Constitutional Dialogue Under Pressure: Constitutional Remedies in Israel as a Test Case / Bell E. Yosef[*]

Introduction

In 2010, Etai Pinkas-Arad and Yoav Arad-Pinkas, an Israeli homosexual couple, petitioned the Israeli Supreme Court concerning the constitutionality of the Israeli surrogacy law.[1] The law—in its wording then (and now)—did not enable homosexual couples to undergo the surrogacy process as the intended parents. The 2010 petition was withdrawn with the petitioners consent due to the establishment of a public committee (Mor-Yosef committee) that was designated to deal with the issue.[2] The Mor-Yosef committee advised the Government, *inter alia*, to enable single men to access the surrogacy process.[3] In 2015 the Arad-Pinkas couple filed another petition, once again challenging the 'intended parents' definition, which still excluded them from surrogacy. In August 2017 The Israeli Supreme Court gave a partial ruling.[4] Since a bill regarding the matter was tabled at the time, the Court granted legal supremacy to

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[1] Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the Newborn) Law, 5756-1996, SH No. 1577 p. 176 (Isr.).

[2] HCJ 1078/10 Arad-Pinkas v. The Comm. for the Approval of Surrogacy (Apr. 14, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Decisions denoted as "official translations" are translations authorized by the Israeli Supreme Court and are available at https://supreme.court.gov.il/sites/en/Pages/fullsearch.aspx. Those denoted as "Versa translations" were translated by the Cardozo Law School's Versa project, and are available at http://versa.cardozo.yu.edu.

[3] Ministry of Health, Pub. Comm'n for Fertility and Childbirth Submitted Findings to Ministry of Health: Findings and Recommendations (May 20, 2012) (Isr.).

[4] HCJ 781/15 Arad-Pinkas v. The B.d for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Aug. 3, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

the bill[5] and decided to suspend the ruling. This decision was handed down despite the fact that the bill did not offer to change the 'intended parents' definition, thereby retaining the constitutional difficulty. The bill was indeed ratified in 2018. In February 2020, the Supreme Court gave another partial ruling. The Court recognized in a principled judgment that the current definition is an infringement of the constitutional right to equality and parenthood. Nonetheless, *the Court did not grant any remedy*. The statute was 'returned' to the Knesset (the Israeli legislature) to amend the law. Even the dissenting opinion, which ruled that the statute must be invalidated due to its unconstitutional nature, sought to delay the invalidity for twelve months. The Court held that a supplementary ruling would be provided within a year.[6]

This saga, brave in part and unfortunate in part, tells a story about the price that human rights pay in order to enable a productive and legitimizing interaction—a dialogic interaction—between the judiciary and the political branches. And this is the story that this article wishes to tell.

The point of departure is that constitutional dialogue theory has a special magic. It shows the institutional interaction between the courts and the political branches in a positive light. It is balanced. It acknowledges the special function of each branch and sees them as completing each other instead of competing with each other. It facilitates a deliberative process of thinking and re-thinking about constitutional questions. It has a majoritarian and democratic value since it eliminates the court's ability to be the final decision-maker. It enhances legitimacy and minimizes inter-institutional collisions. This dialogic process also places constitutional rights at the center of the issue: how to

[5] For an analysis of the doctrine, see Bell E. Yosef, *The Legal Supremacy of Legislative Initiatives in Judicial Proceedings: The Israeli Lesson*, INT'L J. CONST. L. (forthcoming).
[6] HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Feb. 27, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

balance them, how to protect them, how to remedy the infringement of rights—all of these questions lie in the middle, as a part of the litigation process, as a part of the ruling and as a part of the consolidation of the legislative response.

All these virtues stand well in the literature, and some also stand well on the ground, when the theory is translated into reality. Nonetheless, in the process of applying this constitutional theory to the real constitutional process that occurs between courts and legislatures, something else happens as well: the petitioners' rights are neglected, tossed aside in order to achieve legitimacy, respectful institutional interaction and balanced co-operation. Many times, this important and useful theory sees only institutions, and abstains from looking at another direction: *the petitioners*, who are a cardinal part of the constitutional process of designing and protecting constitutional rights.

This article wishes to strengthen this criticism through a discussion of the strong connection between constitutional dialogue and constitutional remedies. The foundational argument at the heart of the article is that the way that supreme courts design constitutional remedies is an important part of the dialogue. Although some focus the dialogue only on the legislature's ability to respond to constitutional decisions in new legislation,[7] the judicial designing of constitutional remedies lies at the heart of this ability. When the court suspends the invalidity declaration, it actually designs an

[7] This trend stems from the way that political science separation-of-powers researches have been developed. See the remarkable following researches: J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004); Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court's Constitutional Decisions*, 47 LAW & SOC'Y REV. 199 (2013); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); James Meernik & Joseph Ignagi, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447 (1997); Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011).

invitation to change the constitutional decision. When the court uses classic severance,[8] it narrows the judicial intervention in the legislative fora and facilitates the legislature's ability to enact a concrete and specific new provision. When the court orders the state to implement a constitutional obligation without specifying exactly how to do so, it leaves the issue to the discretion of the political field. More generally, when the court avoids changing the status quo, it avoids hampering the ability of the political branches to legislate. The court fulfills its constitutional function, and still leaves the decision in the political, democratic, elected hands. The court's choice of remedies that retain the decision in the political hands also helps to create (some will say to restore) constitutional responsibility and sensitivity to the political branches.[9]

Nonetheless, all these great dialogic consequences have a price, and the petitioners are the ones who pay it. Some of these remedies perpetuate an unconstitutional situation for lengthy periods of time. Some of them insist on having the "last word" within the legislative arena, without assuring that the petitioners' claims will be met or at least heard. Avoiding judicial change of the legal status quo may be beneficial for the court's legitimacy vis-à-vis the political branches, but might also be unbearable for the petitioners.

The Israeli Supreme Court's use of constitutional remedies reflects this claim well. Classic severance and invalidity suspension are virtually consensual. Status quo-changing remedies, such as concrete severance and reading-in are rare, and usually subjected to suspension. Individual remedies that focus on the petitioners, such as

[8] I.e., annulling a specific article, articles or chapters in a statute (as opposed to erasing specific words, in concrete severance, a remedy that demands much greater judicial discretion and intervention).
[9] For this line of thought, see Theyer's manifesto, over a hundred years old and still relevant in that context: JAMES BRADLEY THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW (1893).

constitutional exemptions and constitutional damages, are excluded from Israeli constitutional law. Judicial supervision does occur quite often, but usually it is not accompanied with decrees or even judicial willingness to declare that the petitioners' rights must be fulfilled.

This super-dialogic nature of the Israeli Supreme Court use of constitutional remedies reflects the argument well. In this article I argue that as a general matter, the dialogic use in response-based remedies is well desired from an inter-institutional perspective. Nevertheless, when there are concrete petitioners that may be harmed in the constitutional process, strong and status quo-changing remedies are desired.

Although intuitively this argument seems to contradict the dialogic perception, it actually fits properly within it. The dialogic perception—as developed mainly in Canada, the UK, New-Zealand, Australia and Israel—is responsive. It is based on preserving the institutional capability to respond. It is a continuous constitutional process of designing and re-designing the constitutional sphere. Although the phrase "last word" is very common in dialogue theories, there is in fact no "last word." This process is an ongoing shaping and balancing of constitutional rights. As such, the legislature has the ability to change every constitutional remedy. When the court chooses a response-encouraging remedy—such as invalidity suspension or classic severance—it is easier to legislate. When the court chooses a status quo-changing remedy, such as reading in or concrete severance, it is harder to legislate. In any event, the legislature *can* enact and change the remedy. The dialogic framework enables it.

Within this context, it is important to stress that the dialogic perception presented here is not a classical "tennis match" perception, which looks only at the act of invalidating or legislating. There is a spectrum of *dialogic* judicial and legislative

behaviors and practices. Just as the economic analysis of constitutional law acknowledges that constitutional interpretation involves a spectrum of judicial consideration,[10] so does the dialogic perception. However, this understanding is not enough, and it must be accompanied with a realistic thought, as the contemporary analysis of constitutional dialogue holds. It looks, for example, whether the court granted such a strong remedy that the legislature cannot change in practice (albeit formally it is possible).[11] Through a realistic lens, this kind of judicial choice leads to a *de facto* deviation from a dialogic conduct.

Combining these two interconnected insights—concerning the dialogic spectrum and the realistic view if the constitutional dialogue—leads to an understanding that the baseline is that the court has a variety of remedial options, alongside a political understanding of what kind of legislative responses are practical or possible for the legislature. Under this framework, the Court chooses how to design the remedy. The court can operate on different points along this spectrum, choosing different remedial solutions while still remaining dialogic.

Nonetheless, a fundamental argument is that even under this dialogic framework, courts can choose a remedy that has a non-dialogic or less-dialogic character. The petitioners' interests may justify and validate it. In most of the cases of judicial use of strong remedies, the dialogic equilibrium will remain intact.[12] In other

[10] ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 226–27 (2002).
[11] And see in this matter Tushnet's argument regarding the notwithstanding clause, based on this line of thought. Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 TORONTO L.J. 89, 95–97 (2003).
[12] Of great influence is the fact that the constitutional dialogue also relies on other doctrines, which are non-binding and based on a political response, alongside the preservation of judicial authority. See, for example, the judicial guiding, the nullification warning, and the legal supremacy of legislative initiatives. See the discussion that follows in Part III, and especially the accompanying text and references in notes 66–73.

cases, the dialogue is the price that the constitutional protection of rights—and of the petitioners that hold those rights—must pay.

After this introduction, Part I will present the basic notions of dialogue theory, giving special attention to the human rights critique of dialogue theory. Part II will explain the tight connection between dialogue theory and constitutional remedies. In order to use the Israeli Supreme Court's usage of constitutional remedies as a test case of the human rights critique, Part III will demonstrate the strong dialogic nature of Israeli constitutional law. Subsequently, I will funnel all these debates to a discussion of the Israeli test-case. In part IV, I will discuss invalidity suspension and judicial supervision, as well as two interpretive remedies that the court usually does not grant. I will describe the Israeli use of these remedies in order to argue that the Israeli Supreme Court's reluctance to grant strong remedies carries the cost of harming the petitioners' rights. In the following part, and based on the test case, I will present in part V a dialogic claim in favor of strong remedies. Lastly, I will conclude.

I. Dialogue Theory

In 1997, Prof. Peter Hogg and Allison Bushell Thornton published an article titled *The Charter Dialogue between Courts and Legislatures*. The two asserted, as a descriptive matter, that Canada's Supreme Court' rulings regarding constitutional rights protected by the Charter led to a legislative response in eighty percent of the cases.[13] The

[13] Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (OR Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, 35 OSGOODE HALL L.J. 75 (1997) [hereinafter Hogg & Bushell, *Charter*] *see also*. Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited – Or "Much Ado about Metaphor,"* 45 OSGOODE HALL L.J. 1, 44 (2007) (their follow-up research, conducted a decade later, that found a response rate of sixty percent; Peter W. Hogg, *Discovering Dialogue*, 23 SUP. CT. L. REV. 3 (2004).

normative significance of these findings is that the legislature has the "last word" regarding constitutional matters, and that all the claims about anti-majoritarianism and a democratic deficit of the Canadian Charter of Human Rights and Freedoms cannot stand.[14]

They asserted that when the legislature has the power and ability to overrule, change or accept a constitutional judicial decision, this inter-branch interaction between the court and the legislature should be perceived as a dialogue. When the court strikes down a statute due to its incompatibility with the Charter, it arouses a broad public and political debate over the Charter. At this point, the legislature designs a response that fits the Charter while fulfilling the desired policy.[15] This is the nature and quality of constitutional dialogue.

The two explained that the dialogue is possible due to four mechanisms: the notwithstanding clause, which allows the legislature to legislate "notwithstanding" certain Charter rights, but also necessitates a process of re-thinking after five years; the limitation clause, which permits the legislature to infringe constitutional rights under certain conditions (first and foremost, for a justified purpose and using proportional means); qualified rights that permit the legislature to restrict these rights to the extent that the right itself enables; and a wide discretion regarding remedying violations of equality.[16]

[14] Hogg and Bushell Thornton acknowledge that it involves several democratic difficulties such as forcing the legislature to cope with issues that are not at the top of the legislative agenda or re-designing the means to achieve the legislative purpose. However, they emphasized that the decision still remains in the legislature's hands. Hogg & Bushell, *Charter*, *supra* note 13, at 80.
[15] *Id.* at 79–80.
[16] *Id.* at 83–91.

Based on the lively academic discussion ignited by Hogg and Bushell Thornton, Prof. Kent Roach added much more depth and complexity to the constitutional dialogue theory.[17] The main mechanism at the heart of Roach's thesis is the limitation clause, which provides the legislature the ability to respond to judicial decisions. The legislature and the court can act in accordance with their best judgment, without competing with each other regarding who is the best Charter interpreter or who has wider public support. This kind of dialogue helps the court to bring rights issues into the political arena (that otherwise may have been neglected), and also helps the political branches to justify the goals that the government wants to achieve and the means to achieve them. This dialogue, Roach explains, preserves the original roles, authorities and perceptions of each branch, and enables them to speak in different yet complementary voices.[18] This kind of interaction also has a public, democratic and educational value, since there is much more willingness to accept the court rulings due to the ability to change them.[19]

Like Hogg and Bushell-Thornton, Roach relies on the limitation clause, the notwithstanding clause and the wide remedial discretion regarding Charter rights, in order to encourage the dialogue between the court and the legislature. However, Roach also emphasizes the legislative process and structure, which provide the political branches with the possibility of enacting and executing a desired policy.[20] Without this ability, the constitutional dialogue responsive nature is diminished.

[17] Although one can find a very strong dialogic perception in his writing dating earlier to 1997. *See* Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on* R. v. Schachter, 36 MCGILL L.J. 1, 25–26 (1991).
[18] KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE? 14–15 (2016).
[19] Kent Roach, *Dialogic Judicial Review and Its Critic*, 23 SUP. CT. L. REV. 49, 100 (2004).
[20] *Id.* at 64–66.

Roach's overall theory is multi-layered and fully aware of the complexity of dialogue theory. He deals with the critical junctions of the constitutional dialogue: legislative responses that do not settle with the judicial constitutional interpretation; when is it appropriate to use the notwithstanding clause; and the influence of the dialogue on second-look cases. However, Roach's important contribution also stems from the significant place that he gives to petitioners' rights in the dialogic process. He rejects a dialogue that turns into deference,[21] preferring instead judicial activism over restraint, holding the perception that human rights over-enforcement is much better than under-enforcement,[22] and that when the court uses soft remedies it should still grant an immediate and strong remedy to the specific petitioner that initiated the petition.[23]

In the past two decades dialogue theory, mainly as conceptualized by Hogg and Bushell-Thornton, has developed and grown, thanks to many important contributions that wished to elaborate, to invent new dialogic models, to sharpen the debate or to criticize it. Some of them stand in strong contrast to the dialogic approach presented here. This is the case especially with the ones presented by Gardbaum, Hiebert and Dixon. The three, in diverse ways, developed theories that give far more leeway to the legislatures and political branches in the constitutional process, and in many cases, *do* favor judicial restraint or deference.[24]

Currently, as one can see from the short discussion presented here, dialogue theory has strong normative elements, aside from its descriptive roots. Moreover, today

[21] ROACH, *supra* note 18, at 401.
[22] *Id.* at 267.
[23] *Id.* at 368.
[24] JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT ROLE? (2002); STEPHEN GARDBAUM, THE COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013); Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009).

the theory is far more nuanced, varied, and sophisticated than the tennis match analogy, as it includes the daily operation of many remedies, doctrines and mechanisms that deal with the question of how the court designs its decision in order to allow a legislative response and how the legislature accepts the invitation. Today's notion of dialogue is a substantial one, and it includes a large number of mechanisms such as constitutional remedies (an issue that will be elaborated below), as well as other mechanisms such as the limitation clause, the notwithstanding clause, fallback clauses, the constitutional reference institution, interpretive technics, unbinding judicial comments, legislative preambles, giving legal supremacy to legislative initiatives and more.[25] All these mechanisms have dialogic qualities that elevate this dialogue from a simple ping-pong game into a multi-layered and complex responsive interaction.

Despite its increasing sophistication, constitutional scholars have raised some thought-provoking critiques regarding dialogue theory. A prominent one, for example, is that what dialogue theory describes as a dialogue is actually a judicial monologue, since the court expects the legislative response to be acceptance of the judicial ruling.[26] Furthermore, some argue that a true dialogue can never exist as long as the court has a monopoly over constitutional interpretation, regardless of the question of who has the last word.[27] Others maintain that this kind of weak-form (dialogic) judicial review is

[25] For discussions about the dialogic qualities of specific mechanisms, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of InterBranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001); Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 308–09, 348–49 (2007); Duclos & Roach, *supra* note 17; Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1288–89 (2016); Hogg & Bushell, *Charter*, *supra* note 13, at 82–85; Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347, 360 (2006); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014); Kent Roach, *The Uses and Audience of Preambles in Legislation*, 47 MCGILL L.J. 129, 155–56 (2001); Yosef, *supra* note 5.
[26] F.L. Morton, *Dialogue or Monologue*, POLICY OPTIONS 23, 24–26 (Apr. 1999).
[27] Christopher P. Manfredi & James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 OSGOODE HALL L.J. 513 (1999); *see also* Christopher P. Manfredi & James B. Kelly, *Dialogue,*

not stable and is not sustainable for an extended period of time, and will surely result in either legislative supremacy or judicial supremacy.[28] Some scholars argue that the dialogue has an inherent legitimacy deficit that precludes it from having any normative value,[29] or that it is fine as a theory but collapses when it is implemented in the constitutional routine.[30] There are many more important critiques that must be carefully addressed.[31]

All of these critiques are important, but there is one dialogic drawback that merits special attention. The most significant shortcoming of dialogue theory is that the court is so eager to conduct a dialogue, that it is willing to abandon the petitioners' rights.[32] The vast majority of dialogic writing is about institutions, dealing implicitly or explicitly with the ways to achieve legitimacy in the constitutional examination process. Should the court defer to the political branches in second-look cases? Should the court use soft remedies that preserve legislative constitutional decision-making? How will the legislature design the new balance in its legislative response? All of these are

Deference and Restraint: Judicial Independence and Trial Procedures, 64 SASK. L. REV. 323, 336 (2001).

[28] Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislators*, 23 SUP. CT. L. REV. 213, 224 (2004); *see also* ALISON YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION 22–23, 45–46 (2017) (stressing this critique within a comparative view that analyzes all the "new commonwealth" systems).

[29] Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislators*, 3 INT'L J. CONST. L. 6173 (2005); Jean Leclair, *Judicial Review in Canadian Constitutional Law: A Brief Overview*, 36 GEO. WASH. INT'L L. REV. 543, 551 (2004).

[30] Gregoire C.N. Webber, *The Unfulfilled Potential of the Court and Legislature Dialogue*, 42 CAN. J. POL. SCI. 443, 456–58 (2009). For the same critique from a different perspective, see Lorraine Eisenstat Weinrib, *Canada's Constitutional Revolution: From Legislative to Constitutional State*, 33 ISR. L. REV. 13, 34–35 (1999).

[31] *E.g.*, Emmet Macfarlane, *Conceptual Precision and Parliamentary Systems of Rights: Disambiguating "Dialogue,"* 17 REV. CONST. STUD. 73 (2012); Carissima Mathen, *Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment in "Charter Dialogue Revisited,"* 45 OSGOODE HALL L.J. 125 (2007); Andrew Petter, *Look Who's Talking Now: Dialogue Theory and the Return to Democracy*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 519, 525–26 (Richard W. Bauman & Tsvi Kahana eds., 2006); Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. 7 (2004).

[32] ROACH, *supra* note 18, at 226, 368, 377–78; Jamie Cameron, *Dialogue and Hierarchy in Charter Interpretation: A Comment on* R. v. Mills, 38 ALTA. L. REV. 1051 (2001).

questions that exclude the petitioners from being a part of the answer. Constitutional dialogue theory, these days at least, is more than institutional responses, as it seemed to be in American political science, seventy or even thirty years ago.[33] It is a dialogue about rights, and how to balance them and how to shape them. These rights belong to people. And these people *must* be a prominent consideration in shaping the constitutional dialogue.

Before proceeding to the next part, it is crucial to emphasize that constitutional dialogue theory, especially the one adopted here, does not see courts as separate from and indifferent to the political sphere. It is no coincidence that the political science literature, and specifically researches on the separation of powers, has adopted the viewpoint that courts are political institutions and policy makers, an issue that I will return to later on. From Dahl[34] through Fisher,[35] alongside many others,[36] this is the baseline. This perception helps to clarify why courts, as political institutions, care so much about legitimacy, and are also willing to adjust their rulings in order to maintain it.[37] This perception also helps to clarify why, for example, courts choose soft remedies or even avoid granting remedies when they wish to establish a constitutional right for the first time(s) or try to influence an issue that is not clearly within their jurisdiction. Nevertheless, the mere existence of different judicial strategies[38] does not preclude the

[33] Dahl, *supra* note 7.
[34] *Id.*
[35] LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).
[36] *See, e.g.*, MICHAEL A BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 1 (2011); JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED ch. 4 (2002); Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002). Friedman asserts that it is impossible to even try to separate supreme court rulings on constitutional issues from politics. BARRY FREIDMAN, THE WILL OF THE PEOPLE 380 (2009).
[37] This perception corresponds well with the strategic model for adjudicating (see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) as well as with the attitudinal model. *See* SEGAL & SPAETH, *supra* note 36.
[38] Murbery, as is well known, never won his appointment.

core critical argument that the petitioners are the ones who pay the high price of the legitimacy-preserving judicial strategies.

II. Dialogue and Remedies

The point of departure is that constitutional remedies are a cardinal and essential part of the dialogic process. Constitutional remedies enable turning dialogue theory into live reality. The judicial choice as to which constitutional remedy to grant the petitioners shapes the dialogue, since it directly influences the legislature's ability to respond. Under an understanding that the legislative process has numerous barriers and veto-gates[39] and that sometimes a small barrier is all that is needed to block new legislation—the design of the remedy is crucial.

The constitutional dialogue should not influence the question of whether a statute is constitutional or unconstitutional. The legal analysis—based on the constitutional norms, the legal system's basic principles and values, the customary interpretive doctrines and earlier precedents—is separate from the question of whether the court is conducting a dialogue with the political branches. The key point where the dialogue enters the picture is when the court must decide how it designs the invitation to the legislature. *The constitutional remedies are an invitation*: an invitation for a new and further discourse, response or opinion, an invitation to the political branches to take constitutional responsibility.[40]

[39] For a discussion regarding legislative veto-gates and barriers in forming legislative responses, see Alicia Uribe, James F. Spriggs II & Thomas G. Hansford, *The Influence of Congressional Preferences on Legislative Overrides of Supreme Court Decisions*, 48 LAW & SOC'Y REV. 921, 925–28 (2014).
[40] While I use the term "invitation," Roach referred to this as "a bridge" between the judiciary and the political branches. Kent Roach, *Dialogic Remedies*, 17 INT'L J. CONST. L. 860, 867 (2019).

Constitutional remedies fit well in the invitation paradigm: *prima facie*, they are obligatory; *de-facto* they are temporary[41] and open for response. Perhaps in the specific case of the petitioners, the court's decision is the binding and final one, but as a remedial *policy*, the decision remains political, after a democratic, majoritarian and deliberative process.

Although this line of thought does not govern the perception of constitutional dialogue,[42] it is dominant in Roach's dialogic thesis. In several contexts, he draws a sturdy line between dialogic conduct and soft remedies,[43] and sees the constitutional remedies as an imminent part of the court's way to enable a legislative response and still protect the petitioners' rights.[44] He has done so regarding general declaration, invalidity suspension, constitutional exemption and jurisdiction retention.[45] He sees the soft remedies that the court chooses as flexible, since they require the state to fix the constitutional flaw, but leave the question of "how to do it" to the discretion of the

[41] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 899 (2009).
[42] See the new anthology on constitutional dialogue, published in mid-2019: CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon eds., 2019). Except for Roach's work, there is no other work that is strongly dedicated to the connection between constitutional dialogue and constitutional remedies.
[43] "The court starts the institutional conversation when it accepts the rights claims made by the litigant, but the legislature completes the conversation by deciding if and how to respond to the court's rulings." Roach, *supra* note 40, at 868.
[44] ROACH, *supra* note 18, at 377–79.
[45] Kent Roach, *Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U. BRIT. COLUM. L. REV. 211 (2002); Kent Roach, *Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response*, 66 U. TORONTO L.J. 3 (2016).

political branch.[46] This approach has a strong foothold in the literature about Canada,[47] the United States,[48] South Africa[49] and Israel.[50]

The connection between constitutional dialogue and the judicial choice regarding what remedies to grant in constitutional cases is so strong, that this article offers constitutional remedies as a test case for the whole theory. Intense scrutiny of the dialogue-remedies connection can join the two important insights that I have asserted so far: (1) Constitutional remedies facilitate constitutional dialogue, as they limit the court's intervention in the legislative fora, while maintaining the power of the judiciary to decide the case. They can also facilitate the legislative response. These choices strengthen the legitimacy of the constitutional examination by the judiciary as well as the response of the legislative. (2) The judicial choice of a soft remedy has a significant cost of neglecting the petitioners and their rights. The petitioners, who have proved their claims and convinced the court that a statute has a constitutional flaw, leave the court empty-handed and without protection.

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[46] ROACH, *supra* note 18, at 171.
[47] HOGG, *supra* note 41, at 742–43; Paul S. Rouleau & Linsey Sherman, *Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?*, 41 OTTAWA L. REV. 171 (2010).
[48] Evan E. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1206 (1986); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552–53 (1972). Notwithstanding, see another and different version of remedial dialogue in Barry Friedman's work: Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 770–72 (1992). This dialogic conception adheres to his fundamental interpretive dialogue notion that he identifies between the United States Supreme Court and the political branches. *See* FRIEDMAN, supra note 36; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).
[49] Sabrina Germain, *Taking "Health" as a Socio-Economic Right Seriously: Is the South African Constitutional Dialogue a Remedy for the American Healthcare System?*, 21 AFR. J. INT'L & COMP. L. 145, 161–63 (2013); Adam Shinar, *With a Little Help from the Courts: The Promises and Limits of Weak Form Judicial Review of Social and Economic Rights*, 5 INT'L J.L. CONTEXT 417, 422–23 (2009).
[50] Aharon Barak, *On the jurisprudence of Constitutional Remedies*, 20 LAW & BUS. 301, 329 (2017) (Isr.); Ronen Poliak, *The Legislation Order Remedy: An Offer to a Gradual Outline*, 46 MISHPATIM [HEBREW U. L. REV.] 675 (2008) (Isr.); Suzie Navot, *The Constitutional Dialogue: Institutional Mechanisms for Dialogue*, 12 MISHPATIM AL-ATAR [HEBREW U. L. REV. ONLINE] 99 (2018) (Isr.).

Part IV aims to convince the reader of the appropriateness of these arguments. However, it is essential to dedicate a short discussion to Israeli constitutional law as a dialogic system, before leaning on it as a test case in Part IV. This will be the goal of the following part.

III. Israel as a Dialogic System

When writing about dialogic systems, "weak-form judicial review" systems or "the new commonwealth" systems, scholars tend to think about Canada, UK, New Zealand and Australia. Within this dialogic paradigm, Israel is usually overlooked due to the language barrier as well as the fact that Israel does not have a full constitution, but a partial collection of Basic Laws, without a formal framing.[51] The most foundational human rights Basic Law[52] is not even entrenched, and formally[53] can be easily changed in a simple majority. And if so, in the absence of a formal constitution or a full human rights act,[54] how is it possible to discuss constitutional dialogue?

Nonetheless, Israel is a dialogic system, and quite a promising one. This dialogic character is sustained on two levels: the first consists of structural constitutional mechanisms that enable conducting the dialogue. As mentioned, in Canada, the

[51] For a legal-historical description of the constitutional development process in Israel, see SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 35–48 (2007).
[52] Basic Law: Human Dignity and Liberty, 5752-1992 SH No. 1391 p. 350 (Isr.).
[53] Albeit not practically. For a thorough and insightful analysis, within the Israeli perspective, see Ori Aronson, *Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Countermajoritarian Difficulty*, 37 IUNEY MISHPAT [TEL AVIV L. REV.] 509 (2016) (Isr.) (an English introduction is available at https://ssrn.com/abstract=2419417).
[54] The human rights Basic Laws in Israel protect only some of the main constitutional rights, and not necessarily the most important rights: the rights to life, body integrity, dignity, property, deprivation or restriction of liberty, the right of all persons to leave Israel, Israeli citizens right of entry to Israel, privacy, intimacy and freedom of occupation. They do not include, by their wording, the right to equality and freedom of speech and its derivatives, such as freedom of association, etc. These rights do have a constitutional protection due to the Israeli Supreme Court rulings.

literature details several constitutional mechanisms that enable the dialogue: the limitation clause, set in Charter art. 1;[55] the notwithstanding clause, set in Charter art. 33;[56] broad judicial discretion regarding constitutional remedies; the constitutional reference mechanism; qualified rights with implemented authorization for infringement;[57] and a cabinet-ruled government, which makes legislative responses relatively easy and quick.[58]

The structural level reveals a great similarity between Israel and Canada, as well as other commonwealth (and "new commonwealth") systems. The legislation process in Israel is dominated by the government, headed by the cabinet.[59] This structure enables the political branches to respond to constitutional rulings very effectively. The Basic Law: Human dignity and Liberty, which is the source of most of the constitutional invalidations, holds a limitation clause that requires that a statute that limits a constitutional right anchored in the Basic Law will be "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is

[55] "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[56]

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[57] Such as *unreasonable* search or seizure or *arbitrary* detention or imprisonment.

[58] Hogg & Bushell, *Charter*, *supra* note 13, at 83–91; Roach, *supra* note 25, at 348–49, 360; Roach, *supra* note 19, at 64–66.

[59] Guy Lurie, Amir Fuchs & Chen Friedberg, *A Consensual Approach to the Separation of Powers*, THE ISRAEL DEMOCRACY INSTITUTE (June 26, 2019), https://en.idi.org.il/articles/27096.

required."[60] Basic Law: Freedom of Occupation also includes a notwithstanding clause[61] that asserts that

> A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4 (the limitation clause, B.E.Y), if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.

However, this basic law is quite negligible, and it is hard to assume that the Israeli notwithstanding clause plays the same role that the Canadian clause plays. Another important structural mechanism is the vast discretion afforded to the Supreme Court regarding constitutional remedies, which seems to be limited only by political and legitimacy considerations, not by law.[62]

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[60] Basic Law: Human Dignity and Liberty, 5752-1992 SH No. 1391 p. 350, art. 8 (Isr.).

[61] This was designed to solve a very specific political crisis in the 1990s. For elaboration, see Tsvi Kahana, *Majestic Constitutionalism? The Notwithstanding Mechanism in Israel*, *in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING 73, 77–78 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013). For a different perspective, see Rivka Weill, *Juxtaposing Constitution-Making and Constitutional Infringement Mechanisms in Israel and Canada: On the Interplay Between Commonlaw Override and Sunset Override* 49 ISR. L. REV. 103, 127 (2016).

[62] Inquiry into the Court's authority reveals a very wide, almost unlimited power to grant constitutional remedies. Section 15(c) of the Basic Law: The Judiciary, sets the following provision: "The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court." Furthermore, Section 15(d) grants the court permission to give orders to any state authority, local authority, regular court or special court (such as labor courts, religious courts, military courts etc.), and section 15(e) allows the Knesset to expand the Supreme Court authority in legislation. However, the vast part of the Court's constitutional authority lies in the idiom 'to grant relief for the sake of justice' within subsection (c). These constitutional provisions do not stand alone, and they are assigned to the Court's broad self-apprehension of its authority. As Navot writes:

> HCJ judges have extensively applied the "relief for the sake of justice" section of Basic Law: The Judiciary . . . Trends in the HCJ's decisions in recent years indicate that, at least from the judges' point of view, the court's jurisdiction has no boundaries . . . . The feeling is that the HCJ is almost in absolute control over the scope of its powers.

SUZIE NAVOT, THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS 197 (2014). Comparatively, this broad remedial discretion is not exceptional in the common law system. *See* ROBERT LECKEY, BILLS OF RIGHTS IN THE COMMON LAW 123–24 (2015).

The second level that sustains the constitutional paradigm is through practice, and it is manifested in the daily operation of constitutional review.[63] The Israeli Supreme Court rulings are full of rhetoric that is not only respectful to the Knesset (the Israeli legislature) and emphasizes judicial restraint while analyzing the constitutionality of statutes, but also emphasizes the legislature's ability to respond:

> I agree with the conclusion of my colleague the president that there is no alternative to setting the law aside (para. 65 of her opinion). Nonetheless, I should point out that the finding that the enactment of the law as it stands rather than the alternative is not proportionate (in the narrow sense), such that it requires the law to be set aside, is a relatively moderate finding, since it leaves the legislature with a choice: Despite the unconstitutionality of the law, in this situation the legislature is not left with no resort. It does not need to return to the situation that prevailed before the law was enacted. It is able to limit the ―damage of the unconstitutionality. It will do so if it enacts the alternative . . . [thereby] the whole benefit will not be realized and the entire damage will not be undone. But the partial realization may satisfy the legislature's policy (Barak, Fundamental Constitutional Balance and Proportionality: the Jurisprudential Aspect, supra, at p. 63).[64]

and even situates the court-legislature interaction explicitly under a dialogic framework:

[63] These finding are based on a wide-scale research that qualitatively examined hundreds of constitutional judicial decisions within the years 1992 (the year of the human rights Basic Law's enactment) and 2017.
[64] HCJ 2605/05 Acad. Ctr. of Law & Bus. v. Minister of Fin., Justice Naor, para. 28 (Nov. 19, 2009) (Isr.) (official translation).

> In this decision we suspend the ruling on the important issues that I have referred to earlier. We do this out of respect to the legislative branch and to the interaction between the judicial branch and the legislative branch. This relationship is complicated and based on a dialogue between the court and the legislature. This dialogue is based on the fundamental principles and laws of the State of Israel, and within its framework both branches strive to promote the State's goals and contend as best they can with the challenges that it faces, while protecting the human rights granted to each and every person under the Basic Laws. At the conclusion of this dialogue, it is expected that the legal outcome will correspond to the State's fundamental principles and protect the individual's liberties. Now, it is time for the legislative branch to have its say. . . . As always, this court will listen carefully to the legislative branch; and as always, the court's door will be open to each person that claims that his constitutional rights were infringed upon.[65]

Another measure that demonstrates an ongoing inter-branch dialogue is the strong preference for preserving political constitutional decisions.[66] As far as possible, the court avoids handing down binding judicial rulings when the case can be solved in the political field. In this manner, the Israeli Supreme Court gives legal supremacy to legislative initiatives that are promoted concurrently with the judicial proceedings, and holds a strong preference to legal change that will solve the issue, instead of constitutional ruling.[67] The Court uses its rulings to deliver different messages to the

[65] HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law, Justice Jubran, para. 51 (Aug. 3, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[66] For an analysis of these doctrines as Bickelian passive virtues, see Jeff King, *Dialogue, Finality and Legality*, *in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 186, 194–99 (Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon eds., 2019).
[67] Yosef, *supra* note 5.

political branches through the ruling's unbinding parts,[68] and also uses the "nullification warning,"[69] which avoids nullifying the state's decision or statute in the specific case, but pronounces that as long as the concrete theme continues, it will be invalidated.[70] Interpretation can be a further technique, that although binding, can help the Court to refrain from conducting a full constitutional analysis.[71] Within this conceptual response-based group of mechanisms, there are mechanisms that allow the Knesset to have its say in Court. The Knesset Statute grants the Knesset an independent (and separated from the government) legal presentation and standing in constitutional petitions,[72] that allows it to express its constitutional opinion and requires the Court to listen. The Knesset also uses legislative preambles to refer directly to the Supreme Court rulings and justify its decisions regarding them.[73]

A third dialogic measure is the judicial granting of constitutional remedies. As this relates to the testcase examined here, a further elaboration will be unnecessary. Henceforth one can be content with noting that the two constitutional remedies

[68] Liav Orgad & Shai Lavi, *Judicial Guiding*, 34 IUNEY MISHPAT [TEL AVIV U. L. REV.] 437 (2011) (Isr.). This is not a unique phenomenon. See, for example, in the United States: Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislators, and Dialogue*, 83 MINN. L. REV. 1 (1998); Kumar Katyal, *supra* note 25.
[69] Re named it the "one last chance doctrine." Re, *supra* note 25.
[70] This is a useful mechanism when institutional and policy questions are on the line, much less so when there are concrete petitioners that might be substantially harmed by the judicial use of this doctrine. *See* Bell Yosef, *Seven Short Comments on the Nullification Warning*, ICON-S-IL BLOG (May 15, 2018), [https://israeliconstitutionalism.wordpress.com/2018/05/15/%D7%A9%D7%91%D7%A2-%D7%94%D7%A2%D7%A8%D7%95%D7%AA-%D7%A7%D7%A6%D7%A8%D7%95%D7%AA-%D7%A2%D7%9C-%D7%94%D7%AA%D7%A8%D7%90%D7%AA-%D7%94%D7%91%D7%98%D7%9C%D7%95%D7%AA-%D7%91%D7%9C-%D7%99%D7%95%D7%A1/] (Isr.). As of now, the Israeli Supreme Court has used it only under the former circumstances.
[71] This is a concrete appearance of the broader doctrine of constitutional avoidance. *See* Fish, *supra* note 25; David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 657–59 (2008). The most helpful technique, in this context is reading down, which allows interpreting the statute so the constitutional flaw will be removed, as long as the rest of the statute can still realize its purpose. *See* Michael Bishop, *Remedies*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 9, 9-87–9-95 (Stuart Woolman, Michael Bishop & Jason Brickhill eds., 2d ed. 2013).
[72] The Knesset Statute, 5754-1994, SH No. 1462 p. 140, art. 17(c1) (Isr.).
[73] For the dialogic qualities of legislative preambles, see Roach, *supra* note 25, at 155–56.

preferred in the Israeli Supreme Court's constitutional jurisprudence are invalidity suspension and classic severance. The first empowers the legislature to annul the practical aspects of the judicial ruling within a defined time frame. The second narrows the judicial intervention in the legislative fora, and even facilitates the legislature's response by demanding only a specific and narrow amendment in order to deal with, change or accept the judicial decision.

The fourth indicator of the existence of a constitutional dialogue in Israel is the frequent appearance of legislative responses. Up until 2020, The Supreme Court annulled sixteen statutes due to disproportionate violations of rights guaranteed in one of the two human rights basic laws, Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.[74] Despite some momentous constitutional doubts relating to the appropriateness of the legislative purpose, the Court *never* invalidated the legislation purpose itself, so the legislature's ability to respond was always maintained.[75] Eleven of the sixteen constitutional invalidations led to a legislative response. The average timeframe for a legislative response was about eighteen months. Furthermore, the content of the legislative responses was varied. Some of the responses implemented the judicial design of the constitutional right, some were satisfied with a technical amendment, some led to comprehensive legislative reform and some led to an independent legislative analysis of the constitutional right and the ways to balance it vis-à-vis the legislative purpose and desired policy. Thus, the existing dialogue grants

[74] In the beginning of 2020, the Israeli Supreme Court invalidated three more statutes: HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Feb. 27, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 2293/17 Gersgaher v. The Knesset (Apr. 23, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 1308/17 Silwad Mun. v. The Knesset (June 9, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[75] Invalidating the legislative purpose blocks the dialogue and prevents the political branches from executing the desired policy, no matter what the means are. Legislative purpose invalidating terminates the constitutional dialogue. *See* Hogg & Bushell, *Charter*, *supra* note 13, at 92.

the two branches a considerable extent of institutional independence, and makes most of the critiques of judicial monologue redundant.[76]

The Israeli academia put forth its own contribution as well. While the seminal article by Hogg and Bushell-Thornton was being published in Canada, Prof. Yoav Dotan published a similar argument in Israel. Dotan based his notion of constitutional dialogue on the boundaries between the branches, and not on collaboration or mutual influence. He saw the Court as being in a rivalry with the political branches regarding power and authority, and perceived the dialogue as strategic: every institutional action (whether political or judicial) is taken while evaluating the other actor's future course of action.[77] As such, Dotan's constitutional dialogue correspond to the tennis-match analogy, when all that is taken in account is the institutional bottom line. Dotan argued that this conception of dialogue requires a change in the current perception that constitutional nullification and legislative response is a crisis, when in fact it is just one of several possible institutional replies, "normal" replies, in a reality where each institution fulfills its constitutional role.[78]

Years later, placing Israel in a broader and comparative context led Dotan to point out some of the most important qualities of the dialogue: it anchors the judicial constitutional review; it preserves democratic responsibility; it creates a framework for an inter-institutional process regarding implementation of the constitution; it creates reciprocity between the legal and political discourses; it gives the legislature an active

[76] *See, e.g.*, Morton, *supra* note 26; Waldron, *supra* note 31.
[77] Yoav Dotan, *A Constitution for Israel? The Constitutional Dialogue After the "Constitutional Revolution,"* 28 MISHPATIM [HEBREW U. L. REV.] 149, 177, 187 (1997) (Isr.).
[78] *Id.* at 207–08.

role in analyzing the constitutionality of legislation; and it creates a richer and broader balance between rights and interests than can be achieved by the Court alone.[79]

While Hogg and Bushel Thornton publication provoked a wide political, judicial and academic conversation, Dotan's argument did not lead to a similar result. Several years later, Prof. Aharon Barak, then Chief Justice of the Israeli Supreme Court, adopted once again the dialogic theme, while actively rejecting the strategic notion of dialogue.[80] Barak characterized the constitutional dialogue as responsive.[81] Every institution makes an independent decision, regardless of the other institution's anticipated choice, and the other institution can respond correspondingly. The Court, Barak emphasized, does not even try to foresee the political branches' response while designing its own decision. This kind of dialogue reflects the doctrine of the separation of powers, where every branch acts autonomously. As such, the legislative response is part of "healthy practice" and does not impinge upon the role of the judicial branch in the constitutional system. At this point, the legislature faces only two restrictions: it must not violate the petitioner's rights in the concrete case that it responds to, and it must not use its legislative (or constitutional[82]) authority in order to limit the Court's authority.

[79] Yoav Dotan, *The Judicial Review Under a Constitution: The Accountability Question – A Comparative Overview*, 10 MISHPAT UMIMSHAL [LAW & GOVERNANCE] 489, 517–18 (2007) (Isr.).
[80] The book was published originally in 2004 in Hebrew. For an English version, see AHARON BARAK, A JUDGE IN A DEMOCRACY 236–40 (2006).
[81] As opposed to an ongoing and interpretive dialogue, which resembles the American-style constitutional dialogue. For elaboration see Barry Friedman's thorough normative and historic work. Friedman, *supra* note 48.
[82] In Israel, the constitutional amendment process is conducted solely by the Knesset.

Dotan and Barak, as well as several other Israeli writers,[83] reflect the classic dialogic approach,[84] which focuses on the institutional bottom line: whether the Supreme Court invalidated, or the Knesset enacted in response. This bottom-line notion does not give any weight to the *way* that the Court invalidated the legislation or to the *content* of the new legislation. It does not see the broad spectrum of possibilities within which each decision can be given. However, in the last decade, the constitutional literature has come to understand that there is more to dialogue theory than just the bottom line. There is (potentially) vast dialogic value in the different mechanisms that lead to the institutional resolution. Orgad and Lavi, and later Zcharia, found dialogic value in the judicial unbinding comments that are dispersed throughout the constitutional ruling;[85] Mersel found abundant dialogic qualities in the invalidity suspension and later in the Knesset's independent legal presentation and standing in constitutional petitions;[86] Bar-Siman-Tov added his dialogic contribution through a semi-procedural model of judicial review;[87] Poliak did so by developing a gradual model regarding the judicial imposition of the legislature's obligation to legislate;[88] Yosef did so by offering criteria to granting legal supremacy to legislative initiatives in

[83] Guy Davidov, *Constitutional Review of Financial Issues*, 49 HAPRAKLIT [THE LAWYER] 345, 348–49 (2008) (Isr.); Michael Eitan, *The Knesset Standing in Constitutional Review Petitions*, 4 HEARAT DIN [LEGAL COMMENT] 91, 118–20 (2007) (Isr.); Gershon Gontvnik, *The Consttutional Law: Developments After the Constitutional Revolution*, 22 IUNEY MISHPAT [TEL AVIV U. L. REV.] 129, 158–59 (1999) (Isr.); Haim Sandberg, *Strategic Considerations Behind Normative Explanations: Lesson from Israel's Supreme Court Expropriations Case*, 11 INT'L J. CONST. L. 751, 765 (2013).
[84] There are additional, narrower, attitudes. The prominent one is Gideon Sapir's notion of dialogue that views the court mainly as a catalyst for a wide political and public constitutional debate. GIDEON SAPIR, THE CONSTITUTIONAL REVOLUTION: PAST, PRESENT AND FUTURE (2010) (Isr.).
[85] Orgad & Lavi, *supra* note 68; DAVID ZCHARIA, THE CLEAR VOICE OF THE PICCOLO: THE SUPREME COURT, DIALOGUE AND FIGHTING TERROR (2012) (Isr.).
[86] Yigal Mersel, *The Invalidity Suspension*, 9 MISHPAT UMIMSHAL [LAW & GOVERNANCE] 39 (2007) (Isr.); Yigal Mersel, *The Knesset Standing in Petitions Regarding Legislation Constitutionality*, 39 MISHPATIM [HEBREW U. L. REV.] 347 (2010) (Isr.).
[87] Ittai Bar-Siman-Tov, *Substantial Judicial Review and Procedural Judicial Review: Can the Both Sustain? Toward a Semi-Procedural Model in Israel*, *in* DORIT BEINISCH BOOK (Keren Azulai, Ittai Bar-Siman-Tov, Aharon Barak & Shahar Lifshitz eds., 2018) (Isr.).
[88] Poliak, *supra* note 50.

judicial proceedings;[89] and Navot saw a dialogic nature in the overall array of doctrines designed by the Israeli Supreme Court.[90]

One can see that the most meaningful developments and insights regarding the dialogue theory in Israel were developed from the bottom-up. Currently, the conception of constitutional dialogue in Israel is rich, substantial, and acknowledges the diversity, the depth and the complexity of the interbranch dialogue.

Before adopting the Israeli case as a test case, it is important to stress that the Israeli Supreme Court has another characteristic that needs to be carefully considered when learning lessons from the Israeli case: its willingness to be a salient policy maker. Some of the cases discussed here, in which the Supreme Court annulled legislation, might not have reach a ruling in different countries. The *Yeshiva Students* cases, that dealt with the exempting of ultra-orthodox yeshiva students from Israel's mandatory drafting, is a prominent example.[91] In many jurisdictions, this issue would have been dismissed under the threshold of standability or even justiciability. The *Naser* case is another example, since it forced the government to design criteria for text benefits. These are questions of policy as well as public matters that many times even exclude the legislature, with practice showing that the government decides the general principle and direction and the Legislature designs the specific arrangements.

[89] Yosef, *supra* note 5.
[90] Navot, *supra* note 50.
[91] See the main cases that dealt with the issue: HCJ 3267/97 Rubinstein v. Minister of Def. 52(5) PD 481 (1998) (Isr.) (formal Translation); HCJ 6427/02 Movement for the Quality of Gov't in Israel v. The Knesset 61(1) PD 619 (2006) (Isr.); HCJ 6298/07 Ressler v. The Knesset (Feb. 21, 2012) (Isr.) (formal Translation); HCJ 1877/14 Movement for the Quality of Gov't in Israel v. The Knesset (Sept. 12, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

But the fact that the Israeli Supreme Court does have a certain amount of "Israeli exceptionalism," in a comparative view,[92] which is expressed in its broad and generous willingness to examine political questions,[93] does not make its comparative value redundant. All over the world apex courts interfere with policy questions. Supreme and constitutional courts have made decisions regarding indigenous minorities rights,[94] voting rights,[95] LGBTQ marital rights,[96] housing rights,[97] immigration policy,[98] and many more issues that have had a wide public affect. Only lately the South Africa constitutional court ruled that South Africa's Electoral Act is unconstitutional, as it requires that nominees be elected to the national assembly and provincial legislatures only through their membership in political parties; the ruling allowed individuals to be nominated to the national assembly and provincial legislatures.[99] All of these are fundamental policy issues, which apex courts are willing to examine and interfere with. Supreme and constitutional courts are policy makers. Each does so in its own way and under the political and institutional context that it operates within. The Israeli Supreme Court does have a broad standing and justiciability rules,[100] and indeed made some

[92] In a comparative overview, Brice Dickson has portrayed the Israeli Supreme Court as one of the most "daring" courts in the common law system. Brice Dickson, *Comparing Supreme Courts*, *in* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 1, 11 (Brice Dickson ed., 2007).
[93] See also the Court's willingness to examine the constitutionality of the Basic Law: Israel – the Nation State of the Jewish People, 5778-2018, SH No. 2743 p. 898 (Isr.). The petition is now pending, sittings are held, and the panel was expanded to eleven judges. *See* HCJ 9027/18 The Ass'n for Civil Rts. in Israel v. The Knesset (pending).
[94] *See, e.g.*, Mabo v. Queensland, HCA 23, (1992) 175 CLR 1 (AU); Wik Peoples v. Queensland, HCA 40, (1996) 187 CLR 1 (AU); Guerin v. R., 2 S.C.R. 335 (1984) (CA); R. v. Sparrow, 1 S.C.R. 1075 (1990) (CA).
[95] *See, e.g.*, August v. The Electoral Comm'n, (CCT8/99) [1999] ZACC 3 (SA); Minister for Home Aff. v. Nat'l Inst. for Crime Prevention and the Re-integration of Offenders (NICRO), (CCT 03/04) [2004] ZACC 10 (SA); Sauve v. Canada, [1993] 2 S.C.R. 438 (CA); Sauve v. Canada, [2002] 3 S.C.R. 519 (CA); Frank v. Canada (Att'y Gen.) [2019] SCC 1 (CA); Roach v Electoral Comm'r, (2007) 233 CLR 162 (AU).
[96] Obergefell v. Hodges, 576 U.S. 644 (2015).
[97] Daniels v. Scribante [2017] ZACC 13 (SA); Occupiers of Erven 87 & 88 Berea v. De Wet N.O. [2017] ZACC 18 (SA).
[98] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. ___ (2020).
[99] New Nation Movement NPC v. President of the Rep. of S. Afr. [2020] ZACC 11 (SA).
[100] Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 318 (2009); Ariel L. Bendor, *Are There Any Limits to Justiciability?*

prominent decisions in which it compelled a policy change. Yet, it is not an anomaly and does not preclude learning from the rich Israeli experience.

IV. Constitutional Remedies in Israel

The fundamental question of the right-remedy gap has been discussed thoroughly in the constitutional literature.[101] In the United States, many cases of rights-remedy gaps stem from an experimentalist attitude toward judicial remedying.[102] The Israeli case of constitutional remedies enables us to illuminate a different perspective of this important issue. Specifically, the discussion offered here sheds much light on the way that petitioners' rights are being mistreated. Petitioners that prove their constitutional claims and convince the court that a constitutional right has been unconstitutionally infringed upon, do not win an appropriate remedy. Some of the times, *de facto*, they do not win any remedy whatsoever.

In this part I will describe the judicial granting of constitutional remedies in Israel, using three cases: invalidity suspension, judicial supervision, and the strong interpretive remedies, which the Court usually does not grant.

The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience, 7 IND. INT'L & COMP. L. REV. 311 (1996).

[101] *See, e.g.*, Friedman, *supra* note 48; John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). In the United States, the case of *Brown v. Bd. of Edu. of Topeka*, 347 U.S. 483 (1954), contributed greatly to the development of this issue, since the gap between the important ruling and its application cannot be overlooked. For further discussion of this perspective, see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

[102] Roach, *supra* note 40, at 864.

Invalidity Suspension

Invalidity suspension is one of the most consensual remedies in Israeli constitutional law, second only to classic severance. When deciding that a statute is unconstitutional, the court can determine that the operative decision will come into force only in a future point in time (in Israel usually within three to six months).[103] This is an exemption to the fundamental rule that a judicial decision is valid and in force from the moment it is given.[104] This suspension period has several important virtues, which are well explained in the opinion written by Supreme Court Vice President, Justice Mazza, in a case from 2004:

> The advantages of this path are obvious: it allows the legislature to consider the question of reliance concerning the suspension of the entitling law, a question that it did not consider when it enacted the suspending law; its intervention in the work of the legislature is minimal; and it does not impose on the court a task that is unsuited to its institutional competence. Suspending the validity of the declaration of voidance does not lead to an immediate operative consequence, and it certainly does not cause—at least until the mending of the defect by the legislature or until the end of the suspension period—any harm to the constitutional part of the statute or the State budget. In this way, the legislator,

[103] This is a short period of time, that can partially explain the phenomenon of continuous extensions as discussed infra. For comparison, the Canadian Supreme Court tends to be more generous and gives the legislature longer periods of time, usually a delay of six to eighteen months. HOGG, *supra* note 41, at 742.

[104] Ittai Bar-Siman-Tov, *Time and Judicial Review: Tempering the Temporal Effects of Judicial Review*, *in* THE EFFECTS OF JUDICIAL DECISIONS IN TIME 207, 213 (Patricia Popelier, Sarah Verstraelen, Dirk Vanheule & Beatrix Vanlerberghe eds., 2013).

> and not the court, is the one that determines the exact timing, manner and scope of the harm to the budget, which itself is unavoidable.[105]

Much like in Canada, where this remedy is quite common,[106] in Israel one can see a gradual development of the invalidity suspension.[107] In the first case in which the Supreme Court invalidated a statute, in 1997, the Court decided that due to reliance of relevant stakeholders, and in order to avoid a legislative vacuum, invalidity is suspended for three months. The Court emphasized, however, that the invalidity will be suspended only in "special cases that justify it."[108] This practical reasoning was adopted in subsequent invalidation suspension decisions of the Court, and was accompanied by an institutional reasoning[109] that leaned on the desire to allow the legislature to "go back to the drawing board."[110] This institutional reasoning became fixed,[111] while the demand for special circumstances faded away. Today it seems that

[105] HCJ 9098/01 Ganis v. Ministry of Building and Housing 59(4) PD 241, 272–73 (2004) (Isr.) (Versa translation).
[106] Roach, *supra* note 45. This remedy also has a strong foothold in the South Africa Constitutional Court. See Bishop, *supra* note 71, at 9-111–9-115; *see also* Constitution of the Republic of South Africa, 1996, Art. 172;LECKEY, *supra* note 62, at 93–122. This soft remedying is different from the American one, where this sort of remedying is very rare, and the constitutional remedy is usually immediate. *See* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 383 (2016).
[107] For a discussion of the gradual developments in Canada, see Kent Roach, *Enforcement of the Charter – Subsections 24(1) and 52(1), in* CANADIAN CHARTER OF RIGHTS AND FREEDOMS 473, 504–05 (5th ed. 2014); Grant R. Hoole, *Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law*, 49 ALTA L. REV. 107, 108, 117 (2011).
[108] HCJ 1715/97 Chamber of Inv. Managers in Isr. v. Minister of Fin. 51(4) PD 367, 415–16 (1997) (Isr.) (Versa translation).
[109] HCJ 6055/95 Tzemach v. Minister of Defense 53(5) PD 241 (1999) (Isr.):

> The circumstances of this case warrant our deferring the effective date of the declaration of invalidity, in order to give the respondents enough time to propose the necessary bill to the Knesset, to give the Knesset enough time to debate the bill, and also to give the respondents enough time to prepare the military for the expected legislative changes.

Leckey describes a similar graduality in Canada and in South Africa, where the remedy was created to avoid a legal vacuum and anarchy. LECKEY, *supra* note 62, at 138–39, 142–43.
[110] *See* Kent Roach, *Sharpening the Dialogue Debate: The Next Decade of Scholarship*, 45 OSGOODE HALL L.J. 169, 177 (2007). Within this perspective, the invalidity suspension is quite an intrusion upon the legislature's agenda, since the court compels the legislature to re-enact, in a specific timeframe, as long as the latter wants to maintain its policy. *See* HOGG, *supra* note 41, at 899.
[111] Bar-Siman-Tov, *supra* note 104, at 221–22.

examining if and for how long the court can suspend the invalidation is an inherent part of the constitutional analysis, once the statute has been determined as unconstitutional.

To show how consensual the invalidity suspension in Israel is, a brief review of the numbers may be helpful: The Supreme Court invalidated legislation nineteen times due to its discrepancy with the human rights Basic Laws, without complying with the conditions of the limitation clause. In eight of these cases, the court suspended the invalidity declaration.[112] Amongst the remain ten, two cases were *de facto* suspensions, since the Court allowed the statutes, which were temporary provisions, to stay in force, but forbid the political authorities to renew them;[113] in one case the suspension was examined but denied due to its lack of practicability in that case;[114] in another, the close time-frame did not enable the delay;[115] in another case the invalidity suspension was applicable to narrow implications of the statute;[116] and three others it was scrutinized

[112] *Chamber of Inv.* 51(4) PD; *Tzemach* 53(5) PD ; HCJ 10662/04 Hassan v. Nat'l Ins. Inst. (Feb. 28, 2012) , Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal translation); HCJ 8300/02 Naser v. The Gov't of Israel (May 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 7146/12 Adam v. The Knesset (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal summary available by the Supreme Court translation); HCJ 7385/13 Eitan v. Gov't of Israel (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 8665/14 Desta v. The Knesset (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal summary available by the Supreme Court translation); HCJ 1877/14 Movement for the Quality of Gov't in Israel v. The Knesset (Sept. 12, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[113] HCJ 4124/00 Yekutieli v. Minister for Religious Aff. (June 14, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Versa translation); HCJ 6298/07 Ressler v. Knesset 65(3) PD 1 (2012) (Isr.) (formal translation). Bar-Siman-Tov refers to these cases as "*de-facto* suspension". Bar-Siman-Tov, *supra* note 104, at 224–25.

[114] HCJ 2605/05 Acad. Ctr. of Law and Bus. v. Minister of Finance (Nov. 19, 2009), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal translation).

[115] HCJ 1661/05 The Gaza Coast Reg'l Council v. Israel's Knesset 59(2) PD 481 (2006) (Isr.).

[116] HCJ 1308/17 Silwad Muni. v. The Knesset (June 9, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

by the minority opinion.[117] Only three cases did not even mention the suspension option.[118]

Looking at the significant place that the invalidity suspension occupies in Israeli constitutional law, it seems that the Court is designing the constitutional remedies based on an anticipation of a legislative response, and uses the suspension not only to solve practical difficulties that stem from the constitutional invalidity, but also to facilitate the legislature's work and assist it in consolidating a legislative response.

Up to this point, the invalidity suspension looks almost perfect: democratic, balanced, moderate. However, it does have a certain amount of a democratic deficit, since it compels the legislature to act, and to do so within a defined time frame, if it wishes to create a new legislative arrangement and avoid a legislative vacuum.[119] But this (frail) democratic deficit is not the most problematic consequence of the invalidity suspension; rather, the most problematic consequence is the lack of protection that it gives the petitioners.

The invalidity suspension leaves an unconstitutional legal order intact for months (sometimes even years, as I will soon elaborate), with the violation of the petitioners' rights continuing throughout. Furthermore, many times the petitioners' voices are not heard in the process of consolidating the legislative response. Moreover,

[117] CrimApp 8823/07 A v. State of Israel (Nov. 2, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal translation); HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Feb. 27, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 2293/17 Gersgaher v. The Knesset (Apr. 23, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[118] HCJ 1030/99 MK Oron v. Chairman of Knesset 56(3) PD 640 (2002) (Isr.); HCJ 8276/05 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Def. 62(1) PD 1 (2006) (Isr.) (Versa Translation); HCJ 5239/11 Avnery v. Knesset (Apr. 15, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (Versa translation).
[119] Some do not see this as a problem, but as part of the court's duty to coerce the legislature to take constitutional decisions and constitutional responsibility. ROACH, *supra* note 18, at 348.

there is no guarantee to the petitioners that the new statute that will be enacted will protect their rights. There are many cases where the legislative response has been claimed to maintain the infringement upon the petitioners' rights instead of healing it.[120]

The Court can diminish this destructive effect on the petitioners by using the constitutional exemption.[121] In adopting the invalidity suspension, the court proclaims its willingness to overlook the petitioner's constitutional rights in order to avoid a lacuna, practical problems and inter-institutional collision. The use of the constitutional exemption in a specific case excludes the specific litigants (and sometimes people who are in the same situation) from the suspension, gives them an immediate remedy, and is still able to achieve all the virtues of suspension.[122]

The Israeli Supreme Court has never explicitly dealt with the possibility of granting petitioners a constitutional exemption,[123] although as demonstrated, it has

[120] See, for example, in Israel the three constitutional cases of detention on the basis of the Prevention of Infiltration Act, 5714-1954, SH No. 161 p. 160: HCJ 7146/12 Adam v. The Knesset (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal summary available by the Supreme Court translation); HCJ 7385/13 Eitan v. Gov't of Israel (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 8665/14 Desta v. The Knesset (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (formal summary available by the Supreme Court translation), and the different constitutional case of drafting Yeshiva ultra-orthodox students to the army: HCJ 6427/02 Mov't for the Quality of Government in Israel v. The Knesset 61(1) PD 619 (2006) (Isr.); HCJ 6298/07 Ressler v. The Knesset (Feb. 21, 2012) (formal translation) (Isr.); HCJ 1877/14 Mov't for the Quality of Gov't in Israel v. The Knesset (Sept. 12, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). In Canada, regarding the right not to be denied bail without just cause: R. v. Morales, [1992] 3 S.C.R. 711 (Can.); R. v. Hall, [2002] 3 S.C.R. 309 (Can.), and regarding prisoners' right to vote: Sauve v. Canada, [1993] 2 S.C.R. 438; Sauve v. Canada, [2002] 3 S.C.R. 519 (Can.).

[121] See the basic and important distinction between a constitutional exemption that accompanies the invalidity suspension and an independent constitutional exemption that works similarly to a reading-out or notional severance. Andrew K. Lokan & Danny Kastner, *Constitutional Exemptions – The Remedy That Dare Not Speak Its Name*, 27 N.J.C.L. 179, 180 (2009); Peter Sankoff, *Constitutional Exemptions: Myth or Reality*, 11 N.J.C.L. 411, 414 (2000). A different terminology is "permanent constitutional exemption" and "temporary constitutional exemption." *See* Roach, *supra* note 107, at 498.

[122] Hoole, *supra* note 107, at 128–31; Roach, *supra* note 107, at 507.

[123] Just like other individual remedies, and constitutional damages specifically. The Israeli Supreme Court does not order the State to pay punitive constitutional remedies due to a violation of constitutional rights. This remedy is considered a strong remedy with a strong expressive, educational and deterring value that is designated to protect and fulfill the constitutional right itself. *See* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1114–15 (1969); Bishop, *supra* note 71, at 9-156. Yet, the Israeli Supreme Court never considered it as a constitutional remedy that can accompany constitutional invalidity in any of its (stronger or softer) forms. Poliak notes that the Israeli Supreme Court did open a narrow space for judicial granting of a punitive constitutional remedy, although it was in a civil litigation.

suspended the invalidity almost automatically wherever possible. In one case, the court did exempt the petitioners from the suspension, although without discussing the rationale for that choice. This occurred in the *Desta* case: when invalidating parts of the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Law, 2014, the Court gave the state a six-month suspension before the invalidation came into force. It also decided that detainees that are detained for twelve months or more will be released within fifteen days at the most.[124] Even without calling it a constitutional exemption, that was the meaning of the court's choice, and that was the only case in which this remedy was given. In this case, the constitutional exemption was given not only to the petitioners, but to the entire group that was in the same situation (i.e., detainees for twelve months or more). Still, as mentioned, the Court did not discuss or analyze the remedy from any perspective—the petitioners or the entire relevant group.

Comparatively, the reluctance to grant this remedy is not rare.[125] However, the question whether it is practically common or not does not answer the question if this remedy is desired. Rare as it may be, invalidity suspension —as a normative decision— should be accompanied by a constitutional exemption that exempts the petitioners from the suspension and grants them an immediate remedy to stop the infringement of their

Poliak, *supra* note 50. Prof. Daphne Barak-Erez, currently a Supreme Court Justice, holds a similar view. She wrote that the granting of this kind of remedy should evolve from the court's ruling and does not require legislative or constitutional authorization. Daphne Barak-Erez, *Constitutional Torts in the Era of Basic Laws*, 9 MISHPAT UMIMSHAL [LAW & GOVERNANCE] 103, 111–12 (2005) (Isr.).

[124] HCJ 8665/14 *Desta*.

[125] In Canada, see Carter v. Canada (Att. Gen.) [2016] SCC 4. (Can.). For a theoretical and doctrinal review, see Sankoff, *supra* note 121 . For an updated review, see Nitin Kumar Srivastava, *On Constitutional Exemptions*, RIGHTS ANGLE - THE ACLRC BLOG (Feb. 8, 2016), http://www.aclrc.com/blog/2016/2/8/on-constitutional-exemptions.

constitutional rights.[126] Alas, this kind of choice has never been discussed explicitly in the Supreme Court rulings.

Another factor that intensifies the negative consequences of the invalidity suspension on the petitioners is the Court's willingness to prolong the suspension period.[127] In Israel (as well as in other constitutional systems) the rule is that the Court will approve the extension as long as it is submitted within the suspension period.[128] In the first case in Israel that ordered a suspension of invalidity, the Court mentioned explicitly that the State can ask for a further extension,[129] which it did,[130] whereby the three-month suspension was extended by another four months.[131]

The state did so again in the Naser case, which dealt with inequality in tax benefits for municipalities. The court ordered, among other things, the annulment of several tax benefits entitlements, since the beneficiaries were selected unequally and without clear criteria, while neighboring (Arab) settlements were not included in the list of benefiting municipalities. The decision was suspended for twelve months, and

[126] This approach wins much support in Israel, *see* BARAK MEDINA, HUMAN RIGHTS LAW IN ISRAEL 269 (2016) (Isr.); Barak, *supra* note 50, at 373; Mersel, *supra* note 86, at 99; and beyond, *see* Roach, *supra* note 107, at 507; Hoole, *supra* note 107, at 128–31.

[127] One can also notice that renewing an extension of the suspension does not only harm the petitioners' rights, but also harms the dialogue itself. This multiple-extension trend does not indicate the State's willingness to take part in a fruitful dialogue, and places the court in a very uncomfortable institutional situation.

[128] In Israel: Barak, *supra* note 50, at 368. In South-Africa: Bishop, *supra* note 71, at 9-127–9-128.

[129] *See, e.g.*, HCJ 1715/97 Chamber of Inv. Managers in Isr. v. Fin. Minister 51(4) PD 367, 417 (1997) (Isr.) (Versa translation).

[130] Regarding the State's response, see, for comparison, the general declaration: a declaration on the unconstitutionality of a statute, lacking any binding force. This mechanism is anchored in section 4 of the UK Human Rights Act 1998 (c42). The UK Supreme Court did use this mechanism in a restricted and yet significant manner, and most of the cases led to a legislative response. *See Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments* 2010–2011, cmt. 8162, at 29–46 (UK). For further discussion, see Fish, *supra* note 106, at 334–36. The Israeli Supreme Court's strong tendency toward invalidity suspension (as well as endless extensions of the time periods given to the political branches to legislate) does resembles the theoretical and practical logic behind the general declaration. For further elaboration, see Bishop, *supra* note 71, at 9-177; Kent Roach, *A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue*, 57 U. TORONTO L.J. 449, 472 (2007).

[131] *Chamber of Investment* 51(4) PD (decision, given on Jan. 1, 1998).

then another nine months,[132] and then a further nine-month period,[133] followed by three further extensions of two months, four months and one month.[134] All this time, three years and seven months, the petitioners, as well as numerous others, waited for the State to legislate an egalitarian criterion for tax benefits, so that all entitled municipalities could enjoy the benefits. A similar, multiple-extension suspension is currently occurring with regards to the ultra-orthodox yeshiva students, after the statute that exempts them from mandatory military service was declared unconstitutional in September 2017.[135]

At this point, the dialogic value of the invalidity suspension should be clear, as well the remedy's ability to harm the petitioners' rights.[136] The consensual way in which the Court uses the remedy, the lack of willingness to grant the petitioners a constitutional exemption, the ongoing extension of the suspension—all of these strengthen it. The Israeli application of the remedy can teach an important comparative lesson on the negative implications of this soft remedy.

[132] HCJ 8300/02 Naser v. The Gov't of Israel, Nevo Legal Database (by subscription, in Hebrew) (Isr.) (verdict given on May 22, 2012) (interim decision given on May 5, 2013).
[133] *Id.* (interim decision given on Feb. 2, 2014).
[134] *Id.* (interim decisions given on Nov. 2, 2014, Nov. 16, 2014, July 19, 2015, and Nov. 30, 2015).
[135] HCJ 1877/14 Mov't for Quality of Gov't in Israel v. The Knesset (Sept. 12, 2017), Nevo Legal Database (by subscription) (Isr.) (Interim decisions given on Aug. 6, 2018, Jan. 20, 2019, Jan. 9, 2020, and June 15, 2020).
[136] See, in Leckey's words:

> These considerations [that support suspending the invalidity, B.E.Y.] effectively diminish the likelihood that a litigant who has persuaded the court that a law unjustifiably limits her rights will receive the remedy most obvious on the face of the constitutional text, namely, the immediate declaration that unconstitutional legislation is of no force or effect."

LECKEY, *supra* note 62, at 140.

Judicial Supervision

Another dialogic remedy the Israeli Supreme Court frequently uses is judicial supervision, a remedy that is also known in the Israeli discourse as "babysitting" and in the comparative literature as "jurisdiction retention." Within this remedial framework, when a case comes before a court, instead of handing down a conclusive one-time decision, it maintains its authority over the case and supervises the way the state implements its constitutional duties for months or even years.[137]

Prima facie, this remedy has a strong dialogic sense: the court issues a strong and principled declaration regarding the petitioners' rights, and leaves its manner of implement to the discretion of the State.[138] However, the quality of this dialogue might change greatly due to the way the court operates this dynamic remedy. *De facto*, not regulated or doctrinated, it gives the court an almost absolute flexibility and discretion how to manage the litigation. Prof. Mark Tushnet offered some very helpful observations through the weak remedies-strong remedies division: is it a compulsive or declarative order? Does the court wait for the petitioners to be active or does it *a priori* schedule updates from the State? Does the court determine measurable and accurate objectives or is the procedure left to the discretion of the State? Does the decree determine a principle and leave it to the State to fill in the blanks, or is the decree detailed and elaborated?[139] Magnet added a more general distinction between a strict

[137] Although some do not observe it as a remedy and conceptualize it as a process in which the court preserve the controversy until a political or legal change. Ariel L. Bendor & Joshua Segev, *The Supreme Court as a Babysitter:* Modeling Zubik v. Burwell *and* Trump v. International Refugee Assistance Project Rights 2018 MICH. S. L. REV. 373, 391.
[138] *See* Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 383 (2008); Joseph Eliot Magnet, *Constitutional Litigation Against Institutions: Remedies*, 42 OTTAWA L. REV. 285 (2011); Rouleau & Sherman, *supra* note 47.
[139] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 248–49 (2008).

decree ("finance it, do it, now") and a soft decree ("start, finance, update, and then we'll see").[140]

The Israeli-style judicial supervision raises further observations: is it an administrative or legislative supervision? Did the court give an interim order? If it did, was supervision conducted before or after the order? How close and tight was the supervision? Was the supervision held simultaneously with the hearings or afterward? Did the Court write a reasoned judgment or remove the petition due to exhaustion of remedies?

Despite this vast variation in the daily operation of judicial supervision, it is not the most significant problem. Actually, the court's flexibility in this matter can be helpful when designing a specific, case-related remedy under the judicial supervision framework and in order to maintain its legitimacy.[141] This is especially true, some argue, regarding social and economic rights.[142] The main problem is that the discretion that the court leaves to the State concerning implementation leads to extending the violation of the petitioners' rights. This remedy, which was designed to help the petitioners while limiting judicial intervention in the political policy sphere, achieves its goal only partially, and in many cases leaves the petitioners without a proper remedy, or as Swart phrased it, "left at the mercy of government officials."[143]

[140] Magnet, *supra* note 138, at 287.
[141] This is specifically apparent in high-volume cases. For a thorough elaboration from this perspective, see William A. Fletcher, *The Discretionary Constitution Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).
[142] Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007); Klein, *supra* note 138.
[143] Mia Swart, *Left Out in the Cold – Crafting Constitutional Remedies for the Poorest of the Poor*, 21 S. AFR. J. HUM. RTS. 215, 240 (2005).

Moreover, one can think about the most prominent judicial supervision cases comparatively: Brown II,[144] Grootboom,[145] TAC,[146] Doucet-Boudreau[147]—all of them were accompanied by a strong general declaration or a judicial decree (even if declarative). The court in these cases was so determined to provide meaningful protection to the petitioners' rights, that it was not satisfied with a general declaration. In all these cases, and numerous similar ones, the court began with a declaration regarding the petitioners' constitutional rights, and only then designed the specific manner of judicial supervision.

The Israeli Supreme Court, in comparison to these supreme and constitutional courts, is much less generous in its willingness to make declarations regarding the petitioners' rights. It hardly ever issues a general declaration or a decree regarding the petitioners' rights before deciding the judicial supervision framework in the specific case. In one of the cases, the Court itself was willing to admit that the judicial work consisted not of "writing a full reasoned opinion, but of supervising the authorities and encouraging them, as if it was a nanny or a babysitter."[148]

When Roach analyzed this remedy, he conceptualized judicial supervision as a "declaration plus"—a declaration regarding the petitioners rights *plus* retaining jurisdiction in order to fulfil those rights.[149] This conceptualization helps to show how inherent the initial declaration regarding the petitioners' rights is, and how the dialogic use of jurisdiction retention in Israel does not comply with this basic standard.

[144] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
[145] *Gov't of the Rep. of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (SA).
[146] *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (SA).
[147] Doucet-Boudreau v. Nova Scotia (Minister of Educ.), [2003] 3 S.C.R. 3 (Can.).
[148] HCJ 5587/07 Uziel v. Property Tax and Compensation Fund, Justice Rubinstein, para. 6 (Mar. 2, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[149] Roach, *supra* note 45.

The judicial supervision framework can include cases where the petitioners ask the court to order the state to enact (under certain statutory or constitutional obligation)[150] or to act under a certain legal requirement. In both cases, the Israeli Supreme Court tends to refrain from declaring the State's obligation, regardless of its content. The difficulties with legislative supervision can be well demonstrated in the case of *Access Israel*. The petitioner, Access Israel, a non-profit organization that deals with promoting the right to access of people with disabilities, has been waiting *twelve years*, and still counting, for the Knesset to legislate and approve in the relevant committee regulations for accessibility, as a fulfillment of its obligations under the equal rights law for people with disabilities, which was enacted in 1998. The Court has refused, so far, to declare the State's obligation to legislate and protect the right to equality of people with disabilities. Instead, for twelve years, it has decided time and again to reproach the State, and demand a further update in several months. As of August 2019, the Court has given ninety(!) interim decisions.[151] In administrative jurisdiction retention, which exceeds the boundaries of this article, the court usually acts in a similar manner.[152]

Even when courts do grant suitable decrees, the choice of leaving the petitioners' rights in the hands of the State is inherently flawed. It takes time to solve

[150] A remedy that the court traditionally avoids giving, leaning on a principled refusal. *See* HCJ 5677/04 Al-Arfan Ass'n v. Minister of Fin. (Mar. 16, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.). This refusal is understandable, and comparative overview finds a similar outcome in other supreme courts. *See* Fish, *supra* note 106, at 384–85; Dale Gibson, *Non-Destructive Charter Responses to Legislative Inequalities*, 27 ALTA. L. REV. 181, 188–89 (1989). For elaboration regarding Israel see Barak, *supra* note 50, at 357–60; Poliak, *supra* note 50;.

[151] HCJ 5833/08 Access Israel v. Minister of transp. (pending) (Isr.).

[152] See, for example, Tamar Meggido's analysis of the "hot return" cases: In a series of cases that dealt with judicial supervision of "hot return" (returning asylum seekers at the border back to the state where they came from), the Court intentionally avoided granting decrees or binding declarations regarding the State's responsibility at the border. Tamar Meggido, Babysitter Justice (unpublished manuscript, on file with the author).

the problem, sometimes a substantial amount of time, and within this period the unconstitutional situation continues to prevail. Furthermore, the State's incentive to solve the constitutional problem quickly is not as high and significant as the petitioners' need to resolve the issue.[153] Swart named her article "Left out in the cold" to describe part of the consequences of the decision by the South Africa Constitutional Court in the Grootboom case;[154] in the TAC case, fetuses were infected with HIV in the time frame that the court gave to the State for distributing vaccinations;[155] in the Abu-Labda case, young kids remained without any educational system for many years, while the court waited for the State to build elementary schools.[156]

In other words, this remedial choice tolerates an inherent fault, even when it is granted in its "complete" form (i.e., with a general declaration regarding the petitioners' rights and a binding decree). Using this remedy in its partial form seems to be even worse. Once again, the burden of healthy and respectful inter-institutional interaction and legitimacy falls on the petitioners' shoulders.

The Reluctance to Use Strong Remedies

If one needs to characterize the Israeli judicial granting of constitutional remedies, it could easily be described as a reluctance to use strong and status quo-changing remedies. The court usually justifies this kind of decision based on respecting the legislature and the legislation. However, the Court's reluctance is not complete, and at times it is willing to discuss strong remedies, and in rare occasions it even orders to

[153] Roach, *supra* note 107, at 532–33.
[154] Swart, *supra* note 153, at 216–17.
[155] *Id.* at 222.
[156] HCJ 5373/08 Abu-Labda v. Minister of Educ. (Feb. 6, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

grant them, while mitigating their impact by subjugating them to suspension. Reading-in has occurred only once, in a lengthy and reasoned ruling. Concrete severance has occurred only once as well, albeit without any reasoning or discussion. In the end of the day, these strong remedies, which can secure the petitioners' rights, are hardly used.

The distinction between ordinary constitutional remedies and interpretive constitutional remedies in the dialogic context can be helpful. The first kind reflects different categories of constitutional invalidation, whereas in the second kind the court creates *de facto* a new wording of the statute (by using reading-in or concrete severance).[157] Generally, ordinary constitutional remedies are much more intervening in the legislative fora, whereas the interpretive remedies allow the court to "save" the statute. However, and counter-intuitive as it may seem, some support the judicial use of the first kind, since it motivates a political process of re-consideration and deliberation.[158] Nonetheless, it is important to emphasize this view is much stronger in the Canadian context, which has a 'friendly political environment', and might be less robust in other countries.[159]

This counter-intuitive argument is a strong argument from the institutional interaction and legitimacy perspective. However, when locating the petitioners' constitutional rights in the middle, this argument is weakened. The only case in which

[157] *But see* Fish, *supra* note 25, at 1300–01 (undermining this distinction, since all these different kinds of constitutional remedies lead to the same outcome and are derived from the same constitutional authority).
[158] Roach, *supra* note 130, at 473; *see also* ROACH, *supra* note 18, at 378–81; Manfredi & Kelly, *supra* note 27, at 327. From the opposite side of the dialogic spectrum, the two argue quite the same as Roach: using reading-in is much less legitimate than judicial invalidating since it hardly leaves room for a legislative response. *See* Leclair, *supra* note 29, at 552–54. In the UK context, see Aileen Kavanagh, *The Lure and the Limits of Dialogue*, 66 U. TORONTO L.J. 83, 102–03 (2016).
[159] See, in that context, his warning regarding simplified comparative law. Kent Roach, *Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism*, *in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 267 (Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon eds., 2019).

this argument can stand is the case of comprehensive invalidity, which is the corner stone of constitutional remedies, according to which if a court finds that a statute is unconstitutional, it orders the invalidation of the statute, completely and immediately.[160] Unless it is a beneficiary statute,[161] it is the most meaningful remedy for the petitioners since it eliminates, immediately and without further waiting, the infringement of their rights.

However, this is not the case in Israeli law, as well as in Canada and South Africa.[162] In the history of the Israeli Supreme Court, only four cases resulted in comprehensive invalidity.[163] In one of them the court reasoned and justified the use of comprehensive invalidity as a last resort.[164] Only three cases treated comprehensive invalidity as a natural remedy.[165] One of them was not even, ironically, a severe case of human rights violation.

The petitioners are the ones who bear the price of this dialogic conduct. That reality led to calls for a sophisticated judicial use of constitutional remedies that avoids

[160] South-Africa is an interesting case in this context: The South African constitutional jurisprudence instructs the Constitutional Court to make a significant effort to avoid comprehensive invalidity. This judicial attitude reflects a wide discretion, since the South Africa Constitution instructs the Constitutional Court to invalidate a statute if the Court finds that the statute is unconstitutional. The few cases in which the Court did use comprehensive invalidity were characterized by the judicial will to enable the Legislature to enact by itself the desired arrangement. *See* Constitution of the Republic of South Africa, 1996, Art. 172; Bishop, *supra* note 71, at 9-48, 9-86–9-87, 9-96–9-97.

[161] Some also add *any* human rights legislation. *See* Shirish Chotalia, *Case Comment: The Vriend Decision: A Case Study in Constitutional Remedies in the Human Rights Context*, 32 ALTA. L. REV. 825, 833 (1994).

[162] These courts prefer to soften the invalidity. For elaboration on Canada's Supreme Court practices see HOGG, *supra* note 41, at 883–919. For South Africa Constitutional Court practices, see Bishop, *supra* note 71, at 9-48.

[163] HCJ 2065/05 Acad. Ctr. of Law & Bus., Human Rts. Div. v. Minister of Fin. 63(2) PD 545 (2009) (Isr.) (formal translation); HCJ 1030/99 MK Oron v. Chairman of the Knesset 56(3) PD 640 (2002) (Isr.); HCJ 1308/17 Silwad Muni. v. The Knesset (June 9, 2020), Nevo Legal Database (by subscription) (Isr.).

[164] *Acad. Ctr.* 63(2) PD.

[165] *Oron* 56(3) PD; HCJ 8276/05 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Def. 62(1) PD 1 (2006) (Isr.) (Versa translation); HCJ 1308/17 *Silwad* .

eliminating the petitioners' rights.[166] Roach in his new work tries to implement a two-track approach to remedies, in which the first layer of remedies is individual, and "provide, wherever possible, some remedy for successful litigants," and in the second layer "courts should engage the legislature and the executive to devise broader systemic remedies to ensure better compliance with human rights in the future."[167] Nonetheless, a principled objection to strong interpretive remedies (from dialogic accounts) is another (unnecessary) barrier set before the petitioners. This adds to existing inherent barriers that the court takes upon itself regarding reading-in and concrete severance, as will now be demonstrated. In the UK one can find a similar discussion regarding the preference of interpretive remedies according to the Human Rights Act art. 3 compared to the incompatibility statement in accordance with art. 4.[168]

It is important, in this context, to explain briefly the nature of the reading-in remedy, which is perceived as a radical remedy[169]: when the court encounters an unconstitutional violation of equality, it can, instead of annulling the underinclusive act, read in to the act the specific discriminated group. The law still stands, and the group is included within the law's ordinance. In the reading in framework, the court has the discretion to decide the exact words that will be read in to the law and where, inside the specific provision. In the United States, since the 1970s, it has become a dominant

[166] Recently he wrote that "[C]ourts should ensure that litigants receive effective remedies even while they provide legislatures and the executive an opportunity to craft systemic remedies for the future." Roach, *supra* note 159, at 269.
[167] Roach, *supra* note 40, at 865–66.
[168] See LECKEY, *supra* note 62, at 128–30 (stressesing that the litigants' rights are a crucial part of the decision between the two alternatives, whenever the interpretive option is available); *see also* YOUNG, *supra* note 28, at 222–26; Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, 2 PUBLIC LAW 306 (2005); Danny Nicol, *Law and Politics After the Human Rights Act*, 4 PUBLIC LAW 722, 747–48 (2006).
[169] Peter W. Hogg, *Judicial Amendment of Statutes to Conform to the Charter of Rights*, 28 R.J.T. 533, 540 (1994).

remedy,[170] whereas in newer constitutional models this remedy is desirable, although perceived as unusual and subject to more restrictive conditions.[171]

The Israeli Supreme Court was willing to use reading in only once, in the *Naser* case. As explained earlier, in this case the court examined the constitutionality of art. 11(b) of the income tax ordinance, 1981. The article determined a list of 167 municipalities that enjoyed tax benefits—municipalities that were not defined by specific criteria except for a vague referral to the "conflict line region" (a region surrounding borders with a hostile state), and even this criterion was not fully implemented. One group of petitions was submitted by three local Arab municipalities (Mazraa, Kisra-Samia and Beit-Jan) that argued against the discriminating nature of the article. The Court found the lack of criteria, the individual addition of each of the 167 municipalities throughout the years, and the absence of Arab municipalities, as discriminatory and unconstitutional. The Court read the three Arab municipalities into the art. 11(b) list, although it suspended the remedy for six months.[172]

It is hard (and undesirable) to avoid the circumstances that allowed the reading in in this case. First of all, twenty years of preparation. The first step was a civil litigation case, given in 1994, where Chief Justice Barak approved reading in to a collective agreement and noted in *obiter-dictum* that it is an appropriate remedy in the constitutional field as well, and adopted the Canadian *Schachter* criteria[173] to grant the

[170] Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEVELAND S. L. REV. 301, 306–12 (1979).
[171] Sankoff, *supra* note 121 (in Canada); Bishop, *supra* note 71, at 9-104–9-105 (in South Africa).
[172] As opposed to the other parts of the decision that were extended, as described in the discussion concerning the invalidity suspension, this suspension was not extended. *See* HCJ 8300/02 Naser v. The Gov't of Israel Nevo Legal Database (by subscription, in Hebrew) (Isr.) (verdict given on May 22, 2012, interim decision given on May 5, 2013).
[173] Schachter v. Canada [1992] 2 S.C.R. 679 (Can.).

remedy.[174] These criteria were the basis for ongoing judicial rejections of reading discriminated groups into beneficial statutes over the years ever since.[175] Consequently, the case led to the most thorough and elaborated discussion of the reading in remedy in Israeli constitutional law.

The preparation justification is important from the legal-legitimacy perspective, but it is not enough. The judicial use of the reading in remedy could not stand without the second legitimizing circumstance (second in time, although first in its importance): the political justification. The petition, since its filing and until the final judgment, took *ten years*. The vast part of that period was intended to give the political authorities the time and ability to solve the constitutional problem without judicial intervention. Chief Justice Beinisch emphasized that the political branches repeatedly strung out the issue, and that "If we came to the point that we are writing this judgment, it is only because the political branches have refrained from taking action." Even the Attorney General agreed that the Court should read in to the statute in this case.[176] Furthermore, as aforementioned, even under these circumstances, the reading in was subjugated to a six-month suspension that allowed the legislature to annul the judicial decision.

Another mechanism is concrete severance, i.e., when the court severs only specific words from the statute's article in order to solve the constitutional difficulty.[177] This remedy is a reflection of reading in[178] and acts in a similar way. It keeps the court from annulling the statute, but requires a great deal of judicial discretion (which words

[174] HCJ 721/94 EL-AL Israel Airlines v. Danielowitz 48(5) PD 749 (1994) (Isr.) (formal translation).
[175] *See, e.g.*, HCJ 4906/98 "Am Hofshi" Ass'n v. Ministry of Building and Housing 54(2) PD 503, chief Justice Beineisch, para. 16–17 (2000) (Isr.); HCJ 2458/01 New Family v. Bd. for Approval of Embryo Carrying Agreements 57(1) PD 419, Justice S. Levin, para. 1 (2002) (Isr.); HCJ 6758/01 Lifshitz v. Minister of Def. PD 59(5) 25, Justice Maza, para. 20–23 (2005) (Isr.).
[176] HCJ 8300/02 *Naser*, Chief Justice Beinisch, para. 27.
[177] *See* HOGG, *supra* note 41, at 390.
[178] Hogg refers to them as "close cousins." *Id.* at 390.

to sever and when). This remedy changes the current legal status quo, and is hence helpful to the petitioners, as it cures the constitutional infringement of their rights.

The judicial use of the concrete severance remedy is limited, even more than reading in. The remedy appeared in Israeli constitutional law only three times. The first time was in the Avnery case, which dealt with the constitutionality of the Prevention of Harm to the State of Israel by Means of Boycott Law, 2011, which was enacted after lengthy and substantial BDS activity against the State of Israel.[179] The statute ordered several civil sanctions against those who are "deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel, one of its institutions or an area under its control, such that it may cause economic, cultural or academic harm." In order to deal with the constitutional difficulties that the torts (mainly exemplary damages, restriction from attending state tenders and denying state benefits) created, Justice Vogelman offered to annul the words "or an area under its control."[180] In contrast to the reading in discussion in the Israeli rulings, this offer was not accompanied with a discussion regarding the remedy's limitations and consequences.[181] Justice Vogelman opinion was not accepted by the majority.

The second time was in Justice Solberg's minority opinion in the Silwad Municipality case, in which the Court annulled the Judea and Samaria Settlement

[179] HCJ 5239/11 Avnery v. Knesset (Apr. 15, 2015), Nevo Legal Database (by subscription) (Isr.) (Versa translation).
[180] He did not refer to his proposal as a constitutional remedy. For the inner-judicial discussion regarding Vogelman's choice, see *id.* Justice Danziger, para. 41; *id.* Justice Amit, para. 48.
Nonetheless, the distinction between the interpretive and remedying nature of the severance is not clear. For the controversy surrounding the conceptualization of severance, see Gans, *supra* note 71, at 656–62; John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56 (2014); Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 755–56 (2017).
[181] HCJ 5239/11 *Avnery* , Justice Vogelman.

Regulation Law, 2017. The statute allowed to retroactively legalize the property aspect of the Israeli settlements in Judea and Samaria, that in part was built in Palestinian lands. While the majority opinion concluded that the statute must be revoked, Justice Solberg sought to narrow its application. Therefore, he (in his own words) "erased" from the definitions of "State"[182] and "Settlement" several aspects that expressed an unconstitutional over-reaching of the statute. It was, in this case, a conservative attempt to save the statute, and certainly not an attempt to secure the petitioners' rights.

In the third case, the Court did use concrete severance, in a unified opinion of ten majority justices, without saying what it does. This was the case of *The Gaza Coast Regional Council v. Israel's Knesset*.[183] In 2005, the Israeli Government decided to leave Gaza and vacate the Israeli settlements in that area. In the same year the Knesset enacted the Implementation of the Disengagement Plan Law, 2006, that regulated the evacuation of the area and determined the compensation arrangements to the settlers who had to leave their homes and businesses.

While the constitutional challenge to the evacuation was denied, several specific claims against the constitutionality of the compensation arrangements was obtained, due to an un-proportional infringement of the settlers' right to property. The Court found four constitutional flaws in the compensation arrangements. In two of them it annulled several words from the articles in order to broaden the extent of the compensation. For example, the statute ordered that whoever was twenty-one years of age on the day of the evacuation is eligible for a special grant for seniority in the region.

[182] He excluded municipalities and settling institutions, so only the Israel Government, ministries and the military authorities' approval will be relevant in order to legalize the settlement; he excluded agricultural fields, industries and facilities from the statute applicability as well. HCJ 1308/17 Silwad Muni. v. The Knesset, Justice Solberg, paras. 35–41 (June 9, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[183] HCJ 1661/05 The Gaza Coast Reg'l Council v. Israel's Knesset 59(2) PD 481, 746–48 (2006) (Isr.).

The court found out that the age restriction was unconstitutional and annulled the words "at the age of 21" to remove the restriction.[184] In this case the Court did not suspend the decision. Nevertheless, it emphasized in the end of the judgment that the legislature can change the remedy in a new legislation.[185] Once more, the picture drawn here shows that strong interpretive remedies in Israeli law are limited and hesitant.

V. A Dialogic Claim in Favor of Strong Remedies

One of the most significant critiques of constitutional dialogue is the lack of protection that courts provides to the petitioners, in the name of constructive inter-institutional interaction. The judicial choice of remedies can lessen or intensify the problem. Hence, when choosing the appropriate remedy, Courts should not be blinded by institutional legitimacy claims to the point that they cease to take into account the petitioners' claims and rights.[186]

In ordinary constitutional conduct, *the judicial choice of soft remedies is desirable*. Leaving the decision in political hands, after judicial setting of the constitutional framework within which to design the policy, is desirable: it addresses majoritarian and legitimacy claims;[187] it contributes to a better and deeper deliberative process;[188] and it not only locates the constitutional right in the center of the discussion,

[184] *Id.* at 746–47; *see also id.* at 747–48.
[185] *Id.* at 748.
[186] LECKEY, *supra* note 62, at 148 ("In any case, judges' reliance on considerations such as deference to the legislature's remedial function may affect the underlying conception of rights.")..
[187] Originally, this was the most fundamental essence of dialogue theory. *See, e.g.*, HOGG, *supra* note 41, at 904; ROACH, *supra* note 18, at 323; Fish, *supra* note 106, at 324–25; Magnet, *supra* note 138, at 295.
[188] Evan E. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1205–06 (1986); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1427 (1991). It is fascinating that there are so many dialogic writers that wrote of the deliberative value of constitutional judicial judgement, but so few that mentioned the deliberative value of soft constitutional remedies.

it locates the constitutional discussion in the political branch hands, diminishing the so-called judicial monopoly on human rights protection.[189] It also enables a more professional and accurate design of the remedy, according to the political, financial and social circumstances.

However, the constitutional dialogue does not and should not prevent courts from using strong remedies, exactly from the dialogic perspective itself: the legislature can respond to every constitutional remedy. The court chose reading in? The legislature can change it. The court chose an absolute and immediate invalidity? The legislature can change it.

It seems that a substantial part of the problem is the judicial change of the status quo. When the court determines that there is a constitutional flaw in a statute, it changes the legal and constitutional status quo, and forces the political branches to deal with the new constitutional issue, instead of preserving the desirable and current status quo. When the court changes or breaks the legal status quo, it is harder for the political branches to legislate.[190]

However, although a change in the status quo may complicate things for the legislature, it certainly does not prevent it from reacting. Several writers, some of whom play an important role in the development of constitutional dialogue theory, have already emphasized the temporality and flexibility of the constitutional remedy. No matter what constitutional remedy the court chooses, the legislature can always choose

[189] For the importance of this result, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).
[190] F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY 161–62 (2000); Morton, *supra* note 26, at 25. Others, however, wish to undermine this perception and argue that is a matter of simple majoritarian political will. See Hogg, Bushell Thornton & Wright, *supra* note 13, at 41–43.

to re-enact and change the remedy, as long as it is within the constitutional boundaries.[191] The legislature can narrow the remedy or broaden it, perfect it, refine it, clarify it, eliminate it and change it with a completely different remedy.[192] The legislature is the branch that controls the way in which the policy will be manifested, no matter what remedy the court choses.[193] Some even emphasize that courts should not have to make a special effort to enable a legislative response since it will be possible nonetheless.[194]

Hence, within the dialogic framework, the court should fully reject the perception that constitutional dialogue precludes it from using its full remedial powers;[195] in fact, the opposite is true: *the dialogic framework legitimizes the court's choice to use strong and full remediation*, in favor of the petitioners, when the case is right, since the legislature holds the ability to enact a legislative-response, regarding the content and design of the right as well as the content and design of the remedy. As Robert Leckey's thorough analysis shows, common law supreme courts rely on a mixture of human rights and institutional considerations when determining what remedy to prefer: a strong and interpretive remedy, or a remedy that emphasizes the legislature's ability to decide the case.[196] The dialogic argument in itself allows the

[191] Hogg, *supra* note 169, at 544; Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1348–49 (2015); Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling, Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 OSGOODE HALL L.J. 1 (2003).
[192] It seems that Roach's objection to interpretive remedies (discussed above) as well as his "two-trek approach" to remedies, which favors a weak general remedy accompanied by a strong individual remedy, overlooks this factor. Roach, *supra* note 159, at 302–05.
[193] Bishop, *supra* note 71, at 9-106.
[194] Hoole, *supra* note 107, at 128.
[195] See Roach's conception that interpretive remedies block the dialogue discussed earlier. Yet, even Roach recognizes that in some cases, protecting the petitioners' rights can justify interpretive remedies and should override the inter-branch dialogue. See for example in the case of *Vriend v. Alberta*, [1998] 1 S.C.R. 493: Roach asserts that invalidity, in this case, would have been much more radical than reading in. ROACH, *supra* note 18, at 228.
[196] LECKEY, *supra* note 62, at 131–37.

balance between the diverse considerations to tilt more toward human rights and the specific petitioners' rights considerations.

This broad dialogic argument stands well on its own and could work even when using the Israeli case as a test case. What the Israeli test case shows, and the broad dialogic argument misses, is the depth and intensity of the human rights injuries caused due the dialogic judicial choices. The democratic and deliberative value of designing social arrangements by elected representatives is substantial and must guide the courts when designing constitutional remedies. However, true protection for human rights is the other side of the equation and must not be overlooked. All the more so when the legislature always has the ability to "correct" the court if the legislature believes that the remedial choice was wrong.

Furthermore, the case of the specific petitioners—who are being harmed by the inter-institutional legitimacy enhancing attempts—necessitates special attention. In their cases, the argument favoring strong remedies should be even more robust.

Regarding the specific petitioners, courts should avoid using soft remedies as a default. Regarding the broad consequences of the judicial process, however, courts should deliberate in each and every case if a soft remedy fits best or if a strong and status quo-changing remedy will suit better. When deliberating this question, courts should keep in mind that first, each remedy is available for change by the legislature; second, human rights are on the line, and there are additional groups that might still suffer from the ramifications of the remedial choice; third, political and accountable representatives are better suited for accepting policy-laden and value-laden decisions.

This approach, which encourages—out of the dialogic perspective—judicial granting of strong remedies, results in two further questions: The first deals with

prioritizing the specific petitioners and the second deals with the amount of choice that judges truly have.

Indeed, this approach raises what has been called the problem of queue jumping, which prioritizes specific petitioners over others that are situated in a similar condition. This is an inherent and structured flaw of common law constitutionalism.[197] Nonetheless, this preference is well justified for a number of reasons.

Functional justifications: One reason is the vindication of rights, which is one of the prominent goals of constitutional remedies.[198] If courts will avoid granting remedies to the specific petitioners and will be satisfied with general remedies that leave the state with broad discretion, rights will remain infringed. The public trust in courts and adjudication might be harmed as well.[199] Furthermore, by doing so, the courts forgo their expressive and educational functions.[200]

*Principled justification*s: *ubi jus ubi remedium*. This is the most fundamental goal of adjudication.[201] When courts prevent petitioners from receiving a remedy only because there might be hypothetical (or even real) persons in their condition, it fails to fulfil its most fundamental essence.[202]

Practical justifications: Mazraa, Kisra-Samia and Beit-Jan, the three local Arab municipalities that were discussed in the *Naser* case,[203] motivated the litigation, waited

[197] Roach, *supra* note 40, at 872.
[198] Hill, *supra* note 123, at 1114–15.
[199] IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 196 (5th ed. 2005).
[200] For this function, see Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3 (2000); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).
[201] *See* Randall T. Shepard, *State Constitutional Remedies and Judicial Exit Strategies*, 45 NEW ENG. L. REV. 879, 884 (2011). Roach named it "The integrity of adjudication." Roach, *supra* note 45, at 47.
[202] *See* August v. Electoral Commission, [1999] 3 SA 1 para. 30 (CC).
[203] HCJ 8300/02 Naser v. The Gov't of Israel (May 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

for ten years and proved that their right to equality had been infringed. In the meantime, they were deprived of the tax benefits that other localities had received. Yoav and Etai Arad-Pinkas filed several petitions for ten years, [204] bore the costs of litigation as well as the costs of an expensive surrogacy process abroad (much more expensive than a heterosexual couple would pay in Israel), and led in the end to a constitutional decision that states explicitly that the Surrogacy Law is discriminating and unconstitutional. They too have yet to receive any remedy that will allow them to realize their constitutional rights to equality—should the two desire to have a surrogacy process in Israel.

The remedy is the first and most important incentive for petitioners to motivate a litigation process,[205] a process that has high costs and takes much time and energy.[206] Under the remedial framework, prioritizing the petitioners is the more rational and natural decision, and it is justified due to functional, principled and practical causes. It should be mentioned, however, as has been described above, that prioritizing the petitioners does not preclude the courts' ability to grant strong and effective remedies to other individuals or groups that are in a similar condition.

Concerning the second question, the point of departure is that the judicial choice of what remedy to grant is sometimes not voluntary. As many different studies that involve courts and policy-making processes have demonstrated, supreme courts are

[204] HCJ 1078/10 Arad-Pinkas v. The Comm. for the Approval of Surrogacy (Apr. 14, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Aug. 3, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 781/15 Arad-Pinkas v. Bd. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements Law (Feb. 27, 2020), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[205] Bishop, *supra* note 71, at 9-1.
[206] Leckey stresses that it also has future implications for deterring potential petitioners, who will avoid filing a petition since even if they will prove the right infringement, they will receive no remedy. LECKEY, *supra* note 62, at 173.

policy makers.[207] As Eduard Rubin and Malcolm Feeley stated, "policy making is a standard and legitimate function of modern courts, as standard and well-accepted as fact-finding or the interpretation of authoritative texts."[208] And as a policy-makers, there are many considerations and limitations that courts must consider, that are beyond the dialogic paradigm. Several prominent ones, inter alia, are the ability to enforce the judicial decision, the courts' reputation and public trust, and specifically averting political backlash, financial issues, legal considerations and earlier precedents. When courts do not have a formal jurisdiction over a case, for instance, it is much more complicated and "risky" to annul the State's policy. In this notion lies the understanding that litigants must sometimes pay a price in order to accomplish other necessary goals.[209] Therefore, sometimes the judicial choice is between a soft remedy or no remedy at all.

Observing the prominent, policy-laden cases from a policy-oriented point of view, one can argue that in these cases, the ability to draw a normative argument favoring strong remedies in constitutional litigation is weak. Indeed, perhaps the argument favoring strong remedies cannot stand completely in these cases. And yet, it has much value, since cases of straightforward intervention in policy are not common, even in Israel. Furthermore, the argument favoring strong remedies can still guide courts by focusing the lens on the dangers for human rights that soft or 'considerable' remedies causes. It helps clarify that on the other side of respectful institutional interaction that is accompanied by soft and response-based remedies stand petitioners

[207] See this fundamental perception in different perspectives: ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); EPSTEIN & KNIGHT, *supra* note 37; WALTER E. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); GERALD N. ROSENBERG, THE HOLLOW HOPE (2008); Dahl, *supra* note 7; *see also* text accompanying notes 35–37.
[208] Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2002).
[209] *See* Yosef, *supra* note 5, at 10.

that have raised their voice, convinced the court, and yet see no change. It stresses that dialogic, discursive and productive institutional interaction does not necessitate soft remedies in all cases. Lastly, even in these unusual occurrences, locating human rights and petitioners' rights specifically within the dialogic paradigm has its own gravity.

Conclusions

In this article I offered a normative dialogic claim in favor of strong and status quo-changing remedies. I began with an overview of the dialogue theory, and emphasized the responsive nature of the theory. I also described several substantial critiques of dialogue theory, and stressed that the most significant one is the lack of protection that it provides to petitioners and other groups or peoples in the same situation.

After providing a broad view of dialogue theory, I proceeded to a more focused argument, concerning the strong connection between dialogue theories based on responsiveness and constitutional remedies. I construed the constitutional remedy, under the dialogic framework, as an invitation: an invitation extended to the political branches to change the court ruling and start a process of re-designing the constitutional right and the way to balance it and protect it.

With this argument as my reference point, I shed some (dialogic) light on the Israeli constitutional system. I showed that the interaction between Israel's Supreme Court and Legislature contains strong dialogic features, using the constitutional remedies test-case. Through a discussion of two dialogic remedies and two strong interpretive and so-called non-dialogic remedies, I showed the dialogic reluctance of the Israeli Supreme Court to use strong remedies.

All of these led me to the heart of my argument: I maintain that the constitutional dialogue encompasses more than institutions; after all, the constitutional decision and the political response are motivated by the petitioners,[210] and a pure, institutional grasp of the constitutional dialogue excludes them from the constitutional picture. It is *their* constitutional right that has been infringed, discussed and declared. A substantial conception of the constitutional dialogue should avoid authorizing the violation of judicial rights by under-remedying. Courts cannot abandon their constitutional responsibility toward the petitioners after they found that the petitioners' claims are justified and solid.

Even under the dialogic perception, the responsive character of the constitutional examination process is maintained. The court, by using constitutional remedies (sometimes strong constitutional remedies), changes the law and creates a new status quo that is sometimes not optimal for the legislature. The legislature choses whether and how to respond by legislating. The case can arrive once more at the court's doorstep, and this democratic process will continue. The institutional ability to react—in several ways and in many degrees of intensity—remains intact.

I am not maintaining that the court should use strong remedies all the time. As aforementioned, soft remedies are desired in order to maintain a constructive constitutional dialogue between the court and the political branches. Soft remedies are useful in motivating a new deliberative process within the legislature. Soft remedies also have a democratic value, since they preserve the final decision within the hands of

[210] Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1481–82 (2000).

the majority-elected representatives. But there are further considerations that need to be taken into account.

Courts in dialogic systems should open up to a more frequent use of strong remedies when needed. Leckey has already pointed out the common law supreme courts under-use of their remedial authority.[211] The Israeli Supreme Court's use of constitutional remedies is a good example of the price that the dialogic perception may cost. It is also an important illustration of the claim that courts must not neglect the petitioners' concrete interest and constitutional rights in the specific case.

Limiting the applicability of the argument to petitioners and not applying it to the entire offended group could help courts use strong remedies and still preserve their legitimacy. Furthermore, this limited applicability allows the remedial discussion to remain within the dialogic framework, and enables calling for a stronger remedial attitude without breaking the constitutional dialogue.

[211] LECKEY, *supra* note 62, at 149.