HUMAN RIGHTS IN ISRAEL

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I Dedicate this Article to
Claude Klein, a Friend and
a Source of Inspiration

This Article discusses the normative basis for the protection of human rights in Israel and discusses various effects of the Basic Law: Human Dignity and Liberty enacted in 1992. The Article points out that this "constitutional revolution" affected not only the judiciary, which enforces the protection of human rights, but both the executive and the legislative branches that have also internalized the constitutional revolution, by carefully evaluating every bill proposed and every other government action to ensure that it passes constitutional muster. Additionally, the Article discusses the effect of the constitutional revolution on public discourse in Israel. A central part of the discussion is devoted to the role of the protection of human rights in the territories occupied by Israel since 1967, and to the role of the protection of human rights during periods of terror activities.

I. *Introduction*

The subject of human rights in Israel is broad and comprehensive.[1] In this Article I will sketch an outline of the picture in fine lines. Any serious study would require

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[1] *See* RAN HIRSCHL, *Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998); 12 YORAM DINSTEIN, ISRAEL YEARBOOK ON HUMAN RIGHTS (1982); RAPHAEL ISRAELI & RACHEL EHRENFELD, *Between the Peak and the Pit: Human Rights in Israel*, 13 SYRACUSE J. INT'L L. & COM. 403 (1987); IZHAK ENGLARD, *Uri and Caroline Bauer Memorial Lecture: Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903 (1999); ROGER I. ZAKHEIM, *Israel in the Human Rights Era: Finding a Moral Justification for the Jewish State*, 36 N.Y.U. J. INT'L L. & POL. 1005 (2004); BARUCH BRACHA, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001); STEPHEN GOLDSTEIN, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS L.J. 605 (1993); DAPHNA BARAK-EREZ, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

us to take an in-depth look at the picture. Furthermore, this Article will address the normative aspect of human rights, rather than their realization in fact. Unfortunately, there is a gap between law and reality generally and in the area of human rights specifically. Every society should do its best to narrow this gap. This Article will discuss the normative aspect and it alone.

The discussion will focus on two major periods of Israeli history: The first period is from the formation of the State in 1948 until the enactment of the Basic Laws concerning Human Dignity, Liberty, and Freedom of Occupation in 1992, and the second period is from the enactment of those Basic Laws and continues until the present day. In addition to the two periods above, I will briefly address the role of human rights in the territories occupied since 1967, and their role in the context of terrorism.

II. *From the Birth of the State Until the Enactment of the Basic Laws Concerning Human Rights*

The common law is central to this period, and there is relatively little statutory support of human rights. Recognition of human rights is primarily in the form of Supreme Court judgments that lack the capacity to invalidate a statute that disproportionately violates human rights. However, these judgments establish the foundation that human rights are part of Israeli law, and that every statute will be interpreted against the background of these rights. The Supreme Court followed two main concepts in its thought process: [2] First, the State of Israel is a modern democracy, and second, like every other modern democracy, it recognizes all human rights that characterize modern democracies. These rights constitute the background for statutory interpretation.

[2] This approach was primarily developed in HCJ 73/53 Kol Ha'am Ltd. v. The Minister of Interior, [1953] IsrSC 7 871, English translation, *available at* http://elyon1.court.gov.il/files_eng/53/730/000/z01/53000730.z01.htm (last visited June 1, 2006), and since then it was embraced in numerous judgments. *See* Aharon Barak, *President Agranat: "Kol Ha'am"—The Voice of the People*, in ESSAYS IN HONOR OF SHIMON AGRANAT 129 (Ruth Gavison & Mordechi Kremnitzer eds., 1986) [in Hebrew]; AHARON BARAK, 1 SELECTED ESSAYS 575 (C. Cohen & Y. Zamir eds., 2002) [in Hebrew]; Aharon Barak, *Constitutional Law Without A Constitution: The Role of the Judiciary*, in THE ROLE OF COURTS IN SOCIETY 448 (Shimon Shetreet ed., 1988); ZEEV SEGAL, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1 (1992).

Such interpretation is purposive in nature.[3] In addition to the subjective purpose (legislative intent), there is also the objective purpose (the legal system's fundamental values, including the separation of powers, rule of law, and judicial independence). Human rights are central to the objective purpose.[4] Every statute is interpreted on the presumption that its purpose is to advance human rights.[5] Only clear, explicit, and unequivocal language to the contrary can rebut this presumption.[6] When a statute creates the kind of authority that can infringe on human rights, the scope of that authority will be determined according to the proper balance between the governing state power and the human rights harmed. This balance should be principled, not ad-hoc.[7]

An example of this is: An ordinance of the High Commissioner, enacted in 1929 during the period of the British Mandate in Palestine,[8] that establishes the authorization of the High Commissioner to close a newspaper (permanently or temporarily) if, at the Commissioner's discretion, the newspaper publishes an article or information that is likely to endanger the public peace.[9] While the authority to close a newspaper exists, and its legality is not questioned, what is the scope of this authority? To answer that question, we must interpret the word "likely" in its context. Such interpretation should balance public peace with freedom of expression. This balance is located in the principled balance formula that permits an infringement of freedom of expression only in the event there is near certainty that this expression will lead to severe harm of the public peace.[10] If the certainty is not imminent (for example, if it is only remotely

[3] *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005).

[4] *See* HCJ 75/76 "Hilron" v. The Fruit Council [1976] IsrSC 30(3) 645; CFH 9/77 Israel Electric Company Ltd. v. "Ha'aretz" Newspaper Publishing Ltd. [1978] IsrSC 32(3) 337, 359, English translation, *available at* http://elyon1.court.gov.il/files_eng/77/090/000/z01/77000090.z01.HTM (last visited June 1, 2006); HCJ 390/79 Duikat v. The Government of Israel [1979] IsrSC 34(1).

[5] *See* CA 524/88 "Pri Ha'emek" v. Sde Yaacov [1991] IsrSC 45(4) 529, 561; CA 696/81 Azulai v. The State of Israel [1983] IsrSC 37(2) 565; CFH 13/85 The Municipality of Tel- Aviv-Jaffa v. Lubin [1985] IsrSC 13 118, 122.

[6] *See* HCJ 1/49 Bejerano v. The Minister of Police [1949] IsrSC 2, 80; HCJ 337/81 Miterani v. The Minister of Transportation [1983] IsrSC 37(3) 337; LTA 3126/00 The State of Israel v. ESHET Projects Management [2003] IsrSC 57(3) 220; HCJ 6051/95 Rekanat v. The National Labor Court [1997] IsrSC 51(3) 289; CA 6821/93 United Mizrachi Bank v. Migdal Agricultural Cooperative [1995] IsrSC 49(4) 221.

[7] *See Kol Ha'am Ltd. v. The Minister of Interior, supra* note 2; *Israel Electric Company Ltd. v. "Ha'aretz" Newspaper Publishing Ltd. supra* note 4, at 361; Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 93 (2002).

[8] The Press Ordinance, 1929-5689 70 LSI 1191 (Isr.).

[9] *See id.* at Sec 19.

[10] *See Kol Ha'am Ltd. v. The Minister of Interior*, *supra* note 2, at 888-889.

certain),[11] or if the harm is not severe (for example, if it is within the tolerance level that members of a democratic society are expected to bear),[12] freedom of expression should not be compromised.

In this way, Israel adopted an approach substantially similar to the way the United States addresses freedom of expression in the context of the First Amendment.[13] Additionally, this is the way that the Israeli Supreme Court addresses all human rights recognized in liberal democracies, including freedom of occupation,[14] freedom of movement,[15] freedom of conscience and religion,[16] and equality.[17]

The virtues of this approach are clear. It facilitates broad protection of human rights without infringing on the supremacy of parliament. The disadvantages of this approach are clear as well. It lacks the power to nullify a statute that, in clear and explicit language, harms human rights beyond the level permitted by the balancing formula. Indeed, judicial approach is interpretive, but interpretation has its limits as well. The Supreme Court did not cross those limits.

Two additional developments facilitated a growth in the protection of human rights. *First,* the Supreme Court comprehensively liberalized the rules of standing.[18] At the heart of this approach was the need to protect the rule of law in its broad sense,

[11] *See* HCJ 680/88 Schnitzer v. The Chief Military Censor [1989] IsrSC 42(4) 617.

[12] *See* HCJ 5016/96 Horev v. The Minister of Transportation [1997] IsrSC 51(4) 1; HCJ 6055/95 Sagi Tzemach v. The Minister of Defense [1999] IsrSC 53(5) 241, English translation, *available at* http://elyon1.court.gov.il/files_eng/95/550/060/i15/95060550.i15.htm (last visited June 6, 2006).

[13] *See* Zaharah R. Markoe, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L & COMP. L. 319 (2000); Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular Kulturkampf*, 15 EMORY INT'L L. REV. 1 (2001); Iddo Porat & Issachar Rosen-Zvi, *Who's Afraid of Channel 7?: Ideological Radio and Freedom of Speech in Israel*, 38 STAN. J. INT'L L. 79 (2002).

[14] *See Hilron v. The Fruit Council*, *supra* note 4; HCJ 14/78 Agbaria v. The Fruit Council [1978] IsrSC 32(3) 794; HCJ 338/78 Margaliyot v. The Minister of Justice [1978] IsrSC 42(1) 112.

[15] *See* HCJ 672/87 Atmalla v. The Northern Commander [1989] IsrSC 42(4) 708; HCJ 448/85 Dahar v. Peretz [1986] IsrSC 40(2) 401.

[16] *See* HCJ 47/82 Progressive Judaism Movement Fund v. The Minister of Religions [1989] IsrSC 43(2) 661; CA 450/70 Rogosinsky v. The State of Israel [1971] IsrSC 26(1) 129;

[17] HCJ 5432/03 SHIN for Equal Representation of Women v. The Board for Cable and Satellite Broadcasting [2004] IsrSC 58(3) 65; HCJ 721/94 EL-AL Israel Airlines v. Danielowitz [1994] IsrSC 48(5) 749; HCJ 4541/94 Miller v. The Minister of Defense [1995] IsrSC 49(4) 94.

[18] *See* ZE'EV SEGAL, STANDING BEFORE THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE (2nd ed. 1993) [in Hebrew].

the sense in which the rule of law is not just the law of rules.[19] One of the goals was to strengthen the protection of human rights. This was made possible in part by recognizing the standing of entities and institutions which lack a personal interest in the matter but whose role is to protect human rights. These entities carefully choose which cases to bring before the court, and in doing so contribute to expanding the protection of human rights as well as expanding the awareness of their importance.

The *second* development concerns the Court's approach to arguments of non-justiciability.[20] The Court limited these claims, holding, *inter alia*, that they do not apply where a violation of human rights is alleged.[21]

III. *From the Enactment of Basic Laws Concerning Human Rights to the Present*

A significant change in the status of human rights in Israel took place in 1992. In that year, the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation were adopted by the Knesset, acting as a constitutional assembly. In a series of cases, beginning with *Bank Hamizrachi Hameuhad,*[22] the Supreme Court decided that these Basic Laws constitute Israel's Bill of Rights.[23] They establish a list of rights—human dignity, liberty, property, privacy, freedom of occupation, and freedom from detention, imprisonment, and extradition. These rights are subject to the following general limitation clause:[24] "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for

[19] *See* HCJ 852/96 Alony v. The Minister of Justice [1987] IsrSC 41(2) 1; HCJ 3267/97 Rubinstein v. The Minister of Defense [2000] IsrSC 52(5) 481.

[20] *See* HCJ 448/81 Ressler v. The Minister of Defense [1981] IsrSC 36(1) 81; CA 6991/95 Plonit v. The State Attorney [1996] IsrSC 49(4) 210; HCJ 2915/96 Heykind v. The State Attorney [1996] IsrSC 50(1) 818.

[21] *See* HCJ 606/78 Iyub v. The Minister of Defense [1978] IsrSC 33(2) 113; *Duikat v. The Government of Israel*, *supra* note 4.

[22] *See United Mizrachi Bank v. Migdal Agricultural Cooperative, supra* note 6.

[23] *See* HCJ 5578/02 Manor v. The Minister of Finance [2004] IsrSC 59(1) 729; HCJ 4806/94 De.Sh.E. Quality of Environment Ltd. v. The Minister of Finance [1998] IsrSC 52(2) 193; CFH 1333/02 Local Committee of Planning and Building v. Horowitz [12.05.2004] (not yet published); HCJ 3434/96 Hofnong v. The Chairman of the Knesset [1996] IsrSC 50(3) 57; HCJ 4769/95 Ron v. The Minister of Transportation [2002] IsrSC 57(1) 235.

[24] *See* Sec 8 of the Basic Law: Human Dignity and Liberty 1391 LSI 150 (1992) (Isr.); *See also* Sec. 4 of the Basic Law: Freedom of Occupation 1454 LSI 90 (1994) (Isr.).

a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law."

According to another clause of these Basic Laws, all governmental authorities must respect these human rights.[25] Finally, these Basic Laws established that the legal force of a prior statute—one enacted prior to 1992—is preserved.[26]

What is the normative status of those human rights? Do they possess the status of an ordinary statute, as is the case in New Zealand?[27] Do they hold the same status held by human rights in England, due to the 1998 Human Rights Act?[28] Or is their status similar to the status of human rights under the Canadian Charter of Human Rights and Freedoms[29] or the American Bill of Rights?[30] There are no explicit provisions in the two Basic Laws governing their own status. Nor is there a stipulation integrating these Basic Laws with a constitution. Moreover, there is no provision for possible conflicts between a basic law and an ordinary statute that establishes the prevalence of the basic laws. Finally, there is no mention of a supremacy clause. In the past, the Supreme Court held that until the Basic Laws—which, in addition to the 1992 Human Rights Laws, include a variety of basic laws concerning the structure of government[31]—are united into a constitution, their normative status is that of an ordinary statute.[32] Does this holding apply to the two Basic Laws concerning human rights?

This question came before the Supreme Court in 1995.[33] In a comprehensive

[25] *See* Sec. 11 of the Basic Law: Human Dignity and Liberty, *id.* *See also* Sec. 5 of the Basic Law: Freedom of Occupation, *id.*

[26] The Basic Law: Human Dignity and Liberty, *id.* sec. 10.

[27] *See United Mizrachi Bank v. Migdal Agricultural Cooperative*, *supra* note 6, at 294; PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 861 (1993).

[28] *See* The Human Rights Act, 1998, § 3 (Eng.).

[29] Part I of the Constitution Act, 1982 (Charter of Rights and Freedoms, § 52(1)) (Can.).

[30] Marbury v. Madison, 5 U.S. 137 (1803).

[31] *See* The Basic Law: The Knesset 244 LSI 69 (1958) (Isr.); The Basic Law: Israel Lands 312 LSI 56 (1960) (Isr.); The Basic Law: The President of the State 428 LSI 118 (1964) (Isr.); The Basic Law: The Government 1780 LSI 158 (2001) (Isr.); The Basic Law: The State Economy 777 LSI 207 (1975) (Isr.); The Basic Law: The Military 806 LSI 154 (1976) (Isr.); The Basic Law: Jerusalem, Capital of Israel 980 LSI 186 (1980) (Isr.); The Basic Law: The Judiciary 1110 LSI I 78 (1984)(Isr.); The Basic Law: The State Comptroller 1237 LSI 30 (1988) (Isr.).

[32] *See* HCJ 98/69 Bergman v. The Minister of Finance [1969] IsrSC 23(1) 963, English translation, *available at* http://elyon1.court.gov.il/files_eng/69/980/000/z01/69000980.z01.htm (last visited June 4, 2006); HCJ 148/73 Keniel v. The Minister of Justice [1973] IsrSC 23(1) 794; HCJ 179/82 Ressler v. The Minister of Defense [1983] IsrSC 36(4) 421.

[33] *See United Mizrachi Bank v. Migdal Agricultural Cooperative, supra* note 6.

judgment, the Court held that the Basic Laws concerning human rights hold a constitutional, super-legislative status. The judgment held that an ordinary statute which infringes on one of the human rights enumerated in these basic laws, which does not meet the conditions of the limitation clause, is an unconstitutional statute, and every court may declare it invalid. Since that judgment was handed down, the Supreme Court, sitting in various panels, has repeated that approach and recently held[34] that the compensation scheme set forth in the statute providing for the disengagement from The Gaza Strip was unconstitutional, because the formulas established for determining compensation for loss of home, business, or employment, precluded remedies found in the general law.[35] We reasoned that precluding these remedies was not proportional and thus invalid.

In 1992, a constitutional revolution took place in Israel.[36] The human rights established in the two Basic Laws concerning human rights were accorded a constitutional, super-legislative status. The power of the parliament was limited. This revolution had far-reaching implications. Israeli law was constitutionalized.[37] Every branch of law and every legal norm had to conform to this new constitutional regime. Every branch of law had to change its fundamental concepts and its fundamental outlook, in order to conform to the new constitutional regime. Indeed, the constitutional revolution established a new balance between individual liberty and governmental authority and between the liberty individuals enjoy vis-à-vis each other. An inseparable internal link was created between human rights and the public interest that justifies limiting them. The right and its limitation derive from a common source.[38] If, in the past, legal rhetoric focused on authority, power, and governmental

[34] *See Tzemach v. The Minister of Defense, supra* note 12; HCJ 1030/99 Oron v. The Chairman of the Knesset [2002] IsrSC 56(3) 640; HCJ 1661/05 The Gaza Coast Regional Council v. The Knesset [09.06.2005] (not yet published). This new approach has been applied also in regard to the entire corpus of Basic Laws. *See* HCJ 212/03 Herut v. The Chairman of the Central Elections Committee [2003] IsrSC 57(1) 750 English translation, *available at* http://elyon1.court.gov.il/ files_eng/03/120/002/a04/03002120.a04.HTM (last visited June 4, 2006); HCJ 344/81 Negbi v. Central Elections Committee [1981] IsrSC 35(4) 837; HCJ 637/88 La'or Movement v. The Chairman of the Central Elections Committee for the Knesset [1988] IsrSC 42(3) 495; HCJ 2208/02 Salame v. The Minister of the Interior [2002] IsrSC 56(5) 590.

[35] *See The Gaza Coast Regional Council v. The Knesset, id.*

[36] *See* Aharon Barak, *The Constitutional Revolution—12th Anniversary*, 1 L. & Bus. 3 (2004) [in Hebrew];

[37] *See* Aharon Barak, *The Constitutionalization of the Israeli Legal System as Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 Isr. L. Rev. 3 (1997).

[38] *See United Mizrachi Bank v. Migdal Agricultural Cooperative, supra* note 6 at 457-458; R. v. Oakes [1986] 1 SCR 103.

discretion, it now also focuses on human rights. Previously, the proper balance of governmental power determined human rights; now human rights, properly balanced, determine governmental power.

What was the effect of the constitutional revolution in fact? Did the face of Israeli law change? Did Israeli society change the way it addresses human rights? The time that has passed since the constitutional revolution—thirteen years—is brief. Quite naturally, any generalization would be risky. However, it seems safe to make the following remarks:

First, there has been a revolutionary change at the normative level. Constitutional interpretation has developed, distinct from statutory interpretation.[39] That development has occurred within the context of the system of purposive interpretation.[40] The Court has ruled that constitutional human rights affect private law by way of indirect application.[41] Israeli judges and lawyers have internalized these changes. Judicial rhetoric generally makes use of the basic laws concerning human rights. Scholars have internalized the constitutionalization of their various fields of expertise. For a new generation of jurists, the constitutional revolution is a clear and natural normative reality.

Second, the executive branch has internalized the constitutional revolution. With the assistance of the Attorney General and the legal advisers of the various government departments, the civil service core has been educated and has internalized the constitutional change. Every bill proposed by the government and every other governmental action are carefully evaluated to determine if they pass constitutional muster.

Third, the legislative branch takes the constitutional change seriously. The change affects the work of the legislature, who exercises great caution on this issue. When we invalidate a statutory provision of importance to the legislature, the legislature may revisit the issue and re-enact the provision, making the changes necessitated by our

[39] *See* CA 537/95 Ganimat v. The State of Israel [1995] IsrSC 49(3) 355; CFH 2316/95 Ganimat v. The State of Israel [1995] IsrSC 49(4) 589; HCJ 1384/98 Avni v. The Prime Minister [1998] IsrSC 52(5) 206.

[40] *See* AHARON BARAK, 3 INTERPRETATION IN LAW 435 (1994) [in Hebrew]; BARAK, *supra* note 3.

[41] *See* HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphna Barak-Erez eds., 2001); MIGUEL DEUTCH, *Unfair Competition and the "Misappropriation Doctrine"—A Renewed Analysis*, 48 ST. LOUIS L.J. 503, and references therein.

ruling. Having said that, not every Member of Knesset has accepted the constitutional revolution; some deny its legitimacy.[42] A few are trying to establish a constitutional court whose members will be political appointees;[43] some are trying to change the existing system for choosing judges,[44] a system based on the decision of a nine-member committee:[45] two Ministers, two Members of Knesset (one from the coalition and one from the opposition), two lawyers elected by the Israel Bar Association, and three Supreme Court justices. While, the majority on this committee is professional—nonpolitical, some members of Knesset propose increasing the political representation on the committee.

Fourth, the constitutional revolution has changed public discourse. Some believe that it has created too great an emphasis on human rights, and insufficient emphasis on duties. The change in public discourse has created a certain change in the way Israeli democracy is understood. In the past, it was viewed formalistically. Democracy was understood as a system of government in which regular elections are held, and decisions made by the people's representatives are binding. The constitutional revolution has bolstered the view that democracy is not just formal democracy but also substantive democracy, based on the supremacy of values such as the separation of powers, judicial independence, rule of law, and human rights. Indeed, the public has increasingly recognized the complexity of democracy and its internal morality. It has been increasingly understood that democracy is rich and multi-faceted, and cannot be viewed one-dimensionally; it is based both on majority rule and on the rule of values to which the majority is subject. Has there been, in fact, a change in protection

[42] *See, e.g.*, a speech made by the chairman of the Constitution, Law and Justice Committee, Constitution, Law and Justice Committee, Mr. Michael Eitan, on the sitting of 17/7/2002, protocol no. 509.

[43] *See* Private Bill 687, Basic Law: Constitution Court, 19.5.2003 by MK Eliezer Cohen; Private Bill 3393 Constitution Court—2002, 4.2.2003, by MK Eliezer Cohen; Private Bill 3380, Constitution Court—2002, 28.2.2002 by MK Yigal Bibi; Private Bill 1875, Basic Law: Constitution Court, 12.6.2000 by MK Eliezer Cohen; Private Bill 994, Basic Law: Constitution Court, 23.6.2003 by MK Amnon Cohen.

[44] *See* Private Bill 1341, Basic Law: Judiciary (amendment–judges' appointment to the Supreme Court), 31.7.2003 by MK David Tal; Private Bill 1224, The Basic Law: Judiciary (amendment—appointment process), 21.7.2003 by MK Rony Bar-On; Private Bill 980, The Basic Law: Judiciary (amendment—panel of Supreme Court's judges appointment committee), 23.6.2003 by MK Nisan Slominsky; Private Bill 1341, Basic Law: Judiciary (amendment—panel members of Supreme Court's judges appointment committee), 9.6.2003 by MK Yuli Tamir; Private Bill 2574, Basic Law: Judiciary (amendment—judges' appointment committee), 5.3.2001 by MK Yigal Bibi.

[45] *See* Basic Law: The Judiciary, *supra* note 31, at Sec. 4(2).

of human rights, due to the constitutional revolution? Is the new rhetoric practiced? Will the transition from parliamentary democracy to constitutional democracy create results on the ground? I do not know. An answer to that question requires time and empirical study. My impression is that we are in the midst of a process. The journey before us, however, remains long.

Finally, the constitutional revolution has had a significant influence on the courts, chief among them the Supreme Court. Their social importance has grown, while attacks on them have increased. Moreover, the pressure for political appointments in the judiciary has increased as well.

In the years following the constitutional revolution, the Israeli Supreme Court—like the Canadian Supreme Court in the initial period following the enactment of the Canadian Charter of Rights and Freedoms[46]—interpreted human rights broadly and focused judicial efforts on developing the limitation clause. This approach forced Israel's Supreme Court to confront a difficult dilemma: What to include as part of the human rights enumerated in the basic laws and what to leave as part of our common law? For historical-political reasons, the Basic Laws concerning human rights do not include all the political and social human rights.[47] Thus, there is no explicit clause concerning equality, freedom of expression, or the right to education. Does this mean that these rights do not have constitutional status in Israel and that they continue to be a part of the common law rights?

In resolving this question, the Court focused on the right to dignity.[48] What is the scope of this right? Can equality, freedom of expression, or education be included as part of the right to dignity? The Court accepted the position that dignity means recognizing a person as a free being who develops his or her body and mind as he or she sees fit. At the root of dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical

[46] *See* Peter W. Hogg, *Interpreting the Charter of Rights: Generosity and Justification*, 28 Osgoode Hall L.J. 817 (1990).

[47] *See* Judith Karpe, *Basic Law: Dignity and Liberty—Biography of Power Struggles*, 1 L. & Gov't 232 (1993) [in Hebrew].

[48] *See* PPA 4463/94 Golan v. The Prison Services [1996] IsrSC 52(5) 826; CA 105/92; HCJ 205/94 Nof v. The Minister of Defense [1997] IsrSC 50(5) 449 English translation, *available at* http://elyon1.court.gov.il/files_eng/94/050/002/z01/94002050.z01.htm (last visited June 4, 2006); *EL-AL Israel Airlines v. Danielowitz*, *supra* note 17; *Miller v. The Minister of Defense*, *supra* note 17.

and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. Human dignity presumes a free person who is an end unto himself, not a means to achieve the ends of the collective, or of other individuals.[49] This is the background for the judicial ruling that human dignity includes the right to equality and protection from the degradation of discrimination,[50] and it includes freedom of expression.[51] Human dignity also includes a number of social rights[52] and presumes guaranteed minimal conditions for human subsistence. A person deprived of shelter is a person whose human dignity is harmed; a person left to go hungry is a person whose human dignity is harmed; a person without access to basic medical treatment is a person whose human dignity is harmed; a person forced to live under degrading physical conditions is a person whose human dignity is harmed.[53]

The state's duty concerning human dignity is both "negative" and "positive."[54] The negative aspect imposes a duty on state and government authorities to refrain from harming human dignity. The positive aspect imposes a duty on the state and government authorities to protect human dignity. The Court may—and the German Constitutional Court has done so a number of times[55]—impose on the legislature a duty to legislate in a manner that provides the proper protection to human dignity.

This approach to the scope of rights places a special task on the limitation clause. The clause has been developed extensively, particularly its principle of proportionality,

[49] *See* HCJ 7015/02 Ajuri v. The IDF Commander [2002] IsrSC 56(6) 352, English translation, *available at* http://elyon1. court.gov.il/files_eng/02/150/070/a15/02070150.a15.HTM (last visited June 4, 2006); HCJ 2006/97 Janimat v. The Central Commander [1997] IsrSC 51(2) 651; CA 4920/02 Federman v. The State of Israel [20.06.2002] (unpublished); CFH 7048/97 A v. The Minister of Defense [2000] IsrSC 54(1) 721.

[50] *See supra* note 17.

[51] *See Golan v. The Prison Services*, *supra* note 48; CA 105/92 Re'em Engineer Contractors v. Nazareth-Ilit Municipality [1993] IsrSC 57(5) 19.

[52] *See* HCJ 2599/00 Yated v. The Ministry of Education [2002] IsrSC 56(5) 834; HCJ 7715, 1554/95 Shoharie Gilat v. The Minister of Education and Culture [1996] IsrSC 50(3) 2; Aharon Barak, *Forward*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL (Y. Rabin & Y. Shany, eds., 2005 [in Hebrew]; HCJ 366/03 Commitment to Peace and Social Justice Movement v. The Minister of Finance [12.12.2005] (not yet published).

[53] *See Manor v. The Minister of Finance supra* note 23; LTA 4905/98 Gamzu v. Yeshayahu [2001] IsrSC 55(3)360.

[54] For this differentiation *see* BARAK, *supra* note 40, at 361-364.

[55] *See* DIETER GRIMM, *The Protective Function of The State*, in EUROPEAN AND US CONSTITUTIONALISM 137 (Georg Nolte ed., 2005).

and its emphasis on the relationship between goal and means, and the three steps in evaluating the means.[56]

IV. *Human Rights in the Occupied Territories*

It is impossible to discuss the status of human rights in Israel without examining the human rights of the Arabs residents of the Occupied Territories,[57] occupied by Israel in 1967. Israeli law was not applied to them, and, with the exception of East Jerusalem and the Golan Heights, they were not annexed to Israel. The law that applies is the international law of belligerent occupation. Through out the many years of the occupation, many Arabs from of the Occupied Territories petitioned the Supreme Court against the Military Commander. The Court adopted a policy on this matter and established four principles:

First, the Court has jurisdiction to hear petitions against the Military Commander. Objections based on extraterritoriality, political questions, and non-justiciability will not be heard. Furthermore, the doors of the Court are always open.[58]

Second, as a normative matter, there is no vacuum; there are no black holes.[59] The supreme norm in the area is international law governing belligerent occupation; however, local law and orders issued by the Military Commander also apply, to the extent they comply with international law. In addition, the basic principles of Israeli administrative law, such as the rules of natural justice, apply.[60]

[56] *See* HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 58(5) 807, English translation *available at* http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.htm (last visited June 4, 2006); HCJ 1715/97 Investment Managers' Chambers v. The Minister of Finance [1997] IsrSC 51(4) 367; Dahlia Dorner, *Proportionalism*, in BERENSON BOOK 281 (2000) [in Hebrew].

[57] *See, e.g.*, DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 61-160 (2002).

[58] *See* AHARON BARAK, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 130 (2003).

[59] On "black holes," *see* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, in DEMOCRACY THROUGH LAW 195 (J. Steyn ed., 2004).

[60] *See* HCJ 7957/04 Mara'abe v. The Prime Minister of Israel [2004] (not yet published); *Ajuri v. The IDF Commander, supra* note 49; HCJ 3239/02 Marab v. The IDF Commander in the West Bank [2003] IsrSC 57(2) 349, English translation *available at* http://elyon1.court.gov.il/files_eng/02/

Third, the Supreme Court does not ask itself how it would act, were it the Military Commander. The Supreme Court asks itself whether the action taken by the Military Commander was an action that a reasonable military commander, acting proportionally, would have taken under the circumstances. The question, therefore, is not one of deference but rather of reasonableness and proportionality.[61]

Fourth, "security" is not a magic word. The Court examines whether security was indeed the true consideration and also asks whether this consideration meets the applicable legal criteria. We have repeatedly stated that the Military Commander is the expert on security, while we the judges are experts on reasonableness and proportionality.[62]

Since 1967, the Supreme Court has heard thousands of petitions pertaining to the Occupied Territories. Most were brought by Arab, and a small number of them were brought by Israeli settlers. The Supreme Court has done its best to recognize the rights of the protected persons under international law. Sometimes the Court failed. The question that should be asked is not whether the Court has succeeded in equalizing the rights of the protected persons of the area to those of Israelis in Israel, but rather, whether the Court has succeeded in actualizing and maximizing the rights of the protected persons under international humanitarian law, applicable to a long-term belligerent occupation. It is also worthwhile to explore the manner used by courts in other modern democracies that have faced similar situations and determine whether the Supreme Court has failed in areas they have succeeded.

390/032/a04/02032390.a04.htm (last visited June 4, 2006); HCJ 3451/02, Almadani v. The IDF Commander in Judea & Samaria [2002] IsrSC 56(3) 30, 36, English translation *available at* http://elyon1.court.gov.il/files_eng /02/510/034/a06/02034510.a06.htm (last visited, June 4, 2006); HCJ 3278/02 Center for Defense of the Individual v. The IDF Commander, [2002] IsrSC 57(1) 385, English translation, *available at* http://elyon1.court.gov.il/files_eng/02/780/032/a06/02032780.a06.htm (last visited June 4, 2006).

[61] *See* HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11, 16, English translation *available at* http://elyon1.court.gov.il/files_eng/02/140/031/a02/02031140.a02.htm (last visited June 4, 2006)); *Almadani v. IDF Commander in Judea & Samaria, id.* at 60, 36.

[62] *See* HCJ 1005/89 Aga v. The Commander of IDF forces in Gaza [1990] IsrSC 44(1) 536; HCJ 4764/04 Doctors for Human Rights v. Commander of IDF forces in Gaza [2004] IsrSC 58(5) 398, English translation *available at* http://elyon1.court.gov.il /files_eng/04/640/ 047/a03/04047640.a03.htm (last visited June 4, 2006).

Some of the legal problems that the belligerent occupation brought to the doorstep of the Supreme Court raised questions that the Court was accustomed to addressing, such as the granting or revocation of a license or an illegal arrest. Some of the problems were of a special character. In this latter category are eighty petitions concerning the legality of the Separation Barrier, including ten petitions concerning the Barrier in Jerusalem; the treatment of the civilian population during a military operation;[63] the legality of evacuating Israeli residents from the Gaza Strip;[64] and the legality of target killing.[65] For these petitions and many others, our ruling had the potential of changing the political order in the region. These petitions were full of security, military, and political considerations. We had to navigate the judicial ship among stormy waves, sticking closely to fundamental legal principles, and using all the judicial tools at our disposal. An important issue that arose was the relationship between our judgment concerning the Separation Barrier[66] and that of the International Court of Justice at The Hague.[67] Both judgments addressed the rights of the protected persons and the infringement on those rights that the Separation Barrier caused. In our judgment, we noted—as did the International Court of Justice—that the dispute would be decided according to international law. We emphasized the centrality and importance of the judgment of the International Court of Justice at The Hague. We did not deviate from its normative rulings, even if one of them—concerning a state's right to defend itself from terrorism coming from the area subject to belligerent occupation—seemed harsh to us. We repeatedly emphasized that Israel is not an island unto itself; Israel is part of the international community, and as such, it will conform to that community's norms. The disagreement between our Court and that of The Hague concerned the factual basis underlying the claim.[68]

[63] *See* HCJ 3799/02 Adala v. The Central Commander [22.05.2002] (published); *Ajuri v. The IDF Commander*, *supra* note 49; *Almadani v. IDF Commander in Judea & Samaria*, *supra* note 60, at 30, 34–35.

[64] *See The Gaza Coast Regional Council v. The Knesset*, *supra* note 34.

[65] *See* HCJ 769/02 Public Committee Against Torture in Israel v. The Government of Israel [2003] IsrSC 57(6) 285.

[66] *See Mara'abe v. The Prime Minister of Israel*, *supra* note 60.

[67] *See* International Court of Justice, July 9, 2004 Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory (Adv. Op., 9.7.04), 43 IL M 1009 (2004). For further inquiry on the subject, *see* 99 AM. J. INT'L. L. and 38 (1-2) ISR. L. REV. (2004) special issues devoted to the decision of the ICJ in The Hague and the High Court of Justice in Israel on the Separation Barrier.

[68] *See Mara'abe v. The Prime Minister of Israel*, *supra* note 60, at para. 17.

V. *Human Rights and Terrorism*

Terrorism has increased in the past years and, of course, has infiltrated Israel as well. This was the case pre-9-11, and remains the case post-9-11. Naturally, some of the Israel Defense Force military actions in the Occupied Territories are concerned with anti-terrorist activity. The Supreme Court did not change its approach following 9-11. It did not create new rules; nor did it create new balancing formulas. It applied its general approach—to the law inside Israel as well as inside the occupied area—taking the special risks of terror into consideration. Thus, for example, the balancing formulas concerning freedom of expression in Israel—according to which freedom of expression can be restricted only if there is near certainty of severe damage—continued to apply in Israel. Terrorism affected the level of certainty and the extent of the damage. It did not create a new balancing formula for free speech in Israel.[69]

We, judges in modern democracies, have a major role to play in protecting democracy.[70] We should protect it both from terrorism and from the means that the state wants to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war or terrorism than in times of peace and security. If we fail in our role during times of war and terrorism, we will be unable to fulfill our role during times of peace and tranquility. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that we can limit our judicial ruling so that it will be valid only during wartime, and that we can decide that things will change in peacetime. The line between war and peace is thin—what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term. We should assume that whatever we decide when terror is threatening our security will linger many years after the terror is over. Indeed, we judges must act with coherence and consistency. A

[69] *See* HCJ 316/03 Muhammad Bakri v. The Israel Film Council [2003] IsrSC 58(1) 249, English translation, *available at* http://elyon1.court.gov.il/files_eng/03/160/003/115/03003160.115.htm) (last visited June 4, 2006); HCJ 651/03 Association for Civil Rights in Israel v. The Chairman of the Elections for the Sixteenth Knesset [2003] IsrSC 57(2) 62, English translation *available at* http://elyon1.court.gov.il / files_eng/03/510/006/r02/03006510.r02.htm (last visited June 4, 2006).

[70] *See* Barak, *supra* note 7, at 16.

wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes.[71]

Moreover, democracy ensures us, as judges, independence. It strengthens us—because of our political non-accountability—against the fluctuations of public opinion. The real test of this independence comes in situations of war and terrorism. The significance of our political non-accountability becomes clear in these situations, when public opinion is near-unanimous. Precisely in these times of war and terrorism, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution. Lord Atkins's remarks on the subject of administrative detention during World War II aptly describe these duties of a judge. In a minority opinion in November 1941, he wrote:[72]

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which...we are now fighting, that the judges...stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

Admittedly, the struggle against terrorism turns our democracy into a "defensive democracy" or even a "fighting or militant democracy."[73] Nonetheless, this defense and this fight must not deprive our regime of its democratic character. Judges in the highest court of the modern democracy should act in the spirit of defensive democracy as opposed to uncontrolled democracy.

There is a well-known saying that when the cannons speak, the Muses are silent. A similar idea was expressed by Cicero in his maxim "*Silent enim leges inter arma*" (in battle, the laws are silent).[74] These statements are regrettable; I hope they do not reflect the way things are.[75] I am convinced they do not reflect the way things should be. Every battle a country wages—against terrorism or against any other enemy—

[71] *See* Korematsu v. United States, 323 U.S. 214, 245 (1944).
[72] *See* Liversidge v. Anderson, 3 All E.R. 338, 361 (1941).
[73] *See* ANDRAS SAJO, MILITANT DEMOCRACY (2004).
[74] *See* Cicero, *Pro Milone* 16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).
[75] *But cf.* William. H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998) (arguing that Cicero's approach reflects reality).

must be done in accordance with rules and laws. On the international plane, these rules are of international law, on the domestic plane, they are the rules of domestic law. There are always laws according to which the state must act. There are no black holes where there is no law.[76] And the law needs Muses. We need the Muses most when the cannons speak; we need laws most in times of war.[77]

During the Gulf War, Iraq fired missiles at Israel. Fearing chemical and biological warfare as well, the Israeli Government distributed gas masks. A suit was brought against the Military Commander; it was argued that he distributed gas masks unequally in the West Bank. We accepted the petitioner's argument. In my opinion, I wrote:

> When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.[78]

This opinion sparked criticism; some argued that the Supreme Court of Israel intervened in Israel's struggle against Iraq. I believe that this criticism was unjustified. We did not intervene in military considerations, for which the expertise and responsibility lie with the executive. Rather, we intervened in considerations of equality, for which the expertise and responsibility rest with us as judges. Indeed, the struggle against terrorism is not conducted outside the law but within the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves

[76] *See Abbasi v. Sec'y of State for Foreign and Commonwealth Affairs* (2002) EWCA Civ 1958: "[W]e do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole.'" (Lord Phillips M.R.)

[77] *See* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002):

> In the days since, I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.

[78] *See* HCJ 168/91 Morcos v. Minister of Defense [1991] IsrSC 45(1) 467, 470–71.

from the terrorists themselves. They act against the law, by violating and trampling it. In its war against terrorism, a democracy acts within the framework of the law and according to the law. This principle was well expressed by Justice H. Cohen of the Israeli Supreme Court more than twenty years ago, when he said:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and the objective justification of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justification, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and they are perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never yield to its enemies.[79]

Indeed, the fight against terrorism is a war of a law-abiding nation and law-abiding citizens against lawbreakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies. A recent opinion of the Israeli Supreme Court addresses this role of the rule of law as a primary actor in the context of terrorism. The case involved armed terrorists and citizens who ensconced themselves in the Church of the Nativity in Bethlehem, which is in the territory of the Palestinian Authority, outside Israel. The Israeli army laid siege, trying to force them to leave the church (precincts). The army claimed there was a shortage of food and water. In the course of holding negotiations with the army, the terrorists petitioned the Supreme Court. We considered the petition and applied the relevant rules of international law. In doing so, I said:

> Israel finds itself in a difficult war against rampant terrorism. It is acting on the basis of its right to self-defense (see art. 51 of the United Nations Charter). This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that "when the cannons speak, the Muses are silent" is incorrect.... The reason underlying this approach is not merely pragmatic, the result of political and normative reality. The

[79] *See* HCJ 320/80 Kwasama v. The Minister of Defense [1980] IsrSC 5(3) 113, 132.

> reason underlying this approach is much deeper. It is an expression of the difference between a democratic State that is fighting for its survival and the battle of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting and in defiance of the law. The war against terrorism is a war of the law against those who seek to destroy it ... But it is more than this: We have established here a State that respects law, the achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation.[80]

One of the most difficult cases to come before us raised the question of whether the state could use interrogation methods constituting torture, which are prohibited by international law, against a terrorist who is a ticking time bomb.[81] At issue was not the admissibility of statements made under those conditions. They were clearly inadmissible. At issue was the legality of the methods themselves. We held that it these methods are prohibited. The case was difficult. It was so not because of the legal difficulty. Here, the solution was clear. We cannot and would not want to lend a hand to torture. The difficulty was psychological and moral. Can we not justify harm to the one, in order to save the many? We noted that there may be situations in which, in retrospect, an interrogator may make use of the criminal defense of necessity. Even if that is so, it does not justify advance instructions to use torture. That would be bureaucratization of torture, and a court cannot support that. In that judgment, I noted:[82]

> We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end

[80] *See Almadani v. The IDF Commander in Judea & Samaria, supra* note 60.

[81] *See* HCJ 5100/94 Pubic Committee Against Torture in Israel v. The Government of Israel [1999] IsrSC 53(4) 817, English translation, *available at* http://elyon1.court.gov.il/ files_eng/94/000/051/a09/94051000.a09.htm (last visited June 4, 2006).

[82] *Id.* at 845.

of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

VI. *On the Judicial Role*

Indeed, the battle against terrorism poses before judges an old question: What is our role? Of course, this question does not arise in the easy cases, in which there is only one solution. But what is our role in the hard cases, in which there is more than one solution, and we face the need to exercise our discretion?[83] The answer is that our role is two-fold:[84] *First,* bridging the gap between law and life. This gap is natural, and bridging it is one of our central roles. *Second*, our role is also preserving the constitution, democracy, and human rights.

If we wish to preserve democracy, we cannot take its existence for granted. We must fight for it. This is certainly the case with new democracies, but it is also true for the old and well-established ones. The assumption that "it can't happen to us" can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven, and Goethe, it can happen anywhere. If we do not protect democracy; democracy will not protect us. I do not know whether the judges in Germany could have prevented Hitler from coming to power in the 1930s. But I do know that one of the lessons learned from the Holocaust and the Second World War is the need to have democratic constitutions and to ensure that they are put into effect by judges whose main task is to protect democracy. It was this awareness that, in the post-World War II era, helped promote the idea of judicial review of legislative action and made human rights a central issue.[85] And it shaped my belief that the main role of the judge in a democracy is to maintain and protect the constitution and democracy. As I noted in one of my opinions:[86]

[83] *See* AHARON BARAK, JUDICIAL DISCRETION (1987); MARIA I. VILA, FACING JUDICIAL DISCRETION: LEGAL KNOWLEDGE AND RIGHT ANSWERS REVISITED (2001).

[84] *See* Barak, *supra* note 7.

[85] *See generally* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45 (1971); CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, & Steven C. Wheatley eds., 1993); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1995); MARINA ANGEL, *Constitutional Judicial Review of Legislation: A Comparative Law Symposium*, 56 TEMP. L. Q. 287 (1983).

[86] *See* HCJ 5364/94 Velner v. The Chairman of the Israeli Labor Party [1995] IsrSC 49(1) 78, 808.

> The struggle for the law is unceasing. The need to watch over the rule of law exists at all times. Trees that we have nurtured for many years may be uprooted with one stroke of the axe. We must never relax the protection of the rule of law. All of us—all branches of government, all parties and factions, all institutions— must protect our young democracy. This protective role is conferred on the judiciary as a whole and on the Supreme Court in particular. Once again we, the judges of this generation, are charged with watching over our basic values and protecting them against those who challenge them.

This approach—I believe—is common to many Supreme Court judges in modern democracies. Judicial protection of democracy, in general and of human rights in particular, characterizes the development of most modern democracies.[87] The phenomenon is general, the result of the events that occurred during World War II and the Holocaust. Legal scholars often explain this phenomenon as an increase in judicial power relative to other powers in society.[88] This change, however, is merely a side effect. The purpose of this modern development is not to increase the power of the court in a democracy, but rather to increase the protection of democracy and human rights. An increase in judicial power is an inevitable result, because judicial power is one of many factors in the democratic balance.

The tools we have to realize our role are few. They are the ordinary judicial tools:[89] interpretation and development of the common law. I have found that the purposive interpretation gives us, the judges, an effective and legitimate tool for realizing our role.[90] Indeed, the interpretive theory we choose and the interpretive rules we employ, should express our ability to realize our role as judges. In both interpretation and the development of the common law, judges should appropriately and increasingly use the principle of balancing.[91]

[87] *See* MICHAEL KIRBY, *Australian Law—After 11 September 2001*, 21 AUSTL. B. REV. 21 (2001); SIR ANTHONY MASON, *A Bill of Rights for Australia?*, 5 AUSTL. B. REV. 79, 80 (1989); BEVERLEY MCLACHLIN, *The Role of the Supreme Court in the New Democracy* 13-15 (2001) (unpublished manuscript, on file with the Harvard Law School Library).

[88] *See* THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra note* 85, at 1-5.

[89] *See* Barak, *supra* note 7, at 62-115.

[90] *See* BARAK, *supra,* note 3.

[91] On Balancing, *see* Barak, *supra* note 7, at 93.

Balancing and weighing, themselves metaphors, reflect the need to decide a conflict between values and principles that are accepted in the legal system. The result of the balance is important both to the development of common law and to the determination of the objective purpose in a legal text, such as statutes and constitutions. The concept of balancing recognizes that fundamental principles and interests may conflict with one another, and that the proper resolution of this conflict lies not in the elimination of the inferior value but in determining the proper boundary between the conflicting values.[92] Similarly, the concept of balance reflects the recognition that fundamental principles have weight and that it is possible to classify them according to their relative social importance. The act of weighing is merely a normative act designed to give the principles their proper place in the law. By using balancing and by preferring it upon categorization,[93] the judge has at his disposal the most important tool—except interpretation—for realizing his or her role

Justiciability and standing are generally considered marginal issues in public law theory. In my opinion, they are tools of great importance. Tell me your position on justiciability and standing, and I'll tell you your position on the role of the judge. A judge who regards his judicial role as bridging the gap between law and society and protecting democracy will tend to expand the rules of standing. My approach is that the role of a court in a democracy is not restricted to adjudicating disputes in which parties claim that their personal interests have been violated. The Supreme Court of Israel has adopted this approach as well. Gradually—at first, in minority opinions of justices in the 1960s and 1970s,[94] and thereafter as a majority[95]—the Court has adopted the view that when the claim alleges a major violation of the rule of law (in its broad sense), every person in Israel has legal standing to sue. Fears that the court would be "flooded" with frivolous lawsuits have proven groundless. In practice, it is primarily citizen watchdog groups and human rights organizations that have exploited this provision. I think that, overall, the outcome has been positive. I was happy to learn that South Africa adopted a similar solution

[92] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002).
[93] On the distinction between balancing and categorization, *see* KATHLEEN M. SULLIVAN, *Post-Liberal Judging: The Role of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).
[94] *See supra* notes 14-17.
[95] *See supra* note 19.

in its Constitution.[96] Like the Israeli Supreme Court, the Supreme Court of India has reached a similar result by adopting a liberal standing doctrine.[97] Other common law systems are moving towards liberalizing their standing requirements.

VII. *Epilogue*

I regard myself as a judge who is sensitive to his role in a democracy. I take seriously the tasks imposed upon me—of protecting the constitution and democracy. Despite frequent criticism—and it frequently descends to personal attacks and threats of violence—I have continued on this path for the last twenty-seven years. I hope that by doing so, I am serving my legal system properly. Indeed, as judges in our countries' highest courts, we must continue on our paths according to our consciences. A heavy responsibility rests on our shoulders. But even in hard times, we must remain true to ourselves, reflecting history—not hysteria.

As a judge, I do not have a political platform nor am I a political person. Right and left, religious and secular, rich and poor, man and woman, disabled and non-disabled—all are equal in my eyes. All are human beings, created in the image of the Creator. I will protect the human dignity of each. I do not aspire to power. I do not seek to rule. I am aware of the chains that bind me as a judge. I have repeatedly emphasized the rule of the law and not the rule of the judge. I am aware of the importance of the other branches of government—the legislative and executive. I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial.

[96] *See* Article 38 of The Constitution of the Republic of South Africa, 1996.

[97] *See* Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible*, 37 AM. J. COMP. L. 495 (1989).