

Sui Generis? The Hybrid Israeli Constitutional Experience

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Abstract

Consider a country where American-style judicial review is applied to primary legislation, yet its constitutional documents are enacted haphazardly--and in the British-style, using procedures applied to regular legislation. For nearly half a century, this country has acted as if it had a sovereign legislature, yet its highest court decided in 1995 that its most basic norm is that of a limited legislature constrained by a formal Constitution—the existence of which comes as a surprise to constitutional scholars and citizens alike. How then was the country's Supreme Court able to revolutionize its constitutional system in one tangled decision? The fascinating answer is that the Court succeeded by relying both on legislative enactment and more heavily on comparative constitutional experience to suggest that principles of democracy, the rule of law, and respect for individual rights require a formal Constitution.

This is the story of Israel's version of the U.S. Marbury v. Madison decision. The story, detailed in this article, presents three conflicting yet complementary traditions: monism in the British-style; dualism in the American-style; and foundationalism in the German-style. It is a story of how and whether self-legislative entrenchment may create a higher norm. It reflects a dualist approach, despite the lack of a distinct legislative track for the formation of constitutional law. It reveals aspirations for law higher than even the Constitution in the form of foundationalism. This article's narrative of Israel's constitutional story throws new light on recent American debates regarding the constitutionality of legislative entrenchment; the exploitation of comparative constitutional law to decide one's own constitutional dilemmas; and the legitimacy of judicial constitution-making.

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INTRODUCTION

Judge Posner recently wrote in the *New Republic*:

> [The now retired Chief Justice] Barak is John Marshall without a constitution to expound… Israel does not have a constitution. It has "Basic Laws" passed by the Knesset, Israel's parliament, which Barak has equated to a constitution by holding that the Knesset cannot repeal them. That is an amazing idea…And only one-quarter of the Knesset's members voted for those laws!...[1]

Is this an accurate description of Israel's constitutional development?

We are all familiar with the history of the American *Marbury v. Madison* decision.[2] In 1803, Chief Justice John Marshall declared that American courts have the power of judicial review over primary legislation. Although the U.S. Constitution lacks an explicit provision granting such power, Marshall pronounced that between these two alternatives there was no middle ground. Either the Constitution was supreme and thus no regular statute may contradict it, or a Constitution was a futile attempt on the part of the People to limit the legislature.[3] Marshall did have, however, an explicit supremacy clause in the Constitution to rely on.[4] Marshall was also a crafty politician. He used the power of judicial review in the case to limit the scope of jurisdiction of the court. Thus, in the same decision, he both granted the courts the power of judicial review while simultaneously

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[1] Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC, April 23, 2007, at 53 (book review) [hereinafter Posner, *Enlightened Despot*]. *See also* RICHARD A. POSNER, HOW JUDGES THINK 362-68 (2008) (for a somewhat softer criticism, especially with regard to the entrenched nature of the Basic Laws). For Israeli academia responses to Posner's criticism, see Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Criticism of Aharon Barak's Judicial Activism*, 49 HARV. J. INT'L L. 1 (2007) (hereinafter Medina, *Four Myths*) (attempting to rebut Posner's criticism); Hillel Sommer, *Richard Posner on Aharon Barak: The View From Abroad*, 49 HAPRAKLIT 523 (2008) (praising Posner for inviting debate on the subject).

[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) [hereinafter *Marbury*].

[3] *Id.* at 177.

[4] U.S. CONST. Art. VI, cl.2: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." In interpreting this clause, CJ Marshall emphasized that the Constitution is "first mentioned" and only those laws "which shall be made in pursuance of the Constitution, have that rank." He further stated that "the particular phraseology of the Constitution…confirms and strengthens the principle…that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury, supra* note 2.

utilizing it to curtail the courts' jurisdiction.[5] This was a way to sweeten the poison of judicial review power to make it more palatable to the other branches of government. The decision seems outrageous when one considers that Marshall should have recused himself in light of his own prior personal involvement and responsibility for the events leading to the adjudication.[6] Nonetheless, *Marbury v. Madison* is arguably the most important decision ever given by the U.S. Supreme Court.[7] By now, it is long settled that the American courts have the power of judicial review over primary legislation.

The Israeli Supreme Court decision known as *United Mizrahi Bank* may be considered *Marbury*'s equivalent, but it has not fared as well so far.[8] It was given on November 9, 1995, just five days after the assassination of Prime Minister Yitzak Rabin by a Jewish terrorist student. Thus, the decision received scarce media coverage and attracted mere passing attention by the public and politicians when originally given, which was anticlimactic to the revolutionary nature of the decision.

Since the *United Mizrahi Bank* decision was given as recently as 1995, we do not have the perspective of over two hundred years of history to comprehend its resounding effects. Nonetheless, there is worldwide interest in understanding its implications on the one hand and, on the other, not enough scholarship analyzing it.[9] It has been suggested that the *United Mizrahi Bank* Court invented a formal Constitution, as distinguished from an unwritten or substantive one, where none existed.[10] There have been extremely harsh on-going exchanges between the Court and the Knesset (Israel's legislature) over the decision.[11] Others believe it was the Knesset, rather than the Court, that initiated this "constitutional revolution" by enacting "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation," both in 1992.[12] The Court was thus only a humble

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[5] For discussion, *see, e.g.,* Louise Weinberg*, Our "Marbury,"* 89 VA. L. REV. 1235, 1297-1341 (2003).

[6] BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 14 (2005).

[7] Winfield H. Rose, *Marbury v. Madison: How John Marshall Changed History by Misquoting the Constitution,* 36 POL. SCI. AND POLITICS 209 (2003). *See also* WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 1 (P. C. Hoffer & N.E.H. Hull eds., 2000).

[8] CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Collective Village*, 49 (4) P.D. 221 (1995) (Isr.) [hereinafter *United Mizrahi Bank*]. It was partially translated in 31 ISR. L. REV. 764 (1997).

[9] For the world wide interest in the decision, *see*, *e.g.,* Aharon Barak, *The Supreme Court 2001 Term: Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002) [hereinafter Barak, *Judge on Judging*]; ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); NORMAN DORSEN ET AL. EDS., COMPARATIVE CONSTITUTIONALISM 103-13 (2003); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2003-04) [hereinafter Jacobsohn, *Constitutional Borders*].

[10] Posner, *Enlightened Despot*, *supra* note 1, at 53. *See also* Ruth Gavison, *The Constitutional Revolution--A Reality or a Self-Fulfilling Prophecy*, 28 MISHPATIM 21, 28-33, 110,123,132 (1997) [hereinafter Gavison, *Constitutional Revolution*]; Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007).

[11] Yoav Dotan, *Constitution to Israel? The Constitutional Dialog After "The Constitutional Revolution"*, 28 MISHPATIM 149, 190-200 (1997). *See also* Menachem Hofnung, *The Unintended Consequences of the Unplanned Legislative Reform – Constitutional Politics in Israel,* 44 AM. J. COMP. L 585, 597-99 (1996).

[12] By constitutional revolution, I mean the two main accomplishments—the recognition of Basic Laws as Israel's formal supreme Constitution and the exercise of judicial review over primary legislation—occurring between 1992 and 1995.

servant obeying the Knesset's will.[13] Still others insist that nothing revolutionary has happened in 1992 or 1995 and that we should not treat *United Mizrahi Bank* as a threshold in Israel's constitutional development.[14] Which of these is the truth?

The *United Mizrahi Bank* decision is hundreds of pages long.[15] Since the Court did not strike down any statute or provision thereof, it is all *dicta,* the equivalent of Marshall's wisdom in limiting the courts' jurisdiction.[16] It contains a wealth of knowledge that is extremely valuable to students of comparative constitutional law.

The Court decided three fundamental questions: Did the Knesset have the power to create a Constitution for Israel? If so, did it exercise this authority when enacting the "Basic Laws"?[17] If so, do the "Basic Laws" give the courts judicial review power over primary legislation? The first two questions may seem unusual. Usually, there is no doubt whether a country has or lacks a formal supreme constitution.[18] But, in Israel this was an issue that needed to be decided by the Court. Only the third question is similar to the one decided in *Marbury*.

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[13] *See, e.g.,* David Kretzmer, *The Path to Judicial Review in Human Rights Cases: From Bergman and Kol Ha'am to Mizrachi Bank*, 28 MISHPATIM 359, 382-85 (1997) (treating the "Basic Laws" of 1992 as an expression of the Knesset's will to constitutionally protect human rights and authorize judicial review).

[14] See, e.g.,Yoseph M. Edrey, *Constitutional Revolution?,* 3(2) MISHPAT UMIMSHAL 453 (1996). Professor Yoram Shachar frequently asserts this claim in scholarly discussions because he does not believe that there were so far any substantial consequences to Israel's constitutional revolution. (I refer to Shacar's view with his consent.)

[15] With 127,950 words it is the second longest decision ever given by Israel's Supreme Court according to Guy Seidman and Hillel Sommer, *The Israeli Supreme Court and the Disengagement Plan,* 9 MISHPAT UMIMSHAL 579, 593-94 n.65 (2006). Other decisions listed include the cases of Nazi war criminal John "Ivan the Terrible" Demyanyuk and the Israeli government's disengagement from Gaza. The extraordinary length of a decision may indicate that the Court attempts to be persuasive when the case is the focal point of a charged public debate or bears the potential to incur the wrath of other branches of government.

[16] In fact, Justice Cheshin's dissenting opinion begins with his own analysis that the dispute among the justices regarding the Knesset's Constituent Authority is all *dicta*. *United Mizrahi Bank, supra* note 8, at 471-72. *See, e.g.,* Eli M. Salzberger, *The Constituent Assembly in Israel,* 3 MISHPAT UMIMSHAL 679, 696 (1996) [hereinafter Salzberger, *Constituent Assembly*]. For the difference between *ratio* and *dicta*, *see* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW, 39-97 (4th ed., 1991). A student critique even suggested that the Court did not have the relevant data necessary to assess whether the statute was indeed constitutional. The Court barely discussed the factual data in the case. *See* Jonathan Ginat, *Constitutional Litigation and Empirical Data: Facts or Fiction*, 14 BAR ILAN LAW STUDIES 209, 220-24 (1997).

[17] Basic Laws are generally enacted by the Knesset via the same legislative process used to enact regular laws. Generally what makes them "Basic" is that the Knesset grants them the title "Basic Law" without a year mark. Their content usually deals with constitutional issues. For further discussion see Parts I.B., II, III & IV.

[18] *United Mizrahi Bank*, *supra* note 8, at 475 (Cheshin suggested that a judicial debate over the very existence of a constitution is remarkably unusual). It should be emphasized that all countries obviously have "unwritten" or substantive constitutions in the sense that they have statutes, judicial decisions, and customs setting the rules of government. But, the *United Mizrahi Bank* controversy was exceptional in having the Court decide that Israel had a formal Constitution.

There was no unanimity on the Court, though not for lack of trying.[19] The Court was bitterly divided on the question of whether the Knesset had the authority to enact a Constitution for Israel and whether "Basic Laws" should be treated as comprising Israel's Constitution. Justice Cheshin, dissenting, answered "no" to both questions. This, however, did not prevent him from recognizing the courts' power of judicial review over primary legislation. In other words, for Cheshin, the courts may hold the power of judicial review without a formal constitution to expound.[20]

Even the majority of the justices who believed that the Knesset had the authority to enact a constitution could not agree on the constitutional theory justifying this authority. The two main theories offered as an explanation of the Knesset's constituent power were monism, on the one hand, and dualism, on the other. By monism I mean a theory of parliamentary or legislative sovereignty, as in the British tradition.[21] By dualism I mean a theory of popular sovereignty that differentiates between the People's superior constitutional enactments and their representatives' regular inferior statutes, as in the American tradition.[22]

Chief Justice Shamgar, who wrote his opinion in *United Mizrahi Bank* as retired CJ, believed that the Knesset was sovereign and as such could entrench its legislation thus creating a Constitution.[23] Chief Justice Barak, the newly appointed CJ, believed that the Knesset served the double function of a legislature and an ongoing Constituent Assembly until the complete adoption of the Constitution.[24] Each of them believed that the other was utterly wrong in his theory of the Knesset's constituent authority.[25] Three justices

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[19] The importance of unanimity for enhancing the acceptability of the decision was expressed in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEO. L. J. 1*, 2* (1979): "The Unanimity of the court in *Brown v Board of Education* and *Bolling v. Sharpe* was second in importance only to the decisions themselves." *See also* Valerio Grementieri & Cornelius Joseph Golden, Jr., *The United Kingdom and the European Court of Justice: An Encounter between Common and Civil Law Traditions,* 21 AM. J. COMP. L. 664-90 (1973) (for discussion of the pros and cons of the prohibition of the publication of dissenting opinions in the Civil Law tradition).

[20] *United Mizrahi Bank*, *supra* note 8, at 511-12 (Justice Cheshin).

[21] H.L.A. HART, THE CONCEPT OF LAW 74, 149 (2d ed., 1994). Monism has traditionally been understood to require three conditions: that parliament may enact any statute except for restricting its successors, that constitutional law is on par with regular law and no judicial review power over primary legislation is granted to the courts. See ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (8th ed., 1915). However, there has been a relaxation of these requirements in the twentieth century as further elaborated in Parts II & III.C. *infra*.

[22] See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160-229 (1992); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, FOUNDATIONS], BRUCE ACKERMAN: WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]. For elaborate description of dualism, see Part III *infra*.

[23] *United Mizrahi Bank, supra* note 8, at 264-71, 283-94 (Shamgar). The Courts (Consolidated Version) Act, 1984, S.H. 198, § 15 allows each retiring judge, within three months of his or her retirement, to write opinions in cases that he or she heard while sitting on the bench.

[24] *Id.* at 352-402 (Barak).

[25] *Id.* at 287 (Shamgar wrote that he "bluntly" prefers his theory to Barak's Constituent Authority Theory). AHARON BARAK, INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATIONS 45 (1994) [hereinafter BARAK, INTERPRETATION] (writing that a monist theory cannot provide a constitutional future for Israel).

concurred with Barak's theory; three others believed it was unnecessary to decide between the two theories.[26]

Thus, of a nine-member Court, eight believed that the Knesset had the authority to enact a Constitution and that it has further exercised this authority when enacting "Basic Laws." One dissented, believing that the Knesset had no such constituent authority and that Israel lacks a formal Constitution. Of the eight, four supported the theory of the ongoing constituent authority of the Knesset, one supported the theory of the Knesset's self-entrenchment power, and three others remained undecided on the precise theory that justifies this constituent power of the Knesset. Thus, there was no majority opinion in favor of either the monist or dualist theory, only a plurality opinion in favor of the latter.[27]

Why does this matter? It is extremely valuable to students of constitutional law worldwide to study *United Mizrahi Bank* for it offers unique insights to the role of the various branches of government in writing, adopting, and ratifying a Constitution. The article contributes to the scarce literature on evolutionary models of constitution-making[28] and recent American debates regarding the constitutionality of legislative entrenchment in monist as well as dualist constitutional systems.[29] It may contribute to the famous Scalia-Breyer debate on the desirability, as well as danger, in the use of comparative constitutional law to decide one's own constitutional dilemmas.[30] This article demonstrates that one of the potential downsides of employing comparative constitutionalism to decide domestic constitutional dilemmas is that it can produce gaps in legal reasoning when the foreign reasoning that is applied cannot be aligned with the country's historical development. The article may be of interest to anyone who wants to better understand why the exercise of judicial review power over primary legislation is so hotly debated in Israel.

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[26] Justices Dov Levin, Eliahu Matza and Itzhak Zamir concurred with Barak's Constituent Authority theory. Justices Zvi Tal, Eliezer Goldberg, and Gabriel Bach were undecided regarding which of the two theories, Shamgar's or Barak's, was the correct one.

[27] For discussion of the effects of plurality opinions on later development of the law, *see* John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59 (1974); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L.REV. 1127 (1981).

[28] "A systematic comparison of recent evolutionary and revolutionary exercises in constitutionalism should be high on the agenda of future research." BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 47 (1992) [hereinafter ACKERMAN, REVOLUTION].

[29] *See, e.g.,* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 11 YALE L.J. 1665 (2002); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773 (2003), John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003)[hereinafter McGinnis & Rappaport, *Symmetric Entrenchment*].

[30] *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia J., dissenting) ("[I]rrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Justice Kennedy cited decisions of the European Court of Human Rights in support of the majority decision, while Justice Scalia, dissenting, responded that this was "[d]angerous dicta." *Id.* at 598); *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry…Either America's principles are its own, or they follow the world; one cannot have it both ways."). For academic responses to this controversy, *see*, *e.g.,* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L.REV. 129 (2005-06); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004; Jacobsohn, *Constitutional Borders, supra* note 9.

I will analyze the *United Mizrahi Bank* decision using three different models to explain the decision: monism, as in the British tradition; dualism, as in the American tradition; and foundationalism. By foundationalism, I mean a model that treats certain issues as so fundamental as to be beyond the decision of even the People, as in the German and Indian constitutional systems.[31] This latter model was not explicitly suggested by the justices in *United Mizrahi Bank*, but I contend that it is essential to understand Israel's constitutional revolution. Surprisingly, although foundationalism was not explicitly stated in the decision, it may actually provide the uniting theory for the divergent judicial opinions. I will expose the strengths and weaknesses of each model as an explanation for Israel's constitutional development. It will thus enable the readers to understand both what the Court has done and why it is so vigorously contested. To evaluate the decision, the article also surveys some of the most important defining judicial decisions in Israel's constitutional past. It is contended in this article that most Israeli judicial revolutions, including with regard to standing, justiciability, judicial review, and foundationalism, were done in *dicta*, thus, the Court was consciously playing a policy-maker role rather than mere deciding "cases and controversies."[32] It may be that the Court believed this judicial activism was necessary at the formation stage of the Israeli young constitutional system.

It is important to understand the different theoretical bases possible for the Israeli formal Constitution, protected by the Court through judicial review over primary legislation, since it provides the various options available for Israel's future constitutional development. Depending on the theory one ascribes to Israel's formal Constitution, future constitutional debates woud be resolved differently, particularly on matters such as the constitutionality of constitutional amendments; the status of statutes that were enacted in breach of procedural self-entrenchment of the Knesset; the validity of entrenchment found in regular statutes; and the implications of an express language violating rights found in regular statutory provisions.

Part I describes the events that led to the *United Mizrahi Bank* decision. It attempts to answer why Israel's constitutional revolution occurred in the 1990s. It further explains the status of Israel's "Basic Laws" prior to the landmark decision, thus, enabling the reader to understand the scope of the revolution. Part II analyzes the possibility of basing the Israeli constitution on monism, as suggested by the (then retiring) CJ Shamgar in *United Mizrahi Bank*. It explains both the strengths and weaknesses of such a monist thesis. Part III discusses the possibility of grounding the Israeli constitution on the concept of dualism, as suggested by the (then) CJ Barak in his *United Mizrahi Bank* opinion. It questions whether such a dualist approach, although desirable, is truly available in the context of Israel's "Basic Laws." It further analyzes the (then) justice Cheshin's dissenting opinion and why it, too, is an imperfect basis for Israel's constitutional development. The *United Mizrahi Bank* decision has thus left observers confused about the theoretical bases underlying the development of the Israeli constitution. Part IV offers an alternative theory of Israel's constitutional development in the form of foundationalism. It discusses the historical roots of this basis, as well as post-*United*

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[31] ACKERMAN, FOUNDATIONS, *supra* note 22, at 10-16. *See also infra* Part IV.

[32] Since the standing (anyone may petition) and justiciability (every issue is justiciable) judicial revolution described in part IV.C. *infra*, it is questionable whether there is any practical requirement of "case and controversy" in Israel as distinguished from the US.

Mizrahi Bank developments that have made this theory possible. But the fact that this theory is available, both because it comports with the reasoning in *United Mizrahi Bank* and it is supported by later cases, does not mean it is the best one. I explain why Israel should resist the temptation to base its constitution on foundationalism, despite the seeds already planted by the judiciary. Part V concludes by suggesting that Israel's constitution is a hybrid 'Commonwealth constitution,' with mixed features from the various models discussed throughout the article.[33] It remarks on the various options available for Israel's future constitutional development. The article may contribute an understanding of evolutionary patterns of constitution-making to many constitutional systems. It is my hope that it will attract the attention of both jurists and scholars of monist, dualist, and foundationalist constitutional systems.

I. THE TRIGGER TO THE UNITED MIZRAHI BANK DECISION

Since its establishment sixty years ago, there has been a constant cry from some political circles to adopt a formal Israeli constitution. The United Nations General Assembly Resolution 181 of November 29, 1947, prescribed the adoption of a democratic constitution by the Jewish State. The Israeli Declaration of Independence envisioned one. The First Knesset was elected as a Constituent Assembly but never fulfilled its mandate. Thus, the question arises: On what basis was the Israeli Supreme Court able in 1995 to declare the existence of an Israeli formal Constitution? Where did it find one? This part describes the historical events leading to the *United Mizrahi Bank* decision and explains why the decision is so innovative when contrasted with the constitutional status of the "Basic Laws" prior to the decision.

A. What led to the United Mizrahi Bank Case?

The *United Mizrahi Bank* decision is the first Israeli Supreme Court case to deal with the constitutional ramifications of the enactment in 1992 of "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation." More specifically, it is the first decision to deal with the question of whether, as a result of the enactment of these "Basic Laws," the courts have the power of judicial review over primary legislation. The enactment of these statutes was path-breaking in two respects: First, for the first time in Israel's history, the Knesset enacted "Basic Laws" dealing with individual rights. Until their enactment, "Basic Laws" dealt only with the structure of government and division of power between the different branches.[34] This was not for lack of trying.[35] The Knesset

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[33] For discussion of commonwealth hybrid constitutions with regard to Canada, New Zealand and United Kingdom, *see* Stephan Gardbaum, *The New Commonwealth Model of Constitutionalism,* 49 AM. J. COMP. L. 707 (1996).

[34] Before 1992, the following Basic Laws were enacted: Basic Law: The Knesset, 1958, S.H. 69; Basic Law: The People's Lands, 1960, S.H. 56; Basic Law: The President of the State, 1964, S.H. 118; Basic Law: The Government, 1968, S.H. 226; Basic Law: The State Economy, 1975, S.H. 207; Basic Law: The Army, 1976, S.H. 154; Basic Law: Jerusalem the Capital of Israel, 1980, S.H. 186; Basic Law: The Judiciary, 1984, S.H. 78; Basic Law: The State Comptroller, 1988, S.H. 30.

[35] For a synopsis of the many attempts to enact an Israeli Bill of Rights before 1992, *see* AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 910-14 (5th ed. 1996); Ruth Gavison, *The Controversy Over Israel's Bill of Rights*, 15 ISRAEL YEARBOOK OF HUMAN RIGHTS 113-

was just unable to reach agreement regarding individual rights because of the cleavages between Orthodox Jewish political parties and secular ones, and between Jewish and Arab political parties.[36] Thus, the Orthodox Jewish political parties treated with suspicion such principles as equality, freedom of speech, freedom of movement within Israel, and freedom of religion for fear that they would conflict with existing legislation that coerces or imposes religious values on Jewish citizens or permanent residents.[37] Moreover, many of the members of the Orthodox Jewish political parties believed that Israel did not need a formal constitution since Jewish religious law was or, more accurately, should be its Constitution.[38] The Arab minority, on the other hand, found it difficult, if not impossible, to agree to the identity of Israel as a Jewish State.

Second, the 1992 "Basic Laws" contain provisions with substantive entrenchment of the rights enumerated in them. By substantive entrenchment, I mean, that they set substantive criteria that infringing statutes must fulfill. The "Basic Laws" require any statute that infringes upon their provisions to pass muster under the following four-stage substantive test: (1) The conflicting provision must be in a statute or authorized by a statute; (2) the infringement must be compatible with the values of a Jewish and democratic State; (3) it must be done for a proper purpose; and (4) it must be proportional.[39] Until then, "Basic Laws" sometimes included provisions dealing with procedural entrenchment--that is they set a special amendment process, usually requiring the affirmative consent of a specified supermajority of Members of Knesset (MKs) to amend them.[40] But they did not contain substantive entrenchment provisions on later Knessets.[41]

Why did the Knesset finally succeed in 1992 in overcoming the stalemate regarding the enactment of individual rights in "Basic Laws"? The enactment of the 1992 "Basic Laws" was achieved only through a special process of piecemeal legislation.[42] Until then, every attempt to enact a Bill of Rights treated the Bill of Rights as one document. But the initiators of the 1992 "Basic Laws," MK Professor Amnon Rubinstein chief among them, understood that not only was the formal Israeli Constitution to be enacted in piecemeal through the gradual enactment of "Basic Laws," but also its Bill of Rights could only be achieved in stages.[43] That is, only those rights that MKs could agree on were expressly embodied in the new "Basic Laws." Thus, these "Basic Laws" intentionally do not

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50 (1985); I. H. Klinghoffer, *"The Bill of Rights--The Legislative Freeze" in* KLINGHOFFER BOOK ON PUBLIC LAW 137-39 (Itzhak Zamir ed., 1993)

[36] *See, e.g.*, Gavison, *Constitutional Revolution*, *supra* note 10, at 76-77 and n.112

[37] *See, e.g.*, DK (1950) 811-12, 1262.

[38] Dalia Dorner, *Does Israel Have a Constitution*?, 43 ST. LOUIS L.J 1325, 1326 (1999). *See also* DK (1950) 744, 808-11, 1263, 1269.

[39] Basic Law: Human Dignity and Liberty, 1992, S.H. 150, § 8; Basic Law: Freedom of Occupation, 1992, S.H. 114, § 4.

[40] Basic Law: The Knesset, §§4 and 45; Basic Law: Jerusalem the Capital of Israel, § 7; Basic Law: The State Economy, § 3b(c).

[41] There were, however, substantive entrenchment provisions in regular statutes. For further discussion and examples, *see infra* Part II.B.

[42] RUBINSTEIN & MEDINA, *supra* note 35, at 26. *See also* Judith Karp, *Basic Law: Human Dignity and Liberty: A Biography of Power Struggles,* 1 MISHPAT UMIMSHAL 323 (1993) [hereinafter Karp, *Power Struggles*].

[43] For a discussion of the Harrari Resolution by the First Knesset to enact the constitution in stalemates, see *infra* Part I.B.

include explicitly some of the most important individual rights enumerated in any acceptable Bill of Rights in a democratic society, including rights of equality, freedom of religion, freedom of speech and freedom of the press.[44]

The enactment of the 1992 "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation" led to the *United Mizrahi Bank* litigation. The appellants challenged on constitutional grounds an amendment to a statute that was enacted one year later, in 1993. The timing of the amendment was crucial, since "Basic Law: Human Dignity and Liberty" is inferior even to regular statutes, in its *de facto* effects, as far as it concerns the relationship between the "Basic Law" and prior legislation. The "Basic Law" explicitly provides that any enactment preceding its own is protected from constitutional challenge.[45] Thus, it reverses the regular common law maxim that later statutes prevail over earlier ones in the case of their conflict.[46] But, the *United Mizrahi Bank* case dealt with an amendment to a statute, and the amendment was enacted after "Basic Law: Human Dignity and Liberty" and was thus not protected against constitutional attack. In fact, the opposite was true, because "Basic Law: Human Dignity and Liberty" contains a substantive entrenchment provision. In this sense, that "Basic Law" again reverses the maxim that subsequent legislation trumps earlier ones. This time, however, the "Basic Law" was made superior to regular legislation to the extent that it concerned its relations with subsequent legislation.[47]

The challenged amendment was one that revised a statute, known as the "Gal statute" after its initiator, ordering the abolition or reduction of debts of the Kibbutzim and Moshavim to private creditors in an attempt to save them from total bankruptcy.[48] The creditors challenged the amendment's further infringement upon their property rights, which were protected under "Basic Law: Human Dignity and Liberty."[49]

The court unanimously decided that the amendment conformed to the substantive requirements of the "Basic Law" and thus passed constitutional muster. The Court, therefore, could have avoided altogether dealing with the question of the constitutional status of the "Basic Law" and its own judicial review power. But, in the longest *dicta* ever written in Israel, the Court took on the question of whether it had any power of judicial review over primary legislation.[50] Except for Cheshin, the lone dissenter, all the justices believed that judicial review power over primary legislation was possible only in the context of expounding a Constitution. They, thus, believed that they had to first address the question of whether Israel has a formal Constitution in the form of "Basic

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[44] *See* Karp, *Power Struggles*, *supra* note 42, at 326-28, 343-44; Hillel Sommer, *The Non-enumerated Rights: On the Scope of the Constitutional Revolution*, 28 MISHPATIM 259, 268-71 (1997) [hereinafter Sommer, *Non-enumerated Rights*]. This, however, did not prevent the Israeli Supreme Court from reading these rights into the Basic Laws. See *infra* Part IV.

[45] Basic Law: Human Dignity and Liberty, § 10.

[46] *Lex posterior derogat priori.* The rationale behind the maxim is that the last will of the sovereign prevails. BLACK'S LAW DICTIONARY 931 (8th ed., 2004).

[47] It should be noted that since *United Mizrahi Bank*, the Israeli Supreme Court has decided that special rules of interpretation should apply to the Basic Laws because they are of constitutional status. Thus, the regular maxims of interpretation may not necessarily apply to them. HCJ 1384/98 *Avni v. Prime Minister*, 52(5) P.D. 206 (1998).

[48] Arrangements for the Agricultural and Family Sectors Act, 1992, S.H.118.

[49] The Gal Statute was amended by Arrangements for the Agricultural and Family Sectors Act, 1993, S.H. 178. Basic Law: Human Dignity and Liberty, § 3, prohibits infringement of a person's property.

[50] Salzberger, *Constituent Assembly*, *supra* note 16, at 680, 683-84.

Laws." Until the *United Mizrahi Bank* decision, there was no clear judicial answer to this question.

B. The Constitutional Status of "Basic Laws" in the Past

To understand the *United Mizrahi Bank* decision, we need to review the constitutional status of the "Basic Laws" prior to the decision. "Basic Laws" have been enacted in Israel as part of a compromise, known as the *Harrai Resolution*, reached in the First Knesset.[51] The First Knesset was chosen primarily to enact a Constitution.[52] Its election campaigns focused on various proposals to a Constitution advocated by the political parties.[53] However, even during the election, it became clear that the Knesset would function also as a regular legislative assembly.[54] Thus, there was a unification of the different tasks, legislative and constitutive, in one body, very much in conformity with the European model of Constituent Assemblies, but deviating from the American model of separate assemblies for each task.[55] Originally, the Israeli Declaration of Independence envisioned the American model.[56] But, the break of the War of Independence postponed the election to the Constituent Assembly from November 25, 1948, to January 25, 1949.[57] Moetzet Ha'am, which issued the Declaration of Independence and served as a temporary legislative assembly without ever being formally elected, refused to prolong its legislative role without a direct appeal to the People.[58] Thus, it decided to dissolve and allow the new Constituent Assembly to fulfill both legislative and constitutive functions.[59]

Contrary to expectations, the First Knesset could not agree on whether it wanted to adopt a Constitution. Prime Minister David Ben-Gurion and the political governing party, Mapai, believed that the British monist model of parliamentary sovereignty was the more desirable model, while MK Menachem Begin supported the American model of a

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[51] Knesset Resolution from the 13th of June 1950, DK (1950).1743.

[52] Yechiam Weitz, *General Elections and Governmental Crises*, 9 ISRAEL AT THE FIRST DECADE 10 (2001).

[53] "The fact that the Constituent Assembly was elected for the purpose of enacting a constitution would seem to vest that body with such authority by direct mandate from the people." Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1239, n. 92 (1970). "Only in this election was the constitutional issue brought to the voter decision as a matter of legal requirement." *United Mizrahi Bank*, *supra* note 8, at 486 (Cheshin). *See also* DK (1950) 739-49; DK (1950) 804; DK (1950) 826 (for MKs' discussion of the campaigns' promise to draft a Constitution).

[54] The Provisional State Assembly (Moetzet Ha'am) enacted on January 13 the Transition to a Constituent Assembly Act, 1949, stating that it would dissolve after the Constituent Assembly is elected and assembled.

[55] *See* Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191 (1995) (discussing different models of constitution-making).

[56] Israel's Declaration of Independence of May, 14, 1948, envisioned that Moetzet Ha'am will serve as Israel's interim Parliament until elected and regular governmental bodies were created according to a formal Constitution. The Declaration further envisioned that the Constitution would be drafted by an elected Constituent Assembly. The Declaration stated a date of October 1, 1948, though it is unclear whether the date refers to the time of election to the Constituent Assembly or to the time by which the Constitution would be completed or even the time at which regular governmental bodies would be created. *See* RUBINSTEIN & MEDINA, , 5th ed., vol. 1, *supra* note 35, at 50.

[57] Weitz, *supra* note 52, at 10-12.

[58] *See* Uri Yadin, *The Transition to a Constituent Assembly Act*, in IN MEMORIAM URI YADIN 79-82 (Aharon Barak & Tana Spanic eds., 1990) (a lecture given on the Israeli radio "Kol Israel" on January 17, 1949).

[59] The Transition to a Constituent Assembly Act, 1949, §§ 1 and 3.

supreme Constitution. Ben Gurion also argued that it was too early for Israel to adopt a Constitution, when most of its target population was still in the Diaspora.[60] Instead, the First Knesset thus adopted the *Harrari Resolution.* According to the Resolution, the task of proposing a Constitution was entrusted to a committee of the Knesset, which would draft chapters of the Constitution that the Knesset would enact as "Basic Laws." When the task is completed, all "Basic Laws" would be unified in one document to serve as Israel's Constitution.

As typical of compromises, everyone understood this resolution differently. The status of the "Basic Laws" enacted prior to the completion of the Constitution was unclear: In the interim period, would they be treated as regular laws or as supreme? How would the Constitution be unified, by a special enactment process or technically? Could others propose "Basic Laws"--as in fact happened with "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation," or only the committee? When would the constitution be completed; did the First Knesset contemplate a deadline? These ambiguities were intentionally left for future Knessets due to the First Knesset's failure to reach consensus on the most fundamental question: whether a Constitution was at all desired.[61]

The First Knesset did not enact any "Basic Laws." When later Knessets did so, they used the same process as regular statutes. Sometimes, during the enactment process, some MKs would emphasize the importance of "Basic Laws" both for their constitutional content and as an implementation of the *Harrari Resolution*. But there was no greater attendance of MKs than that typical of regular enactments. "Basic Laws" often passed with the presence of only a few Members present.[62] This was true even when the "Basic Law" included provision ensuring procedural entrenchment, which would require a supermajority of MKs for its repeal.[63] It was also true of the enactment of "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation," although they include substantive entrenchment regarding future legislation.[64] The two main differences between "Basic Laws" and regular statutes as far as their enactment was concerned were: First, the title "Basic Law," as opposed to mere "Law" without a year mark, separated the former from regular legislation, placing it in a category of its own; second, the content of "Basic Laws" usually dealt with constitutional as opposed to regular issues. Some regular

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[60] BENYAMIN NEUBERGER, THE CONSTITUTION DEBATE IN ISRAEL, GOVERNMENT AND POLITICS IN ISRAEL, unit 3, at 25-37 (1990).
[61] *Id.* at 38-40.
[62] *See infra* Parts II & III.
[63] Thus, for example, Basic Law: The Government, 1992, § 56, required the support of an absolute majority of MKs for its amendment. This Basic Law, however, was enacted by a vote of 55 to 32 MKs in the last reading. Thus, fewer MKs supported its enactment than the absolute majority that was required for its amendment. DK (1992) 3862-63. Similarly, Basic Law: Freedom of Occupation passed in 1992 by a vote of 23 to 0 MKs. DK (1992) 3392-93. However, section 5 included an entrenchment provision requiring an absolute majority of MKs for its amendment. Moreover, even the enactment of Basic Law: Freedom of Occupation of 1994 did not enjoy the requisite absolute majority support required for its amendment since many of the most important provisions within it did not appear on first reading. *See infra* Part III.B.
[64] *See infra* Part III.B.

statutes, however, dealt with constitutional matters,[65] while some "Basic Laws" dealt with benign matters.[66]

Prior to the *United Mizrahi Bank* decision, there was also no clear judicial opinion on the constitutional status of the "Basic Laws." The Court often spoke of the Knesset as enjoying legislative sovereignty.[67] It often treated the "Basic Laws" as enjoying the status of regular laws. It allowed the Knesset to amend "Basic Laws" using regular statutes.[68] It applied to "Basic Laws" the general maxims of interpretation, so that a subsequent regular statute could impliedly repeal an earlier "Basic Law."[69] And, a specific earlier regular statute would prevail over a later general "Basic Law."[70] Only when the "Basic Law" included a procedural entrenchment provision specifically requiring a supermajority for its repeal would the Court impose this entrenchment provision on the Knesset. This occurred only four times and only with regard to section 4 of "Basic Law: The Knesset,"[71] which entrenches Israel's electoral system and especially the norm of "equal elections," protecting both the right to equal vote (every eligible citizen has one vote) and the right to equal access to power (every eligible citizen may be elected), unless an absolute majority (61 out of 120) of MKs agrees to the repeal.[72]

In its decisions, the Court did not provide a coherent theory explaining why it could impose this entrenchment provision on the Knesset. It did not even explain whether it consciously treated this provision as entrenchment. It also did not coherently explain why it could exercise judicial review over primary legislation in this context. Justice Landau, deciding in 1969 the first case that exercised this power of judicial review over primary legislation, explicitly declared that "it was not deciding the issue,"[73] since the Attorney General was not challenging the Court's authority.[74] Since this 1969 *Bergman* decision, the Knesset adhered to the Court's ruling probably because it, too, felt the need to respect equal elections norms and not infringe upon them without the necessary support of an

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[65] Two notable examples are The Woman's Equal Rights Law, 1951, S.H. 248 and The Law of Return, 1950, S.H. 159.

[66] For detailed examples, *see* RUBINSTEIN & MEDINA, 5th ed., *supra* note 35, at 375-77.

[67] *See e.g.* C.A. 228/63 *Azuz v. Ezer*, 17 P.D. 2541, 2547 (1963) (Isr.) (Berenzon Justice) ("There is no doubt that according to Israel's constitutional law, the Knesset is sovereign and may enact any statute it desires."); HCJ 112/77 *Fogel v. Broadcasting Authority*, 31 (3) P.D. 657, 664 (1977) (Isr.) (Deputy CJ Landau) ("This is how we earned a quasi-judicial Bill of Rights…that is subordinate to the sovereign will of the Knesset as a legislative assembly.").

[68] *See, e.g.*, HCJ 148/73 *Kniel v. Minister of Justice*, 27 (1) P.D. 794, 795 (1973) (Isr.); HCJ 60/77 *Ressler v. Chairman of the Central Elections to the Knesset Commission*, 31 (2) P.D. 556 (1977) (Isr.).

[69] *Id.*

[70] *Lex specialis derogat generali*. CA 107/73 *Negev v. State of Israel*, 28 (1) P.D. 640, 642 (1974) (Isr.) (Berenzon Justice).

[71] HCJ 98/69 *Bergman v. Minister of Finance and State Comptroller*, 23 (1) P.D. 693 (1969) (Isr.) [hereinafter *Bergman*] (an English translation is available in 4 ISR. L.REV. 559 (1969)); HCJ 246/81 *Agudat Derech Eretz v. Broadcasting Authority*, 35(4) P.D. 1 (1981) (Isr.) [hereinafter *Agudat Derech Eretz*]; HCJ 141/82 *Rubinstein M.K. v. Chairman of the Knesset*, 37(3) P.D. 141 (1983) (Isr.); HCJ 172, 142/89 *Laor Movement v. Speaker of the Knesset*, 44(3) P.D. 529 (1990) (Isr.) [hereinafter *Laor Movement*].

[72] The section is cited *infra* Part II.B.

[73] *Bergman*, *supra* note 71, at 696. But see further discussion *infra* Part II.B.

[74] For Justice Landau's view of his *Bergman* decision, and his critique of its use in *United Mizrahi Bank, see* Moshe Landau, *The Supreme Court as Constitution Maker for Israel,* 3 MISHPAT UMIMSHAL 697, 699-700 (1996) [hereinafter Landau, *Constitution Maker*].

absolute majority of MKs.[75] Thus, prior to the *United Mizrahi Bank* decision, there was no real judicial or legislative discussion of the Court's scope of judicial review authority over primary legislation.

In *United Mizrahi Bank*, the justices seized upon the opportunity to clarify once and for all the status of the "Basic Laws," as well as their own judicial review power. As discussed above, the justices regarded the enactment of the two "Basic Laws" dealing with individual rights as a "constitutional revolution,"[76] as it was the first time in Israel's history that "Basic Laws" dealt exclusively with individual rights. Also for the first time, "Basic Laws" included substantive, not just procedural, entrenchment. Even prior to *United Mizrahi Bank*, the justices, especially Barak, publicly spoke in speeches and scholarly work of the constitutional revolution that occurred with these 1992 "Basic Laws."[77] But, Barak spoke of a constitutional revolution that had occurred quietly, without anyone taking notice.[78]

II. MONISM

Shamgar suggested in *United Mizrahi Bank* that Israel's "Basic Laws" were its formal supreme Constitution.[79] The Knesset had an unlimited sovereign authority, which it exercised by enacting "Basic Laws" that serve as Israel's constitution. In fact, Shamgar wrote, even the British people understand that monism enables constitution-making. But aren't parliamentary sovereignty and a supreme constitution contradictory terms? This part discusses this seeming paradox, analyzing both what can be said in favor of Shamgar's thesis, as well as its limitations in explaining Israel's constitutional development.

A. Shamgar's Theory of the Unlimited Sovereignty of the Knesset

The retiring CJ Shamgar based the Knesset's constituent authority on the theory of monism. The Knesset was sovereign and as such could entrench its enactments, thus, creating a Constitution.[80] He named his theory "the unlimited sovereignty of the Knesset,"[81] though in essence he was advancing the theory of "the limited sovereignty of

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[75] For the Knesset's response to the court's rulings, *see infra* Part II.B.

[76] Barak, more than any other speaker, is identified with coining the term "constitutional revolution" to describe the enactment of the 1992 "Basic Laws," Aharon Barak, *"The Constitutional Revolution: Protected Human Rights,"* 1 MISHPAT UMIMSHAL 9, 9-13 (1992) [hereinafter Barak, *Constitutional Revolution*]. However, he attributes the term to Professor Claud Klein. *See* Aharon Barak, *The Constitutional Revolution-12th Anniversary*, 1 LAW & BUSINESS 3, 5 (2004) [hereinafter Barak, *12th Anniversary*]. The (then) Minister of Justice, MK Dan Meridor, was also among the firsts to use the term. See Barak, *Constitutional Revolution, id.*, at 12-13.

[77] *Id. See also* BARAK, INTERPRETATION, *supra* note 25, at 29, 61.

[78] *See* Rivka Weill, *Shouldn't We Seek the People's Consent? On the Nexus Between the Procedures of Adoption and Amendment of Israel's Constitution,* 10 MISHPAT UMIMSHAL 449, 453 n.14 (2007) [hereinafter Weill, *the People's Consent*] (citing Barak's speech of November 20, 1994 at an annual conference for Accounting).

[79] But see *infra* note 167 and accompanying text regarding the question whether Shamgar treats all Basic Laws or just those enacted in 1992 as supreme.

[80] *United Mizrahi Bank*, *supra* note 8, at 288-94.

[81] *Id.* at 283-86.

the Knesset" through its own enactment of a Constitution. Shamgar followed H.L.A. Hart in arguing that two concepts of sovereignty were possible: the first was that of a sovereign that could not restrict itself; the other was a sovereign that could restrict itself, but once restricted, it was no longer sovereign with respect to the issue entrenched. In Hart's words:

> Under the influence of the Austinian doctrine that law is essentially the product of a legally untrammeled will, older constitutional theorists wrote as if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra,* but also from its own prior legislation. That parliament is sovereign in this sense may now be regarded as established, and the principle that no earlier Parliament can preclude its 'successors' from repealing its legislation constitutes part of the ultimate rule of recognition used by the courts in identifying valid rules of law. It is, however, important to see that no necessity of logic, still less of nature, dictates that there should be such a Parliament; it is only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity. Among these others is another principle which might equally well, perhaps better, deserve the name of 'sovereignty.' This is the principle that Parliament should not be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would then at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows it. The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is, after all, only one interpretation of the ambiguous idea of legal omnipotence.[82]

This constitutional paradox is very similar to the theological one raised with respect to God: Could God create a stone it could not raise? If it couldn't, it was never almighty. If it could, once done, it was no longer almighty.[83] Shamgar stated that the second concept of sovereignty better portrayed the Knesset's power. In other words, the sovereignty of the Knesset implied that it could entrench its enactments thus restricting its sovereignty with respect to the future. For Shamgar, this was in fact Israel's ultimate rule of recognition.[84]

Shamgar further explained that, just as the Knesset has the power to create administrative rules that are inferior to regular enactments (i.e., internal procedural rules for conducting its proceedings), so too does it enjoy the power to create "Basic Laws" that are superior to regular statutes. As part of its sovereignty, it was up to the Knesset to determine the constitutional status of its enactment. Shamgar thus believed that a

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[82] HART, *supra* note 21, at 149.

[83] *See* PETER SUBER, THE PARADOX OF SELF-AMENDMENT 32 (1990).

[84] "The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense…an *ultimate* rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is *supreme*." HART, *supra* note 21, at 102.

hierarchy between norms is based on a hierarchy between the authorities creating the norms, but that the same governmental branch may exercise different hierarchical authorities.[85]

Shamgar believed that the above-stated theory of "the unlimited sovereignty of the Knesset" aligns with Israel's constitutional history. It gives meaning to the *Harrari Resolution* and the enactment of "Basic Laws" that followed it. He believed that through general elections the People granted the Knesset plenary power to enact both regular and constitutional law. The Knesset was, in fact, a "continuing body" enjoying the same authority as the First Knesset to enact a Constitution until the completion of its task.[86]

According to Shamgar, this "unlimited sovereignty" theory also granted legitimacy to the Court's exercise of judicial review over primary legislation. The Court was enforcing the entrenchment that the Knesset imposed upon itself. Shamgar further stated that this is in fact how the Court understood its own authority in the past when it demanded that the Knesset either abide to an "equal elections" norm or infringe upon it through legislation that enjoyed the support of an absolute majority of MKs. Either way, the Knesset was fulfilling the requirements of the procedural entrenchment provision embodied in section 4 of "Basic Law: The Knesset." [87]

Shamgar further believed that this theory was consistent with the British constitutional development in the last decades. Dicey's theory of parliamentary sovereignty was no longer applicable even in Britain. According to the traditional understanding of Dicey, following Blackstone, parliamentary sovereignty meant that no legislature could be more sovereign than its successors and thus entrench its enactments. Rather constitutional law was on the same footing as regular law, and no judicial review power was possible.[88] But Shamgar suggested that, after Britain joined the European Union, or the European Community as it was then known, British judges did not apply statutes that conflicted with the superiority of Community law. By Parliament's own decision, its sovereignty was curtailed.[89]

Shamgar warned, however, that this entrenchment power of the Israeli legislature was not unlimited. Rather, he suggested that it was subject to judicial limits regarding the scope and nature of entrenchment. Not every supermajority requirement will be valid. Sometimes, they may be too restrictive of democratic self-government. Not every subject may be entrenched either. Constitutional issues may be entrenched, but, as to others, it was unclear.[90] Shamgar did not offer a theory to justify the "inherent" limits on the entrenchment power, leaving it to be elaborated by future court decisions.[91]

B. *In Support of Shamgar's Monist Theory*

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[85] *United Mizrahi Bank*, *supra* note 8, at 267-70.

[86] *Id.* at 278-94. The Transition to the Second Knesset Act, 1951, S.H. 104, § 5, provided that "the Second Knesset and its members will enjoy the same authorities, rights and duties that the First Knesset and its members enjoyed." Section 10 applied this statute also on future Knessets. Shamgar thus understood these sections as manifesting that every Knesset continued to enjoy constitutive authority like the First Knesset. *United Mizrahi Bank*, *supra* note 8, at 281-83.

[87] *United Mizrahi Bank*, *supra* note 8, at 292-93. *See also* discussion of *Bergman*, *infra* Part II.B.

[88] *See, e.g.,* DICEY, *supra* note 21, at 39.

[89] *United Mizrahi Bank*, *supra* note 8, at 291-92.

[90] *Id.* at 293.

[91] For a theory that might justify such limits, s*ee infra* part IV.

1. *Political Actors' Understanding*

Prima facie, Shamgar's monist theory is deeply rooted in Israel's constitutional history. The young Zionist State was established on the remains of the British Mandate, its immediate predecessor.[92] To avoid legal chaos, the new State adopted the law by statute as it existed at the time of the State's founding, but with the necessary implied alterations resulting from its establishment.[93] That law included British judicial decisions that served as precedents for the new State.[94] In fact, in the first years of its establishment, the British legal system, more than any other system, influenced the new Israeli courts' jurisprudence. The judges often cited British cases for support and inspiration when making new decisions.[95] Also, many of the judges were educated in the British tradition.[96] Mapai, the only political party to head the Israeli government from 1948 to 1977, and its leader David Ben Gurion were strong advocates of the British legal tradition as well.[97] Mapai was also the party in control of the majority in the Knesset.[98] Thus, all three branches of government (legislative, executive and judicial) treated the British legal tradition with veneration and looked to it for guidance.

In the Knesset, members often spoke of the Knesset as sovereign and entitled to enact any law. Even when enacting "Basic Laws," members emphasized that the Knesset was enacting them as an exercise of its sovereignty.[99] The Knesset did not differentiate between the enactment of regular and constitutional statutes. Rather, both were enacted via the same legislative process of three readings. There were no more MKs present when

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[92] Daniel Friedman, *Infusion of the Common Law into the Legal System of Israel,* 10 ISR.L.R. 324 (1975).

[93] Law and Administration Ordinance, 1948, 1 S.H. 7, § 11.

[94] *See* Friedman, *supra* note 92; Aharon Barak, *The Israeli Legal System--Tradition and Culture,* 40 HAPRAKLIT 179, 202-05 (1992).

[95] In 1957, the primacy of British citations reached a peak with 40% of citations in Israeli Supreme Court decisions being of British origin. This percentage declined gradually until circa 1980 with no particular identifiable reason according to Yoram Shachar, Ron Harris & Meron Gross, *Citation Practices of the Supreme Court, Quantitative Analyses*, 27 MISHPATIM 119, 152, 157-59 (1996).

[96] Of the Supreme Court justices serving in the years 1948-1980, 20% were educated in England, 20% were educated in Israel, and 32% were educated in Germany. See ELYAKIM RUBINSTEIN, JUDGES OF THE LAND 142 (1980). For the ramifications of these demographics, *see* Oz-Salzberger Fania, & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 ISRAEL STUDIES 159, 185 (1998) (arguing that Israel's "German" Supreme Court judges were "Anglophilians" and that "the British and American legacy dominates the Israeli legal system." Nonetheless, the "Israeli judiciary…created a shared heritage of liberalism, which incorporated both Central-European and Anglo-American elements.")

[97] *See* Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 ISRAEL STUDIES 193-214 (1998) (discussing the origins and effects of Ben-Gurion's disposition towards the British legal tradition). *See also* discussion *supra* Part I.B.

[98] Israel has a parliamentary British style model of government under which the elections to the Knesset also determine the identity of the government. The president (fulfilling mainly a symbolic role) assigns the task of establishing a government to a Knesset Member that enjoys the support of a majority in the Knesset. *See* Basic Law: The Government, § 7. Since the government needs the confidence of the Knesset to rule, it is composed of representatives of political parties that enjoy a majority of MKs. *Id.* § 3.

[99] *See, e.g., United Mizrahi Bank*, *supra* note 8, at 375, 496 (citing MKs' speeches in the Knesset). In fact, in the first five editions of the classic book on Israel's constitutional law, the Knesset was portrayed as sovereign. The fifth edition was published in 1996 after the Israeli constitutional revolution, but nonetheless chapter 11 was entitled "the sovereignty of the Knesset and its limits." RUBINSTEIN & MEDINA, 5th ed., vol. 1, *supra* note 35, at 409.

"Basic Laws" were enacted than usual.[100] Further, the Knesset placed "Basic Laws" that were supposedly of constitutional nature on the same footing as regular statutes. Thus, the Knesset amended "Basic Laws" using regular statutes as well. Further, constitutional matters were enacted in statutes entitled mere laws and not just in "Basic Laws." Some of the provisions of "Basic Laws" dealt with benign matters.[101] Placing constitutional statutes on par with regular statutes is one of the main characteristics of parliamentary sovereignty in the Diceyan tradition.[102]

The Court, too, often decided cases on the assumption that the Knesset was sovereign.[103] As far as possible, it would interpret statutes in conformity with basic individual rights. The Court would infer in every statute a general purpose to protect individual rights, in addition to its specific purpose. But, when such an interpretation was not possible, the statute would prevail over individual rights that enjoyed the status of mere judge-made common law rights.[104] This did not prevent the judges, however, from interpreting statutes in very creative ways and against legislative intent in an attempt to respect individual rights.[105] In that sense, prior to the *United Mizrahi Bank* decision, Israel at least had an *interpretive constitution*. That is, it had a common law constitution with interpretive force when construing statutes.[106] This kind of a constitution may align with the traditional theory of legislative sovereignty.[107]

Neither did the Court treat "Basic Laws" per "Basic Laws" as supreme. In the Court's jurisprudence, it was possible for later regular statutes to both prevail over earlier "Basic Laws" and even impliedly repeal them.[108] Thus, there was no formal constitution supreme over regular enactments, but rather all legislation enjoyed similar status as characteristic of a system based on the tradition of parliamentary sovereignty.

Both the Knesset and the Court, however, treated the Knesset as enjoying self-entrenchment power--that is, the power to entrench its enactments against repeal by a simple, random majority of MKs present. The Knesset utilized this power when enacting statutes that included procedural or substantive entrenchment provisions. It primarily exercised this entrenchment power to protect against random amendment of some of the provisions of "Basic Laws."[109] But not all "Basic Laws" were entrenched. In fact, "Basic Law: Human Dignity and Liberty" lacks procedural, though not substantive, entrenchment. Its proponents have tried to include a provision requiring an absolute majority of MKs for its amendment, but their proposal was one vote short of majority support.[110]

Nor are entrenchment provisions unique to "Basic Laws," but rather may be found in regular enactments as well. Thus, the Knesset used entrenchment in some statutes

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[100] *See infra* Part III.B.
[101] For support, *see supra* Part I.B.
[102] DICEY, *supra* note 88, at 39. See also *supra* note 21.
[103] For support, *see supra* Part I.B.
[104] *See infra* Part IV.
[105] RUBINSTEIN & MEDINA, *supra* note 35, at 68.
[106] Gardbaum, *supra* note 33, at 728 (using the expression "*interpretive"* bill of rights with respect to New Zealand).
[107] For recent British debates regarding the compatibility of purposive interpretation and parliamentary sovereignty, see J.W.F. ALLISON, THE ENGLISH HISTORICAL CONSTITUTION 186-236 (2007).
[108] For support *see supra* Part I.B.
[109] For examples, *see supra* note 40.
[110] For the story behind the scenes, *see infra* note 240 and accompanying text.

dealing with economic matters when it wanted to credibly signal to the public its commitment to a certain economic policy.[111] It also attempted to entrench some of its statutes dealing with the territory of the Israeli State and its borders.[112] The Knesset did not treat this self-entrenchment power as unique to constitutional matters. *Prima facie,* this self-entrenchment power seems to support Shamgar's theory of a sovereign Knesset empowered to entrench its enactments, thus restricting its sovereignty.

Procedural entrenchment provisions usually did not exceed the requirement that a statute be amended by the support of an absolute majority of MKs.[113] One may even argue that such a requirement is not true entrenchment, but merely a demand that MKs be present when enacting certain policies, i.e., a form of quorum requirement.[114] Usually, in the absence of entrenchment provisions, the Knesset has no quorum requirements, and a statute may be enacted with the slimmest presence of MKs.[115] Although absolute majority requirement was the prevalent procedural entrenchment form, exceptions may be found, including entrenchment provisions requiring the consent of two-thirds of MKs (80 of 120).[116]

Surprisingly, often when the Knesset exercised its entrenchment power, it enacted entrenchment provisions with simple random majority rather than having the support of the supermajority required to undo the entrenchment.[117] This necessarily meant that the Knesset that enacted the entrenchment provision enjoyed greater authority than any subsequent Knesset that would attempt to repeal it, assuming that the entrenchment was valid and applicable.

Prior to the enactment of the 1992 "Basic Laws," substantive entrenchment existed only in a few regular statutes. Usually, substantive entrenchment required an explicit amendment of the provision at stake.[118] In other words, substantive entrenchment

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[111] The Protection of the Israeli Public Investment in Financial Assets Act, 1984, S.H. 178, § 3, requires an absolute majority of MKs for its amendment. This provision was enacted to signal to the public that the government would not unilaterally alter the conditions of financial instruments such as state bonds. Until 1995, there was also a procedural entrenchment provision in section 45b of The Bank of Israel Act, 1954, S.H. 192 (inserted by amendment no. 15 enacted in 1985) requiring an absolute majority of MKs to amend sec. 45a. The entrenchment aimed at restricting the government's authority to lend money from the Central Bank. The provision intended to limit governmental increase of the amount of money available in the market.

[112] For example, Jerusalem's territory may not be relinquished but by amendment of Basic Law: Jerusalem the Capital of Israel, which requires the support of an absolute majority of MKs. § 7.
A government's decision to relinquish territory that is officially part of Israel's territory is subject to Knesset's authorization by an absolute majority vote. The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) Act, 1999, S.H. 86, § 2. This section however is not itself entrenched and may thus be amended by regular majority vote. HCJ 1169/07 *Rabes v. Israel's Knesset* (unpublished yet).

[113] This is true of "Basic Law: Freedom of Occupation," § 7 (entrenching the entire "Basic Law"); "Basic Law: Jerusalem The Capital of Israel," § 7; "Basic Law: The Government," 2001, § 44 (entrenching the entire "Basic Law"); "Basic Law: The Knesset," § 4; "Basic Law: State Economy," §3b(c).

[114] *United Mizrahi Bank*, *supra* note 8, at 538 (Cheshin).

[115] "Basic Law: The Knesset," § 25; Knesset's Rules of Procedure, § 22.

[116] Thus, for example, "Basic Law: The Knesset," § 45 states: "Section 44, or this section, shall not be varied save by a majority of eighty members of the Knesset."

[117] See discussion *supra* note 63 and accompanying text.

[118] The Woman's Equal Rights Law, 1951, S.H. 248, § 1a; The Budget Principles Law, 1985, S.H. 1139, § 3a; Commodities and Services (Control) Law, 1957, S.H. 24, § 46(b). For decisions interpreting these substantive entrenchment provisions as requiring an explicit repeal, *see, e.g,.* HCJ 104/87 *Nevo v. National*

(merely) reversed the regular interpretation maxim that a later statute may be impliedly repealed by an earlier statute.[119]

2. *The Bergman Decision*

What was the force of the entrenchment provisions? Did the Court impose the entrenchment provisions against a noncompliant Knesset attempting to amend an entrenched provision without the necessary majority required? Prior to *United Mizrahi Bank*, only four times did the Court impose an entrenchment provision against a noncompliant Knesset. On all four occasions, the provision was section 4 of "Basic Law: The Knesset," which defines the nature of the electoral system in Israel, as follows:

> The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Election Law; This section shall not be varied save by a majority of Members of Knesset.[120]

In all four times, the attempted infringement was upon the norm of equal elections that serves at the heart of any fair elections in a democratic society. Each time, the Court required the Knesset to either amend the law in a way that would respect equal elections norms or reenact the infringement with the necessary support of an absolute majority of MKs.[121]

The first decision on this topic was *Bergman,* given in 1969.[122] For its pioneering status, Justice Zamir, in *United Mizrahi Bank*, treated *Bergman* as a precedent for the existence of judicial review power over primary legislation, thereby anchoring the timing of the "constitutional revolution" with the *Bergman*, rather than *United Mizrahi Bank*, decision.[123] Is this treatment of the *Bergman* decision justified?

Dr. Bergman was a private Tel-Aviv attorney. He appealed to the Israeli Supreme Court, which was sitting as a High Court of Justice, arguing against the validity of a 1969 finance law that granted public funding for the (then) upcoming general elections.[124] He claimed, *inter alia,* that the finance law treated unequally the political parties competing at election, because it provided public funding only to political parties that were already represented in the outgoing Knesset. It thus discriminated against new political parties. As such, the finance statute violated "equal elections" norms guaranteed by section 4 of "Basic Law: The Knesset" without enjoying the support of a "majority" of MKs during

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Labor Court, 44 (4) P.D. 749, 764 (1990) (Isr.), HCJ 256/88 *Medinvest Herzliya Medical Center v. CEO of Minister of Health*, 44 (1) P.D. 19 (1989) (Isr.), HCJ 1438/98 *Conservative Movement v. Minister of Religions*, 53(5) P.D. 337, 385-88 (Isr.) (Cheshin, J.). For discussion of explicit repeal requirements, see *infra* Part III.C.

[119] For the rationale of this maxim, *see* Karen Petroski, *Retheorizing the Presumption against Implied Repeals*, 92 CALIF. L.REV. 487 (2004).

[120] *See* http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm.

[121] *See supra* note 71 citing all four cases.

[122] *Bergman, supra* note 71.

[123] *United Mizrahi Bank*, *supra* note 8, at 468 (Zamir).

[124] Elections to the Knesset and Local Authorities in the year 5730 (Financing, Limitation of Expenses and Auditing) Law, 1969, S.H. 48 [hereinafter finance Act or law].

its enactment.[125] Bergman sought and won an injunction to prevent the execution of the finance law.

The *Bergman* decision is six-pages long, which stands in sharp contrast to the lengthiness of the *United Mizrahi Bank* decision. The opinion of the Court is laconic and covers more than it reveals. Although the Court ordered the legislature to either reenact the finance law in a way that aligns with equal elections norms or reenact the infringement with the necessary majority, it did not explain why, if at all, it has the power of judicial review over primary legislation. The (then) Attorney General Meir Shamgar did not get a chance to argue against the Court's judicial review authority. Shamgar was so convinced of winning the case that he did not bother to argue against the Court's judicial review authority. Rather, he requested the Court allow him to argue against such authority if it became relevant.[126] His request was *de facto* denied, without reasoning, probably due to the urgency of deciding the case near election time.[127] Later, the *Bergman* decision would serve as precedent for the Court's judicial review power. But what theory should be attributed to it? In other words, how could this decision be generalized and serve as future precedent? Based on *Bergman*, when, if at all, was judicial review over primary legislation justified? Does it align with the monist theory suggested by Shamgar in *United Mizrahi Bank*?

At least, six different theories may be offered in explanation of the Court's decision in *Bergman*. Each suggesting a different scope of the Court's judicial review power. The first is that all "Basic Laws" were supreme and should be treated as part of Israel's formal Constitution. Thus, any regular statute, such as the finance law at stake, that infringes upon "Basic Laws" provisions must pass constitutional muster, which the finance law failed to do because it lacked majority support. But, while this theory may have been plausible at the time the *Bergman* case was decided, it did not align with later Court decisions. Later decisions did not treat "Basic Laws" per "Basic Laws" as supreme, as noted above.[128] Thus, this is not the best available theory to explain the *Bergman* decision.[129]

A second possible theory is that what counts is entrenchment, not "Basic Laws." In other words, when a later statute conflicts with an entrenched provision of an earlier statute, whether the entrenchment appears in a "Basic Law" or in a regular statute, the entrenched provision prevails. Thus, the conflicting statute must fulfill the requirements of the entrenchment to survive judicial scrutiny. Since the finance law at stake in *Bergman* violated equal elections norms without the majority support required by the entrenched provision of section 4 of "Basic Law: The Knesset," it failed scrutiny. This entrenchment theory aligns with the *Bergman* Court's proposed remedy: to reenact the finance Act with the support of the necessary majority. [130]

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[125] The stated finance Act passed first reading by a majority of 24 to 2. The Knesset's records of third reading merely state that the law was "adopted," without recording the count of the votes. The Petitioner argued that this session too was not attended by a majority of MKs, and the Attorney-General did not dispute that. *Bergman*, *supra* note 71, at 696.

[126] *Id.* at 696.

[127] Bergman petitioned the Court on April 30 and the decision was given on March 7, 1969. *Bergman*, *supra* note 71. The elections were held on October 28, 1969.

[128] See discussion *supra* Part I.B.

[129] "Best" in the Dworkian sense, see RONALD DWORKIN, LAW'S EMPIRE 227-28 (1986).

[130] For literature on the legislative self-entrenchment power, see *supra* note 29.

It should be noted, however, that it is not at all clear whether the finance law at stake in *Bergman* conflicted with section 4 of "Basic Law: The Knesset" in the following sense: The wording of section 4 seems to suggest that only amendment, not infringement, of section 4 would require the support of an absolute majority. The finance law in no way attempted to redefine equal elections norms, but rather infringed upon it in a specific election. The *Bergman* Court was not aware of the distinction between infringement and amendment existing in constitutional jurisprudence and thus applied section 4 also to the case at hand. This distinction between amendment and infringement is not made explicit in Israel's constitutional jurisprudence until *United Mizrahi Bank*.[131] In fact, the legislature was made aware of this distinction only by (the then Deputy CJ) Barak's letter to the Chairman of the Constitution, Legislation and Justice Committee of the Knesset of January 11, 1994, responding to the Knesset's draft "Basic Law: Freedom of Occupation of 1994," which replaced the 1992 version.[132] Since the *Bergman* decision, however, section 4 of "Basic Law: The Knesset" is interpreted uniquely so that a majority is required for both amendment and infringement. In other words, "amendment" includes infringement for section 4 and only section 4.[133] This is a manifestation of how sporadic the Israeli constitutional development has been.

The entrenchment theory assumes that what counts is solely entrenchment, not the constitutional status of the enactment that includes the entrenchment.[134] However, it is an open question whether the Israeli Supreme Court would have reached the same result of *Bergman* were the entrenchment present in a regular statute, as opposed to a "Basic Law." Although the Knesset has entrenched both "Basic Laws" and regular statutes, we have no legal case as of yet dealing with an infringement of procedural entrenchment provisions in regular statutes. The Court did apply substantive entrenchment provisions in regular statutes by requiring that a later statute infringing upon them do so explicitly, rather than implicitly.[135] The theory of entrenchment, therefore, may explain the *Bergman* decision.

A third plausible theory is that only entrenched "Basic Laws" prevail over later conflicting regular statutes. In other words, the combination of a "Basic Law" and an entrenchment provision is necessary to overcome the maxim that later statutes prevail over earlier ones.[136] In fact, prior to *United Mizrahi Bank*, the Court *de facto* applied the *Bergman* precedent only in three cases, all of which dealt with the protection of section 4 of "Basic Law: The Knesset."[137] Thus, the *Bergman* decision applied *de facto* only to "Basic Laws" that were entrenched.

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[131] *United Mizrahi Bank*, *supra* note 8, at 274-76.

[132] For Barak's letter, *see* Aharon Barak, *On the Amendments to Basic Law: Freedom of Occupation*, 2 MISHPAT UMIMSHAL 545 (1994) [hereinafter Barak, *Amendments*].

[133] *See supra* note 71 enumerating three later cases in which the court interpreted the section in this way.

[134] *See* Ariel Bendor, *Entrenchment and Constitution: Bergman and the Constitutional Discourse in Israel,* 31 MISHPATIM 821 (2001).

[135] *See* discussion *supra* notes 118 & 119 and accompanying text.

[136] *See* David Kretzmer, *The Path to Judicial Review in Human Rights Cases: From Bergman and Kol Ha'am to Mizrahi Bank*, 28 MISHPATIM 359 (1997).

[137] *See supra* note 71 and accompanying text. That later judicial decisions' understanding of the precedential nature of the case is important in determining its contribution. *See* CROSS AND HARRIS, *supra* note 16, at 45-47.

A fourth theory that may be offered as an explanation of the *Bergman* decision is that of self-dealing or usurpation of power. According to it, the Court treated the finance statute at stake in *Bergman* as the product of self-dealing on the part of MKs. By preventing public funding for new political parties, members of the legislature were effectively trying to limit the electoral competition they would face and entrench themselves in office. The Court thus treated the finance statute as a usurpation of the Knesset's legislative powers and thus beyond its authority to legislate. Although the Knesset enjoys legislative powers, those are granted by the People at election. The People, however, never granted MKs the power to entrench themselves in office.[138] The power of judicial review thus understood is limited to cases of gross usurpation of power, much like the famous British seventeenth century *Dr. Bonham's* case.[139] In fact, as already mentioned, in all subsequent cases in which the Court exercised judicial review power over primary legislation, it was always in the case of section 4 of "Basic Law: The Knesset" and always involved self-dealing by MKs.[140] Therefore, this theory could have served as an explanation of the Court's judicial review power prior to *United Mizrahi Bank*.

The difficulty with the theory arises, however, on the remedial front. In all cases dealing with the infringement of section 4 of "Basic Law: The Knesset," the Court granted the Knesset the option to either remove the violation of self-dealing or reenact the violation with the support of an absolute majority of MKs. If the Court treated self-dealing as a usurpation of legislative power, it is not clear why it could be remedied if done with the support of an absolute majority of MKs.

A fifth possible theory is that "nothing" was decided in the case. Retired CJ Landau, who wrote the *Bergman* decision, used similar words to describe the *ratio* of the case in articles published in both 1971 and 1996.[141] Landau wrote his 1996 article in response to the *United Mizrahi Bank* decision. He was upset with both Shamgar and Zamir for relying on his opinion in *Bergman* as a precedent for the *United Mizrahi Bank* decision. Landau felt that *Bergman* could not serve as precedent for either the assertion that Israel has a formal Constitution in the form of "Basic Laws" or that the Court has the power of judicial review over primary legislation. He read his very own *Bergman* decision to mean that "all the constitutional questions were left open."[142]

While Landau's proposition seems peculiar in light of the remedy granted in the *Bergman* decision, the decision does lack an explanation for the Court's judicial review

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[138] "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others." JOHN LOCKE, TWO TREATISES OF GOVERNMENT the Second Treatise § 141 (Peter Laslett ed., 1988).

[139] 8 CO. REP. 114a, 77 ENG. REP. 646 (C.P. 1610). *See also* Theodore F.T. Plucknett, *Bonham's Case and Judicial Review,* 40 HARV. L. REV. 30 (1926-27); Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928-29); Raoul Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521-45 (1969).

[140] *Cf.* Yoav Dotan, *The Knesset as 'Legislating for Itself' in the Jurisprudence of the Supreme Court*, 31 MISHPATIM 771 (2001) (arguing that because the Court relied on sec. 4 of "Basic Law: the Knesset" this could not have been the theory underlying the Court's decision).

[141] Landau, *Constitution Maker*, *supra* note 73, at 699-700. *See also* Moshe Landau, *The Constitution as a Supreme Law of the State?,* 27 HAPRAKLIT 30, 30 (1971) (writing that "the Supreme Court refrained from answering these [constitutional] questions.")

[142] *Id.* at 700.

authority. If a precedent is judged by its reasoning rather than its outcome, no theory was offered in *Bergman* that may be relied upon in future cases.[143]

It may be further suggested that because of the uniqueness of the issue at stake—i.e., ensuring equal elections to the legislative assembly—no one ever challenged the Court's judicial review authority to protect the very foundation of a democratic society.[144] In other words, during the *Bergman* case, due to the urgency of deciding the case at election time, the Attorney General was never granted his request to argue against the Court's judicial review authority. In later cases, the Attorney General probably felt that in such a fundamental matter as ensuring equality in impending elections, she would not want to insist on questioning or undermining the Court's judicial review authority. Rather, the overriding concern was to remedy any statute that might infringe upon the equality of elections. With no one to challenge the Court's judicial review authority, the *Bergman* decision became a precedent for the Israeli Court's power of judicial review over primary legislation. That is an example of how "hard cases make bad law."[145]

In this sense, even if the *Bergman* decision was revolutionary, the scope of the revolution was limited to ensuring equal elections. Obviously, this is no small matter. Equal elections norms are part of the very essence of a democratic society. Prior to *United Mizrahi Bank*, however, Israel was still very far from a fully formed constitution.

A sixth plausible theory is that the *Bergman* decision enforced a quorum requirement on MKs. Usually, Israeli law enforces no attendance requirements on MKs in order to enact laws.[146] Section 4 of "Basic Law: The Knesset" required such attendance by demanding the support of a "majority" of MKs to amend it. The Court enforced such a "quorum" or "attendance" requirement because it aligned with democratic theory. Section 4 did not require the support of more than the majority to amend a statute if all Members were attending and participating in the debate. But the *Bergman* decision should not be understood as precedent for the validity of any entrenchment provision that exceeds the requirement of an absolute majority of MKs. Such an entrenchment provision would not align with basic democratic principles of majority rule.[147] This is, in fact, how Justice Cheshin interpreted the *Bergman* decision in his *United Mizrahi Bank* dissent. Cheshin recognized the validity of procedural entrenchment provisions as long as they did not require the support of more than a majority of MKs. He viewed such entrenchment provisions as essentially "quorum" or "attendance" requirements which were valid whether they appeared in regular statutes or "Basic Laws."[148]

All six theories explaining the *Bergman* decision could potentially align with Shamgar's monist theory. If what counts is the title "Basic Laws," then the Knesset uses this title to indicate its desire to entrench the enactment at stake. If what counts is

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[143] *See* CROSS & HARRIS, *supra* note 16, at 47-48 (regarding how to determine the *ratio* where the reasoning is lacking from the decision).

[144] This is in keeping with J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), suggesting that the Court is justified in exercising judicial review only to enhance the democratic process. Ely was highly influenced by *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938).

[145] 1854 G. Hayes in W. S. HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) IX. 423.

[146] *See supra* note 115 and accompanying text.

[147] *See, e.g.,* Roberts & Chemerinsky, *supra* note 29; Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1985-86) (contending that entrenchment is constitutional only if done by a hierarchical authority).

[148] *United Mizrahi Bank*, *supra* note 8, at 535-47.

entrenchment *per se*, then the Knesset is unlimited unless it imposes limits upon itself, in the form of entrenchment, as Shamgar suggested. If what matters is the combination of the title "Basic Law" and an entrenchment provision, then the Knesset uses such combinations, and only such combinations, to limit itself. If only in cases of gross usurpation of legislative power the Court intervenes, then even in the Britain of the seventeenth century there is precedent for the exercise of judicial review power to protect against self-dealing by the legislature.[149] It is beyond doubt that, even in a parliamentary sovereignty system, the regular mandate granted by the People at election does not include the power of the legislature to entrench itself in office.[150] If "nothing" was decided in the case, then it is by Knesset's consent, rather than the decree of the Court, that equal elections norms has prevailed even against subsequent conflicting statutes. Further, such an approach aligns with Ely's democratic theory that judicial review power is justified only as an enhancement of democratic mechanisms. Only then is judicial review democratic, not counter-majoritarian.[151] If it is only a quorum requirement that the Court is enforcing, then entrenchment provisions are not truly entrenchment but rather absolute majority requirements. Under such theory, the Knesset is not only sovereign but also unlimited. Under either theory, Shamgar seems to stand on firm ground and to have relied on Israel's particular legislative and judicial history when suggesting the monist theory.

3. *The Knesset's Response*

Following the *Bergman* decision, the Knesset abided by the Court's decision. It complied with both remedies suggested by the Court, although they were offered alternatively rather than cumulatively. In other words, it would have been sufficient for the Knesset to adhere to one of the remedies proposed.

The Knesset amended the finance law, so that it granted funding to new competing political parties if they were successfully elected to the Knesset. Under the amended finance law, established political parties that were already represented in the outgoing Knesset got their financing ahead of the election, while the new competing political parties were granted funding retrospectively, if successful at the polls. While established political parties still enjoyed an advantage at election, MKs believed that the amended finance law conformed to the *Bergman*'s Court suggestion to fulfill the requirements of "substantive," rather than "formal," equality norms at elections.[152]

The Knesset, however, did not risk another challenge against the (now) amended finance Act, but in addition enacted also a unique statute entitled "Elections (Certification of the Validity of Statutes) Act of 1969" (the "Validity Act").[153] This Act certified retroactively and by way of reference that all existing enumerated statutes dealing with the upcoming elections were valid. The Knesset enacted this Validity Act by an absolute

[149] *See Dr. Bonham's* Case, *supra* note 139 and accompanying text.
[150] *See also* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY, 180-86 (1955). During both World Wars, however, the British Parliament extended its life to meet the emergency at stake.
[151] *See* discussion of Ely, *supra* note 144 and accompanying text.
[152] *Bergman*, *supra* note 71, at 700.
[153] S.H. 204. *See also* DK (1969) 3679-83.

majority of MKs to guarantee that it conformed to the majority requirements of section 4 of "Basic Law: The Knesset."

What was peculiar about the Knesset's move was that not only was it done retroactively, but the Validity Act itself, rather than the potential infringing election statutes, was passed by the required absolute majority. This method, using a combination of reference and retroactive validation, without a "notwithstanding" language referring to the constitutional norm that has been infringed, would become the Knesset's regular pattern to revalidate statutes invalidated by the Court.[154]

This method of validation by way of reference raises a constitutional problem: Instead of forcing the legislature to consider each infringement on constitutional provisions for its own sake and determine the propriety, desirability, and constitutionality of that infringing provision, the legislature only grants lip service to the status of the "Basic Law." This is not the kind of respect we demand of legislative assemblies to constitutional provisions.[155] It also does not enable the legislature to self-consciously and publicly take responsibility for infringing the constitution. How can either legislative members or the public assess the constitutional ramifications and the severity of the infringement if there is no discussion of the nature of the infringement? It is a blank check for circumventing the Constitution.[156]

The threshold constitutional difficulty with granting retroactive validity to infringing statutes is the general problem of the "rule of law," which requires that legislation generally have only prospective application.[157] In addition, it lacks respect; the legislature should not be able to retroactively circumvent the Constitution. If it can, then the Constitution cannot be deemed supreme.[158]

Thus, while the prevailing scholarly understanding is that the Knesset acquiesced with the *Bergman* progeny line of decisions, thus consenting to judicial review over primary legislation, it is my contention that a careful analysis of how the Knesset

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[154] *See infra* notes 348 - 351 and accompanying discussion. In addition to the *Bergman* and *Laor* cases, the Knesset reaffirmed an infringing statute and gave it retroactive validity following *Agudat Derech Eretz*, *supra* note 71. *See* Hans Klinghoffer, *Legislative Reaction to Judicial Decisions in Public Law*, 18 ISR. L. REV. 30, 33-34 (1983).

[155] The duty of respect is explicitly provided for in "Basic Law: Human Dignity and Liberty," § 11: "All governmental authorities are bound to respect the rights under this Basic Law."
(available at http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm.) (last visited on July 29, 2008). Similar provision appears in "Basic Law: Freedom of Occupation," § 5.

[156] *Cf. Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford*]. In *Ford*, the Canadian Supreme Court upheld the validity of an omnibus override on the part of Quebec's legislature, which took the form of a standard general provision inserted in all past statutes. This general override was done to protest the adoption of the Charter without Quebec's consent. *But see* Lorraine Eisenstat Weinrib, *Learning to Live With the Override*, 35 MCGILL L.J. 543 (1989-90). Weinrib criticized the *Ford* decision for enabling the Quebec legislature such robust override of the Charter. Instead, she suggested that the override mechanisms should have been interpreted to demand the legislature to specifically consider and deliberate regarding each constitutional infringement whether it was justified by stating specifically which rights were infringed by which statutes.

[157] *See* LON L. FULLER, THE MORALITY OF LAW 51-63 (revised ed., 1963). *See also* Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?*, 10 OTAGO L. REV. 631 (2004) (criticizing retroactivity also in the context of electoral laws).

[158] Indeed, the only part in Quebec's sweeping general override of the Charter that was overruled by the Canadian Supreme Court was its retroactive applicability. *See Ford*, *supra* note 156.

responded reveals a very different outcome.[159] The Knesset's method of certifying infringing statutes retroactively by way of reference actually mirrors the way the Knesset puts even entrenched "Basic Laws" on par with regular statutes. That the Israeli Supreme Court repeatedly validated the Knesset's technique manifests that it, too, treated the "Basic Laws" as part of a monist tradition.[160]

Moreover, even as late as March 26, 1992, Barak too accepted the Knesset's retroactive validation technique, treating entrenched "Basic Laws" as part of our monist tradition.[161] Only in January 1994, when responding to the Knesset's initial draft of amendment to "Basic Law: Freedom of Occupation," did Barak write in a letter to the Knesset that it is questionable whether the Knesset as a Constituent Assembly is authorized to amend the constitution with retroactive applicability.[162] Shamgar may thus rely on both the Knesset's and the Court's own actions in support of his monist rule of recognition.

C. Is It Monism, after all? Or the Difficulties with Monism

The essence of Shamgar's theory is that the sovereign Knesset creates a Constitution by entrenching its enactments. Shamgar treats entrenchment as a supremacy mechanism. Entrenchment and normative supremacy, however, are two separate matters. It is true that a supreme constitution is characterized by amendment provisions that define a more arduous track for achieving constitutional, as opposed to legislative, change. In that sense, a supreme constitution enjoys some degree of entrenchment.[163] However, entrenchment provisions may appear in regular enactments as well,[164] and no one

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[159] For the prevailing understanding, *see, e.g.*, Gal Dor, *Governmental Avoidance Versus Judicial Review: A Comparative Perspective on Israeli Decision-Making Strategies in Response to Constitutional Adjudication*, 13 TEMP. INT'L & COMP. L.J. 231 (1999); Klinghoffer, *supra* note 154.

[160] HCJ 60/77 *Ressler v. Broadcasting Authority*, 31 (2) P.D. 556 (1977) (Isr.). In *Ressler*, the Court accepted the validity of the Validity Act and thus refrained from reviewing the validity of certain provisions of an elections law that was protected under the Act. This decision was given before Barak was appointed to a Supreme Court justice.

[161] *See* HCJ 410/91 *Blum v. Chairman of the Knesset*, 46 (2) P.D. 201 (Isr.) [hereinafter *Blum*] (affirming the legality of retroactive validation of both amendment of Basic Law: The Knesset and regular statutes that may have infringed its sec. 4, enacted by the Knesset in response to the *Laor Movement* decision, *supra* note 71). One can argue however that the issue of retroactivity was not raised by the appellants though this has not been an obstacle to the Court in other cases in the past. See also discussion *infra* Part IV.B.

[162] Barak, *Amendments, supra* note 132, at 549. The Knesset has accepted Barak's recommendations on how to draft the amendment, including his advice on the distinction between infringement and amendment of the Basic Law.

[163] *See* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION].

[164] See discussion *supra* Part I.B. *See also Skaggs v. Carle*, 898 F. Supp. 1, 1995 U.S. Dist. LEXIS 13772 (D.D.C. 1995) affirmed by *Skaggs v. Carle*, 324 U.S. App. D.C. 87, 110 F.3d 831, 1997 U.S. App. LEXIS 8044, 79 A.F.T.R.2d (RIA) 2258 (1997) (famously rejecting a constitutional challenge to supermajority requirement in the House of Representatives' Rules to protect against legislation increasing income taxes). *See* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich,* 104 YALE L. J. 1539 (1995) (asserting that this supermajority requirement is unconstitutional); and for further discussion by one of the authors: Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress,* 46 DUKE L. J 73 (1996). For a critique of this open letter, *see* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995). This may not be true

seriously claims that entrenched regular statutes are part of the Israeli Constitution. Even Shamgar did not assert that. Thus, entrenchment provisions alone cannot be used as the mark distinguishing constitutional from regular law. This is not the mechanism that creates supreme constitutions, Shamgar's theory notwithstanding. In fact, this difficulty is probably one of the forces behind Barak's rejection of monism to explain Israel's constitutional development.[165]

Not only may entrenchment provisions appear in regular law, but normative supremacy may exist without entrenchment provisions. Put differently, entrenchment does not entail normative supremacy and normative supremacy does not entail entrenchment. Thus, supreme constitutions enjoy wide-ranging amendment mechanisms varying from the mere requirement of a legislative majority to the complete inability to amend some of their provisions. Moreover, the same constitution may define different amendment tracks to its various provisions.[166] In fact, most of the provisions in Israel's "Basic Laws" lack entrenchment protection, yet Shamgar seems to suggest that all should enjoy supreme status and be amended by "Basic Laws" alone, not by mere legislation.[167] Thus, Shamgar himself is inconsistent regarding what it takes to create the Israeli Constitution.

Additionally, the Court clarified in decisions after *United Mizrahi Bank* that the constitutional revolution pertains to all "Basic Laws," and not just to those dealing with individual rights.[168] Thus, the Court treats all "Basic Laws" as supreme, even though most of them are not entrenched and can be amended by bare regular majorities of those present. The Knesset cannot infringe upon their provisions dealing with individual rights unless the infringing statute fulfills the four-part test of constitutional scrutiny,[169] which is explicitly embodied in the "Basic Laws" enacted in 1992 but is read by the judiciary into previous "Basic Laws." Even "Basic Law: Human Dignity and Liberty" is not procedurally entrenched, yet is treated as supreme.

Furthermore, while self-entrenchment of the legislature may be found in practice in many countries, it is not free from challenge, even aside from the well-known self-reference logical difficulty.[170] Admittedly, it may offer numerous unique advantages to a legislature that utilizes it. Entrenchment provisions may contribute to constitutional and

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legislative entrenchment however, since the House could change this entrenchment provision by regular majority. Skaggs, 110 F.3d 835.

[165] *United Mizrahi Bank*, *supra* note 8, at 403 (Barak) ("Entrenchment does not create normative supremacy. Even if the law may entrench itself, it cannot elevate itself."). See also BARAK, INTERPRETATION, *supra* note 25, at 45.

[166] *See* RESPONDING TO IMPERFECTION, *supra* note 163.

[167] Shamgar was not consistent however regarding his own theory. In some places, he asserted that, when there is no entrenchment provision in place, then the "Basic Laws" are only potentially and not *de facto* supreme. *United Mizrahi Bank*, *supra* note 8, at 271. In other places, he seemed to suggest that after the *United Mizrahi Bank* decision, all "Basic Laws" should be treated as supreme regardless of whether they enjoy entrenchment provisions. *Id.* at 299.

[168] *See, e.g.,* HCJ 212/03 *Herut-The National Movement v. Chairman of the Central Elections Commission to the Sixteenth Knesset*, 57(1) P.D. 750 (2003) (Isr.); EA 92/03 *Mofaz v. Chairman of the Central Elections Commission to the Sixteenth Knesset*, 57(3) P.D. 793 (2003) (Isr.).

[169] See text accompanying note 37 *supra.* Judicial decisions have applied the four-partite test of constitutional scrutiny without clarifying that they impose it only with regard to the protection of rights. So far, only the literature makes the explicit distinction between the protection of individual rights and that of the structure of government. See AHARON BARAK, A JUDGE IN A DEMOCRACY 352-53 (2004).

[170] *See* Alf Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1 (1969).

legislative stability. It allows the legislature to credibly signal its commitment to a certain policy and thus reduce *ex ante* the costs of legislation. It may remove certain contested topics from the public agenda, and thus enable the legislature to concentrate on other imperative matters. It guarantees public deliberation before the entrenched provision is amended. It allows the legislature to pre-commit to a certain policy, when its members fear they may not act according to their true preferences *ex post* due to political considerations. It provides a better decision-making rule than a simple majority for protecting minority rights from majority's abuse.[171]

But despite these substantial advantages, self-entrenchment of the legislature is questionable on democratic grounds. It allows one legislature to bind another without providing democratic legitimacy: Why should the entrenching legislature enjoy more power than its successor to restrict the latter by entrenched provisions? Moreover, the actual effect of such entrenchment when it consists of supermajority requirements is a transfer of power from the majority of legislators to the minority. The minority is granted veto power over the entrenched matter. In fact, we choose the legislature to legislate, not to delegate its authority to yesterday's majority or tomorrow's minority, as occurs under common entrenchment.[172] Furthermore, entrenchment is especially problematic when it is decided by a passing random majority but requires a supermajority to undo it, as happened in Israel.[173]

We even treat the legislative delegation of legislative power as unconstitutional and beyond the authority of Congress in the U.S.[174] Certainly, there is a long common law tradition that Parliament is sovereign and may legislate as it desires, except binding its successors.[175] Even Hart, whose writings Shamgar relies on when discussing the two concepts of sovereignty, openly admits that the concept of a self-restricting sovereign has been rejected *de facto*.[176] This is not to say that the British Parliament has not attempted at times to bind its successors.[177] The courts, however, did not always enforce such entrenchment on noncompliant Parliaments.[178] This is another manifestation of the fact that legislative self-entrenchment is not equivalent to the creation of a supreme constitution.

Consistent with this policy, even recent changes in British constitutional law are not treated as beyond Parliament's legislative power to undo. Thus, European law is supreme over contradictory British law, as long as Parliament chooses to remain part of the Union. Obviously, retrieval is not simple and will extract heavy political and economic prices,

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[171] *See* Posner & Vermeule, *supra* note 29 (elaborating these advantages with regard to legislative self-entrenchment in a constitutional system that enjoys a supreme Constitution).
[172] For support, *see supra* notes 29 & 138 and accompanying text.
[173] See McGinnis & Rappaport, *Symmetric Entrenchment*, *supra* note 29.
[174] *See I.N.S. v. Chadha*, 462 U.S. 919 (1983).
[175] DICEY, *supra* note 88, at 39. 1 W. BLACKSTONE COMMENTARIES 91.
[176] *See supra* note 82 and accompanying text.
[177] For examples, *see* Posner & Vermeule, *supra* note 29, at 1678; DICEY, *supra* note 88, at 21-25 ("That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure." *Id.* at 21).
[178] *See* Mark Elliott, *Embracing 'Constitutional' Legislation: Towards Fundamental Law?,* 54 N. IR. LEGAL Q. 25 (2003) [hereinafter Mark Elliott, *Embracing*]; Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE. L. J. 457 (1991); Posner & Vermeule, *supra* note 29, at 1667-68; Roberts & Chemerinsky, *supra* note 29, at 1789-95 (suggesting that US courts will treat the breach of legislative entrenchment requirements as non-justiciable).

but it is still possible. Thus, British courts have treated the supremacy of European law as a matter of parliamentary choice.[179] Similarly, the Human Rights Act 1998 is treated as a Bill of Rights, but even Parliament's adherence to it is voluntary. The superior courts at most will issue a proclamation of incompatibility between a breaching statute and the Act, but the implications, however politically harsh, are up to Parliament to decide. Parliament may decide to leave the breaching statute intact.[180] Thus, Shamgar dismissed too hastily the traditional understanding of Diceyan parliamentary sovereignty as explanatory of British constitutional law today.

Shamgar's monist theory further assumes that sovereignty and true (or valid) entrenchment are not mutually exclusive. However, if we take his theory seriously, then once a constitution is established through entrenchment, the legislature has exhausted its sovereignty and its powers are then curtailed. More than monism, his theory is a portrayal of how monism destroys itself without defining a clear successor: What new sovereign to replaces the legislature? Ultimately, where does responsibility lie when the Constitution is unalterable according to existing rules but an overwhelming consensus of the legislature or the People demand that it be changed?

Shamgar assumes that there are "inherent" limits on the Knesset's power of entrenchment.[181] These inherent limits may probably assist him when entrenchment fails to make sense in light of a new overwhelming consensus. But what is the theory that defines these inherent limits? His monist theory does not answer these pertinent questions. It cannot thus provide the theory for the Israeli Constitution. At least, it cannot do so alone.

III. DUALISM

While Shamgar suggested that Israel's "Basic Laws" formed a formal monist constitution, Barak opted to ground the Israeli Constitution in the concept of dualism. Instead of relying on the British roots, Barak referred to the American tradition of *Marbury v. Madison*. After all, if it worked for the Americans, why wouldn't it also succeed in Israel? In fact, the U.S. Constitution is considered around the world to be the oldest surviving formal constitution of a democratic country. But, does popular sovereignty provide a convincing basis for the adoption of the Israeli constitution in the twentieth century? This Part analyzes Barak's Constituent Authority theory and whether, though desirable, it can serve as an adequate theoretical basis for the emerging Israeli formal Constitution. This Part concludes with an analysis of Cheshin's dissenting opinion and why it too fails to sufficiently explain Israel's constitutional development.

A. Barak's Constituent Authority Theory

The newly appointed Chief Justice of the Israeli Supreme Court based the Knesset's power to adopt a constitution on a theory of constituent authority. The Knesset fulfills

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[179] *See* John Laws, *Law and Democracy*, 1995 PUBLIC LAW 72. *Cf.* Anthony W. Bradley, *"The Sovereignty of Parliament - Form or Substance?"* in THE CHANGING CONSTITUTION 26 (Jeffrey Jowell & Dawn Oliver eds., 2004).

[180] Gardbaum, *supra* note 33, at 732-39.

[181] See *supra* notes 90 & 91 and accompanying text.

two alternate roles, that of a legislature and that of a constituent authority.[182] Barak further stated that only in its capacity as a constituent authority may the Knesset entrench its enactments. Any attempt on its part to entrench regular enactments as part of its legislative task is questionable on democratic grounds and may not survive judicial scrutiny.[183] That is, only in its capacity as a constituent authority may the Knesset limit its authority as a legislative authority. Although the Knesset has no separate legislative track for the enactment of constitutional law, Barak asserted that MKs were actually aware when enacting "Basic Laws" that they were fulfilling their task of a Constituent Assembly.[184] He held that the Knesset used the title "Basic Law" without a year mark to distinguish chapters of the Constitution from regular legislation.[185] This differentiation is sufficient to validate entrenched constitutional, but not regular, enactments.

The Knesset's continuing power of constituent authority since 1949 Barak attributes to "constitutional continuity."[186] Had the First Knesset, elected in 1949, chosen to adopt a Constitution, no one seriously doubts that it would have enjoyed the authority to do so.[187] This First Knesset was elected primarily as a constituent rather than legislative body.[188] Although it did not adopt a Constitution, it passed the *Harrari Resolution* charging future Knessets with the task of drafting the Constitution in the form of "Basic Laws." The Constitution, Legislation and Justice Committee was specifically assigned the task of preparing a draft constitution in the form of "Basic Laws."[189] The First Knesset further enacted the "Transition to the Second Knesset Act of 1951," which states that any authority enjoyed by it would also be available to its successors.[190] Barak concluded that, when future Knessets enacted "Basic Laws," they thus assumed they were enjoying the same authority of Constituent Assembly as the First Knesset.[191]

Barak admitted that if the question of the Knesset's constituent authority would have been raised at the time of the Second Knesset in the 1950s, it would have been a grave constitutional question and different answers could have been offered in reply. On the one hand, the Transition Act attempted to establish expectations of continuing authority. On the other hand, it may have been advisable to return to the people and ask for their direct consent. At the time of the *United Mizrahi Bank* decision in the 1990s, however, Barak held that it was too late to raise doubts as to the Knesset's constituent authority.[192] Barak accepted that the main difference between the First Knesset and any subsequent Knesset is the fact that only elections to the former were focused on the constitutional agenda. In any subsequent election, the constitutional issue was only one of the issues competing for electoral attention. It definitely did not serve as a prominent topic at

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[182] *United Mizrahi Bank*, *supra* note 8, at 355-56.
[183] *Id.* at 410-11.
[184] *Id.* at 369-83.
[185] *Id.* at 403-06.
[186] *Id.* at 359-69.
[187] *Id.* at 393 (Barak).
[188] *See supra* notes 52 & 53 and accompanying text.
[189] *See* discussion *supra* Part I.B.
[190] The Transition to the Second Knesset Act, 1951, S.H. 104, §§ 5 and 10.
[191] *United Mizrahi Bank*, *supra* note 8, at 365-69.
[192] *Id.* at 366-69, 392-401.

elections. Barak was satisfied however with even such an amorphous mandate from the People to the Knesset to enact a Constitution.[193]

In support of his well-stated constituent authority theory, Barak noted that the courts have treated the Knesset as enjoying such authority. That is why they enforced entrenched section 4 of "Basic Law: The Knesset" on breaching Knessets.[194] Further, Barak held that legal academia too predominantly shared his view..[195] Thus, all the different relevant political actors, the Knesset, Court, the people and academia, share common expectations that the Knesset would be the one to draft the Israeli Constitution, and, in fact, the Knesset has fulfilled these expectations when enacting "Basic Laws."

Barak further asserted that any different interpretation would mean that the Knesset worked in vain when enacting 11 "Basic Laws" over the last half-century.[196] Israel as a country would be back to square one in adopting a constitution. Barak also warned that such an interpretation by the Court would have dire implications, since it is not at all clear how Israel can adopt a constitution today from scratch. Usually, a country adopts a constitution at its founding. But Israel does not want to begin again. Israelis do not want the fire, turmoil, and violence typical of a nation's founding and constitutional birth. Moreover, referring a constitution for the people's decision via referendum is not simple, since Israel has no tradition of such referrals to the populous.[197] Barak concluded that such results can be avoided if one accepts his theory of constituent authority.

Barak suggested three possible alternative models, any of which could serve as theoretical bases for his normative conclusions. Each model is based on the writings of a different prominent legal philosopher. They include Kelsen's Austrian theory of the *Grundnorm*; Hart's British theory of the "rule of recognition"; and Dworkin's American theory of interpretation.[198] The first Kelsian model suggests that every state has a basic norm from which derives the authority of all legal norms in the system. This basic norm, however, is extra-legal, based on an assertion of power rather than legal authority. It serves as the new beginning of the legal system.[199] Barak asserted that in Israel this basic norm is the authority of Moetzet Ha'am, which included representatives of both the Jewish population in Israel and the Zionist movement, to declare a new State and decide on elections to an assembly that will adopt a formal constitution. Moetzet Ha'am enjoyed plenary lawmaking power and transferred that authority to the First Knesset. That the Knesset today still enjoys this plenary lawmaking power Barak attributed to "constitutional continuity," as stated above.

The second alternative, the Hartian model, distinguishes between primary and secondary rules. Primary rules are obligatory on individuals. Secondary rules, on the other hand, are concerned with the identification, validity, changeability, and efficacy of the primary rules.[200] Among the secondary rules is the "ultimate rule of recognition" that provides "the criteria by which the validity of other rules of the system is assessed…

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[193] *Id.* at 400.
[194] *Id.* at 386-90.
[195] *Id.* at 383-86.
[196] *Id.* at 392.
[197] *Id.* at 392, 399-400.
[198] *Id.* at 356-58.
[199] H. KELSEN, PURE THEORY OF LAW 193-95 (Knight trans. 1967).
[200] HART, *supra* note 21, at 79-99.

[but] there is no rule providing criteria for the assessment of its own legal validity."[201] We may learn to identify this ultimate rule by observing what courts, officials, and the People treat as the ultimate rule of recognition. In Britain, for example, Hart suggested that the ultimate rule of recognition is: What Parliament enacts is law.[202] To determine Israel's ultimate rule of recognition, Barak analyzed the views held by the Knesset, Court, academia, and the People, as noted above. He concluded that the ultimate rule of recognition in Israel is that the Knesset enjoys constituent authority to enact "Basic Laws" that serve as Israel's Constitution.

The third alternative, the Dworkian model of interpretation, suggests that judges should interpret legal norms according to the interpretation that best "fits" the legal system.[203] Barak emphasized that such interpretation has to be best suited to the legal system's social and legal history.[204] In the interpretative dilemma Barak faced in *United Mizrahi Bank*--whether the Knesset enjoys constituent authority and whether the "Basic Laws" are Israel's Constitution--Barak answered "yes" to both questions to avoid the dire results that any alternative interpretation would entail, as enumerated above. It best suited Israel's social and legal history in light of "constitutional continuity" and the perceptions of all political actors involved.

Barak offered these three alternative models, instead of just one, to enhance his dualist conclusion that Israel has a formal supreme Constitution in the form of "Basic Laws." Under any of the models suggested, all the relevant political actors were partners to this dualist constitutional enterprise. They were all aware that the Knesset enjoys such constituent authority and was exercising it when enacting "Basic Laws." They all consented to this dualist process. Barak therefore felt comfortable to rely on the American justification for judicial review as stated in *Marbury v. Madison*.[205] Since "Basic Laws" represent the will of the People, Israeli courts in the future would exercise judicial review to merely guarantee that the will of the People is superior over the will of its representatives in the legislature. This was a democratic answer to the Bickelian "counter-majoritarian" difficulty with judicial review.[206]

Barak was not satisfied with the dualist Marburian justification alone. He offered a well-organized array of additional justifications for the legitimacy of judicial review over primary legislation in the Israeli context, including the rule of law; separation of powers; substantive democracy (which demands the protection of Human Rights); and the objectivity of an independent, unelected, professional judiciary.[207] In essence, he stated his beliefs that judicial review power is derived from the very nature of a formal Constitution. There is no meaning to a Constitution unless it is supreme. Like Marshall, he further asserted that there is no meaning to its supremacy unless it is enforced by an independent judicial branch that exercises judicial review over primary legislation.[208] Put differently, if a country has a Constitution, its Constitution is by definition supreme and enforced by judicial review. Barak had just laid the groundwork explaining why Israel

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[201] *Id.* at 105-07.
[202] *Id.* at 100-10.
[203] R. DWORKIN, LAW'S EMPIRE, *supra* note 129; R. DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990).
[204] *United Mizrahi Bank*, *supra* note 8, at 358.
[205] *Id.* at 416-17.
[206] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2nd ed., 1986).
[207] *United Mizrahi Bank*, *supra* note 8, at 419-27.
[208] *Id.* at 420.

has a formal Constitution in the form of "Basic Laws." From that necessarily derived the assertion that this Constitution is supreme and protected by judicial review. All three giant steps were taken in the *United Mizrahi Bank* decision.

Barak readily conceded, however, that the legitimacy of judicial review ultimately depends on the legitimacy enjoyed by a constitution itself.[209] He wrote that if the Constitution was democratic then the exercise of judicial review to protect it is democratic as well.[210] He thus challenged his critics to focus on the legitimacy of the very formation of the Israeli Constitution.

B. Does the Much Desired Dualist Israeli Constitution Exist?

In technical formal terms, Barak has succeeded in establishing the Israeli Constitution through a dualistic approach, giving Israel a two-tier system of "Basic Laws" and regular laws. By the Court's ruling in *United Mizrahi Bank*, the Knesset may amend "Basic Laws" only by "Basic Laws" (usually same process of enactment as regular laws), and legislative encroachment of "Basic Laws'" provisions may be done according to the conditions prescribed by the "Basic Laws" alone.[211] *United Mizrahi Bank* achieved a formal hierarchical dualist result. But, has the process of enactment of the "Basic Laws" provide a dualist basis in substantive terms or, instead, was it typical of a monist constitution? We will now turn our attention to this question and its implication for Israel's constitutional future.

1. *Dualism's Requirements*

A dualist Israeli Constitution has obvious advantages over its monist rival. It suggests that the Constitution enjoys the legitimacy of popular, not just legislative, consent. Under dualism, the legislature is limited by the higher authority of the People, rather than its own self-entrenchment power. If, under monism, grave democratic doubts arise as to the power of one legislature to bind its successors without a special mandate from the People, under dualism it is the *demos* that binds its representatives. It should come as no surprise, therefore, that Barak attempted to base the Israeli Constitution on the solid grounds of dualism.

What are the requirements of the dualist model? When could we plausibly argue that a constitution is based on popular sovereignty? Dualism distinguishes between the People and their representatives. It does not assume that the will of the representatives necessarily aligns with the will of the People.[212] Today, we have vast empirical evidence suggesting that legislation supported even by an overwhelming majority of the representatives does not necessarily enjoy similarly enthusiastic support of the People.[213]

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[209] *Id.*
[210] *Id.* at 427.
[211] *See infra* note 263.
[212] ACKERMAN, FOUNDATIONS, *supra* note 22, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 22, at 3-31; Akhil Amar, *Philadelphia Revisited: Amending the constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).
[213] *See, e.g.,* Vernon Bogdanor, *Western Europe*, *in* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 24, 65–68, 96 (David Butler & Austin Ranney eds., 1994); Kris W. Kobach, *Switzerland*, *id.,* at 98, 132.

Dualism thus requires, for a nation's most important constitutional decisions, the consent of the People, not just that of their representatives. The People in this context "is not the name of some superhuman being…but the name of an extended process of interaction between political elites [especially the various branches of government] and ordinary citizens."[214] Thus, dualism in essence requires a dual lawmaking track: The first track is for the enactment of regular law by the legislature as representative of the People. The other, more arduous, track is for the enactment of constitutional law by the People.[215]

Dualism accepts that, in normal lawmaking, the representatives stand in for the People. Although elections are held during normal politics, people do not deliberate seriously on any particular topic before voting. They are too busy with daily private life to make the kind of considered judgment necessary in times of constitutional change.[216] Also, regular elections are fought over a mixture of issues. It is difficult, if not impossible, to discern from election's results the People's will with respect to a particular issue.[217] Regular elections thus grant the legislature a general mandate to enact regular law. They do not grant it a specific mandate to enact constitutional change.

However, at times of constitutional lawmaking, the People must give their deep, broad, and decisive consent before a dualist change may occur, so that the constitutional development represents the People's deliberate will.[218] The constitutional issue should dominate the nation's life for a significant period to enable appropriate deliberation[219] and must at minimum reflect the majority's wishes[220]; a certain percentage of the electorate[221] or, in under more demanding standards, a consensus.[222] Definitely, "numbers count" and

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[214] ACKERMAN, TRANSFORMATIONS, *supra* note 22, at 187. *See also id.* at 162.

[215] ACKERMAN, FOUNDATIONS, *supra* note 22, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 22, at 3-31, 383-420. For similar theory arising from British constitutional thinkers and political actors of the nineteenth and early twentieth century, *see* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006) [hereinafter Weill, *Evolution*]; Rivka Weill, *We the British People*, 2004 PUBLIC LAW 380; Rivka Weill, *Dicey was not Diceyan,*62 CAMBRIDGE L.J. 474 (2003). For a similar approach described in French constitutional theory, see Jeremy Waldron, *Judicial Power and Popular Sovereignty, in* MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 181-202 (Mark Graber & Michael Perhac eds., .2002) (discussing primarily Sièyes' theory) [hereinafter Waldron, *Judicial Power*].

[216] ACKERMAN, FOUNDATIONS, *supra* note 22, at 3-10, 230-322.

[217] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1284 (1995) [hereinafter Tribe, *Taking Text*]; David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V,* 76 IOWA L. REV. 1, 47 (1990) (suggesting that "reading electoral politics is only slightly less fatuous than reading tea leaves."); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People,* 9 CONST. COMM. 309, 319-22 (1992).

[218] ACKERMAN, FOUNDATIONS, *supra* note 22, at 266-94.

[219] Ackerman writes that the American process for achieving constitutional transformations is typically spread over many years. "Each was preceded by a generation and more of political agitation that prepared the way for a decade of decisive change." ACKERMAN, TRANSFORMATIONS, *supra* note 22, at 7. But, this prolonged deliberation time is not necessarily shared by the experience of other countries. *See* Weill, *Evolution*, *supra* note 215, at 466-67. A shorter but more focused deliberation period may replace a prolonged but less focused one.

[220] ACKERMAN, FOUNDATIONS, *supra* note 22, at 266-94.

[221] *See, e.g.,* Bogdanor, *supra* note 213, at 24-33 (enumerating different Western European countries that require qualified majority support).

[222] *See ,e.g.,* J.M. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962) (arguing that unanimity rule is socially optimal in the absence of 'decision-making costs.')

slim support for change simply will not do.[223] Decisive consent requires that the change offered is a "Condorcet winner"; that is, it can top each of the other candidate's policies in a one-to-one contest.[224]

Elections held during constitutional times may thus signify the People's consent if they are at least focused on, if not exclusively targeted to, the constitutional change.[225] Usually, dualist systems require a series of elections before such popular consent may be attributed to the election's results.[226] Elections are not the only tool available to signify the People's consent either. Other available tools include, for example, the use of referenda (or a series of referendums) that focus exclusively on the constitutional change or elections to a Constituent Assembly that is charged with the sole mission of drafting constitutional change.[227] Definitely, under dualism, it is not sufficient for the constitutional issue to be one of the issues at election such that election's results are used to suggest the consent of the People.

2. *Were Dualism's Requirements Fulfilled in Israel?*

Does Israel's constitutional history fulfill the dualist requirements? Even Barak himself conceded that, excluding the elections to the First Knesset, elections never focused on the constitutional issue. The constitutional agenda was rather one of many issues competing for the electorate attention and not even central among them.[228] Elections in Israel were usually fought over security, politicians' personalities, and socioeconomic matters, not constitutional topics.[229] This is also true of the elections preceding the 1992 revolutionary "Basic Laws" enactment.[230] Under dualism, such regular elections grant a mandate for the enactment of regular, not constitutional, law.

While the theory of continuity assumes that it is sufficient for later Knessets to enact constitutional law based on the special popular mandate granted to the First Knesset, dualism in the sense of popular sovereignty requires that the assembly, which actually adopts constitutional change, directly enjoy such authority. It cannot rely on its predecessors' authority, but must earn a special popular mandate for a defined constitutional agenda itself. Definitely, the Knesset cannot enjoy constituent authority

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[223] ACKERMAN, FOUNDATIONS, *supra* note 22, at 274.

[224] *Id.* at 277. I believe that this is probably the hardest, almost utopian, condition to fulfill.

[225] *See* Amar, *supra* note 212, at 1094. On the use of elections as *semi* referenda, see Weill, *Evolution, supra* note 215, at 450-53, 466-68.

[226] ACKERMAN, TRANSFORMATIONS, *supra* note 22; Weill, *Evolution, supra* note 215.

[227] *See, e.g.*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Arato, *supra* note 55; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

[228] *See supra* note 193 and accompanying text.

[229] *See, e.g.*, A. DISKIN, ELECTIONS AND VOTERS IN ISRAEL (1988); G. GOLDBERG, THE ISRAELI VOTER 1992 (1994). Since its establishment, not a decade has passed without a war in Israel.

[230] There was the activity of the movement 'Constitution for Israel' prior to the elections to the 12th Knesset and during the time it was in session. But, the 1988 elections to the Knesset dealt with the explosion of the Intifada by the Palestinians. The voter was not primarily considering the Constitution. A. ARIEN AND M. SHAMIR, THE ELECTIONS IN ISRAEL-1988 (1990). Further, the 'Constitution for Israel' movement focused its struggle on electoral change, advocating direct elections to the Prime Minister. The Bill of Rights suggested by it was entirely different than that enacted by the Knesset. The movement also sought that its proposed Constitution would be ratified by the support of two-thirds of the entire Knesset and a referendum. Neither of these ratification requirements was ever followed. G. BECHOR, CONSTITUTION FOR ISRAEL (1996).

just because it legislated so in the Transition Act. It cannot simply grant itself supreme legal authority. Under dualism, such authority belongs to the People. Further, it is not at all clear that the Transition Act meant to transfer constitutional authority to later Knessets. Some interpret it to declare that every Knesset is Israel's legislature. That is, every Knesset enjoys the same scope of legislative, not constitutional, authority.[231] Furthermore, if, under dualism, legislation cannot grant constitutional authority to adopt constitutional change, the same limitation applies to a mere decision of the Knesset in the form of the *Harrari Resolution*.[232] It should also be noted that, contrary to the Harrari Resolution's prescription, *de facto* most "Basic Laws" enacted were not initiated by the Constitution, Legislation and Justice Committee.[233]

Not only were Israeli elections dominated by security and socioeconomic matters rather than constitutional issues, but also there was no more MKs in attendance at the enactment of "Basic Laws" than that typical of regular enactments. While some MKs may have understood that they were fulfilling a constitutional role when enacting "Basic Laws," many more were utterly unaware of their task as a Constituent Assembly.[234]

Judith Karp, who accompanied the enactment process in 1992 of "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation" as representative of the Minister of Justice, believes that a constitutional revolution has occurred with their enactment. Nonetheless, she attested "that it is doubtful whether the opinions raised in the Knesset during the discussion of the law show that Knesset Members were aware of their part and participation in the process of a Constitutional Revolution."[235]

In fact, the two revolutionary "Basic Laws"—"Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation"--were enacted in 1992 with a slim presence of MKs. Many MKs, including coalition members, preferred campaigning for the upcoming election to being present during the "Basic Laws'" enactment.[236] They certainly did not view the laws as a turning point in Israel's constitutional history.[237] Thus, "Basic Law: Freedom of Occupation" passed first reading with the vote of 21 to 16, and the final reading with the support of 23 MKs and none against. "Basic Law: Human Dignity and Liberty" passed first reading with the vote of 40 to 12, and the final reading with the support of 32 MKs and 21 against. This is probably why Posner suggested that

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[231] *United Mizrahi Bank, supra* note 8, at 484 (Cheshin). *See also* Hornstein, *Entrenchment of Provisions in Basic Laws*, 25 HAPRAKLIT 648 (1969) (arguing that the Knesset exhausted its constitutional authority by enacting Basic Law: The Knesset in 1958).

[232] A resolution or decision is inferior to legislation. It does not have to pass three reading as regular enactments.

[233] RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 731.

[234] *See United Mizrahi Bank*, *supra* note 8, at 495-501 (Cheshin's dissenting opinion quoting MKs' speeches at the Knesset).

[235] Karp, *Power Struggles, supra* note 42, at 326.

[236] RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 918.

[237] Professor Rubinstein, who was one of the main initiators of the 1992 "Basic Laws" as a MK, wrote that their enactment reflected wide consensus and their content was reached through agreement between the secular and Orthodox Jewish political parties. However, even he admits, that "never has a Parliament adopt a constitution in this way, against the government (and Prime Minister's) will, via a private Bill, in an atmosphere of indifference on the part of the media." Amnon Rubinstein, *The Knesset and the Human Rights Basic Laws*, 5 MISHPAT UMIMSHAL 339, 349 (1999).

"only one-quarter of the Knesset's members voted for those laws."[238] Thus, it is difficult, if not impossible, to speak of an overwhelming support of MKs for the enactment of these "Basic Laws." Barak himself further wrote in his scholarly work that the two revolutionary 1992 "Basic Laws" passed without the public or media taking notice of their enactment or significance. In an interview, he feared "the crisis of legitimacy originated by the way in which the "Basic Laws" were enacted. They were not preceded by enough preparation of the public. The constitutional revolution occurred in quiet, almost in secrecy."[239]

The final content of the "Basic Laws" was also a matter of sheer luck or lack thereof. The draft of "Basic Law: Human Dignity and Liberty" originally included a procedural entrenchment requiring the support of an absolute majority of MKs to amend it. However, at the last moment, one MK changed his opinion and this entrenchment fell through.[240] A day after the vote, Professor Amnon Rubinstein lamented in the Knesset the fact that, as a result of massive absentees of Labor party members, this entrenchment provision failed. He further carped that there was no precedent anywhere in the world for that turn of events, in which such important constitutional provisions are enacted "by the way." He asserted that the importance of the "Basic Law" stands in sharp contrast to the absent of interest in it by the media and MKs.[241] This is not the kind of broad, deep, and decisive popular consent required to satisfy the requirements of the dualist model.

It has, however, been suggested that in 1994 the Knesset replaced "Basic Law: Freedom of Occupation" with a new one, this time with the presence and support of 67 to nine MKs on third reading.[242] With this replacement, the Knesset also amended some sections of "Basic Law: Human Dignity and Liberty." Thus, the broader support of MKs in 1994 remedied the slim support granted to these "Basic Laws" in 1992.[243] While tempting, there are numerous difficulties with this assertion as well. It is questionable whether *ex post* consent may amount to a dualist endorsement of constitutional change.[244] Moreover, in 1994, the Knesset replaced "Basic Law: Freedom of Occupation" on the

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[238] Posner, *Enlightened Despot*, *supra* note 1. For discussion of the size of the majority, see RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 918.

[239] Aharon Barak, *The Knesset was never Sovereign, the People are the Sovereign*, 24 HALISHKAH 8, 14 (1995). *See also* Karp, *Power Struggles*, *supra* note 42 , at 325 (quoting Barak's speech at Haifa U. of May 18, 1992 speaking of the fact that "not everyone is aware of it, but recently a revolution has occurred.)

[240] Section 13 of the proposed Basic Law required an absolute majority of MKs for its amendment. On second reading, however, the religious political parties proposed to omit the entrenchment and the vote was 27 to 27 in favor of their proposal, thus, the original draft should have remained intact. However, MK Charlie Biton announced that he has mistakenly voted against the proposed change and in a recount of the vote there was a majority of one in favor of the change. The entrenchment was rejected by a vote of 27 to 26. *See* DK (1992) 3793; RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 921-22 and n. 40.

[241] *See* DK (1992) 3852 (March 18, 1992).

[242] *See* DK (1994) 5439 (March 9, 1994).

[243] *See* Dan Meridor, *Court Rulings in light of the Basic Laws*, in CONSTITUTIONAL REFORM IN ISRAEL AND ITS IMPLICATIONS - CONFERENCE PROCEEDINGS, JUNE 1994 69, at 70-71 (1995). *See also* RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 915.

[244] In other works, I have contended that Bruce Ackerman allows for retroactive acquiescence for the process, though not content, of dualist change. *See* Weill, *Evolution, supra* note 215, at 456-58. That is, if there were dualist consent to the content of change at the time the change was adopted, then even if the dualist process was not agreed to in advance, *ex-post* consent to the process is possible to grant it retroactive legitimacy. But, in the Israeli case, the difficulty is that there was no dualist consent to the content of change at the time it was adopted, as further elaborated in the text.

advice of the Supreme Court that such a move was advisable if it wanted to guarantee that a statute prohibiting the importation of non-kosher meat would survive constitutional scrutiny.[245] In the 1994 "Basic Law: Freedom of Occupation," the Knesset adopted an override clause to the effect that the Knesset could enact an infringing statute explicitly proclaiming its validity despite its conflict with the "Basic Law" with the support of an absolute majority of MKs. This override would be valid for four years, unless a shorter period was provided for in the infringing statute.[246] The government, headed by Prime Minister Rabin, just had to replace the "Basic Law" if it wanted to preserve the Ultra-Orthodox political party, Shas, in the coalition.[247]

Thus, the 1994 "Basic Law: Freedom of Occupation" passed hastily, within less than a month. The Knesset held its second and third readings on the same day.[248] Some MKs wrongly assumed that they were voting for the statute prohibiting the importation of non-kosher meat rather than for the "Basic Law."[249] Many of the most important provisions in the "Basic Law" were not included in the original draft and appeared only in the second and third readings, with MKs unaware of their change of content.[250] Both Prime Minister Rabin and Shas later "discovered" that the "Basic Law" they had voted for included reference to the Declaration of Independence and felt "cheated." They had learned, after their vote, of the "Basic Law's" declaration that the rights enumerated in it and in "Basic Law: Human Dignity and Liberty" would be respected in the spirit of the principles embodied in the Declaration of Independence.[251] This Shas and Rabin never intended to enact or so they claimed. Because of the reference to the Declaration of Independence in the amended "Basic Law," Shas never returned to the coalition despite the fact that the "Basic Law" was amended only to enable its return.[252]

Interestingly, CJ Barak played a crucial and unusual role in drafting this "Basic Law." In a letter to the Knesset, he advised MKs of the difference between infringement and amendment in constitutional jurisprudence, and suggested the resulting amendments necessary to align with this distinction.[253] In fact, the government reintroduced a draft of "Basic Law: Freedom of Occupation" following Barak's letter in which it adopted many of his recommendations.[254] Apparently, MKs were clueless about their constitutional role without this extra-judicial assistance. With such legislative (or constitutional) history, even the size of the majority of MKs supporting the enactment in 1994 of "Basic Law: Freedom of Occupation" on third reading cannot offer a solid dualistic ground for the "Basic Law's" enactment.

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[245] HCJ 3872/93 *Meatrael v. Prime Minister and Minister of Religions*, 47 (5) P.D. 485, 505 (1993) (Isr.) [hereinafter *Meatrael*]. The decision was given on October 22, 1993.
[246] Basic Law: Freedom of Occupation, 1994, § 8.
[247] *Meatrael*, *supra* note 245; RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 922-23.
[248] The government publicized the draft of the Basic Law on February 14 and the Basic Law had become law already on March 9, 1994. *See* Basic Law: Freedom of Occupation, 1994, S.H. 90 (March 10, 1994).
[249] *See* Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 MISHPAT UMIMSHAL 443, 445-446 (1994) [hereinafter Bendor, *Defects*].
[250] *Id.* at 445, 447.
[251] Basic Law: Freedom of Occupation, 1994, § 1 and the amended new § 1 of Basic Law: Human Dignity and Liberty.
[252] RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 924.
[253] *See* Barak, *Amendments, supra* notes 132 & 162 and accompanying text.
[254] *See* Draft of Basic Law: Freedom of Occupation (Amendment) (A Substitute Draft), 1994, Draft Statutes 289 (February 14, 1994).

The low attendance and support of MKs to the enactment of the two revolutionary "Basic Laws" was typical.[255] For most "Basic Laws," there is no official record of the number of MKs supporting their enactment, and of the eleven "Basic Laws," only partial data exists of MKs' vote with regard to just five of them.[256] No one thought that the breadth and depth of MK support for "Basic Laws'" enactment really mattered.

As noted, the Knesset also did not treat the "Basic Laws" with the reverence usually accorded to a formal constitution. It frequently amended "Basic Laws" to adjust to new political conditions—including two that were completely replaced within a short period. For example, the 1992 "Basic Law: Freedom of Occupation" was replaced to suit coalition considerations, as explained above. "Basic Law: The Government" of 1968 fared worse. The Knesset completely replaced it twice, first in 1992 to change its parliamentary scheme into a mixed parliamentary system, such that the Prime Minister is elected separately and independently from the Knesset in the hope of enhancing the Prime Minister's authority and lessening the political bargaining power of small political parties to extract benefits for their support of the government. However, this new "Basic Law" proved to be a disaster, creating a splinter of political parties in the Knesset. The People then split their vote and gave the smaller political parties enhanced power in the bargain to form a government that was still dependent on the Knesset for confidence. The Knesset thus replaced it again, in 2001, with another "Basic Law," returning to the old system of elections to parliament alone.[257]

Not only were some "Basic Laws" replaced, but those that survived were subject to frequent amendment as well. "Basic Law: The Knesset" has been amended 39 times since 1958. The Knesset often adopted several amendments in the same year. Thus, for example, the Knesset amended "Basic Law: The Knesset" five times in 1996, four times in 2000, and six times in 2001 alone. The new "Basic Law: Freedom of Occupation" has been amended twice since its replacement in 1994— in 1998 specifically to permanently override the "Basic Law" to allow the prohibition on importation of non-kosher meat, thereby exempting that statute from constitutional scrutiny.[258] The Knesset has amended "Basic Law: The President" seven times since 1964. The frequency and haste of amendments are further indications that the Knesset views "Basic Laws" as being on par with regular legislation.

Moreover, "Basic Laws" were amended to fit whatever political need arose. In this respect, yet again, the political story leading to the replacement of "Basic Law: Freedom of Occupation" is not unique. "Basic Law: The Government" of 1992, for example, originally restricted the number of appointed ministers to eighteen to prevent oversized governments. This "Basic Law" was then amended in 1999 to enable Ehud Barak to form a large-sized government, and a petition to the High Court against the inappropriate

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[255] *Cf.* Medina, *Four Myths, supra* note 1, at 2 ("It is also false that only a quarter of the Knesset Members supported the Basic Laws—the bulk of the Basic Laws were passed by a decisive majority.").

[256] There is no record on MKs' votes on Basic Law: The People's Lands, 1960, S.H. 56; Basic Law: The President of the State, 1964, S.H. 118; Basic Law: The Government, 1968, S.H. 214, except for the vote on first reading of 51 to 23 MKs (DK (1966) 2533); Basic Law: The State Economy, 1975, S.H. 207; Basic Law: The Army, 1976, S.H. 154; Basic Law: The Judiciary, 1984, S.H. 78; and Basic Law: The State Comptroller, 1988, S.H. 30.

[257] For the history of enactment, *see* RUBINSTEIN & MEDINA, 5th ed., vol. 2, *supra* note 35, at 687-730, RUBINSTEIN & MEDINA, sixth ed., vol. 2, *supra* note 35, at 821-79.

[258] *See* Basic Law: Freedom of Occupation (Amendment no. 2), S.H. 1662 at 178 (March 19, 1998).

motive for amending the "Basic Law" was rejected.[259] This is daily, not constitutional, politics.

A manifestation of the Knesset's treatment of the Basic Laws may be seen in the recent enactment of a new Basic Law entitled "Basic Law: The State's Budget for the Years 2009 and 2010 (Special Provisions) (Provisional Enactment)" passed on a single day (April 6, 2009) in all three readings with the coalition's support alone. It was enacted on the eve of Passover (celebrated in Israel on April 8, 2009) without any preceding debate in any of the Knesset's permanent committees, which were not yet established by the new elected Knesset. This Basic Law amended provisions in both "Basic Law: The Knesset" and "Basic Law: The State Economy," by providing that the Knesset will pass in 2009 a dual-year budget for the years 2009-2010.[260]

The government, which initiated this legislation, asserted that it was necessary to address the severe economic crisis Israel is facing, like the rest of the world. However, since Israel has a parliamentary system, this Basic Law *de facto* entails that the Knesset's supervisory power over the government is severely curtailed. Since the government is not elected independently of the Knesset, it is crucial that at least once a year it is required to actively gain the legislature's confidence through its support of the annual budget. In Israel, as in other parliamentary-system countries, if a government fails to gain the legislature's confidence for its budget, it must hold elections.[261] But, with the passage of this new unique creature in Israel's legislative history—a provisional Basic Law—the new government of Prime Minister Netanyahu has guaranteed itself two quiet years from Knesset's active supervision. This is how lightly Israel's most sacred provisions dealing with the structure of government are treated.

As noted above, the Knesset enacted "Basic Laws" and regular laws via the same legislative process consisting of three readings, as is typical of a monist not dualist constitutional system. A petition to the Israeli Supreme Court against this practice was rejected in 1977, because the difference between a "Basic Law" and a law was "mere semantics."[262] In fact, the justices acknowledged this constitutional reality in *United Mizrahi Bank*. In response, Barak stated that the past cannot be undone but going forward after *United Mizrahi Bank* the Knesset should amend "Basic Laws" only in other "Basic Laws."[263] At the time of *United Mizrahi Bank*, however, there was a blur of constitutional and regular law as is typical of monist constitutional systems. In fact, since Barak expressed his views that entrenchment in regular statutes is problematic on democratic grounds, it follows that a similar problem exists with respect to entrenchment in "Basic Laws" in Israel due to their monist process of enactment.

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[259] HCJ 5160/99 *Movement for Quality Government v. Constitution, Legislation and Justice Committee*, P.D. 53 (4) 92 (1999) (Isr.). *See also* RUBINSTEIN & MEDINA, *supra* note 35, at 835.

[260] For the Knesset's discussions on this Basic Law, see http://www.knesset.gov.il/plenum/data/01168009.doc#_Toc228181954. It should be noted that MK Dan Meridor, who was the Minister of Justice at the time the 1992 "Basic Laws" were enacted and who has treated their passage as a constitutional revolution, voted in support of this provisional Basic Law in 2009.

[261] Basic Law: The Knesset, § 36a. See also COLIN TURPIN, BRITISH GOVERNMENT AND THE CONSTITUTION; TEXT, CASES AND MATERIALS 447 (fifth ed., 2002); A.W.BRADLEY &K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 218 (12th ed., 1997).

[262] HCJ 60/77 *Ressler v. Chairman of the Central Elections to the Knesset Commission*, 31 (2) P.D. 556, 560 (1977) (Isr.).

[263] *United Mizrahi Bank*, *supra* note 8, at 406-07.

Furthermore, only in *United Mizrahi Bank* do the justices come up with a test for identifying what is part of the Israeli formal Constitution. The very necessity to define what comprises Constitution arose because the Knesset did not treat constitutional law differently than regular law prior to *United Mizrahi Bank.* Barak suggested that, if the enactment is entitled "Basic Law" without a year mark, then it will be construed as part of the formal Constitution in accordance with the *Harrari Resolution*.[264]

Barak's "technical title" test could have worked, but Barak was not satisfied with this single factor. In *dicta (to the dicta)*, he qualified this "technical title" test twice. He first suggested that some of the enactments of the First Knesset might be part of the formal Constitution, even though they lack the title "Basic Law." Barak had in mind mainly two statutes, the Law of Return enacted in July 1950 and the Statute of Equal Rights for A Woman enacted in 1951.[265] The difficulty with his reasoning is that these two Acts were enacted after the *Harrari Resolution* was decided in June 1950, but the First Knesset did not view them or title them "Basic Laws." Although Barak's dualism rests on the notion that later Knessets enjoy the same authority as the First Knesset, he himself treated the First Knesset differently. Even in the *United Mizrahi Bank* opinion, his dualist approach required some fine tuning to accommodate his higher goals.[266]

Bark secondly qualified his title test by suggesting that there may be an unconstitutional constitutional amendment or an abuse of the Knesset's constituent authority.[267] If the first qualification broadens what may be included in the formal Constitution, the latter qualification attempts to narrow those options. Barak did not clarify, however, the parameters for a judicial decision that such abuse did indeed occur. He left that determination for future court decisions. However, with this second qualification, he laid the theoretical grounds for the courts to ultimately decide the definitive content of the Israeli formal Constitution. Yet, his reasoning again is not entirely consistent with dualism for two reasons. First, it leaves to the Court rather than the People to ultimately decide the content of the Constitution. Second, on a related point, under a dualist approach based on popular sovereignty, the People reserve the power to alter the Constitution, and may even do so by procedures that may violate the constitutional amendment process as defined in the constitutional text, as long as the process used for amendment satisfies the substantive requirements of dualism as elaborated above—primarily, it must manifest broad, deep, and decisive popular consent for change. Under dualism, the People's power to alter the constitution is treated on par with their original power to create a constitution,[268] while under Barak's approach, the

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[264] *Id.* at 403.

[265] *Id.* at 294 (Shamgar), 406 (Barak). *See also* BARAK, INTERPRETATION, *supra* note 25, at 46. Shamgar specifically explained in *dicta* that, because the First Knesset was primarily a Constituent Assembly, its enactments may be classified based on their content, not their title. If their content is constitutional, they may be part of the formal Constitution. Both Shamgar and Barak, however, chose to leave this issue open for future court decisions.

[266] It should be emphasized that, so far, the Law of Return and the Statute of Equal Rights for A Woman are not treated as part of the formal Israeli Constitution. Thus, Barak's qualification of the title test is still *dicta*.

[267] *United Mizrahi Bank*, *supra* note 8, at 406, 408.

[268] That the People included in the Constitution explicit provisions governing its amendment only restricts their representatives (constituted power) when amending the document. But the People themselves may alter it by other means as well. *See, e.g.,* ACKERMAN, FOUNDATIONS, *supra* note 22; ACKERMAN, TRANSFORMATIONS, *supra* note 22; Waldron, *Judicial Power*, *supra* note 215. Others have vehemently

power to amend is necessarily inferior to the power to create the Constitution in the first place.[269] Furthermore, constitutional theorists have long recognized that *de facto* many constitutional changes occur outside the regular mechanisms prescribed in the constitution for change.[270] Barak's approach to constitutional amendment may suggest that, in the final analysis, Barak may be a foundationalist more than a dualist, as will be further illustrated in Part IV below.

In support of his dualist opinion, we return to Barak's suggested three alternative theoretical models: Kelsen's basic norm; Hart's rule of recognition; and Dworkin's "best fit" interpretation.[271] None of these models, however, supply the desired answer.[272] At most, they assist in defining the right question. That every constitutional system has a basic norm does not lead to the conclusion that dualism is the basic norm. Furthermore, that courts are one of the political players defining the ultimate "rule of recognition" does not lead to the conclusion that the other branches of government and the People view dualism as the ultimate "rule of recognition." That it is most desirable to adopt an interpretation that "best fits" Israel's constitutional and social history grants judges almost an aplatonian role to decide for the People what is best for them. This, in fact, has been the harsh criticism raised against Dworkin's work in general.[273] Surprisingly, Barak neglected to elaborate what the theory of dualism entails even while he concluded that Israel has a dualist Constitution. To reach such a conclusion, he might have examined Israel's constitutional history, with a view toward the dualist requirements over any other model. The three models he did offer led him to assume what needed to be proven.

Barak may have been partly driven to his *United Mizrahi Bank* opinion due to a belief that the 1992 "Basic Laws" dealing with individual rights was a constitutional opportunity that should be seized. The young Israeli State could just not afford to squander that opportunity,[274] with so many already gone. The Declaration of Independence, with its enumeration of rights, could have served as a constitution, but

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debated the proposition that constitutional amendment may legitimately occur in violation of the Constitution's provisions governing its amendment. *See, e.g.*, Tribe, *Taking Text*, *supra* note 217.

[269] Barak relied on C. Klein, *The Constitutional Power in Israel,* 2 MISHPATIM 51 (1970) (discussing the French distinction between original and derivative constitutional power).

[270] *See, e.g.,* ACKERMAN, FOUNDATIONS, *supra* note 22; ACKERMAN, TRANSFORMATIONS, *supra* note 22; Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13 (Sanford Levinson ed., 1995); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Peter H. Russell, *Can the Canadians Be a Sovereign People? The Question Revisited, in* CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES 9, 9-34 (Stephen L. Newman ed., 2004) [hereinafter CONSTITUTIONAL POLITICS]; Ian Greene, *Constitutional Amendment in Canada and the United States*, *in* CONSTITUTIONAL POLITICS, id., at 249–271.

[271] *See supra* Part III.A.

[272] For similar criticism, *see* Salzberger, *Constituent Assembly, supra* note 16.

[273] Dworkin himself speaks of the heroic judge Hercules. DWORKIN, LAW'S EMPIRE, *supra* note 129.. For criticism, *see, e.g.,* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

[274] Bruce Ackerman, *The Lost Opportunity?*, 10 TEL AVIV U. STUD. IN LAW 53 (1990) discusses the fact that, although Israel had all the features of a "fresh start" constitutional scenario, its founders risked missing the window of opportunity entirely.

instead the Court treated it as legally non-binding.[275] The First Knesset could have enacted a constitution, but it decided not to decide.[276] The *Bergman* decision, in 1969, could have laid a solid ground for constitutionalism and judicial review, but was instead laconic.[277] If this opportunity, too, went by, Barak portrayed a very bleak constitutional horizon for Israel. He expressed grave doubts about the ability of Israel ever, in the future, to adopt a constitution.[278]

This pessimism, however, warrants close examination. Comparative constitutional experience does suggest that it is more difficult to adopt a constitution after the founding period.[279] It further instructs that often the adoption of a dualistic constitution is accompanied by violence, turmoil, and the break from the regular legal rules of the system.[280] It does not suggest, however, that dualistic constitutions cannot be adopted in stages, in an evolutionary fashion. It does not imply that a monistic constitutional system cannot transform into a dualistic one by the use of referenda or gradually. There is nothing irreversible about the non-use of referenda in the past in Israel.[281] Barak's great worry regarding Israel's constitutional future ultimately reflected his own heart's desire that Israel would have a formal dualistic Constitution. But, the "ought" does not necessarily reflect the "is," however desired it might be.

In an attempt to rescue what he perceived as a dire situation for Israel, Barak made three leaps in his *United Mizrahi Bank* opinion. First, he made the following assertion: If Israel has a Constitution then it is, by its very nature, supreme. Second, from its supremacy necessarily derives the courts' judicial review power over primary legislation. Third, since "Basic Laws" are recognized as Israel's Constitution in *United Mizrahi Bank*, they are both supreme and grant the power of judicial review.[282]

In the American counterpart, *Marbury v. Madison*, the Court made only one leap. No one disputed that the U.S. had a Constitution. There was also no doubt as to its normative supremacy, and it even had an explicit clause to such effect. The Court "only" derived from its supremacy that it enjoyed the power of judicial review.[283] This was not the only possible outcome.[284] From comparative perspective, there are other available enforcement mechanisms, including politics or "shaming" and a special court that functions as part of the legislative branch.[285] The Israeli *United Mizrahi Bank* decision is

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[275] *See, e.g,.* HCJ 7/48 *Elkarbotly v. Minister of Defense*, 2 P.D. at 5 (Isr.). *See also* M. Ben-Porat, *A Constitution for the State of Israel: Whether Desirable and Feasible?*, 11 TEL AVIV. U. L. REV. 17, 19 (1985) (writing of the lost opportunity to recognize the Declaration as part of the Israeli Constitution). The Declaration was also signed by representatives of all the Jewish fractions in the Israeli society. Ben Gurion doubted whether any further consensus could be reached than that achieved in the Declaration. *See* DK (1950) 820.

[276] See discussion of the *Harrari Resolution supra* Part I.B.

[277] See discussion of the *Bergman* decision *supra* Part II.B.

[278] *See supra* notes 196 & 197 and accompanying text.

[279] *See, e.g.,* ACKERMAN, REVOLUTION, *supra* note 28; Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997), K.C. WHEARE MODERN CONSTITUTIONS 8-9 (1951).

[280] *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 22; ACKERMAN, TRANSFORMATIONS, *supra* note 22.

[281] *See* Weill, *Evolution*, *supra* note 215.

[282] *See supra* Part III.A.

[283] *See supra* introduction, especially note 4 and accompanying text.

[284] *See, e.g.,* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969) (offering competing interpretations to the supremacy clause) .

[285] *See, e.g,.* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006) [hereinafter Waldron, *Judicial Review*]; Victor Ferreres Comella, *The Consequences of Centralizing*

much bolder. Not only did it read judicial review power into the Constitution like its American counterpart, but it also read a supremacy clause into it. But, from the existence of a formal constitution, we cannot necessarily derive that it is supreme.[286] While Barak wrote in celebratory language that the Court humbly joins the other branches of government and the People in recognizing the existence of a formal Israeli Constitution, the Court was actually making three very defining and significant decisions regarding Israel's constitutional future.

Evidently, Barak was not satisfied with deriving judicial review from the very nature of a constitution alone--the existence of which was announced for the first time in that very decision. As stated above, he offered many additional justifications in support of judicial review. Thus, if judicial review did not derive from the nature of a constitution, then he suggested that it can be derived from a *Marburian* justification.[287] However, the *Marburian* justification rests on dualism (as based on popular sovereignty) and may not be easily transplanted to Israel's constitutional history. Barak additionally asserted that judicial review may also derive from the definition of democracy as "substantial" and as protective of human rights.[288] But such a redefinition--from "majority rule" to that of "protector of human rights"--can be contested.[289] It again shows that Barak is a foundationalist rather than a dualist, as will be further discussed in part IV below. Barak also suggested that the rule of law and separation of powers support the power of judicial review. But both principles may exist in constitutional systems that lack judicial review.[290] Judicial review simply does not derive from them alone. Thus, none of the rationales suggested by Barak prescribe that Israeli courts have the power of judicial review. Moreover, MKs have specifically debated whether to grant judicial review power to the courts and decided not to include an explicit provision to that effect in the 1992 "Basic Laws."[291] In a dualistic system based on popular sovereignty, it is better to entrust this fundamental decision with the People. But, the *United Mizrahi Bank* decision made it for them.

C. The Great Controversy with Justice Cheshin's Dissenting Opinion

Even common law judicial systems strive to reach unanimity on the bench when dealing with defining contentious constitutional issues.[292] But, in sharp contrast to the unanimous

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Constitutional Review in a Special Court: Some Thoughts on Judicial Activism, 82 TEX. L. REV. 1705 (2003-04); Weill, *Evolution, supra* note 215; Gardbaum, *supra* note 33; DORSEN, *supra* note 9, at 99-113.

[286] *See, e.g.*, Gardbaum, *supra* note 33; LAURENCE H. TRIBE, FIVE REIGNING MYTHS ABOUT CONSTITUTIONALISM AND JUDICIAL REVIEW (1994); CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Greenberg et al. eds. 1993).

[287] *See supra* Part III.A.

[288] *Id.*

[289] *See*, *e.g.*, Waldron, *Judicial Review, supra* note 285; Posner, *Enlightened Despot*, supra note 1.

[290] The British constitutional system is a prime example. *See* A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 78-103 (13th ed., 2003). Furthermore, even before the *United Mizrahi Bank* decision, Israel's justices treated separation of powers and the rule of law as central features of the Israeli constitutional system. *See* RUBINSTEIN, fourth ed., vol. 1, *supra* note 35, chs. 10-11. It should be noted that, under a parliamentary system, the understanding of separation of powers differs from the American model of a separate elected executive.

[291] Karp, *Power Struggles, supra* note 42, at 365-66 (citing DK (1992) 3783-88).

[292] *See supra* note 19.

Marbury decision, justice Cheshin dissented, arguing that Israel lacked a formal Constitution, whether monist or dualist.[293] Cheshin disputed Barak's dualist opinion mainly on factual historical grounds. He agreed with Barak that the dualist, rather than monist, model was the one most appropriate on which to found an Israeli Constitution. He too shared his fellow justices' desires that Israel would adopt a formal Constitution. He just did not accept that Israel had already done so.[294]

Cheshin bluntly accused his fellow justices of inventing a formal Constitution where none existed.[295] He explained that the adoption of a formal Constitution requires special standing similar to Mount Sinai. That is, there should be no doubt in anyone's mind as to who the founders are or what documents serve as parts of that formal Constitution. The Constitution should be adopted at great mega-moments, when a national consensus can be reached around its formation.[296] This simply has not yet occurred in Israel. In other words, until the *United Mizrahi Bank* decision, no one knew that Israel had already adopted a formal Constitution.

Cheshin analyzed MKs' debates in great detail to disprove Barak's assertion that they were aware of adopting a constitution when enacting "Basic Laws." In contrast, Cheshin asserted that MKs were at most split as to the constitutional ramifications of the "Basic Laws." Cheshin argued that the more suitable interpretation was that MKs treated "Basic Laws" on par with regular laws.[297] He further argued that the Court too had had no clear vision of the status of "Basic Laws" prior to *United Mizrahi Bank*. Certainly, it did not treat them as part of a formal dualist Constitution.[298] Cheshin also suggested that Israeli legal scholars were divided regarding the question of whether the Knesset enjoys constituent authority, let alone the question of whether it exercised such authority when enacting "Basic Laws."[299] In light of the lack of clarity and consent regarding these profoundly defining questions, Cheshin concluded that it was simply premature for the Court to declare the existence of a formal Israeli dualist Constitution.

Cheshin further accused Barak of misuse of terminology in his opinion. He claimed that the enactment of "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation" did not rise to the level of a constitutional revolution. Rather, their passage should be treated as part of evolution of an Israeli monist material Constitution. He argued that his generation of justices should be humble and realize that a judge-made interpretive constitution existed before them. Their decisions were only part of the common law process of developing that very Constitution.[300]

Cheshin thus concurred with Barak's opinion that the dualist model was best suited to a formal Israeli Constitution. He, however, concurred with Shamgar's opinion that currently Israel enjoys only a monist Constitution. But, his understanding of monism sharply differed from Shamgar's. Under Cheshin's perception of monism, no formal

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[293] In fact, CJ Marshall's strategy for enhancing the United States Supreme Court's stature was to write unanimous opinions by himself. *See* Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WILLIAM & MARY Q. 353 (1953).
[294] *United Mizrahi Bank*, *supra* note 8, at 518-19.
[295] *Id.* at 526.
[296] *Id.* at 473-75.
[297] *Id.* at 482-509, 521.
[298] *Id.* at 513-15.
[299] *Id.* at 510-13.
[300] *Id.* at 565-67.

Constitution may be adopted. Rather, the Knesset was sovereign and every Knesset was as sovereign as its predecessors. Thus, no Knesset could bind its successors. The Knesset might entrench statutes, regular or Basic, as long as the entrenchment did not violate the democratic principle of majority rule. In other words, it was not true entrenchment. Thus, the most that a Knesset could do is require an absolute majority of MKs to undo an enactment. Statutes requiring a higher majority of MKs to repeal them would accordingly be interpreted as requiring an absolute majority. In this way, the Knesset's intent to tighten the requirements for repeal would be respected without defying majority rule.[301]

Under Cheshin's approach, not only was procedural entrenchment subject to majority rule, but substantive entrenchment as well. Thus, substantive entrenchment meant that the Knesset could not repeal the entrenched statute absent-mindedly. It should rather be a self-conscious public act. The Knesset would have to take responsibility for its actions. The Knesset could either fulfill the requirements enumerated in the substantive entrenchment provisions or explicitly repeal the entrenched statute. Implicit repeal simply would not do.[302]

Cheshin's dispute with Shamgar and Barak must be translated into operative grounds. First, for Chesin, even a regular statute may repeal a "Basic Law." As far as he is concerned, "Basic Laws" are no different than regular laws.[303] In contrast, Barak and Shamgar require that amendments to "Basic Laws" be accomplished only in other "Basic Laws."[304] Second, for Cheshin, an explicit repeal is sufficient to overcome substantive entrenchment in "Basic Laws." For Barak, an explicit repeal in breach of substantive entrenchment provisions would only assist the Court in deciding the unconstitutionality of the breaching statute. If the Knesset itself declared that it did not fulfill the requirements of substantive entrenchment, why should he argue otherwise?[305] Third, for Cheshin, a procedural entrenchment (whether in a "Basic Law" or in a regular statute) that exceeds the requirements of an absolute majority would merely be interpreted as a requirement for absolute majority. For Barak, if the entrenchment appears in a "Basic Law," it may very well be valid. For him, the whole idea of a Constitution is to be anti-majoritarian and restrict majority rule. However, if the entrenchment appears in a mere regular statute, even a requirement for an absolute majority may not be valid. Barak was undecided regarding the question whether MKs have the right to abstain. If they do, then a requirement of absolute majority may infringe upon MKs' right to be undecided.[306] Certainly, if the entrenchment in a regular statute exceeds absolute majority, it would be undemocratic and thus invalid. The Knesset, in its role as a legislative assembly, enjoys no superior authority over its successors.[307]

So far, these operative differences between the justices have not been tested empirically. *De facto*, the Knesset had not created a situation where such differences bear significance. Instead, in four subsequent decisions that implemented the *United Mizrahi Bank dicta*, by declaring statutes unconstitutional, justice Cheshin concurred without writing a separate opinion. Those decisions did not discuss anew any theory that might

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[301] *Id*. at 529-47.
[302] *Id.* at 551-63.
[303] *Id.* at 563-64.
[304] *See supra* notes 167 & 263 and accompanying text.
[305] *United Mizrahi Bank*, *supra* note 8, at 409 (CJ Barak).
[306] *Id.* at 411.
[307] *See supra* note 183 and accompanying text.

justify the exercise of judicial review, relying instead on *United Mizrahi Bank*.[308] If Cheshin held that Israel lacked a formal Constitution, how could he concur in striking down statutes? The explanation must be as follows.

In his *United Mizrahi Bank* opinion, Cheshin concurred that the Court may exercise judicial review power over primary legislation. He did not believe that the existence of a formal Constitution was a prerequisite for the exercise of such power. Rather, he suggested that the Court may exercise judicial review in order to enforce "manner and form" restrictions that the Knesset imposed upon itself.[309] The Knesset was authorized to set its own internal proceedings rules. Those included its authority to require an absolute majority to repeal a statute, quorum, or "explicit repeal" requirements. He thus translated any restriction that the Knesset imposed upon itself into a mere procedural, "manner and form" one. Substantive entrenchment was merely a requirement for an explicit repeal, since the Knesset lacked authority to bind its successors to legislation. Any procedural entrenchment was merely a quorum requirement that did not exceed the requirement of an absolute majority, since the Knesset could not violate majority rule. Once the Knesset imposed such internal proceedings rules upon itself, any statute enacted in violation thereof was not a "statute." The Court was authorized to so declare.

Prima facie, Cheshin's theory—limiting the legislature's self-entrenchment power to majority rule and construing substantive entrenchment as merely requiring explicit repeal of prior legislation—is very attractive. Majority rule comports with democracy. Explicit repeal guarantees that the breach of entrenchment is done self-consciously and in the public eye. It necessitates public deliberation and extracts a political price from the breaching Parliament. It is a form of accountability and a shaming mechanism.[310] It

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[308] HCJ 1715/97 *Lishkat Menahalei Haskaot in Israel v. Minister of Treasury*, 51 (4) P.D. 367 (1997) (Isr.) (finding the regulation of brokers unconstitutional with regard to those practicing in the field for a substantial time) ; HCJ 6055/95 *Tzemach v. Minister of Defense*, 53(5) P.D. 241 (1999) (Isr.) (finding the detention of soldiers to up to 96 hours without appearance before a magistrate unconstitutional); HCJ 1030/99 *MK Oron v. Chairman of Knesset,* 56(3) P.D. 640 (2002) (Isr.) (finding the law legalizing existing pirate radio stations unconstitutional); HCJ 1661/05 *Hamoeza Haezurit Hof Aza v. Israeli Knesset*, 59(2) P.D. 481 (2005) (Isr.) (finding the compensation provisions for evacuation of Gaza settlements unconstitutional). It should be noted that after Cheshin's retirement, the Court invalidated a provision of a statute also in HCJ 8276/05 *Adalah—The Legal Center for Arab Minority Rights in Israel v. Minister of Defense* (2006) (unpublished yet) (finding a provision in a statute exempting the State from tort liability for acts done in hostility areas, that are not war acts, unconstitutional).
It should also be noted that it has been debated how to interpret the HCJ 7052/03 *Adalah—The Legal Center for Arab Minority Rights in Israel v. Minister of Interior Affairs* (2006) (unpublished yet) dealing with the constitutionality of a provisional statute severely restricting entrance to Israel of people from belligerent areas, even when those are married or parents to Israeli citizens. According to the result of the decision, the statute was found constitutional. But, according to the reasoning, the minority finding the statute unconstitutional may have prevailed. One of the justices joining the majority in result, Justice Levi, did so while suggesting that the Knesset must amend the statute for it to survive constitutional scrutiny in the future. This decision was one of the rare cases in which CJ Barak wrote a minority opinion.

[309] *United Mizrahi Bank*, *supra* note 8, at 530-35. For literature discussing "manner and form," *see supra* notes 29 & 178 and accompanying text. See also *infra* notes 311 - 316 and accompanying discussion.

[310] Scholars usually discuss shaming of individuals, but s*ee,* Berthold Rittberger and Frank Schimmelfennig, *Explaining the Constitutionalization of the European Union*, 13 J. EUR. PUB. POL. 1148 (2006) (suggesting that community shaming enabled European constitutionalism). For critique, *see* R. Daniel Kelemen, *Comment: Shaming the Shameless? The Constitutionalization of the European Union*, 13 J. EUR. PUB. POL. 1302 (2006).

respects, however, the ultimate democratic authority of the legislature to repeal its predecessors' legislation by majority vote.

It should be noted that this position of Cheshin relies on the "new view" of parliamentary sovereignty as allowing "manner and form" restrictions on Parliament's power to legislate.[311] However, the very name "manner and form" is taken from the Colonial Laws Validity Act of 1865, which reflected manner and form restrictions imposed by the British Imperial higher outside authority on colonial legislators. It is not an example of internal self-limits imposed on Parliament by its own actions.[312] In contrast, "manner and from" restrictions that are self-imposed suffer from the "self-reference" problem identified by Alf Ross.[313] At times such requirements were not imposed on noncompliant parliaments by the courts in the Anglo-American world.[314]

"Manner and form" theory also assumes that as long as Parliament legislates according to existing procedures of legislation, it may even amend the procedures required to enact law. However, as the theory has been utilized, rather than using "manner and form" to redefine Parliament's procedure in general, "manner and form" restrictions are used with regard to specific enactments. Thus, while the essence of "manner and form" theory states that Parliament may restrict its successors as to the form of enacting law but not the content of law, *de facto* "manner and form" requirements are used today primarily to restrict the legislature with regard to specific contents—mainly constitutional issues. But with regard to content, the theory has always claimed that Parliament may not bind its successors to specific agendas. This manifestation of "manner and form" contradicts the very essence of parliamentary sovereignty as having a monist tier of enactments.

In addition, Cheshin's approach raises the same concerns debated in Britain and New Zealand nowadays whether requirements of "explicit repeal" are compatible with parliamentary sovereignty.[315] The difficulty arises because courts would interpret a later statute to impliedly repeal an earlier one only when the two cannot be reconciled through interpretation. It is considered a "last resort" tool in common law. If such circumstances arise, then shouldn't the last will of the sovereign legislature govern despite its predecessor's requirement for explicit repeal?

Despite these difficulties, "manner and form" restrictions have been lately advocated in Commonwealth countries—notably New Zealand, Britain and Canada—as an intermediate model between parliamentary sovereignty and supreme constitutions, useful to protect individual rights and fundamental values, by requiring the legislature to

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[311] See, e.g., SIR W. IVOR. JENNINGS, THE LAW OF THE CONSTITUTION 152-53 (5th ed., 1959); R.F. V.HEUSTON, ESSAYS IN CONSTITUTIONAL LAW 6-7 (2nd ed., 1964); Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54 (1953-54); R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L. J. 215 (1991).

[312] See Chander, *supra* note 178. See also M.H. Tse, *The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v. Canada*, 18 NAT'L J. CONST. L. 71 (2005).

[313] Ross, *supra* note 170. See also Kahn, *supra* note 147 (asserting that entrenchment is possible only in hierarchical relations).

[314] See Tse, *supra* note 312. *See also supra* note 177.

[315] *See e.g. Thoburn v. Sunderland City Council* [2003] Q.B. 151 (Div Ct.) (Laws LJ requiring explicit repeal of statutes he characterized as fundamental); Rebecca Prebble, *Constitutional Statutes and Implied Repeal: The Thoburn Decision and the Consequences for New Zealand*, 36 VICT. U. WELLINGTON L. REV. 291 (2009); Mark Elliott, *Embracing, supra* note 178; Andrew Butler, *Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand*, [2001] PUB. L. 586.

publicly take responsibility for violating constitutional principles. Though such "manner and form" requirements do not totally align with parliamentary sovereignty, they are considered a small "price" to pay for enhanced protection of rights.[316] But, if this is the motive for recognizing the legitimacy of "manner and form" restrictions, then Cheshin, no less than Shamgar and Barak, were pursuing a constitutional agenda.

Cheshin however did not tie his opinion of the validity of "manner and form" restrictions to constitutional issues alone. Instead, he embraced the classic British monist theory, but in a novel way that enabled the Court to enjoy the power of judicial review while simultaneously declaring itself to be the Knesset's most humble servant. Without acknowledging it, Cheshin's perception of monism sharply deviated from the traditional Diceyan monism, under which legislative sovereignty and judicial review over primary legislation could not co-exist.[317] While the traditional Diceyan understanding is that it is either the legislature or the courts that are supreme, not both, for Cheshin there was no choice to make. Rather, the impossible was Israel's reality.

IV. FOUNDATIONALISM

We have shown that none of the three major judicial opinions offered in the *United Mizrahi Bank* decision to explain Israel's constitutional development do it real justice. Monism, suggested by the retiring CJ Shamgar, cannot establish the supremacy of the constitution. Dualism, asserted by then CJ Barak, while desirable, is not supported by the historical facts. Asserting that Israel lacks a formal Constitution yet its judiciary still exercises judicial review over primary legislation, as suggested in Justice Cheshin's dissent, is not convincing either. So, what is left? In this part, I propose a different theory--foundationalism--as the theory that may better explain what has motivated the justices. While this theory may have motivated the justices, probably because of its difficulties as heretofore elaborated, they were not satisfied with offering it as the exclusive basis for the emerging formal Israeli Constitution but coupled it with either monism (Shamgar and Cheshin) or dualism (Barak).

A. *The Missing Theory*

So far we have established that all three theories offered in the *United Mizrahi Bank* decision to explain Israel's constitutional development are problematic. Shamgar's monist theory cannot account for why one Knesset should be supreme to its successors and bind them with a constitution. Barak's dualist theory does not align, by his own admission, with the idea that the Israeli constitutional revolution occurred in secret, the public unaware of its occurrence. Cheshin's theory is an attempt to have one's cake and eat it too. Cheshin announced that Israel lacks a formal constitution while enjoying all the benefits characteristic of such a constitution, most notably judicial review over primary legislation.

A fourth possible theory, never explicitly enumerated in *United Mizrahi Bank*, is foundationalism. By foundationalism, I mean a theory under which some rights are so fundamental as to be beyond the ability of either the legislature or the People to take

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[316] *See e.g*. Prebble, *id*. (citing British authorities); Tse, *supra* note 312, at 83 (citing Canadian authorities).
[317] *See supra* note 102 and accompanying text.

away. The guardians of these rights are the courts.[318] Barak did hint in *dicta* of such a theory in the *United Mizrahi Bank* decision when he suggested that the Court could find some constitutional amendments unconstitutional, i.e., beyond the reach of even a constituent authority.[319] That is, the Court may review the content of constitutional amendments to decide their validity. The Court may thus not only exercise judicial review over primary legislation based on the supremacy of the "Basic Laws" decided in *United Mizrahi Bank* decision, but it may further exercise judicial review over the content of the forming Israeli "Basic Laws." Barak did not suggest which fundamental values or principles constitutional amendments should conform to, or from what source he would derive such values or principles.

Barak further suggested *in dicta* that, although the defining test for whether a statute is part of the Israeli Constitution is technical (i.e., merely a question of whether it carries the title "Basic Law") in the future a need may arise to use substantive criteria based on the content of the statute. In other words, he did not exclude the possibility of misuse of the title "Basic Law" by the Knesset. The Court might thus find that certain "Basic Laws" or provisions within them do not "deserve" to be treated as constitutional.[320] Barak relied on both the famous Indian *Kesavananda* case and German constitutional jurisprudence to justify his position.[321] With both these propositions--the unconstitutional constitutional amendment and misuse of the title "Basic Law"--Barak hinted that the basis of the Israeli Constitution may be foundationalist, rather than dualist, after all.

Foundationalism also better explains Barak's assertions that the rule of law, by its nature, justifies judicial review or that substantive democracy automatically entails it to protect basic rights.[322] Both assertions reveal a philosophy that necessitates judicial review regardless of whether there exists a specific formal Constitution to expound. That is also why Barak stated that anyone asserting that judicial review is undemocratic asserts that the protection of human rights is undemocratic.[323]

Foundationalism may also align with Shamgar's assertions in *United Mizrahi Bank* that there were inherent limits on the Knesset's self-entrenchment power. Not every subject may be entrenched nor is any form of entrenchment constitutional. This qualification was especially important under Shamgar's thesis that, by entrenchment, the Knesset creates the Constitution. But Shamgar was undecided from what source he would derive the principles that defined the restrictions on the Knesset's self-entrenchment power.[324] Monism does not offer such guidelines beyond maybe majority rule, as the dissenting justice Cheshin pointed out.[325] But, Shamgar had in mind different kinds of restrictions on the Knesset's self-entrenchment power, since he felt quite comfortable with even two-thirds majority requirement to amend some provisions in "Basic Law: The

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[318] For foundationalist approach, see, e.g., DWORKIN, LAW'S EMPIRE, *supra* note 129; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001).
[319] *United Mizrahi Bank*, *supra* note 8, at 394, 408.
[320] *Id.* at 406.
[321] *United Mizrahi Bank*, *supra* note 8, at 394 (citing Kesavande [*sic*] v. State of Kerala, 1973 A.I.R. 146 (India) and 6 BverfGE 32 (1957) (Germany)).
[322] *See supra* note 207 and accompanying text.
[323] *United Mizrahi Bank*, *supra* note 8, at 424.
[324] *See supra* Part II.
[325] *See supra* Part III.C.

Knesset."[326] It seems that with this *dicta*, Shamgar, too, was primarily relying on foundationalism, and indeed he suggested that he might refer to "basic principles of our system as a Jewish and democratic State."[327]

Surprisingly, for a theory that was never explicitly singled out by any of the justices, foundationalism may unite not only Barak's and Shamgar's theses, but also that of the dissenting justice Cheshin, as will be further elaborated below.

B. Historical Roots

A foundationalist approach is not foreign to Israel's constitutional development. It has been repeatedly discussed in past judicial opinions, but so far has not been adopted as part of Israel's positive law.

In the early years of Israel's founding, appellants asserted basic rights stemming from natural law to challenge the validity of existing statutes, only to be rejected by the Court. Thus, for example, Jewish couples who wished to marry under civilian ceremony, rather than according to Jewish law, claimed that the 1953 statute imposing Jewish religious law on every marriage and divorce of Israeli citizens and inhabitants infringed upon their freedom of religion—or more precisely, their right to be free from religion.[328] They were denied a remedy because no concept of natural law was part of Israel's positive law. The Court explicitly ruled that natural law could not prevail over explicit conflicting statutes, despite the infringement on any natural rights.[329]

Scholars have attempted to describe the *Yardor* decision, given in 1964, as the first decision to rely on foundationalism in reaching a result contrary to the explicit language of a statute.[330] In a majority opinion, the Court validated the Central Election Commission's decision to disqualify the political party, *El Ard*, from competing in elections to the sixth Knesset. The statute did not authorize the Commission to exclude a political party based on the content of its platform and ideology. To the contrary, "Basic Law: The Knesset" explicitly granted equal rights to all parties to compete at elections.[331] Nonetheless, the Court ruled that Israel was not required to permit campaigning by political parties that aimed to abuse the democratic laws to destroy the State from within the Knesset.[332] Rather, Israel could protect itself just as the Germans protect themselves from the revival of Nazism.[333]

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[326] *United Mizrahi Bank, supra* note 8, at 292.
[327] *Id.* at 293.
[328] Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 1953, S.H. 165.
[329] C.A. 450/70 *Rogozinski v. State of Israel*, 26 (1) P.D. 129 (1972) (Isr.).
[330] E.A. 1/65 *Yardor v. Chairman of Central Elections Committee to the Sixth Knesset*, 19(3) P.D. 365 (1965) (Isr.) [hereinafter *Yardor*]. For scholarship's treatment of the case along the lines suggested in the text, *see, e.g,.* Shlomo Guberman, *Israel's Supra-Constitution*, 2 ISR. L. REV. 455 (1967).
[331] Basic Law: The Knesset, §§ 4 and 6.
[332] *Yardor*, *supra* note 330, at 384-90.
[333] In Germany, this is treated as "militant democracy." In other places, it is treated as "protective democracy." For discussion of the inherent democratic dilemma in excluding political parties in a democracy, *see, e.g.,* Walter F. Murphy, "*Excluding Political Parties: Problems for Democratic and Constitutional Theory*," in GERMANY AND ITS BASIC LAW 173 (Paul Kirchhof & Donald Kommers eds., 1993); Gregory Fox & George Nolte, "*Intolerant Democracies*," in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 389 (Gregory Fox & Brad R. Roth eds., 2000).

It was unclear whether the Court identified a physical threat to the very existence of the Israeli State from the *El-Ard* political party or whether the threat was primarily an attack on the Jewish and democratic identity of the State. It seems that during this early period of the State's existence, the justices treated the very existence of the Israeli State and its identity as one and the same.[334] Only justice Chaim Cohn, in a dissenting opinion, described by the majority as courageous, stated that Israel could not exclude a political party from competing at election without an explicit statutory authorization to that effect. The right to compete at elections was too fundamental in a democracy to be left to the discretion of the Central Election Commission.[335]

Did the Court invalidate a statute in this decision? Obviously, the Court did not explicitly invalidate a statute. The majority opinion relied on fundamental unwritten principles to authorize the disqualification of a political party, but it did not use the language of striking down a statute. But was there an implicit invalidation? Different interpretations are possible. On the one hand, the Court enabled the Central Election Commission to disqualify a political party despite the explicit statutory grant of the right to equal elections, and the rights to vote and be elected. Moreover, these enumerated fundamental rights were granted not just under regular election statutes, but also in "Basic Law: The Knesset."[336] In this sense, the Court implicitly overruled both election statutes and "Basic Law: The Knesset"—and with regard to the most basic norm of a democracy: equal elections. On the other hand, it is possible to read the majority decision as a robust interpretation of existing statutes to embody principles of self-defense that were not explicitly stated but seem self-evident.[337] This latter interpretation aligns with the general jurisprudence of the Court during that era. The Court was actively engaged in developing an interpretive non-formal common law constitution during those years.[338] But, if the former interpretation is the better one, then the *Yardor* decision marks the use of fundamental unwritten principles to at least implicitly overrule even "Basic Laws." In such a case, the fundamental value worth protecting is the very physical existence of the State or even just its identity as a Jewish and democratic State.[339]

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[334] In E.A. 2/84 *Neiman v. Chairman of the Central Elections Commission to the Eleventh Knesset*, 39 (2) P.D. 225 (1985) (Isr.) [hereinafter *Neiman*], the justices interpreted the *Yardor* decision as permitting disqualification of only political parties that aim at Israel's destruction, not its democratic nature. *But see* Ruth Gavison, *Twenty Years to the Yardor Decision--The Right to be Elected and Historical Lessons*, in ESSAYS IN HONOUR OF SHIMON AGRANAT 145, at 181 (R. Gavison & M. Kremnitzer eds., 1986) (suggesting that the *Yardor* court was also trying to protect the democratic and Jewish character of the State).

[335] *Yardor*, *supra* note 330, at 368-84.

[336] The (then) Justice Sussman wrote that he has "no doubt" that the elections law does not authorize the Central Election Commission to disqualify political parties according to its own discretion. He suggested that the opposite is implicit from the statute's language. *Yardor*, *supra* note 330, at 389. He however found the Commission authorized to disqualify *El-Ard* based on "natural law" of the State's right to self-existence. *Id.* at 390.

[337] The (then) CJ Agranat emphasized that, in interpreting the law he was required to take into account constitutional facts such as the very existence of the State and its identity as a Jewish and democratic State. He thus interpreted Basic Law: The Knesset, § 1, providing that "the Knesset was the representative assembly of the State," as entailing an election of political parties that do not seek Israel's destruction. *Yardor*, *supra* note 330, at 385-87.

[338] *See supra* Part II.B.

[339] In fact, in the *Neiman* decision, justice Elon read the *Yardor* majority decision as applying fundamental unwritten law, rather than interpretation, to disqualify a political party. This is why he read the *Yardor*

While the *Yardor* decision did not explicitly discuss the possibility of invalidating statutes in the name of fundamental unwritten rights, the *Laor Movement* decision, given in July 1990, marked a turning point.[340] There, the (then) justice Barak, in *dicta* in his dissent, raised the possibility that the Court may strike down a statute, and even a "Basic Law," if it does not align with fundamental unwritten principles of the legal system.[341] Barak referred to German jurisprudence, especially after World War II, to justify his position.[342] Barak asserted that such authority may theoretically be attributed to the Court though the time has not yet come to utilize it. The statute at hand was probably not extreme enough in its abuse of fundamental rights to warrant such judicial intervention, and Barak could not discern any public consensus to enable the Court to use such authority.[343] But, Barak suggested, theoretically the Court could enjoy such potent authority. Thus, it seemed that it was only a matter of time and judicial discretion before the Court could act upon this authority.

Barak could have reached the judicial result he desired in the *Laor Movement* case without the need to write *dicta* or to dissent. The statute at hand infringed upon the principle of equal elections in violation of section 4 of "Basic Law: The Knesset."[344] Two weeks after the elections to the twelfth Knesset, the Knesset's finance committee decided, and was later ratified by statute, to retroactively increase the public funding granted to the political parties that competed in the previous election. It was done to cover huge deficits that the parties suffered as a result of the preceding electoral campaign. *Prima facie*, the increase did not infringe upon the principle of equal elections, since all elected political parties would have enjoyed it equally. *De facto*, the statute, if valid, would have permitted political parties to spend more money than their economic fortunes allowed for campaigning if they could safely assume they would be part of the majority in the forthcoming legislature, and could then enact a statute with retroactive funding increase. This would have heavily distorted election results, since small parties that were insecure of their electoral success would be unable to spend equally with large political parties whose future place in the Knesset was guaranteed. The retroactive funding would have meant unequal elections in real time.

To be valid, section 4 required that this retroactive funding statute pass with the support of a majority of MKs, i.e., 61 MKs. The majority opinion in the *Laor Movement* decision struck down the statute because the statute did not pass with the requisite majority of MKs in all its readings. Rather, in the preliminary reading, which was required in addition to the three regular readings because the statute was proposed by a private MK, there was no absolute majority present.[345] Thus, the majority opinion chose

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decision narrowly as applicable only to political parties that aim at the very destruction of the State. *See Neiman*, *supra* note 334, at 289-92. Elon, however, believed that this natural law would succumb where the Knesset to explicitly overrule it. *Id.* at 292. *See also* Barak Medina, *Forty Years to Yeredor: The Rule of Law, Natural Law and Restrictions on Political Parties in a Jewish and Democratic State*, 22 BAR-ILAN LAW STUDIES 327 (2006) (discussing the different interpretations possible for the *Yardor* decision).

[340] *Laor Movement*, *supra* note 71.

[341] *Id.* at 551-54.

[342] Barak cited the following German authorities: H. REICHEL, GESETZ UND RICHTERSPRUCH (1915); K. ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN STUTTGART-BERLIN-KÖLN, 173 (7th ed.,1977); G. RADBRUCH, RECHTSPHILOSOPHIE 4 (Stuttgart, 1954); *Article 117 Case* (3 BVerfGE 225).

[343] *Laor Movement, supra* note 71, at 554.

[344] The Financing Political Parties (Amendment no. 8) Act, 1989, S.H. 6, § 2 .

[345] *Laor Movemen*t, *supra* note 71, at 554-74 (Deputy CJ Elon and Justice Maltz).

the solution that aligned with the language of sections 4 and 46 of "Basic Law: The Knesset" (requiring absolute majority "in all phases of legislation") and reached the desired result of invalidating an outrageous statute. But Barak chose to dissent finding the repugnant statute valid. He interpreted sections 4 and 46 to mean that no absolute majority was required in a preliminary reading, as opposed to the three regular readings. He thus curiously interpreted the preliminary reading as not part of the "phases of legislation," though he could have easily interpreted it as the majority did. Since Barak too felt repelled by the statute at stake, he suggested in *dicta* that in the future he might reach the desired result anyway by relying on foundationalism.

Barak thus utilized this *Laor Movement* decision to lay the theoretical foundations for the use of judicial review over primary legislation, even in the absence of a formal constitution. His opinion showed that he viewed foundationalism as a very real option for Israel's constitutional development. He may have intended to catalyze the development of judicial review.[346] With or without a formal Constitution, it was only a matter of time before Barak would recognize the existence of such judicial authority. Barak was thus sending the Knesset a clear message that if it did not proceed with the enactment of "Basic Laws," he could do without them. It was better for the Knesset to decide the content of the formal Constitution then to entrust the Court to develop one through foundationalism.

The Knesset was fond of Barak's *dicta,* since it meant that it did not need an absolute majority in preliminary readings. The easier the better, when it comes to burdening equal elections norms with absolute majorities. It thus amended section 46 of "Basic Law: The Knesset" to read explicitly that majorities were necessary only in the "three readings" rather than in "all phases of legislation."[347] The Knesset further provided that this amendment would apply retroactively from August 6, 1959—that is, the retroactivity stretched to roughly 30 years.[348] It also explicitly stated that any past statute that amended section 4 without an absolute majority during the preliminary reading was nonetheless valid from the time of its enactment.[349] This enactment thus annulled the *Laor Movement* majority opinion retroactively, and an appeal to the High Court against this retroactive enactment was denied.[350] As in its reaction to *Bergman*, the Knesset again validated infringing regular statutes retroactively by way of reference.[351] The Knesset thus swallowed the bait, celebrating Barak's *dicta* as an increase of the Knesset's authority with regard to absolute majority requirements, while disregarding the harsher implications of his *dicta* to the Knesset's authority if foundationalism was ever acted upon.

Since Barak suggested that no public consensus has formed with regard to foundationalism as of that time, many mistakenly assumed that this was a moderate opinion.[352] But it was rather a Marburian strategy *par excellence*: First, raise the possibility of judicial review over primary legislation without utilizing it. Only later act

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[346] See Gavison, *Constitutional Revolution* , *supra* note 10, at 91-92.
[347] Basic Law: The Knesset (Amendment no. 11), 1990, S.H. 196.
[348] *Id.* at § 2.
[349] *Id.* at § 3.
[350] *See Blum*, *supra* note 161.
[351] *See supra* Part II.B.3.
[352] RUBINSTEIN & MEDINA, *supra* note 35, at 231 (citing this decision as a clear example of a case where the Court refrained from granting remedy to protect its public standing).

upon it. It comfortably suited Barak's general judicial tactics of writing prolonged and innovative opinions in *dicta* to set the stage for later judicial revolutions.[353] This practice deviated from the traditional judicial role of deciding "cases and controversies," enabling the Court to play a conscious policy-maker role.

But Barak did not need to utilize the grounds he so carefully laid in the *Laor Movement* decision. Instead the enactment of "Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation" enabled him to declare in *United Mizrahi Bank* a "constitutional revolution" based on "Basic Laws" rather than on mere unwritten values of the legal system. His judicial philosophy however remained the same. For him, there were substantive constraints on the legislative power of the Knesset, whether defined as "Basic Laws" or as unwritten fundamental values. Their exact content will be determined by the Court. It was more comfortable to develop this supreme structure, based on the deeds of the Knesset in the form of "Basic Laws," than to do it through unwritten basic values. If founded upon "Basic Laws," it would be less susceptible to criticism that it was all the Court's doing. It was possible to speak of the joint venture of the Knesset and the Court in establishing the constitutional revolution.

The content of the Constitution however may be determined by the Court through robust interpretation of "Basic Laws"' provisions. Thus, it was possible for the Court to recognize many fundamental rights that the legislature discussed yet consciously not explicitly enumerated them in "Basic Law: Human Dignity and Liberty" as incorporated in it nonetheless. This was done, for example, with regard to aspects of equality, freedom of speech, and freedom of religion, and so forth. The Court treated all these rights as part of the constitutional right to "human dignity," and more specifically part of a person's right to autonomy.[354] That the Knesset may have meant otherwise just a decade ago did not matter because "it is a constitution we are expounding."[355] This judicial activism fits comfortably with Barak's general judicial philosophy of foundationalism.

This judicial philosophy was evident also in the second *Meatrael* decision dealing with the constitutionality of the statute prohibiting the importation of non-kosher meat enacted with a "notwithstanding clause" to overcome challenges to its constitutionality because it infringes the new "Basic Law: Freedom of Occupation" from 1994.[356] While the constitutional challenge was rejected, CJ Barak suggested *in dicta* that, if a statute were to severely infringe the most basic values of a Jewish and democratic State, even were it to include a "notwithstanding provision", the Court may find it unconstitutional nonetheless. In such a case, the Court may narrowly read the notwithstanding provision

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[353] In addition to the *United Mizrahi Bank* and *Laor Movement* decisions, these judicial tactics were manifested with regard to standing, justiciability, freedom from religion and many other contentious issues within the Israeli society.

[354] *See infra* Part IV.C.. *See also* Sommer, *Non-enumerated Rights*, *supra* note 44 (discussing the ambiguous constitutional status of non-enumerated rights and the considerations for and against judicial recognition of them as part of the Israeli formal constitution); Hillel Sommer, *From Childhood to Maturity: Outstanding Issues in Implementation of the Constitutional Revolution*, 1 LAW & BUSINESS 59 (2004) (criticizing the Court for leaving the constitutional status of many non-enumerated rights indefinite).

[355] This is a quote from CJ Marshall's words *in McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). *See* Barak, *Judge on Judging, supra* note 9, at 64-84. For a recent critique of Barak's purposive interpretation theory, see Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008).

[356] HCJ 4676/94 *Meatrael Ltd. v. The Israeli Knesset*, P.D. 50 (5) 15 (1996). For the history of this decision, see *supra* notes 245 - 254 and accompanying text.

in the "Basic Law: Freedom of Occupation" to prevent a statute from overcoming the most basic values of Israel's society as protected by the "Basic Laws" "purpose and basic principles" clauses.[357] One may conclude that this *dicta* too serves as a consistent reminder of Barak's philosophy of foundationalism.

C. *Post United Mizrahi Bank : Movement for Quality Government Decision*

Since the *United Mizrahi Bank dicta* establishing judicial review over primary legislation based on "Basic Laws," the Court exercised this judicial review authority five times to declare statutes or provisions thereof as unconstitutional. On all five occasions, the Court relied on *United Mizrahi Bank* without discussing anew why the Court should enjoy such judicial review authority. Justice Cheshin sat on four of these cases and concurred.[358] But, in May 2006, on the eve of retirement of both CJ Barak and Justice Cheshin, the grounds for judicial review authority were reopened.[359] This was done in the *Movement for Quality Government* decision reviewing whether the exemption from army service granted to ultra-orthodox men was constitutional.[360] The decision further illuminates the theoretical grounds underlying Israel's formal Constitution.

Movement for Quality Government (MQG) is an NGO that specializes in petitioning the High Court of Justice against the government's and administration's breach of administrative and constitutional law.[361] As such, it is part of the growing global phenomenon of employing the private sector to enforce public law through the courts.[362] MQG petitioned the Israeli Supreme Court against the validity of the 2002 statute to regulate the deferral of army service to ultra-orthodox men, known as the "Tal Statute."[363] Since the establishment of the Israeli State, ultra-orthodox men were practically exempt from army service. The then Prime Minister David Ben Gurion accepted the ultra-orthodox political parties' request to re-establish Yeshivot after the great destruction of the Holocaust.[364] Prior to 2002, this exemption was not codified in statute, but rather the Defense Minister used his general statutory authority to exempt people from army service.[365] Since there is a general duty under Israeli law imposed on all citizens to join the army, this special treatment of ultra-orthodox men was always very contentious.

In 1970, an Israeli student, Baker, petitioned the Israeli High Court of Justice against the special treatment awarded to ultra-orthodox men, but he was denied a remedy for lack of standing and non-justiciability.[366] Beginning in 1981, Advocate Ressler petitioned the Court repeatedly against the constitutionality of this special treatment. At first, however,

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[357] *Id.* at 27-28.
[358] For enumeration of these cases, *see supra* note 308.
[359] In Israel, judges must retire at seventy. The Courts Statute, 1984, S.H. 198, § 13. Cheshin retired in February 2006 and Barak in September 2006. See also supra note 23.
[360] HCJ 6427/02 *Movement for Quality Government* v. *The Knesset* (2006) (unpublished yet) [hereinafter *Movement for Quality Government*].
[361] See http://www.mqg.org.il.
[362] *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).
[363] Deferral of Service to Yeshiva Students That Torah Is Their Work Act, 2002, S.H. 521.
[364] Daphne Barak-Erez, *The Military Service of Yeshiva Students: Between Citizenship and Justiciability*, 22 BAR-ILAN LAW STUDIES 227 (2006).
[365] The Security Service Law, 1986, S.H. 107, § 36.
[366] HCJ 40/70 *Baker v. Minister of Defense*, P.D. 24 (1) 238 (Isr.).

the Court consistently refused to hear the case on standing and justiciability grounds.[367] But, in the famous 1988 *Ressler* decision, the Court with the (then) justice Barak writing the main opinion, decided to broaden its authority to hear cases by *de facto* granting standing in public matters to any citizen who wished to raise a grievance. Thus, almost any citizen may petition the High Court of Justice against public authorities' breach of law. It further decided that almost any issue was justiciable, including army matters.[368] While broadening its authority, the Court did not utilize it to abolish the exemption, as was actually requested by Ressler. Thus, Ressler was denied remedy. But, the Court did suggest in *dicta* that it was a matter of time and the size of the population subject to exemption before such a finding would be made. That is, with time, as the number of Yeshiva students subject to exemption grows both in absolute terms and as a percentage of the population, then the Court will reexamine this decision.

As already illustrated throughout this article, it is typical of the Court to enact its judicial revolutions gradually, in stages, in a *Marburian* strategy. The Knesset received its carrot in the form of a continuation of the exemption, while the stick was a far-reaching decision that broadened and democratized access to the Court. The decision should be seen as the tremor before the constitutional revolution, since it enabled the rise of the Israeli Supreme Court as a potent political player. Arguably, this rise of the Court was done in *dicta* in *Ressler*, just as the constitutional revolution was declared in *dicta* in the *United Mizrahi Bank*. Since Ressler was denied a remedy, there was no actual need to decide the issues before the Court: standing and justiciability.

Then, in a breakthrough *Rubinstein* decision, in 1998, the Court ruled that the exemption from army service could only be done in an explicit statute, rather than through the general discretion of the Defense Minister, because of the separation of powers doctrine.[369] What had changed in the passing decade? Precisely what the Court warned: time and the growth of the population of those exempted. The Court had already prepared public opinion for this decision with its decade-old *dicta*.

Moreover, the *Rubinstein* decision showed a crafty judicial strategy. *Prima facie*, while the decision abolished an arrangement that had been valid since the establishment of the Israeli State, it also suggested that the exemption was within the legislative branch's, not the administrative branch's, discretion to make. *De facto*, any new statute enacted subsequent to "Basic Law: Human Dignity and Liberty" was subject to constitutional scrutiny. In contrast, the exemption that was abolished by the Court

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[367] HCJ 448/81 *Ressler v. Defense Minister*, 36(1) P.D. 81 (Isr.); HCJ 179/82 *Ressler v. Defense Minister*, 36(4) P.D. 421 (Isr.).

[368] HCJ 910/86 *Ressler v. Minister of Defense*, 42(2) P.D. 441 (1988) (Isr.). While the other justices sitting in the *Ressler* decision concurred with Barak's opinion, each wrote a separate opinion. The (then) Deputy CJ Ben-Porat emphasized that she did not support a result in which "the public appealant" would become the main appellant in appeals to the High Court of Justice rather than the exception. CJ Shamgar emphasized that when the main thrust of the case was political, the issue might be best left to the other branches of government on justiciability grounds.
Despite their opinion, *de facto* since the *Ressler* decision there are no genuine hurdles of standing and justiciabilty in appealing to the High Court of Justice in matters of public law. See, e.g., Barak-Erez, *supra* note 364. See also RUTH GAVISON ET AL., JUDICIAL ACTIVISM: FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY (2000).

[369] HCJ 3267/97 *Rubinstein v. Defense Minister*, 52(5) P.D. 481 (1998) (Isr.)[hereinafter *Rubinstein* decision].

enjoyed constitutional protection because it originated pre-"Basic Law."[370] This is why the Court invalidated the exemption on administrative grounds, rather than on constitutional grounds.

The Knesset was thus forced to regulate the deferral/exemption of ultra-orthodox men by statute. It did so in the Tal Statute, offering ultra-orthodox men special treatment.[371] Not surprising in light of the previous litigious history, the statute was challenged in the Court as unconstitutional.

MQG asserted that the statute infringed on human dignity, since the discrimination against the general male population (and in favor of ultra-orthodox men) was "humiliating" and discriminatory. The majority opinion left the statute intact despite their dislike of it. In the past, the Court has already ruled that statutes, in which the discrimination amounts to humiliation (e.g., when discrimination is based on sex, race, or origin), may be treated as infringing the constitutional right to dignity.[372] The justices in MQG were willing to go one step further and treat human dignity as protecting against discrimination, even if it merely infringed on personal autonomy and did not amount to humiliation. This was a major judicial innovation, since the drafters of "Basic Law: Human Dignity and Liberty" intentionally omitted equality from the rights enumerated within it because that right lacked political consensus in the Knesset at the time.[373] The justices further suggested that the statute did infringe on human dignity, but it passed muster anyway, because it was too early to judge whether the statute would succeed in bringing about a social revolution and greater enrollment of ultra-orthodox men in the army.[374] Here again we see that the Court, led by Barak, cautiously and relentlessly advanced its judicial agenda gradually, picking its fights. It was better to establish equality as a constitutional value, while leaving the abolishment of the exemption for a later day. But yet again, the Court's methodology achieved its major innovation, arguably, in *dicta*.

Justice Cheshin in dissent found the statute repugnant to the most fundamental unwritten constitutional values of the Israeli legal system and, as such, invalid. He found the statute in violation of the fundamental value of equality, but not based on humiliation. Cheshin believed that to serve in the army was a great honor and did not infringe on human dignity. The statute also did not infringe on personal autonomy since there was no proof that, because Ultra-Orthodox men were exempted, those serving had to serve longer. Furthermore, the infringement on personal autonomy of those serving in the army was primarily due to the draft, not to the exemption of Ultra-Orthodox men, and Cheshin was principally (even ideologically) unwilling to treat the draft as violating human dignity. But ultra-orthodox men's blood was not redder than secular men's blood. Since

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[370] *See supra* notes 45 & 46.

[371] Between ages 18 and 22, they may study in their Yeshiva as long as they do so for at least 45 hours per week and are prohibited from working. At age 22, they may decide to take a year off to consider their next actions. Within this year they may even work. After that year, they may return to their studies for 45 hours per week and combine it with work after yeshiva hours. Or they may decide to serve in the army or in civil service for a shortened term.

[372] See HCJ 4541/94 *Alice Miller v. The Minister of Defense*, 49(4) P.D. 94 (1995) (especially Justice Dorner opinion).

[373] See Karp, *Power Struggles*, *supra* note 42, at 345-46. Karp interprets the Basic Law: Human Dignity and Liberty to protect equality despite MK's intent.

[374] *Movement for Quality Government, supra* note 360 (Barak's opinion).

equality was not enumerated in "Basic Law: Human Dignity and Liberty," Cheshin was willing to invalidate the statute as repugnant to the Israeli State as Jewish (implicating the need for an army to protect the State) and as democratic (implicating the imperative of not discriminating against seculars).[375]

This was the first and only time that an Israeli Supreme Court justice was willing to explicitly utilize foundationalism to invalidate a statute. Although done in dissent, this decision is definitely another turning point in Israel's constitutional development. It may even be treated as another mini-constitutional revolution. But for the fact that it was done in dissent, it could have been a major judicially-made constitutional revolution.

Prima facie, it seems surprising that justice Cheshin, who dissented in *United Mizrahi Bank* because he was unwilling to find the existence of a formal Constitution without the People's consent would be the one to introduce foundationalism to the Israeli legal system through the front door, rather than through the back door, as CJ Barak has so carefully done.

Why did Cheshin base his opinion on foundationalism? *Prima facie*, the Tal Statute mainly infringed on citizens' equality, which the Knesset intentionally decided not to explicitly include in "Basic Law: Human Dignity and Liberty."[376] If human dignity embraced any infringement on a person's right to autonomy, as the majority suggested, then what was left out? Thus, Cheshin honestly and openly admitted that he found the statute so outrageous as to be against the very basic unwritten foundations of the Israeli legal system, even though it did not violate explicit provisions of "Basic Law: Human Dignity and Liberty."

But, are we persuaded? It seems to me that Cheshin wanted to send a clear educational message on an issue that has divided Israeli society for many years: that is, no matter how the exemption is accomplished—even were it to be codified in a "Basic Law"—it would not withstand scrutiny. In fact, Cheshin hinted at this in the *Rubinstein* decision, when abolishing the Defense Minister's exemption system.[377] Using foundationalism in his *Movement for Quality Government* decision guaranteed that, even if the Knesset codified the exemption in a "Basic Law," it would not be valid. One may carefully suggest that since Cheshin was about to retire, he made sure he left his mark on the future development of the Israeli legal system with regard to both foundationalism in general and the honorable duty to serve in the army in particular.

But, did his reliance on foundationalism comport with his *United Mizrahi Bank* dissenting opinion? In *United Mizrahi Bank*, Cheshin enumerated a monist theory, under which Israel's parliament was sovereign when "legislating to others," as opposed to its more limited authority in the regulation of its own conduct. Thus, the Knesset may even legally declare that a man was a woman or vice versa.[378] In contrast, with regard to its own authority, the Knesset was restricted by the most fundamental unwritten value of democracy itself. Thus, the Knesset could not entrench its legislation beyond an absolute majority requirement or extend its term in office.[379] With the *Movement for Quality*

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[375] *Id.* (Cheshin's opinion).
[376] *See supra* note 44 and accompanying text.
[377] *Rubinstein* decision, *supra* note 369, at 541.
[378] *United Mizrahi Bank*, *supra* note 8, at 527. *Cf.* DICEY, *supra* note 88, at 5 ("It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.").
[379] *United Mizrahi Bank*, *supra* note 8, at 544-46. *See also supra* Part III.C.

Government decision, Cheshin was extending foundationalism. It now applied not just to the internal proceedings of the Knesset, but also when the Knesset was legislating for others.

Ironically, Cheshin who strove hard in the *United Mizrahi Bank* decision to interpret every substantive self-entrenchment of the Knesset as procedural, requiring merely "explicit" overrule by the Knesset, was now recognizing substantive external unwritten constraints on the Knesset's legislative power.[380]

It was CJ Barak who was more restrained this time around. There was no true controversy between him and Cheshin on the possibility of relying on foundationalism, if the appropriate case arose. But, the Tal statute was not the case that required it. After the *United Mizrahi Bank* opinion, Barak could easily utilize the "Basic Laws" to strike down the Tal Statute if that result was warranted. There was no need to refer to foundationalism as of yet.[381] Better to keep foundationalism reserved for situations in which there was a need to invalidate a "Basic Law," not a regular statute, to protect the core values of a Jewish and democratic State. That is to say, foundationalism was treated as an unconventional weapon reserved for a time when no other option was available. Short of that, through robust interpretation, regular statutes may always be found to violate "Basic Laws," if that result was found justified.

While Cheshin tried to expand the basis for judicial review over primary legislation in the *Movement for Quality Government* decision, Justice Grunis tried to restrict it to situations similar to those enumerated in footnote 4 of *Carolene Products*[382]--that is, to situations in which judicial review enhances rather than restricts the democratic process and is thus less counter-majoritarian. Thus, Grunis found that the Tal Statute was valid because it favored a minority group--ultra-orthodox men--and the majority of secular men did not need the Court's protection. There was no fear of the tyranny of the majority against itself.[383]

Not surprisingly, Barak rejected this theory outright. It was too restrictive of judicial review and did not align with Barak's own theory of substantive democracy. There was no need to import it to Israel from the United States, when it was never relied upon, at least not explicitly, in prior Israeli judicial decisions or by the Knesset when enacting "Basic Laws."[384] So far, Grunis is a lone voice in Israel's jurisprudence.

D. *Is Foundationalism a Fitting Ground for Israel's Developing Constitution?*

It is probably to foundationalism that Posner referred when suggesting that Barak has decided "that the Knesset cannot repeal" the "Basic Laws."[385] Barak, however, does believe that the "Basic Laws" are amendable, even too easily so, because their amendment usually requires only a bare majority of the MKs present. Posner's

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[380] *See supra* Part III.C..
[381] *Movement for Quality Government*, *supra* note 360, paras. 73-74 of Barak's opinion.
[382] *Id.* (Grunis opinion). *See Carolene Products, supra* note 144. Grunis did not mention *Carolene Products* but rather Ely's writings. *See* ELY, *supra* note 144. Ely, however, theorized the *Carolene Products* footnote.
[383] *Movement for Quality Government*, *supra* note 360 (Grunis opinion).
[384] *Id.* at paras. 75-81 of Barak's opinion.
[385] Posner, *Enlightened Despot*, *supra* note 1. (Though he did not discuss or refer explicitly to foundationalism).

description is nevertheless accurate as far as the core values of a Jewish and democratic State are concerned, as discussed above.

On first glance, the concept of an unconstitutional constitutional amendment seems self-contradictory. How can part of the constitution be deemed unconstitutional? Against what content should the text of the amendment be measured? Obviously, the amendment contradicts the text of the existing Constitution, otherwise no amendment would have been necessary. If the amendment were passed according to the applicable procedural rules set in the Constitution, why shouldn't the constitutional amendment be valid? Indeed, some constitutional systems, chief among them the U.S., rejected the idea of judicial review over the constitutionality of constitutional amendments. The U.S. Supreme Court treats this issue as non-justiciable. That is, on prudential grounds the court prefers to leave the judgment as to the validity of constitutional amendments to the political branches.[386] If judicial review over primary legislation suffers from counter-majoritarian difficulties, even though done on the basis of a supreme constitution, then judicial review of the very content of the Constitution itself is even more contentious on democratic grounds. Many scholars actually believe that the amending power is on par with the original constitutive power and that constitutional amendments may actually occur outside the process prescribed for amendment in the constitutional text.[387]

Nonetheless, many constitutional systems have decided to treat certain provisions within the Constitution as not amendable by explicitly granting them absolute entrenchment. Usually, such absolute entrenchment is granted to the democratic or republican nature of the State and certain fundamental rights.[388] Obviously, such provisions cannot prevent constitutional change from occurring when the popular will overwhelmingly and passionately favors it. They only raise the stakes for constitutional change by requiring a new Constitution or even the use of force to bring about change. The U.S. Constitution, for example, when adopted, guaranteed no change in the status of the institution of slavery for about twenty years, but eventually slavery was abolished by a civil war.[389] This is also an historical example manifesting that absolute entrenchments, even for a limited time, are not necessarily of liberal or even humane content.

The German "Basic Law" is famous for opting in favor of foundationalism. The horror of Nazism brought the drafters of their "Basic Law" to explicitly include inviolable provisions within it, especially those regarding the basic value of human dignity and the democratic character of the State.[390] This also explains why the German Federal

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[386] *See Coleman v. Miller*, 307 U.S. 433 (1939). This was not always the attitude of the U.S. Supreme Court. For discussion, *see* Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185 (1951).

[387] See discussion supra notes 268- 270 and accompanying text.

[388] *See* SAM BROOKE, CONSTITUTION-MAKING AND IMMUTABLE PRINCIPLES 52-78 (M.A. in Law and Diplomacy Thesis, The Fletcher School, Tufts University, 2005), available at http://fletcher.tufts.edu/research/2005/Brooke3.pdf (last visited July 15, 2008). Even the U.S. Constitution has similar clauses regarding states' representation in the Senate. It cannot be changed without the consent of the state involved. U.S. CONST. Art. V.

[389] *Id.*

[390] Article 79(3) of the German Basic Law states: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." Article 1 provides that "Human dignity shall be inviolable," and Article 20 defines that "Germany is a democratic and social federal state." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, Appendix A (2nd ed., 1997).

Constitutional Court, in its first major constitutional decision, introduced the notion of the unconstitutional constitutional amendment into the system.[391] It had strong textual support for it within its "Basic Law." It had a horrible history of extreme human rights abuses that led to a World War and taught the necessity to include such explicit limitations within the German constitutional system. Although the Court did not invent the doctrine of unconstitutional constitutional amendment from thin air, it has never acted upon it. It has so far remained a famous and important judicial *dicta* of educational value.[392]

But, what if the Constitution does not explicitly include an absolute entrenchment provision? This did not prevent the Indian Supreme Court from adopting the doctrine of the unconstitutional constitutional amendment and acting upon it to abolish some parts of its constitutional amendments.[393] The Indian Supreme Court, by a majority of seven to six, decided that its Constitution has some "essential features" and a "basic structure" that could not be violated, including by a constitutional amendment.

This decision was given in April 1973, and the Court relied on the history of the drafting of the Indian Constitution. It was suggested that the Constituent Assembly that drafted the Constitution both represented the various minority groups within the Indian society and reached its decisions consensually. Thus, it was not appropriate for a random supermajority of Parliament to amend the essential features of the constitutional document.[394] Furthermore, the decision should be seen as part of a power struggle between the legislative and judicial branches culminating in almost two years of "emergency rule" in India in the years 1975-1976, when Parliament suspended some of India's most important constitutional provisions with regard to fundamental rights.[395] These extreme historical and political circumstances led credence and legitimacy to the very innovative decision of the Court.

In introducing the doctrine of the unconstitutional constitutional amendment to the Israeli constitutional system, Barak, in *dicta,* relied on the German and Indian experiences.[396] But, is this reliance justified?

Barak agrees and often speaks of the fact that the Israeli Constitution is incomplete; that we are in the midst of the process of constitution-making.[397] In fact, "Basic Law:

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[391] The doctrine of the unconstitutional constitutional amendment was mentioned in *dicta* in the *Southwest State Case*, 1 BVerfGE 14, 32 (1951). It originated with the Bavarian Constitutional Court in 1950. *See* KOMMERS, *supra* note 390, at 542 n.90. The doctrine was further embraced in the *Article 117 case*, 3 BVerfGE 225, 234 (1953). KOMMERS, *id*., at 48.

[392] *See* Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. [I·CON] 460, 477 (2006) [hereinafter Jacobsohn, *Unconstitutional Constitution*]. Only a minority of justices were willing to exploit it in the *Klass case*, 30 BVerfGE 1, 33-47 (1970), to invalidate "an amendment to Article 10 of the Basic Law limiting the 'inviolable' right of 'privacy of posts and telecommunications.'" KOMMERS, *supra* note 390, at 48.

[393] *Kesvananda v. State of Kerala*, A.I.R. 1973 S.C. 1461. The decision is extremely long, containing 566 pages in the All Indian Reporter. At the time the decision was given, Article 368 of the Indian Constitution, prescribing the constitutional amendment procedure, did not include any language suggesting that the constitutional amendment power was qualified, except for stipulating certain procedures for amendments (supermajorities requirements).

[394] *See* David Gwynn Morgan, *The Indian 'Essential Features' Case*, 30 INT'L COMP. L. Q. 307 (1981).

[395] BROOKE, *supra* note 388, at 63-65; Morgan, *id.*, at 326-337; Jacobsohn, *Unconstitutional Constitution*, *supra* note 392, at 470-76.

[396] *See supra* Part IV.A.

[397] *See, e.g.*, Barak, *12th Anniversary, supra* note 76, at 57-58.

Legislation," which should have provided for the amendment process has not yet been enacted primarily due to lack of consensus on how much entrenchment, if at all, is warranted.[398] So far, it was the *United Mizrahi Bank* Court that decided on the procedure for amending non-entrenched "Basic Laws"—that is through "Basic Laws" alone.

This constitutional history hardly lends support to a doctrine of unconstitutional constitutional amendment. There is no textual basis for absolute entrenchment in Israel, in contrast to the German experience. It is difficult to decide on the essential features of a Constitution that is incomplete, in contrast to the Indian experience. Israel's constitutional history does not resemble the German, or even the Indian, experience to the slightest.

Moreover, ironically, both Shamgar and Barak suggested that there were limits on the Knesset's entrenchment power due to democratic considerations.[399] If there were limits to the Knesset's entrenchment powers, weren't they relevant also to entrenchment imposed by the judiciary (in the form of "unconstitutional constitutional amendment") rather than by the Knesset?

In the absence of explicit adoption by the Knesset of absolute entrenchment in constitutional provisions, we may still believe that certain values are so fundamental that the Knesset may not violate them. But, the circumstances that support such a judicial decision should be quite extreme. In the two specific instances in which the use of foundationalism was seriously considered in Israel—the *Laor Movement* and *Movement for Quality Government* cases—it can hardly be said that the statutes were so extreme as to rise to the level requiring the use of foundationalism.

Why should foundationalism be left to the extreme rather than be the measure for the forming of Israel's Constitution? Simply because, in the absence of explicit foundationalist provisions in the Constitution, we don't really know what foundationalism requires. We do not know the origins of its principles. There is no document ever agreed to that can serve as its basis. It is a form of secular religion, but religion nonetheless. Thus, for example, in the *Movement for Quality Government* case, both sides could have invoked foundationalism on behalf of their cause. The ultra-orthodox population could have claimed that their foundationalism required respect for Jewish tradition and Torah learning, thus necessitating the exemption of Yeshiva students from army service. Those serving in the army, on the other hand, could have invoked equality and protection of life as requiring no exemption for the ultra-orthodox community. History is actually full of examples of the use of foundationalism to advance not-so-liberal goals, such as slavery, racial segregation, or degradation of women.[400]

And even if there were explicit constitutional provisions establishing foundationalism, those could not have prevented constitutional change from occurring if the people and their representatives overwhelmingly, consistently, and deliberatively endorsed change. It would only have raised the stakes for achieving change by requiring that they resort to force. It is thus my contention that, only in extreme circumstances, when human people

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[398] *See* Weill, *the People's Consent, supra* note 78.

[399] *See supra* notes 90 & 91 (Shamgar) and 183 (Barak) and accompanying text.

[400] Thus, for example, before the Civil War, it was argued by both sides of the slavery debate that God's law either required or forbade that black people should be slaves. *See* ELY, *supra* note 144, at 50-51. During the nineteenth century, it was argued that women could not be attorneys since, by the law of nature, they were destined to fulfill the role of mothers and wives. *Bradwell v. Illinois*, 16 Wall. 130, 141 (1872) (Bradley, J., concurring). In *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), "the nature of things" required social segregation of blacks and whites on railroad trains.

cannot reasonably argue that certain political actions are extremely unjust, should foundationalism ever be referred to.[401] And may Israel's judiciary never need to resort to it. If ever truly needed, it is doubtful whether foundationalism can be successful in saving us from ourselves.

It is probably that the difficulties plaguing foundationalism have prevented the justices from explicitly basing the Israeli emerging formal Constitution on it as its sole basis. While perceptions of foundationalism—including the inviolable nature of individual rights and the inherent limited power of the legislature—may have motivated the justices in the first place when deciding *United Mizrahi Bank*, they were careful to suggest either monism (Shamgar and Cheshin) or dualism (Barak) as the main basis, treating foundationalism as a supplementary basis alone.

V. THE EMERGING HYBRID FORMAL ISRAELI CONSTITUTION

The story of Israel's constitutional development has been highly affected by asking the wrong question. Both political actors and legal and political science scholars have concentrated on the question of whether Israel has a formal Constitution rather than what kind of constitution Israel enjoys. Thus, we have witnessed bizarre events in recent years when, in different settings, the (then) CJ Barak spoke of Israel's Constitution and the (then) Chairman of the Knesset or the (then) Minister of Justice or the (then) Head of the Bar Association denied the existence of a Constitution.[402] But, the institutional dialogue should have focused on what kind of Constitution is forming in Israel rather than whether Israel has one at all. The either-or approach, influenced by the American *Marbury* rhetoric, was not compatible to Israel's conditions.

Israel, like other Commonwealth countries, has developed a hybrid constitution.[403] It has mixed features from all three models: monism, dualism, and foundationalism. It is monist, based on the Knesset's "Basic Laws," which were enacted without any special process to differentiate them from regular enactments. Most "Basic Laws," including "Basic Law: Human Dignity and Liberty," are not entrenched and may be amended by a regular majority of MKs present. Although the Knesset treats "Basic Law: Human Dignity and Liberty" as holy, it is only the Knesset's self-imposed "shaming" mechanism that prevents it from abolishing or amending the individual rights guaranteed within it.[404] It has dualist features that are very weak. The Court has decided that "Basic Laws" may only be amended via "Basic Laws," though so far this only entails a different title, not process of enactment. The public has not been involved in the process of enactment, thus

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[401] See A. Parush, *Judicial Activism, Natural Law and Legal Positivism—Judge Barak and the 'Omnipotent Knesset' Doctrine*, 17 TEL-AVIV UNIV. L. REV. 717 (1993) (supporting Barak's *Laor Movement dicta* if applied only in extreme cases).

[402] *See, e.g.,* Evelyn Gordon, *Judicial Activism and the Missing Deliberation*, 3 AZURE 44 (1998); Aharon Barak, *To Protect the Citizen from the Legislature*, speech given on May 26, 2003 at the annual conference of the Israeli Bar in Eilat, available at http://www.nfc.co.il/Archive/003-D-2715-00.html?tag=11-44-31 (last visited on July 21, 2008). Even the (retired) CJ Shamgar in a conference of the Israeli Association of Pubic Law in November 2008 has expressed the view that Israel lacks a Constitution, by which he probably meant to lament the fact that it is incomplete.

[403] For discussion of hybrid commonwealth constitutions, *see* Gardbaum, *supra* note 33. Gardbaum, however, did not discuss the Israeli Constitution.

[404] *See* Weill, *the People's Consent*, *supra* note 78, at 467-468.

no true popular sovereignty basis has so far emerged for the Israeli Constitution. Israel's dualism does not mean popular sovereignty, but it does describe the consequences of the Court's ruling in the sense that we have a two tier constitutional system, and that the Court protects "Basic Laws" from regular legislative encroachment by exercising judicial review. Its foundationalist character is again judge-made. Although the Court has not imposed foundationalism yet, it is unclear what would trigger such a holding. Thus, for example, it is left open whether the Court would treat the constitutional revolution as irreversible regarding the very existence of a Bill of Rights and the power of judicial review, even were the Knesset to attempt their abolition by amending the "Basic Laws." In a sense, one may conclude that so far Israel had a monist process, semi-dualist outcome and foundationalist motives for constitution-making.

Obviously, every country has its unique history of constitutional development. The process of constitution-making worldwide has always required, or even been typified, by compromises and even the use of force and coercion against dissenters and resorting to illegality to bring about change.[405] This article has attempted to portray Israel's compromises in its constitutional adoption process. But the impetus behind the article has been deeper. It argues that it is pertinent to understand the mixed characteristics of the Israeli formal Constitution since depending on one's view of the basis of the Israeli Constitution different results may ascribe to future constitutional dilemmas. Thus, for example, how should the Court react to an express infringement of the "Basic Laws" in a regular statute? What is the validity of an entrenchment found in regular statutes? How should the Court treat Knesset's breach of an entrenchment provision?[406] What constitutional amendment mechanism best fits Israel's current constitutional development?[407] Could there be an unconstitutional constitutional amendment? These are partial examples of the importance of understanding the strengths and weaknesses of the various bases of Israel's mixed constitution. From each base derives a different conclusion for Israel's constitutional future. None of the issues have yet been the subject of litigation. It is left for the future to determine which of the bases of the hybrid Israeli Constitution would be strengthened.

The Israeli "Basic Laws," like the British Human Rights Act of 1998, are another manifestation of the possibility of a middle ground between the supremacy of the constitution (or some would say of the judges) and the supremacy of the legislature, contrary to CJ Marshall's finding in *Marbury*. The Constitution established dialogue mechanisms--including a Canadian-style override mechanism in "Basic Law: Freedom of Occupation" and light entrenchment that, if used correctly, could have enabled a fruitful conversation between the Knesset, the Government, the Israeli Supreme Court and the People over constitutional issues.

The override mechanism in "Basic Law: Freedom of Occupation" could have been employed to enable the Knesset to either *a priori* or following a judicial decision protect an infringing statute from invalidity for a limited renewable period.[408] This could have

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[405] See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 22; ACKERMAN, TRANSFORMATIONS, *supra* note 22; Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (1999-2000).
[406] See discussion Part III.C. supra.
[407] See Weill, *the people's Consent, supra* note 78 (discussing what constitutional amendment mechanisms should be adopted if Basic Law: Legislation were to be enacted).
[408] Basic Law: Freedom of Occupation, § 8..

been used when either the Knesset accepts that the statute infringes on the "Basic Law" but has enacted it due to transient crucial State interests, or the Knesset disputes the Supreme Court's judgment in the matter. Of course, such override of judicial decision will apply only prospectively.[409] By requiring explicit override of the "Basic Law," the Knesset would have been forced to take public responsibility for its actions. The limited validity of such an override mechanism for four years requires the Knesset to gather anew, after each election, the required absolute majority of MKs to reenact it.[410] On its face, this is a simple task to achieve, since every governmental coalition requires the support of an absolute majority of MKs to govern in Israel's parliamentary system. But, in light of the legislative history of the "Basic Laws" enactment, it seems that it would not be so simple for the government to gather such support. Only few "Basic Laws" enjoyed the support of an absolute majority of MKs during their enactment, as elaborated above.[411] Furthermore, since Israel has a parliamentary system and its electoral system is based on proportional representation, the government which enjoys the support of a majority of the Knesset usually consists of many coalition partners with different constitutional agendas and it would require their consent to constitutional change. Since the constitutional revolution, some political parties have even included in their coalition agreements that no amendment of the "Basic Laws" would be done without their consent.

Thus, the override mechanism could provide a very potent dialogue between the various political actors involved. Some have even suggested adopting a general override to apply to all Israel's "Basic Laws" dealing with individual rights, and not just to "Basic Law: Freedom of Occupation," as is currently provided.[412] Of course, such an override mechanism, if it would require not more than the consent of an absolute majority of MKs and be renewable, could serve as a compromise between strong advocates of constitutionalism and judicial review, and those in favor of parliamentary sovereignty.

The relative flexible amendment process of "Basic Laws" could have been used by the Knesset to respond to the Israeli Supreme Court decisions, as well.[413] In fact, the (then) CJ Barak in the *United Mizrachi Bank* decision enumerated the amendment mechanism available to the Knesset as one of the justifications for the legitimacy of judicial review

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[409] For a similar interpretation of the Canadian override mechanism, which served as inspiration for the Israeli provision, *see* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA ch. 39 (5th ed. vol. 2, 2007) (supporting the use of the override when the legislature disputes constitutional decisions of the Supreme Court and preferring the override to American court packing techniques). On an interesting analysis of whose interpretation should matter in constitutional issues, *see* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[410] Basic Law: The Knesset, § 8, provides that "the term of office of the Knesset shall be four years from the day on which it is elected."

[411] *See supra* Part III.B.

[412] See proposal of the Law, Legislation and Constitution Committee of the Knesset for Constitution to Israel based on broad consent, available at http://www.huka.gov.il/wiki/index.php/English. *Cf.* Draft of Basic Law: Judiciary (Amendment-Judicial Review over Primary Legislation) of April 12, 2007 available at http://www.justice.gov.il/mojheb/TazkireyHok (last visited on July 21, 2008). According to the proposed Basic Law, only the Israeli Supreme Court by a two-thirds majority decision will be authorized to invalidate a law of the Knesset, provided that the law infringes only the two "Basic Laws" dealing with individual rights or it infringes the supermajority requirements of other Basic Laws. The Knesset will be authorized to override such judicial decision by the support of an absolute majority of its members.

[413] Such amendment may be subject to a Court's ruling of an unconstitutional constitutional amendment as elaborated in Part IV. *supra*.

over primary legislation.[414] In the United States, for example, the Constitution was amended four times to overturn decisions of the U.S. Supreme Court in very contentious constitutional matters.[415] The ease with which the Knesset could have amended the "Basic Laws" in the face of judicial invalidation requires both the Knesset and the Supreme Court to weigh carefully and seek balance in each constitutional dilemma. So far, the Knesset withstood the temptation to amend the 1992 "Basic Laws" in response to judicial decisions, and that alone reflects its own acknowledgement of the need to respect individual rights. The Knesset does not accord such reverence to "Basic Laws" dealing with the structure of government, which it often amends. Furthermore, since the *United Hamizrahi Bank* decision, the Knesset has accepted the Court's judicial review "trumping" power as manifested time and again in its willingness to amend regular statutes found by the Court to be unconstitutional.[416] This may legitimize Israel's formal Constitution over time, based on *ex-post facto* acquiescence. That is, with time, the content if not the process of constitution-making might be accepted as binding.[417]

Israel is seriously considering enhancing its constitutional commitments via a comprehensive enactment of a new complete Constitution that may require broad consensus on the part of both Knesset members and the citizenry. The last head of the Knesset's Constitution, Legislation and Justice Committee, Professor Menachem Ben-Sason, has continued the task of its predecessor to draft a full new Constitution for Israel.[418] In light of Israel's constitutional past, it is however far from clear whether Israel could achieve the replacement of its fragile hybrid Constitution with a dualist one based on popular sovereignty. It is uncertain whether both the Knesset and the fractured Israeli society could agree on such a formal comprehensive Constitution.

These are trying times for the Israeli legal system. Never has the tension between the Supreme Court and the government been so high. While CJ Beinish, Barak's successor, tries to maintain the constitutional revolution's achievements, the last Minister of Justice (and former distinguished Tel-Aviv University Professor of Law) Friedman has attempted to undo some of them, especially with regard to judicial review.[419] Anyone voicing an opinion in this debate is a foe of one camp and a friend of another. Both sides contend that accepted, almost universal, constitutional norms condone their stand and reject the other in the debate, which is an alarming manifestation of how dangerous

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[414] *See United Mizrahi Bank*, *supra* note 8, at 424-25.

[415] *See, e.g,.* Laurence H. Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

[416] For decisions finding regular statutes unconstitutional see *supra* note 308.

[417] *Cf.* Weill, *Evolution, supra* note 215, at 456-58 and my discussion supra note 244. See also Or Bassok, *A Decade to the 'Constitutional Revolution': Israel's Constitutional Process from a Historical-Comparative Perspective*, 6 MISHPAT UMIMSHAL 451 (2003) (discussing the potential that Israel's Constitution would acquire legitimacy in an evolutionary manner).

[418] *See* http://huka.gov.il/wiki/index.php/English (last visited July 21, 2008).

[419] *See supra* note 412. On July 28, 2008 the Knesset enacted an amendment to Courts Statute requiring a supermajority of nomination committee to appoint justices to the Supreme Court, instead of the regular majority customary since the establishment of the State. It was done to inhibit the justices' ability to nominate their successors, though it actually grants veto power to the justices, who compose third of the committee's members. See Courts Statute (Amendment no. 55), 2008 available at: http://www.knesset.gov.il/privatelaw/Plaw_display.asp?lawtp=2; http://www.knesset.gov.il/Tql//mark01/h0012136.html#TQL (preliminary reading in the Knesset on May 21, 2008).

comparative constitutionalism might become when used without prudence. It is left for the academia to mourn this turn of events and throw some light on the debate.

Annex : Chronological Table