HCJ 4908/10

1. MK Ronnie Bar-On

2. Kadimah Party

v.

1. Israel Knesset

2. Speaker of the Knesset

3. Knesset Finance Committee

4. Joint Committee of the Finance Committee and the Law and Constitution Committee for deliberation of the Economic Efficiency and State Budget for the Years 2009 and 2010 Bill

5. Chairman of the Finance Committee

6. Chairman of the Law and Constitution Committee

7. Government of Israel

8. Prime Minister of Israel

9. Minister of Finance

The Supreme Court sitting as the High Court of Justice

[January 11, 2011**]**

Before President D. Beinisch, Vice President E. Rivlin, Justices A. Grunis, M. Naor, E. Arbel, E. Rubinstein, U. Vogelman

Israeli legislation cited:

Basic Law: Freedom of Occupation

Basic Law: The Government (old and new)

Basic Law: Human Dignity and Liberty

Basic Law: Israel Lands

Basic Law: Jerusalem the Capital of Israel

Basic Law: The Judiciary

Basic Law: The Knesset

Basic Law: The Military

Basic Law: The President of the State

Basic Law: The State Budget (Special Provisions) (Temporary Provision) (Amendment)

Basic Law: The State Comptroller

Basic Law: The State Economy

Basic Law: The State Economy (Bills and Reservations Involving Budgetary Expenditures) (Temporary Provision) 2002,

Basic Law (Temporary Provision)

Budget Law 2012

Elections to the Eighth Knesset and to Local Government (Temporary Provision) Law 1974

Law of Return, 1950

Foreign legislation cited:

Basic Law for the Federal Republic of Germany**,** art. 79(d)

Constitution of the Republic of Turkey, art. 4

Israeli Supreme Court cases cited:

[1] CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [1995] IsrSC 49(2) 221.

[2] HCJ 5160/99 *Movement for Quality Government in Israel v. Law and Constitution Committee* [1999] IsrSC 53(4) 92.

[3] EA 1/65 *Yardur v. Central Elections Committee for the Sixth Knesset* [1965] IsrSC 19(3) 365.

[4] HCJ 142/89 *La'Or Movement - One Heart and One Spirit v. Central Elections Committee for the Sixteenth Knesset* [1990] IsrSC 44(3) 529.

[5] CA 733/95 *Arpel Aluminium Ltd. v. Klil Industries Ltd.* [1997] IsrSC 51(3) 577.

[6] HCJ 4676/94 *Mitral Ltd. v. Israeli Knesset* [1996] IsrSC 50(5) 15.

[7] HCJ 6427/02 *Movement for Quality Government in Israel v. Israel Knesset* (not yet reported, 11.5.2006).

[8] HCJ 4124/00 *Yekutieli v. Minister for Religious Affairs* (not yet reported, 14.6.2010).

[9] HCJ 1438/98 *Conservative Movement v. Minister for Religious Affairs* [1999] IsrSC 53(5) 337.

For the petitioners — E. Rosovsky, E Burstein

For respondents 1-6 — E. Yinon, G. Blai

For respondents 7-9 — D. Briskman, Y. Bart

Petition to the Supreme Court sitting as the High Court of Justice for an Order Nisi

JUDGMENT

President D. Beinisch

1. On 22.6.2010, Basic Law: State Budget (Special Provisions) (Temporary Provision) (Amendment) (hereinafter: the Law or Basic Law (Temporary Provision)) passed its second and third readings in the Knesset. Basic Law (Temporary Provision) provides that the state budget for the years 2011 and 2012 will be a biennial one, enacted in a single law. Basic Law (Temporary Provision) is the continuation of an earlier basic law that stated, also as a temporary provision, that the state budget for the years 2009 and 2010 would be a biennial one (hereinafter: Original Temporary Provision). Basic Law (Temporary Provision), like the Original Temporary Provision, changes the provisions of ss. 3(a)(2), 3(b)(1) and 3A of Basic Law: The State Economy, whereby the state budget is to be set for a single year only.

2. The background to the enactment of the said basic laws, as emerges from the pleadings of the parties, lies in the unfolding of events after the resignation of the then Prime Minister, Ehud Olmert. On 11.2.2009, general elections were held, and a new government was sworn in on 31.3.2009. Parallel to these events, the global economy was experiencing an economic crisis, one whose ramifications for the Israeli economy could not be assessed. These events made it impossible to approve the 2009 budget before the second half of the year, and the budget was based on that of the year 2008. On 5.4.2009 the Government decided to submit to the Knesset for approval a biennial budget for the years 2009 and 2010 by way of a temporary provision. The Explanatory Notes to the Bill stated that due to the unique situation that had arisen as a result of the delay in approving the state budget for the year 2009, and the negative impact of the global crisis on Israel, it was proposed to introduce a special arrangement, one that would apply to the state budget for the years 2009 and 2010.

3. The introduction of a biennial budget proved to be a successful experiment, as evident from the pleadings of the respondents and from the protocols of the discussions in the Joint Committee of the Finance Committee and the Law and Constitution Committee (hereinafter: the Joint

Committee or the Committee). Senior officials in the Treasury were therefore of the opinion that the possibility of transitioning to a system of biennial budgets on a permanent basis should be considered. For this purpose, it was proposed to conduct a trial, for an additional two years, in which the budget would be biennial. Accordingly, a proposal was submitted to amend the Original Temporary Provision to make it applicable to the budget for the years 2011 and 2012 as well. In the Explanatory Notes to the Memorandum of the Basic Law (Temporary Provision) Bill it was noted that following the implementation of the biennial budget, the Government became aware of the advantages of this system of budgeting, leading it to think about changing the budgetary system in Israel. The Memorandum to the Bill lists the advantages of a biennial budget, together with the disadvantages of this system. For example, the creation of greater certainty for the government and the economy, and the freeing up of management resources in order to make long term plans comes up against the difficulty of predicting state income for a period of two years, which requires special professional experience. It was therefore proposed –

> 'To conduct a full examination of the application of the biennial system by way of a trial in the years 2011 and 2012, as a temporary provision of the Basic Law, for two main reasons:
>
> 1. In the absence of recognized experience in other states, most of the learning will be done in "real time", while implementing the first full biennial budget, as proposed.
>
> 2. In the course of the biennial budgetary period it will be necessary to examine the ability to devise a biennial budget and to act upon it, primarily from the perspective of dealing with the difficulties involved in devising a biennial forecast, as well as the need to adapt the provisions of the law, including the adaptations of the Basic Law, according to the experience that has accumulated.'

In the Memorandum to the Bill it was also mentioned that –

> 'In view of the significance of the process of fixing the budget from the point of view of the regime, society and the economy, it is important that the process of consolidating a permanent arrangement of this matter and its enactment be done in a wise, orderly fashion, on the basis of the maximum amount of information that has accumulated, and accompanied by an appropriate public investigation. This is also taking into consideration the fact that amendment of basic laws ought to be done in moderation' (Memorandum to Basic Law: The State Economy (Special Provisions) (Temporary Provision) (Amendment) pp. 4-5).

4. On 17.3.2010 the Bill was discussed in the plenum of the Knesset and passed its first reading, and on 22.6.2010 it passed its second and third readings. A few days later, MK Ronnie Bar-On and the Kadimah Party (hereinafter: the petitioners) filed the present petition. The petition raised three main questions in relation to Basic Law (Temporary Provision): **first,** can the principle stated in Basic Law: The State Economy, whereby the Knesset determines, annually, the priorities of the state in the process of approving the budget, be changed by means of a temporary provision which endures for the duration of the term of office of the present government? **Second**, is it possible, by means of a temporary provision with limited application, to nullify the constitutional principle whereby if the approval of the Knesset for the budget is not forthcoming once a year, the Knesset will be dissolved and new elections will be held? **Third,** is it possible to disturb the constitutional balance between the legislature and the executive branch by means of a temporary provision and without obtaining a majority of 61 Members of Knesset at each of the legislative stages?

5. The petition was first heard before three justices. At the end of the hearing, which was held on 4.10.2010, an order nisi was issued, with the agreement of the respondents, ordering them to appear and to show cause why the Court should not order as follows: that Basic Law (Temporary

Provision) is void or alternatively that it should be voided; and that the Israeli Knesset acted *ultra vires* when it approved the amendment of the Basic Law by means of Basic Law (Temporary Provision) and with a majority of less than 61 Members of Knesset in the first and second readings. It was further decided that the panel of justices should be expanded. Accordingly on 11.1.2011 the Court held a second hearing with an expanded panel of seven justices.

In both the written and the oral pleadings the parties raised serious constitutional questions. A significant number of these questions have not yet been considered or decided in Israeli law. These questions relate, either directly or indirectly, to the status of the basic laws and to the way in which it is possible to refashion constitutional arrangements in Israel. The arguments of the parties also highlight the inherent difficulties in Israel's constitutional system due to there being no Basic Law: Legislation, and in view of the fact that the formal requirements for amending most of the basic laws are few. Let us mention at this early stage that we believe it is possible at this time to leave some of the questions for future consideration. Although difficulty arises from the arguments of the petitioners, we are not convinced that the present case justifies unprecedented intervention in the legislation of the Knesset in its function as a constituent authority. At the same time, we find it appropriate to outline several principles regarding the legislation and the amendment of basic laws in Israel, in order to lay out a partial roadmap for the Knesset in the absence of Basic Law: Legislation.

Pleadings of the Parties

6. The petitioners have asked the Court to declare that Basic Law (Temporary Provision) is invalid, or alternatively, to strike it down. According to the argument, Basic Law (Temporary Provision) came about due to considerations connected to the survival of the Government, which sought to take advantage of its parliamentary majority in order to change basic principles of governance. The petitioners argue that approval of the Budget Law on an annual basis is considered a cornerstone of democratic policy, and it is the central tool in the hands of a parliament for overseeing the work of the government and the priorities that it sets. Basic Law (Temporary Provision) detracts from the capacity for oversight by the Knesset, and in fact, it is designed to weaken the Knesset vis-à-vis the government. Basic Law (Temporary Provision), so it is argued, is contrary to

the longstanding trend to increase oversight of the government by the Knesset, *inter alia* by regulation of the specific times at which the government must present the budget to the Knesset plenum. The petitioners add that weakening the power of the Knesset has real practical significance, which manifests itself in preventing the possibility of dissolving the Knesset and toppling the government in the event that the budget is not passed. The petitioners argue that whereas for the purpose of toppling the government by means of a no confidence vote, the opposition must enlist a majority of at least 61 Members of Knesset, for the purpose of dissolving the Knesset and holding new elections by way of non-approval of the State budget, a majority of only 60 Members of Knesset is required. According to the petitioners, this is a very powerful tool, which can bring about a change in the leadership of the State, and it is available to the Knesset only once a year. Basic Law (Temporary Provision) confines the use of this tool to once every two years, in a manner that is detrimental to the intricate web of power and relations between the government and the Knesset.

Regarding the substance of the amendment to the Basic Law, the petitioners argue that in practice, this legislation suffers from lack of reasonability, for two main reasons. First, so goes their argument, it will not allow for effective oversight of the government by the Knesset, due to the amount of information that will be presented to the Members of Knesset in the case of a biennial budget, particularly if it comes together with a broad Omnibus Law of Arrangements in the State Economy, forestalling any possibility of studying the material in the period of time allocated for approval of the budget legislation. Secondly, the petitioners believe that advance approval of the budget for a period of two years requires that accurate predictions of state expenditures and costs be drawn up – a mission that according to them is impossible, especially in the Israeli reality. In addition, the petitioners stress that if the next state budget is not approved on the due date, then by law, the Budget Law for the year 2013 will be derived from the Budget Law of 2012, so that in fact, it is possible that the biennial budget law will actually become a triennial one.

The petitioners also challenge the fact that a basic law was amended by way of a temporary provision. They argue that the attempt to legislate a basic law in a temporary provision stands in clear contradiction to the case law of this Court, whereby basic laws are laws of an "eternal" nature that were designed to constitute chapters of the future constitution of the State of

Israel. Therefore, it is argued, basic laws cannot be temporary laws, enacted *ad hoc* with the aim of serving the temporary political needs of a given majority at a particular time. It was further argued that Basic Law (Temporary Provision) does not merit being considered a basic law – both by virtue of a formal criterion and by virtue of a criterion of substance. According to the petitioners, the fact that the name of the Law mentions the years during which the temporary provision is intended to apply detracts from its validity as a basic law under the formal criterion, and the fact that the Law lacks an element of "eternity" detracts from its validity under the substantial criterion. Finally, the petitioners claim that the very process of enactment of Basic Law (Temporary Provision) was defective in that it was not passed with a majority of 61 MKs at each reading. The petitioners argue that this majority is required in view of the fact that Basic Law (Temporary Provision) limits the possibility of Members of Knesset dissolving the government and the Knesset through non-approval of the budget to only once every two years; for this reason, it constitutes an implicit change to s. 34 of Basic Law: The Knesset, which determines when the Knesset is permitted to dissolve itself prior to the end of its term; this, they argue, is an entrenched section.

Arguments of the Respondents

7. Respondents 1-6 (hereinafter: the Knesset) submitted their response to the petition on 16.8.2010, and their reply after the order nisi was issued, on 5.12.2010. In the response it was argued that even if Basic Law (Temporary Provision) "raises not inconsiderable difficulties with respect to damage to the parliamentary oversight of the Government and the balance of power between the Knesset and the Government," these arguments still do not justify the intervention of this Court. The Knesset further argued that although there is no disagreement that laying down a norm concerning a biennial budget law in the framework of a temporary provision "raises an inherent conceptual difficulty", this does not make of Basic Law (Temporary Provision) a "regular" or "inferior" law relative to other basic laws.

The Knesset's reply cited at length the discussions that were held in the Finance Committee and the Joint Committee. It was also pointed out that most of the arguments raised in the petition were also raised in these Committees, whether by members of the Committee or by people who appeared before it, or by the legal advisors, including the Legal Advisor to

the Knesset, the Legal Advisor to the Finance Committee, the Legal Advisor to the Ministry of Finance and the head of the Public Law Division of the Department for Legal Advice and Legislation in the Ministry of Justice. All the legal advisors referred to the difficulties raised by the Bill, including the difficulty inherent in amending a basic law by way of a temporary provision. The position of the Legal Advisor to the Knesset, as expressed before the Joint Committee, was that although "there is no dispute that a basic law and a temporary provision are contradictory things", nevertheless, as long as the Knesset has not yet enacted Basic Law: Legislation, which is intended to regulate the process of legislation in Israel, the Knesset Rules of Procedure are the sole normative source for legislative procedure in the Knesset, and these do not make any provision regarding the enactment of basic laws or their amendment.

In the Knesset's reply it was further argued that the petitioners' contention that Basic Law (Temporary Provision) is not in fact a basic law, and that its normative status is inferior to that of a "regular" basic law, should be dismissed. According to the approach of the Knesset, the accepted criterion in Israel for identifying a basic law is that of form. Under this criterion, conferring the title "Basic Law" on the law and not mentioning the year of its enactment are sufficient to transform a piece of legislation from a "regular" law into a basic law. It was also argued that review of the contents of basic laws is permissible only in exceptional, extreme cases of detriment to the meta-principles of our legal system, and that the Knesset is competent to change the balance between the different authorities.

8. In their response, respondents 7-9 (hereinafter: the State) described the circumstances that led to the enactment of the Basic Law as a temporary provision, and principally, wanting to allow for a trial period in which the transition to a biennial budget as a permanent arrangement would be examined. According to the argument, the representatives of the Ministry of Finance believed that it was more appropriate to make a change in the basic laws that would expire automatically after two years than to make a permanent change in the basic laws – which, after a trial period – may prove to have been unnecessary. According to the approach of the State, opting for the enactment of a temporary provision that expires automatically after two years allows for the preservation of the stability of the basic laws and prevents their frequent amendment.

The State rejected the petitioners' argument that the normative status of a temporary provision – whether enacted in the framework of a regular law or a basic law – is inferior to that of a regular law or a basic law. According to the State, because the process of legislating a "regular" basic law and a basic law by way of temporary provision is the same, the Knesset is competent to choose the way in which to legislate, and there is no room for intervention in this discretion. In effect, it was argued, in the past the Knesset occasionally employed the legislative technique of temporary provisions in primary legislation, including basic laws. For example, Basic Law: The State Economy (Bills and Reservations Involving Budgetary Expenditures) (Temporary Provision) 2002, stated that for a trial period of one year, a budgetary law would be passed by the Knesset only with the support of at least 50 MKs. After a year, this arrangement became embedded, with several changes, in the provisions of s. 3C of Basic Law: The State Economy. The State also referred to several laws that were enacted by way of temporary provisions which regulated important matters with far-reaching ramifications, including the electoral system in Israel and deferral of military service for full-time Talmudic Academy students.

The State further argued that Basic Law (Temporary Provision) is a basic law for all intents and purposes, by virtue of both the formal criterion and the substantive one, and the fact that it was enacted by way of a temporary provision cannot affect its normative status. Furthermore, the State also held that in view of the "stable and unchanging" status of the basic laws, it is preferable that in appropriate circumstances, changes to the basic laws be effected by means of temporary provisions and not by means of "regular" basic laws. The State also dismissed the argument whereby Basic Law (Temporary Provision) changes the provision of s. 36A of Basic Law: The Knesset, or changes the balance of power between the branches of government. According to this argument, the purpose of the above section is not to express no confidence in the government, but to express no confidence solely in the budget proposal. The State contends that even if in practice, the result of expressing no confidence in the budget proposal is dissolution of the Knesset, Basic Law (Temporary Provision) cannot be viewed as containing any substantive change of the balance of power between the government and the Knesset. The State does indeed agree that "the power given to the Knesset to approve the budget is [ ] a 'sacrosanct' power", but, according to its approach, "there is nothing 'sacrosanct' about the Knesset using this power annually." The State further argued that even if Basic Law

(Temporary Provision) may have the effect of changing the balance of power between the authorities, it is within the power of the Knesset to make changes to this balance of power. This change, so goes the argument, does not need to be passed with a majority of at least 61 Members of Knesset in each of the readings, as argued by the petitioners, in view of the fact that s. 36A is not an entrenched section. Similarly, there would be no requirement for such a majority even if the argument of the petitioners, whereby Basic Law (Temporary Provision) implicitly changes the provision of s. 34 of Basic Law: The Knesset, were accepted, for neither is the said s. 34 entrenched. The State also dismissed all the other arguments of the petitioners regarding the motives of the Members of Parliament in enacting Basic Law (Temporary Provision), regarding the concern about expanding the Arrangements Law and regarding the unreasonableness of the Basic Law. These arguments, contends the State, are not acceptable on their merits and in any case they are not arguments by virtue of which it would be justified to strike down a basic law.

Deliberations

9. The arguments of the parties raise two major questions. First, is Basic Law (Temporary Provision) indeed a basic law for all intents and purposes? Determination of this question, naturally, impacts on the validity of the amendment to Basic Law: The State Economy and on the extent of intervention of the Court in the arrangement laid down in Basic Law (Temporary Provision). Examination of this question necessitates a discussion of two secondary questions. The first relates to the manner of identification of the outcome of the activity of the Knesset as a constituent authority. Is the criterion for the identification of a law as a basic law one of form, one of substance, or a combination of the two? The second question relates to the fact that the amendment of Basic Law: The State Economy is for a set, predetermined period of time. Is the use of a temporary provision detrimental to the validity or the status of the Law as a basic law? The second central question – on the assumption that Basic Law (Temporary Provision) is indeed a basic law – is whether it is in order to nullify it because it changes the balance of power between the Knesset and the government in the budgetary approval process?

We will begin with the first question.

Are we Dealing with a Basic Law?

10. As is known, basic laws in Israel are the outcome of that historical compromise reached by the constituent assembly – the "Harari decision" of 13 June, 1950 – whereby the Law and Constitution Committee was charged with preparing a draft constitution for the State, "that would be built chapter by chapter in a manner such that each chapter would constitute a basic law in itself" (D.K. 5, 1743 (1950)). Over the years, several basic laws were enacted, the hope that they would eventually be united in a whole constitution, and the conception was accepted whereby in enacting the basic laws, the Knesset was acting as a constituent authority (see the majority opinion in CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [1995] IsrSC 49(2) 221, which was accepted against the minority opinion of Justice M. Cheshin).

It is this constitutional structure, in which the same body – the Knesset – acts as both the constituent and the legislative authority that creates a need to identify the characteristics of the legislative outcomes and determine whether a law that is produced by the Knesset belongs with those legislative acts that have a meta-legal normative status or whether it belongs to the family of "regular" laws. Over the course of the years, this identification was made on the basis of a formal criterion, both by the various Israeli parliaments and by this Court. And thus, all those laws that bore the title "Basic Law" without mention of the year of enactment in the title, were considered to be basic laws that are part of the nascent constitution of the State. Accordingly, over the years twelve basic law were enacted: Basic Law: The Knesset; Basic Law: Israel Lands; Basic Law: The President of the State; Basic Law: The Government (old and new); Basic Law: The State Economy; Basic Law: The Military; Basic Law: Jerusalem the Capital of Israel; Basic Law: The Judiciary; Basic Law: The State Comptroller; Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.

11. The formal criterion received further support in the ruling in *Bank Mizrahi v. Migdal* [1]. In the majority opinion the formal criterion was determined to be that by which basic laws are identified. Justice Barak, with whom the majority concurred, stated in his written opinion (at p. 403):

> 'When does a norm that is created [by the Knesset] have constitutional status, and when is it said that the norm is a "regular" law? In my opinion, the answer is that the Knesset

> uses its constituent authority … when it gives this external expression in the name of the norm and views it as a "basic law" (without indicating the year of enactment).'

Underlying the decision to adopt the formal criterion was the assumption that a simple criterion was needed for identifying basic laws, so that problems and uncertainty would not arise with respect to laws whose normative status was meta-legal. As President Barak pointed out: "This formalistic criterion – use of the term 'basic law' – is easy to apply. It grants security and certainty" (ibid., p. 406; and see also ibid., at p. 394: "The reply of the constituent authority doctrine to the distinction between an act of constitution and an act of legislation is simple and clear, for it uses a simple, formalistic criterion"). And indeed, the formal criterion made – and still makes – it possible to classify those legislative acts that constitute part of the state constitution in a class of their own. The formal criterion also enables the Knesset to know in good time when it is acting as a constituent authority, to "enter into" that commitment that is necessary for basic legislation and to "don" its constituent authority hat prior to debating a bill that is destined to become part of the constitution of the state.

12. The argument has been raised more than once that the formal criterion is too simplistic (see, e.g., Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, Vol. 1: *Basic Principles* (6th ed., 2005) 96 (Hebrew) (hereinafter: Rubinstein & Medina); see also Aharon Barak, "The Constitutional Revolution: Protected Human Rights" *Mishpat Umimshal* 1 (1992), 9, 19 (Hebrew) (hereinafter: Barak, *Constitutional Revolution*); Ariel Bendor, "The Legal Status of Basic Laws" in Aharon Barak and Haim Berenson, eds., *Justice Berenson Book*, vol. 2 (2000), 119, 140-142 (Hebrew) (hereinafter: Bendor). President Barak himself, in his book on constitutional interpretation, raised the argument that in the formal criterion there is no reference to the substance of the legislation (see: Aharon Barak, *Legal Interpretation, Vol. 3: Constitutional Interpretation* (1995), 46 (Hebrew) (hereinafter: Barak, *Constitutional Interpretation*). This being so, provisions that regulate subjects which, from the point of view of their substance, are suitable for inclusion in the constitution, but do not bear the title "Basic Law", will not be considered part of the constitution. Amongst the regular laws that ought to be endowed, according to the argument, with constitutional status, it is accepted to mention the Law of Return, 1950 (see,

e.g. the words of MK Bar-Yehuda, who in presenting (to the Second Knesset) Basic Law: The Knesset – which is the first basic law to have been enacted – points out that during the term of the Second Knesset, "several laws that are clearly in the nature of basic laws, even if not in form, have been enacted; it is sufficient to mention the Law of Return and the Law of Judges (D.K. 15, 57 (5714)). On the other hand, some provisions find their way into the state constitution, despite their questionable suitability for inclusion therein (see, for example, Prof. Itzhak Zamir's critique of Basic Law: The Knesset, which "spreads over 46 sections, bloated with minute details which ought to have been laid down in a regular law": Itzhak Zamir, "Basic Laws on the Way to a Constitution", Introduction to Amnon Rubinstein and Raanan Har-Zahav, "Basic Law: The Knesset", *Commentary to the Basic Laws*, (I. Zamir ed., 1992), 11, 13-14 – hereinafter: Zamir). Therefore, the argument is often heard that the substantive criterion should be applied alongside the formal criterion, in such a way that inclusion of the words "basic law" in the title of a law will constitute a preliminary condition, but not a sufficient one, for recognition of the law as a basic law (see: Rubinstein & Medina, p. 96).

13. This proposal to institute a combined criterion for identification of basic laws has both advantages and disadvantages. On the one hand it allows for an extensive examination of a piece of legislation that is destined to become part of the constitution of the State. The substantive criterion or the combined criterion helps to overcome the problematic nature of the formal criterion, and it ensures that the title "basic law" will not be misused in order to entrench arrangements that are not suited, from the point of view of their substance, to be part of the constitution. On the other hand, recourse to a substantive criterion or some kind of combined criterion is not without its problems. First and foremost, it involves a degree of uncertainty with respect to existing and future legislation regarding the question of whether it constitutes part of the constitution. There is another real difficulty inherent in the substantive criterion, which, in the words of President Barak, "touches on the very relations between the constituent authority (of the Knesset) and the judicial authority (of the court)" (*Bank Mizrahi v. Migdal* [1], at p. 406), in whose hands will be placed the power to decide whether a statute is suitable, from the perspective of its substance, for inclusion in the constitution.

14. The question of whether a combined criterion should be applied in

Israel is a complex one which I believe can be left for future consideration and which need not be resolved in the framework of the present petition. Indeed, there is merit to the argument that there are some laws which, from the point of view of their substance, ought to be included in the constitution. Similarly, there is merit to the argument that there are sections and provisions in the basic laws in relation to which it is doubtful whether they are of the type of provision that merits inclusion in the constitution. At the same time, this fact alone does not necessarily lead to the conclusion that there is call for departing from the criterion that was accepted to date. There is no dispute that the use of the formal criterion requires self-restraint on the part of the legislature, which has the central authority to determine *a priori*, which legislative acts will be endowed with constitutional status. The formal criterion supposes that the legislature will not misuse its constituent power by attaching the title "basic law" to legislation that is not worthy of being part of the constitution. A review of the enactment of the basic laws from 1958 till the present shows that there was no such misuse (see also Barak, *Constitutional Interpretation*, p. 46 n. 51; Bendor, "The Legal Status of Basic Laws", p. 143). The constitutional history of Israel shows that the Knesset used the term "basic law" in cases in which it was clear to the Knesset and to its members that they were operating within the framework of their competence as a constituent authority that is preparing to enact a chapter in the future constitution of the state. This conclusion emerges from an examination of the protocols of the debates in the plenum when draft bills for the enactment of basic laws were submitted for their first, second or third readings: the Members of Knesset specifically mention the fact that the proposed basic law is part of the constitution of the state (inter alia see: D.K. 15, 57 (1954); D.K. 36, 963 (1963); D.K. 74, 4002 (1975)). To this must be added that even from the relatively small number of basic laws we learn that the enactment of basic laws was not taken for granted, but was considered to be the act of the constituent authority in determining the highest norm of the state.

15. Furthermore, it is not necessary to decide on the question of the criterion for identifying basic laws in the present case, since recourse to the combined criterion too, leads to the conclusion that Basic Law (Temporary Provision) is a basic law. By virtue of the terms of the formal criterion, the title of Basic Law (Temporary Provision) includes the words "basic law", and the year of its enactment is not mentioned. The petitioners argued that

the fact that the title of the Law includes the years of its application is equivalent to mention of the year of enactment. This argument is not convincing. Mention of the period of application of a basic law is not analogous to mention of the year of its enactment, and it cannot detract from the validity of the Law under the formal criterion. Under the substantive criterion too, the conclusion of the petitioners that the status of Basic Law (Temporary Provision) is that of "legislation that is even inferior to a regular law" is unfounded, even if it is agreed that the Law gives rise to not inconsiderable difficulties. The material dealt with by the law – the state budget – is material that has been regulated in Basic Law: The State Economy, and recognized as an area that constitutes part of the basic laws in Israel. Basic Law (Temporary Provision) changes the constitutional arrangement pertaining to the state budget, in its determination that the budget for the years 2011-2012 will be set as a biennial budget instead of an annual one. For this reason, too, it cannot be said that the Law, from the perspective of its contents, is unsuitable for inclusion in our basic laws.

For all these reasons, I am of the opinion that in the circumstances of the case before us it is not necessary to decide on the question of the application of a combined criterion for identifying basic laws, which raises, as we have said, complex issues regarding both the characterization of legislation as basic legislation and the division of authority between the legislature and the judiciary.

16. A separate question is whether in the case before us there was misuse of the title "Basic Law". The petitioners argued at length that it is not possible to override a constitutional principle that is anchored in basic laws by means of a temporary provision whose period of application is determined solely for the duration of the term of the present government. According to this argument, the Israeli Government wishes to exploit its parliamentary majority in order to change the rules of the parliamentary game, "abusing the automatic majority that the present government enjoys in the elected parliament, in order to change a basic law in a temporary and tendentious manner – only until the end of the term of this present government" (petition of 3.6.2010, pp. 2-3). The petitioners further argued that "It was not considerations of the good of the parliamentary regime or the good of democracy that the architects of the Law had in mind, but rather, considerations of convenience and the survival of the government (even at the expense of basic principles)" (*ibid.*, p. 3). According to the petitioners, if

the Members of Knesset had wished to conduct a "real" experiment in operating a biennial budget, they should have decided that the biennial budget would apply from the next Knesset onwards.

17. Let it be said first that as a rule, "it is very doubtful whether motives for the enactment of a basic law – even if it may be argued that they are not worthy – are liable, *per se*, to constitute a juridical flaw that constitutes cause for judicial review" (HCJ 5160/99 *Movement for Quality Government in Israel v. Law and Constitution Committee* [1999] IsrSC 53(4) 92, 96). Even were I prepared to assume that the motivation for enacting this Law, as claimed by the petitioners, is the desire of the Coalition to avoid the need to approve the budget annually, this reason alone, cannot justify judicial review; particularly where the relief sought is an order nullifying the Basic Law. A separate question is whether the very fact that the Law was enacted by way of a temporary provision constitutes "misuse" of constituent authority, thereby affecting the validity of Basic Law (Temporary Provision) as a basic law. The petitioners' approach, as described at length in the introduction, is that the attempt to define a temporary provision as a basic law is a "contradiction in terms that leads to a degradation of the enactment of basic laws and of the status of the Knesset as a constituent authority" (reply of the petitioners to the response of the respondents dated 4.1.2011, p. 11). According to this argument, there is no conceptual and theoretical possibility of establishing a temporary provision in a basic law, and therefore, it is totally without force.

The respondents, and particularly respondents 1-6, did not deny the conceptual difficulty in establishing a basic law whose period of application was defined in advance and limited in time. The legal advisor to the Knesset, who was invited to the deliberations of the Joint Committee, also gave his professional opinion to the Committee to the effect that this involves an inherent, inbuilt problem. However, according to respondents 1-6, as long as the procedures for the enactment of basic laws have not been set in the framework of Basic Law: Legislation, it is possible for the Knesset to change a basic law by means of another basic law, even if it is a temporary provision. Respondents 7-9 added that indeed, as a rule, the provisions in basic laws are not time-bound, but in suitable circumstances the Knesset has the authority to make temporary provisions even in basic laws; and, on their approach, there is "no contradiction between a piece of legislation being a basic law, and it being a temporary provision." Moreover, the State also

argued that in certain cases, it is possible that "in view of the stable and unchanging status of the basic laws, there is a certain preference for making changes to them, when the continued validity of the changes is doubtful, by means of basic laws that are temporary provisions" (Response to the petition on behalf of respondents 7-9 of 20.9.2010, p. 16).

Does the Fact that the Basic Law was Enacted by Way of a Temporary Provision Affect its Validity?

18. The question of whether a basic law may be enacted by way of a temporary provision has already arisen in the Knesset. See *Movement for Quality Government in Israel v. Law and Constitution Committee* [2], in which Amendment no. 9 of Basic Law: The Government, which cancelled the limit that had been set in that Basic Law on the number of members of the government, was reviewed. It is noteworthy that in the deliberations in the Law and Constitution Committee on this proposed Law, the position of the then Attorney General, E. Rubinstein, was presented, whereby alongside the interest in the stability of the constitutional structure, and the need to avoid, insofar as possible, frequent changes to basic laws, it cannot be stated that there is any legal bar to enacting a basic law as a temporary provision. Furthermore, the Knesset already changed a basic law by means of another basic law that was set in a temporary provision (see: Basic Law: The State Economy (Bills and Reservations Involving Budgetary Expenditures) (Temporary Provision) 2002), but this matter has not been considered by this Court in the past.

19. The possibility of enacting a constitutional provision whose beginning and end are predetermined for a set period of time brings to light a series of difficulties in Israeli Constitutional law. It should be recalled that the constitutional structure in Israel is special and it is not complete. Indeed, it is indisputable that the constitutional enterprise in the State of Israel has progressed significantly since the enactment of the first Basic Law in 1958, but this enterprise has not yet been completed (see, e.g., Aharon Barak, *A Judge in a Democratic Society* (2004), 79). For this reason, our constitution is lacking many characteristics that are normal in states which have a completed constitution. Thus, for example, some basic rights are not protected in basic legislation. Some of the provisions that appear in the basic laws are entrenched, whereas others may be changed by a regular majority. Some of the provisions are formulated in ceremonious, general and brief

language whereas some of the provisions are too detailed and convoluted (see: Zamir, *Basic Laws on the Way to a Constitution*). Some of the basic laws regulate subjects which by their nature were destined to become part of a future constitution, whereas some of them regulate subjects that are not, generally, included in those constitutions of other countries with which we are familiar. Some of the major subjects in constitutions of other countries are not regulated in Israel in basic laws at all, and a question arises as to their constitutional status (see the opinion of President Barak in *United Mizrahi Bank Ltd. v. Migdal* [1], at pp. 402-403). This is the constitution "Israeli-style". To a considerable extent, it is a constitution that is still in the process of consolidation.

20. There is a glaring lacuna in our constitutional regime insofar as the manner of enactment of basic laws is concerned. In view of the fact that Basic Law: Legislation has not yet been enacted, there is as yet no blueprint for amending and changing the constitution; for the majority required for amending the constitution; and for the possibility, if at all, of amending the constitution or amending it in a temporary manner. As a result, the Rules of the Knesset are the central mechanism that applies to the procedures for the enactment of the basic laws, and they do not include a special provision that differentiates between the procedure for enactment of "regular" laws and the procedure for enactment of basic laws. For this reason, basic laws can be enacted by any majority in the Knesset; and basic laws may be changed – unless they are specially entrenched – by any majority as long as the amending law is a basic law. In practice, an examination of the history of the amendments to our basic laws reveals that the basic laws were amended or changed a great number of times (seem e.g., Ariel Bendor, "Flaws in the Enactment of Basic Laws", *Mishpat Umimshal* 2 (1995), 443, 444-445 (Hebrew)); much more often than amendments to constitutions in other democratic states (the American Constitution, for example, has been amended 18 times (and in total, 27 amendments) over the 227 years of its existence; the Dutch Constitution, which was passed in 1814, has been amended 24 times; the French Constitution has been amended 8 times since it was passed in 1958. On constitutional amendments in general, see: European Commission for Democracy Through Law (Venice Commission) *Report on Constitutional Amendment* (2010)).

21. The ease with which Israel's basic laws can be changed detracts from their status. The major characteristic of a constitution – a characteristic

that is part of the basic definition of a constitution and also part of the advantages inherent in the existence of a constitution – is its stability. A constitution is intended to withstand frequent changes, and to stand firm in the face of changes in the political composition of the regime and in the face of various social changes. A constitution serves as a normative yardstick for society. It is the complex process of amending the constitution that allows this yardstick to stand firm and unwavering even in the face of a tumultuous society and a changing regime. In Israel this is not the situation. Most of our basic laws are not entrenched, and they can therefore be changed by the Knesset with a regular majority by means of regular enactment procedures. This constitutional reality derives to a great extent from the fact that our constitution is coming into being chapter by chapter, and not in a one-time constituent act subsequent to which every change requires a rigid, and special, process. The basic laws in Israel were enacted over a long period of time. They were not enacted as part of the constituent document of the establishment of the State, nor even in a time of revolution, war, or as a reaction to some other radical change in society or of the regime (see, e.g., Jon Elster, "Forces and Mechanisms in the Constitution Making Process", 45 *Duke L.J.* (1995), 364).

22. At the same time, it may be said that the basic laws have taken root in our juridical culture and in the political and public tradition as part of the constitution of the State. To a not inconsiderable degree, the strength of a constitution and of a proper constitutional regime is tested by the ability of the constitution to serve as a normative yardstick for the legislature, the executive, the judiciary and for individual citizens. The greatness of a constitution lies in its success in directing the behavior of individuals and of the state authorities, and in limiting the legislator's ability to upset constitutional arrangements. As such, the answer to the question of whether the basic laws "have become rooted" in our constitutional tradition is not dependent only on the judicial review undertaken by this Court, but it is also – and even especially – evident in those cases in which the matter does not come to court because the elements involved in the legislative processes, as well as the executive, have internalized the accepted rules of play of the constitutional regime.

23. In Israel, the superiority of the basic laws and their meta-legal normative status find expression both in the judicial review of regular legislation exercised by this Court and in the legislative procedures in the

Knesset in recent decades. In practice, the question of the relationship of a proposed law to the existing basic laws has become one that is inseparable from the procedures for examining proposed laws. The directive of the Attorney General even states that "when a proposed law is submitted on behalf of the government for discussion by the government or by a ministerial committee, attached to it will be an opinion … on the question of the validity of the proposed law in light of the basic laws" (The relevant part of the Directive appears in Amnon Rubinstein's article, "The Knesset and the Human Rights Basic Laws", *Mishpat Umimshal* 5 (2000), 339, 352-3 (n. 9) (Hebrew)). A constitutional examination of proposed laws in light of the basic laws is conducted at each stage of the legislative process by the staff of the legal advisor to the Knesset (see *ibid*., p. 352). The deliberations in the Knesset plenum and in the various Knesset committees also indicate that the Members of Knesset are aware of the constitutional status of the basic laws and of the legislative constraints that derive from the superiority of the basic laws. This is evident, as will be discussed at length below, in the present case as well. The constitutional awareness that expresses itself in the process of examining the compatibility of the proposed legislation with the basic laws is a necessary process in every properly-functioning constitutional state, particularly so in the special circumstances of the constitutional law in Israel, which demand a great deal of self-restraint on the part of the Knesset in order to preserve the status of the basic laws and the stability of the arrangements they embody. Alongside this self-restraint, there is also a need for judicial review by the Court aimed at ensuring that legislation, acts and decisions of the authorities and other public bodies do not change the basic laws or detract from them, but rather that they comport with the conditions established in the basic laws themselves and in the case law of this Court.

24. Where does Basic Law (Temporary Provision) fit into the constitutional tapestry that we have described? Does self-restraint on the part of the Knesset mean that there is no room for changing basic laws for short, defined periods of time? It appears that no one would argue that a temporary provision contradicts the basic idea whereby the provisions of the constitution are fixed, and some would say even eternal. As stated, at the basis of a constitution stands the will to ensure stable principles, social identity and common values that are not easily changed, in order that they endure beyond that which is temporary and passing. The amendment of a constitution by way of a temporary provision assumes that it is possible to

revoke a constitutional principle for a limited time. Is this unlawful?

In an ideal state of affairs, in which there exists a regulated and rigid mechanism for changing and amending the constitution, it is doubtful whether amendment of the constitution by way of a temporary provision would be possible. See, for example, the ruling of the Constitutional Court in the Czech Republic from September 2010: 2009/09/10 – PL. US 27/09 (for an English translation of the decision, see: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=468&cHash=44785c32dd4c4d1466ba00318b1d7bd5) in which the constitutional court struck down a constitutional act that shortened the term of office of the sitting Chamber of Deputies and led to early elections. The reason for this nullification was that the one-off provision was incompatible with the eternity clause fixed in the Constitution. It is doubtful whether this rigid approach would be suited to the basic constitutional conception in Israel. In any case, according to the present situation in Israel, the rigid approach in relation to the legislative processes does not have a suitable framework. As stated, in the absence of Basic Law: Legislation, the restrictions on the procedures for legislation or amendment of the basic laws are few, and in order to enact a basic law in Israel there is no need for special procedures in the Knesset. In these circumstances, it cannot be said that the very fact that the basic law was enacted by way of a temporary provision fundamentally disqualifies it or places it on a normative rung that is lower than a regular law, as the petitioners contend. At the same time, it may also not be said that this practice is problem-free. Setting a temporary constitutional arrangement indeed denigrates the status of the basic laws, and it should be done only sparingly, if at all. In certain circumstances, which cannot be determined in advance, it is possible that the enactment of a basic law as a temporary provision may amount to "misuse" of the title "basic law". In considering each case on its merits, attention must be paid, *inter alia*, to the existence of exceptional circumstances that justify the making of a temporary arrangement rather than a permanent one; the subject being regulated by the basic law must be examined; and an assessment must be made of the extent of damage wrought by the temporary basic law on the principles of the regime and other basic rights. It is important to note that application of these criteria to an examination of the constitutionality of a temporary provision is linked, by its very nature, to the question of the applicability of a substantive criterion for the identification of basic laws. At the same time, this question can also stand as an independent one. As stated, in certain, exceptional

circumstances, the very recourse to a temporary provision may justify intervention in the basic legislation.

25. From the discussions in the Joint Committee it transpires that the decision to enact the Basic Law under discussion by way of a temporary provision derived from the professional position of senior Treasury officials, who felt that they do not have the tools to determine that the advantages of the biennial budget are greater than its disadvantages without conducting an actual "experiment". The Treasury officials therefore sought to avoid a permanent amendment to the basic laws until after a "pilot" had been conducted, following which the Ministry would formulate a recommendation as to whether there should be a transition to a permanent biennial budget (see the protocol of the Joint Committee of the Finance Committee and the Law and Constitution Committee, 11.5.2010).

The problems involved in enacting a basic law by way of a temporary provision did not escape the Members of Knesset. The members of the Joint Committee devoted several discussions to the subject, and sought to ascertain the legality and the constitutionality of the draft law before them. As part of this effort, two legal opinions were submitted for review by the members of the Committee, and four legal advisers appeared before the Committee. The Committee also allowed the petitioner, MK Ronnie Bar-On, to address it at length. MK Bar-On laid out in detail the main arguments that were raised in the present petition. *Inter alia*, MK Bar-On spoke about the alleged harm to the balance between the powers, and about the central role of the Knesset in its oversight of the government in the process of approving the budget. MK Bar-On also mentioned his position that enactment of the amendment to Basic Law: The State Economy by way of a temporary provision constitutes misuse of the Basic Law for the purpose of obtaining a short-term political goal (Protocol of the Joint Committee, 11.5.2010, pp. 5-20). In two written opinions submitted by the legal adviser to the Finance Committee, the legal adviser pointed out that "it is a commonplace that basic laws and temporary provisions are contradictory concepts, and they are not compatible", and it was also mentioned that a change to a basic law must be done in a basic law, and that determining the state budget is a constitutional norm. It was further pointed out in the written opinion that "the enactment of the biennial budget law is reserved for exceptional circumstances and ought not to be turned into the norm barring such circumstances without a comprehensive discussion of the basic values of our system"; and that

transitioning to a biennial budgetary regime is liable to upset the balance between the executive branch and the legislative branch with respect to approval of the budget. In the wake of these opinions, and in the wake of what was said in the Committee, the members of the Joint Committee invited the legal advisor of the Treasury to its sessions, and asked for the professional opinion of the Ministry of Justice regarding the enactment of the Law by way of a temporary provision. Advocate J. Baris, the legal advisor to the Ministry of Finance, gave his opinion:

> 'This matter [of determining an arrangement by way of a temporary provision], it must be stated clearly, is a matter that is very exceptional and one that must be avoided insofar as possible. This is not a trivial matter … At the same time, it must be understood that this question, more than being a legal question is one of constitutional policy. In other words, does the Knesset as a constituent authority, as a matter of policy for determining constitutional arrangements, believe that this matter justifies a temporary provision or not … The starting point is that today, from a professional point of view, from the point of view of the matters that arise, there are advantages that resulted from the partial attempt that was made at an almost biennial budget … as opposed to the advantages, there are concerns … and the concerns are great and therefore from a professional perspective we are in a situation in which the clear professional recommendation is not to move over to a permanent provision for a biennial budget' (Protocol of the Joint Committee, 11.5.2010, pp. 43-44).

Adv. Baris added that according to the Ministry of Finance, the present Temporary Provision is exceptional against the background of the accepted temporary provisions in Israeli law. Adv. Baris stated as follows:

> ‘In our legislation there are two types of temporary provision from a conceptual point of view. There are temporary provisions that stem from a temporary need, when I make a temporary provision in view of that need and it provides a response for that temporary need. There are temporary provisions that begin as a trial and a test … in general there is sometimes a need to conduct a trial, we go into something and we don’t yet know how it will work out, and you want to test the matter.
>
> …
>
> Now I want to be more accurate and to say that we are on the seam of these two types of temporary provisions. The temporary provision of last year (the original temporary provision) was of the type of a clear temporary need … we saw the particular advantages of this partial attempt, and then we are at the transition to a temporary provision of the second type where you say that we do not have an annual budget so let’s experiment. I do not know whether in a basic law … you would say that we will move over from situation A to situation B as an experiment, but if you are already in situation B and you say, should we go back to situation A or extend by two additional years in order to make the experiment possible, this is our situation and this is a coming together of circumstances according to which we believe that there are circumstances in which it is possible to propose a draft basic law as a temporary provision … in these circumstances we have reached the conclusion that it is precisely respect for the basic law that [lies] in the temporary provision. If we were to make a

> temporary provision in a basic law where there is a possibility that in two years or whenever we will have to submit to the Knesset a repealing provision because the concerns proved to be overriding or to be founded or to be real in the general balance and to justify a return to the annual budget, to submit a counter amendment is less seemly than in these circumstances to say that we are extending the temporary provision that began due to the special circumstances of the period in which we can for the first time truly examine the biennial budget (*ibid*., pp. 44, 45-46).

Adv. Eyal Zandberg, Head of the Public Law Section of the Advice and Legislation Department of the Ministry of Justice, pointed out to the Committee that several options for changing the Basic Law were available to the Government; one of these was the option that was chosen – that is, the enactment of a temporary provision for two years. Like Adv. Baris, Adv. Zandberg too pointed out that this track is not problem free, although it is possible from a legal standpoint. According to Adv. Zandberg:

> '… from a legal standpoint, from the point of view of the idea, the problem, and this is the problem here and I admit that there is a problem. I do not think that it disqualifies the proposal, but there is a problem, it cannot be ignored, with a temporary provision in a basic law … We asked and we were convinced that there is no desire here to protect the current government, there were professional explanations why this arrangement is required for two years, and for two years only …. Hence the conclusion was … that it cannot be said to the Government that it is not within its authority to submit a bill that amends a basic law and establishes, in circumstances as I have described, this arrangement as a temporary

> arrangement for a specific period of time that is actually intended to allow the State as a whole, not only the Government, to try this out … and we did not think it correct to say that such an amendment to a basic law amounts to an illegal amendment. What is more, it must be said, that not every text that bears the title "basic law" legitimizes what is written beneath the title. This is not our position – let this be clear. I do not think that it may be argued that the contents of the basic law are in themselves unsuited to a basic law, according to their substance, and the difficulty is a conceptual one, how is it that a basic law, a segment of the law [should be "constitution", D.B.], a permanent arrangement – how can the foundation stones be temporary? How can those walls of stone be built as plasterboard, which may easily be cut? This is a difficulty, but this is the explanation that we found for our professional legal opinion' (Protocol of the Joint Committee of the Finance Committee and the Law and Constitution Committee from the discussion of the Economic Efficiency and the State Budget for the years 2009-2010, 31.5.10 p. 3).'

26. After hearing these opinions, the legal advisor of the Knesset, Adv. Eyal Yinon, was also invited to appear. Like the legal advisors who presented their views to the Joint Committee before him, the legal advisor to the Knesset, too, explained to the members of the Committee the complexity of the issue facing them. Adv. Yinon said that "it is clear that the biennial budget is a constitutional matter, a matter pertaining to the regime", in that it is the type of provision that appears in constitutions throughout the world and in basic laws in Israel. Adv. Yinon further stated that "no one disputes that basic laws and temporary provisions are contradictions in terms", but, in his view –

> 'Due to the absence of a legislative arrangement of the issue of amendment of basic laws, it is difficult to argue that the proposed amendment is not constitutional or is not compatible with the basic values of the system. But of course the MKs must understand that their assent to an amendment of this type, beyond detracting from the ability of the Knesset to oversee the government … also contains an erosion of the status of the basic laws and of the protection that the Knesset is supposed to afford to the basic constitutional principles of our regime' (Protocol of the session of the Joint Committee relating to the Economic Efficiency and State Budget Law for 2009-2010, 15.6.2010, pp. 5-6).

The members of the Joint Committee were persuaded that it is possible to enact that Basic Law as a temporary provision, but in order to address the difficulties that arose from the Bill, including the concern about weakening the Knesset's power of oversight of the government, the Joint Committee made several changes to the proposal. The framework of the biennial budget was retained, but it was determined that the government will be obliged to submit the budgetary plan within 90 days prior to the commencement of the 2012 fiscal year; a section relating to a budget of adjustments for the fiscal year 2012 was introduced, designed to allow flexibility in the mode of execution of the budget in the course of implementing the biennial budget; a duty was imposed on the Minister of Finance to report to the Joint Committee within 120 days from the beginning of the 2012 fiscal year regarding his position on the transition to a biennial budget on a permanent basis; the Knesset Finance Committee was authorized to determine the date for submission of the budgetary laws to the Knesset under s. 3(b)(1) of Basic Law: The State Economy. It is noteworthy that this last amendment was a permanent amendment and not a temporary provision.

27. We have cited at length what was said in the Joint Committee because in our view, the professional and detailed discussion in the Joint Committee indicates that the enactment of the Basic Law by way of a

temporary provision was a conscious decision; in the process of enactment there was a serious discussion and the question of the possibility of enacting the Basic Law as a temporary provision was duly considered. This fact must be taken into account when the constitutionality of the Law is being considered, for it can demonstrate that the Knesset acted with the understanding that it was applying its constituent authority while relating to the complexity this involved.

28. The entire array of circumstances in the present case – including the identification of Basic Law (Temporary Provision) as a basic law under both the formal and the combined criteria; the material it regulates; and the combination of circumstances that led to the decision to introduce a biennial budget for two years – leads to the conclusion that even if we identify substantial difficulties in temporary enactment or amendment of basic laws, a determination that Basic Law (Temporary Provision) is void is unwarranted. As emerges from the deliberations in the Knesset, it was the special circumstances that gave rise to the wish to attempt to implement a biennial budget that lay at the basis of the decision to introduce a temporary change to Basic Law: The State Economy. As pointed out by Adv. Baris, the Ministry of Finance refused to draw up a permanent amendment, because it was not possible, from a professional point of view, to support a permanent transition to a biennial budget. Were it not for the economic crisis and the unexpected elections that led to the approval of a biennial budget for the years 2009-2010, it is doubtful whether the senior Treasury officials would have proposed conducting such an "experiment". However, in the circumstances that unfolded, it was decided to examine the advantages of the budget and to study the ability of the Treasury to correctly assess the forecast of expenses and income of the State for a period of two years. We will further mention that even had we thought that additional considerations underlay the legislation before us, this too would not have been enough to constitute cause for intervention in the legislation, and certainly not in basic legislation (see para. 17 above).

29. In summary: We are of the opinion that Basic Law (Temporary Provision) is a basic law for all intents and purposes. In the circumstances of the case before us, there is nothing in the use of a temporary provision in itself that would justify a determination that the basic law is void or that it should be struck down. At the same time, it would be better if in the future, the Knesset would avoid resorting to temporary provisions for amending

constitutional provisions. In any case, as long as the framework for the enactment, amendment and change of a basic law has not been determined, a legislative procedure of this kind should be reserved for exceptional, extreme and special cases, due to the status of the basic laws. In this context, the words of Justice D. Levin are apt:

> 'Amendment of a constitution should not be done as a matter of routine; a constitution and the constitutional values it embodies should never bend and change with every passing wind. The stability of the law, and *a fortiori*, of the constitution, are a value in themselves. Therefore, the legislature should consider this before passing a law, for a law, and *a fortiori* a constitution, are intended to lay down norms and principles that must guide the citizen's conduct through the days and the years to come' (*United Mizrahi Bank Ltd. v. Migdal* [1], p. 456).

30. The additional arguments that were raised by the petitioners concerning the reasonability of the Basic Law and the majority by which it was passed in the various readings in the Knesset must also be dismissed. Without taking any position on the advantages or disadvantages of a biennial budgetary system, considerations regarding the reasonability of the Basic Law are not among those considerations that justify the intervention of this Court in basic legislation. Arguments whereby the Law should have been passed by a majority of 61 MKs in the three readings are also not founded, for s. 36A of Basic Law: The Knesset is not an entrenched section. Its amendment, therefore, does not require a special majority. The argument whereby Basic Law (Temporary Provision) explicitly or implicitly changes s. 34 of Basic Law: The Knesset, and therefore the Knesset should have passed it with a special majority, must also be dismissed. We accept the State's position and that of the Knesset whereby s. 34 is not a general section that defines when the Knesset is dissolved, but rather a section that deals with the possibility of the Knesset deciding on its own dissolution – a decision that can be made by a law that is enacted by a majority of Members of Knesset. Consequently, the transition to a biennial budget should not be viewed as an implicit change of s. 34 of Basic Law: The Knesset.

The Doctrine of the Unconstitutional Constitutional Amendment

31. Having determined that Basic Law (Temporary Provision) is indeed a basic law, let us now address another central argument raised by the petitioners in the petition – although they would appear to have abandoned it in the course of the oral pleadings – that concerns the possibility of the Court nullifying Basic Law (Temporary Provision) because it contradicts fundamental values of our legal system. This issue, which in comparative legal literature is termed "the unconstitutional constitutional amendment", deals with judicial review of a constitutional amendment made by the constituent authority.

According to this argument, Basic Law (Temporary Provision) upsets the constitutional balance between the legislative authority and the executive authority, and violates the constitutional principle under which if Knesset approval of the budget is not secured once a year, both the government and the Knesset are dissolved (in accordance with s. 36A of Basic Law: The Knesset). The petitioners cited many legal sources and extra-legal sources as the basis for their argument to the effect that approval of the budget in a democratic state in general, and in the State of Israel in particular, has special significance. In approving the state budget, so argue the petitioners, the Knesset gives concrete expression to its sovereignty and superiority vis-à-vis the government; and in the period of approval of the state budget, the government is under the review of the Knesset, and conducts debates with the Knesset concerning the priorities of the state (see, *inter alia*: Chen Freidberg and Reuven Chazan, *Knesset Oversight of the Government* (Israel Democracy Institute, 2009) pp. 33-34 (Hebrew)). Basic Law (Temporary Provision), it is argued, weakens the Knesset and detracts from its ability to oversee the work of the government, its mode of operation and the priorities that it sets. This, according to the petitioners, justifies the intervention of this Court by way of nullification of a basic law, since "approval of the Budget Law on an annual basis is considered one of the foundation stones of a democratic state the world over, and in Israel in particular" (Petition of 30.6.2010, p. 3). Moreover, the petitioners argued that the Basic Law violates another fundamental principle – the ability to bring about the dissolution of the Knesset and new elections by means of only 60 Members of Knesset, if the state budget is not approved within three months of the beginning of the fiscal year.

32. The doctrine of the unconstitutional constitutional amendment has been discussed at length in foreign legal systems (for a comparative review of this issue see: Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (2008); and see: Aharon Barak, "The Unconstitutional Constitutional Amendment" (forthcoming, *Bach Book*) (Hebrew)). At its base, the doctrine of the unconstitutional constitutional amendment addresses the question of whether the courts have the authority to examine the constitutionality of amendments to the constitution. The answer to this question is directly connected to the nature and the character of the constitution in the framework of which the constitutional amendment is examined. Accordingly, there are states whose constitutions include "eternity clauses" – constitutional provisions that cannot be amended (see, e.g., art. 4 of the Constitution of the Republic of Turkey; art. 79(d) of Basic Law for the Federal Republic of Germany). In a number of states, courts have struck down amendments to the constitution on the basis of eternity clauses. There are states, such as India, in which the constitution does not include an eternity clause, but despite that the court has struck down amendments to the constitution for the reason that they were injurious to "the basic structure of the constitution" (for a review of the decisions of the Indian Supreme Court, see Gözler, pp. 88-95). In both situations – cases based on eternity clauses and those in which there was no such clause – the courts that were prepared to subject constitutional amendments to judicial review did so where the constitutional amendment breached or changed a fundamental, basic meta-principle of the constitution and the regime in the relevant state (such as the republican structure and the secular regime in Turkey. See also the abovementioned ruling of the Czech Constitutional Court, which nullified the law for bringing forward the elections based, *inter alia*, on an eternity clause in the Constitution according to which "any changes in the essential requirements for a democratic state governed by the rule of law are impermissible." For further examples, see Gözler, *ibid*.).

33. This doctrine, which recognizes "eternal" meta-principles in some form or other, has also been mentioned several times in *obiter dicta* in the case law of this Court, but it has not yet been applied (see: EA 1/65 *Yardur v. Central Elections Committee for the Sixth Knesset* [1965] IsrSC 19(3) 365, 389-390, per Justice Y. Sussman; HCJ 142/89 *La'Or Movement - One Heart and One Spirit v. Central Elections Committee for the Sixteenth Knessset* [1990] IsrSC 44(3) 529, 551-554, per [then] Justice A. Barak; *Bank Mizrahi v. Migdal* [1], pp. 394, 546, per President A. Barak and Justice M. Cheshin;

CA 733/95 *Arpel Aluminium Ltd. v. Klil Industries Ltd.* [1997] IsrSC 51(3) 577, 629-630, per Justice M. Cheshin; HCJ 4676/94 *Mitral Ltd. v. Israeli Knesset* [1996] IsrSC 50(5) 15, 28, per President A. Barak; *Movement for Quality Government v. Law and Constitution Committee* [2], p. 96, per Justice D. Dorner; HCJ 6427/02 *Movement for Quality Government in Israel v. Israel Knesset* (not yet reported, 11.5.2006), per President A. Barak, para. 74; per Deputy President (ret.) M. Cheshin, para. 11). In Israel, in view of the fact that a complete constitution – including, in that framework, the procedures for enacting and amending the basic laws – has not yet been established, the doctrine takes on special meaning. In these circumstances, the question of whether the court in Israeli is competent to strike down basic legislation because it contradicts meta-principles of our system is a complicated one that reaches to the very root of the legitimacy of the constituent authority instituting constitutional arrangements that change the nature of the basic laws, and to the core of the competence of the Court to exercise judicial review of the outcome of the acts of the Knesset as a constitutive body. At the same time, the courts in Israel have recognized the existence of principles that are irrevocable. Our basic laws, too, have laid down a central constitutional principle, the ability to change which is doubtful, relating to the Jewish and democratic nature of the State. When the constitution of the State will be complete, the question of the inclusion of eternity clauses that express the meta-principles of the regime and society in Israel will come up for discussion. In this context, President A. Barak made the following observation in his article on this subject:

> ‘With the conclusion of the enterprise of basic laws and its ratification by the people, and with the introduction of a new complete constitution, there will be room for making a decision concerning the unconstitutional constitutional amendment. It may be that the constitution itself will solve this problem explicitly; it may be that it will contain eternity clauses that can help provide a solution to the question; the constitutional text may have nothing to say on this issue and the Supreme Court will be required to make a decision on whether to adopt the doctrine of

the basic structure of the constitution or some similar doctrine or to reject them; it is possible that amendment of the law will be so difficult and complicated that the question will not even come up for discussion.

Does this mean that at the present stage of constitutional development in Israel, there is no call to consider the place of the question of unconstitutional constitutional amendment? Indeed, in the comprehensive, complete sense of this doctrine in comparative law, it has no place in Israel. This is because the concept of constitutional "amendment" is in itself problematic in Israel. The constitutional enterprise is an enterprise in the making. The mission is not yet complete. The "complete" is yet to be completed, and in any case the constitutional amendment has not yet ripened. Nevertheless, in Israel there is a process of establishing basic laws. At times, a basic law is enacted in an area in which there was previously no basic law; at times, an amendment to an existing basic law comes about by way of enacting an amending basic law. Against this background, the following question may be raised in Israel: are there constraints on the power of the Knesset, as a constituent authority, in its determination of the substantive contents of the basic laws, such that we can talk about an unconstitutional basic law? In this regard is there a difference between an area which has already been addressed in basic laws and needs amendment and between an area in which no basic law has yet been established?

…

> In my opinion, there is room for an approach according to which the constituent power of the Knesset is not absolute. This is so regarding the establishment of a new basic law and regarding the amendment of an existing basic law. In both cases the Knesset, as a constituent authority … must act within the framework of the basic principles and basic values of our constitutional structure … The Knesset was not given authority to harm the "democratic core, and the minimum requirements for the character of the state as democratic." Similarly, it was not authorized to harm the core of Israel as a Jewish state and the minimum requirements for this aspect of its character' (Barak, *Unconstitutional Constitutional Amendment*)

34. Indeed, I too believe that there are basic principles standing at the very basis of our existence as a society and a state, the breach of which would raise difficult questions of authority, including doubts as to whether at issue is a change in the constitution or the establishment of a new constitution. In such a case – and it would be best were it never to occur – the Court will be called upon to decide whether the Knesset has overstepped its constituent authority and violated the basic foundations of the state as a Jewish and democratic state. The case before us is not such a case. True, the relationship between the government and the Knesset in the process of approving a state budget is undoubtedly a very important relationship that expresses the principle of separation of powers. There is also no dispute that Knesset oversight of the government is an integral part of the principle of separation of powers. But does the requirement that the approval of the Knesset be obtained once every two years instead of annually constitute, for example, a negation of the democratic or Jewish character of the State? Does a decision to adopt a biennial budget for two years constitute a breach of the fundamental principles of the regime, as expressed in the Declaration of Independence? The answer is negative. Even if there is a detraction from the authority of the Knesset when it is asked to approve the budget once every two years instead of annually, the Members of Knesset have the option of

choosing to change the period of the budget. To this must also be added the special positon of the Budget Law on the scale of constitutional norms (see: HCJ 4124/00 *Yekutieli v. Minister for Religious Affairs* (not yet reported, 14.6.2010); HCJ 1438/98 *Conservative Movement v. Minister for Religious Affairs* [1999] IsrSC 53(5) 337). Hence, the damage caused to the Knesset as a result of the transition to a biennial budget does not amount to damage to the meta-principles of our system in a way that would justify the nullification of the basic law by virtue of the doctrine of the unconstitutional constitutional amendment – whatever be the scope of its application in Israel. In the circumstances of the present case it is not necessary for us to decide on this question.

35. In conclusion: for all the reasons elucidated above, I propose to my colleagues to deny the petition. Basic Law (Temporary Provision) is indeed a basic law, and the harm that it allegedly harbors is not of the type that justifies the intervention of the Court in basic legislation, even if the Law was enacted in a manner which it would have been better to avoid. As stated, we leave pending the question of the possibility of applying a substantive criterion for identifying basic laws, and we do not think that we ought to decide on the question of the application, or the scope of application, of the doctrine of the unconstitutional constitutional amendment in Israel. Determination of these two issues is not necessary in the case at hand, and we hope that we will not require it in the future.

36. Apropos of the above discussion we would point out that above all, the present petition is an indication of the need to complete the constitutional enterprise and to entrench the procedures for enacting and changing basic laws through the mechanism of Basic Law: Legislation (see, in this context, the various Basic Law: Legislation Bills that have been submitted to the Knesset; see, for example, Basic Law: Legislation Bill, H.H. 5761 2988 and the earlier draft laws mentioned in the Explanatory Notes. See also Dan Meridor, "Major Principles in Basic Law: Legislation Bill" *Mishpat Umimshal* 1 (1992), 387 (Hebrew)). The fact that the procedure for changing basic laws is liable to have significant ramifications for the constitutional regime cannot be ignored. The manner in which basic laws may be changed and the degree of rigidity of the procedure have a direct impact on the status of the basic laws, on the stability of the arrangements they prescribe, and on the extent of the power of an accidental majority to change the political, social and value-related identity of the State of Israel

(see also, on the argument that the procedure for amendment affects the nature of the regime that the constitution establishes, Avichai Dorfman, "The Theory of the Rule of Constitutional Change" *Mishpat Umimshal* 10 (2007), 429 (Hebrew)). As stated, there have been several attempts in the past to formulate draft laws to regulate the procedures of enactment of basic laws. These bills did not develop into a fully-fledged comprehensive basic law. It would seem that today, ten decades after the enactment of the first basic law, the time has come to do so.

Justice U. Vogelman

I concur.

Justice M. Naor

1. I concur in the opinion of the President.

2. The question that is central to this petition, as emerges from the discussion that took place before us in the hearing on 11.1.2011, is whether the fact that the Basic Law was changed by way of a temporary provision is a reason for striking down the Law. In my opinion too, this must be answered in the negative. My colleague the President emphasized the need to complete the legislative enterprise and to entrench the procedures for enacting basic laws and their amendment by means of Basic Law: Legislation. In the present legal situation, however, it cannot be ruled categorically that a basic law may never be changed by way of a temporary provision. All appear to agree that there are exceptional situations in which there is no avoiding a change in this manner. An example of this may be found in the provisions of the law that postponed to a small extent the date of elections to the Knesset and the Local Authorities due to the 1973 Yom Kippur War, thereby extending the term of the sitting Knesset. The Law to which we are referring is the Elections to the Eighth Knesset and to Local Government (Temporary Provision) Law, 1974, the provisions of which apply notwithstanding the provisions of Basic Law: The Knesset (s. 10). This temporary provision was at the time dictated by reality.

3. Indeed, creditable constitutional arrangements must leave a narrow

opening at least for changing basic laws by way of temporary provisions, due to what the legal advisor to the Ministry of Finance, Adv. Baris, in the section cited by the President, called "the needs of the hour". The matter at hand is not one of "the needs of the hour", but the present constitutional structure in Israel does not rule out the amendment of a basic law by way of a temporary provision that is a basic law. I agree with my colleague that determining a **temporary** constitutional arrangement detracts from the status of the basic laws, and it should be done sparingly.

4. The present case touches upon the fabric of the relations between the legislative and the executive authorities. This is not a matter of a violation of human rights, nor, in my view, of a breach of the fundamental principles of the regime. The determination that a budget will be an annual one (as opposed to a biennial one) is not, in my opinion, a fundamental constitutional principle. I can understand the objection of the petitioner, who feels that the amendment was intended to achieve a political end, even though an examination of the legislative history does not evince this. However, like the President I do not find cause for the intervention of the High Court of Justice regarding the constitutionality of the Law only because the Basic Law was amended by way of a temporary provision.

Justice E. Rubinstein

1. This case, even if outcome is denial of the petition, highlights, in my opinion, a resounding systemic failure – to instill in the Israeli people, and even sadder, in its parliamentary representatives, a constitutional awareness. The fact that the constitutional texts – basic laws – are "as clay in the potter's hands; he expands it at will and contracts it at will", in the words of the prayer recited in the Synagogue on the Eve of Yom Kippur , is sad evidence of this. We live in ongoing eras of, on the one hand, "quasi-constitution" – basic laws, including constitutional judicial review within the bounds of *Bank Mizrahi v. Migdal* [1] and the subsequent rulings, and on the other hand, a degradation of the basic laws as if they were a "request program". The question facing us is whether it is possible, by way of judicial action, to achieve greater respect for the constitutional text? The answer is not clear.

2. The specific issue at hand is in my mind a two-fold one. One is whether a basic law may be changed by way of a temporary provision. The

second, continuing from this, is the slippery slope of the degradation of the constitutional dignity of a basic law.

3. On the juridical plane it is hard to state categorically that a law cannot be changed by way of a temporary provision absent Basic Law: Legislation, and even more so prior to completion of the constitution. The reply of the Knesset quotes from my letter of 19.7.99 – when I was serving as the Attorney General – to the chairman of the Law and Constitution Committee of the Knesset which was discussing the attempt of the Government to change Basic Law: The Government so as to remove the limitation that then existed in the Basic Law on the number of ministers. The proposal seemed problematic from a legal perspective, and I expressed my reservation in view of the constitutional entrenchment in the existing Basic Law of the number of ministers; my reservation also related to "the interest in the stability of the constitutional structure and the need to refrain, insofar as possible, from frequent changes in the basic laws …". I added, however, that "to the extent that this is done in accordance with the provisions of the relevant Basic Law, I cannot say that there is a legal bar to this." In view of the problematic nature of the matter, and in order to achieve a balance between what the Government wants and the needs it has presented on the one hand, and wanting to refrain from fixing the extension for a long period on the other, the Ministry of Justice suggested – and the Government agreed – that the proposal be entrenched in a temporary provision for the term of that Knesset. In another letter to the Chairman of the Committee dated 21.7.99, I pointed out that for the sake of lessening the problem, I had raised the possibility of a temporary provision, and that it could indeed be argued that –

> 'It is preferable and dignified to amend a basic law by way of a temporary provision, because we are dealing with a constitutional document. However, matters must be weighed on the scales of profit and loss in the long term as well, and in my view the damage done by transmitting a message of the possibility of permanently expanding the government outweighs the difficulty – which I do not underestimate – of amending a constitutional text by means of a temporary provision (and

> regrettably, we have not yet succeeded in endowing most of the constitutional texts, the basic laws with the aura of "constitutionality" in the public and in the Knesset for various reasons).'

I was of the opinion that a temporary provision would necessitate the instigation of renewed processes in the future, and that the wheel would possibly turn back; at that time too there were examples of temporary provisions – s. 10 of Basic Law: Freedom of Occupation. I was of the opinion therefore that "the balance is tending towards a temporary provision, in order not to permanently fix something that is liable to transpire as being a temporary necessity." The Knesset ultimately decided on a permanent amendment, with which we are living to this very day in our minister-rich governments.

4. I cited the above at some length in order to explain the circumstances of "Woe to me from my Creator and woe to me from my evil inclination" (*B. T. Berachot* 61a). The Basic Laws have not been accorded the status that they deserve, as evinced, inter alia, by the vicissitudes of Basic Law: The Government, which was enacted, amended (not necessarily by way of a temporary provision) and replaced, in large part according to changing situations of coalition needs which mostly have no relation to constitutional dignity (and see my article: "Basic Law: The Government in its Original Formulation – Theory and Practice" *Mishpat Umimshal* 3 (1996) 521, 578-583 (Hebrew), published also in my book *Paths of Government and Law* (2003) 79, 86-91 (Hebrew). Therefore, when the Government wished to increase the number of ministers in 1999, I thought, as the Attorney General, that this was an error and it was a pity that it should be fixed (as ultimately occurred) as an "eternal lament"; consequently I was of the opinion that a temporary provision was preferable, as stated, in the sense of "choosing the lesser of two evils", in the words of the Mejelle. Today, too, I cannot say unreservedly that a constitutional temporary provision has no basis in law such that it would have to be struck down, as we are asked to do today, and I say this with regret.

5. The subject on which the petition turns is not a trivial one. Suffice it to say that the budget is one of the central pillars on which parliamentary oversight of the government rests. I personally do not believe that a constitutional text is an experimental field, as those seeking the amendment

would like to argue. Let us admit the truth: a temporary provision that stems from clear necessity – for example the temporary provision concerning the elections after the Yom Kippur War, as mentioned by my colleague Justice Naor (para. 3) – is rare. Temporary provisions will usually stem from coalition and political needs, which are virtually unrelated to a constitution that symbolizes permanence, eternity of the state and the nation, human citizens' rights, including the rights of minorities. In the present case, the idea of a biennial budget is not in essence conjunctural and it has some basis – as demonstrated to us – in the professional approach and from the international perspective, but it involves, as stated, the ability of the Knesset to exercise oversight of the Government; ought it to be the subject of constitutional experimentation and a weather vane?

6. Furthermore, I will not refrain from stating here that a biennial budget might well appear to be the younger sibling of the Arrangements Law, which is not well thought of – not to say infamous; a Law that continues, despite several improvements following a certain parliamentary awakening and legal and judicial remarks, to accompany every budget as a persistent slap in the face to the notion of creditable legislation, and in my view also as lack of respect for the Knesset, and much has already been written and said on this, and to add would be to detract.

7. But after having said all this, in order to strike down the Basic Law (Temporary Provision) a stronger juridical entrenchment than that which exists would be required, even though I would not padlock the door with a view to the future; in the circumstances there is not the critical mass which would entail its nullification. My colleague Justice Naor (in para. 3 of her opinion) stated that "indeed creditable constitutional arrangements must leave a narrow opening at least for changing basic laws by way of a temporary provision." I would leave this pending future investigation; for example, in the United States an amendment to the Constitution (under art. 5 thereof) necessitates an extensive, drawn-out procedure, that combines Congressional decisions with the consent of the States. But I certainly can agree with Justice Naor, that if the thing is done and the temporary provision is passed, it must be done sparingly, and as far as I am concerned, exceedingly sparingly. In any case at the present time and in the present case and in the existing juridical situation, we cannot dignify the Knesset more than it dignifies itself, and therefore we cannot grant the petition.

I will conclude by concurring in the words of my colleague the President with respect to the need for completing the constitutional enterprise. I will say clearly and somewhat stridently: the main reason for it not having been completed until now, so it seems to me – and let us recall that for nearly two decades, not even one basic law has been passed, despite efforts having been made – is not because of what will be written in the Constitution, but apparently because of the question of who will interpret it. The last basic laws came into being in 1992, but in 1995 a ruling was handed down in the case of *Bank Mizrahi v Migdal* [1] which determined the constitutional authority, and since then there has been a "silence of the constitution" in the operative sense, as opposed to various proposals. It seems that parts of the Knesset are not happy with the constitutional authority of this Court, and are afraid that additional constitutional texts will add to its power. I will merely say that not only is the power of judicial review exercised by this Court cautiously and sparingly, but whoever looks into the matter will find that when it has been exercised, it has always been in areas that for the most part are not the areas that worry those who are concerned. We live in a world of appearances and public and media-related perceptions that feed off themselves. It would be good if the scrutiny would sometimes be directed at the substance of issue, if one may make this modest request, even though criticism is of course legitimate, and also in the court itself there are majority and minority decisions. But scrutiny is always a good thing, so that the criticism can follow and not come before. Why do I believe in the importance of completing the constitution, although we in fact live in a quasi-constitutional regime? For educational reasons, to perpetuate the values of Israel as a Jewish and democratic state, as a text that will teach and will constitute a historical fountain spouting the values of the nation and the individual as one. The Declaration of Independence, which constitutes a major source of interpretation by virtue of s.1 of Basic Law: Freedom of Occupation and s.1 of Basic Law: Human Dignity and Liberty, can fill some of these roles (see the article by myself and N. Solberg, "The Declaration of Independence of the State of Israel – After it has (Almost) Waxed Old, Shall It Have Pleasure", *Netivei Mimshal Umisphat* 179, 191-195 (Hebrew)). But a complete constitution would be an upgrade and an empowerment on the educational plane and for the long term, and for this reason it ought to come into being.

9. As stated, in the circumstances I concur in the ruling of my colleague, the President.

Justice E. Arbel

I concur in the judgment of my colleague, the President.

Vice President E. Rivlin

I concur.

Justice A. Grunis

I concur.

The petition was denied as stated in the ruling of the President D. Beinisch. There is no order for costs.

3 Nissan 5771.

7 April 2011.