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RESEARCH ARTICLE

Comparative political process theory II

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Abstract

This article aims to continue the recent neo-Elyean turn in comparative constitutional scholarship by further exploring the role of the courts in supporting and protecting democracy. In so doing, it refines and develops my previous work on the topic, and applies this fuller version to a highly visible current dispute. The article first examines the underlying conception of democracy that comparative political process theory is designed to protect; namely, constitutional democracy. It asks what this is and what role courts have in supporting it. The article then introduces the idea of 'semi-substantive review' as an integral and output-oriented part of a comprehensive comparative political process theory, alongside and in addition to the types of more purely procedural review I primarily emphasized in my previous work. Finally, the article employs the recent, highly controversial judicial reforms in Israel as a case study in applying the criteria for, and limits of, court intervention in my account. It analyses whether, why and how, in the event that the deeply contested bills become law (as so far one did), judges would be justified in acting to support and protect constitutional democracy.

Keywords: Basic Laws; comparative political process theory; constitutional democracy; semi-substantive judicial review; South African Constitution Chapter 9

Introduction

In a previous article, 'Comparative Political Process Theory',[1] I sought to refocus the longstanding debate about judicial review from the protection of rights to the protection of the structures and processes of democracy. Along with the work of others,[2] this recent neo-Elyean turn in comparative scholarship presents a more affirmative account of the relationship between judicial review and democracy than the traditional one of uneasy

[1]S Gardbaum, 'Comparative Political Process Theory' (2020)18 *International Journal of Constitutional Law* 1429.

[2]In addition to the work of other scholars cited in n 6, see also J Fowkes, 'A hole where Ely could be: Democracy and trust in South Africa' (2021) 19 *International Journal of Constitutional Law* 476; M Hailbronner, 'Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory' (2021) 19 *International Journal of Constitutional Law* 495.

tension.[3] Emphasizing the judicial role in supporting and protecting democracy not only promises to bypass the issue of legitimacy associated with the countermajoritarian difficulty[4] but, in the current period of widespread democratic backsliding, it appears as a more pressing priority that the conventional focus on protecting individual rights.

More specifically, the previous article aimed to expand, update and comparativize John Hart Ely's famous theory of judicial review as 'policing the process of representation',[5] primarily by emphasizing the need to incorporate review of various key democratic political processes.[6] The essential absence of such genuine process review from his 'political process theory' seemed strange and several recent examples of governmental abuse of one type of political procedure or another as a tool of democratic backsliding made this an urgent area in which to explain and justify judicial intervention in the face of traditional objections to it.[7]

Important as such pure process review is, however, a fuller comparative political process theory is also not limited to it. In this article, I seek to develop the other side of the coin and explore the nature, scope, justification and limits of more substantive-oriented review from the perspective of a political process theory in which the key role of the courts is to support and protect democratic procedures. The type of substantive or output review that is an essential part of political process theory involves situations where a law or other governmental act has the effect of undermining the institutional structure or a key process of democracy. In this way, it addresses similar types of political process failures as the more direct abuse of process on which I mostly focused in the earlier article. I refer to such review as 'semi-substantive'.[8] Although Ely's theory itself certainly included, indeed relied

[3]See, for example, A Bickel, *The Least Dangerous Branch* (Yale University Press, New Haven, CT, 1962); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

[4]Bickel (n 3).

[5]JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980) 73.

[6]The work of several colleagues primarily emphasizes other elements of a new, neo-Elyean comparative political process theory. These include: S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, New York, 2015) (explicating the role of constitutional courts in fragile democracies as helping to ensure that the first democratic election is not the last); N Pietersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa*, (Oxford University Press, Oxford, 2017) Ch 1 (arguing for proportionality-based judicial review to prevent political market failures and elite domination of the political process); R Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, New York, 2023) (focusing on judicial review to counter antidemocratic monopoly power, legislative blind spots and burdens of inertia); S Choudhry, 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1 (2009) (the role of courts in countering risks of dominant party status); 'Symposium, Ely in the World: The Global Legacy of Democracy and Distrust Forty Years On' (2021) 19 *International Journal of Constitutional Law* 427 (exploring the influence of Ely's work in various jurisdictions); MJ Cepeda Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19 *International Journal of Constitutional Law* 548 (broadening Ely's theory for deployment in the Global South and fragile democracies).

[7]These traditional objections sound in separation of powers and the perceived overreach of courts reviewing the 'internal workings' of coequal branches of government. For my response to this objection, see text accompanying n 34.

[8]The term 'semi-substantive review' has been used in a different sense by Professor Dan Coenen to identify a general type of judicial review in the United States where, in a variety of ways, the process that led to a law's enactment is relevant to its constitutionality. DT Coenen, 'The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review' (2002) 75 *Southern California Law Review* 1281. Ittai Bar-Siman-

mainly on, such semi-substantive review (in my terms), it was – even here – once again too narrow. This is because it was largely limited to the effects of laws on only one process, the electoral process, whereas a more comprehensive account must include and protect all the central structures and processes of democracy.

A second refinement of my earlier work pursued in this article involves the underlying conception of democracy that comparative political process theory is designed to protect. Here, I have come to understand my position as inspired by, and an extension of, a well-known section of the South African Constitution. Chapter 9 of the post-apartheid text is entitled 'State Institutions Supporting Constitutional Democracy. It sets out the composition and powers of seven new, non-elective institutions with significant degrees of political independence, the goals of which are to bolster the overall system of constitutional democracy by addressing, strengthening and anticipating areas of potential weakness or dysfunction.[9] They are increasingly becoming known in the literature as fourth branch institutions.[10] In this article, I argue that courts should also be understood in significant part as state institutions supporting constitutional democracy. But what exactly is constitutional democracy and what is the role of the courts in supporting it? Both the existence of such a multi-institutional framework and the pattern of authoritarian populist regimes dismantling those they inherited in the name of pure electoral majoritarianism suggest the difference between the two conceptions of democracy.

The recent political crisis in Israel, in which the legislative plans of the right-wing coalition government to weaken or 'rebalance' judicial power met with massive popular resistance before 7 October 2023, illustrates all three of these points. First, the rival claims of the opposition and government about destroying and strengthening democracy very roughly capture the difference between constitutional and pure electoral majoritarian conceptions of democracy. Second, largely in the name of the latter, the Netanyahu government has targeted one of the key non-electoral processes of constitutional democracy in Israel – namely, the process of judicial appointments that is carefully designed to prevent governmental control and retain the courts as independent power centers. Third, if the proposed series of laws were to be enacted through the regular legislative procedures,[11] without abusing them, then any subsequent judicial review would likely be of the semi-substantive type. That is, it would focus on the effects of the laws on the structure and processes of constitutional democracy in Israel.

The remainder of this article develops these various claims. The next section asks what constitutional democracy is and how courts support it. What role or roles do judges play in this system of government? How does the judicial protection of democracy differ from the protection of rights? This is followed by an explanation of the nature, scope, limits and

Tov coined the term 'semiprocedural review' for the more specific situation where the quality and amount of legislative deliberation is relevant to, and may affect, the substantive validity of a statute. See I Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271.

[9]These seven institutions are the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Independent Electoral Commission; and an Independent Authority to Regulate Broadcasting.

[10]See, for example, M Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, New York, 2021); T Khaitan, 'Guarantor (or the So-called "Fourth Branch") Institutions' in *Cambridge Handbook of Constitutional Theory*, ed J King and R Bellamy (Cambridge University Press, New York, 2023).

[11]Some of the proposals involve amendment of the Basic Laws, others ordinary legislation. See text accompanying n 48.

justification of semi-substantive judicial review as an integral part of a more comprehensive comparative political process theory, alongside and in addition to the types of more purely procedural review on which I mainly focused in my previous article. The final section employs the recent situation in Israel as a case study illustrating almost everything contained in the previous two parts of the article. It also applies the criteria for, and limits of, judicial intervention developed both in my earlier work and an earlier section of this article to explore whether and why, should the deeply challenged laws eventually be enacted, courts would be justified in intervening to support and protect constitutional democracy.

Constitutional democracy and the role of courts

This is not the place for a full-blown analysis of the term 'constitutional democracy', much though one is needed – especially in the current context of perceived and actual challenges to it from various sources.[12] Like most such texts, and indeed most scholarship generally, the South African constitution employs but does not define the term, in Chapter 9 or anywhere else. For the current purpose of presenting the judicial role in supporting it, I will very briefly outline my own account of constitutional democracy.[13]

By itself, democracy is a genus, umbrella term or thin concept that denotes collective self-rule or self-government by the citizens of a political community and can take a wide variety of more particular forms. This variety consists of thicker conceptions of democracy, which – often through the addition of one adjective or another – specify the different species of democracy. It is important to underscore that such adjectives do not qualify or modify democracy but rather *specify* its different types. Some of these thicker conceptions are largely alternatives to each other (if not necessarily mutually exclusive), such as direct and representative democracy, while others are less starkly opposed and incorporate or emphasize different procedural or substantive values. These include deliberative democracy (deliberation), participatory democracy (popular participation) and liberal democracy.[14] Although I certainly acknowledge that it is frequently used in a different, broader or more generic sense,[15] at root and (arguably) most usefully, liberal democracy primarily specifies a substantive version of democracy that privileges the separation between the public and private spheres, the institution of private property and the values of individual autonomy and (mostly) formal equality.

[12]Most references to constitutional democracy in this context employ a minimalist or 'modular' conception to include a list of essential components, such as protection of rights, free and fair elections, separation of powers, rule of law and so on. See, for example, T Ginsburg and A Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, Chicago, 2018) Ch 1 (on 'liberal constitutional democracy'); M Tushnet and B Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (Oxford University Press, Oxford 2021) Ch 1 (presenting a 'thin' account of constitutionalism).

[13]What follows borrows in part from my work-in-progress, S Gardbaum, 'Constitutionalism as Constitutional Supremacy, and its Alternatives' (manuscript on file with author).

[14]In addition, there are certain other conceptions that specify the institutional forms that representative democracy may take, such as parliamentary and presidential democracies, and monarchical and republican democracies.

[15]For example, John Rawls famously argued that 'political liberalism' does not reflect a particular substantive set of values but rather an 'overlapping consensus' among competing comprehensive conceptions of the good. J Rawls, *Political Liberalism* (Columbia University Press, New York, 1993).

Constitutional democracy essentially means constitutionalist democracy. That is, it references constitutionalism and denotes the constitutionalist version of democracy. Although constitutionalism, like democracy, is a much-debated, often vague and likely essentially contested concept,[16] at its very core is a political theory that prioritizes the values of reflective, pluralistic, mediated and non-arbitrary government. Accordingly, the basic meaning of key political terms that include the adjective 'constitutional' – such as constitutional monarchy, constitutional government and constitutional democracy – is to provide a contrast with unreflective, monistic, unmediated and/or arbitrary alternatives. Just as the modern political theory of constitutionalism arose in the context of the seventeenth-century struggle against the Stuart dynasty's claim of the divine right of kings,[17] leading eventually to the distinction between a constitutional and an absolute monarch, a similar opposition is still useful for contrasting a constitutional and an absolute democracy.

In an absolute monarchy, the king's will is sovereign and the ultimate source of law. More specifically, the absolutism of such a monarchy has two dimensions: (1) the source or location of legitimate authority, which is undivided, monopolistic or wholly concentrated in the person of the monarch, even if delegated to certain officials for reasons of administration; and (2) the scope of political power, which is essentially unlimited. By contrast, the new, post-Glorious Revolution concept of the constitutional monarch – prior to the modern, almost entirely ceremonial, version – rejected both dimensions. First, the king permanently shared sovereignty and legitimate authority with the other main political institutions of state (as in King, Lords and Commons and the new defining phrase of the British Constitution, 'the King-in-Parliament is supreme'), each of which had their own roles in the law-making and other governance functions. Second, the king's political powers were limited and partial. As 'chief executive magistrate', the monarch lacked law-making power, except for the (rarely used) veto, and the remaining royal prerogative powers could be limited or superseded by statute.[18]

There is a very basic, analogous (if over-simplified) contrast between an absolute and a constitutional democracy. In an absolute democracy, the people's will, as reflected in the majority's view, replaces the monarch's as the sovereign power and serves as the sole and sufficient source of legitimate authority with an unlimited scope of action. In representative versions, this authority is delegated to periodically elected governments, which act in the people's name. By contrast, in a constitutional democracy, collective self-government involves the sharing of legitimate authority among a plurality of governance institutions, of which representative ones exercising primary political power are chosen by, and accountable to, the citizenry via elections and other, more continuous mechanisms. This institutional pluralism creates a form of separation of powers requiring ongoing cooperation and collaboration.[19]

Constitutional democracy also imposes limits on what citizens, acting through these governing institutions, can do to or demand from each other in the name of the political

[16]See, for example, M Loughlin, *Against Constitutionalism* (Harvard University Press, Cambridge, MA, 2022)) and J Waldron, 'Constitutionalism: A Skeptical View' in T. Christiano and J Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, Chichester, 2009).

[17]See, for example, A Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge University Press, Cambridge, 2006).

[18]As with the Act of Settlement of 1701, under which the monarch lost the power to fire judges at will.

[19]See A Kavanagh, *The Collaborative Constitution* (Cambridge University Press, Cambridge, 2023).

community.[20] Two features of such limits bear emphasizing. First, their existence does not of itself create, or necessarily result in, 'limited government' in the sense of the minimalist, nightwatchman state: limits on government and limited government are not always the same thing. Second, these limits may be: (1) legal in nature, and enshrined in different types of law (constitutional, statutory, administrative or common law); (2) non-legal conventions, norms or understandings of political culture; or (3) a combination of both. Accordingly, constitutional democracy emphatically does not require entrenchment or a codified supreme law text or texts, or mandate legal limits on the content of law – although these are, of course, very common in the contemporary world.[21] In other words, constitutional*ist* democracy does not require constitutional*ized* democracy.

In sum, constitutional democracies are focused primarily on, and defined by, the institutional structures and political processes that help to achieve and secure within a system of collective self-government the essential constitutionalist values of reflective, pluralistic, mediated and non-arbitrary governance. In particular, constitutional democracies are not (either in theory or practice) single-player, or univocal, enterprises but rather consist of a plurality of institutions and power centres with distinct roles to play in the overall system of democratic governance.[22] For example, in parliamentary and some presidential constitutional democracies, executives set and implement the legislative agenda but legislatures examine, deliberate over and often suggest amendments to government bills as they make their way through a series of procedural stages aimed at eliciting reflection and considered collective judgement. In all constitutional democracies, multi-member legislatures have the function of overseeing the executive and holding it politically accountable for its actions, to counter arbitrariness and abuse in government. And so on.

My account of comparative political process theory views courts as playing an important role in supporting and protecting this particular conception or species of democracy. They do so in two ways. Like other institutions in a constitutional democracy, courts have both a primary, more specific or first-order role *within* the multi-institutional system of democratic governance and a secondary, or second-order, role of supporting and protecting this *system* as a whole.

The primary role of the courts is their ordinary separation of powers function of adjudicating litigated cases and, in so doing, interpreting, applying and enforcing the law. This may (but, again, need not) include the supreme law of a documentary constitution, where it exists and the power of constitutional review is granted[23] and/or a constitutional or statutory bill of rights.[24] In the course of this role, the courts both help to constitute

[20]This formulation is adapted from Jeremy Waldron's idea of rights ('The idea of rights is the idea that there are limits on what we may do to each other, or demand from each other, for the sake of the common good.'). See J Waldron, *Law and Disagreement* (Oxford University Press, Oxford 1999) 309.

[21]For example, the United Kingdom and New Zealand are, of course, constitutional democracies.

[22]See Gardbaum (n 1) 1450–51; Kavanagh (19).

[23]Switzerland and the Netherlands are well-known examples where this power is expressly denied. As part of what I am terming this primary or first-order function, the power of constitutional review may be institutionalized in either a specialist constitutional court or the generalist, ordinary courts. I am, of course, aware that in many ways this power is an extraordinary one. See S Gardbaum, 'What the World Can Teach Us About Supreme Court Reform' (2023) 70 *UCLA Law Review Discussion* 184.

[24]Accordingly, my account does not insist that protecting the structures and processes of democracy is the *only* legitimate or justified function of judicial review; there may also be some judicial protection of rights not directly linked to democracy. For me, though, this is a separate function, part of the primary or first-order role of courts in interpreting, applying and adjudicating the law, including a bill of rights where it exists and the

constitutional democracy as a key part of its institutional structure and manifest it by practising some of its defining characteristics and values: reflective judgement and (in the case of multimember courts) internal deliberation, producing reasoned opinions, promoting non-arbitrariness in government and the rule of law.

The secondary, or second-order, role of the courts is to support and protect the broader institutional structure of constitutional democracy, of which they are part, from serious threats or abuse emanating from any sector of the system, including their own.[25] As we have come to (re)learn in recent years, democracy is inherently fragile and requires support and protection everywhere. The distinctive contemporary challenge is the undermining of constitutional democracy from within[26] by democratically elected leaders and parties determined to concentrate and entrench their power, as well as by powerful private interests (and sometimes the two in combination), rather than immediate overthrow by would-be 'national saviors' of one type or another. Courts are not institutionally well positioned to do much against the latter, but as (mostly) unelected public office-holders with some significant degree of independence from the other branches, judges have a role to play in protecting against democratic degradation.

This more explicit democracy-supporting role is also secondary for a different reason: the primary role falls to the political institutions and the ordinary forces of political accountability and competition, which of course includes the people as citizens and voters. The role of the courts here is subsidiary and, in this sense, the exception not the norm. But their institutional position enables and obligates them to protect against the undermining of constitutional democracy from within. Like all public institutions in a constitutional democracy, courts have a duty of loyalty to the democratic order and they are sometimes in a better institutional position to fulfil it than others.

The exceptional nature of the role of the courts also reflects the fact that, in addition to being fragile, all democracies are imperfect. Accordingly, the Chapter 9-like understanding views the relevant judicial task as supporting, protecting and reinforcing constitutional democracy rather than perfecting it. That is, looking to the familiar histories of backsliding and decline, the key function of the courts is to identify or anticipate serious abuse or systematic undermining of the political processes and structures that constitute a country's system of constitutional democracy, and not to intervene to address more

courts have been empowered to enforce it. My earlier work 'The New Commonwealth Model of Constitutionalism' is about this distinct function of courts with respect to (non-democracy-specific) rights; it argues for non-final review as an intermediate position between judicial and legislative supremacy on the resolution of contested rights issues in the face of both inevitable reasonable disagreement and electoral incentives faced by legislators to under-value minority or unpopular rights in particular. See S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge 2013); 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707. As will be seen below, comparative political process theory frequently also involves non-final judicial review, but mostly for different reasons, as process review is often inherently non-final.

[25]D Landau and R Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) *UC Davis Law Review* 1313.

[26]There is, of course, a huge literature on this challenge. For illustrative purposes, see Ginsburg and Huq (n 12); Tushnet and Bugaric (n 12); D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189; M Graber, S Levinson, M Tushnet, *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford 2018); Dixon and Landau (n 38).

ordinary and commonplace weaknesses or imperfections of the democratic process. This is for reasons of both institutional capacity and democratic legitimacy.[27]

Semi-substantive judicial review

In my previous article, which sought to comparativize, update and expand existing political process theory, I focused primarily (though not exclusively) on the need to incorporate the possibility of judicial review of certain procedures that are central to the existence, functioning and protection of democracy. This was because undermining or abusing such procedures has been one of the key weapons employed in various kinds and degrees of democratic backsliding over the past decade. The three main examples I gave were: (1) abuse of the impeachment process by the ANC-controlled National Assembly in South Africa to effectively grant impunity to President Zuma;[28] (2) Boris Johnson's prorogation of Parliament in August 2019 to prevent it from rejecting or replacing his Brexit deal;[29] and (3) executive manipulation of legislative procedures in various countries to deny law-makers the opportunity to deliberate meaningfully on proposed bills.[30]

Ely's own theory did not include, and conventional separation of powers understandings generally preclude, the types of judicial intervention that occurred in these instances. Despite the political process label, Ely's paradigmatic scenarios for judicial review – laws that block the channels of change or exhibit prejudice against discrete and insular minorities – turn on legislative outputs rather than procedures. My article did not focus exclusively on such 'pure process review', as I included at least one type of a more substantive threat to democracy that in principle justifies judicial intervention: the capture of independent institutions.[31] But it is fair to say that its major emphasis was on the need to recognize and explore potential justifications for the kinds of judicial intervention in these cases, given their recent visibility and what appeared to be a significant gap in existing political process theory.

In sum, my earlier account emphasized two distinct modes of process review to support and protect constitutional democracy. These were: (1) reviewing a non-law-making process, such as impeachment or executive accountability to a legislature; and (2) reviewing a law-making process not only for formal compliance with required steps but also for such things as potential undue influence over the passage of legislation or the opportunity for collective deliberation in the enactment of a law.[32] As types of judicial review of process, both tend to be inherently non-final (or weak) in that normally nothing prevents the underlying outcome from being achieved, as long as the proper or due

[27]For more details, see S Gardbaum, 'Comparative Political Process Theory: A Rejoinder' (2020) 18 *International Journal of Constitutional Law* 1503, 1504–06.

[28]Gardbaum (n 1) 1435–37.

[29]Ibid 1437–38.

[30]Ibid 1446–48.

[31]Ibid 1438–42.

[32]A more recent example of this type of process review is the Mexican Supreme Court's 9–2 decision striking down President Obrador's 'Plan B' reform of the Election Commission on the basis that the legislature had not been given sufficient time and notice to deliberate on the bill. *See* Emiliano Rodriguez Mega, 'Mexican Court Strikes Down President's Bid to Remake Election Laws', *New York Times*, 22 June 2023, available at <https://www.nytimes.com/2023/06/22/world/americas/mexico-electoral-bill-supreme-court.html>.

process is employed.[33] With respect to traditional separation of powers concerns with such review, as I argued previously,[34] separation of powers exists not only between the political institutions and the courts but also among the former. In these two modes of review, the judiciary is seeking to protect the distinctive roles of, and separation of powers between, the executive and legislative branches of government, of which executive accountability to legislators and legislative consideration of government bills are especially important in parliamentary democracies.

Although, as just mentioned, this was at least implicit in my earlier article, these two modes of political process review need to be more explicitly supplemented by a third, which is more substantive or output-focused in nature. This is reviewing the effect of a law or other government act on the institutional structure or key processes of constitutional democracy. Examples include laws that restrict political speech (as per Ely) and the capturing or undermining of a court or other independent institution where, in the context of the particular constitutional democracy concerned, its status as at least a relatively independent power centre is essential to that democracy. Here, although a court is reviewing legislative outputs, it is not reviewing *for* their substance, or to protect a substantive right or value in the sense of identifying specific acts that cannot be done regardless of their procedure but is rather reviewing for effect on the particular structure and processes of democracy. Accordingly, it is not 'pure' substantive review – that is, the opposite of pure process review – and may be termed 'semi-substantive'.[35]

At this point, let me clarify that these three modes of judicial intervention are not always mutually exclusive, but may sometimes overlap. For example, the UK case of *Miller II* discussed in my earlier article involved judicial review of a non-legislative process of parliament, namely prorogation. But the Supreme Court held that the prime minister's attempt to employ this process in August 2019 was unlawful because, in the immediate context of a looming Brexit deadline, it had the *effect* of undermining democracy by preventing parliament from fulfilling its constitutional functions of legislating and holding the government accountable.[36]

Although Ely's theory itself certainly included – indeed, relied mainly on – such semi-substantive review, it was once again too narrow. This is because it was largely limited to the effects of laws on only one process – the electoral process – whereas a more comprehensive account must include and protect all the central structures and processes of constitutional democracy. The *Miller II* case is also helpful in this regard, for in context the effects of triggering prorogation that rightly concerned the court were not to block electoral channels but rather impacted other key democratic processes, including law-making and accountability.

Each constitutional democracy constructs its own system of institutional structure and political processes from its individual history, context and choices, which often resemble but are never identical to those of any other. Within this system, the existence of free and fair elections for public office – competitive in the sense of open on equal terms to more than one party/candidacy, etc., although not necessarily in terms of uncertainty of

[33]Again, this reflects a different type of, or reason for, weak or non-final judicial review from that used in the context of rights issues: see (n 24).

[34]*See* Gardbaum (n 1) 1437–38; Gardbaum (n 27) 1513.

[35]For a different previous scholarly use of this term, and a neighbouring one, see (n 8). Also, unlike the first two modes, this third is not inherently non-final and may require 'stronger' judicial intervention.

[36]See Gardbaum (n 1) 1437–38; see also T Khaitan, 'The Supreme Court Ruling: Why the Effects Test Could Help Save Democracy (Somewhat)' IACL-AIDC Blog, 26 September 2019.

outcome[37] – is perhaps the most essential and minimally necessary characteristic of the generic modern concept.[38] But such elections do not exhaust the key structures and processes of a system of constitutional democracy. Accordingly, the subsidiary judicial role of supporting and protecting the structures and processes of constitutional democracy, including through semi-substantive review, has a significantly wider ambit than elections.

Starting with institutional structure, this encompasses the institutional composition of the system, the distinct roles and powers assigned to each, as well as their overlap, and the degree and type of independence (if any) that fulfilling these roles presupposes.[39] As key institutions in and of democracies, political parties are also part of this structure, and may be both protected and regulated in ways that help to ensure their essential roles are fulfilled.[40] Among the non-electoral processes that are core components of constitutional democracy are: (1) the constitutional, statutory and administrative law-making processes, as well as any direct popular ones that may exist; (2) the modes and methods of the executive's political accountability to, and oversight by, the legislature in between elections;[41] (3) the method of appointment of non-elected public officials; and (4) the rules and procedures of the legislative and executive branches of government. This is the legitimate terrain of potential judicial intervention under the three modes of political process review; none of them is categorically off-limits. Whether the subsidiary judicial role is triggered and such intervention is justified in any particular case will depend on a context-sensitive assessment of the risk or reality of serious abuse, systematic undermining or structural dysfunction of a country's infrastructure of constitutional democracy.[42]

The Israeli case study

Background and judicial reform plans

The recent political crisis in Israel over the current right-wing coalition government's plans to reform the judiciary illustrate the main points in the previous sections of this article. It also provides a case study for applying the criteria for judicial intervention, including semi-substantive review, developed both here and previously. So, before explaining how and why, let me very briefly describe the situation, which is likely reasonably familiar to readers.

[37]In accordance with the existence of dominant party democracies, such as South Africa (since the end of apartheid until now) or India and Israel in their first few decades after independence.

[38]See, for example, Rosalind Dixon and David Landau's electorally-centred concept of the democratic minimum core. R Dixon and D Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, New York, 2021) Ch 2.

[39]This institutional structure may, of course, include fourth branch institutions, such as those in South Africa.

[40]T Khaitan, 'Political Parties in Constitutional Theory' (2020) 73 *Current Legal Problems* 89.

[41]The executive's legal accountability to the courts, by means of judicial review of its actions, is typically part of their primary or first-order judicial function: see text accompanying (nn 23–24), here ensuring that the executive is acting within its lawful (constitutional or statutory) authority. However, in unusual situations, judicial review of executive action may potentially implicate the secondary, democracy-protecting function of the courts. Examples include the *Miller II* case on prorogation, legislation ousting such judicial review and the recent amendment of the Basic Law in Israel barring the Supreme Court from employing the reasonableness standard in judicial review cases, discussed below.

[42]For more detail on these criteria for intervention, see the discussion below.

The immediate background to the crisis and underlying reasons for the government's plan are a combination of institutional power issues and substantive policy ones. As is well known, the Israeli Supreme Court in its 1995 decision in the *United Mizrahi Bank* case[43] instituted a 'constitutional revolution' by declaring that the two 1992 Basic Laws on rights, Freedom of Occupation and Human Dignity and Liberty, were (1) enacted by the Knesset in its continuing capacity as constituent assembly, (2) the supreme law of the land, the limitations clauses[44] of which imposed legal limits on the legislature, and (3) empowered the court to invalidate ordinary statutes in conflict with them. Previously, the exact legal status of the various Basic Laws, Israel's constitution by instalments, which are enacted (and generally amendable) by the Knesset by a simple majority of those present,[45] was uncertain and contested, although de facto the reigning principle was parliamentary sovereignty.[46] Subsequently the court extended this higher law status to all of the Basic Laws, whether or not they contained express limitations clauses.[47] For some, these and other decisions reached by the court were perceived as illegitimate overreach and triggered the demand for a 'counterrevolutionary' response. At the same time, Israel's judiciary is widely perceived to be disproportionately populated by members of the secular, European-descended elite who for the first few decades of the country's history held political dominance, primarily via the Labour Party.[48]

In an increasingly polarized political landscape in which this dominance has long ended and partly been replaced by the more religious, non-European support for Likud and its allies further to the right, the courts have issued certain decisions frustrating the desires and ambitions of various parts of this politically ascendant sector of society. Thus, the Supreme Court ended the exemption from military service for ultra-orthodox Jews,[49] has on occasion curbed the nationalist settler movement in the West Bank,[50] and at the time of writing, Benjamin Netanyahu is on trial for corruption. Moreover, what is at stake substantively in the current battle over judicial power is the potential fate of some of the most extreme components of the government's plans, as demanded by various of its coalition partners, including complete annexation of the West Bank into Israel, building

[43] *United Mizrahi Bank v Migdal Cooperative Village* [1995], CA 6821/1993.

[44] Each of the two Basic Laws contains the identical limitations clause, in Section 8 of Basic Law: Human Dignity and Liberty, and Section 4 of Basic Law: Freedom of Occupation, respectively: 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.'

[45] Amendment of two of the Basic Laws (the Knesset and Freedom of Occupation) requires a majority of the full Knesset – that is, 61 out of 120 members.

[46] See G Jacobsohn and Y Roznai, *Constitutional Revolution* (Yale University Press, New Haven, CT, 2020) 193–94.

[47] HCJ 212/03 Herut – *The National Jewish Movement v Chairman of the Central Elections Committee for the Sixteenth Knesset* [2003]; EA 92/03 *Mofaz v Chairman of the Central Elections Committee for the Sixteenth Knesset* [2003]. *See also* Jacobsohn and Roznai (n 46) 209–11.

[48] This is one of the key bases for Ran Hirschl's theory of the hegemony-preserving role of judicial review. See R Hirschl, *Towards Juristocracy* (Harvard University Press, Cambridge, MA, 2004).

[49] See Isabel Kershner, 'Israel's Military Exemption for Ultra-Orthodox is Ruled Unconstitutional', *New York Times*, 12 September 2017, available at <https://www.nytimes.com/2017/09/12/world/middleeast/israel-ultra-orthodox-military.html>.

[50] See, for example, David Halbfinger and Adam Rascon, 'Israel Court Rejects Law Legalizing Thousands of Settlement Homes', *New York Times*, 9 June 2020, available at <https://www.nytimes.com/2020/06/09/world/middleeast/israel-supreme-court-west-bank-settlements.html>.

large numbers of new settlements there, expanding the public role of orthodox Judaism and Jewish access to, and control over, Temple Mount in Jerusalem.

The coalition has several legislative plans for judicial reform, which were included in separate bills making their ways through the stages of the parliamentary process prior to the Hamas attack on 7 October, 2023.[51] Until the Knesset's Passover recess in April 2023, the furthest along, and the most important one in terms of both the negative reaction inside and outside Israel and for the purposes of this article, had been the plan to give the government of the day a majority of seats on the Judicial Selection Committee (JSC), which has selected all judges since 1953. Currently, under the 1984 Basic Law: The Judiciary, the nine-member committee consists of the Justice Minister, another cabinet member chosen by the cabinet, two Knesset members chosen by the Knesset (usually one coalition and one opposition member), two members of the Bar Association, the Chief Justice and two other Supreme Court judges. Appointment of Supreme Court judges requires seven members in support; for all other judges, a simple majority of those present is required.[52] At the time of writing, the plan was to increase the size of the JSC to eleven members, including three ministers, three coalition and two opposition legislators, and three Supreme Court judges, including the President of the Court, thereby giving the government six members and an inbuilt majority. Also, only six votes would be needed to appoint the President and up to two other members of the court in each Knesset term, with only additional appointments requiring supermajority support.[53] Although after the recess and before the Israel–Hamas war, the government was still insisting that it planned to move forward with this bill, the current situation is uncertain.[54]

The one part of its programme that was enacted, following the recess, is an amendment to the Basic Law: The Judiciary, prohibiting the Supreme Court from employing its judicially created 'patently unreasonable standard' to invalidate administrative decisions.[55] The full Supreme Court heard petitions against this law in September 2023 and invalidated it by a vote of 8–7 on 1 January 2024.[56] Other separate legislative proposals include empowering the Knesset to overrule the Supreme Court by ordinary majority vote, requiring a supermajority of the court to invalidate statutes, and prohibiting judicial review of the Basic Laws or amendments.[57]

[51]*See* Aeyal Gross, 'The Battle Over the Populist Constitutional Coup in Israel: Spring of Hope or Winter of Despair?', VerfBlog, 31 March 2023.

[52]Basic Law: The Judiciary, art 4 (1984).

[53]See Gross (n 51).

[54]See PM aide, 'We'll Remake the Judicial Selection Committee, Shelve Rest of Overhaul', *The Times of Israel*, 4 August 2023, available at <https://www.timesofisrael.com/pm-aid-well-pass-judicial-selection-committee-shakeup-shelve-rest-of-overhaul>.

[55]The law was enacted on 24 July 2023. See Judicial Legislation Tracker, Israel Policy Forum, available at <https://israelpolicyforum.org/judicial-legislation-tracker>. Amendment 3 to the Basic Law: The Judiciary states: 'Notwithstanding the provisions of this basic law, those who have jurisdiction by law, including the Supreme Court sitting as the High Court of Justice, will not consider the reasonableness of a decision of the government, the prime minister, or any other minister, and shall not issue an order in this regard. In this section, "decision" means any decision, including regarding appointments or a decision to refrain from exercising any authority.'

[56]HCJ 5658/23 *Movement for Quality Government v Knesset* [2024].

[57]Gross (n 51).

Illustrating my claims

All three of my refinements in this article are fairly well illustrated by the ongoing situation in Israel. First, the secondary role of courts under political process theory is to be a state institution supporting and protecting constitutional democracy, rather than an absolutist, or pure electoral majoritarian, conception of democracy. The respective claims of the coalition and the opposition, that the reforms strengthen and undermine democracy, very roughly express the difference between these two. As with similar appeals based on their electoral victories by authoritarian populist leaders such as Orban and Erdogan, the government argues that its reform plans are democratically legitimate and legitimated because they were part of its platform at the most recent election, resulting in victory for the right-wing coalition, which controls 64 of the 120 seats.[58] More substantively, it also argues that the reforms strengthen and improve Israeli democracy by rebalancing power away from the overly powerful, self-aggrandizing and unaccountable courts and in favour of the democratically elected branches.[59] In the face of their electoral mandate claim, whether giving control over judicial appointments to the government of the day undermines the independence of courts and/or whether it goes too far in the opposite direction by overly concentrating power in that government are not questions the coalition feel compelled to address. Yet, from the perspective of constitutional democracy, these are the critical questions because some degree of independence and dispersal of power among institutions are the usual hallmarks of the reflective, mediated and non-arbitrary democracy that constitutionalism requires. Indeed, the Israeli case study underscores not only the role of courts and an independent judiciary in supporting and protecting, but also in *constituting*, constitutional democracy.

Second, the case study also provides a concrete example of the point that the electoral process is not the only process that is important to, and requires protection in, constitutional democracies. For what is being targeted here by one of the laws is the process of judicial appointments, one carefully calibrated within the particular institutional context of Israel to maintain the independence of courts and prevent the undue concentration of governmental power. Third, should this law eventually be enacted, and assuming no independent violations of legislative procedures, then the relevant type of judicial intervention that potentially comes into play is semi-substantive review. The question at issue would be whether the effect of this law – or, indeed, the one to prohibit judicial use of the reasonableness standard – is such as to undermine or threaten either or both the institutional structure or a key process of constitutional democracy in Israel.

Justified intervention?

The case study provides a vivid and rich example for applying the various criteria for, and limits on, judicial intervention under comparative political process theory that I developed in my previous work.[60] Would this be an example of when courts would be justified in intervening to protect democracy? And if so, how should they intervene?

[58]James Shotter, 'Netanyahu Defends Judiciary Reforms in Israel After Protests', *Financial Times*, 8 January 2023, available at <https://www.ft.com/content/f8d84969-c087-42d9-8a2d-4604d4379093>.

[59]Jeremy Sharon, 'Justice Minister Unveils Plan to Shackle the High Court, Overhaul Israel's Judiciary', *The Times of Israel*, 4 January 2023, available at <https://www.timesofisrael.com/justice-minister-unveils-plan-to-shackle-the-high-court-overhaul-israels-judiciary>.

[60]In addition to the article cited in Gardbaum (n 1), this previous work also includes Gardbaum (n 27).

To summarize these criteria briefly, first the role of courts is to intervene when an act or omission threatens a system of constitutional democracy, in whole or in part. Such acts or omissions will usually be one of three types: (1) systematic undermining of the institutional structure or political processes of a country's constitutional democracy; (2) more singular abusive acts that violate a democratic process or target an institution in a way that, individually or precedentially, poses serious risks to the system; and (3) chronic dysfunction of one or more institutions that similarly threatens the system of constitutional democracy by rendering governance ineffective and unresponsive.[61] These are clearly extraordinary situations and intervening to protect against them is very much not part of the 'ordinary' judicial function. Moreover, they each amount to actual or potential political process failures and underscore the difference between judicial intervention to support and protect constitutional democracy on the one hand, and to perfect it on the other, which would give courts a broader licence to address more typical or routine political process weaknesses or imperfections.[62]

Second, the role of courts in supporting and protecting constitutional democracy is secondary, or subsidiary, to that of the political institutions, acting though the ordinary democratic political processes of competition, accountability, deliberation and opposition. Only when these ordinary processes are unable to prevent the type of systematic undermining, abuse or dysfunction that amounts to potential or actual failure would the courts be justified in intervening to protect them.[63] Otherwise, such intervention risks being illegitimate, inexpert and counterproductive, as itself undermining of these primary processes and trust in them.[64]

A third criterion and limit is pragmatic. Even if judicial intervention to support or protect constitutional democracy were legitimate based on the criteria just specified, it may nonetheless not be wise in the particular circumstances. Courts must exercise pragmatic and contextual judgement with respect to potential risks and benefits to try to ensure that, overall, constitutional democracy is supported rather than further undermined by their efforts.[65]

Finally,[66] whatever the general normative criteria for intervention, any given apex or other court must be understood to have authority within its particular system to exercise the relevant power. Limits on that authority may circumscribe what a given court is empowered to do by way of support and protection. So, for example, while the UK Supreme Court was understood to have authority to protect the common law principle of parliamentary sovereignty threatened by Johnson's prorogation in *Miller II*, that particular court would not be empowered to invalidate a statute in the course of engaging in semi-substantive review, although it could potentially employ other remedies.[67] Similarly, the case did not involve judicial review of legislative procedures, which is taken to be barred in the United Kingdom by Article 9 of the 1689 Bill of Rights.[68]

[61]See Gardbaum (n 1) 1453–57.

[62]See Part II.

[63]Ibid; see also Gardbaum (n 27) 1505.

[64]On the importance of such trust, see Fowkes (n 2).

[65]Gardbaum (n 27) 1505.

[66]This final limit is newly developed in this article.

[67]Such as reading down – that is, interpreting a statute in a way that reduces its effects.

[68]'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'

So, assuming that the proposed amendment to the Basic Law: The Judiciary, changing the composition of the JSC, were to be enacted without any independent violations of legislative procedures, would the above criteria be satisfied? Would the Supreme Court be justified in intervening to support and protect constitutional democracy and if so how? What about its ruling invalidating the amendment prohibiting judicial use of the reasonableness standard?

Whether the proposed reform of the JSC is a serious, singular abusive act that threatens or weakens constitutional democracy in Israel would be determined by applying the standard for semi-substantive review. In the particular context of Israel's political and legal system, would this amendment of the Basic Law have the effect of undermining a key process or institutional structure of its constitutional democracy? It may well be that, in the context of certain other, different institutional and procedural structures, guaranteeing the government of the day sufficient votes to control the judicial appointments process does not pose a serious threat to constitutional democracy.[69] But the question must be assessed in the Israeli context.

There are three particularly relevant features of this context. The first is an institutional structure in which a parliamentary system of government is combined with a unitary state and unicameral legislature. Moreover, new Basic Laws can be enacted, and existing ones amended or repealed, by a simple majority of the Knesset.[70] Second, the country's politics and party system have become extremely polarized, so that to the extent norms of restraint, bipartisanship, good faith and a common sense of the national interest ever played much of a role, they have largely been replaced by hyper partisanship and hardball. Moreover, Israel's pure proportional representation list system for elections has, in recent years, given disproportionate power to smaller, more extreme parties and their leaders. Third, the coalition government, which controls 64 of the 120 Knesset seats, received only about 0.7 per cent more votes than the opposition parties in the 2022 election.[71] In this context, the likely effect of the amendment targeting the key process of judicial appointments is that it would be employed to the full in an attempt to neutralize the courts and prevent them from serving as the one real source of institutional restraint to the radical substantive policy plans of the government, supported by at most the narrowest of majorities. Accordingly, a strong case can be made that the first criterion for intervention is satisfied.

This would also be a textbook scenario of the secondary role of the courts, coming into play only if and after the primary protector of constitutional democracy – the ordinary democratic institutions and processes of competition, accountability, deliberation and opposition, including popular protest – have been unable to prevent the act(s) at issue. The force, effectiveness and unquestioned legitimacy of this primary protection, and the reason it is primary, have been on impressive display recently, with massive mobilization and protests on Israeli streets over the past year and broad, cross-cutting support among

[69]In some constitutional democracies, for example, the chief executive makes or finalizes judicial appointments, although usually after other institutions have vetted candidates or played some other substantive role in the process.

[70]Recall that two of the Basic Laws require 61 votes for amendment, while the others only a simple majority of those present. See (n 45).

[71]To be exact, 30,283 more votes out of the 4,691,221 cast. See Jeremy Sharon, 'Netanyahu Won 8-seat Majority Over His Opponents Despite Near-parity in Raw Votes', *The Times of Israel*, 3 November 2022, available at <https://www.timesofisrael.com/netanyahu-won-8-seat-majority-over-his-opponents-despite-near-parity-in-raw-votes>.

many sectors of society, including not only civil society actors but also the military and national security apparatus. Even prior to the current freeze due to the Israel–Hamas war, these forces had compelled the government to delay the legislation and talk the talk of negotiating with the opposition, although the willingness to compromise and the likelihood of any deal remain highly uncertain. But if the law is eventually enacted in roughly its current form, judicial review would clearly be a secondary, or last resort, protection, as my account holds is appropriate. Up to this point, Israeli courts and judges have, for the most part,[72] played no role in the matter, and have waited on the sidelines in the event that the law is enacted despite the opposition and is challenged.

Even if judicial intervention would be justified here, on the basis of the general normative criteria in my account of comparative political process theory, does the Supreme Court have the authority within the Israeli legal system to engage in semi-substantive review of what would (by hypothesis) be a procedurally valid amendment of Basic Law: The Judiciary? Until recently, this was an uncertain, contested and not fully decided question of Israeli constitutional law. However, in the past few years, the court at least has clarified the situation. In May 2021, it both declared its authority to invalidate a Basic Law and exercised this power with respect to an amendment to a Basic Law enabling the government to temporarily bypass the permanent constitutional arrangement and continue for four months without a state budget, referring to this as an abuse of the constituent authority.[73] Two months later, in reviewing the constitutionality of the newest Basic Law, the highly controversial Israel: The Nation State, the Supreme Court stated that 'the Knesset could not by a Basic Law eliminate the core principle of Israel being a Jewish and democratic state'.[74] However, it interpreted this Basic Law as consistent with democracy. Finally, in its January 2024 decision striking down the amendment to the Basic Law: The Judiciary, barring the court from employing the reasonableness standard in judicial review cases, the Supreme Court affirmed the existence of the power of invalidation by a far more lopsided vote (of 12–3) than its exercise in the same case. Accordingly, I will leave this issue with a conditional statement: if the court has this power (as now seems likely), it would be justified by the general normative criteria of the theory to employ it, given the particular effect on democracy the law is likely to have in the specific context of the Israeli democratic system.

If the court has the power, and it would be justified to use it in this case, are there nonetheless pragmatic reasons that might count against doing so? In fulfilling their secondary role of supporting and protecting constitutional democracy, judges must always keep the bigger picture in mind and consider the likely consequences of their decisions for the medium- to longer-term stability of democracy. In agreeing to delay the legislation, Netanyahu talked of the need to avoid a potential civil war and it seems clear that the national security implications of increasing and unprecedented refusals by military reservists to serve exerted much leverage over the government's decision. These would certainly be the sort of consequences the Supreme Court would need to consider in

[72]The one major exception was a speech by the current President of the Supreme Court warning of the dangers of the proposed reforms. See 'Israel's Top Judge Says Government's Judicial Reform Plan will Crush Justice System, Reuters, 12 January 2023, available at <https://www.reuters.com/world/middle-east/israels-top-judge-govt-judicial-reform-plan-is-an-attack-justice-system-2023-01-12>.

[73]HCJ 5969/20 *Stav Shafir v The Knesset* (2021). For analysis, see Yaniv Roznai and Matan Gutman, 'The Israeli High Court of Justice and the Misuse of Constituent Power Doctrine', VerfBlog, 30 May 2021.

[74]HCJ 5555/18 *Hasson v Knesset* (2021). See Tamar Hostovsky Brandes, 'The Israeli Supreme Court's Decision on the Nation State Law', VerfBlog, 20 July 2021.

any ruling that it rendered, although the seeming lack of widespread support for the reforms among the population at large perhaps suggests that these risks are not great. The disproportionate bargaining power of the several small religious and right-wing, nationalist parties in the coalition, representing narrow but ideologically cohesive sets of voters, appears to have made judicial overhaul the price of Netanyahu regaining and staying in power.

Given the above analysis that, in context, the proposed reform of judicial appointments would fail semi-substantive review, the final question is the nature of the remedy. Consistent with the general role of the courts under political process theory, obviously any remedies employed must be democracy-supporting ones. Due to the highly determinate nature of the law, specifying the precise composition of the JSC, there is no interpretive ambiguity to exploit enabling the court to read down the law. Accordingly, there is no option other than to declare the law invalid, but this could be accompanied by a list of suggested reforms that would not have similar effects to the law at issue. These could, for example, include appointment by a supermajority of the Knesset[75] which, although in an obvious sense a more political process, would nonetheless protect against government capture by requiring cross-party support. Another possibility – perhaps the basis of a compromise although probably less desirable overall – would be increasing the number of government supporters on the JSC from the current three to four out of nine. A third would be for a government minister, such as the minister of justice, to choose one person for each judicial vacancy from a panel of three or so finalists selected by the JSC as more-or-less currently constituted.[76] In addition, whether or not accompanied by such suggestions, the declaration of invalidity could be suspended for, say, one year if there would likely be insufficient turnover during this period for the government to capture the court.

Whether this amendment of the Basic Law: The Judiciary will be enacted remains to be seen at the time of writing, although the government has not indicated that it plans to shelve it. What about the amendment that *did* become law, prohibiting the Supreme Court from reviewing administrative decisions for unreasonableness,[77] which the court recently invalidated on the basis that it 'is an unprecedented infringement of two of the core characteristics of the State of Israel as a democratic state – the separation of powers and the rule of law'?[78] Here, by contrast, whether the criteria for judicial intervention are met is, to my mind, a much closer question, as the 8–7 divided vote on a broadly similar standard suggests.

On the one hand, judicial review of executive action as a whole (unlike of legislation) is inherent in the rule of law[79] and constitutional democracy, to protect against governmental lawlessness.[80] This why ouster clauses are so problematic. In addition, the reasonableness doctrine is designed to quash arbitrary decision-making by the executive, decision-making lacking any reasonable basis, and as such promotes a core constitutionalist value. It also furthers the value of pluralistic rather than single-player governance

[75]As argued for in M Cohen-Eliya and I Porat, 'A New Deal to the Israeli Judicial System', *DPCE Online*, 18 January 2023.

[76]More or less because presumably the Minister of Justice would need to be replaced by a different minister on the JSC. This appointments process is a variation on the ones in South Africa and Colombia.

[77]See (n 55).

[78]HCJ 5658/23 *Movement for Quality Government v Knesset* (translation of official abstract) 3.

[79]See Waldron (n 3).

[80]As mentioned above, such judicial review is standardly part of the primary judicial function of interpreting, applying and enforcing the law: see (n 41).

because, in the Israeli political and institutional context, the concentration of power in the executive means that only in exceptional circumstances is non-judicial review or push-back to be expected.[81]

On the other hand, although judicial review of the lawfulness of executive action in general is essential to the rule of law and constitutional democracy, the specific Israeli doctrine of reasonableness is arguably not. First, even without this doctrine, some of the acts previously invalidated under it by the Supreme Court – for example, those involving the appointment or tenure of government ministers – might fail other, existing or potentially newly established, judicial review standards, such as corruption, clean hands or proportionality.[82] Second, unlike affording courts some significant degree of independence, by no means do all constitutional democracies recognize this particular judicial power, as distinct from others that protect against legally unauthorized administrative decision-making or violation of protected rights. As is well known, the reasonableness standard in administrative law originated in the United Kingdom, with the famous 1948 case of *Wednesbury*[83] ('Wednesbury unreasonableness'), and versions of it have been adopted in several other common law countries,[84] but not generally elsewhere.[85] Moreover, the Israeli Supreme Court's version of the reasonableness standard is arguably broader than anywhere else.[86] It is, for example, hard to imagine the UK Supreme Court employing it to invalidate the prime minister's choice of cabinet ministers, as the Israeli Court has done.[87] In short, whether in context the effect of the law is to undermine the Israeli system of constitutional democracy, and so amounts to the necessary type of serious abusive act, is a close call. A conscientious judgement on either side would not itself fail the reasonableness standard.

Conclusion

What distinguishes political process theory from more traditional accounts of judicial review is not only its reluctance or refusal to promote 'substantive values', but also that its goal is to support and protect democracy rather than individual rights per se.[88] This

[81]Even if, by itself, the law falls short of being a sufficiently abusive singular act to justify judicial intervention, it may be vulnerable as part of the package of judicial reforms that collectively amount to systematic undermining of constitutional democracy in Israel. But this would first require the other parts of the package to be enacted.

[82]See the views of Professor Yoav Dotan, as quoted in 'Why is Reasonableness Making Us So Unreasonable?', *Globes*, 11 July 2023, available at <https://perma.cc/H3TM-2MGD>.

[83]*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[84]Including Australia, Canada, India, Singapore and the United States ('the arbitrary and capricious' standard).

[85]The now ubiquitous proportionality principle, unlike the common law reasonableness standard with which it otherwise somewhat overlaps, essentially applies only to restrictions of protected rights (not to all administrative decisions) and addresses the question of whether their limitation is justified.

[86]See *Globes* (n 82) (quoting Professor Dotan to this effect). The reasonableness standard is widely understood in Israel to have been significantly broadened to include 'interest balancing' in the 1980 case of *Dapei Zahav Ltd v Broadcasting Authority*, HCJ 389/80.

[87]Ibid.

[88]Obviously, protecting rights and democracy is not mutually exclusive, there is a certain amount of inevitable overlap between the two. At a minimum, the existence and exercise of certain rights are essential for democracy, as part of its basic structure, such as the general right of citizens to vote in modern representative democracies and freedom of expression and assembly. Comparative political process theory protects such

change in focus also affects the justification of judicial review, for it can no longer plausibly be critiqued as straightforwardly anti-democratic when its goal is not to displace but to protect and preserve the integrity of democratic processes and decision-making. What distinguishes the recent burst of scholarship falling under the rubric of 'new' political process theory from the original or older versions is both the comparative constitutional framing and the breadth of contexts and types of democratic dysfunctions in which it has been argued that courts have a role to play.[89] Inevitably, this breadth invites consideration of limits, both in terms of judicial legitimacy and capacity, and scholars in the field have somewhat different ideas, both regarding which political process malfunctions to focus on and what these limits are.[90]

In this article, I have attempted to refine and develop my account of these issues, including by more explicit recognition and exploration of semi-substantive review as a way for courts to protect the institutional structures and political processes that are centrally what constitutional democracy is about. But we are still nearer the beginning than the end of the collective enterprise of developing a full account of the promise and limits of courts as defenders of democracy alongside other necessary actors and initiatives. This is an important, if unwished-for, enterprise and I look forward to the next iterations.

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(procedural and substantive) rights that underlie democracy, as part of the democracy-supporting function of the courts.

[89]See (n 2) and (n 6).

[90]Ibid.

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