Stability of constitutional structures and identity amidst ‘political settlement’: lessons from Kenya and Israel

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In 2021, two dramatic judgments were handed down in Kenya’s Court of Appeals (CoA) and the Israeli Supreme Court. In Kenya, the CoA upheld a ruling from the High Court that had found the Constitution Amendment Bill of 2020 – aimed to implement the Building Bridges Initiatives (BBI) – unconstitutional and void, inter alia, for violating the basic structure of the constitution. Politically, this was a blow to the BBI initiative, a key project for President Uhuru Kenyatta and opposition leader Raila Odinga. It is assumed that the real purpose of the initiative, beside ‘reconciliation’, was expansion of executive power by allowing both leaders to form a coalition for the sake of winning the 2022 general elections.

About the same time, in Israel, after the March 2020 election did not lead to a clear result that would allow one of the two major competing parties to form a coalition, an agreement to form a unity government of the two was reached. Yet, in light of a deep distrust between the parties, a strong legal anchoring was needed. This led to a major constitutional amendment that transformed the system of government and established a ‘rotating government’ model which created a new position of ‘Alternate Prime Minister’ alongside the serving prime minister. This tailor-made constitutional reform served a political purpose of the two leaders to form a government.

In both countries, the sought constitutional change was challenged before courts. Yet, while in Kenya, courts stopped the constitutional transformation, the Israeli court did not intervene. This article reviews both case studies in order to draw broad lessons on how political settlement may overcome constitutional rigidity and abuse the amending process for dismemberment of the constitution, and how courts may function as a veto institution that can be a useful countermeasure against radical change to constitutional structures and identity.

Keywords: basic structure doctrine, BBI, comparative constitutional law, constitutional amendment, constitutional politics, courts, elections, executive power, Israel, judicial review, Kenya, unconstitutional constitutional amendments

INTRODUCTION

The higher law-making power that brings constitutional norms and institutions into existence requires that its creations are not as easily changed as normal legislative
enactments: this is what constitutional stability is essentially about.\textsuperscript{1} A considerable amount of scholarship has theorized stability of constitutions alongside related concepts such as longevity – and how they can be realized.\textsuperscript{2} In general, and with reference to actually enforced constitutions, rules of amendment – invariably now present in formally enacted constitutions – are often designed to achieve stability through balancing rigidity and flexibility.\textsuperscript{3} From a constitutional design perspective, procedural, temporal or substantive limits on constitutional change are quintessentially imposed on amendment powers to foster stability.\textsuperscript{4} The assumption that underlies the constitutional design choices which deploy procedural limits and other measures is, nonetheless, that majoritarian democracy and its institutions are functional and their excesses are somehow contained either by politics itself or by devices such as supermajority voting requirements in veto institutions.

There may, however, be a particular challenge presented in situations where there is either no supermajority veto requirement or, in cases where such a requirement does exist, it can be easily overcome by securing numbers through the usual electoral process (where a massive electoral victory is guaranteed, especially in authoritarian domains) or by political settlement phenomena such as or akin to multi/bipartisanship or elite bargaining. The latter situation, which is the concern of this article, is what we loosely label as ‘political settlement’.\textsuperscript{5} In the literature, political settlements are often defined as ‘rolling bargains between powerful actors and the dynamic renegotiation and compromise that characterises these bargains’.\textsuperscript{6} In other words, we are interested in the distribution of political power among elite political actors, and mainly political rivals. While there are some positives that might be associated with political settlements, such as the promotion of unity, economic development, or social and political

5. J. Di John and J. Putzel, ‘Political Settlements: Issues Paper’ (Governance and Social Development Resource Centre, 2009) (they define political settlement as ‘the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power’).
stability, we are interested in the underlying power arrangements and configurations of interests in political settlements that influence institutional and legal designs.7

Through a comparative study of judicial responses to proposed constitutional changes, we argue that political settlement, notwithstanding its well-known contributions to constitutional building, has the potential to expose constitutional structures and identity to the dangers of easy or opportunistic changes.8 To remedy this situation, we argue that in the case of political settlements, constitutional identity, structures and institutions may be justifiably preserved through judicially derived substantive limits, though there may also be certain dangers associated with over-powerful judiciaries.

In advancing our case, we consider recent developments in Kenya and Israel. The key similarity between them is that both states were subject to post-election political settlements underwritten by promises of constitutional change. In both cases, the political settlements, which were anchored in major constitutional revisions, benefited the two main opposing political leaders who had decided to cooperate in determining the division of power between them. Further, as we show, the proposals to amend the existing constitutions in the two polities had potentially far-reaching implications on their constitutional institutions, structures and identity. Lastly, the proposals in both contexts attracted petitions for judicial review.

We hasten to add, though, that these two cases have some differences. In the main, and for the sake of this analysis, Israel does not have a formally enacted Constitution as in Kenya. However, Israel has a series of Basic Laws that carry a constitutional status. In addition, Kenya’s High Court and Court of Appeal, by majority opinion, invoked substantive limits, justified in part by the ‘basic structure doctrine’, to veto a radical proposal to amend the Constitution of Kenya of 2010 (CoK). Notwithstanding that the Supreme Court of Kenya did not rule in favour of applying the basic structure doctrine, judicial intervention in the Kenyan case was, overall, a blow to the Building Bridges Initiative’s (BBI) drive for constitutional change.9 In contrast, the Israeli court rejected the constitutional challenges to an amendment to Basic Law: The Government, thereby allowing a dismemberment of the constitutional structure. In our view, given the similarities, these differences do not obstruct the comparison and, in fact, can be said to enrich it.

We begin our analysis in section 1 by providing the context within which constitutional stability in Kenya and Israel are pursued. We then turn, in section 2, to the interventions of elite consensus, or political settlement as we term it, in the both cases and their constitutional change overtones. Section 3 of the article is concerned with the judicial reactions towards constitutional change initiatives associated with political settlement in each context. This part’s focus is on how the idea of substantive limits was thought of as being a remedy to radical constitutional change. The implications on

9. On the BBI saga see e.g. Yaniv Roznai, ‘We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments’ (2023) 1110 Supreme Court Law Review 103.
constitutional stability and identity of the initiatives is discussed in section 4. Section 5 summarizes the core argument we make in the comparison and draws a conclusion.

1 CONSTITUTIONAL STRUCTURES, IDENTITY AND STABILITY

GENERALLY: THE KENYAN AND ISRAELI CASES

1.1 Kenya

As noted, Kenya has a formally enacted constitution. While it has been claimed to imitate the South African one, its provisions and institutions are informed by its own history and context and can be said to be autochthonous in many respects.10 Concealed broadly as the relationship between the provisions and the context, Kenya’s constitutional identity finds expression in almost every chapter of the Constitution and should be understood to have informed the institutional formation and designs and the values it proclaims. These include the creation of: (a) a pure presidential system where members of Parliament are not part of the Executive;11 (b) a justiciable bill of rights with relaxed rules of standing for its enforcement;12 (c) prescriptions on ethics of leaders;13 (d) a bicameral legislature composed of the Senate and the National Assembly with special membership for women and persons representing special interests;14 (e) constitutional commissions that are formally independent from the executive;15 (f) a Supreme Court with special jurisdiction to address disputes in presidential elections within 14 days;16 and (g) a system of devolved governance with units having their own executive and legislative bodies to deal with certain matters such as health.17

Stability of the CoK has been sought to be achieved through several devices set out in a free-standing chapter on amendment, characterized by several veto institutions and other procedural limits that must be overcome or adhered to for an amendment to be valid.18 The amendment power may be exercised either through popular initiative or through parliamentary initiative. There is no special subject matter to which either initiative is limited. The limits imposed by constituent power if the parliamentary amendment route is used are: first, it ‘may not address any matter apart from consequential amendment to legislation arising from the Bill’; second, it can only be called into second reading after 90 days following the first reading; and third, each of the two houses, that is the National Assembly and the Senate, must pass it by a two-thirds majority vote.19 The popular initiative route, on the other hand, first requires the signatures of at least one million registered voters for its initiation,

12. Ibid at Chapter 4.
13. Ibid at Chapter 6.
15. Ibid at Chapter 15.
16. Ibid at Article 163.
17. Ibid at Chapter 11.
18. Ibid at Chapter 16.
19. Ibid at Article 256.
which are subject to verification by the Independent Electoral and Boundaries Commission (IEBC).  

Second, the IEBC is required to submit the popular initiative proposal Bill to the county assemblies (i.e. the 47 legislative organs for the county governments) for consideration; unless half of the county assemblies pass it, the Bill cannot continue to the next stage. Third, after the Bill has been passed by the requisite number of county assemblies, it has to be introduced into both houses of Parliament (i.e. the National Assembly and Senate) and passed by a simple majority. Thus, both of the initiatives contain a requirement that several institutions or persons participate in the amendment processes, with the implication that should one of them withhold approval, the proposed amendment may not see the light of day.

There are no explicit substantive bars or limits to amending the CoK, although, presumably, a bill could be vetoed on its substance as it passes through the various institutions that are involved in the exercise of the amendment power. Instead, there is a requirement under article 255 of the CoK that certain ‘matters’ can only be amended through a referendum. This is a ‘tier-design’. These matters include: (a) the supremacy of the constitution; (b) the territory of Kenya; (c) the sovereignty of the people; (d) the national values and principles of governance; (d) the Bill of Rights; (e) the term of the president; (f) the independence of the judiciary; (g) the functions of Parliament; (f) the objects, structure and principles of the devolved governance; and (h) the provisions on amendments to the CoK. In respect of these matters, the President must present them to the IEBC for a referendum before he or she can assent to it. These matters can be said to be entrenched, though not explicitly unamendable, and whatever route is taken to formally alter them must involve the people through a referendum. There is, nevertheless, a second circumstance when a referendum must be invoked; this is not related to the nature of the matter, but is rather occurs where either house refuses to pass a popular initiative. In Kenyan constitutionalism, the referendum can be viewed as a public sentiment assessment device intended to approve presidential assent in respect of the enumerated matters. While the matters listed under article 255 are important — deserving a referendum as a prerequisite for presidential assent — they are by no means the embodiment of Kenya’s constitutional identity and structures.

Contrasted with the Independence Constitution, the structures under the CoK and the constitutional identity traceable to it have been enviably stable in formal terms. Since its promulgation in 2010, there has not been a single successful amendment to it despite several attempts. Through the parliamentary initiative route, there have been 13 proposals to amend the CoK introduced in parliament as Bills.

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20. Ibid at Article 257.
21. Ibid at Article 257(5).
22. Ibid at Article 257(9).
24. This tiered design can be described as a ‘second order unamendability’, a term coined by Richard Albert, and refers to the distinction between the procedures for constitutional amendment and for revision or for partial and total revision. See generally, Richard Albert, ‘Amendment and Revision in the Unmaking of Constitutions’ in David Landau and Hanna Lerner (eds), Edward Elgar Research Handbook on Comparative Constitution-Making (Edward Elgar, 2019) 117.
25. Article 257(10), CoK.
27. These are: two (2) Constitution of Kenya (Amendment) Bills in 2013 (Act No. 13 of 2013 and Act No. 15 of 2013); four (4) in 2015 (Act No. 2 of 2015, Act No. 38 of 2015, Act No. 64
These previous efforts were not successful due to the inability to meet the technical requirements for an amendment and due to purely political reasons that did not have any connection with the merits of the proposed amendments. In this regard, the 90-day proscription on the second reading has deprived most parliamentary initiatives of the momentum they needed and most bills have been abandoned as the political motivations for them dissipated. Excluding what is described later in this analysis, namely the BBI Bill, there have been other two non-government supported ‘popular initiatives’, one called ‘OKOA Kenya’ (Save Kenya) and the other called ‘Punguza Mizigo’ (Reduce the Load). OKOA Kenya, a venture by the opposition leader Odinga, was vetoed by the electoral body, the IEBC, on the grounds that the IEBC was unable to verify the signatures. For its part, the other popular initiative, Punguza Mizigo, was rejected by the county assemblies partly because its promoters, a political party called the Third-way Alliance, did not have the numbers in any county assembly. In fact, some of the proposals in the initiative were to reduce the number of county assemblies and the positions that its members held. Thus, no successful attempt to amend the CoK had occurred by the time the BBI constitutional amendment process was conceived, as we discuss in a segment below.

1.2 Israel

By contrast, the constitutional structure in Israel is extremely flexible. Lacking a formal rigid Constitution, the unentrenched Basic Laws allow frequent constitutional changes in Israel to occur rather easily. The background for understanding the constitutional instability is, nonetheless, important.

The Declaration of Independence of 14 May 1948 explicitly stated that the Israeli regime would be based on a constitution, and a Constituent Assembly was thus elected for that purpose. However, after deep political disagreements over the need to adopt a formal, written constitution at that stage, on 13 June 1950, the Knesset (the Israeli Parliament) adopted the ‘Harari Decision’. According to the Harari Decision, instead of completing the constitutional project immediately, the Knesset, which holds both legislative and constituent powers, would enact Basic Laws in stages and dimensions: 493.2x705.8 [64x618] These previous efforts were not successful due to the inability to meet the technical requirements for an amendment and due to purely political reasons that did not have any connection with the merits of the proposed amendments. In this regard, the 90-day proscription on the second reading has deprived most parliamentary initiatives of the momentum they needed and most bills have been abandoned as the political motivations for them dissipated. Excluding what is described later in this analysis, namely the BBI Bill, there have been other two non-government supported ‘popular initiatives’, one called ‘OKOA Kenya’ (Save Kenya) and the other called ‘Punguza Mizigo’ (Reduce the Load). OKOA Kenya, a venture by the opposition leader Odinga, was vetoed by the electoral body, the IEBC, on the grounds that the IEBC was unable to verify the signatures. For its part, the other popular initiative, Punguza Mizigo, was rejected by the county assemblies partly because its promoters, a political party called the Third-way Alliance, did not have the numbers in any county assembly. In fact, some of the proposals in the initiative were to reduce the number of county assemblies and the positions that its members held. Thus, no successful attempt to amend the CoK had occurred by the time the BBI constitutional amendment process was conceived, as we discuss in a segment below.

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those would eventually comprise the Israeli constitution.\textsuperscript{32} Until the early 1990s, the Knesset enacted several Basic Laws that regulated governmental structure and institutions. Moreover, the High Court of Justice (HCJ) served as a legal defender for unwritten common law rights and freedoms despite there being no entrenched bill of rights. Yet, the prevailing approach was that of legislative supremacy.\textsuperscript{33}

In 1992, the Knesset enacted two significant Basic Laws on human rights: the Basic Law: Human Dignity and Freedom, and the Basic Law: Freedom of Occupation. These two Basic Laws provided substantive limits on the legislative powers of the Knesset by stipulating conditions for any infringement of protected constitutional rights. Three years later, in the pioneer judgment of \textit{United Mizrahi Bank v. Migdal Cooperative Village},\textsuperscript{34} the Supreme Court held that the Basic Laws hold a normative constitutional status superior to ordinary laws and that the Court has the power to conduct judicial review and invalidate unconstitutional legislation. This judicial decision marked a constitutional revolution.\textsuperscript{35}

In light of this constitutional revolution, the Israeli constitutional order is a rather bizarre one: the Basic Laws carry a constitutional status, although they are not entrenched and may be amended according to the ordinary legislative process just like any other law.\textsuperscript{36} The procedure for enacting a Basic Law is identical to that of a regular law; the process of enacting Basic Laws does not involve any special procedures. All of the Basic Laws have been enacted in accordance with the procedure required for enacting regular laws, and most of them do not prescribe any special procedures for their amendment or variation. The exceptions are the Basic Law: The Knesset, which specifically limited the Members of Knessets’ (MKs) ability to modify particular sections thereof;\textsuperscript{37} the Basic Law: Freedom of Occupation; the Basic Law: the Government; the Basic Law: Referendum; and recently the Basic Law: Israel as the Nation State of the Jewish People. All of them include an ‘entrenchment clause’ under which that Basic Law cannot be amended other than by a Basic Law passed by a majority of 61 MKs (out of 120).\textsuperscript{38} Of course, this is not a difficult bar as any coalition, at least in theory, will possess this majority. But the Court exercises strong powers of judicial review. So, while the constitutional laws are enacted in the British

\textsuperscript{32} See e.g. Hanna Lerner, \textit{Making Constitutions in Deeply Divided Societies} (Cambridge University Press, 2011) Ch 3.


\textsuperscript{34} CA 6821/93 \textit{United Mizrahi Bank Ltd. v. Migdal Cooperative Village}, 49(4) P.D. 221 (1995).


\textsuperscript{36} For an elaboration, see Navot (fn 31).

\textsuperscript{37} Section 46 provides that a direct change (amendment) of sections 4, 44 and 45 must be done by way of a Basic Law adopted by a majority of 61 votes in three readings. Mention should also be made of section 9A, which states that the extension of the term of the Knesset must be anchored in a law passed by a majority of 80 members, although this particular section is not entrenched (so that in principle, the Knesset can change this law by a regular majority, and that the majority required for an extension of its term is smaller).

\textsuperscript{38} Section 7 of Basic Law: Freedom of Occupation, \textit{SH} 5754, No 1454, at 90 (from 1994).
style, the judiciary applies an American style of judicial review over primary legislation.\textsuperscript{39}

Given that most Basic Laws do not include an entrenchment clause or a majority requirement, it would seem that theoretically any non-entrenched Basic Law may be modified or even nullified by a simple majority of only one MK. This is, in fact, the biggest weakness of the current Israeli constitutional structure: amendment of the Basic Laws or the enactment of new Basic Laws requires no special majority, so that a vote with just a few MKs present could modify or amend a basic law, or even enact a new one. It is not only possible for ordinary legislation to be passed relatively easily and for the furtherance of narrow political interests, but it is also possible for constitutional legislation.\textsuperscript{40}

To demonstrate the over-flexibility of the Israeli constitutional order, in 2020 alone, nine amendments to the Basic Laws were made. Since 2013, over 30 amendments to the Basic Laws have been enacted and three new Basic Laws have been introduced; in other words, more constitutional changes have occurred in Israel in the last nine years than throughout American history!\textsuperscript{41} Moreover, Basic Laws are sometimes changed in an expedited manner. For example, Amendment No. 5 to the Basic Law: The Government, which dealt with the position of deputy ministers, passed in the Knesset on 10 January 2018 within 35 hours of it being introduced. As Dr Amir Fuchs describes it:

Try telling a citizen living in a constitutional democracy about a constitutional amendment, which included a first reading on Monday morning, a quick discussion at 8:00 a.m. in the Constitution and Law Committee (decided urgently the day before), and a second and third reading on Tuesday afternoon, and you get shock and amazement. The Legislature (and in this capacity, the constitutional legislature) amended the constitution, solely due to a specific personal political need, within a day and a half and with almost no serious debate in the Knesset, let alone a public debate.\textsuperscript{42}

Many of the constitutional amendments have also been enacted as temporary measures to accommodate narrow and urgent political needs.\textsuperscript{43}

With this flexibility in mind, and with the absence of any unamendable provisions or of a responsible amendment culture,\textsuperscript{44} judicial supervision of constitutional norms through a doctrine of implied limitations is arguably necessary if some stability in the existing constitutional arrangements is to be achieved. Where the overly flexible legislative process is controlled by the government, and where there is no rigid

\textsuperscript{40} This is what Ariel Bendor calls ‘the unbearable lightness with which changes can be made in basic laws’. See Ariel Bendor, ‘Flaws in the Enactment of the Basic Laws’ (1994) 2 Law & Government 443 (Hebrew).
\textsuperscript{42} Amir Fuchs, ‘Only Israel the Constitution is Amended in a Bizarre way’ (Haaretz, 17 January 2018), (Hebrew), available at: <https://www.haaretz.co.il/opinions/premium-1.5744040> (accessed 1 June 2023).
\textsuperscript{44} On the importance of culture to the rigidity of constitutional arrangements, see Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty’ (2015) 13 ICON 686.
constitution or political checks and balances in place, the only real balancing authority to the power of the majority government is the Supreme Court. In Israel, the legislature holds a dual authority — both legislative power and constituent power — with no procedural distinction. A Basic Law can be enacted without delay and through an ordinary majority, and the Government de-facto controls the legislative process through strong coalition discipline. This composition causes the mingling of the longer-term issues of constitutional planning with the short-term interests of political power, and increases the risk of a misuse of constituent power for short-term political interests or convenience, as is discussed in the next section of this article. With a single chamber in the legislature and a lack of procedural restrictions, the authority of the Supreme Court to review Basic Laws may be a central part of its ability to protect fundamental rights and the stability and structure of the constitutional order.45

2 BBI AND BIBI: POLITICAL SETTLEMENT

2.1 The Kenyan case

Given the two dominant political blocs that have often characterized Kenya’s political scene since 2007, it seems to have been an uphill battle to effect an amendment to the CoK through the veto institutions. The constitution-making process which sought to address long-standing problems of governance had itself become unsuccessful until a coalition government was put into place in 2008 following the disputed 2007 presidential election. The protracted constitution-change process that started in the early 1990s only materialized after the 2008 political settlement between the government and the opposition.46 Prior to 2008, there had been a somewhat unending constitution-making process that included the ‘Bomas Process’ (led by Professor Yash Ghai) and the Attorney General Amos Wako’s ‘Kilifi Draft’.47 The Bomas Process, which occurred between 2000 and 2003, was aborted for various reasons, including by a declaration of invalidity that ensued from the High Court judgment, Njoya & Others v. Attorney General & Others.48 The Court declared that the attempt at a constitutional substitution process that excluded the Kenyan people was unconstitutional.49 On the other hand, the 2005 draft which emerged from the Kilifi process was presented to the people and rejected in a referendum.50 Hence, the two main processes did not yield a constitution.

In 2008, Kenya plunged into post-election violence following claims of electoral irregularities and a refusal by the opposition to present their grievances to the courts for adjudication. The opposition leader, Raila Odinga, called for mass protests which involved

47. See Alamin M. Mazrui, Cultural Politics of Translation: East Africa in a Global Context (Routledge, 2016) 125.
50. See Joe Khamisi, Dash before Dusk: A Slave Descendant is a Journey in Freedom (East African Educational Publishers, 2014) 213.
the destruction of property as well as ethnic violence. The international community intervened through what was later called the ‘Annan-led mediations’. These mediations, led by Kofi Annan, were undertaken under certain themes, one of which was dubbed ‘Agenda 4’, i.e. long-term reforms. The reforms in question included a new constitution and it was implemented immediately after a peace pact in which a grand coalition government was created with Mwai Kibaki as the President, and Raila, who had come second to him, as the Prime Minister; they would govern as co-principals. The newly formed government created a legal framework for constitutional rewriting that resulted in the 2010 Constitution.\(^{51}\) Thus, political settlement helped to produce a new constitution in Kenya. Political settlement is therefore not inherently detrimental to constitution building, particularly in the absence of short-term and self-serving ambitions among the agreeing elites.

As we demonstrate later, it was apparent that the proposal to amend the CoK through the Constitution of Kenya (Amendment) Bill 2020 was different from previous attempts, having been birthed by a political settlement, and was bound to succeed had it not been for judicial intervention. The precursor to this political settlement was that the opposition, led by Odinga, boycotted a repeat presidential election and instead resorted to calls for economic sabotage measures and to holding a parallel presidential swearing-in ceremony.\(^{52}\) This was after the Supreme Court had nullified the main election. The deepening political and looming economic crises were resolved when President Kenyatta and Odinga entered into a settlement now called the ‘Handshake’.\(^{53}\) The President, acting under the Handshake, established a taskforce to collect views from the country on how to address the political and governance problems that had been fronted by the opposition as justification for their measures. That taskforce came to be known as the ‘BBI’.

While certain recommendations of the BBI Taskforce were thought of as capable of being implemented through legislative and policy review, others ostensibly required formal constitutional amendments.\(^{54}\) Proposals that were thought of as requiring a constitutional amendment were consequently reduced into a Constitutional Amendment Bill. Also, the proponents of the constitutional change chose the popular initiative route rather than the parliamentary one, though not for any known special reason. Assessed as whole, this Bill had far-reaching implications for the structure and form of government and touched many aspects of the CoK such that it invariably required a referendum approval by virtue of Article 255. After reverification of the signatures, the Bill was presented to county assemblies for approval. It is noteworthy in this regard that members of the county assembly


were promised ‘car grants’ towards the purchase of vehicles for personal use, by both opposition leader Raila and President Kenyatta if they passed the bill — and pass it they did indeed.55

Therefore, while the political settlement was presented as the vehicle for fostering national unity, it turned out to be self-serving in that it became the basis for political mobilization against the then Deputy President, William Ruto, who had already been informally sidelined in favour of Raila. Raila had been assured of support by President Kenyatta in the run-up to the 2022 presidential elections.56 The idea, therefore, behind the expansion of the executive prior to the elections had something to do with accommodating major ethnic political kingpins or figures for the sake of winning the 2022 elections. Rather than a political settlement aimed at creating national unity, this seemed like an elite political settlement aimed to benefit the two political leaders. As The Economist has interpreted the events:

On the surface the BBI seemed a worthy enterprise. It was purported to be the glue that held the reconciliation between Messrs Kenyatta and Odinga together … Yet it was little more than political expediency that underpinned the reconciliation. For the president it defused a nasty crisis, shored up his tiffy legitimacy and neutralised an opponent. Better still, it offered a handy opportunity to ditch his deputy president, William Ruto … Mr Odinga also benefited. After four failed bids for the presidency, he appears to have concluded that a share of power was better than none at all. More important, the president would now presumably back him rather than Mr Ruto as his successor in the election next August, when Mr Kenyatta is required to stand down. A deal built on rank expediency needed a cloak of respectability, however. Mr Odinga had to justify to his supporters his reconciliation with the man he accused of thrice cheating him. The bbi helped cover the stink. Kenya’s ethnic and political divisions could be presented not as man-made but the result of surmountable constitutional flaws. A popular initiative to fix these would usher in a new era of peace and prosperity and allow its architects to cast themselves as saviours.57

The political bargain was regarded as an ‘elite capture’, driving the BBI constitutional reform for personal benefits.58 This brings us to the popular initiative to amend core provisions of the CoK, a process that also requires a referendum for its ratification.

The referendum requirement could be seen as a counter-measure against potential abuse of the amendment power by political institutions, even in the face of political settlement. However, constitutional processes are inherently political in nature, especially in states that are not ‘fully democratic’, and even where there are participatory processes, they may need to be insulated from manipulation by the elites. For instance, much scholarship in Africa decries the capture of constituent power even in cases

55. Patrick Lagat, ‘SRC approves car grants for MCAs and county assembly speakers’ (Nation, 10 February 2021).
where constitutional assemblies and referendums are involved.59 These devices, it is suggested, are often utilized by political elites in order to claim sociological or legal legitimacy associated with popular constitutional authorship even if, as is always the case, the ruling elites simply impose their preferred models.60 In these cases, there is never a serious intention that involvement of the ‘people’ should inform or even change a desired outcome. For instance, in a study on referendums in Southern and East Africa, Norbert Kersting, while acknowledging the contribution of referendums in Africa on one hand, has also cautioned that:

Most referendums in East and Southern Africa are aimed less at fair decision-making than at strengthening incumbent authorities and are, in the main, presidential plebiscites. Populist policies are connected in an effort to strengthen the executive…The head of the executive controls the electorate and expects certain results.61

This conclusion may be qualified in the Kenyan context given the events of 2005 when a referendum rejected a proposed constitution, but that case was exceptional because of a split in government and the absence of well-mobilized opposition co-optation.

In the BBI situation, opposition co-optation through the BBI ‘handshake’ had provided the numbers necessary to overcome the supermajority requirements. Internal division within the ruling party, the Jubilee Alliance Party, were overcome as main figures turned their eye to the 2022 general elections. As we have also observed, incidents such as promising members of the county assemblies car grants in exchange for voting for the bills characterized the exercise. All these events arguably call for scepticism on the integrity of the referendum as a veto mechanism and, if taken into account, supply a greater justification, on theoretical grounds, for the courts to scrutinize amendments on their substance as a way of hedging against self-serving amendments generally.62

2.2 The Israeli case

The last four years in Israel have been characterized by a fusion of at least four crises: a constitutional crisis, a political-governmental crisis, COVID-19, and another major constitutional crisis with dramatic judicial overhaul reforms launched in early 2023.63

At the time of the pandemic’s outbreak, a long-time caretaker government had been in

60. Ndulo Ibid.
62. For an argument that even when the people are included in the amendment process through a referendum they act as a limited constitutional organ and may even be subject to judicial review, see Roznai, ‘We the limited people’ (fn 9).
power due to an unprecedented political deadlock. For the first time in the history of Israel, on 2 March 2020, a third parliamentary election took place in the span of 12 months. This round of elections occurred after the previous two rounds (which were held on 9 April 2019 and 17 September 2019) failed to successfully produce a sustainable government, as none of the leading candidates was able to get enough supporters from the Knesset to form a coalition. Throughout this period, Benjamin (Bibi) Netanyahu of the Likud Party remained the caretaker Prime Minister. The political situation was complicated mainly because a month before the third elections were held, an indictment was filed against incumbent Prime Minister Netanyahu based on bribery, fraud, and a breach of trust.

The third round of elections in March 2020 was no different. None of the Knesset Members were able to obtain the required support in order to form a government. However, the results of the March 2020 election did grant a narrow parliamentary majority to a party bloc led by the Blue and White party, which was under the leadership of Benjamin (Benny) Gantz. As a result, Gantz was granted by the President the mandate to assemble a coalition.

On 16 March 2020, the 23rd Knesset was sworn in but before the Knesset committees were formed, the caretaker government began to exercise emergency powers to address the COVID-19 crisis. The two major parties began negotiating a broad government, yet alongside the negotiations, the Blue and White party sought to take advantage of its slim parliamentary majority to elect a permanent Speaker for the Knesset on its behalf and to establish Knesset committees on the basis of the balance of power between the two political blocs.

At that time, the incumbent Speaker of the Knesset, Yuli Edelstein from Likud, was still in office due to the constitutional rule of continuity which requires that the incumbent Speaker remain in place until the Knesset elects a permanent replacement. Nonetheless, Edelstein was not willing to put the requests by 61 MKs (out of 120) to introduce a vote on his replacement on the Knesset’s agenda. In a decision on 23 March, an extended bench of five judges unanimously held that the Speaker’s continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermined the foundations of the democratic process and ordered that the Speaker convene the Knesset plenum as soon as possible for the purpose of electing a permanent Speaker for the 23rd Knesset by no later than 25 March 2020. Following the judgment, Edelstein announced his resignation and adjourned the session, thereby preventing an election for his replacement. In doing so, Edelstein violated the Court’s order. After an urgent hearing held on 25 March 2020, the Court heavily criticized the disobeying of its judicial order and ordered that the longest serving MK be granted limited, defined authority to convene and preside over a plenum session


during which the motion for the election of a permanent Speaker would be set on the agenda.

The next day, another political bomb landed, as Benny Gantz nominated himself for the position of Speaker and was indeed elected as the Speaker with the support of Likud, a move which caused the split of the Blue and White party. This move led to a power-sharing deal to form a national emergency government against the backdrop of the COVID-19 pandemic. Accordingly, a coalition agreement between the rival parliamentary groups, the Blue and White party and the Likud, was signed. According to the agreement, the government will be a rotating one; during the government’s first 18 months, Netanyahu would serve as Prime Minister and would then be replaced by Gantz. This coalition agreement was challenged before the HCJ, but on 6 May 2020, the HCJ unanimously rejected the petitions, paving the way for the new government. The government was sworn on 17 May 2020.

This was not the first time a model of rotating government has appeared in Israel. In fact, Israel has a history of power-sharing coalitions in situations of a political tie. However, in contrast with past rotating governments that were based solely on political agreements, the recent political polarization meant that reliance on coalition agreement alone for the purpose of forming a government was no longer sufficient. This political partnership was characterized by acute distrust and by the fear of further elections, leading to a situation where the coalition agreements, with regard to the political settlement concerning the formation of the government, required a very strong legal anchor. This eventually led to its entrenchment via a constitutional amendment. This was the background to Amendment No. 8 to the Basic Law: The Government, which established the ‘rotating government’ model and was enacted on 7 May 2020. While the model of rotating government has been previously recognized in the Israeli constitutional culture, Amendment No. 8 was dramatic because it transformed the form of government.

Amendment No. 8 stipulates a rotating government as an alternative model to the regular one person prime ministership. For that purpose, it entrenches a new ‘Alternate Prime Minister’ who is another Knesset Member. The Alternate Prime Minister is ‘a member of the Knesset who is to serve as Prime Minister in an exchange government and a Member of the Knesset who served in the same rotating government before the rotation’. The Prime Minister’s authority in a rotating government to dissolve the Knesset requires the consent of the Alternate Prime Minister.

The political significance of such a rotating government is in the requirement — in the Amendment itself — that the political affiliation of government ministers must to be both to the Prime Minister and the Alternate Prime Minister, equally and separately. Thus, the amendment states that in such a government, ‘every minister and deputy minister shall be identified as having an affiliation with the Prime Minister or the Alternate Prime Minister’, and that ‘the number of ministers identified as having an affiliation with the Prime Minister shall be equal to the number of ministers identified as having an affiliation with the Alternate Prime Minister’.

Amendment No. 8 reflects a development in which ordinary politics — in the narrowest sense of provisional agreements to enter a coalition — is nowadays

68. The political situation in Israel was compared to that of Ireland. See Ofer Kenig, ‘Ireland Finally Has a Government!’ (The Israel democracy Institute, 2 July 2020).
characterized by a deep mistrust which does not allow for democratic reciprocity and consent. This distrust led the party leaders to choose a path of significant structural amendment to the Basic Law which has anchored the mandate and the political power of the two main party leaders in the new rotating government.

The political urgency in amending the Basic Law was also reflected in the amendment process. Amendment No. 8 was rapidly enacted in the span of two weeks. After it was submitted to Parliament on 23 April, it was published as a Bill on 30 April, and was enacted on 5 May. This fast-tracked legislative process did not include any serious constitutional deliberations or in-depth analysis of the implications for the governmental structure, for ministerial and other constitutional accountability, for prospective influence on the party system, or for any other questions relevant to such an amendment. In contrast to constitutional amendments where the purpose is prospective and long-term, in the present case, it was clear that this was a constitutional amendment that served the narrow political interests of two political leaders for the purpose of forming a government that would be sworn in immediately after it was legislated. The entire constitutional structure of government was mutilated to accommodate the narrow political interests of two politicians.

3 JUDICIAL REACTIONS: THE SIMILAR AND DIFFERENT PERSPECTIVES

3.1 Kenya and the judiciary to the rescue

In the Kenyan case, before the BBI Bill could be presented in a referendum, its constitutionality became the subject of vigorous judicial controversy. Several petitions were filed in the High Court of Kenya (HCK) challenging its constitutionality on various grounds, including that the bill offended the basic structure doctrine. The lead petition was David Ndii & Others v. Attorney General & Others. Amidst growing political inertia for a referendum, the HCK, in a decision handed down on 13 May 2022, declared the Bill unconstitutional and held that the basic structure doctrine was applicable in Kenya in respect of the ‘core edifice, foundational structures and values of the constitution’. In the Court’s assessment, the text and structure of the CoK, as well as its context and history, justified the application of the basic structure doctrine. The doctrine protected certain ‘fundamental aspects of the constitution’ from amendment through either the secondary constituent power or the constituted power, aspects which could only be amended through a process akin to constitution-making, with the exercise of primary constituted powers. In other words, it did not matter that a referendum was part of the amendment formula in respect of certain ‘matters’ contemplated under Article 255. The HCK found that there is, nonetheless, an implied substantive limit on the amendment power. There were several other unconstitutional aspects in the BBI process, including that the president could not resort to the popular initiative route and that there was an absence of public participation.

69. For elaboration, see Roznai (fn 9).
71. Ibid at para 474(g).
72. Ibid.
73. Ibid at para 784.
It was essentially this decision of the HCK that halted the rallies that were already in place to mobilize support for approval of the Bill at a referendum. The government, through the Attorney General, the IEBC, the President and the BBI Secretariat, filed appeals to the Court of Appeal of Kenya (CAK) seeking to set aside the decision of the HCK in its entirety and to allow the Bill to be subjected to a referendum. The CAK delivered its judgment on 20 August 2022, with each of the seven judges of appeal — Musinga, Nambuye, Okwengu, Kiage, Gatembu, Sichale and Tuiyott — writing separate opinions. With the exception of Justice Sichale, the other judges of the CAK upheld the decision of the HCK, further justifying the application of the basic structure doctrine in Kenya as a substantive limit on amendments. The emphasis was mostly on a distinction between amendment and dismemberment, with the largely shared view being that the basic structure doctrine could be invoked by courts to declare an amendment that destroyed the constitution’s identity, or which altered it radically, as unconstitutional. For his part, the Court of Appeal’s President, Musinga, who summarized the findings of the Court, observed as follows:

As for justification for the courts intervention to halt the amendment, it is my opinion, as did the Judges that the impugned Bill attempts to alter fundamental aspects of the CoK, 2010 akin to completely overhauling certain provisions and clauses which if passed, would have explicitly changed the CoK, 2010 and given it a new identity, affecting the constitutional pillars namely separation of powers, independence of the Judiciary and the independence of independent constitutional commissions among others.

While the Court of Appeal, by a majority, set aside certain HCK findings, such as the finding that civil proceedings could be instituted against the President for acts done contrary to the CoK, it largely upheld the main findings of the HCK. The overall effect was that the Bill, as well as the processes set into motion to amend the constitution, were found to be unconstitutional. The decision of a majority of the Court of Appeal judges was ultimately appealed against in the Supreme Court of Kenya (SCK), chiefly by the Attorney General and the IEBC.

The SCK disagreed with and overturned the decisions of both the HCK and the majority in the CAK. In other words, it upheld the minority opinion of Justice Sichale of the CAK, who had held in her dissent that the basic structure doctrine was not applicable to Kenya. Nevertheless, the Supreme Court judges offered a somewhat broader basis for finding that the basic structure doctrine was inapplicable in Kenya. The various opinions by the majority SCK judges were to the effect that Chapter 16 of the CoK was comprehensive, leaving no gap which justified the application of the doctrine. The position of the SCK was also that the basic structure doctrine is a foreign notion and that the main concern for the drafters of the amendment power was the issue of ‘hyper-amendability’, but that this is resolved in the new


75. Opinion of Musinga P at Page 63. For Kiage JA, ‘the basic structure doctrine is legitimate and sound. I would think it strange that anyone would doubt the existence of a basic, fundamental, essential core being the pillar upon which our Constitution stands, and from which its character, ethos and identity flows’ at p. 80.

76. See para 495.

77. See para 48, Opinion of Justice Sichale.

78. See para 189.
Constitution through the rigid mechanisms of amendment. The idea that the basic structure doctrine is a foreign notion strongly emerges from Chief Justice Martha Koome’s opinion. She justified the use of ‘foreign laws and doctrines’ on the condition that ‘local statutes’ left a void and then faulted the CAK for failing to analyse the provisions of Chapter 16 in order to arrive at an independent conclusion of ‘whether it was necessary to call in aid a foreign doctrine’. Justice Ibrahim of the SCK nevertheless dissented, agreeing with the HCK and the majority CAK judges that some of the fundamental features of the Constitution could only be amended through the use of the primary constituent power. The SCK, by a majority, upheld the finding of unconstitutionality of the BBI Bill on the basis that the President could not resort to the popular initiative route.

In sum, the BBI process could not continue as courts at various levels found the Bill or the processes leading to it to be unconstitutional. In the decisions of the HCK and CAK, there were reasons to invoke implicit substantive limits on the amendment power generally. It is arguable that that even though the SCK found that the basic structure doctrine was inapplicable, the momentum towards constitutional change had already been lost which justified, for its part, a more restrained approach. All in all, the courts forestalled an initiative towards radical constitutional change amidst a political settlement.

### 3.2 Israel and the judiciary’s green light

Compared to the Kenyan cases, the judicial response in the Israeli case was completely different. The constitutionality of Amendment No. 8, which formed the alternate government, was challenged before the HCJ. Due to the importance of the case and the legal questions it raised, the HCJ decided to expand the panel that heard the petition to nine judges. Moreover, in light of the high level of public interest in the case, on 27 October 2020, the HCJ held live hearings of the various petitions. It took almost a year and on 12 July 2021, the nine-judge panel of the HCJ rejected the petitions against the 2020 amendment to the Basic Law: The Government, anchoring the establishment of a rotating government with the position of alternate prime minister.

In order to understand reluctance of the Court to intervene in this delicate case of ‘unconstitutional constitutional amendments’, one has to grasp the Israeli constitutional context of the subject matter. Until this case, the Israeli court had never formally adopted a doctrine akin to the ‘basic structure doctrine’ and, a fortiori, has never invalidated a constitutional amendment, notwithstanding various statements in obiter dicta concerning the limited constituent authority of the Knesset. Adoption of such a comprehensive doctrine was perceived to be problematic where there is no formal constitution and the constitution-making process is itself still in the making. At most, it was suggested that it is only the core and narrow values of the state as a Jewish and Democratic one that may be protected from change, even by constitutional legislation.

79. See para 200 as well as para 405.
80. Para 745.
82. See Navot and Roznai (fn 45).
However, on September 2017, an expanded panel of seven judges of the HCJ issued a notice of invalidation to a Temporary Order that amended a Basic Law to establish a biennial budget (for the fifth time). In that case, the Court held that amending the Basic Law by temporary orders, time after time and under the current circumstances, constituted a misuse of constituent power that justified judicial intervention.\(^{85}\)

Justice Rubinstein, writing for the majority, held that when there is an abuse by the majority of the constitutional text, the political need must retreat in face of the constitutional core; that is, the principles derived from and the legal importance of the Basic Laws, which are constitutional documents.\(^{86}\)

Against the backdrop of such statements, the petitions against the amendment establishing the rotating government claimed that this was a misuse of constituent power. It was also thought that it violated the basic values of the state as a democracy. The majority of the Court was, nevertheless, not convinced. It held that Amendment No. 8 did not amount to the denial of the basic characteristics of the state as Jewish and Democratic, and thus did not warrant judicial intervention. Moreover, it was not considered a misuse of the Basic Laws. There was, however, one important minority opinion written by Justice Hanan Melcer. According to Justice Melcer, the provision of the amendment that provided that the amendment be entered into force immediately with the 23rd Knesset should be repealed. He held that such a dramatic amendment of a Basic Law amounts to ‘changing the rules of the game while it is still being played’, and thereby constituted a misuse of constituent power. Such amendments should only apply prospectively to future Knessets or Governments. Yet he remained the sole dissenting voice.

But what could the Court have done? If the amendment to the Basic Law: The Government did not affect the core of Israel as a Jewish and Democratic State, how could it intervene? We find one of the arguments that was raised by the Movement for Quality Government in Israel against the amendment especially appealing. According to the petition, there is a distinction between constitutional replacement and constitutional amendments. After reviewing the ‘constitutional replacement doctrine’ in Colombia, according to which the power to amend the constitution does not imply the power to replace it, but only to modify it,\(^{87}\) the petition argued that ‘where the constitutional amendments amount to a fundamental change of government, these are not “amendments” but are rather constitutional replacements in which the court has a duty to intervene. Since the authority of the Knesset to amend the Basic Law is an authority that is derived from the Basic Law itself, it is limited and cannot bring about a replacement of the Basic Law with a new one.’\(^{88}\)

This argument carries force as it is semi-procedural. According to this argument, one cannot amend a basic law in a manner that would defectively replace the existing

86. Ibid.
Basic Law with a new one. In the past, when the Knesset wanted to make a new substantial change in the form of government — namely, the introduction of a direct vote to the Prime Minister in 1992 — it explicitly replaced the older Basic Law from 1968 with a new one. It did not make this fundamental change through an amendment of the old Basic Law. Similarly, when the Knesset decided to remove the direct vote and to return to the previous voting system, it repealed the old Basic Law and enacted a new Basic Law: The Government in 2001. Likewise, arguably, one cannot introduce an entirely new Basic Law: The Government by dressing it as an amendment to the existing Basic Law: The Government. In other words, in light of the magnitude of the change introduced by Amendment No. 8, the government should have enacted a new basic law instead of amending the old basic law. Such an argument has relevance to the legislative process. Although the procedural threshold would be the same, at least formally, introducing into parliament and to the public a completely new Basic Law would surely carry a much greater weight and visibility than a change that claims to be a mere ‘amendment’, and would be accompanied by a much wider political and public debate. However, the Court was unconvinced by this constitutional replacement/amendment argument that the derived constituent authority of the Knesset cannot introduce a new Basic Law by amending the Basic Laws. Instead, the Court gave the green light to this fundamental constitutional change.

4 IMPLICATIONS ON STABILITY OF STRUCTURES AND CONSTITUTIONAL IDENTITY

We argue that the two constitutional reforms discussed in this article had, or had the potential of having, a dramatic effect on the structure and identity of the constitutional orders of Israel and Kenya respectively. Rather than constitutional amendments, each of these proposed amendments was, in reality, what Richard Albert has termed ‘constitutional dismemberment’ — a proposed change that has the form of an amendment but it is ‘incompatible with the existing framework of a constitution because it seeks … deliberately to disassemble one or more of a constitution’s elemental parts’ and, in our cases, because it alters the ‘load bearing structure’.90

Given the likely success of the BBI process had it been allowed to continue, and taking into account the constitutional history of Kenya, especially the change through the CoK to a ‘pure’ presidential system, we argue that the BBI amendment could have had a profound effect on Kenya’s constitutional structures and identity. While the structure of government in the CoK is not in itself peculiar to Kenya, a consideration of Kenya’s evolving constitutional history strongly suggests that the structure is part of its constitutional identity. In this regard, constitutional dismemberment in Kenya in the 1960s had seen the country change its system of government from a Westminster parliamentary system headed by a prime minister to a parliamentary republic system under a president who was also a member of the legislature.91 It is during this parliamentary republic system era that Kenya was turned into a single party dictatorship. In the early 1990s, following the Third Wave of Democratisation, Kenya embarked

90. On The Dismemberment of Constitutional Structure, see ibid at 44–46.
on a constitution-making process that became protracted, spanning over two decades. At the end of the exercise, a decision was made to oust members of Parliament from the executive and vice versa, considering that executive capture of the legislature and its attendant inability to check the executive had been one of the longstanding governance problems that faced Kenya. The structure of government espoused in the CoK is thus inextricably intertwined with the struggle for constitutionalism in Kenya and, indeed, can be said to be part of its constitutional identity.

Indeed, the BBI proposed more than 70 amendments to the CoK in one go. Although there were many interventions proposed in the Bill, reformulation of the executive appears to have been the key one. This involved changing the nature of the executive through introducing the office of prime minister and two deputy prime ministers. In addition, the cabinet would be drawn from parliament, implying that the country was bound to change from a pure presidential system to the previous semi-parliamentary one. This would mark a return to the pre-2010 constitutional arrangements, especially those that occurred between 2008–2010, and, in doing so, destroy the cumulative consensus on the nature of government that had taken place over the decades long search for a new constitution. The formal justifications given for intervention was the need to ‘broaden the executive to achieve inclusivity, cohesiveness and unity for the benefit of the people’. However, the real reason behind the amendment, as already observed, appears to have been a self-serving desire to accommodate the interests behind the Handshake following the 2022 elections. This supports the argument that in Kenya, constitutional bargaining serves the executive dominance of the incumbents and of other political leaders.

In the Israeli case, the amendment of the Basic Law led to a transformation of the form of government and created a new model of dual prime ministers. As explained, although Israel has had previous experience of a ‘unity government’, this model goes far beyond that. In a recent study, Dr Maoz Rosenthal compared the alternate government to the rotating governments that existed in Israel during 1984–1988 in order to explore the question of whether the amendment was truly a significant institutional change. After all, the very existence of a previous rotating government between two prime ministers provides the basis for the argument that the new rotating government, with alternating prime ministers, does not in fact constitute a regime change. For example, in its response to the HCJ, the Blue and White party claimed that the legal establishment of the rotating government and the Alternate Prime Minister was not a move with far-reaching constitutional consequences since there have already been governments in the past with rotations between prime ministers. According to this position, the difference here is simply the anchoring of the rotation arrangement in legislation and not by the coalition agreement alone. However, Rosenthal showed that the very idea of an Alternate Prime Minister is a major difference between the new rotating government model and those that took place in the 1980s. Under the new model, there are two prime ministers, one who is in office and the other who is an alternate, and both of them have

92. Memorandum to the Bill.
a constitutionally higher status than the other ministers. Both are regarded as prime ministers from the inception of the government and the Knesset conducts a vote of confidence in both. This marks a significant difference in the executive-legislature relationship. In the 1980s unity government, the Knesset conducted a vote of confidence in one prime minister and then, in order to facilitate the rotation, had to vote once again for the alternate prime minister. Therefore, from a regime point of view, there has been a dramatic change that did not exist before: there are now two prime ministers simultaneously holding veto power, with the status of both as the head of the executive authority and with each responsible for his own ministers. Maoz notes that the decision to appoint two members from the competing parties for the position of Prime Minister is a rare event that does not occur frequently in political systems.

The significance of the governmental change in the recent case is also visible with the passage of time. What started as an emergency — a one-time deal — soon became the default model. As we noted, it was designed as part of the unity coalition agreement between Likud leader Bibi Netanyahu and the Blue and White party’s Benny Gantz in 2020. It created the Alternate Prime Minister’s office, which was supposed to have been held by Gantz for 18 months and then be transferred to Netanyahu as part of a power-sharing deal. This new model was only meant to be one possible course when establishing a new coalition. In other words, establishing a regular government with a single Prime Minister and without alternation always remained a possibility. This was one of the reasons why the Court rejected the petitions against the amendment. How can this be a radical transformation in the form of government if establishing a regular form of government always remained an option? However, this argument ignores realpolitik. Once this option of power-sharing was included as a legitimate option in the Basic Law, why would any politician in the future settle for the position of Minister of Defense or of Foreign Affairs when he or she can negotiate to be the Alternate Prime Minister? Indeed, this form of government has been maintained by the current government to anchor a similar rotational agreement between Yamina chair Naftali Bennett and Yesh Atid leader Yair Lapid, even where Bennett’s party holds only (yet crucially) six seats in the 120-member parliament. This new form of government, created by a dramatic constitutional amendment that was enacted in the span of two weeks, has far-reaching implications. It is the result of tinkering with the Basic Laws to further narrow political interests. In retrospect, the petitions against the amendment were correct — this was a dismemberment of the Israeli constitutional order.

Though constitutional identity may also relate to the religious or secular character of the state or its ideological vision, the focus of this article has been on relationship between the structure of government and constitutional identity. The link between structure and identity is visible. Consider, for example, Article 4(2) of the Treaty on European Union that explicitly refers to national constitutional identities of the nation states. It reads as follows: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’ (italic added). The link may also be derived from examining various unamendable provisions in constitutions. The form and system of government (for example, whether a country is republican or monarchical) and the political or governmental structure are some of the most common features usually protected

95. Ibid.
in unamendable provisions — these are constitutional provisions that very often comprise ‘the genetic code of the constitution’ and are core components of constitutional identity that should be resistant to change. Similarly, according to the Indian ‘Basic Structure Doctrine’, endorsed by the Indian Supreme Court in 1973 in *Kesavananda Bharati v. State of Kerala*, the amendment power does not include the power to alter the basic structure or framework of the Constitution so as to change its identity. The unamendable features that make up the constitution's basic structure includes features such as the democratic form of government, federalism and separation of powers. Constitutional structure must be part of the constitutional identity. Indeed, as Roberto Gargarella convincingly argues, the ‘engine room of the Constitution’ — the structural organization of power — has a direct impact upon far-reaching constitutional issues, and is very often more important for constitutionalism in a given country than a declaration of rights. Once this connection is admitted, it is plausible to make the argument that specific changes to the structure of government may also bring about changes to a state’s constitutional identity.

5 CONCLUSION

This article has proffered a justification against judicial reluctance to imply substantive limits in the face of what we have dubbed as ‘political settlement’. As observed in the introductory sections, political settlement is not detrimental to constitution building because it can help, and has indeed previously been useful, in peace building, crisis solving, constitutional negotiation and even constitution-making. However, it can also provide an enabling environment for overcoming non-substantive constraints (where such exist) on the amendment power. This is especially, as the case of Kenya and Israel shows, if political settlement mobilizes consensus with constitutional amendment overtones.

On the one hand, as discussed, Kenya’s 2010 Constitution is relatively rigid. While it does not have explicit substantive limits on the power of amendment, it has procedural and temporal ones imposed in its Chapter 16 and a referendum requirement in respect of some matters. These have effectively made it difficult to amend the CoK and, as we have showed, previous efforts before the BBI were all ineffective. Though the BBI process was not successful itself, we argue that it carried real prospects of success considering that it had already been approved by a majority of the county assemblies. Like the changes that were made in Israel’s case by Bibi, the proposals in the BBI Bill were radical and had the prospect of altering not only Kenya’s

98. AIR 1973 SC 1461.
institutions but also its constitutional identity. On the other hand, the ‘constitution’ of Israel is relatively flexible and lacks any special protection for its constitutional structures and, by extension, its constitutional identity. Amidst the Bibi–Gantz cooperation, constitutional change, analogized to dismemberment, was easily achieved with far-reaching implications.

As this article has discussed, proposals to amend the respective constitutions of these countries through the BBI and by Bibi attracted judicial review. In the case of the BBI, Kenya’s courts of first and second instance — that is, the HCK and CAK — declared the proposed amendments as unconstitutional on the basis, inter alia, that they offended the basic structure doctrine. In other words, these courts found that there was an implicit substantive limit on the amendment power that can be invoked, as the courts did, if the ‘amendment’ goes beyond the scope of an amendment. While the top court in Kenya overturned the findings on the applicability of the basic structure doctrine by the HCK and CAK, it did block the amendment on another minimalist basis; that is, that the president could not resort to a popular initiative route to amend the constitution. In sum, the BBI proposal was blocked. In the case of Israel, the HCJ gave a greenlight to Amendment No. 8, having refused to invalidate the amendments on substantive grounds. Although our concern in this article is on the effect of political settlement or of similar scenarios on the effectiveness of limits, we acknowledge that the basis for judicial review towards constitutional change initiatives in both Kenya and Israel was not ‘political settlement’. However, the BBI and the Bibi cases show that it is a scenario that may need to be considered when implicit terms are either being justified or rejected as the basis for substantive review of constitutional amendments. In this way, judicial review can be a useful counter-measure against constitutional replacement or dismemberment where it is disguised as amendment, often for the purpose of pursuing narrow self-interests.