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SECTION III – REPORTS

The Changing Role of Judicial Review During Prolonged Emergencies: The Israeli Supreme Court During COVID-19

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Abstract. This article explores the role of the Israeli Supreme Court in exercising judicial review of Covid-19 control measures. It argues that the Court exhibited changes in its review methods and adapted its role throughout this prolonged crisis. At the first stage, the Court focused on protecting institutional democratic safeguards, while exercising judicial restraint and greater deference than usual in its substantive review of the content of Covid-19 measures. The second stage (after nearly a year into the pandemic), was characterized by more significant judicial intervention and a growing propensity to hold Covid-19 measures unconstitutional, based on a combination of stricter substantive judicial review and increased demand for an evidentiary and scientific basis to justify infringement of rights. Therefore, the Israeli case demonstrates the broader question of the changing role of judicial review, and, more specifically, of evidence-based judicial review, during prolonged emergencies.

Keywords: *COVID-19, Coronavirus, Pandemic, Crisis, Judicial Review, Evidence-based Judicial Review, Courts, Separation-of-powers, Israel*

1. Introduction

In this article, we explore the role of the Israeli Supreme Court in reviewing Covid-19 control measures. We argue that there is a changing judicial role throughout the Covid-19 crisis. At the first stage (February 2020-January 2021), the judicial role is characterized by restraint in substantive review of the content of Covid-19 measures and marked by significant greater deference than in regular times, while maintaining and protecting institutional democratic safeguards. The second stage (beginning in February 2021) is characterized by more significant judicial intervention and a growing propensity to hold Covid-19 measures unconstitutional. This second stage was marked by broader substantive judicial review, as well as increased demand for a factual and scientific infrastructure to justify the infringement of rights. We argue that the change in the Court's approach can be seen as an adaptation of the judicial role as circumstances have changed. In the first stage, Covid-19 was perceived as an imminent, new, and unknown threat. In the second stage, the sense of danger diminished, and growing data and knowledge were accumulated. Hence, the Court adapted its role and demands from the other branches of government accordingly. The Israeli case demonstrates the general question of the changing role of judicial review during prolonged emergencies. It also demonstrates the ideas of evidence-based judicial review and shifting demand for evidence-based legislation during ongoing crises.

This article examines how the Israeli Supreme Court responded to the challenges of prolonged crisis in cases dealing with restrictions on freedom of movement, demonstration, and assembly during the Covid-19 crisis. The article is structured as follows. Part 1 very briefly sketches the theoretical background about judicial review in emergencies and pandemics and the idea of evidence-based

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judicial review. Part 2 presents our argument about the changes in the judicial role of the Israeli Supreme Court.

Given space limitations, we do not purport to provide an extensive literature review in the theoretical background section, nor do we attempt to provide an exhaustive review of the Israeli Court's entire case-law on Covid-19 related issues. Instead, in this brief paper, we present a limited number of representative cases. We based our case selection on two guiding principles. First, we chose leading and particularly illustrative cases from each stage. Second, given the substantive focus of this special issue on restrictions on freedom of movement, demonstration, and assembly, we focused on cases dealing with these rights.[1]

2. Theoretical Background

Emergencies are typically associated with the (perceived and real) need for rapid and effective government responses to imminent dangers and threats, often in the context of insufficient information. Typically, responses involve an accumulation of powers by the executive branch and the adoption of rights-restricting measures. This raises many questions about the role of courts during emergencies and whether and how their role should change compared to regular times. These include questions such as the appropriate degree of deference to the government and the extent that courts should and can assume a role in safeguarding democracy, ensuring a proper institutional balance between the executive and the legislature, balancing between the needs for effectiveness and expediency on the one hand, and accountability and fundamental rights, on the other.[2] One of the main dilemmas for the judicial role in emergencies is how courts should ensure that rights-infringing emergency measures are justified, required, and appropriate for dealing with the emergency. In addition to established debates on doctrinal and balancing tools (such as proportionality), a crucial question is how courts can ensure that the governmental responses are based on sufficient factual and scientific basis. This relates to questions of whether and how courts should exercise evidence-based judicial review of rights-restricting measures or require the government and legislature to exercise evidence-based decision-making processes when adopting such measures.[3]

3. The Changing Role of the Israeli Supreme Court during COVID-19

3.1. The First Stage

The first stage of the judicial response to the Covid-19 crisis was characterized by markedly greater deference than regular times, and great judicial restraint in reviewing Covid-19 measures. This first period can be demonstrated by cases concerning restrictions on freedom of movement in the form of imposing a closure on some urban regions.

During April 2020, particularly during the Passover holiday, the government adopted various temporary measures based on emergency regulations that significantly limited freedom of movement.[4] This included *cordon sanitaire* decisions – temporarily declaring certain areas as "restricted areas," such that entry to and exit from these areas were prohibited, except for specified permitted purposes (such as medical treatment, participation in legal proceedings, or the funeral of a first-degree relative).[5] Among the declared

[1] Therefore, important cases such as the cases dealing with privacy infringements and location-tracking by the General Security Service, which could also demonstrate our argument about the changing role of the Court, are not discussed in depth. For discussions of these and additional cases dealing with other rights, see, e.g., Einat Albin, Ittai Bar-Siman-Tov, Aeyal Gross and Tamar Hostovsky-Brandes, 'Israel: Legal Response to Covid-19', in Jeff King and Octavio Ferraz (eds) The Oxford Compendium of National Legal Responses to Covid-19 (2021); Ayal Gross, 'Like a Dystopian Nightmare: Human Rights, Democracy, and Politicization and Securitization of Health in Constitutional and Global Law in the Shadow of the COVID-19 Crisis' (forthcoming 2021) Mishpat Umimshal (Hebrew); see also Myssana Morany, *The Israeli Supreme Court and the COVID-19 Emergency* (Adalah, 2021), which was published after this article was written and shortly before it went to press.

[2] For recent overviews see, Fabrizio Cafaggi and Paola Iamiceli, 'Global Pandemic and the Role of Courts' (2021) 1(1-2-3) Legal Policy & Pandemics The Journal of the Global Pandemic Network; Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2020) 52 (University of Chicago, Public Law Working Paper no 747) Virginia Public Law and Legal Theory Research Paper; Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8 Theory & Pract. Legis. 7, 92.

[3] Ittai Bar-Siman-Tov, 'The dual meaning of evidence-based judicial review of legislation' (2016) 4(2) Theory & Pract. Legis. 107, 133; Patricia Popelier *et al*., 'Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts' (forthcoming, 2021) Eur. J. Risk Regul. 1, 26.

[4] Einat Albin and others (n.1).

[5] Declaration of Areas in the City of Jerusalem as a 'Restricted Area' According to the Emergency Regulations (New Corona Virus) (Israeli Government, 2020) <https://www.gov.il/he/departments/policies/dec4978_2020> accessed 2 August 2021.

"restricted areas" were the large city of *Bnei-Brak* and the *Ramot-Alon* neighborhood in Jerusalem (the city's largest neighborhood with a population of about 51,000 residents). Residents of *Bnei-Brak* and *Ramot-Alon* filled two separate petitions to the Supreme Court. They argued that these government decisions represented disproportionate violations of their rights. They further argued that the government's decision should be invalidated because it was not anchored in a solid factual infrastructure regarding the morbidity data in their area.[6]

The Supreme Court rejected both petitions and upheld the government's restrictive measures. In the *Bnei-Brak* case, Justice Amit began his legal analysis by stating:

"On the legal front, the pandemic leads us in unsown land, in legal and constitutional areas and paths which were not foreseen even by doomsayers. Basic constitutional rights such as the right to privacy, property, freedom of occupation and freedom of movement within Israel are dumb struck in the face of terms such as closure and quarantine, blockade, road blocks, location-tracing of phones by the General Security Service, social distancing and more. All these pass before us like a dystopian nightmare in a democratic state where civil liberties are the basis of its existence. In ordinary times, these measures would have been disqualified on site as manifestly illegal, but the days are not ordinary days…"[7]

Justice Amit then proceeded with examining the measure through the usual constitutional limitation-clause tests. At the end of the analysis, he noted, however, that his analysis of this case was unusual:

"We are standing in an unprecedented situation of fear of rapid spread of the Covid-19 pandemic at high rates, for all that it entails in terms of morbidity, mortality and the collapse of the health care system. In the horizontal balance between rights, this time, against the infringement of freedoms and basic rights such as freedom of movement, we place the right to life and the integrity of the body, an uncommon situation in our legal system. In this horizontal balance, the hand of the right to life prevails."[8]

A similar approach was echoed by Justice Baron in the *Ramot Alon* case. Justice Baron ended her legal analysis with a strong statement about the exceptionality of the situation, which merits a more accommodating view toward rights-infringing measures than in regular times:

"As my colleague Justice Y. Amit noted in the judgment in the Bnei-Brak petition, in routine times it would not have been possible to accept such a serious infringement of constitutional rights such as freedom of movement and the right to privacy, property and freedom of occupation. But the days are 'Corona days,' and the dangers inherent in the spread of this pandemic are immediate and palpable. This pandemic has already claimed the lives of tens of thousands of people around the world, and the number of sick and dead is still rising at a dizzying pace. In horror and fear we watch the collapse, one after another, of health systems in Western countries which do not meet the burden of the respiratory patients. Concern for the well-being of patients and anxiety about the fate of the country cross sectors and we are all partners in it... In these exceptional circumstances, and despite the heavy toll it places upon the population in Israel… it is clear that there is no escape from overall social support for the fight against the spread of the virus..."[9]

To clarify, we do not argue that the Court was necessarily wrong in upholding these temporary measures in these two cases. Instead, our aim is to illustrate how the 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. These two cases illustrate the Court's general practice throughout the first year of the Covid-19 pandemic, in which the Court appeared reluctant to second-guess the necessity of public health interventions to control the pandemic.

In additional cases, the Court refused to intervene in Covid-19 measures, while candidly stating that these were "far-reaching restrictions … on basic constitutional rights … which, in normal times, would have been disqualified instantly as patently unconstitutional."[10] Interestingly, in

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[6] HCJ 2435/20 *Yedidya Loewenthal v. Prime Minister* (2020) (Isr.); HCJ 2491/20 *Community Administration Ramot Alon v. The Government* (2020) (Isr.).

[7] HCJ 2435/20 Loewenthal, *id*., at para. 1.

[8] *Ibidem* at par. 23.

[9] Community Administration Ramot Alon, *supra* note 6, at para. 11.

[10] HCJ 2705/20 *Smadar v Prime Minister* (2020) (Isr.); See also, HCJ 6774/20 *Gertal v Government of Israel* (2020) (Isr.); HCJ 6575/20 *Granot v Prime Minister* (2020); Albin et al., *supra* note 1; Elena Chachko and Adam Shinar, *Israel pushes its emergency powers to their limits*, The Regulatory Review (28 April 2020)*;* Ayal Gross, *Rights Restrictions and Securitization of Health in Israel During COVID-19*, Bill of Health (29 May 2020); Gross, *supra* note 1; Jeremie Bracka, 'Israel' *in* Bonavero Reports: A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic Across 27 Jurisdictions (Bonavero Institute of Human Rights 2020); Morany, *supra* note 1.

addition to a general view that the balance between rights and public interests should change during such an emergency, the Court seemed to alter its usual balancing method. In normal times, the typical balancing approach would be vertical balancing, which places against the infringed right, a public interest, such as public health. In such a balancing method between rights and public interests, the rights tend to have the *a priori* upper hand. Yet, as the *Bnei-Brak* case illustrated, instead of balancing between individual rights and public interests, the Court viewed this case as involving fundamental rights at both sides, as the public health interest was considered a manifestation of the individual right to life.[11] When infringed rights are balanced against the very right to life, the chances that the Court would intervene in the rights-infringing health measure are much lower.[12]

The Court's manifest reluctance to intervene in Covid-19 measures during the first stage, has led some human rights organizations in Israel to criticize it for being overly deferential to a degree abdicating its role during emergencies.[13] While we share the descriptive observation that the Court eschewed substantive judicial intervention in the government's health measures, we believe it would be incorrect to assume that the Court remained completely passive during this first stage of its response to the pandemic. Instead, it limited its role to ensuring structural separation-of-powers safeguards, by upholding the parliament's ability to control the government's measures.

When the pandemic hit Israel, the country was in the midst of an unprecedented political crisis, with a care-taker government (headed by the recently indicted Prime Minister Netanyahu) and a newly elected parliament, after three rounds of elections.[14] The Court seemed to realize that such an unelected care-taker government that adopts far-reaching rights-restricting measures in the fight against Covid-19 must be supervised by an operating parliament. Hence, when the outgoing Speaker of the parliament (from Netanyahu's party) was trying to prevent the new parliament from forming committees and electing a new Speaker (which are required for the parliament to begin to operate and start overseeing the government), the Court did not hesitate to intervene. In *The Movement for Quality Government in Israel v Knesset* case, the Court held that the outgoing Knesset Speaker's "continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process" and "clearly harms the status of the Knesset as an independent branch of government," and therefore this was "one of those exceptional cases in which the intervention of this Court is required in order to prevent harm to our parliamentary system of government."[15] Similarly, in the *Ben Meir v Prime Minister* case, the Court warned that it would issue a temporary order that would stay the government's decision to allow the General Security Service to track the location of Israeli citizens if the parliamentary committee in charge of supervising this measure would not be formed (which indeed led to its formation); and latter held in its final ruling that such a far-reaching measure may only be authorized by parliament through primary legislation (while adding that such legislation should be enacted as temporary legislation with a sunset clause).[16] Hence, when Justice Amit proclaimed in the *Ramot Alon* case that

[11] Einat Albin and others (n.1).

[12] Ittai Bar-Siman-Tov 'Legislatures and Rights: Comment on Legislated Rights – Securing Human Rights Through Legislation' (2020) 21 Jerusalem Rev. Leg. Stud. 112–128.

[13] Morany, *supra* note 1.

[14] Ittai Bar-Siman-Tov, 'Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8 Theory & Pract. Legis. 11–48; Tamar Hostovsky Brandes, 'Israel's Perfect Storm: Fighting Coronavirus in the Midst of a Constitutional Crisis' (*VerfBlog*, 7 April 2020) <https://verfassungsblog.de/israels-perfect-storm-fighting-coronavirus-in-the-midst-of-a-constitutional-crisis/> accessed 2 August 2021; Tamar Hostovsky Brandes, 'A Year in Review: COVID-19 in Israel: A Tale of Two Crises' (*VerfBlog*, 13 April 2021) <https://verfassungsblog.de/a-year-in-review-covid-19-in-israel/> accessed 2 August 2021.

[15] HCJ 2905/20 The Movement for Quality Government in Israel v. Knesset (2020) (Isr.); Bar-Siman-Tov, 'Covid-19 Meets Politics', *supra* note 13; Nadiv Mordechay and Yaniv Roznai, 'Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review' (*VerfBlog*, 2020) <https://verfassungsblog.de/constitutional-crisis-in-israel-coronavirus-interbranch-conflict-and-dynamic-judicial-review/> accessed 9 April 2020.

[16] HCJ 2109/20 *Ben Meir v. Prime Minister* (2020) (Isr.) (English translation available at <https://versa.cardozo.yu.edu/opinions/ben-meir-v-prime-minister0>); Chachko and Shinar, *supra* note 10. Another example is HCJ 1633/20 *"Basket" Nursing Services v The State of Israel* (2020) (Isr.), invalidating the general "Sickness Certification" issued by the Ministry of Health for people under isolation or quarantine. This was largely a statutory interpretation case, but we see it as another example of the Court's structural separation-of-powers approach, because the bottom line of the holding was that the Ministry of Health exceeded its authority and therefore the sweeping certification it issued should be invalidated as ultra vires. The Court rejected the state's argument that the exceptional situation in the face of Covid-19 justifies its broad interpretation of the relevant legislation as providing it the necessary authority to issue this certification. Justice Stein, who wrote the main opinion, held, inter alia: "We are in an unprecedented

"[e]ven when the Coronavirus is roaming our streets, the muses are not silent and parliamentary and judicial oversight are not silenced," this was not empty rhetoric.[17]

3.2. The Second Stage

After about a year into the pandemic, we observe a change in the Court's approach to the extent and manner of judicial intervention in Covid-19 measures. The Court began showing greater willingness to exercise stricter substantive scrutiny of Covid-19 measures, while also emphasizing the importance of relying on factual and scientific infrastructure in adopting rights-infringing measures. Since February 2021, there has been a series of cases in which the Court found various Covid-19 measures unconstitutional.[18] Given the focus of this special issue and limitation of space, we will focus on two representative cases on freedom of demonstration and travel.

3.2.1. The Ruling regarding Restrictions on Demonstrations[19]

In July-October 2020, Israel faced the "second wave" of outbreaks of the pandemic. As part of the response steps taken, the government decided in September 2020 to impose a total closure on the state of Israel. While in previous lockdowns the right of demonstration was exempted, this time, the government also temporarily prohibited demonstrations that exceeded 1,000 meters from the demonstrator's residence. Six different petitions were filed against this decision. Although the temporary limitation that was in force in October 2020 already expired by the time the Court rendered its decision in April 2021, the majority opinion retroactively invalidated the regulation that limited demonstrations, deeming the fines imposed by the regulations null and void. The Court held that the limitation did not pass the constitutional tests due to the severe violation of freedom of demonstration and freedom of expression. Furthermore, the Court recognized the place of protest as an essential part of the demonstration's message, especially when it comes to the official residence of a public official and given the importance of criticizing the government in times of emergency.[20]

The majority opinion, written by the Court's President, Hayut, emphasized the importance of the evidence-based data that the respondents should have presented as a sufficient basis for the infringement of fundamental rights such as the right of demonstration and assembly:

"Against the gravity of this harm [to rights], stands a benefit whose exact degree is unknown and unproven… As the respondents themselves have stated, they do not have any data on the extent of infections in demonstrations. Thus, the attempt to hinge on to the decrease in general morbidity after the imposition of closures, as a fact justifying the imposition of restrictions relating to demonstrations, suffers from the fact that it does not indicate a proven causal link between the two."[21]

Due to this lack of an evidence-based justification for restricting demonstrations, President Hayut held that the limits imposed on

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state of national emergency. We all worry, we all take care, and we all wear masks to prevent infection. At the same time, we continue to speak the same language and make use of the same legal principles that have been successfully used since ancient times" (id par. 31.). CJ Hayut added that the sweeping Sickness Certification issued by the Ministry has broader consequences for the rights of the parties to the employment relationship and is therefore "not within the authority of the executive body in the Ministry of Health - it is subject to the legislature" (Id, Hayut, par. 3).

[17] Community Administration Ramot Alon, *supra* note 6, Amit J. at para. 1. To be sure, some critics of the Court argue that the Court should have done even more in accepting structural and separation-of-powers petitions during this period (Morany, *supra* note 1), while others criticized it for being too excessive in its intervention (Rivka Weill, 'Judicial Intervention in Parliamentary Affairs to Prevent a Coup d'état' (forthcoming, 2021) Maryl. L. Rev. 1–19). At any rate, both claims do not contradict our descriptive claim that during the first period, the Court eschewed substantive judicial intervention in the government's health measures, while focusing on the protection of structural separation-of-powers safeguards.

[18] e.g., HCJ 6939/20 *Idan Mercaz Dimona Ltd.v. Government of Israel* (2021) (Isr.) ; HCJ 6732/20 *Association for Civil Rights in Israel v Knesset* (2020) (Isr.); HCJ 1107/21 *Oren Shemesh v Prime Minister* (2021) (Isr.); HCJ 158/21 *Physicians for Human Rights v. Minister of Public Security* (2021) (Isr.); HCJ 5469/20 *Achrayut leumit– Israel is my home v. Government of Israel* (2021) (Isr.).

[19] *Achrayut leumit– Israel is my home v. Government of Israel*, *Id*.

[20] Justice Solberg, in a minority dissent opinion, opined that since the 1,000-meter limit expired about six months before the judicial decision was rendered, after being in effect for only 13 days, days of considerable aggravation in corona morbidity – the issue has become theoretical at this stage. He opined that since there is no concrete petitioner claiming to have been fined in those days (and anyone who has been fined can seek to have the fine overturned or tried instead), there is no good enough reason to invalidate the regulation enacted by the entire government with the approval of the Knesset's Constitution, Law, and Justice Committee, long after it has expired (Id.)

[21] *Achrayut leumit– Israel is my home v. Government of Israel*, President Hayut, Id. at para 64.

demonstrations did not meet the balancing test that required "near certainty of harm to the public wellbeing" to justify restricting the right of demonstration.[22]

Justice Mazuz, in a minority opinion, exhibited an even more robust semi-procedural approach,[23] opining that the entire regulation (not only its sub-section that limited demonstrations) should be invalidated due to a material defect in the process of its adoption: its nightly approval by telephone between the Ministers without presenting the protocols of the discussion before their approval, the insufficient factual infrastructure presented to the government, and the lack of documentation regarding the alternatives examined.

3.2.2. The Ruling on the Prohibition of Entry to Israel[24]

Since January 2021, there have been restrictions on leaving and entering Israel due to the discovery of new variants of the coronavirus, for which there is concern about the vaccine's effectiveness. The limits applied for an extended period and have been imposed without giving sufficient time for citizens to prepare and without clarifying the date on which they would be entirely removed, which was necessary because of the proximity to election day in Israel.

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. [25] Thus, the exercise of the rights to enter and leave the country may be a condition for the practice of fundamental rights such as freedom of occupation, family life, freedom of association, the right to education, and more. 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.[26]

In addition to exercising substantive constitutional judicial review of the content of the restrictions and their proportionality, President Hayut emphasizes the necessity of a factual infrastructure to impose restrictions that infringed fundamental rights. President Hayut ruled that the limits were set without the government having any factual or empirical evidence, or any data on the number of citizens abroad seeking to return to Israel. Additionally, no explanation had been given as to why the daily passenger quota was set at 3,000 persons. The impression was that concerning the spread of variants, the government preferred to implement a regime of entry quotas, which is simpler to implement but whose violation of fundamental rights is much more harmful. She observed that:

"During the hearings held in the petitions, it became clear to us that the process for adopting the regulations and restrictions set forth therein also suffered from a lack of a relevant factual infrastructure. As is well known, any decision of an administrative authority, including a decision to enact secondary legislation, must be based on a sufficient factual basis. From the arguments heard before us, it became clear during the discussions that the government does not have any data on the number of citizens abroad seeking to return to Israel. This basic data, which could have illuminated the extent of the expected infringements, was not available to the government during the entire period in which the decisions were made and not even after the filing of the petitions and the holding of hearings on the petitions".[27]

The Court added that only later in the judicial proceedings did the government acquire the data, but that:

"It goes without saying that given the short and late period of time in which these data were collected, they do not present an accurate and exhaustive factual infrastructure, and in any case certainly do not cure the defect that initially occurred in the enactment process of the regulations of the absence of any factual infrastructure in this regard. The lack of such an infrastructure also emphasizes the degree of arbitrariness of setting the daily entry quota to 3,000 passengers".[28]

4. Conclusion

In this article, we argued that there is an observed change in the Israeli Supreme Court's approach in reviewing Covid-19 measures. In the first period of the pandemic, the Court exhibited significant judicial restraint, while delineating the judicial review for assuring institutional safeguards. Our finding that during the first phase of the crisis, the Court has shown much greater deference in reviewing governmental Covid-19 measures than

[22] *Ibidem.*

[23] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271.

[24] HCJ 1107/21 *Oren Shemesh v Prime Minister* (2021) (Isr.)

[25] *Ibidem* at par. 17.

[26] *Ibidem* para. 14.

[27] *Ibidem,* para. 31.

[28] *Ibidem.*

in regular times, is at concert with similar findings from other countries, and is not surprising.[29] What's more interesting is our finding that rather than simply taking a passive approach, the Court changed its emphasis from substantive rights-based judicial review to structural separation-of-powers judicial review. This is particularly interesting, as it stands in contrast to the major trend in the Israeli Court's approach during past decades of clearly favoring substantive judicial review and the protection of constitutional rights over structural and procedural judicial review and the protection of structural and institutional constitutional values.[30]

During the second period, the Supreme Court exercised broader substantive judicial review. This more significant judicial role was also characterized by more substantial evidence-based judicial review.

As time passed, and the sense of danger diminished, the Court started to assert that empirical and scientific evidence could and should have been collected to substantiate the violation of fundamental rights.

Interestingly, this finding is also at concert with similar observations in other countries.[31]

It also emerges from the cases we have presented that the Court observed that the enactment process itself was not evidence-based and that that the data was only collected when the Court demanded it. Yet, interestingly, the Court exercised evidence-based judicial review in its two versions identified in the theoretical scholarship:[32] first, examining whether the rights-restricting measures were enacted via an evidence-based process, focusing on whether the government had sufficient factual infrastructure at the time of adopting the measure; and second, examining the evidence presented to the Court during the judicial proceedings, and focusing on whether the Court was presented with sufficient factual data for establishing a connection between the restrictive means and its stated justification.

While some have criticized the Court for being overly deferential during the first stage of the pandemic, we believe that over time, the Israeli Court has shown a commendable ability to adapt its role in the face of a challenging situation that began as a new, unknown and threatening emergency and developed into a prolonged crisis.

[29] Cafaggi and Iamiceli, *supra* note 2.

[30] Ittai Bar-Siman-Tov, 'Revolution or Continuity? Bank Hamizrachi's Role in the Development of Judicial Review Models in Israel' (2018) Law and Government 271 (Hebrew); Amichai Cohen and Yaniv Roznai, 'Populism and Israeli Democracy' (forthcoming 2021) Tel Aviv University Law Review (Hebrew); Barak Medina and Asor Watzman 'The Constitutional Revolution or Human-Rights Revolution? The Constitutional Basis of "Institutional" Norms' (2018) 40 Tel Aviv University Law Review 595– 662 (Hebrew). Albeit, there may be basis to argue that first hints of this change preceded the Covid-19 crisis. See, Yaniv Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset' (2018-2019) 51(4) VRÜ 415.

[31] Cafaggi and Iamiceli, *supra* note 2; Popelier *et al*., *supra* note 3.

[32] Bar-Siman-Tov, 'The dual meaning of evidence-based judicial review of legislation', *supra* note 3.