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Human Rights in Israel – A Brief Overview

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Introduction

A. Rule of Law and Constitutionalism

The rule of law is a complex concept and various writers and judicial decisions have tried to formulate it over the generations.[1] For our purposes, it is sufficient to say that the rule of law is a bulwark against anarchy, chaos, intemperate executive action, despotism, and rule by whim. It provides the foundation necessary for a society lead a (reasonably) stable and comprehensible existence. In a democracy, the rule of law requires that, at a minimum, every legal norm is based on a democratically legitimate source. Ministers and servants of the State cannot act without authorization, and even when authorized to act by the legislature, they cannot act without restrictions on their exercise of power. Moreover, administrative action must be reasonable, predictable, uncontradictory, and allow for compliance. Constitutional democracy includes an extra layer of the rule of law. Here, not only is administrative power not unlimited, but neither is *legislative* power is ever absolute. A constitution and resultant judicial review provide a brake on the power of the legislature to act as it pleases.

Constitutions typically limit legislatures through two types of norms: First, through provisions that regulate the structure of government pertaining to things such as the three branches, the electoral system, and so on. Secondly, via provisions that protect human rights. It is the second element of the constitutional rule of law – rights protection – on which this article focuses.

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1 The components of the rule of law were famously described by theorist Lon Fuller as including eight elements:

> 1) Governance by general norms: No system of governance can count as a regime of law unless it operates through general norms, for those norms are its principal laws and are also the sources of its other laws. There can hardly be law without laws;
>
> 2) Public ascertainability: No legal system can guide and direct human behavior if the contents of its norms remain wholly undisclosed to the people within the jurisdiction of the system;
>
> 3) Prospectivity: In any functional regime, all or most of the laws must be prospective rather than purely retrospective;
>
> 4) Perspicuity: One of the hallmarks of the rule of law is that it conveys to people a clear sense of what is demanded of them (and what is permitted and what is authorized);
>
> 5) Against conflict and contradictions: The principle of non-contradictoriness;
>
> 6) Compliability: The possibility of compliance with laws;
>
> 7) Constancy: Steadiness or constancy of legal norms through time;
>
> 8) [N]orms generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the laws in which they are implemented (the laws in practice).

The article discusses the development of human rights in Israel, and argues that it developed through a partnership between the courts and the national legislature, the Knesset. Historically, the court has always made the first moves on rights protection, but it always did so by attributing the intention to protect such rights to the legislature. The legislature for its part did not challenge this assumption and was comfortable leaving the court with the main responsibility over human rights. While there has always been some criticism – sometimes harsh criticism – of judicial activism, disapproval within the legislature and the polity never amounted to formal legislation that would curtail or even limit the judicial review power of the court. We will demonstrate that the partnership between the courts and the legislature evolved in two stages: (1) when the court accepted that legislative power was absolute, but held that administrative action is not immune to judicial review; and (2) when the court found that even the power of the legislature is not absolute.

Our thesis will show that the court set out to protect rights from the very beginning, and that the successive Knessets did not object to the infringement on their authority, and that they implicitly approved it. The court used this implicit approval, then, to actually strengthen the doctrine of human rights protection. During the entire period from 1948 until 1992, instead of creating formal rules for the court's authority, the legislature and Israeli society engaged in active debate about whether the country should have a constitution. No formal declaration was ever made that the court should or should not engage in judicial rights protection, despite the constant debate in parliament and the academy. Throughout this development, the court attributed the desire for human rights protection to the legislature, and implied that every piece of legislation should be read as though it had been drafted in light of that implied bill of rights. In this way, human rights acquired safeguards, ensuring that even in the midst of fear, war, and political and social tension, that basic rights had some measure of protection.

B. The Structure of Constitutionalism in Israel

The way in which constitutionalism ordinarily constrains the power of legislatures is through a formal, written constitution. This constitution is normally entrenched so that the legislature cannot change it for narrow political needs, and is enforced by the judiciary, which is not directly politically accountable. Israel, however, has no formal written constitution. While the U.N.

Resolution[2] that provided for the establishment of the state of Israel called for a constituent assembly and the creation of a constitution, no such document was produced. The constituent assembly elected in 1949 failed to agree on the form and content of a formal constitution. Once it was clear than an impasse had been reached, the Assembly passed the *Transition to the Second Knesset Act 1949*,[3] transforming itself into the first Knesset (ordinary legislature), forestalling efforts to produce a working constitution.

There were many reasons for the failure to agree on a formally entrenched bill of rights, starting first with Prime Minister Ben-Gurion's desire that Israel should be governed by a supreme legislature.[4] Moreover, the ever-present security concerns of a nation at war since the hour of its birth made some of the polity reluctant to allow judicial review, fearing that courts would prefer human rights over security, while the Knesset would look first to the security of the state.[5] Furthermore, the lack of consensus of the disparate groups making up the new polity, and especially the divide between secular and religious visions of the state, all militated against the entrenchment of a formal, written constitution.[6] The reasons for the lack of adoption of a constitution have persisted since the early days of the state and continue today. The necessary consensus for the creation of a constitution has never been formed.[7]

The decision to hold-off from the continuing debate over the nature of any constitution was formalized by the *Harari Resolution*, 1950.[8] It prescribed that a series of "Basic Laws" should be drawn up to govern the nascent state. Over time, these specially entrenched Basic Laws would

2 UNGAOR, 2d. sess., U.N. Doc A/519 (1948).

3 L.S.I. 5709/1949 vol. 3, 3 [Transition Act]. Ruth Gavison, "Legislatures and the Quest for a Constitution: The Case of Israel" (2006) 11:2 Review of Constitutional Studies 345 ["Case of Israel"].

4 Gavison, "Case of Israel," supra note 3 at 366.

5 See for example Daphne Barak-Erez, "From an Unwritten to a Written Constitution" (1995) Columbia Human Rights Law Rev. 309 [Barak-Erez, "Unwritten"]; Ruth Gavison, "A Constitution for Israel: Lessons from the American Experiment" (2002) Azure 133 [Gavison, "Lessons"]; Gavison, "Case of Israel", supra note 3.

6 For an extensive discussion of this issue, see Gidon Sapir, "Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment" (1998-1999) 22 Hastings Int'l & Comp. L. Rev. 617 [Sapir, Re-evaluation]; and Gidon Sapir, "How Should a Court Deal with a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy over Who is a Jew as an Illustration" (2006) 39 Vand. J. Transnt'l L. 1233 [Sapir, "Who is Jew?"].

7 For more on the difficulties in creating an entrenched, written constitution for Israel, see Barak-Erez, "Unwritten" supra note 5; Ruth Gavison, "The Controversy Over Israel's Bill of Rights" (1985) 15 Israel Yearbook on Human Rights 113 [Gavison, "Controversy"]; Gavison, "Case of Israel," supra note 3 at 366-72 ff.

8 Harari Resolution, D.K. (1950) 1743 (Hebrew).

comprise a gradually enacted constitution. In the years following the *Harari Resolution*, ten Basic Laws were enacted.[9]

However, both the status and the content of the decision were far from reflecting a clear legislative intent or agenda. In terms of status, the resolution is more a declaration by the Knesset, rather than a statute or otherwise binding statement. In terms of content, the language of the *Resolution* mentioned nothing about how Basic Laws should be passed. Neither were there instructions about whether once a Basic Law passes it immediately becomes a chapter in the constitution, or whether some final act of constitutionalization is necessary. There was no mention of a required formula, no mechanism for amendment, and no description about how the Basic Laws would be transformed into a constitution.

Specifically, the *Resolution* left open three major issues: entrenchment, supremacy, and judicial review. Put differently, the *Resolution* did not provide an answer to the following questions: (1) Are Basic Laws supreme or can ordinary legislation be inconsistent with them? (supremacy); (2) What majority is required to amend a Basic Law? (entrenchment); and (3) Can there be judicial review of any of the two three questions, that is, are courts allowed to strike down legislation which is incompatible with the constitution? (judicial review)

The answers to these three questions determine to what extent a regime is constitutional. In the classic model of constitutional democracy, the answers are that (1) the constitution is *supreme*. A law that is inconsistent with the constitution is invalid. (2) Constitutions are *entrenched*. This means that constitutional provisions are to be amended only according to an amending formula, which requires a super majority rather than an ordinary majority of legislators (or, in a federal system, a super majority of the units composing the federation). (3) There exists judicial review on the constitutionality of legislation. The courts have the power to strike down legislation, and thus ensure that the supremacy of the constitution reigns.

Over time, the courts and the Knesset provided some answers to these questions. The first question was implicitly answered by the *Bergman* case, discussed in the next section. *Bergman*

9 The Basic Laws passed up to the present include: Basic Law: The Knesset; Basic Law: The Government; Basic Law: Israel Lands; Basic Law: Judicature; Basic Law: The President of the State; Basic Law: The State Economy; Basic Law: Jerusalem, Capital of Israel; Basic Law: The State Comptroller; and Basic Law: The Army.

held that Basic Laws are supreme only if entrenched, and if a contradicting piece of ordinary legislation did not amend them by the required majority. The only unresolved concern on this point was whether the infringing legislation passed with the majority required by the terms of the Basic Law. The second question was never answered, but given that some Basic Laws specifically require either an absolute or a super majority to amend, then it is logical that those that do not have such requirements can be amended by ordinary legislation. Finally, the third question was practically answered by the act of judicial review in *Bergman*.

C. Basic Laws and Judicial Review

Though judicial review has existed in Israel since 1948, it was initially restricted to administrative actions. Courts checked the actions of Ministers, but refrained from challenging the validity of statutes passed by the Knesset. This was because of parliamentary supremacy and the developing of a notion of an implied Bill of Rights. The principle of parliamentary supremacy meant that there can be no judicial review on the constitutionality of legislation. The notion of an implied bill of rights meant that unless the legislature indicates so explicitly, any legislation should be interpreted as respecting human rights.

It took until 1969 for the Supreme Court to strike down a law duly enacted by parliament. In a key decision in the case of *Bergman*, the Supreme Court introduced the possibility of judicial invalidation of Knesset law: Justice Moshe Landau accepted that the court can make a judgment with respect to an inconsistency between Basic Laws and ordinary legislation.

When the Sixth Knesset passed a new election financing law in 1969, a motion was brought for an order *nisi* on the basis that the law violated the equality provisions of *Basic Law: The Knesset*.[10] Section 4 of the Basic Law requires that elections shall be "general, nationwide, direct, equal, secret, and proportional."[11] According to this Basic Law, s. 4 can be amended only by an absolute majority of the Knesset, which had not happened in this case. The new financing law provided election funding only to parties represented in the current session of the Knesset, and

10 Basic Law: The Knesset, 12 L.S.I. 85 (1958), [Basic Law: The Knesset]. Full texts of the Basic Laws in unofficial English translation are available online at <http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm>.

11 Basic Law: The Knesset, s. 4.

not to as-yet-unelected parties. The challenge was on the basis that it violated (i.e. amended) the equality provision in section 4, and was therefore void for lack of an absolute majority of the Knesset.[12]

The Attorney General made it clear that he wanted the issue decided on its merits, without evaluation of the justiciability question. Justice Landau accepted this proposition, and left open the justiciability question for later consideration. While deliberately sidestepping the issue of justiciability of the Knesset's compliance with the provisions of a Basic Law,[13] Landau rejected the Attorney General's argument that equality of elections extended only to "one man, one vote" and no more. Equality, held the court, could exist "independently without resting upon a provision in a written constitution that expressly declares the principle of equality of all persons before the law… [because] this unwritten principle is the soul of our entire constitutional regime."[14] This implied right of equality extended to the right to be elected. The financing law, therefore, contradicted the Basic Law. Because the act was not passed by a proper majority, the court made absolute the orders *nisi*, and forbade the Minister of Finance to act, unless the law was amended to remove the inequality, or was re-enacted with the required majority.[15]

The *Bergman* decision implied that there was no distinction between contradicting and amending a Basic Law, as well as between amending (or contradicting) a Basic Law by another Basic Law, as compared to by another ordinary law. In both cases, all that matters is that the inconsistent law was passed by the majority specified in the Basic Law for its change. This approach befitted the notion of parliamentary sovereignty, understood in Israel at the time as the foundational principle of Israeli democracy. This notion was coupled with the idea of the implied repeal. That is, parliamentary sovereignty is evident if when there are two laws, and the latter contradicts the former, then the latter prevails (an implied repeal). It was assumed that a Basic Law could be

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12 The new law had been passed by a vote of 24 to 2, less than the required absolute majority of the sixty-one-member Knesset, see Bergman v. Minister of Finance, HCJ 98/69 at 4 [Bergman]. English version available from the Supreme Court of Israel website online at <http://elyon1.court.gov.il/eng/home/index.html>.

13 Bergman, supra note 12 at 4.

14 Ibid. at 8.

15 Bergman, supra note 12 at 10. In response to the decision, the Sixth Knesset amended the Law to permit funding for new party groups in the election, by an absolute majority. It also passed a new law confirming the validity of previously enacted elections legislation, to immunize it from judicial review. See Editor's Synopsis, Bergman, supra note 12 at 1-2.

amended implicitly. Basic Laws are not supreme, and an appropriate majority was the only requirement to validly amend them.

The importance of *Bergman* is not that it created the possibility of judicial review on the constitutionality on legislation, but also in that it implied how rare such judicial review is likely to be. If s. 4 of *Basic Law: The Knesset* was supreme only because it was entrenched, then hundreds of sections in other Basic Laws, which were not entrenched, were not supreme. Thus, while *Bergman* announced the authority of the court to overturn legislation passed by the Knesset, it also affirmed the principle of parliamentary sovereignty. The Knesset had the power to alter Basic Laws, as long as it met its own majoritarian benchmark.

Bergman is comparable to *Marbury v. Maddison* in the United States. The authority established by *Bergman* was infrequently used in the intervening years up until the passage of the new Basic Laws in 1992, but it infused the courts with the power to overturn Knesset laws. It was an authoritative statement that Basic Laws were normatively superior to ordinary statutes, but not necessarily supreme. Whether that had been an appropriate legislative majority was the only question. Supremacy could be attained only through entrenchment. This would change only twenty-five years later, by the *Bank Hamizrachi* decision, which is explored below.

The Constitutional Status of Human Rights before 1995

Human rights were also subject to the principle of parliamentary sovereignty in Israel. For anything to be protected from subsequent Knesset amendment, it would have to be in an entrenched provision of a Basic Law. Most constitutional legislation, including most Basic Laws, was never entrenched, and human rights were no different. Recall, there was general reluctance in Israel to entrench a constitution, but in the context of human rights, an additional reason existed for the resistance to entrenchment. Because the language of rights provisions in the constitution is always abstract, and is more general than that of structural laws, the fear of entrenchment was great. The fear was that if courts are authorized to strike down legislation because they violate abstractly-defined rights, this would give the judiciary power over many

important social issues, including those in the realm of religion and the state, and on isuses of security.

Nevertheless, the Knesset did not stop the courts from giving human rights legal status, provided that legislation which explicitly denied such rights was pronounced valid. In this way, a partnership between the courts and the legislature began. Although parliamentary sovereignty reigned so that the Knesset had the power to curtail human rights at its will, Israeli courts gave human rights legal status.[16] The development of the appropriately titled "Unwritten Constitution"[17] sprung from judicial recognition of diverse rights: personal liberty, freedom of speech, freedom of religion and conscience, and procedural due process among them.[18] The court located the source of these rights in the *Declaration of Independence*,[19] in fundamental principles, and saw them arising naturally as part of the project of democracy chosen by the Israeli people.[20] This kind of judicial action continued in this common law style until the passing of two new Basic Laws in 1992. *Basic Law: Human Dignity and Freedom* altered the approach to rights protection,[21] which was affirmed in the seminal 1995 *Bank Hamizrachi* decision.

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16 For analysis of the development of human rights in Israel, see Baruch Bracha, "Judicial Review of Security Powers in Israel: A New Policy of the courts" (1991) 28 Stan. J. Int'l Law 39 Bracha, "Judicial Review"; Baruch Bracha, "The Protection of Human Rights in Israel" (1982) 12 Isr. Y.B. on Hum. Rts. 110 Bracha, "Protection of Human Rights"; Barak Cohen, "Empowering Constitutionalism with Text from an Israeli Perspective" (2002-2003) 18 Am. U. Int'l L. Rev. 585 [Cohen]; Yoseph M. Edrey, "The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements" (2005) 53 Am. J. Comp. L. 77 [Edrey]; Ruth Gavison, "Forty Years of Israeli Law: Constitutional Law" (1990) 24 Isr. L. Rev. 431 [Gavison, "Forty Years"]; Pnina Lahav, Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century, Berkeley: University of California Press, 1997; Asher Maoz, "Defending Liberties Without a Constitution – The Israeli Experience" (1988) 16 Melb. U. L. Rev. 815 [Maoz, "Defending Liberties"]; Amos Shapira, "The Status of Fundamental Individual Rights in the Absence of a Written Constitution" (1974) 9 Isr. L. Rev. 497; Amos Shapira, "Judicial Review Without a Constitution: The Israeli Paradox" (1983) 56 Temp. L.Q. 405; Aharon Barak, The Judge in a Democracy, Princeton: Princeton University Press, 2006 [Barak, Judge in a Democracy].

17 For a further exploration of the term, see Barak-Erez, "Unwritten", supra note 5 at 315-22. For a brief history of judicial rights protection generally, Cohen, supra note 16, Edrey, supra note 16.

18 Recognized rights include personal liberty (Al-Karbutli v. Minister of Defense, 2 P.D. 5 (1948)); freedom of speech (starting with "Kol Ha'am" Co. LTD v. Minister of Interior, H.C.J 73/53 [Kol Ha'am] [unofficial English version from the Supreme Court of Israel website online at <http://elyon1.court.gov.il/eng/home/index.html>, and aff'd in Laor, infra note 32; and Schnitzer, infra note 40); freedom of religion and conscience (Peretz v. Local Council of Kfar Shmaryahu, 16 P.D. 2101 (1962)); equality (Peretz; aff'd in Younes v. Director Gen. of the Prime Minister's Office, 35(3) P.D. 589 (1981)); and procedural due process or the "rules of natural justice" (Barman v. Minister of the Interior, 12 P.D. 1493 (1958)).

19 Declaration on the Foundation of the State, Laws of the State of Israel 5708/1948, vols. 1-3 [Official English Translation of Israeli Statutes].

20 Edrey, supra note 16 throughout, esp. at 118-19.

21 For an examination of the changes in the source of human rights protection, see e.g. Baruch Bracha, "Constitutional Upgrading of Human Rights Law in Israel: The Impact on Administrative Law" (2001) 3 U. Pa. J. Const. L. 581 [Bracha, "Administrative Law"].

Until 1995, however, only administrative actions were subject to judicial review on the ground of rights violations.[22] Based on this doctrine, many executive (including military) actions were invalidated by the Supreme Court, sometimes creating public outrage that the court was being too respectful of rights.[23] Nonetheless, the court wrote that a host of principles, including the rule of law, meant that if there was an explicit authorization from legislation, then a violation of human rights was permitted.[24] The following sections are descriptions of some of the most important decisions given by the Supreme Court of Israel between 1948, when the state was established, and 1995, when the *Bank Hamizrachi* decision revised *Bergman* and gave constitutional status to Basic Laws, including Basic Laws on human rights.[25]

The decisions that are described here all involve the balancing of freedom of expression with security concerns. The relationship between these two rights is relevant in every country, and they are easily relatable to other contexts. In order to allow the reader to see a clear line of development, we have chosen to explore only freedom of expression. The first decision, *Kol Ha'am*, is the most important decision. In applying its result, we have chosen two cases that deal with three of the holiest cows in Israel: the Holocaust, the Mossad, and racism.

i. Kol Ha'am and the Test for Infringing on Human Rights

In Israel of the early fifties, before the polarization of Israeli policy towards the U.S.S.R., the Soviet Union was still a friend of Israel. The Union of Soviet Socialist Republics had even voted in favour of Israel's admission to the United Nations. In 1953, two Israeli communist newspapers published articles about comments made by Israel's ambassador to the United States about Israel's potential contributions to a war against the Soviet Union. The statements by the

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22 Bracha, "Administrative Law", supra note 21 at 583-89; and Barak-Erez, "Unwritten," supra note 5 at 327 fn 88.

23 Aharon Barak, "Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) 116 Harv. L. Rev. 16 [Barak, "A Judge on Judging"]; Daphne Barak-Erez, "Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court" (2001) 16: 1 Canadian Journal of Law and Society 93 at 109-110 (the effects on legitimacy of the court's decisions) [Barak-Erez, "Collective Memory"]; An example of this would be the decision to force the military to provide gas masks to Palestinians in the occupied territories during the first Gulf War (Murkus v. Minister of Defence, H.C. 168/91, 45(1) P.D. 467.).

24 On this basis, there are still a number of laws in force in Israel that clearly violate human rights and that likely would be rendered unconstitutional by a court enforcing a bill of rights. For example, family law in Israel does not allow Jewish people to marry non-rabbinically; see Ruth Halperin-Kaddari, Women in Israel: A State of their Own (Philadelphia: University Of Pennsylvania Press, 2004).

25 The end of the period begins in 1992 with the passage of the new Basic Laws, but because we are dealing with judicial decisions, the 1995 decision in Bank Hamizrachi Ltd., et al. v. Migdal Collective Village, et al., P.D. 49 (4) 221 provided the impetus for the transition to a new era of constitutional jurisprudence, and so we start our discussion there.

ambassador were perceived as a break with the past relationship between the Soviet Union and Israel. They riled the pro-Communist elements of society in an already tense political climate.

The Minister of the Interior considered that the inflammatory nature of the articles was likely to endanger the public peace, and under s. 19(2)(a) of the *British Mandate Press Ordinance*, suspended operation of the papers. The papers sought orders *nisi* to have the suspensions set aside. The Supreme Court, sitting as the High Court of Justice, held that the Minister had improperly exercised his discretion in making the orders, and held that the suspensions should be set aside.

In this case, there was a statute authorizing the Minister to employ broad and potentially detrimental powers, without specifying how the power should be exercised. The regulation that the Minister used to make his order stated that if "any matter appearing in a newspaper is, in the opinion of the [Minister], likely to endanger the public peace, … [he may] … suspend the publication of the newspaper for such period as he may think fit ... [26] As a result, the court turned to the independent category of human rights in order to interpret the legislation.

Writing for the court, Justice Agranat ruled that discretion must be exercised reasonably, and that the Minister must consider the "weighing of the interests involved" when making an administrative order.[27] In interpreting the authorizing statute, the court examined the term "likely". Consequently, the court established a test to determine when administrative sanction is appropriate, given the balance of interests involved in a decision. The Minister must consider whether there is a strong probability and severity of danger to the public peace, so as to justify the use of so drastic a power as censorship.[28]

This test scrutinized the language of the statute, and interpreted it against the right infringed on and the interest against which it was balanced (in this case, freedom of speech was balanced against security interests). The result was the requirement of a "strong probability" and "severity" of harm in order to justify the use of severe administrative sanction. After *Kol Ha'am*,

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26 Kol Ha'am, supra note 18 at 3.

27 Ibid. at 29.

28 Ibid. at 29.

the necessary components of "strong probability" and "severity of harm" were adopted as the standard for judging administrative action in all situations involving the exercise of administrative discretion. This happened even in cases where the statute in question did not contain specific references to those terms, and even where the values involved were considerably more important to the Israeli state (such as occurs in *Laor* and *Schnitzer*, below).

The court found its authority to overrule the Minister in the democratic character of the Israeli state: for there to be democracy, they said, then, like the United States, like the United Kingdom, the first step was freedom of speech and ideas.[29] The balancing of interests between the state and the individual, and between freedom and necessary restraint, is a necessary precondition for democracy.[30] When this balancing was done by the legislature, however, the court said that it would not interfere.[31] This deference to legislative specificity, coupled with the strong assertion by the court that it would oversee the discretionary actions of the Executive, was a watershed moment, and the beginning of the partnership. The court both acknowledged the separate character of the legislature, and took on its role in order to protect human rights. The implication is that the legislature would not pass a law that contained an inherent violation of human rights. Instead, it was the Minister's action that broke with human rights protection, and so had to be remedied.

The effect of this judgment was to declare for the court the power to oversee the exercise of administrative authority. *Kol Ha'am* has been affirmed innumerable times since its release, and is the first decisive action by the court to rein-in the Executive branch. In *Kol Ha'am*, the court read into the Minister's action a presumption that he would respect human rights, and implied that he would violate human rights (here, freedom of speech and the press), only if the situation merited it.

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29 Ibid. at 6-10 ff.

30 Ibid. at 11-12.

31 Ibid. at 14.

ii. Balancing Freedom of Speech and the Emotions of Holocaust Survivors - Laor[32]

In 1986, a motion was brought before the High Court of Justice to lift an order enjoining the Haifa Municipal Theatre from staging a production of Yitzhak Laor's play "Efrayim Returns to the Army". The Film and Play Supervisory Board had refused to grant permission to perform the play, which explored a series of events and relationships in the office of the Military Governor of the West Bank. It did so on the basis of the "falsifying, provocative and insulting nature" of the play,[33] which included comparisons between the Israeli Army and Nazi Germany, and the degradation of a female soldier, among other scenes.

The bulk of the judgment by Justice Barak[34] dealt with the weighing and balancing of violations of freedom of speech against the need for public order and safety.[35] In this case, there was no explicit legislation enabling the infringement of human rights, and the language of the authorizing statute was not explicit. Because the statutory language and aim of the governing Act did not explicitly delineate the boundaries of these interests, the court was obliged to undertake the balancing "against the background of the fundamental principles" of the Israeli legal system.[36] The recourse to the unwritten constitution, and the balancing of statutorily permitted censorship against the implied right to freedom of speech reinforced the decision in *Kol Ha'am*.[37] It shows the court imposing limits on the exercise of executive authority when it conflicts with the implied bill of rights through judicial review, even where the action is authorized by statute. There was no attempt to impugn the legislature's authorization of censorship in the governing act, but given its lack of specificity, the court had recourse to the implied constitution. The partnership legitimized the court's imposition of further limits on executive action, and enabled it to intervene where delegated authority has not been exercised within a "zone of reasonability".[38]

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32 H.C. 142/86 Laor v. Film and Play Supervisory Board, 41 P.D. 421 (1986) [Laor].

33 Laor, supra note 32 at 1.

34 There were concurring judgments by Netanyahu J. supra note 32 at 36, and Maltz J. supra note 32 at 41, which focus on whether censorship should be permitted at all in Israel.

35 See especially Laor, supra note 32 at 17-21 ff.

36 Laor, supra note 32 at 14-15.

37 The judgment makes explicit reference to Kol Ha'am throughout; see especially Laor, supra note 32 at 23-24.

38 Laor, supra note 32 at 29.

In making his decision, Barak J. spoke about being a child during the Holocaust, and how it pained him to have to sanction this kind of commentary:

> I was myself a child during the Holocaust and crossed fences and borders guarded by the German army carrying forbidden articles on my body. The parallel between a German soldier who stops this body and an Israeli soldier who detains an Arab boy sears my heart. But we live in a democratic state, and this searing of the heart lies at the very core of democracy. The force of democracy lies not in acknowledging my rights to hear what pleases my ear. It lies in recognizing the right of the other to utter words that hurt my ears and cause pain in my heart.[39]

Despite his feelings, Barak stuck firmly to the principles set out in *Kol Ha'am*. And as in *Kol Ha'am*, even when interests (here, social values and the role of the Holocaust) central to the nation of Israel were under threat, the court applied a stringent balancing of rights and interests. The decision resulted in the court authorizing the play to be performed as planned.

iii. Schnizter and Israeli Democratic Values[40]

The petitioners in this case sought an order *nisi*, enjoining the Chief Military Censor from preventing publication of a newspaper article. In 1988, the paper sought to publish an article on the outgoing head of the Mossad, which criticized his leadership, and which discussed the upcoming transition. The Chief Military Censor withheld permission for publication under the *Defence (Emergency) Regulations 1945*,[41] on the grounds that the Mossad's functionality would be impaired, and that the life of the head of the service might be endangered. These regulations were issued under the British Mandate in Palestine, but were incorporated into the law of Israel.[42] Reg. 87 was specifically at issue: it prohibited publication of matters which, in the opinion of the censor, "would be, or be likely to be or become, prejudicial to the defence of Palestine or to the

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39 Laor, supra note 32 at 34.

40 H.C. 680/88 Schnitzer v. Chief Military Censor 42(4) P.D. 617 (1988). [Schnitzer]

41 Schnitzer, supra note 40 at 84-85.

42 Transition Act, 1949.

public safety or to public order." No other guidance for application was offered. In its decision, the court issued the order, releasing the articles for publication.

While ultimately finding that the Military Censor had failed to meet the burden of proof set out in the *Kol Ha'am* test,[43] the court found that the regulations, though passed during the British Mandate, were subject to interpretation "against the background of the basic principles of the legal system".[44] Legislation must be interpreted against the unwritten principles of the Israeli state, including the value of freedom of speech and the press (human rights considerations).[45] The Military Censor could not evade judicial review on the basis that he was using his "subjective discretion" to make the decision.[46] This case represents an expansion of the authority of the court to interpret legislation against the standard of the implied bill of rights, and further scope for judicial review of executive action.

iv. Kahane and Racism[47]

Another case of non-explicit legislation in which the court filled in the context of judicial rights protection occurred in *Kahane*. It involved the always contentious issue of Israeli and Jewish racism. The right-wing extremist Rabbi Meir Kahane was elected to the Eleventh Knesset. He campaigned and was elected on a platform promising to deport the Arabs, and save Israel for the Jews. Following his election, the Israel Broadcasting Authority took steps to prevent broadcasts of his statements in parliament, because they hateful and racist.

> The provision authorizing the Broadcasting Authority to act stated its role as follows:
>
> The Authority will provide the broadcasts to fulfill the following roles:
>
> (1) To broadcast educational, entertainment and informative programs in the fields of politics society, economy, culture, science and art. In order
>
> …
>
> (b) to foster good citizenship;

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43 Schnitzer, supra note 40 at 109-15.

44 Ibid. at 87.

45 See especially ibid. at 88-99.

46 Ibid. at 99-114.

47 H.C. 399/85, Kahane v. The Executive Board of the Broadcasting Authority, PD 41(3) 255.

(c) to strengthen the tie to Jewish heritage and its values and deepen its understanding …

(e) to broaden and spread knowledge; …

(f) to further the aims of public education…[48]

The breadth of this mandate meant that the Broadcasting Authority had to operate without detailed guidance from the legislature. By providing only general statements about the objectives of the Authority, the legislation did not explicitly grant the power to ban publication. The Broadcasting Authority based its decision on its obligation "to further the aims of public education". It felt that hateful speech did not meet this objective, and should therefore be banned.

The Broadcasting Authority issued a resolution respecting the Member's broadcast status. The resolution, as followed, would broadcast Kahane's Knesset appearances only when they were "clearly newsworthy". The basis for this extraordinary order was the "violent racial incitement, preaching hatred among sections of the public, and injury to basic democratic principles" engendered by Kahane's political speeches. The resolution would ban his political opinions, and forbid him to answer criticisms, which would be broadcast.[49] Kahane argued that the resolution constituted a "ban" against him, damaging to his freedom of speech, while the broadcaster argued that it was statutorily permitted to refuse to broadcast material that incites hatred.[50]

In the main judgment of Barak J.,[51] the court revisited the question of whether freedom of speech includes "deviant" speech.[52] The judgment followed the line of cases stretching from *Kol Ha'am* that hold that freedom of speech should only be curtailed when there is a strong probability and severity of danger to the public peace, so as to justify the use of so drastic a power. On this basis, the court ordered that the Broadcasting Authority must broadcast Kahane's speeches, unless in each particular instance, they believe there was a near certainty that his hatred would cause

48 Kahane, supra note 47 at 7-8.

49 Ibid. at 2-4.

50 Ibid. at 5-6.

51 Concurring judgments by Bach and Netanyahu JJ.

52 Kahane, supra note 47 at 10, 16.

serious harm.[53] In making its decision, the court used human rights to balance the responsibilities of the Broadcasting Authority with the protection of freedom of speech.

B. 1995-Present

Human rights protection continued in the common law vein until the passage of two new Basic Laws in 1992. *Basic Law: Human Dignity and Freedom* (*BL: Dignity*), and *Basic Law: Freedom of Occupation* (*BL: Occupation*) created a statutory basis for human rights protection. Shortly thereafter, in the seminal 1995 decision in *Bank Hamizrachi*, the Supreme Court declared the new Basic Laws to be a "constitutional revolution", which granted them the power to invalidate legislation deemed inconsistent with the provisions of the Basic Laws, and acted as an entrenched bill of rights for Israel.[54] Basic Laws were held to be supreme, and normatively superior to ordinary legislation. Courts now have constitutional authority with which to restrain the Knesset. Since 1995, Israel has existed as a constitutional democracy with full judicial review and an entrenched bill of rights – all by judicial fiat.

i. The Basic Laws of 1992

Over the years, there have been numerous proposals for constitutions and bills of rights for Israel.[55] Previously, it was an issue that attracted limited media attention, despite its cyclical recurrence. A number of times, a proposed constitution or bill of rights would be proposed, and almost reach a vote in the Knesset, only to fail for lack of consensus. In the interim, however, judicial rights protection was the norm.

This was the case until *BL: Dignity* and *BL: Occupation* introduced (limited) constitutionally-entrenched human rights provisions. This altered the source of human rights protections in Israel: the locus of legitimate checks on executive action shifted from the proclamations of judges, to

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53 Ibid. at 42-46, 77.

54 For a discussion of the "constitutional revolution," see e.g. David Kretzmer, "The New Basic Laws on Human Rights: A Mini Revolution in Israeli Constitutional Law?" (1992) 26 Israel Law Rev. 238 [Kretzmer, "Mini Revolution"]; Gavison, "Case of Israel" supra note 3; Gary Jeffrey Jacobsohn, "After the Revolution" (2000) 34 Isr. L.R. 139 [Jacobsohn, "After the Revolution"]; Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Cambridge: Harvard University Press, 2004).

55 Judith Karp, "Basic Law Human Dignity and Liberty – A Biography of Power Struggles" (1993) 2 Mishpat Umimshal – Law and Government in Israel 323.

the decree of the legislature.[56] The laws were passed with no public discussion and little legislative discussion or even awareness.[57] There were two parts of a proposed bill of rights, which had been divided into four parts in order to get it to pass the Knesset.[58] Legislators, much of the academy, and the public alike did not realize that the Basic Laws would become so contentious or important to the constitutional regime.

To be clear, the Basic Laws did not offer an exhaustive spectrum of rights protection.[59] *BL: Occupation* was fully entrenched,[60] while *BL: Dignity* was not entrenched, and both contained a provision granting all existing legislation immunity from judicial review.[61] Neither Basic Law contained a provision authorizing judicial review. Much like the Canadian *Charter's* own s. 1 limitation clause, these laws declared that certain rights are not to be limited except for a "proper purpose", in a way that "befits the values of the State of Israel as a Jewish and Democratic State", and only in a proportional manner.[62] Following a decision by the Supreme Court in 1994 to invalidate part of a non-entrenched law for failure to conform to *BL: Occupation*, the Basic Law was re-enacted by the Knesset to add a legislative override clause.[63]

Despite the uproar over the Supreme Court's use of *BL: Occupation* to strike down a law, *BL: Occupation* is the less important human rights law. *BL: Dignity* is the basis for constitutional human rights protection in Israel. While it is not entrenched, its codification of the rights to life,

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56 Bracha, "Administrative Law," supra note 21, esp. 586 fn 21, 642-45.

57 Karp, supra note 55.

58 Karp, supra note 55; Gavison, "Case of Israel," supra note 3.

59 Nor were they passed by a comprehensive majority of the Knesset: BL: Occupation was passed by a vote of 23-0, and BL: Dignity was passed by a vote of 32-21, both late at night. See Gavison, "Case of Israel," supra note 3 at 370 fn 4.

60 The formal citation for BL: Occupation is: Basic Law: Freedom of Occupation, S.H. 114 (1992) [BL: Occupation] at s. 7. The formal citation for BL: Dignity is Basic Law: Human Dignity and Liberty, Sefer HaHukim (S.H.) 150 (1992) [BL: Dignity].

61 BL: Occupation, supra note 60 at s. 10; BL: Dignity, supra note 60 at s. 10.

62 BL: Occupation, supra note 60 at s. 10; BL: Dignity, supra note 60 at s. 10.

63 The override clause was added as s. 8 of BL: Occupation.

The decision that inspired the amendment was the case of Meatrael v. The Government of Israel, P.D. 47(5) 485. In that case, the Petitioner, a company looking to import non-Kosher meat into Israel challenged a law forbidding it to import meat on the basis that it violated Basic Law: Freedom of Occupation. In obiter, the court held that the legislation did unlawfully infringe on BL: Occupation, and did not conform to the limitation clause. As a result of the decision, the Knesset amended BL: Occupation to include an override clause (s. 8), that permits valid infringement on freedom of occupation, if the act were passed by a majority of Knesset members, and stated that it was valid notwithstanding BL: Occupation. In a subsequent decision, Meatrael v. The Knesset of Israel, H.C. 4676/94, an override was found to be valid, despite potentially infringing rights in another Basic Law (here, BL: Dignity).

body and dignity, liberty, privacy, and property, gives broad authority to the courts to safeguard rights. It is the most similar Basic Law to a formal bill of rights. The scope of the rights it protects leads to greater conflict with the power of the Knesset to infringe on them.

ii. Bank Hamizrachi and the Constitutional Revolution

Following the passage of the new Basic Laws, an intense academic debate began, particularly in relation to *BL: Dignity*, regarding both its scope and its status.[64] Scholars disagreed over whether many important rights, such as equality and freedom of expression, which were deliberately not included in the bill of *BL: Dignity* to allow support for its adoption, are nevertheless constitutionally protected by *BL: Dignity*'s entrenchment of the right to "Human Dignity and Liberty". Scholars also disagreed about the exact meaning of the arguably oxymoronic term "Jewish and Democratic State".[65]

Second, the constitutional status of *BL: Dignity* was also debated. Some, most notably Aharon Barak, then the President of the Supreme Court of Israel, agued that these Basic Laws represented a "constitutional revolution", and that ordinary legislation could no longer violate protected rights. Many others argued that given the lack of a supremacy clause, entrenchment clause, and judicial review clause, the Basic Laws are more statutory than constitutional.[66]

The question arrived at the Supreme Court in the landmark and controversial 1995 *Bank Hamizrachi* case. In a multi-part decision, the court favoured the former view (President Barak's), ruling that courts have the power to invalidate any legislation inconsistent with *BL: Dignity*. Thus, the court gave *BL: Dignity* constitutional status by judicial fiat. Furthermore, the court revoked its old decisions and ruled that all Basic Laws enjoy constitutional status, thus giving Israel a constitution, even if only by an unentrenched judicial decision.

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64 See e.g. Dan Avnon, "The Israeli Basic Laws' (Potentially) Fatal Flaw" (1998) 32 Israel Law Rev. 535; Daphne Barak-Erez, "From an Unwritten to a Written Constitution" (1995) Colum. H.R.L. Rev. 309; Gavison, "Case of Israel," supra note 3; David Kretzmer, "The New Basic Laws on Human Rights: A Mini Revolution in Israeli Constitutional Law?" (1992) 26 Is. L.R. 238; Hirschl, Juristocracy, supra note 54.

65 See e.g. Basheva Genut, "Competing Visions of the Jewish State: Promoting and Protecing Freedom of Religion in Israel" (1995-1996) 19 Fordham Int'l L.J. 2120; Asher Maoz, "The Values of a Jewish and Democratic State" in Daphne Barak-Erez, ed., A Jewish and Democratic State (Tel Aviv: Ramot, 1996) 83 (Hebrew).

66 See, e.g., Aharon Barak, "Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) Harv. L. Rev. 16; Aharon Barak, "Hermeneutics and Constitutional Interpretation" (1993) 14 Cardozo L. Rev. 767.

The decision in *Bank Hamizrachi* arose in a dispute over the constitutionality of the *Family Agricultural Sector Law*. The law was passed to help revitalize the agricultural economy, which like in many other parts of the world, was in crisis. The law provided for an administrative authority with, among other things, the power to cancel debts. The creditors of a cancelled debt challenged the law under s. 3 of *BL: Dignity*, which protects property rights.[67] The District Court annulled the law on the basis that it infringed s. 3.[68] The decision was appealed to the Supreme Court, where the lower court decision was overturned.

There were several questions at issue, but the central question was whether the Basic Laws had constitutional status.[69] The court in *Bank Hamizrachi* was split: in an unusual move, nine judges heard the case, and each wrote a separate opinion.[70] The most important majority opinion was President Barak's, because although there were nine separate sets of reasons, seven of the judges made certain to agree with Barak's findings.[71]

Barak crafted his judgment in line with the terms of the "constitutional revolution". It is a declaratory decision – imperative in character. He says, bluntly, that with the Basic Laws, the "Knesset created a superior constitutional norm,"[72] and that, with their passage, "a constitutional

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[67] BL: Dignity, supra note 60 at s. 3.

[68] The action started in the District Court in Tel Aviv, and was actually struck down in 1993. The legislation was inoperative until 1995.

[69] In answering, whether the Knesset had the power to enact boundaries on their future legislative power. This is an issue tangential to our discussion, and we will not address it here.

[70] The Justices on the Bench were Past President Shamgar (who had retired after hearing the case, but was still involved in writing the decision), President Barak, Levin J., Bach J., Goldberg J., Mazza J., Cheshin J., Zamir J., and Tal J.

[71] All seven concurring reasons agreed with Barak's holdings at para. 108.

The two opinions that differed substantially were those of Past President Shamgar, and Cheshin J. In contrast to Barak, Shamgar based the Knesset's constituent authority on the theory of unlimited parliamentary sovereignty: on this view, the Knesset has the power to enact any law (770-77), including the ability to pass laws that bind itself (or future self) (772-74). No other member of the court agreed. In dissent, Cheshin held that the Knesset no longer had the power of a constituent assembly, and could not, therefore, pass statutes with constitutional standing (796-97) – a "one hat" doctrine. He rejected Barak's "constitutional revolution", and questioned whether the Knesset "members themselves were aware of the 'revolution' that they were generating." (800) The Justice also expressed an opinion that the power of the court to invalidate laws should be restricted to the Supreme Court (801-02).

[72] *Bank Hamizrachi*, *supra* note 25 at 777.

revolution took place".[73] From the confluence of judicial precedent, the will of the Israeli people, and the text and purpose of the Basic Laws themselves, flows the constitutionalization of human rights. The Knesset has bound itself as against human rights – no longer does it have untrammeled authority.

The Justice held that the authority of the Knesset to limit itself sprung from the "two hats" doctrine.[74] In that theory, the legislature retains the power of the original constituent assembly to make a constitution, which was transferred to the First Knesset in the *Transition Act*. That power has been present with every Knesset up to the present day.[75] At the same time, the Knesset retains the power to enact ordinary legislation in its capacity as an elected legislature. Depending on the function it is performing, the Knesset can wear either hat. In the case of the *BL: Dignity*, it had activated its constituent authority to pass laws with constitutional status.

Bank Hamizrachi, however, left two important questions unresolved: the first, which has not been resolved to date, is the scope of *BL: Dignity*. How far do its protections extend? Do they cover unenumerated rights? The second question, whether *BL: Dignity* applies to the common law, was addressed in *Ganimat*.

iii. Ganimat: The Extent of the Revolution[76]

In the same year as the decision in *Bank Hamizrachi* was released, the Supreme Court heard an appeal by an accused car thief detained under customary law as a danger to society. The case centered on the interpretation of the law of arrest, especially in light of the passage of *BL: Dignity*. The majority of the court held that although s. 10 of the Basic Law does not

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[73] *Ibid.* at 777.

[74] The "two hats" doctrine was developed by Professor Klein, in a 1971 article, to explain how the Knesset could retain the powers of the original constituent assembly in addition to the powers of an ordinary legislature. See Claude Klein, "A New Constitutional Law," 6 Isr. L. Rev. 51 (1971).

[75] *Bank Hamizrachi*, *supra* note 25 at 777-84.

[76] *Ganimat v. The State of Israel* (1995) 49(iv) *P.D.* 589, as cited in (1997) 31: 4 Is. L.R. 754 [*Ganimat*].

retroactively invalidate laws in place before *BL: Dignity*,[77] the Basic Law influences the *interpretation* of any law passed at any time.[78] According to Barak J.:

> It is here that the Basic Law performs its interpretive deed. Under its influence, different weights are likely to be assigned to the protected values and interests. Consequently, there is liable to be a change in the point of balance between the interests and the values that constitute the objective purpose of the law…The piece of legislation is no different, but its meaning is different. The validity of the existing law is preserved, however there is a change in the scope of its deployment.[79]

In this way, *BL: Dignity* was extended to the common law: any interpretive act made by the courts must be measured against the rights in *BL: Dignity*.

Since the decision in *Bank Hamizrachi*, the Supreme Court and the lower courts have indeed invalidated a few provisions found to be inconsistent with the Basic Laws,[80] and have thus made the "constitutional revolution" a reality, by giving Israel constitutional rights protection. The legal community has accepted the constitutional revolution as a matter of law, and there is much literature on the impact of the new Basic Laws on substantive law, both on legislation and on common law.[81] However, while *Bank Hamizrachi* settled the matter legally, debate still persists in Israel about constitutionalism in academia, politics, the media, and other parts of civil society.

The debate is both theoretical and practical. Scholars argue theoretically about the legitimacy and desirability of judicial review. The theoretical debate replicates that taking place in other constitutional democracies (such as the United States and Canada) but each side cites the peculiarity of the Israeli situation as an additional argument. Supporters of judicial review argue

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[77] *Ganimat*, *supra* note 76 at 756 *Editorial Commentary*.

[78] *Ibid.* at 761-62 per Barak J. for the majority.

[79] *Ganimat*, *supra* note 76 at 762, per Barak J. for the majority.

[80] See Bracha, "Administrative Law," *supra* note 21 at 585 fn 16-18; Guy E. Carmi, "A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the only Tribunal for Judicial Review" (2005-2006) 21 Conn. J. Int'l Law 67 at 68 fn 9; and Gavison, "Case of Israel," *supra* note 3 at 372 fn 70.

[81] See *e.g.* Frances Raday, "The Constitutionalization of Labor Law" 4 Labour, Society and Law 151; Emanuel Gross, "Exclusionary Rule in Israel – Does it Exist?" (1999) 30 Hebrew U. L. Rev. 145.

that especially in Israel, where the very idea of rights is not shared by all, courts should have the final word on rights issue. Opponents of judicial review argue that especially in Israel, where the society is so divided and there is no consensus about the role of the courts, the Supreme Court should not be making a constitution by fiat.[82] The practical side of the debate is led by various governmental committees, scholars, groups, and NGOs, which have proposed constitutional reform in order to bring about constitutional consensus. The proposals range from making *BL: Dignity* an American-style entrenched bill of rights with judicial supremacy, to making it a Canadian-style bill of rights with a notwithstanding clause, to explicitly prescribing in it that the court will have no power to strike down legislation.[83] So far the Knesset itself has not taken any position on the matter, and while individual legislators and parties have expressed different views on the matter, no changes to the Basic Laws were passed and no laws were enacted in response to judicial nullifications of legislation.

iv. Miller: The Scope of the Revolution[84]

After the decision in *Bank Hamizrachi*, the scope of *BL: Dignity* remained undetermined. In *Miller*, the court addressed the question of whether rights not enumerated in *BL: Dignity* were entitled to protection, if not protecting them would result in a substantive violation of the spirit of that law. The question has yet to be finally determined.

The petition in this case was brought when Alice Miller applied to participate in the Air Force examinations, and was rejected on the basis that women were not entitled to serve as pilots in the Israeli Air Force. She was a highly qualified commercial pilot, and she challenged the rejection on the basis that it was "unconstitutionally discriminatory to women in that it comprise[d] a

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[82] See Barak, "A Judge on Judging," *supra* note 16; Barak, *Judge in a Democracy*, *supra* note 23; Gavison, "Case of Israel," *supra* note 3 at 393 esp.; Ron Hirschl, "Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order" (1998) American J. of Comparative Law 427; Hirschl, *Juristocracy*, *supra* note 54 at 149 ff., 173 ff., 211 ff.; Michael Mandel, "Democracy and the New Constitutionalism in Israel" (1999) 33 Israel Law Rev. 259; Joshua Segev, "The Changing Role of the Israeli Supreme Court and the Question of Legitimacy" (2006) 20 Temp. Int'l & Comp. L.J. 1; Yossi Yonah, "Israel's 'Constitutional Revolution': The Liberal/Communitarian Debate and Legitimate Stability" (2001) 27:4 Philosophy and Social Criticism 41.

[83] Gavison, "Case of Israel," *supra* note 3.

[84] *Alice Miller v. Minister of Defense* (1995) 49(iv) *P.D.* 94, cited to (1998) 32:1 Is. L.R. 157 [*Miller*].

blanket denial of women's equal participation in the Air Force".[85] The Air Force asserted that while it had no specific statutory basis that explicitly barred woman from serving, other provisions and alleged "organisational difficulties" brought on by integration justified the barriers to entry.[86] These "difficulties" were the (1) the increased danger to women if they were shot down and captured, and (2) that it would be expensive to build new base facilities to separate men and women. In the face of two dissenting judgments, the majority of the Supreme Court found for Miller.

Miller represents a strengthening of human rights protection, by reference to the content of the Basic Laws. In the majority judgments of Mazza, Strasberg-Cohen, and Dorner JJ., the pre-existing fundamental right to equality of the sexes,[87] "the normative status of the principle of equality – that has already been characterised as the 'soul of [the] constitutional regime' – has become a principle endowed with a constitutional supra-statutory status."[88] Prior to the Basic Laws, government authorities were obliged to interpret laws against the implied bill of rights.[89] The Basic Laws "granted a constitutional – supra-statutory – status" to the principle of equality.[90] Despite the deliberate and explicit legislative refusal to include equality in *BL: Dignity*,[91] the objective of the Basic Law to prevent the degradation of human dignity is sufficiently broad that it safeguards equality, when the impugned action would result in a loss of human dignity.

v. Ka'Adan: The Depth of the Revolution[92]

The case concerned the settlement of land controlled by the Jewish Agency – an organization devoted specifically to the settlement of Israeli lands by Jews. The Agency is one of the holiest cows in Israel, with its dedicated Zionist mission to settle Israel with Jews. An Arab family

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[85] *Miller*, *supra* note 84 at 157.

[86] *Ibid.* at 163-66.

[87] *Ibid.* at 162-62 *per* Mazza J., and at 170-73 *per* Dorner J.

[88] *Ibid.* at 162-63 *per* Mazza J.

[89] *Ibid.* at 170-71, *per* Dorner J.

[90] *Ibid.* at 171, *per* Dorner J.

[91] *Ibid.* at 172-73, *per* Dorner J.

[92] H.C, 6698/95, Ka'adan *v. Israel Lands Administration,* P.D. 54 (1) 258

wished to move to the Katzir communal village, but were told that by the Jewish Agency that because they were Arab, that they could not reside in the village. They brought their case against the settlement, the Agency, and the government on the basis that they were being treated unequally by virtue of their nationality and religion, and that any law that allocates land on the basis of these criteria must be struck down as unequal. The respondents argued that they had acted within the law in allocating lands exclusively to Jews. The Supreme Court ruled that discriminating based on nationality and religion was a violation of the right to equal treatment, and forbade the government from assigning lands on that basis.

The ownership of land in Israel is governed by *Basic Law: Israel Lands*. The court ruled that the particular objective of the law and its secondary legislation was to provide for an integrated national land policy, one which took into account all the facets of settlement, including the security of the nation. Overlaid on this specific objective is the principle of equality, which is a normative "umbrella" through which all legislation must be interpreted. Equality is presumed, held the court, unless the Knesset explicitly provides otherwise. *Ka'Adan* stands for the proposition that the government cannot discriminate *indirectly*, as in this case, by ceding authority to an organism that contracts exclusively with Jews. The effect of *Ka'Adan* was to show that the constitutional revolution extends even to this sacred part of Jewish Israeli identity.

Legislative Constitutionalism and the Partnership between Courts and Legislatures

A. The Theory

Over the past few decades, a new form of constitutional rights protection has developed, which we call "legislative constitutionalism".[93] Under this form of constitutionalism, there is judicial involvement in rights protection, but judges do not get the final say on rights issues. Legislative

[93] See Tsvi Kahana, "Legalism, Anxiety and Legislative Constitutionalism" (2006) 31:2 Queen's L.J. 536. See also, more generally, Richard Bauman & Tsvi Kahana, eds., *The Least Examined Branch* (New York: Cambridge University Press, 2006).

constitutionalism is the hallmark of modern bills of rights, such as the Canadian *Charter of Rights and Freedoms*,[94] the United Kingdom's *Human Rights Act 1998*,[95] and, to a lesser extent, the *New Zealand Bill of Rights Act 1990*.[96] The concept developed initially in Canada over the past three decades and, more recently, in the United States. This concept seeks to combine parliamentary sovereignty and traditional constitutional rights protection. It accommodates judicial involvement in rights protection but objects to giving courts the final say on rights issues.

In this understanding, courts in Canada can strike down legislation, but the notwithstanding clause in Section 33 of the *Charter* allows legislatures to re-enact a piece of legislation that has been struck down. Judges may take action, but it remains within the power of the legislature to check the courts. Section 33, for example, even allows a legislature to make a statute immune from judicial review in the first place.[97] In the United Kingdom, courts are not allowed to strike down legislation but the *Human Rights Act* allows them to issue declarations whereby legislation is declared incompatible with the rights in the act.[98] Individuals whose rights are found to have been infringed upon are entitled to compensation. In New Zealand there is some limited judicial review, and the Attorney General must advise Parliament if legislation is inconsistent with the *Bill of Rights*.[99] The courts, however, do not have the power to invalidate legislation, and the *Bill of Rights* is not entrenched or supreme.

B. Application to Israel

Israel is another case of legislative constitutionalism, and one that has received virtually no scholarly attention. As with other polities with the characteristics of legislative constitutionalism, the courts are free to conduct judicial review, but the legislature retains the power to undo court

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[94] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[95] *Human Rights Act 1998* (U.K.), c. 42 [*Human Rights Act*].

[96] *New Zealand Bill of Rights Act 1990* (N.Z.), No. 109 [*Bill of Rights Act*].

[97] *Charter*, *supra* note 94 at s. 33 [the Notwithstanding Clause].

[98] *Human Rights Act*, *supra* note 95 at ss. 3-5.

[99] *Bill of Rights Act*, *supra* note 96 at ss. 3-6. Unlike under U.K. legislation, no compensation is available to persons whose rights are found to have been infringed.

actions or preemptively insulate their laws from review by the courts. As we see it, the partnership between the courts and the legislature that was the source of human rights protection is also evidence of legislative constitutionalism in Israel.

In Part 2, above, we demonstrated that the court actively checked administrative action, and instead of revoking or channeling its authority to do so, successive Knessets did nothing. Apart from vocal denunciations of the courts' actions, the Knesset did not seek to remedy the infringement on its authority, and thus arguably approved it. This reluctance by the legislature to actively involve itself allowed the court to strengthen human rights protections. It exemplifies a case of legislative constitutionalism because the court took an active role, and the legislature did not interfere. The legislature, however, retained the power to undo the court's actions; it merely chose not to.

In its decisions, by attributing the protection of rights to the unspoken will of the legislature, the court implied that every piece of legislation should be read as though it had been drafted in light of the common law bill of rights. In the common law bill of rights interpretation that we discussed in Part 2 human rights existed independently of statute. There was a limitation on the Common law bill of rights: because of the principle of parliamentary sovereignty, the courts always allowed explicit legislation to infringe on human rights. Legislation was therefore placed above human rights considerations in the Israeli system, but administrative action was always subject to judicial review. Administrative action could violate human rights only if it was explicitly authorized to do by legislation, or if passed the *Kol Ha'am* test, whereby limiting the right is necessary to avoid a likely harm to an important public value. This accords with the idea of legislative constitutionalism, because if the legislature formulated a statute in deliberate fashion, the court would not interfere with the law. Only where the legislature did not act explicitly did the court act to suspend or modify the application of a law.

A doctrine through which common law rights protection can exist in a legislative supremacy world is the notion of interpretive presumption: the rights in the unwritten constitution result from presumption that the legislature formulated legislation to respect human rights, unless it explicitly said otherwise. This is the implied bill of rights that we discussed in Part 2. Human rights did not reside in the common law, but in the intention of the legislature, which itself

wanted to protect human rights. There was no difference between these rights and the common law view of rights existing independently. The key, however, was the attribution – the court presumed that the legislature *intended* to protect human rights. The only way to refute that presumption is through explicit legislation. This implied normative basis supports the idea of the partnership between the courts and the legislature.

In the sections that follow, we suggest a reading of the cases discussed *infra*, in Part 2, based on the idea of partnership, legislative constitutionalism, and the implied bill of rights.

i. 1953-1995

The period from 1953-1995 defined the terms of the partnership. In each of the decisions explored above, a different facet of the partnership is evident: *Bergman* determined the status of Basic Laws and ordinary legislation; *Kol Ha'am* established the boundaries between rights, limits, and administrative action; and in *Laor*, *Schnitzer*, and *Kahane*, the court interpreted legislation against the implied bill of rights.

In making its decision in *Bergman*, the court was careful to make clear that it wasn't "encroaching upon the sovereignty of the Knesset as the legislative authority."[100] Justice Landau prefaced the result with the caveat that the "law of the Knesset is presumed to be valid as adopted … even when … it contradicts an 'entrenched' statutory provision…"[101] Nevertheless, the conflict with the implied constitutional right of equality before the law was too great to allow the statute to stand. To be clear, the court did not strike down the legislation. It acted in a roundabout fashion to restrain its implementation: by curtailing the actions of the executive, the court checked the *effects* of the law, without upsetting the supremacy of the legislature. In this way, the court implied that the legislature would not allow the passage of an unequal law, and that it would not permit executive action to violate the implied bill of rights.

Bergman set the terms of the partnership: The notion of partnership between court and legislature is based on the idea of implied repeals. The principle of parliamentary sovereignty is expressed

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[100] *Bergman*, *supra* note 12 at 10.

[101] *Ibid.* at 8.

by the idea that if there are two laws, and the latter contradicts the former, then the latter prevails (an implied repeal). The key is the fact of entrenchment. *Bergman* holds that a Basic Law, if formally entrenched, prevails against later legislation. This decision acknowledges that Basic Laws are supreme, because supremacy is implied by the fact of entrenchment. If a law had a clause delimiting precisely the conditions by which it may be altered, then it stands to reason that they are entrenched to immunize them from amendment by ordinary legislation. As a result, Basic Laws were normatively superior to ordinary statutes, unless the Knesset amended an entrenched Basic Law with the majority required. This holding gave the Basic Laws a status subject to Knesset repeal, and said explicitly, this Basic Law is supreme. The legislature's decision to tacitly follow the instructions of the court, and re-pass the law, acknowledged the validity of the court's order. There was no contradiction, and the partnership between was born.

Kol Ha'am provided the first doctrinal tool of the partnership. In addressing the limits of the exercise of administrative power, the court offered deference to legislative specificity. In the balancing phase of its reasons, the court tried to strike a balance between competing rights (freedom of speech and security). When the balancing was done by the legislature, the court stated that it would not interfere. Where, however, legislation was insufficiently specific, the court would intervene – by applying the *Kol Ha'am* test (explained above in Part 2).

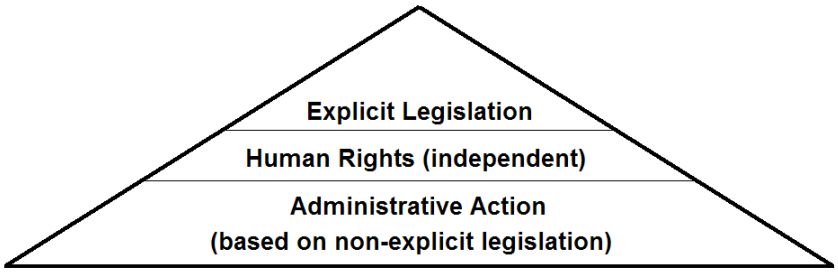
The formulation of the *Kol Ha'am* test read into the legislation a presumption that human rights would be violated only if the situation absolutely demanded it. The test presupposed that the legislature would not establish a law that violated human rights, unless it did so explicitly. This reinforced the separate spheres of activity inherent in the partnership: The court left the originating statute untouched, and focused only on the exercise of power under that statute. By interpreting the law vis-à-vis the common law bill of rights, and by presuming that the legislature had conceived the legislation against the backdrop of human rights concerns, the court did not trespass on the power of the legislature. By speaking in an area where the legislature was silent, the court was acting in concert with the principle of parliamentary supremacy: they were not interfering with the deliberate action of the Knesset, but addressing a void. The court simultaneously acknowledged the separate character of the legislature, and stepped into its shoes to protect human rights.

Following *Kol Ha'am*, and until *Bank Hamizrachi*, two situations existed:

1. Where legislation did not explicitly violate human rights, the courts held that it must pass the *Kol Ha'am* test in order to be valid;

2. Where legislation explicitly violated human rights, it was allowed to stand without having to pass the *Kol Ha'am* test.

Because human rights existed independently of any statutory basis, they were still secondary to explicit legislation. Administrative action not guided explicitly by statute, however, was subject to judicial review. This may be depicted graphically as:



Under this situation, because legislation is supreme, once it explicitly violates human right, the court must accept this violation (the top level), so no courts can ever strike down legislation. Therefore, judicial sanction is attracted only to the bottom of the pyramid, where the argument will be that administrative actions violate rights *without* an explicit authorization by the legislature. Human rights were assumed protected, but the court would say that their importance was outweighed by legislative supremacy. This relationship between the implied bill of rights and judicial protection of human rights was the status quo until 1995.

Given the implicit legislative acceptance of the rights even without a constitution, it was necessary for the court to address the issue of constitutional interpretation without a constitution. It did so in *Laor, Schnitzer* and *Kahane*. In *Kahane*, Barak J. stated that "no constitutional provision determining the permissible limits on freedom of speech has yet been enacted. Therefore, every law limiting freedom of speech is constitutionally valid. But … it is the courts

… that should interpret the limiting law and determine its scope."[102] This was recognition of the implied bill of rights – the court interpreting legislation that makes no mention of rights against the standard set up by the court. In carrying out this balancing of rights, "[t]he balance is determined first by the legislature itself…Sometimes the legislature does not indicate a position in the balancing issue, and it is wholly performed by the court."[103]

This is a direct acknowledgment of the otherwise silent partnership between the court and the Knesset. The court makes homage to the power of the legislature, and then proceeds to step in and do what the legislature neglected to do. Again in *Kahane*, Barak J. wrote that "[t]he task of balancing belongs first and foremost to the legislature. Where the legislature refrain[s] from setting the balance the court must do it…"[104] Each acknowledgment of legislative supremacy is paired with contrary action by the court. The court derives its authority to act in the legislature's stead by *recognizing* its subservience, while actively usurping legislative authority.

ii. 1995-Present

The passage of the Basic Laws of 1992 changed the nature of the partnership. The new Basic Laws offered formalized human rights protections, though they were not exhaustive. In 1995, the *Hamizrachi* decision reinforced the limitations on human rights protection, but altered the *status quo ante*. Legislation became subordinate to human rights considerations. Following the "constitutional revolution" the relative importance of statutes and rights changed, and human rights were granted paramountcy over both administrative action and, for the first time, over legislation.

The dynamic of the partnership also changed. The same relationship existed – there would be judicial protection of human rights, and there would be legislative ability to amend or override judicial decisions – but in 1992 the partnership ascended to a new level. In the first stage, the legislature refrained from using its *legislative* power to respond to judicial decisions (i.e. amending laws to counter the judicial decisions; or providing directions as to what the courts

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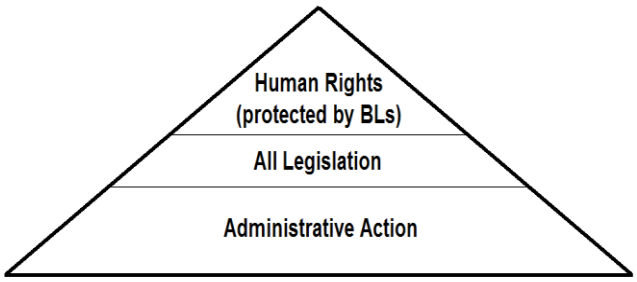
[102] *Kahane*, *supra* note 47 at 35.

[103] *Ibid.* at 35-36.

[104] *Ibid.* at 37.

could or could not do). In the second stage, the new stage, the legislature was no longer able to use this power, since legislation had become inferior to human rights. However, it did retain its power as a constituent assembly to amend the constitution. It nevertheless refrained from using that power.[105] Therefore, ironically, even though the Israeli system has been the subject of a tortured debate between the powers of the courts and the powers of the legislature, what enabled the most distinctive feature of the rule of law in Israel was the partnership between them.

The new human rights regime may be depicted graphically as:



The constitutional status of the Basic Laws gives them normative superiority over ordinary legislation and all administrative action. Legislation can be immunized from judicial scrutiny only if the Basic Laws are amended to explicitly allow a given rights violation, or through the invocation of the legislative override, the one in *BL: Occupation* s. 8, for example, is used by the Knesset.[106] Otherwise, human rights protected by Basic Laws prevail.

The approach to rights and limits taken by the court changed with *Bank Hamizrachi*. The judgment reads like a Canadian *Charter* decision: the rights are balanced against the limits (i.e. freedom of property against expropriation). The court could have done what it did in *Bergman*, and avoided addressing the justiciability of the Basic Laws and the statutes. Not only did the

[105] The so-called "two hats" doctrine is described in the discussion on *Bank Hamizrachi*, see Klein, *supra* note 74.

[106] It should be noted, however, that unlike in Canada where the use of the override does not require any special majority, a use of this mechanism in Israel requires a majority of the Knesset members, which is also the amending formula for this basic law.

court not follow *Bergman*'s approach, but they overruled it. Basic Laws were held to be supreme.

There are clear links between *Bank Hamizrachi* and *Bergman*. The emphasis in *Bergman* is on the fact of formal entrenchment, while the focus changes in *Bank Hamizrachi* to the form of the relationship. *Bank Hamizrachi* can be seen as the extension of *Bergman*, because *Bergman* declared that a Basic Law prevails if formally entrenched. *Bank Hamizrachi* holds that, *all* Basic Laws, by virtue of their very name and character ("supra-statutory status") prevail over ordinary legislation. The Basic Laws are not entrenched in the sense that their amendment is difficult, but in the sense that they are supreme.[107] It was always assumed the entrenchment brings about supremacy. *Bergman* was an acknowledgement of supremacy by virtue of entrenchment – supremacy was implied in the entrenchment provision. *Bank Hamizrachi* implies that that interpretation is correct, but that entrenchment does not have to be formal entrenchment. It can be entrenchment by status, and, therefore, all Basic Laws are supreme.

The combined result of *Bergman* and *Bank Hamizrachi* can be understood through the following chart. The court found that amendments to Basic Laws could be made in the following ways:

Amendments to Basic Laws:	Explicit Amendment by Another Basic Law	Implicit Amendment by Another Basic Law	Explicit Amendment by Ordinary Legislation	Contradiction/ Implicit Amendment by Ordinary Legislation
According to *Bergman*:	This is possible	This is possible	Not addressed	Possible, if the required majority is met
According to *Bank Hamizrachi*:	This is possible	This is possible	No longer possible [overturns the possibility in *Bergman*]	No longer possible [overturns *Bergman*]

Barak also pointed to the limits imposed by the constitutional status of the rights in *BL: Dignity*. Pointing to s. 8 of *BL: Dignity*, the limitation clause, he wrote that any legislation purporting to

[107] "This entrenchment is not formal, requiring a certain majority in order to pass the infringing law. Rather, the entrenchment is substantive, providing that a provision of the Basic Law may be infringed by means of regular legislation, but only if the … regular legislation fulfils the substantive requirements of content." *Bank Hamizrachi*, *supra* note 25 at 784 *per* Barak J.

infringe a human right must pass the test of proportionality, proving a statute worthy and no more harmful than necessary.[108] This is the *Kol Ha'am* test given constitutional status over ordinary legislation. Instead of functioning at the level of administrative discretion, it acts as an imperative on the legislature itself, protecting human rights from the drafting table onwards.

The effect of *Bank Hamizrachi* was to overturn *Bergman*: instead of refusing to address the constitutionality of the Basic Laws, as the court did in *Bergman*, the judgment comprehensively examined the constitutional status of *BL: Dignity*.[109] In finding that *BL: Dignity* had the status of constitutional law, the court ruled that, unlike in *Bergman*, formal entrenchment was not necessary to give a law supra-statutory standing. Instead, the substantive character of the Basic Law, the fact that it was a Basic Law made it normatively superior to ordinary laws.

Finally, the partnership between the court and the Knesset was no longer a silent one: said Barak, "the Supreme Court exercises its legal position confirming this superior constitutional status. Thus the legislative arm links with the judicial arm. The constituent link joins the judicial link."[110] Judicial review of the constitutionality of laws is a necessary component of constitutional supremacy – the court is competent to invalidate laws for inconsistency with the superior norms.[111] In this fashion, Barak declared the Supreme Court to be a constitutional court, tasked with overseeing not just administrative operation, but *legislative* action.

The implicit partnership between the court and the legislature had always existed. That partnership was the foundation for the constitutional revolution, not only in relation to human rights, but also in relation to the Basic Laws. *Bank Hamizrachi* was a culmination of these two, independently evolving partnerships, into a structured system of human rights, where, on the one hand, the court says that the legislature has the ability as a constituent assembly to limit the court's power, but, on the other, that it is never done. To this date, the court has never been explicitly authorized to strike down laws in any area. Even though the absence of statutes

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[108] *Bank Hamizrachi*, *supra* note 25 at 784-91. Note the similarities to the Canadian *Oakes Test* under s. 1 of the *Charter*, *supra* note 94, for rights infringement.

[109] It also examined the status of BL: Occupation.

[110] *Bank Hamizrachi*, *supra* note 25 at 777-78.

[111] *Ibid.* at 785.

authorizing judicial review and judicial supremacy might seem an aberration or an exception, this state of affairs either deliberately or unintentionally continues with the partnership. The legislature allows the court do the job for it. It is striking that the constitutional "revolution" is not, in fact, a revolution.[112] *Bank Hamizrachi*, however, left the scope of *BL: Dignity* undetermined, and did not address the question of whether *BL: Dignity* applied to the Common law.

Ganimat addressed the latter of these issues. It substantially altered the relationship between human rights and limits placed on them by legislation and executive action.[113] While there is an explicit statement in the judgment to the effect that the "Basic Laws … did not initiate fundamental rights, rather they lent them a special normative status – protected and distinguished,"[114] the relationship between rights and their limits had changed after *Bank Hamizrachi*. This was not merely a change in the order of importance, placing human rights above ordinary legislation, but a substantial evolution in the relationship between rights and limits.

The partnership between the court and the legislature is now clearly rooted in the entrenched provisions of the Basic Laws. Limits must be applied more carefully to any right(s) protected under the Basic Laws. Administrative action will have to be more circumspect about actions that threaten to infringe on constitutionally-protected human rights: it may be, too, that the danger test from *Kol Ha'am* will have to be amended, in its balancing, to reflect the changed nature of human rights protection. The *Ganimat* decision affected future judicial decisions, by altering the rough weight between rights and interests.

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[112] Instead, Zamir J. adopted the terminology of "evolution" in *Bank Hamizrachi*. The "revolution" occurred in *Bergman*, when the court found that when the Knesset wore its constituent hat, it could pass laws that were inviolable when it was wearing its legislative hat. In *Bergman* it was assumed that only formal entrenchment would activate the two hats. In *Bank Hamizrachi*, the court moved beyond formal entrenchment to substantive normative superiority, discussed below.

See also Edrey, *supra* note 16. He makes the argument that the evolution of Israel's bill of rights was due to the democratic nature of the state – an Elian approach. He also discusses the "two hats" doctrine at 103.

[113] For an examination of this issue, see *e.g.* Bracha, "Administrative Law," *supra* note 21; Gavison, "Case of Israel," *supra* note 3.

[114] *Ganimat*, *supra* note 76 at 758, per Past President Shamgar.

Ganimat proves the implicit theory: why should the court re-evaluate its human rights jurisdiction? If the source of human rights was the common law bill of rights, there should be no change, because it developed independently of the legislature, and so it would not be rational to re-evaluate forty years of common law precedent. But if we understand it as an implied bill of rights, then it makes sense that there had to be a re-evaluation of the jurisprudence, because those forty years were based on interpreting legislation. The transition to a constitutional order requires a new approach to rights, limits, and legislation.

Miller is important for its holding that unenumerated rights, those not listed in *BL: Dignity*, were nevertheless entitled to protection. This was a turning point in the partnership: instead of deference to an explicit legislative choice (the reasoned decision not to include equality in *BL: Dignity*), the constitutional status of the Basic Law allowed it to be read-in by the court. The penumbra of the listed supra-statutory rights trumped legislative intent on the level of ordinary statute. The supra-statutory protection also affects the "definition of the conditions under which one may – if ever – infringe upon it."[115] It increased the care with which balancing and violations must be done, and, concomitantly, the power of the judiciary to invalidate legislative and executive actions.

Ka'Adan had only a limited effect on the nature of the partnership, but it stands for the proposition that even Israel's holiest cows – Zionism and the settlement of Israeli lands by Jews – are subject to judicial scrutiny and to the constitutional balancing formulas. Whether or not commentators agree that the constitutional revolution was a legitimate step for the court to take, its far-reaching effect cannot be denied. As it stands, nothing in Israel is so sacred as to be immunized from the protections in the Basic Laws.

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[115] *Miller*, *supra* note 84 at 173, *per* Dorner J.

Conclusion

This article addressed the development of constitutional rights protection in Israel. Rather than focusing on the substance of the various rights, we focused on the institutional aspect of Israeli constitutionalism. While the rights themselves provide for the conceptual and sometimes the textual basis for their protection, it is institutions that enforce these rights, balance between them, and, when necessary, limit them. More so than constitutional texts, institutions are what make the law rule in practice. The partnership between two such institutions, the court and the legislature, was highlighted in this article. We showed that it was the Supreme Court of Israel that promoted the notion of human rights, even without any statutory recognition, and later it was the Supreme Court that promoted the idea of constitutional status to human rights even with a bill of rights the status of which was arguably statutory and not constitutional. The Knesset, for its part, did not stop the court from fulfilling its human rights aspirations. Despite constant criticism of the court's activism, the Knesset did not take any actual steps to curtail the court's power.

Israel thus has a system of what we call "legislative constitutionalism". On the one hand, there is judicial review and rights protection; on the other hand, the constitution is not immune from majoritarian power and the legislature is at liberty to change it. The advantages of such an institutional setting are that both the courts and the legislature carry some of the responsibility for rights protection. The constitution is not perceived as antithetical to the legislature and the court, but rather allows them to be partners.

References