of value of human being, the sanctity of human law, and the principle that all persons are free . . . .").

[14] *See* Daphne Barak-Erez, *From Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 321, 326, 331 (1995) (discussing the majoritarian structure of Israel's parliament and the judicial authorization of infringement); Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross & Tamar Hostovsky-Brandes, *Israel: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2021), https://oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e13 [https://perma.cc/5DMP-V85E] (detailing Israel's constitutional framework). Indeed, recently, the right-wing coalition formed after the November 2022 elections initiated a far-reaching plan to fundamentally

Despite these seemingly fragile constitutional foundations, the Israeli judiciary has developed, throughout the years, a powerful regime of judicial review. The central pillar of this regime is the High Court of Justice (HCJ), which is the Israeli Supreme Court sitting as a court of first and last instance for important public law cases.[15] The HCJ's effectiveness as a forum for judicial review is based on three main elements. *First*, on a structural and procedural level, the High Court provides the first and only opportunity for review in most major cases.[16] This means that most major cases make their way to the High Court directly and instantly when the government announces action or policy.[17] The COVID-19 crisis forms a good example for this. Almost all cases of judicial review over pandemic-related legislation and regulation were disposed of by the HCJ.

Second, on a doctrinal level, over the years the HCJ has lowered access barriers such as standing, justiciability, and political

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change the relationship between the judiciary and the political branches and to severely curtail judicial review. *See generally* Raffi Berg, *Israel Judicial Reform Explained: What is the Crisis About?*, BBC (Sept. 11, 2023), https://www.bbc.com/news/world-middle-east-65086871 [https://perma.cc/2HYQ-7JZE] (describing the proposed reforms).; Rivka Weill, *Did Israel Lose Its Sanity?*, VERFASSUNGSBLOG (July 12, 2023), https://verfassungsblog.de/did-israel-lose-its-sanity/ [https://perma.cc/9W2N-WRP4] (discussing judicial reform proposals and the arguments for and against them). The initiative encountered unprecedented waves of protest and mass demonstration. *See generally* Berg, *supra* note 14 (documenting protest and anti-reform demonstration efforts).

[15] The HCJ is one of the three capacities of the Israeli Supreme Court. It also functions as an appellate court and the court of cassation for criminal and civil cases. *See* Menachem Hofnung & Ofir Hadad, *Latent Judicial Intervention: The Case of Self-Claiming Palestinian Informers*, 11 J.L. & CTS. 187, 194–95 (2021) ("The Israeli Supreme Court acts in two main capacities. In its first capacity, it functions as a supreme appellate court, dealing with cases challenging the outcome of decisions rendered by lower courts. In its second capacity, it serves as a High Court of Justice (HCJ), where it has original and final jurisdiction in petitions brought against the country's organs in matters that fall outside the jurisdiction of other courts."). In administrative law, the HCJ functions as the first and last instance for administrative litigation in important matters, including when the legality of regulations is at stake. § 5, Administrative Affairs Courts Law, 5760-2000 (2000) (Isr.), *reprinted in* ISRAEL'S COURTS OF LAW AND TRIBUNALS (Aryeh Greenfield trans., 2001). In administrative petitions of lesser importance, the HCJ functions as an appellate court over the Courts of Administrative Affairs. *Id.*

[16] *See* YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL 23, 27 (2014) (stating that the HCJ "functions as the first and last instance for most judicial review" and describing the procedural process).

[17] *Id.*

question restrictions.[18] As a result, almost anyone may petition the High Court about almost any governmental decision.[19] In addition, the Court has developed throughout the years ambitious tools for judicial review as it imposed broad requirements on administrative agencies, such as the duties of reasonableness,[20] rationality of the decision-making process[21] and proportionality.[22] The courts also displayed a willingness to review the actions of institutions that were previously held to be partly or wholly immune from judicial supervision, such as the military and the security services.[23] In

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[18] Yoav Dotan & Menachem Hofnung, *Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements*, 23 L. & POL'Y 1, 9 (2001) ("[W]henever a petition raises an issue of important constitutional merit, or when there is a suspicion of serious governmental violations of the principle of the rule of law, *any* person is entitled to bring the petition into court, *regardless* of her personal interest in the outcome of the litigation.").

[19] *See, e.g.*, HCJ 910/86 Ressler v. Minister of Def. 42(2) PD 441 (1988) (Isr.), *translated in Ressler v. Minister of Defense,* CARDOZO L.: VERSA 101, https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence [https://perma.cc/JA73-XK4R] ("*Normally* the petitioner must be the injured party (or the party likely to be injured) by the authority's decision or action, but in exceptional cases a petition filed by someone who is not *personally* injured (or likely to be injured) will be heard."); Dotan & Hofnung, *supra* note 18, at 9–11 (discussing the HCJ elimination of barriers to standing, justiciability, and political question restrictions).

[20] HCJ 389/80 Dapei Zahav v. The Broadcasting Authority 35(1) PD 421 (1980) (Isr.).

[21] HCJ 297/82 Berger v. Minister of the Interior 37(3) PD 29 (1983) (Isr.).

[22] HCJ 5510/92 Turkeman v. Minister of Defense 48(1) PD 217 (1993) (Isr.); *see also* Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, *in* PUBLIC LAW IN ISRAEL 327–33 (Itzhak Zamir & Allen Zysblat eds., 1996) (discussing the proportionality requirement of the High Court's Jurisprudence).

[23] *See, e.g.*, HCJ 428/86 Barzilai v. Government of Israel 40(3) PD 505 (1986) (Isr.), *translated in Barzilai v. Government of Israel,* CARDOZO L.: VERSA 53, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Barzilai%20v.%20Government%20of%20Israel.pdf [https://perma.cc/H5E5-2HFD] ("There are different ways to conduct a confined or departmental inquiry or investigation into any subject - including recourse to whatever legal proceedings be considered necessary - without prejudicing the national security."); HCJ 680/88 Schnitzer v. The Chief Military Censor 42(4) PD 617 (1989) (Isr.), *translated in Schnitzer v. The Chief Military Censor*, CARDOZO L.: VERSA 56, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Schnitzer%20v.%20Chief%20Military%20Censor.pdf [https://perma.cc/Y4ZH-F5F7] ("[I]t is important to reiterate that the Defence Regulations - even though their source is Mandatory-autocratic - are applied in a democratic country. In these circumstances, their character must be fashioned against the background of their new democratic environment."); *see also* Yoav Dotan & Menachem Hofnung, *Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court?*, 38

addition, the Court developed a doctrine that enables it to oversee and interfere in executive appointments and even order the removal of elected officials charged with criminal offences.[24]

Third, the High Court has developed various doctrines and instruments enabling it to supervise and direct the Israeli government's legal apparatus, which most importantly includes the *Attorney General Office* (AGO), the department in charge of both providing legal advice to the government and representing the government in court.[25] Consequently, the legal bureaucracy largely internalized the above-mentioned judicial doctrines and regards itself as "guardians of the rule of law." Accordingly, the AGO function as "gatekeepers" who seek to implement judicial values and policies even in the absence of any immediate possibility of court litigation.[26]

Finally, review by the High Court takes place within days or even hours of a petition's filing, which enables the High Court to review and react to government action almost in real time.[27] The influence

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COMPAR. POL. STUD. 75, 86 (2005) (noting the HCJ's willingness "to review actions of state security organs, which were previously . . . immune from judicial supervision").

[24] *See* HCJ 3094/93 The Movement for Quality in Gov't in Isr. v. State of Israel 47(5) PD 404 (1993) (Isr.), *translated in The Movement for Quality in Government v. State of Israel,* CARDOZO L.: VERSA 25, https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-state-israel [https://perma.cc/WNY7-LZTJ] ("[P]ower . . . can be exercised in order to enable the government to function properly and to lead to the removal of a minister who does not fit in with the web of government policy or who defies the principle of collective responsibility."); *see also* Yoav Dotan, *Impeachment by Judicial Review: Israel's Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES L. 705, 735, 739–40 (2018) (discussing the doctrine of good character, which permits the removal of public officials).

[25] *See Israel Judicial Branch: The Attorney General*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/israel-attorney-general-jewish-virtual-library [https://perma.cc/E8YJ-FNM7] (explaining the responsibilities of the Attorney General).

[26] *See* DOTAN, *supra* note 16, at 87 ("[T]he HCJD regards itself as not merely the representative of its agencies in court, but rather as a supervisory organ that seeks to promote the general value of the rule of law in the government . . . .").

[27] Filing a petition to the HCJ also does not involve high costs on the part of the petitioner since court fees are low and there is no mandatory requirement for attorney representation. *See id.* at 29–30 ("The court's fees are significantly lower compared to those that apply in civil matters, and the simplicity of the procedures also contributes to ease the financial burden of litigation."). The easy and quick access to judicial review makes the HCJ somewhat similar to the French *Conseil d' Etat*. *See* Duncan Fairgrieve & François Lichère, *Judicial Review of Coronavirus Measures in the United Kingdom and France*, 58 GA. L. REV. 1281, 1286–87, 1302–04 (2024) (discussing *Conseil d' Etat* and its uses in French administrative law).

of the High Court over governmental policies, however, is exerted in most cases even before litigation begins—through the advisory mechanism of the AGO, over which the High Court exerts considerable influence. This means that the vast majority of petitions issued to the HCJ do not reach final judicial determination, but instead are settled before the litigation starts or while the case is pending, with or without active involvement by the Court.[28]

III. THE SPREAD OF THE PANDEMIC IN ISRAEL AND THE GOVERNMENT RESPONSE

Like most other parts of the world, the Coronavirus crisis caught Israeli authorities and society by almost complete surprise. Indeed, the pandemic reached Israel around three weeks after it was already hitting Western European countries (such as Italy and Spain),[29] but by mid-March 2020 the Israeli Government had already taken severe regulatory measures to control the spread of the COVID-19.[30]

The crisis has compounded Israel's preexisting constitutional and political crises. On March 2, 2020 Israel held its third election in a single year, after the previous rounds failed to produce a government.[31] For over a year, a caretaker government that lacked a parliamentary majority had been governing the state.[32] Prime Minister Benjamin Netanyahu's criminal indictment has also prompted a legal debate over his competence to remain in

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[28] *See* DOTAN, *supra* note 16, at 97 (noting that the number of cases the HCJ agreed to settle out-of-court almost doubled in the 1990s).

[29] *See, e.g.*, Mark Last, *The First Wave of COVID-19 in Israel—Initial Analysis of Publicly Available Data*, 15 PLOS ONE 1, 3 (October 29, 2020) ("[T]he first multiple COVID-19 cases were detected in Israel . . . about three weeks later than in Italy").

[30] *See* Arnon Afek, Eyal Leshem & Yitshak Kress, *Buying Time with Covid-19 Outbreak Response, Israel*, 26 EMERGING INFECTIOUS DISEASES 2251, 2251 (2020) (describing how Israel's "containment measures proved successful in creating weeks of delay in peak transmission, more than those for some countries in Europe").

[31] *See* Daniel Estrin & Larry Kaplow, *Israel's 'Groundhog Day': Hold Elections. Call Another Vote. Repeat.*, NPR, (March 1, 2020, 8:01 AM) https://www.npr.org/2020/03/01/809978504/israels-groundhog-day-hold-elections-call-another-vote-repeat (describing Israel's unprecedented third election in one year).

[32] *See* Albin et al., *supra* note 14 (discussing how Israel was left in the hands of a caretaker government between elections).

office.[33] Finally, a government was formed after a fourth round of elections in June 2021 (ousting Netanyahu for the first time after over a decade).[34] Israel's regulatory response to the COVID-19 pandemic should be assessed against this complicated background.[35]

The Israeli government responded quickly to the crisis with a host of regulatory measures, essentially shutting down its economy. The Israeli executive has dominated the response at the expense of the legislature encountering little resistance. Crucially, much of the legal infrastructure that empowered the government to take steps (at least during the first months of the crisis) has nothing to do with COVID-19, but instead was created to support the state of emergency Israel declared upon its founding in 1948, which remains in force today.[36] The state of emergency, along with the constitutional rules that govern the executive, allow the government to enact emergency regulations that trump legislation with limited parliamentary oversight.[37]

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[33] *See* Raoul Wootliff, *Netanyahu Indicted for Corruption in Three Cases, in First for a Sitting PM*, TIMES OF ISR., (January 28, 2020, 2:22 PM) https://www.timesofisrael.com/netanyahu-indicted-for-corruption-in-three-cases-in-first-for-a-sitting-pm/ [https://perma.cc/AD4G-DDMD] (documenting Israeli public opinion in response to Netanyahu's criminal indictment).

[34] *See* Saphora Smith & Rachel Elbaum, *Netanyahu Era Ends in Israel as New Government Survives Key Parliament Vote*, NBC NEWS (June 13, 2021, 4:36 PM) https://www.nbcnews.com/news/mideast/netanyahu-era-ends-israel-new-government-survives-key-parliament-vote-n1055301 [https://perma.cc/6AMT-HFSK] ("[Netanyahu] managed to survive the first three votes, but the fourth has brought his premiership to an end — at least for now.").

[35] For a detailed description of the political background and Israel's regulatory response to COVID-19, see Albin et al., *supra* note 14. This newly elected government also did not survive for long, and in November 2022, the fifth election in two years was held. This round of elections brought Netanyahu back in office. *See* Josef Federman, *Netanyahu Set to Return to Power in Israel After PM Concedes*, AP News (Nov. 3, 2022, 3:42 PM) https://apnews.com/article/middle-east-religion-israel-benjamin-netanyahu-0f97b58db3b188bc7512854bd449f8cd [https://perma.cc/3SVS-VUNM] (reporting on the events of Israel's fifth election in two years and Netanyahu's return to power).

[36] *See* Albin et al., *supra* note 14 (detailing the background of Israel's state of emergency law).

[37] *See* Elena Chachko & Adam Shinar, *Israel Pushes Its Emergency Powers to Their Limits*, REGUL. REV. (Apr. 28, 2020), https://www.theregreview.org/2020/04/28/chachko-shinar-israel-pushes-emergency-powers-limits/ [https://perma.cc/RW6N-HV5K] (discussing the utilization of emergency powers to introduce regulations with limited parliamentary

On July 23, 2020, however, following heavy pressures on the government by the HCJ, the Knesset legislated the *Coronavirus Law*.[38] This statute provided the government with ample powers to combat the coronavirus crisis and its repercussions. These included the power to declare a state of emergency (with the approval of a parliamentary committee); to promulgate regulations that would ban or restrict public gathering; to restrict movement within the country or in and out of its borders; to close businesses; to stop social activities on private premises; and various other measurements required to deal with the pandemic.[39] The law included various mechanisms of parliamentary oversight and established administrative tribunals for hearing individual complaints to mitigate the magnitude of infringements on human rights.[40] It also contained some specific exceptions regarding the right of procession, prayer, and access to the courts.[41] In addition, the Law included detailed mechanisms for administrative and criminal

oversight during the COVID-19 pandemic). Commentators have accused Prime Minister Netanyahu of taking these extraordinary measures to entrench his rule rather than to protect the citizenry. *See, e.g.*, David Horovitz, *Netanyahu Celebrates a Victory Over COVID-19; It Marks His Political Triumph Too*, TIMES OF ISR. (May 4, 2020, 11:34 PM), https://www.timesofisrael.com/netanyahu-celebrates-a-victory-over-covid-19-it-marks-his-political-triumph-too/ [https://perma.cc/W99W-AK5F] (discussing Netanyahu's "unity government" plan granting unprecedented authority over emergency regulation to confront COVID-19); Albin et al., *supra* note 14 (noting the controversy surrounding Israel's "Corona Law"). This political turmoil made it difficult to say whether government decisions were predominantly driven by electoral politics or a good faith evaluation of the public's best interest.

[38] *See* Ruth Levush*, Israel: Law Granting Government Special Authorities to Combat Novel Coronavirus Adopted,* LIBR. CONG. (Jul. 29, 2020), https://www.loc.gov/item/global-legal-monitor/2020-07-29/israel-law-granting-government-special-authorities-to-combat-novel-coronavirus-adopted/ [https://perma.cc/Q9MY-UNTT] ("On July 23, 2020, the Knesset (Israel's parliament) passed the Special Authorities to Combat the Novel Coronavirus (Temporary Provision) Law, 5780-2020. The law will remain in effect until June 30, 2021.").

[39] *See* Tobias Siegal, *Knesset Approves 'Big Coronavirus Law' Giving Gov't More Power*, JERUSALEM POST (July 23, 2020, 11:31), https://www.jpost.com/israel-news/knesset-approves-big-coronavirus-bill-giving-govt-more-power-636005 [https://perma.cc/3TVV-D334] (discussing the various new powers promulgated by the Coronavirus Law).

[40] *See* Levush, *supra* note 38 (discussing the parliamentary overview processes for the Coronavirus Law regulations).

[41] *See id.* ("The exit of a person from a restricted area cannot be prohibited if it is intended to accomplish one of the defined objectives enumerated under the law, including the obtaining of medical treatment; participation in a demonstration; and participation of a first-degree relative in a funeral, wedding, or other listed religious ceremonies.").

enforcement.[42] The constitutionality of the Law was upheld by the HCJ,[43] and the Court also upheld additional government decision to extend the duration of the state of emergency due to the spread of the Omicron variant in 2021.[44] Since the passing of the law, all governmental regulations and actions regarding the pandemic have been based on it.

IV. THE RIGHT TO PRIVACY: THE ISA TRACKING SAGA

The first and probably most difficult issue brought before the High Court was the government's decision to permit the Israeli Security Agency (ISA) to use electronic surveillance tools—normally used to counter domestic terrorism—in order to track the movements and contacts of coronavirus carriers.[45] The General Security Service Law, which governs the ISA's operations, requires that any use of electronic surveillance tools outside the realm of domestic security only be done with the approval of a parliamentary committee.[46] At the time of the decision to permit ISA surveillance, however, this committee was not yet formed—due to the stalemate in the Knesset after (yet another) round of elections.[47] Without the

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[42] *See id.* ("Violation of regulations imposed during the state of emergency may result in criminal or administrative fines as prescribed by the law.").

[43] *See* HCJ 5469/20 Achrayut Leumit v. Government of Israel (2021) (Isr.); *infra* Part IV; *see also* Albin et al., *supra* note 14 (discussing the HCJ's reasoning for upholding the Coronavirus Law as constitutional).

[44] *See* HCJ 7930/21 Amutat Tomchei v. Prime Minister (2021) (Isr.).

[45] Tom Bateman, *Coronavirus: Israel Turns Surveillance Tools on Itself*, BBC (May 12, 2020), https://www.bbc.com/news/world-middle-east-52579475 [https://perma.cc/VCE6-9AA4] (reporting that "counter-terrorism technology is hunting down people exposed to Covid-19" using "the same system [and] the same methods" ordinarily used for counter-terrorism). *Cf.* Fairgrieve & Lichère, *supra* note 27, at 1300–01 (discussing judicial review of government use of drones to track citizens' movement during the pandemic in France).

[46] § 7(b)(6), General Security Service Law, 5762-2002, SH 1832 179 (2002) (Isr.). For a general discussion of parliamentary oversight during the Coronavirus crisis see Albin et al., *supra* note 14.

[47] *See* Elena Chachko, *The Israeli Supreme Court Checks COVID-19 Electronic Surveillance*, LAWFARE (May 5, 2020, 1:10 PM), https://www.lawfaremedia.org/article/israeli-supreme-court-checks-covid-19-electronic-surveillance [https://perma.cc/ND3X-KVKL] (describing how the new surveillance regulations came during a time of Knesset stalemate).

approval of a parliamentary committee, the government issued emergency regulations to initiate this tracking mechanism.[48]

There is no doubt that the decision to authorize the ISA to track Israeli citizens for public health purposes was exceptional. This decision involved serious violations of fundamental rights such as privacy. It should be noted, however, that the drafters of the emergency regulations were well aware of their sensitive nature. Accordingly, the regulations included several provisions aimed to mitigate the infringement on human rights. For example, the emergency regulations were set to expire within fourteen days, and included constraints on how the information gathered through surveillance would be used.[49] The ISA was not allowed to have access to the information collected or to use or process the information for any purpose.[50] In fact, the ISA's role was purely for information gathering, as its involvement ended when it passed the information to the Ministry of Health.[51] The regulations also provided that all information should be erased from any databases within a short period.[52]

It is also known that the process of drafting these unusual regulations was closely supervised by the AGO in order to face inevitable challenges before the High Court. In fact, the Attorney

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[48] *See id.* (discussing the decision to allow surveillance during the pandemic).

[49] *See* Amir Cahane, *The Israeli Emergency Regulations for Location Tracking of Coronavirus Carriers*, LAWFARE (Mar. 21, 2020, 12:45 PM), https://www.lawfaremedia.org/article/israeli-emergency-regulations-location-tracking-coronavirus-carriers [https://perma.cc/2JU6-GKJW] (discussing time limits on emergency powers in the Coronavirus Law).

[50] *See* Tehilla Shwartz Altshuler, *Coronavirus Crisis: Implications of ISA Tracking Citizens*, ISR. DEMOCRACY INST. (Mar. 17, 2020), https://en.idi.org.il/articles/31247 [https://perma.cc/7WM7-WZU6] ("The Emergency Regulations approved by the Government in the middle of the night, bypassing the Knesset, give the ISA (Israel Security Agency) extensive powers to access the location data of each and every one of us. These extreme regulations threaten our right to privacy, and set a dangerous precedent that could remain with us long after the COVID-19 crisis comes to an end.").

[51] *See* Cahane, *supra* note 49 ("The ISA is authorized to use the data and any further information derived from it only for the aforementioned purpose of assisting the Ministry of Health in conducting epidemiological investigations.").

[52] *See id.* ("The ISA Emergency Coronavirus Regulations will be in force for a period of 14 days, following which any data received and retained by the Ministry of Health shall be purged—except data required by the ministry for internal inspection of its activities posthoc, which may be retained for an additional period of 60 days.").

General's involvement in developing these regulations was entrenched in the regulations themselves, since they provided that any guidelines or procedures related to this sensitive process should be approved by the AGO.[53] Indeed, the emergency regulations were challenged before the High Court immediately after their promulgation in *Ben Meir v. Prime Minister*.[54] Within two days, the High Court issued an interim injunction, staying the force of the regulations unless they were submitted to the parliamentary committee for approval within five days.[55] The parliamentary committee was then formed, and within this period it conducted a thorough review of the regulations' content to mitigate potential privacy violations and to ensure proper supervision over these extraordinary powers.[56]

Even so, the High Court did not tolerate this state of affairs for long. Within a month since the promulgation of the emergency regulations, it ruled again on the matter.[57] In April 2020 it determined that, since the exigencies of the COVID-19 crisis have been mitigated, the government may not continue its surveillance practices any further—at least, not on the basis and authority of the

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[53] *See id.* ("Both ISA and police acquisition and use of 'technological' and location data are not subject to ex ante judicial or quasi-judicial review, and the ex post review made by the attorney general—who will receive a limited post hoc report under the ISA Coronavirus Technological Data Regulations—and the currently nonexistent Knesset intelligence and secret services subcommittee might be too little and too late.").

[54] *See* HCJ 2109/20 Ben Meir v. Prime Minister (2020) (Isr.) (stating the petitions challenge the Emergency Regulations).

[55] *See* HCJ 2109/20 Ben Meir v. Prime Minister (Mar. 19, 2020) (Isr.) (interim order granting petition for order *nisi*), *translated in Ben Meir v. Prime Minister*, CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ben%20Meir%20v.%20Prime%20Minister.pdf [https://perma.cc/BZX5-YWT9] (prohibiting the implementation of COVID-19 Emergency Regulations until the Knesset establishes oversight mechanisms).

[56] *See* Chachko & Shinar, *supra* note 37 ("Critics challenged the regulations before the Supreme Court, which required that the regulations be submitted to the parliamentary committee in charge of the ISA by March 24. If the government failed to comply, the Court held, the regulations would become void. Consequently, the Knesset committee formed and renewed its activity. The government, in turn, revised the regulations to address privacy concerns, and the committee provided its own comments.").

[57] HCJ 2109/20 Ben Meir v. Prime Minister (Apr. 26, 2020) (Isr.) (interim order granting petition for order *nisi*), *translated in Ben Meir v. Prime Minister*, CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ben%20Meir%20v.%20Prime%20Minister1.pdf [https://perma.cc/44JC-W4ZH].

administrative regulations.[58] Accordingly, the Court allowed the government a few additional weeks to reform the relevant law.[59]

The *Ben Meir* decision has not been the final say in the ISA Tracking saga. In July 2020, after many hesitations and internal disputes within the government, the Knesset enacted The ISA Authorization Law to specifically authorize the ISA to implement the tracking mechanism to aid the government in dealing with the second wave of the pandemic.[60] Like in the case of the general Coronavirus Law, this Law could only be enforced after a declaration of state of emergency by the government. Unlike in the case of the general Coronavirus Law, the duration of this proclamation could not exceed twenty-one days and its validity depended on confirmation by a parliamentary committee.[61] The Law also contained detailed provisions to ensure that the information gathered by the ISA would not be transferred to any authority save the Ministry of Health, and that this information would be completely erased from any governmental database within sixty days after its collection.[62] The law also included a sunset provision that stated that its force is limited to six months after which the Knesset is required to re-legislate if it decides that there is a need

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[58] *Id.* (granting a petition for an interim order that, until the Knesset establishes relevant oversight, the Emergency Regulations cannot be used).

[59] *See* HCJ 2109/20 Ben Meir v. Prime Minister (Apr. 26, 2020) (interim order granting petition for order *nisi*), *translated in Ben Meir v. Prime Minister*, CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ben%20Meir%20v.%20Prime%20Minister1.pdf [https://perma.cc/44JC-W4ZH] (allotting for "a short, additional period that shall not exceed a few weeks" to complete the legislation).

[60] *See generally* Law on ISA Authorization to Assist in the National Effort to Reduce the Spread of the Novel Coronavirus and to Promote the Use of Civilian Technology to Trace Those Who Have Been in Close Contact with Patients, 5780-2020, SH 2816 166 (Isr.) https://www.gov.il/he/Departments/official_gazette [https://perma.cc/A8XX-XSXC] [hereinafter ISA Authorization Law] (authorizing the ISA to collect information but limiting its duration and scope to Ministry of Health disclosure); *see also* Ruth Levush, *Israel: Regulation of Covid-19 Digital Contract Tracing,* LIB. CONG. 3 (Dec. 2020) https://tile.loc.gov/storage-services/service/ll/llglrd/2020725114/2020725114.pdf [https://perma.cc/NYK7-3R3Y] (explaining that "[t]he ISA Authorization Law empowers the government . . . to issue a declaration authorizing the ISA to provide tracing assistance.").

[61] *See* Levush, *supra* note 60, at 3 ("The declaration will expire on the date it specifies or within 21 days from its publication in the official gazette, depending on the prognosis for the spread of the coronavirus.").

[62] *See generally* ISA Authorization Law, *supra* note 60. (authorizing the ISA to collect information but limiting its duration and scope to Ministry of Health disclosure).

for such extension.[63] Nevertheless, the duration of this law was automatically extended due to the dissolution of the Knesset for yet another round of elections.[64] When the extended law was challenged before the HCJ, the Court stopped short of invalidating it altogether. Instead, the Court ruled that the government can only use it according to specific guidelines and, in any case, the tracking mechanism can only be used against Corona carriers that refuse to cooperate with the health authorities.[65] Following this decision, the government decided to stop using the tracking mechanism as a vehicle to deal with the pandemic.[66]

V. POLITICAL LIBERTIES: SPEECH AND PROCESSION

The ISA Tracking saga forms a good illustration of the "dialogue" between the political branches and the judiciary throughout the coronavirus crisis. Another example for the Court's influence over the executive and the legislature's reaction to the crisis is the field of fundamental political rights. As noted above, the coronavirus pandemic took place at a very sensitive period in Israeli politics, amidst four consecutive elections after which none of the political forces managed to form a stable government.[67] This means that for

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[63] *See* Daniel Shtauber, Gaya Harari-Heit & Ittai Bar-Siman-Tov, Sunset Legislation in Israel During the COVID-19 Pandemic 7–11 (2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4582056 (providing background on sunset provisions in the ISA Authorization Law).

[64] *See* Levush, *supra* note 60, at 19 n.75 ("With the dispersal of the 23rd Knesset, the ISA Tracking Law remain in effect until July 5, 2021, three months after the start of the 24th Knesset, in accordance with article 38 of the Basic Law: The Knesset.").

[65] HCJ 6732/20 Ass'n for Civ. Rts. in Isr. v. Knesset (2021) (Isr.). *See also* Ittai Bar-Siman-Tov, Yehonatan Dayan & Shaiel Tchercansky, *Israel, The Supreme Court of Israel Sitting as High Court of Justice, 1 March 2021, HCJ 6732/20*, COVID-19 LITIG., https://www.covid19litigation.org/case-index/israel-supreme-court-israel-sitting-high-court-justice-hcj-673220-2021-03-01 [https://perma.cc/GS5N-3GYC] (noting that the HCJ's decision means "[t]he use of ISA surveillance will be reduced and reserved only for individual cases where people refuse to cooperate with epidemiological investigations. In addition, if the government chooses to continue to be assisted by the ISA technology, they should establish measurable criteria that will determine the scope for assistance from the ISA tracking tool").

[66] *See* Bar-Siman-Tov, Dayan, & Tchercansky, *supra* note 65 ("[T]he government has stopped using ISA technology to conduct epidemiological investigations.").

[67] For a discussion of this period of political instability, see *supra* note 31 and associated discussion.

most of the period between March 2020 and June 2021 the government was in a status of caretaker government with no support by the majority in the Knesset.[68] Moreover, throughout this period mass demonstrations against Netanyahu took place in various locations, and particularly in front of the Prime-Minister House in Jerusalem.[69] When the pandemic crisis began, there was a fear that the government would use the coronavirus restrictions in order to restrict the demonstrations.[70] Indeed, several government spokespeople attacked the demonstrators—asserting that they endangered public health.[71] The government however, stopped short of using the emergency regulations as a vehicle to constrain the demonstrations.[72] Few doubted that the omission's sole cause was that the Attorney General's stance that the pandemic did not excuse curtailing freedom of speech or procession, and that such regulations were doomed to be invalidated by the HCJ. Indeed, in its major decisions regarding the coronavirus regulations the Court emphasized that fundamental freedoms, such as freedom of speech, freedom of the press, and the right for demonstration and procession did not cease to exist during the pandemic, and that the government should accommodate these rights in any regulations concerning the pandemic.[73] The result was that, except during a

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[68] The exception for this was a period between May to December 2020 when Netanyahu formed a "partition government" with Beni Ganz (one of the opposition leaders) but this government also collapsed as Netanyahu refused to pass the budget in order to avoid change of guard with Ganz (as was stipulated in the coalition agreement). S*ee MK Accuses Government of Planning 'Partitioning' of Western Wall,* ISR. NAT'L NEWS (Oct. 28, 2021, 6:04 PM), https://www.israelnationalnews.com/news/315905 (documenting the Noam Party leader MK Avi Maoz calling the coalition government a "partition government"). For a detailed description of the caretaker government, see Albin et al., *supra* note 14.

[69] *See* Maayan Lubell, *Israelis Protest Outside Netanyahu's Home After Bid to Curb Demonstrations,* REUTERS (Sept. 6, 2020, 11:05 PM), https://www.reuters.com/article/us-health-coronavirus-israel-protests-idUSKBN26H0ZD/ [https://perma.cc/YL7P-CD43] (discussing protests outside of Netanyahu's house among other locations).

[70] *See id.* (documenting the attempt to tighten restrictions on demonstrations).

[71] *See, e.g.*, *id.* ("Netanyahu has rejected allegations that the tougher lockdown rules were in part intended to quash the protests, which he has often called 'anarchist' and 'ludicrous'. 'We need the lockdown in order to save lives' . . . .").

[72] *See* Albin et al., *supra* note 14 (stating the HCJ struck down regulations that restricted demonstrations).

[73] *See*, *e.g.,* HCJ 2109/20 Ben Meir v. Prime Minister (Apr. 26, 2020) (interim order granting petition for order *nisi*), *translated in Ben Meir v. Prime Minister*, CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ben%20Meir%20v.%20Prime

short period in which the whole population was under a general closure order (which banned anyone from being over one kilometer from home), the demonstrations against Netanyahu's government persisted throughout the coronavirus era.[74] Indeed, when the Coronavirus Law was enacted, it specifically exempted demonstrations from most restrictions that the government was authorized to impose.[75]

Similar guarantees were given to the right of prayer. While the Court upheld regulations aimed at preventing events of mass gathering for prayer on religious holidays,[76] it made clear that the government should give proper weight to free exercise of religion. Accordingly, the Coronavirus Law exempted prayer from most governmental restrictions.[77]

VI. FREEDOM OF MOVEMENT AND THE RIGHT TO ENTER ISRAEL

The regime of Corona regulations constituted severe restrictions on the right of movement. Almost all over the world, people were ordered by their governments to stay home, avoid accessing public places, or refrain from gathering with others for professional or social purposes. In particular, the pandemic brought about an

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%20Minister1.pdf [https://perma.cc/44JC-W4ZH], (emphasizing the importance of press freedoms during a national crisis); HCJ 5078/20 Fadida v. Israeli Police – Jerusalem District Commander (2020) (Isr.).

[74] Mairav Zonszein, *Israelis Take on Netanyahu and Coronavirus Restrictions in Wave of Civil Disobedience*, INTERCEPT (Nov. 14, 2020, 9:10 AM), https://theintercept.com/2020/11/14/israel-coronavirus-netanyahu-protests/ [https://perma.cc/Y3GC-FRSP] (documenting repeated demonstrations against Netanyahu's government and the effect of lockdown orders on those demonstrations).

[75] *See* Levush, *supra* note 38 (explaining that participation in demonstrations was specifically exempted from restrictions aimed to prevent the spread of COVID-19 under Israel's "Special Authorities to Combat the Novel Coronavirus" law).

[76] *See, e.g.*, HCJ 2956/20 Roznblat v. Prime Minister (2020) (Isr.) (dismissing petitions against restrictions related to prayer in the holy place of Meiron Mountain during a holiday); HCJ 2960/20 Levin v. Government of Israel (2020) (Isr.) (same); HCJ 2818/20 Etzion v. Prime Minister (2020) (Isr.) (dismissing a petition against Coronavirus restrictions related to the entrance to the Temple Mount).

[77] *See* §§ 7A(1)J1, 7A(2), 19, Law Granting Government Special Authorities to Combat Novel Coronavirus, 5780-2020 (Temporary Provision) (2020) (Isr.); *see also* Levush, *supra* note 38 (noting participation in religious ceremonies was legislatively exempted from many COVID-19 restrictions).

unprecedented wave of restrictions over movement between states and on international transportation. Israel was no exception. Shortly after the pandemic hit the country, the government published emergency regulations that banned non-citizens from entering the state and imposed heavy restrictions on the right of Israeli citizens to leave and enter.[78] Those restrictions included a requirement for a period of isolation after the entering and corona tests.[79] According to the regulations, the isolation should have taken place either in the private residence of the relevant citizen, or, if effective isolation was not possible at home, the person was referred to Corona hotels.[80] However, the government's array of hotels failed to function properly, and so did the inspection regime that was supposed to enforce isolation orders.[81] As the result of its failure to develop a proper regime of control and inspection over the entrance to the country, at a certain stage the government decided to limit the number of citizens allowed to enter to a certain quota (of a few thousand passengers per day).[82] These regulations soon made their way before the HCJ. The petitioners argued that the restrictions severely infringe on the right of movement as well as on various other fundamental rights such as the right for free trade and the right for family life. Like in the other major coronavirus cases, the issue of entrance was not devoid of connection to the political turmoil as petitioners argued, among other things, that the regulations were aimed to infringe on their right to take part in the upcoming elections.[83] The Court intervened. It stressed the

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[78] *See* Albin et al., *supra* note 14 (describing the Israeli government's early travel restrictions).

[79] *See id.* (explaining that both a supervised quarantine and negative test were required to enter Israel).

[80] *See id.* ("The rules about the location of quarantine changed and while, for the most part, home quarantine was allowed, during certain periods quarantine was required to take place in state supervised institutions.").

[81] *See* Sam Sokol, *Little Oversight, Even Less Testing: Inside Israel's COVID Quarantine Tracking Program,* HAARETZ (Dec. 23, 2021), https://www.haaretz.com/israel-news/2021-12-23/ty-article/little-oversight-less-testing-inside-israels-covid-quarantine-tracking-program/0000017f-db61-db22-a17f-fff1ff000000 [https://perma.cc/T4A7-PVKX] (outlining the failure of the quarantine and inspection system in preventing COVID-19).

[82] For a detailed description of movement constraints in Israel, see Albin et al., *supra* note 14.

[83] *See* Ittai Bar-Siman-Tov, Itay Cohen & Chani Koth, *The Changing Role of Judicial Review During Prolonged Emergencies: The Israeli Supreme Court During COVID-19*, 1 L.

importance of the right of movement and the severity of the infringement on fundamental freedoms resulting from the regulations.[84] It ruled that the regulations fail to meet the proportionality test since there were other, less extreme means the government could utilize to promote the interest of public health short of restricting the number of citizens allowed to return to their homes.[85] It also ruled that the failure of the government to build a proper enforcement mechanism over the entering population cannot serve as a justification to take disproportionate measures that severely infringe on fundamental rights.[86] The regulations were invalidated accordingly.[87]

VII. OVERALL REVIEW OF CORONA REGULATION

While the Court did step in to strike down coronavirus regulations in some notable cases (as described above), in the vast majority of cases it refrained from intervention and confirmed the validity of the measures taken by the government to deal with the pandemic.[88] Like most governments around the world, the Israeli government took extreme measures to prevent the spread of the COVID-19 virus throughout the crisis. These included (at certain periods) closure orders on certain cities or areas, partial or complete

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POL'Y & PANDEMICS 271, 276 (2021) ("Many of the petitioners complain about the inability to leave the country or return to it and about accompanying violations of additional rights, including the right to family life and the right to vote and be elected").

[84] *See id.* ("The Court accepted the petition against these restrictions. The Court held that the right to leave a person's country of citizenship and enter it is based on the right to freedom of movement, which has been recognized in Israeli case law as a supreme right, with particular strength and status among the individual's rights and freedoms, derived from being a free person and the state's character as a democracy.").

[85] *See id*. (noting that the HCJ "exercis[ed] substantive constitutional judicial review of the content of the restrictions and their proportionality" in finding the regulations to be impermissible).

[86] *See id*. ("Due to this lack of an evidence-based justification for restricting demonstrations, . . . the limits imposed on demonstrations did not meet the balancing test that required near certainty of harm to the public wellbeing to justify restricting the right of demonstration.") (internal citation and punctuation omitted).

[87] HCJ 1107/21 Shemesh v. Prime Minister (2021) (Isr.).

[88] *See* Bar-Siman-Tov, Cohen & Koth, *supra* note 83, at 276 (claiming that "[i]n the first period of the pandemic, the Court exhibited significant judicial restraint" in refusing to strike down restrictions).

bans on commercial and cultural activities, requirements to wear masks in all public places, severe restrictions on movement between certain areas, and even a comprehensive stay-home order that required the whole population to stay within 100 meters from their homes.[89]

Almost all these regulations were challenged before the HCJ. The Court however, exhibited considerable deference in most cases —sustaining regulations in almost all cases.[90] It affirmed restrictions on movement in certain designated municipal zones.[91] It sustained regulations that prevented mass public gathering for prayer in religious holidays[92] and in memorial ceremonies.[93] The Court dismissed attempts to challenge the duty to wear masks even when the pandemic was in a state of recession.[94] The Court also affirmed severe restrictions on business activities, including general closure orders[95] as well as long-term restrictions on activities of certain businesses such as wedding halls.[96] It affirmed governmental policies that distinguished between vaccinated and non-vaccinated persons for the purpose of taking COVID-19 tests as a condition for attending schools.[97] It also refused to intervene in executive decisions regarding vaccination policies[98] and the

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[89] *See* Albin et al., *supra* note 14 (discussing the Israeli government's COVID-19 restrictions).

[90] *See* Bar-Siman-Tov, Cohen & Koth, *supra* note 83, at 276 (noting the "significant judicial restraint" from the HCJ in reviewing early regulations).

[91] *See, e.g.*, HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.), *translated in Yedidya Loewenthal, Adv. v. Prime Minister,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/7RL8-CE97] (finding "no grounds for intervening in the Government's decision" restricting movement between municipal zones); HCJ 2491/20 Ramot Alon v. Gov. of Israel (2020) (Isr.).

[92] *See supra* note 76 (listing cases sustaining regulations on public gathering for religious holidays).

[93] HCJ 2705/20 Smadar v. Prime Minister (2020) (Isr.).

[94] HCJ 8691/20 Argaman v. Gen. Manager of the Ministry of Health (2021) (Isr.).

[95] HCJ 2305/20 Shozopo Trading Co. v. Prime Minister (2020) (Isr.).

[96] HCJ 3432/20 Traklin v. Government of Israel (2020) (Isr.); HCJ 5254/20 Tel Ya v. Government of Israel (2020) (Isr.); HCJ 8136/20 Heichalei Malchut v. Government of Israel (2020) (Isr.).

[97] HCJ 5322/21 Kaspi v. Government of Israel (2021) (Isr.).

[98] HCJ 5822/21 Hamagen for Individual Freedom v. Gen, Manager of the Ministry of Health (2021) (Isr.).

designation of certain medical facilities, such as nursing homes, as centers for treatment of COVID-19 patients.[99]

The Court heard all of these petitions within days—but all were ultimately dismissed after the Court accepted the government's arguments that these restrictive measures were justified due to the exigencies posed by the coronavirus outbreak.[100] While affirming the governmental decisions, the Court acknowledged, of course, that the coronavirus regulations contained severe infringements on basic human rights as well as on vital individual interests.[101] It also acknowledged, however, that the pandemic created an exigent public interest that justified extraordinary governmental measures to deal with the pandemic. It stressed that "these are not normal times," and hence, irregular governmental regulations are justified.[102] The Court also emphasized that it refrains from intervening in the executive judgement based on medical, economic

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[99] *See* HCJ 2233/20 Pardes Hana-Karkur Local Council v. Ministry of Health (2020) (Isr.), *translated in Pardes Hanna-Karkur Local Council v. Ministry of Health,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Pardes%20Hanna-Karkur%20Local%20Council%20v.%20Ministry%20of%20Health.pdf [https://perma.cc/826J-Z6ZL] (refusing to undermine the government's decision to use certain medical facilities for the treatment of COVID patients).

[100] *See, e.g.*, *supra* notes 91–95 (collecting cases upholding restrictions); *see also, e.g.*, HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.), *translated in Yedidya Lowenthal, Adv. v. Prime Minister,* Cardozo L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/2482-YJK5] ("We face an unprecedented situation of fear of the rapid spread of the coronavirus in large numbers, with all that portends in terms of morbidity, death, and the collapse of the health system. In the horizontal balancing of rights, we now place the violation of fundamental liberties and rights like freedom of movement against the right to life and physical integrity – an uncommon situation in our state. In that horizontal balance, the right to life prevails.").

[101] *See, e.g.*, HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.), *translated in Yedidya Loewenthal, Adv. v. Prime Minister,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/7RL8-CE97] (noting that the restrictions constituted "violation of fundamental liberties and rights like freedom of movement" but that these violations were necessary to maintain the right to life).

[102] *See, e.g.*, HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.) ¶1, *translated in Yedidya Loewenthal, Adv. v. Prime Minister,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/7RL8-CE97] (discussing the legal impact of the exigent circumstances created by the pandemic); *see also* HCJ 2705/20 Smadar v. Prime Minister (2020) (Isr.).

or technological assessments.[103] Attempts by petitioners to present expert opinions that supported their claims largely failed, as the Court noted that as long as the governmental policy is based on reasonable professional grounds, it is not for the Court to decide between conflicting expert opinions.[104]

To sum up this part of the analysis, one can say that, from a purely *doctrinal* point of view, it seems that during the Corona crisis there was a considerable shift in the HCJ's policies. In normal times, the Court exerts a penetrative mode of review over governmental policies by carefully overviewing the "reasonableness" of the "balancing" done by administrative decisionmakers when creating policies in all fields.[105] During the

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[103] *See* HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.), *translated in Yedidya Loewenthal, Adv. v. Prime Minister,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/7RL8-CE97] ("We act under the presumption that, in this matter, the Government made its decision on the basis of the recommendations of the professional organs, and solely for relevant reasons.").

[104] *See, e.g.*, HCJ 7174/20 Free Israel v. Ministry of Health (2020); HCJ 5822/21 Hamagen v. General Manager of The Ministry of Health (2021)*;* HCJ 5322/21 Kaspi v. Government of Israel (2021). This approach is well in line with the general doctrine of review of administrative evidence. *See* HCJ 80/13 "Nun" Reserved Indus. v. Ministry of Health*,* 34(2) PD 693 (1980) (Isr.); HCJ 987/94 Euronet Gold Lines v. Minister of Commc'ns*,* 48(5) PD 412 (1994) (Isr.). It is also in line with the "substantial evidence" doctrine in the United States. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477–86 (1951) (explaining the "substantial evidence" standard of judicial review); *see also* Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (explaining the substantial evidence standard in comparison to other tests used in U.S. courts).

[105] *See* Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 118, 119 (2009) ("Since the 1980s, the Israeli Supreme Court has increasingly recognized reasonableness as a basis for judicial review. The reasonableness test extends beyond mere irrationality and enables the court to overrule decisions which do not balance properly between relevant considerations, when the balance struck is 'extremely' unreasonable or extends beyond the 'zone of reasonableness.'"). The recent controversy over the judicial reforms passed in July 2023 largely resulted from limitations on the judiciary's use of "reasonableness." *See* JIM ZANOTTI, CONG. RSCH. SERV., IN12214, ISRAEL: CONTROVERSY OVER JUDICIAL SYSTEM CHANGES AND PROPOSALS 1 (2023), https://crsreports.congress.gov/product/pdf/IN/IN12214 ("In July 2023, the Israeli Knesset passed a law to limit the judiciary's use of "reasonableness" in reviewing government decisions. . . . The proposals—which Netanyahu and supporters say would provide corrective balance within an Israeli system that lacks explicit constitutional boundaries to judicial review—have triggered a charged national debate, including mass protests.").

crisis, the Court shifted to a much narrower mode of review.[106] It maintained the above penetrative mode of review only with regard to decisions that involved potential infringement of basic democratic liberties.[107] In all other fields, it shifted into a less intensified mode of review. It emphasized the wide discretion that the government has to deal with situations of emergency, the advantages of the executive over the judiciary in areas of professional expertise, and the need to limit judicial intervention to the boundaries of clear illegality or extreme unreasonableness.[108] Hence, the HCJ avoided intervention by formal court order in the vast majority of cases.[109] Accordingly, it seems that the Coronavirus crisis led the HCJ to lower the intensity of judicial review and to function within boundaries of review accepted in most judicial systems of administrative review.

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[106] *See* Bar-Siman-Tov, Cohen & Koth, *supra* note 83, at 273 ("[T]he perception of Covid-19 as an exceptional and unprecedented situation, which entails fear from potential catastrophic consequences, has caused the Court to adopt a much more deferential approach toward rights- infringing measures than in normal times.").

[107] *See id.* at 274 ("[I]t would be incorrect to assume that the Court remained completely passive . . . . Instead, it limited its role to ensuring structural separation-of-powers safeguards, by upholding the parliament's ability to control the government's measures.").

[108] *See, e.g.*, HCJ 2435/20 Loewenthal v. Prime Minister (2020) (Isr.), *translated in Yedidya Loewenthal, Adv. v. Prime Minister,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/opinions/yedidya-loewenthal-adv-v-prime-minister [https://perma.cc/7RL8-CE97] ("It is settled law that when the Court reviews a decision by a governmental agency, it does not presume to stand in its shoes and make decisions for it in its area of expertise. It is not the practice of this Court to intervene in matters of the agency's policy, and this is particularly so in regard to policy that is based upon clearly professional data, and where the decision is of a clearly professional nature under the agency's authority and expertise. . . . Wh[en] we are not concerned with a regular administrative decision, but rather with a Government Decision by virtue of emergency regulations, we are concerned with a clearly professional matter.").

[109] MYSSNA MORANY, THE LEGAL CTR. FOR ARAB MINORITY RTS. IN ISR., THE ISRAELI SUPREME COURT AND THE COVID-19 EMERGENCY 35 (2021), https://www.adalah.org/uploads/uploads/COVID19%20report%20EN.pdf [https://perma.cc/37NM-HX6B] ("The Court was . . . reluctant to intervene in petitions concerning the protection of human rights, and dismissed or rejected the overwhelming majority of such petitions. . . . [T]he use of these strategies became very pronounced during the first wave of COVID-19, particularly when set against the backdrop of the sweeping powers wielded by the government and the increased potential for human rights violations through the exercise of such powers.").

VIII. THE IMPACT OF HCJ REVIEW ON CORONA REGULATION—BEYOND JUDICIAL RHETORIC

From the above description of the HCJ's jurisprudence during the Coronavirus crisis one may get the impression that, save in some fields such as infringement on basic democratic rights, the HCJ had little involvement in the way by which the Israeli government handled the crisis. The truth is, however, very different. Indeed, if one looks only at judicial rhetoric, or on the bottom-line outcomes of litigation (in terms of formal judicial orders), then the possible conclusion is that in the vast majority of cases the petitions were ultimately dismissed.[110] A closer look at the practices of the HCJ, however, reveals a much more complex picture. Despite the shift the Court made into a more restrictive review on the doctrinal level, in practice, litigation before the HCJ continued to be a crucial factor in shaping governmental policies.[111] That is, the model of "soft continuous judicial review",[112] did not lose its relevance during the crisis. If anything, the reverse seems to be the case. This means that despite the restrictive rhetoric, and despite the fact that the vast majority of petitions were ultimately dismissed, still the Court had its ways of shaping public policy.

The impact of judicial review on public policy was carried through various practices and avenues that are the product of the (as described above) particular procedural features of litigation before the HCJ. The fact that the HCJ is essentially a trial court,

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[110] These findings correspond with Fairgrieve & Lichère's findings that during the Coronavirus crisis the rate of cases in which courts in the UK and France intervened in administrative decisions dropped, see Fairgrieve & Lichère, *supra* note 27, at 1304–06, 1306 ("[I]n exceptional circumstances, courts will grant more extensive deference to the executive than in normal times.").

[111] *See* Yoav Dotan, *Continuous Judicial Review in Coronavirus Times*, REG. REV. (May 11, 2020), https://www.theregreview.org/2020/05/11/dotan-continuous-judicial-review-coronavirus-times/ [https://perma.cc/RJ24-LRBU] ("One may be tempted to conclude that the judicial system simply relinquished its supervisory role in the face of the pressures of the crisis. The reality, however, is more complex. A closer look . . . reveals that, although the petitions were ultimately dismissed, in the course of litigation the government was called on to provide detailed explanations for its decisions, and governmental policies were often reshaped and refined in the course of litigation.").

[112] *See* DOTAN, *supra* note 16, at 44 (describing the HCJ's ability to review a wide range of institutions without needing to issue formal decisions).

before which governmental decisions are brought for review shortly after they are made (sometimes—as in the case of the Coronavirus crisis—within days or even hours), combined with the fact that the legal advisors of the government view themselves as "gatekeepers" who are highly attentive to judicial preferences, ensured that "the shadow" of the HCJ was well reflected throughout policymaking processes even before any matter was brought to court. Thus, for example, the Court dismissed a petition that challenged the lack of sufficient Coronavirus testing facilities to serve the Arab population in East Jerusalem after closely overviewing the detailed statement by the government that presented all moves taken to settle the issue.[113] In other words, in many cases it is clear that the regulations were designated to meet the requirements of the judicial doctrine and in order to sustain the (almost certain) possibility of judicial review.

In addition, since decisions are brought to judicial review shortly after they are made, the Court is able to strike the iron while it is hot. In many cases, remarks made by the justices off the bench brought about modifications in the regulations and adaptations of policies by the government while the case was pending, thus affecting policymaking even though the petitions were ultimately dismissed (the *Ben Meir* case, above discussed is a good illustration of such "dialogue" between the government and the Court in this respect).[114]

The impact of judicial review was not limited only to cases that reached litigation. It was conspicuous in all regulative measures taken throughout the crisis and was effectuated by the legal advisory mechanism of the government.[115] The fact that any

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[113] *See* HCJ 2471/20 Adalah Legal Ctr. for Arab Minority Rts. in Isr. v. Ministry of Health, (2020) (Isr.), *translated in Pardes Hanna-Karkur Local Council v. Ministry of Health,* CARDOZO L.: VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Interior.pdf [https://perma.cc/WZ6J-F8C5] (holding that the respondent sufficiently responded to the pandemic, considering the circumstances).

[114] HCJ 2120/20 Ben Meir v. Prime Minister (2020) (Isr.) (voicing belief that the dangers COVID-19 presented fell within the imminent dangers the government can act against for national security).

[115] *See* Dotan, *supra* note 111 ("The bottom line is that review by the High Court takes place within days or even hours of a petition's filing, which enables the High Court to review

regulatory decision was potentially vulnerable to immediate challenge in court provided crucial power to the legal advisors of the government and specifically to the position of the Attorney General and his staff.[116] In fact, any significant governmental decision during the crisis required the approval of this advisory mechanism. The bright side of the legal supervision is that it reduced the risks of blatant infringements on basic human rights as the result of the emergency situation and the exigencies of the crisis.[117] All this, however, did not come without a price. The social toll of this need for approval by the legal advisors for every move of the government was bureaucratic complications and delays, which were not always essential and, in some cases, significantly compromised the ability of the government to react swiftly and decisively in the face of rapidly changing circumstances.[118] For example, the government's efforts to impose entrance restrictions at the airports or to quickly establish an effective system of Coronavirus testing at the ports of

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and react to government action almost in real time. The influence of the High Court over governmental policies, however, is exerted in most cases even before litigation begins—through the advisory mechanism of the AGO, over which the High Court has considerable influence.").

[116] For a comprehensive discussion of the institution of the Attorney General and its relationships with other executive offices, see DOTAN, *supra* note 16, at 54–71.

[117] *See, e.g.*, Aeyal Gross & Nir Kosti, *The Paradox of Israel's Coronavirus Law*, VERFASSUNGSBLOG (Jan. 8, 2021), https://verfassungsblog.de/the-paradox-of-israels-coronavirus-law/ [https://perma.cc/H9H3-PWG3] ("In April 2020 . . . Israel's Attorney-General advised the government that, whenever possible, it was its legal duty to advance primary legislation in the Knesset to replace continued recourse to ER. A petition to the HCJ also demanded a stop to the use of ER, arguing it exceeded the government's authority grounded in the ongoing state of emergency. . . . [I]n September 2020, the government considered reverting to ER to restrict demonstrations. The Attorney General objected to such use and the Law was eventually amended in the Knesset.").

[118] For examples of the various bureaucratic hurdles that the government's Coronavirus response faced, see TEHILLA SHWARTZ ALTSHULER & RACHEL ARIDOR HERSHKOVITZ, BROOKINGS INST., DIGITAL CONTACT TRACING AND THE CORONAVIRUS: ISRAELI AND COMPARATIVE PERSPECTIVES 17 (2020) ("Israel does have a functioning system of checks and balances. Civil society spoke out loudly and kept the issue on the public agenda. Appeals to Knesset members and High Court petitions led to significant curtailment of the original government decisions. The Knesset Foreign Affairs and Defense Committee held hearings and demanded a greater degree of transparency than the government had planned on. The High Court ruled that the GSS could not be given such sweeping powers purely on the basis of a government decision, and twice ordered the government to obtain parliamentary approval for its policies.").

entrance were often impeded by bureaucratic obstacles.[119] Not all of these were the result of the need to get clearance from the legal advisors, and sometimes it seems that politicians exploited legal constraints as an excuse for their own incompetence.[120] It seems, however, that while the justices of the HCJ were quick to understand that the exigencies of the crisis require quick adaptations of the legal doctrine, not all legal advisors within the government were as quick and alert. As a result, the bureaucratic costs caused by legal advisors were significant and in some cases completely forestalled essential decisions and impaired the public good. For example, the government plan to impose an across-the-board night closure order during the peak of the pandemic was effectively preempted by delays produced by legal advisors.[121] Likewise, essential decisions to lift or relieve restrictions were sometimes intolerably impeded by similar unnecessary delays.[122]

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[119] *See* Nati Tucker, *A Cabinet Within a Cabinet: Where Israel Really Sets Its COVID Policies*, HAARETZ (Dec. 9, 2021), https://www.haaretz.com/israel-news/2021-12-09/ty-article/.premium/a-cabinet-within-a-cabinet-where-israel-really-sets-its-covid-policies/0000017f-e5b8-dea7-adff-f5fbea730000 [https://perma.cc/55H4-EH4C] ("Although the [COVID-19 advisory] panel makes operational decisions, it has no official standing. However, Attorney General Avichai Mandelblit does have a representative participating in its sessions; usually it's Deputy Attorney General Raz Nizri. On occasion the panel has developed policy on a specific issue only to be told by Mandelblit's representative that the issue would have to be taken up by the coronavirus cabinet.").

[120] *See, e.g.*, Kenan Cohen, *Rapid Corona Tests Were Approved in Israel; Regev: "The Ministry of Justice Delayed the Inspection Obligation,"* WALLA (Jan. 18, 2021, 9:09 AM), https://news.walla.co.il/item/3412373 [perma.cc/PDN9-V9QZ] ("Transport Minister Regev accused the Ministry of Justice of 'preventing for months the charging of tests and isolation.'"); Itamar Eichner, Tova Tsimuki, Nina Fox, Adir Yanko & Gad Lior, *The Battle over Israel and Against the Ombudsman: A Negative Corona Test Will Be A Condition of Entry into Israel*, YNET (Jan. 18, 2021, 4:24 AM), https://www.ynet.co.il/news/article/S1l0011CG1u [perma.cc/A5WW-FUF6] (reporting that Ministers of Health and Transport Yuli Edelstein and Miri Regev accused Attorney General Avichai Mandelblit of "prevent[ing] a charge for a negative corona test as a condition of entry into the country").

[121] *See* Yaron Avraham & Kern Martziano, *Another Farce: Due to Legal Difficulties – The Night Curfew Was Dropped from the Episode* (Dec. 8, 2020, 5:58 PM), https://www.mako.co.il/news-israel/2020_q4/Article-6298a2c1f034671026.htm [perma.cc/Y6YM-6CE9] ("The government canceled the meeting that was supposed to convene this evening . . . to approve the night curfew, due to legal difficulties involved in the process.").

[122] *See, e.g.*, *Again at the Last Minute: Israel Is Waiting for a Decision Tonight on the Reliefs from Tomorrow*, YNET (Mar. 6, 2021, 10:55 AM), https://www.ynet.co.il/news/article/rJLbhbb7u [perma.cc/5K4B-X55E] ("[A] delay in the

IX. CONCLUSION

The above account of judicial review by the Israeli HCJ during the time of the coronavirus crisis points to the fact that the HCJ was particularly active in the following areas: *Firstly,* the Court fulfilled its classic role as a defender of individual rights in face of the harshness of the regulatory measures taken by the government. The Court did so, however, while taking into account the exigent needs of the government to effectively combat the spread of the COVID-19 virus and while carefully balancing the competing interests within the framework of the constitutional principle of proportionality.[123] *Secondly,* the Court was particularly sensitive with regard to the status of *political rights*, such as the right for demonstration and procession, and the right of free movement in the context of the general elections.[124] This should not come as a surprise given the instability of the political situation during the relevant period and the concern that the government may exploit the Coronavirus crisis in order to gain political advantage. *Thirdly,* the Court was markedly active in ensuring the proper function of *other mechanisms of democratic control* over the government. In particular, it made sure that the government would only be able to use emergency measures under parliamentary oversight (and, at a later stage, that the framework within which the government operate would be defined by the Knesset in a special Coronavirus Law).[125] *Lastly,* in all cases that did not involve fundamental individual rights and/or the function of basic democratic mechanisms – the HCJ demonstrated considerable deference vis-à-vis executive discretion.[126]

The above may lead to a conclusion that, contrary to its general course of action in normal times, during the Coronavirus crisis the HCJ's policies corresponded well with a model of a limited judicial

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drafting of the regulations by the legal advisors to the government and the corona cabinet led to the postponement of the vote on the various reliefs . . . .").

[123] *See supra* Part VI (chronicling the Court's intervention in government regulations on proportionality grounds).

[124] *See supra* Part VI (outlining the Court's focus on political rights).

[125] *See supra* Part VIII (noting the HCJ's supervisory powers through mechanisms such as the Attorney General's Office).

[126] *See supra* Part VII (arguing that the HCJ demonstrated deference to executive discretion during the Coronavirus crisis).

review (perhaps even with the lines of Ely's process theory).[127] Such a conclusion, however, fails to account for the *indirect* impact of judicial review as exerted through its *soft* influence over the Israeli executive through the mechanism of AG Office and the legal apparatus of the government. To sum up, one can suggest that—while the HCJ itself exhibited considerable restraint *vis-à-vis* executive discretion during the crisis—its *shadow* over the Israeli bureaucracy was still significant and even penetrative.

[127] *See* ELY, *supra* note 2 (outlining Ely's process theory).