FROM AN UNWRITTEN TO A WRITTEN CONSTITUTION: THE ISRAELI CHALLENGE IN AMERICAN PERSPECTIVE

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I. INTRODUCTION

Constitutional adjudication raises the most fundamental questions with which a legal system must grapple — questions about forms of government and ways of life. The basic difficulties faced by different systems are similar: defining the relative power of the judiciary vis-à-vis other branches of government and protecting a sphere of personal autonomy from the state. However, different legal systems may deal with these difficulties in different ways, particularly in light of their political histories and legal cultures. For this reason, lessons learned from the experiences of another legal system may be misleading in part. On the other hand, freedom from one's immediate national context may permit a fresh perspective for enlightening constitutional discussions. With these considerations in mind, I venture to look at the constitutional change evolving now in Israel — a change which is unique in many respects — as enacted gradually and not as an outcome of revolutionary events. I will try to view the debates that this change is about to bring forth within the Israeli legal system, as well as within Israeli society, in the context of the American constitutional experience.[1] At the same time, I hope, the Israeli perspective may add some insight into the bitter controversies in American constitutional theory, specifically the controversies over limits of judicial review and the correct approach to constitutional interpretation.[2]

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1. For the purposes of the current comparison, it will suffice to discuss the history of the federal constitution, although in the American context state constitutions are of significance, too. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Ronald K.L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599 (1986).

2. *See infra* Part VII. An early discussion comparing the evolution of judicial review in Israel and the United States is found in Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 Cardozo L. Rev. 2013 (1989). That article had a different

Following this introduction, the discussion describes the historic developments which led to the current constitutional change. Part II gives a general explanation of the change brought about by the enactment of two new Basic Laws.[3] Part III addresses the relevance of the American perspective to the evaluation of this change. Part IV provides an historical overview of the political and legal circumstances that influenced Israeli abstention from enacting a constitution. It also explains the partial solution developed by the Israeli Supreme Court, which declared and enforced unwritten constitutional principles. Part V elaborates on the disadvantages of Israel's unwritten constitution and the circumstances that led to a new initiative to enact a formal constitution. Part VI reviews the two new Basic Laws that were the outcome of this initiative — Basic Law: Freedom of Occupation and, especially, Basic Law: Human Dignity and Freedom. Against this background, the core of this Article is dedicated to questions of constitutional interpretation. The future of Israeli constitutional adjudication is very much dependent on the interpretation of the new Basic Laws, particularly with regard to the scope of the rights protected by them and the availability of judicial review. These questions of interpretation are discussed in Part VII, with a review of the competing interpretive methods at the center of the American constitutional debate: text-centered interpretation, history-centered interpretation (known usually as originalism) and value-centered interpretation. At the outset, no preference is declared for any method of interpretation. Instead, the application of each of these interpretive traditions is attempted as a means to evaluate their relative merits. Following the interpretive discussion, Part VIII of the article addresses the legitimacy problem of judicial review. This is a long-debated issue in constitutional theory. I take a stand in the debate, but I do not profess to solve the matter. Rather, I try to evaluate the influence of the legitimacy problem on the application of the new Basic Laws by the Israeli Supreme Court. Part IX concludes the discussion with reference to the future of the Israeli constitutional project, including the deficiencies that still must be addressed.

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focus, concentrating on the judicial response to challenges imposed on the Supreme Court by political crisis, e.g., the slavery question decided in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

3. These are laws intended to form the Israeli Constitution, as explained *infra* in the text accompanying notes 15–16.

II. THE CHANGE IN ISRAELI LAW

In the last two years, the Israeli legal system has begun to experience a fundamental constitutional change. According to Aharon Barak, one of Israel's most prominent scholars, it even deserves the title of a "constitutional revolution."[4] This change is the passage from the concept of an unwritten constitution, following the English tradition, to the enactment of formal constitutional guarantees of civil rights. The essence of this change is not the recognition of basic human rights as part of the legal system. That recognition proved to be part of the Israeli legal system at its inception, due to the enumeration and enforcement of these rights by the Israeli Supreme Court.[5] Rather, the change is aimed at accepting the concept of judicial review as applied to the legislature, including invalidation of statutes. In other words, the Israeli legal system is directing its Supreme Court into the most problematic area of judicial review — the value-laden sphere of protecting civil rights against infringing legislation.

III. A FRESH START FROM THE AMERICAN PERSPECTIVE

The question is how the Israeli Supreme Court will handle its new mission. The American system has rich experience in coping with the equivalent question regarding the limits of judicial review by the Supreme Court. I will try to examine whether the answers suggested in the American context may provide the Israeli Supreme Court with effective guidelines in establishing its constitutional jurisdiction. Should it guide itself by "neutral principles," as suggested by Professor Wechsler in his famous article[6] following *Brown v. Board of Education*?[7] Should it adhere to the concept of "original intent"[8] right from the very beginning, when it is still possible to recollect it? These are the types of questions addressed in this Article. At the threshold of a new practice of constitutional review, addressing these questions is imperative. From the Israeli perspective, the American debate is

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4. Aharon Barak, *HaMahapecha HaHukatit: Zechuyot Adam Muganot* [*The Constitutional Revolution: Protected Human Rights*], 1 Law & Gov't in Isr. 9 (1992–93).

5. *See infra* Part IV.

6. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). This approach is discussed more fully *infra* in the text accompanying notes 179–80.

7. 347 U.S. 483 (1954).

8. For a discussion of this mode of interpretation, see *infra* Part VII.B.

helpful because it illuminates possible future controversies and alternative approaches to constitutional adjudication. From the American perspective, the nascent Israeli experience may be an interesting test case, free from the burden of history.

IV. HISTORIC BACKGROUND: AN UNWRITTEN CONSTITUTION AS A COMPROMISE

A discussion of the prospects of judicial review in Israel cannot be handled without general reference to the history of and the reasons for the current constitutional change at a relatively late stage in the development of the Israeli legal system. This discussion is especially pressing since the current change did not occur as a result of any particular historic event.

A. The Political Compromise

When Israel was established in 1948 after thirty years of the English Mandate, the question of forming a constitution was self-evident. The promise of a constitution was even mentioned in the Declaration of the Establishment of the State of Israel, also known as the Israeli Declaration of Independence — the first official document of the state. According to the declaration, the constitution was intended to be accepted by the first elected parliament, which was defined in the declaration as the "Elected Constituent Assembly."[9]

However, soon after the declaration, events took a different course. Internal political debates regarding the content of the future constitution rendered it impossible to agree upon a text which would gain broad-based support in the heterogeneous Israeli society, consisting of immigrants from diverse cultural backgrounds with strongly-held opposing ideologies — nationalist, socialist and religious.[10] Moreover, these debates transpired against the background of an indeterminate state of national security as the war

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9. Declaration of the Establishment of the State of Israel, 1 Laws of the State of Israel [L.S.I.] 3, 4 (1948). The declaration refers to "the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948." *Id.*

10. Israeli society was formed mainly by Jewish immigrants from all over the world, bringing with them different cultural backgrounds and ideologies. For a discussion of the heterogeneity of Israeli society, see 22 New Encyclopaedia Britannica 135–36 (15th ed. 1986).

of independence continued.[11] The difference between these circumstances and the social background supporting the birth of the American Constitution can be easily traced. The American Constitution was formed by and for a relatively homogeneous political society.[12] The Framers had to face controversies and develop compromises,[13] but these were differences and compromises within a society with a common background.[14] Similar essential preconditions for a broad social agreement did not exist in the newly born Israeli state.

The eventual compromise in Israel took the form of a resolution accepted by the first Knesset (the Israeli parliament) in 1950 to enact the future constitution gradually — chapter by chapter in the form of "Basic Laws."[15] The idea was to form a process in which the controversies would be addressed one by one, and whenever an agreement was achieved, it would be brought to the Knesset and enacted. These Basic Laws, accumulated together, would form the future Israeli Constitution.[16] In the meantime, lack of a constitution did not seem to be an illegitimate situation in view of the model of the English system, in which there is no written constitution.[17] However, in the beginning, the lack of a formal constitution was not an ideal, but rather a political compromise.

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11. The Israeli war of independence against the neighboring Arab countries lasted more than a year, until 1949. *See id.* at 144.

12. Most of the immigrants to the New World at that time were of northern or western European origin. *See* 29 New Encyclopaedia Britannica 240 (15th ed. 1986).

13. For a discussion of these compromises, see 1 R.D. Rotunda and J.E. Nowak, Treatise on Const. Law 27–34 (2d ed. 1992).

14. Of course, this homogeneity was also the result of exclusion of some social groups, like African-Americans, from the political process.

15. This was the so-called Harari Resolution, stating:

> The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State's constitution.

5 Knesset Protocols 1743 (1950).

16. *Id.*

17. *See infra* note 37.

B. From a Gradual Constitution to No Constitution

For many years, the gradual enactment of the future constitution proved to be an abstention from doing just that. Reality did not become simpler. Internal ideological differences in society proved to be ever present. More specifically, an irreconcilable debate raged between the secular society and the religious groups, the latter forming only a minority but a significant one which was also politically well-organized.[18] The religious parties opposed the ever-recurring proposals to enact a constitution for several reasons.[19] Ideologically, they found the idea of a secular constitution offensive.[20] Practically, and primarily, they opposed a bill of rights which would invalidate laws encroaching upon religious values.[21]

Another dilemma raised by the prospect of a constitution involved the reconciliation of the protection of human rights and the state of emergency the state faced from its very first day. This dilemma did not reflect a disregard for the importance of human rights. Nevertheless, it was apparent that any constitution would have to take into account security requirements. There was a fear of two opposing dangers in the constitution: on the one hand, lack of legal rules necessary to cope with the state of war, and on the other, reluctance to adopt a constitution which would not give due respect to human rights. It was believed that a constitution of the latter type would not serve as a deserving model for generations to come.[22]

As a result of these tensions, the constitutional project declined. There were no internal social developments nor international breakthroughs that could revive the project of drafting a constitution. The controversies did not diminish but, to the contrary, worsened. Legislative initiatives to propose drafts of a Basic Law recognizing the

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18. Religious parties (among others) have participated in all Israeli elections since the state's establishment, and they have always been represented in the Knesset.

19. For a discussion of the opposition of the religious parties, see Ruth Gavison, *The Controversy Over Israel's Bill of Rights*, 15 Isr. Y.B. on Hum. Rts. 113, 148–49 (1985).

20. The argument is that the Torah (Jewish Bible) is the only true constitution for a Jewish state.

21. Sabbath laws may serve as an example. An even more problematic example is that of family law. *See infra* note 51 and accompanying text.

22. *See* Gavison, *supra* note 19, at 137–38. The conflict between security measures and human rights considerations is an ever-recurring one in times of national emergency. Controversial security measures may include administrative detention and demolition of homes. *See also infra* notes 53–54.

supreme status of civil rights did not gain sufficient support and failed in the legislative process.[23]

There was some progress in the project of enactment of the Basic Laws. However, the Basic Laws enacted were mainly structural laws defining the form of government and the powers of the government's three branches — the executive,[24] the legislative[25] and the judiciary.[26] Generally speaking, these laws followed from understandings achieved when the state was established, and set up a democratic regime adhering to the English model of a parliamentary system. In Israel, these structural issues lacked the unique complexities which arise in a federal system like that of the United States.[27] However, the constitutional project could not be completed without an agreement on the heart of every modern constitution: a definition of individual rights and the form of their protection.[28]

C. The Growth of the Unwritten Constitution

The formal description of the failure to enact Basic Laws protecting civil rights addresses only half of the Israeli constitutional agenda. Even without a recognition of these rights in a formal constitution, the Israeli Supreme Court established their legal status through its precedents. The lack of formality was not considered to be a lack of recognition. The court concluded and declared that the legal status of basic human rights is part of the chosen form of government (a democracy), the national spirit and the common understanding,

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23. For the history of the failed proposals to enact civil rights in Israel, see generally Gavison, *supra* note 19; 2 Amnon Rubinstein, HaMishpat HaKonstitutsiyoni shel Medinat Yisrael [The Constitutional Law of the State of Israel] 704–07 (1991). *See also* Amos Shapira, *Why Israel Has No Constitution*, 37 St. Louis U. L.J. 283 (1993).

24. The original version, Basic Law: The Government, 22 L.S.I. 257 (1969), was recently replaced by a new version, Hok Yesod: HaMemshalah [Basic Law: The Government], Sefer HaHukim [S.H.] 214 (1992), which will come into force beginning with the next elections (for the 14th Knesset) and enable direct election of the prime minister.

25. Basic Law: The Knesset, 12 L.S.I. 85 (1958).

26. Basic Law: Judicature, 38 L.S.I. 101 (1984).

27. In a unitary state like Israel, the question of allocation of powers between the federal government and the states does not exist.

28. The other structural Basic Laws that were enacted are: Basic Law: Israel Lands, 14 L.S.I. 48 (1960); Basic Law: The President of the State, 18 L.S.I. 11 (1964); Basic Law: The State Economy, 29 L.S.I. 273 (1975); Basic Law: The Army, 30 L.S.I. 150 (1976); Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980); and Hok Yesod: Mevaker HaMedinah [Basic Law: The State Comptroller], S.H. 30 (1988).

demonstrated by the text of the Israeli Declaration of Independence,[29] as well as by history.[30]

The rights declared and enforced by the court encompass the classic understanding of the scope of human rights in the international community, including, but not limited to: personal liberty,[31] freedom of speech,[32] freedom of religion and conscience,[33] equality,[34] and

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29. The relevant part of the Israeli Declaration of Independence states:

> The State of Israel . . . will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

1 L.S.I. 3, 4 (1948).

30. A landmark precedent in this context is Kol Ha'am v. Minister of the Interior, 7 Piskei Din [P.D.] 871, *translated in* 1 Selected Judgments of the State of Israel 90 (1953) [hereinafter Selected Judgments], from which the following may be cited:

> The system of laws under which the political institutions . . . have been established and function are witness to the fact that this is indeed a State founded on democracy. Moreover, the matters set forth in the Declaration of Independence — especially as regards basing the State 'on the foundations of freedom' and securing freedom of conscience — mean that Israel is a freedom-loving country. It is true that the Declaration 'does not include any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws' . . . but in so far as it 'expresses the vision of the people and its faith,' we are bound to pay attention to the matters set forth therein when we come to interpret and give meaning to the laws of the state.

Id. at 884. The decision nullified an order promulgated by the minister of the interior to close down a newspaper for a few days.

31. Al-Karbutli v. Minister of Defense, 2 P.D. 5 (1948).

32. The basic precedent is *Kol Ha'am*. More recent precedents include Laor v. Theater Review Bd., 41(1) P.D. 421 (1987); Shnitzer v. Chief Military Censor, 42(4) P.D. 617 (1988).

33. Peretz v. Local Council of Kfar Shmaryahu, 16 P.D. 2101, 2116, *translated in* 4 Selected Judgments 191 (1962).

34. The basic precedent is once again *Peretz*. *See also* Younes v. Director Gen. of the Prime Minister's Office, 35(3) P.D. 589 (1981).

procedural due process, which is termed the "rules of natural justice."[35] It is important to emphasize that the judicial recognition of basic civil rights was not mere empty rhetoric but rather an operative prescription. The court enforced those rights against infringement by government authorities. Government violations of civil rights were considered ultra vires and therefore void. In the years to come, the Israeli system was proud to regard this line of precedents as Israel's unwritten constitution.[36]

The unwritten Israeli Constitution was an unwritten constitution following the English model — meaning a judicial protection of human rights without any written constitution.[37] In the United States, the idea of an unwritten constitution is also part of the constitutional debate but in a different form. The American debate raises the question of unwritten judicial supplements to the rights enshrined in the constitutional text.[38] I will come back to this debate later on and mention it now only to raise awareness of the differences between the two traditions of unwritten constitutions — an unwritten constitution as an independent idea (the Israeli and English models) and the unwritten constitution as a supplement or a broad understanding of a given constitutional text, which is part of the American debate.

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35. Berman v. Minister of the Interior, 12 P.D. 1493, *translated in* 3 Selected Judgments 29 (1958).

36. *See* Jeffrey M. Albert, *Constitutional Adjudication without a Constitution: The Case of Israel*, 82 Harv. L. Rev. 1245 (1969); Amos Shapira, *Beit HaMishpat HaElyon keMagen Zechuyot HaYesod shel HaPerat Be Yisrael — Mivtzar Meshuryan o Namer shel Niyyar?* [*The Supreme Court as Guardian of the Individual's Fundamental Freedoms in Israel — A Fortified Bastion or a Paper Tiger?*], 3 Tel Aviv U. L. Rev. 625 (1974); Amos Shapira, *The Status of Fundamental Individual Rights in the Absence of a Written Constitution*, 9 Isr. L. Rev. 497 (1974); Baruch Bracha, *The Protection of Human Rights in Israel*, 12 Isr. Y.B. on Hum. Rts. 110 (1982); Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 Temp. L.Q. 405 (1983); Asher Maoz, *Defending Civil Liberties Without a Constitution — The Israeli Experience*, 16 Melb. U. L. Rev. 815 (1988); 2 Rubinstein, *supra* note 23, at 701–848.

37. For the English model, see Lloyd of Hampstead, *Do We Need a Bill of Rights?*, 39 Mod. L. Rev. 121 (1976); Christian G. Fritz, *An Entrenched Bill of Rights for the United Kingdom: The Constitutional Dilemma*, 10 Anglo-Am. L. Rev. 105 (1981); M. Glenn Abernathy, *Should the United Kingdom Adopt a Bill of Rights?*, 31 Am. J. Comp. L. 431 (1983).

38. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975).

V. THE NEED FOR A WRITTEN CONSTITUTION

The development of an unwritten constitution in Israel raised the question whether a written constitution was really necessary. It was even possible to identify some seeming advantages of an unwritten constitution — it is not imprisoned by textual definitions and therefore can preserve the spirit of constitutional rights in changing times; it circumvents the confusion of defining limitations on human rights for reasons of necessity.[39]

Nonetheless, there was also a significant disadvantage to this form of protection of civil rights — in comparison to the American system's means of civil rights defense — in the sphere of judicial review of legislation. In Israel, the fundamental premise of the legal system (again, adhering to the English model) was the sovereignty of the legislature.[40] The meaning of this sovereignty is the absolute supremacy of laws of the Knesset, notwithstanding their substantive content.[41] The result is that civil rights are not protected against repugnant legislation but rather only against infringements of an administrative nature (by the government, including all branches of the executive). In other words, the protection of civil rights is available but limited in application. The Supreme Court of Israel has not ventured to violate this basic premise, subject to the special exception of legislation infringing on entrenched provisions of Basic Laws, which is explained *infra*.[42] The Court has not felt free to change a common understanding regarding the limits of the rule of the majority in the Israeli democracy. It may be said that among other considerations, the

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39. For considerations in favor of the unwritten constitution, see Lord Diplock, *On the Unwritten Constitution*, 9 Isr. L. Rev. 463 (1974).

40. For the English doctrine, see H.W.R. Wade, *The Basis of Legal Sovereignty*, 1955 Cambridge L.J. 172.

41. *See, e.g.*, Ezuz v. Ezer, 17 P.D. 2541, 2547 (1963) ("The Knesset is sovereign and has the power to enact any law and give it content — as it pleases. It is entirely inconceivable that a duly enacted Knesset law, or any provision thereof, should for any reason be deprived of validity."). *See also* Batzul v. Minister of the Interior 19(1) P.D. 337, 349 (1963) ("The Knesset is supreme in the enactment of laws. The Knesset is free to choose the subject matter of its laws and to determine their contents. Every law or part of law which is enacted by the Knesset must be enforced . . . . After a law has been enacted by the Knesset and published in the Official Gazette, we must bow before it and not doubt its provisions, instructions and directives."). For criticism of the doctrine, see Yizhar Tal, *Mehokek Kol Yachol: HaUmnam*, [*Legislative Omnipotence Reconsidered*], 10 Tel Aviv U. L. Rev. 361 (1985) and *infra* Part VI.B.2.

42. *See infra* Part VI.B.2, especially the text accompanying notes 85–88.

Court acknowledged that the controversy over the proposals to enact a Basic Law of civil rights was really a conflict over the availability of judicial review of legislation. This was the "danger" feared by the religious parties, and this was also the real question underlying the national security issue. In other words, the question of judicial review of legislation was understood to be a totally different matter from the recognition of the legal status of civil rights.[43] There is a general recognition of the importance of human rights among Western democracies, but there is no self-evident solution to the question of judicial review of legislation. Issues remain as to whether judicial review should exist and as to its legitimate limits. Another impending question is the appropriate process for such review: Should review occur through standard judicial proceedings or according to a special constitutional process in a constitutional court?[44]

Until relatively recently, the unavailability of judicial review was not perceived necessarily as a deficiency of the Israeli system. Some celebrated the democratic notion of living by the laws enacted by the representative legislature and thereby avoiding "the counter-majoritarian difficulty"[45] depicted in Alexander Bickel's

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43. The closest the Israeli Supreme Court has come to recognition of judicial review was the important dicta of Judge Aharon Barak in Tnuat Laor v. Speaker of the Knesset, 44(3) P.D. 529, 551–54 (1990). Judge Barak raised the possibility of reassessment of the basic premise regarding sovereignty of the Knesset in extreme cases of legislation repugnant to basic values such as equality. However, he stated at the same time that it would be unacceptable to change this precedent within the present social understanding regarding the limits of the court. For a jurisprudential discussion of the question, see Adi Parush, *Aktivizm Shiputi, Pozitivizm Mishpati uMishpat Tiv'i — HaShofet Barak veDoktrinat HaKnesset HaKol-Yecholah* [*Judicial Activism, Natural Law and Legal Positivism — Judge Barak and "The Omnipotent Knesset" Doctrine*], 17 Tel Aviv U. L. Rev. 717 (1993).

44. For a discussion regarding the French system, see Barry Nicholas, *Fundamental Rights and Judicial Review in France*, 1978 Pub. L. 155; Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. Rev. 363 (1982). With regard to Germany, see Michael Singer, *The Constitutional Court of the German Federal Republic: Jurisdiction Over Individual Complaints*, 31 Int'l & Comp. L.Q. 331 (1982); David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 Sup. Ct. Rev. 333. *See generally* Wilhelm Karl Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 Cornell L. Rev. 250 (1966); Amos Shapira & Baruch Bracha, *The Constitutional Status of Individual Freedoms*, 2 Isr. Y.B. on Hum. Rts. 211 (1972).

45. The "counter-majoritarian difficulty" posits that judicial review repels the will of the majority, upon which a democratic regime is supposed to be based. Alexander M. Bickel, The Least Dangerous Branch 16 (2d ed. 1986).

famous work, *The Least Dangerous Branch*.[46] Others warned of the danger of politicizing judicial nominations if judicial review were to be established.[47] These arguments may look familiar to the American reader agonizing over the same difficulties in an established system of judicial review.[48] In addition, the relative contentment with the unwritten constitution owed a great deal to the stability of the democratic system in Israel. The power of the legislature to enact statutes as it preferred was not exercised to its limits. Built-in constraints on the political system and public opinion proved to be natural restraints upon the legislature.[49] True, there were laws restricting human rights in disputable matters. The examples are found once again mainly in the two most controversial areas, national security and state-religion relations. In the sphere of national security, there were broad powers of military censorship, arrest and deportation, reflecting English legislation still in force from the days of the English Mandate.[50] In the sphere of state-religion relations, there were some laws incorporating religious values, like religious marriages.[51] There is complete freedom to choose one's religion or repudiate religion, but the choice of civil marriage is not available. This creates a serious problem of freedom of religion, a practical bar on marriages of people holding different religions, and also problems of equality, considering the fact that religious law is not egalitarian. However, on the whole, these restrictions are the exceptions — very problematic, yet still exceptions. Moreover, the Supreme Court interpreted these rules in a limiting manner: in favor of the protection of human rights, to the extent that the restrictive language is not express.[52] The "normalization" of life also had its influence on the legislature, and

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46. *Id.*

47. *See* Moshe Landau, *Hukah K'Hok Elyon L'Medinat Yisrael?* [*A Constitution as a Supreme Law of the State?*], 27 Hapraklit 30 (1972). The view advocated by this article, written by a former chief justice of the Israeli Supreme Court, is similar to the classic piece by Learned Hand, The Bill of Rights (1958), insofar as they both distinguish between judicial review in structural matters and judicial review in the domain of rights and values.

48. *See* Laurence H. Tribe, God Save This Honorable Court (1985).

49. In this context, it is important to mention that since the establishment of the state, no single party has ever had a majority in the Knesset.

50. *See* Defence (Emergency) Regulations, 1945, Palestine Gazette No. 1442, at 1055 (Supp. 2, 1945).

51. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 7 L.S.I 139 (1953).

52. For this approach, see Shnitzer, 42(4) P.D. 617, 626–28 (involving judicial intervention in the discretion of military censorship).

some of the most troubling emergency powers were amended.[53] Other emergency powers exist only to be implemented in times of war, as a matter of practice.[54]

In the long run, discontent with the lack of constitutional judicial review has grown. More and more, people find it disturbing — within the professional community, as well as among the public in general. The reasons for this discontent stem from developments in Israeli society and the Israeli political system, especially during the eighties. In general, it is possible to say that those years mark a deterioration in political morality and ethics in Israel. Politicians proved to have less self-restraint and sensitivity to public opinion.[55] The real problem lay in the unstable balance in the parliament. Israel has a multi-party system, in which the government is formed by a coalition of parties capable of achieving a majority in the votes administered in the Knesset.[56] Election results frequently make it very difficult to form such a majority.[57] Within this background, the relative political power of the small parties, and of practically every member of the Knesset, grows out of proportion. The result is unlimited demands from, and even threats by, interest groups, each having the potential of negating the delicate majority supporting the government.[58] In these circumstances, the politicians of the ruling party — every ruling party — tend to favor demands by minority

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53. Emergency Powers (Detentions) Act, 33 L.S.I. 89 (1979), *amending* the stricter Defence (Emergency) Regulations, 1945, Palestine Gazette No. 1442, at 1055 (Supp. 2, 1945). This statute abolished the military deportation power and limited the power of administrative detention. This applies, of course, only to Israel itself and not to the occupied territories.

54. More elaborate discussions are found in Alan Dershowitz, *Preventive Detention of Citizens During a National Emergency — A Comparison Between Israel and the United States*, 1 Isr. Y.B. on Hum. Rts. 295 (1971); Shapira, *The Israeli Paradox*, *supra* note 36, at 442–58; Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375 (1989); Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 Stan. J. Int'l L. 39 (1991); 2 Rubinstein, *supra* note 23, at 612–38.

55. For the political and social developments during this period, see Menachem Mautner, *Yeridat HaFormalizm veAliyat HaArachim baMishpat haYisraeli* [*The Decline of Formalism and the Rise of Values in Israeli Law*], 17 Tel Aviv U. L. Rev. 503, 580–85 (1993).

56. *See* 1 Rubinstein, *supra* note 23, at 479–80.

57. Not only has no single party ever gained a majority in the Knesset, but such a majority has not been formed even when the bigger parties are supported by those smaller parties which advocate similar ideologies (their natural allies).

58. *See* 1 Rubinstein, *supra* note 23, at 26–27, 32–33; Mautner, *supra* note 55, at 585. *See also infra* note 60.

groups, including illegitimate demands,[59] over basic notions of public fairness and the clear will of the public (including of supporters of the ruling party itself).[60] Using James Madison's terminology, during those years, Israel was a paradigm for the danger of factions.[61] The result was a distrust of politics, and therefore a distrust of a legislature dominated by degenerate politics.

This new mood was exemplified by growing support for a new movement called "Constitution to Israel," which had the support of both left-wing and right-wing individuals.[62] Demonstrations were held in favor of constitutional change.[63] Due to the instability caused by the multi-party system, considerable emphasis was given to a concrete proposal to change the electoral system, primarily through separate election of the prime minister, in order to limit his dependence on demands of small parties. However, this practical emphasis should not be disconnected from the broader background.

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59. These are usually demands for funding and subsidies that go beyond the normal standards for such demands.

60. An extreme example is the political agreement taken to the Supreme Court in Dzerdzevsky v. The Prime Minister, 45(1) P.D. 749 (1990). In this matter, a faction of Knesset members left their party and conditioned their continued support of it on the fulfillment of several demands, including political nominations and a waiver of debts owed to the party.

61. The Federalist No. 10 (James Madison) (P. Ford ed., 1898). I refer here to the phenomenon of politics dominated by irresponsible interest groups. *See also* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

62. "Constitution to Israel" is an association not organized as a political party. It dedicates its actions to the support of a constitutional change in Israel. Therefore, it is supported by people who oppose each other in matters that divide the political arena between "right" and "left." (Generally speaking, in Israel, being "right-wing" is associated mainly with opposing territorial concessions, while being "left-wing" is associated mainly with supporting such concessions as an integral part of peace with the neighboring Arab countries.). The movement originated from a proposal of a draft constitution by a group of professors from Tel-Aviv University. For a discussion of this draft, see Marina O. Lowy, *Restructuring a Democracy: An Analysis of the New Proposed Constitution for Israel*, 22 Cornell Int'l L.J. 115 (1989).

63. For a description of the political events of the time, see 1 Rubinstein, *supra* note 23, at 25–34.

VI. THE TWO NEW BASIC LAWS: THE BREAKTHROUGH AND THE OBSTACLES

A. The Gradual Approach

The bitter public reaction to the deterioration in political life gave new life to the constitutional project. Nevertheless, the controversies, and especially the opposition of the religious parties, persisted.[64] It was then that Knesset-member Amnon Rubinstein, a prominent constitutional law professor, tried new political tactics by proposing to enact human rights provisions gradually, following the chapter-by-chapter tradition.[65] Rubinstein's approach was to reach a consensus on the definition of one or a few of these rights in order to stir the dynamics of the constitutional project.[66] The logical premise was that only certain rights are controversial, and if the process of constitutionalizing human rights were to begin, it would also necessarily be completed. Due to Rubinstein's initiative, and after debates and amendments to the original proposal, in March 1992 the Knesset passed two new Basic Laws for Israel — Basic Law: Freedom of Occupation[67] and Basic Law: Human Dignity and Freedom.[68] These Basic Laws mark the beginning of a new constitutional era in Israeli law.

This is still a developing era. Two years later, in March 1994, as a result of a delayed reaction by political forces opposing the constitutional change, the Knesset amended the new Basic Laws. It was clear that the only realistic alternative left for opponents at this stage was the battle over the particulars of the Basic Laws, rather than over their existence. Consequently, the original Basic Law: Freedom of Occupation was replaced by a new version,[69] and a change

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64. *See supra* text accompanying notes 19–21.

65. *See supra* text accompanying note 15.

66. *See* Judith Karp, *Hok Yesod: Kevod HaAdam veHeiruto — Biografia shel Ma'avakei Koah [Basic Law: Human Dignity and Liberty — A Biography of Power Struggles]*, 1 Law & Gov't in Isr. 323, 338–40 (1992-93).

67. Hok Yesod: Hofesh HaIsuk [Basic Law: Freedom of Occupation], S.H. 114 (1992).

68. Hok Yesod: Kevod HaAdam VeHeiruto [Basic Law: Human Dignity and Freedom], S.H. 150 (1992).

69. Hok Yesod: Hofesh HaIsuk [Basic Law: Freedom of Occupation], S.H. 90 (1994).

followed in the original version of Basic Law: Human Dignity and Freedom.[70]

B. Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom — Achievements and Compromises

In order to discuss and evaluate the extent of the change brought about by the new Basic Laws, it is essential to review their provisions, first by enumerating those rights considered so noncontroversial as to be constitutionalized in a Basic Law with minimum political difficulty.

1. The Listed Rights and the Missing Rights

As implied by its title, Basic Law: Freedom of Occupation establishes only one right — the right to choose one's occupation. This basic tenet has not changed in the new version of this Basic Law. Section 3[71] of the law declares that "every citizen or resident of the State may engage in any occupation, profession or business."[72] The second Basic Law, Basic Law: Human Dignity and Freedom, is broader and guarantees several civil rights. Section 2 declares that "the life, body or dignity of any person shall not be violated."[73] The provisions which follow are more specific. Section 3 states that "a person's property shall not be infringed."[74] Section 4 protects "life, body and dignity."[75] Section 5 provides for the right of personal liberty, stating that "the liberty of a person shall not be deprived or restricted through imprisonment, extradition, or in any other manner."[76] Section 6 provides for the general right to leave the country and the right of citizens to re-enter.[77] Section 7 establishes the right of privacy, stating that "every person is entitled to privacy and to the

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70. The amendment was included in section 11 of the new Basic Law: Freedom of Occupation, *supra* note 69.

71. An identical provision used to be part of section 1 of the original version of Basic Law: Freedom of Occupation, *supra* note 67, § 1.

72. Basic Law: Freedom of Occupation, *supra* note 69, § 3.

73. Basic Law: Human Dignity and Freedom, *supra* note 68, § 2.

74. *Id.* § 3.

75. *Id.* § 4.

76. *Id.* § 5.

77. *Id.* § 6.

confidentiality of his life."[78] This provision may be of particular interest to the American reader, considering the controversial status of the right of privacy in American constitutional law.[79]

As important as the rights mentioned above may be, the rights not expressly mentioned in these new Basic Laws are no less significant. This is true especially regarding three major rights: equality, freedom of religion, and freedom of speech. Their apparent absence from the new Basic Laws was not a mistake. It was also not a reflection of their insignificance in the Israeli legal system. As previously noted, these rights had been declared and enforced by the Supreme Court of Israel from its very first days and are rooted in the express text of the Declaration of Independence.[80] The reason for their omission was rather opposition from the religious lobby, which bridled at the possible influence the constitutionalization of these rights would have on legislation of religious interest, especially in the field of family law. Preserving religious law as applied to marriage and divorce is considered to be the most precious achievement of the religious parties, and they consider any threat against it as *causus belli*.[81] Therefore, existing family law raises the issue of freedom of religion, and also the issue of equality, since religious law is not always egalitarian. Freedom of speech also impacts directly upon the interests of the religious lobby, for example, through laws regarding obscenity. Consequently, in order to gain wide political support in this political terrain, these controversial issues were excluded from the draft. The overriding consideration was to enable a first breakthrough.[82]

Logical as these tactical considerations may have been, there is doubt as to whether the effort was worthwhile. What is the value of a constitutional scheme lacking a guarantee for equality, for example? The history preceding the American Civil War and the Reconstruction amendments may prove that the answer is, "Not much." Why, then,

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78. *Id.* § 7.

79. The prominent examples include Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973).

80. *See supra* note 29.

81. According to Jewish religious law, the preservation of religious marriages and divorces is cardinal for the legitimacy of children. The standard argument of the religious parties is that civil family law will cause separation in the Jewish nation, since religious people will refrain from marrying people born as a result of non-religious ceremonies (including all offspring in future generations).

82. For the history of this legislation, see Karp, *supra* note 66; Uriel Lynn, *Tashtit LeHukah Ketuvah BeYisrael* [*A Foundation for a Written Constitution in Israel*], 1 Hamishpat 81 (1993).

are the new Basic Laws considered to be a true "constitutional revolution,"[83] and not a false one? There are two possible answers to this question. The first lies in the political domain, advocating that the new Basic Laws are the beginning of a renewed constitutional project that will be completed in the near future. The firmness of this prediction will not be addressed here, but it expresses the aspirations of many. The second answer is a legal one, to be discussed later, concentrating on the interpretation of the new Basic Laws. It has been argued by scholars that at least some of the seemingly missing rights are recognized by Basic Law: Human Dignity and Freedom duly interpreted, because its language is so open-textured.[84]

2. The Question of Judicial Review

This description of the new Basic Laws is still incomplete. As explained above, the true question underlying their enactment was not the recognition of human rights as legal rights but rather the availability of judicial review — that is, the possibility of judicial invalidation of infringing legislation. Is judicial review of legislation available for the protection of the rights mentioned in the two new Basic Laws?

The answer to this question is not as simple as one might think. The American reader may assume that judicial review is available whenever a provision of a Basic Law is at stake, following the rationale of *Marbury v. Madison*,[85] which held that judicial review was a necessary component of upholding the Constitution. However, the Israeli doctrine is quite different. The Basic Laws enacted in the past consist of two kinds of provisions: regular and entrenched. The entrenched provisions are those which, according to the Basic Law, can be amended only by the vote of a special majority of Knesset members. The Israeli Supreme Court has ruled that only entrenched provisions of Basic Laws have normative superiority over regular statutes.[86] Therefore, regular provisions of Basic Laws, not protected by specific entrenchment, may be legally changed by subsequent legislation.[87] The Court has been willing to review and invalidate statutes

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83. *See supra* text accompanying note 4.
84. *See infra* text accompanying notes 116–18.
85. 5 U.S. (1 Cranch) 137 (1803).
86. *See* Kaniel v. Minister of Justice, 27(1) P.D. 794 (1973).
87. *See* Negev v. State of Isr., 28(1) P.D. 640 (1974).

contradicting entrenched provisions of Basic Laws, but only in regard to those provisions.[88] Of course, this qualified form of judicial review has not been available in matters of civil rights, which, until 1994, were only part of the judicial unwritten constitution and not legislated in any Basic Law. An exception to this may have been section 4 of Basic Law: The Knesset, an entrenched provision which states the principles of the election system. Among other things, it provides for the equality of elections, and therefore may be considered a civil rights guarantee, apart from its structural objective.

Are there entrenchment guarantees in the new Basic Laws? An answer to this question is essential to the understanding of their respective significance. However, the answer is not an easy one. This aspect of the new Basic Laws was also the cause of their recent amendment. The original Basic law: Freedom of Occupation had a clear entrenchment provision. Section 5 provided that "this Basic Law shall not be changed except by Basic Law enacted by a majority of Knesset members."[89] This was even an especially strong entrenchment, because it referred not only to a special majority, but also indicated that change could occur only through enactment of a new Basic Law, rather than through a regular law enacted by the required majority. On the other hand, the original Basic Law: Human Dignity and Freedom did not contain a similar entrenchment provision. It was omitted during the legislative process.[90] This difference between the two Basic Laws raised questions with regard to the operative effects of the new Basic Laws. Prima facie, it led to a conclusion that only Basic Law: Freedom of Occupation brought about a change in the sphere of judicial review. If this had been the correct conclusion, a true "constitutional revolution" would not yet have occurred. However, a more thorough reading of Basic Law: Human Dignity and Freedom suggests an alternative answer.

It is true that Basic Law: Human Dignity and Freedom did not contain an express entrenchment provision. However, another provision that survived the legislative process could have a similar effect. Section 8 stated that "the rights according to this Basic Law

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88. *See* Tnuat Laor v. Speaker of the Knesset, 44(3) P.D. 529 (1990); Rubinstein v. Speaker of the Knesset, 37(3) P.D. 141 (1983); Agudat Derech Eretz v. Broadcasting Auth., 35(4) P.D. 1 (1981); Bergman v. Minister of Fin., 23(1) P.D. 693 (1969). All of these cases discuss the principle of equality in elections. *See also* Claude Klein, *A New Era in Israel's Constitutional Law*, 6 Isr. L. Rev. 376 (1971).

89. Basic Law: Freedom of Occupation, *supra* note 67, § 5.

90. *See* Karp, *supra* note 66, at 344.

shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."[91] This provision, defined in Israeli scholarship as a "limitation provision,"[92] implies that a statute not satisfying these conditions will be deemed invalid.[93] Otherwise, section 8 is meaningless. Another argument in support of this interpretation is based upon section 10 of the same Basic Law. This section provided for conservation of existing laws, stating that "nothing in this Basic Law affects the validity of law that existed prior to the coming into force of this Basic Law."[94] This compromise provision, advocated by the opponents of the new Basic Law, may in fact contribute to its supremacy over future legislation. It implies that at least future statutes infringing on rights guaranteed by Basic Law: Human Dignity and Freedom may be declared invalid if they do not pass the limitation provision of section 8. This mode of reasoning was even applied recently in an unprecedented decision of the Tel Aviv District Court.[95]

The recent amendments to the new Basic Laws were aimed at introducing changes in the context of their supremacy over future

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91. Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

92. *See* Barak, *supra* note 4, at 22–34.

93. This provision is very similar to section 1 of the Canadian Charter of Rights and Freedoms, which states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. For the Canadian approach, see R. v. Oakes (1986) 1 S.C.R. 103 (a restriction will be upheld only if the government proves by a preponderance of rigorous evidence that the restraint advances a substantial governmental objective through means that are compatible with a free and democratic society, that are rational, that seek to minimize the impairment of freedom, and that reasonably correspond in severity to the importance of the objective sought). The difference is that section 1 of the Canadian Charter is accompanied by section 52(1) of the Canadian Constitution Act 1982, which states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect." Can. Const. (Constitution Act, 1982) § 52(1).

94. Basic Law: Human Dignity and Freedom, *supra* note 68, § 10.

95. Commercial Credit Servs. (Isr.) Ltd. v. Givat Yoav, 2252/91 (Tel Aviv Dist. Ct. Mar. 19, 1994). The district court overruled a moratorium statute that was overly broad and unbalanced. While this is not a binding precedent, it is an example of the growing understanding that a limitation provision included in a Basic Law can serve as a basis for judicial review of future legislation. An appeal on this decision is pending before the Israeli Supreme Court. In the meantime, this decision was followed by the decision of the Haifa District Court in Kfar Bialik v. Nachmias, 18/94 (Haifa Dist. Ct. May 30, 1994).

legislation. The political pressure in favor of these amendments came from the religious parties, who only became aware of the potential of the new Basic Laws to initiate a constitutional transformation after their enactment. Surprisingly, the immediate concern of the religious lobby was with Basic Law: Freedom of Occupation. Freedom of occupation may seem a "religion-free" value, but a recent decision of the Israeli Supreme Court drew attention to an aspect of this right that concerned the religious lobby — import of non-kosher meat to Israel. The Supreme Court ruled that denial of import permits to merchants interested in dealing with non-kosher meat infringes the constitutional right of freedom of occupation.[96] Following this decision, one of the religious parties (Shas) pressed the coalition to support an amendment to Basic Law: Freedom of Occupation to enable the enactment of limitations on the import of non-kosher meat, both a symbolic and practical concern from its perspective. The coalition, in need of political support for its present peace initiative, was willing, reluctantly, to pay this political price and support the amendment.

The result of this concession was the enactment of a new version of Basic Law: Freedom of Occupation, which acknowledges the possibility of enacting statutes that infringe the right of freedom of occupation. New section 4 of this Basic Law consists of a limitation provision similar to the one included in section 8 of Basic Law: Human Dignity and Freedom, and therefore sets effective limitations on infringing legislation: it must "befit the values of the State of Israel" and be "directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."[97] However, new section 8 of Basic Law: Freedom of Occupation also recognizes an alternative way to legislate in contradiction of the right of freedom of occupation. Section 8 now states that "a statutory provision which infringes freedom of occupation will be valid even if it does not meet section 4, if it is included in a statute enacted by a majority of the Knesset members and expressly declares that it is valid despite this Basic Law; Such a statute shall cease to have effect four years after it comes into force, unless it specifies an earlier date."[98] This provision is the significant change introduced by the new version of Basic Law: Freedom of Occupation, and distinguishes it from Basic Law: Human Dignity and Freedom. This section enables legislation to be passed

96. Mitral Ltd. v. The Prime Minister, 47(5) P.D. 485 (1993).
97. Basic Law: Freedom of Occupation, *supra* note 69, § 4.
98. *Id.* § 8.

which infringes freedom of occupation even when it does not meet the requirements of the limitation provision, when the Knesset is fully aware of its decision to so infringe by expressly declaring so, though only for a limited period of time.[99] This compromise sufficed to settle the political crisis over the import of non-kosher meat, by facilitating the passage of a statute limiting free import of meat to Israel, a statute declaring its validity notwithstanding Basic Law: Freedom of Occupation.[100]

Another change introduced by the new version of Basic Law: Freedom of Occupation was an addition to the limitation provisions. According to the original draft of Basic Law: Human Dignity and Freedom, the limitation provision limited the possibility of infringing legislation to "a statute that befits the values of the state of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."[101] Currently, it is possible to do so also "according to an express authorization in such a statute" that meets all the above requirements.[102] The purpose of this change was to enable derogation from the protected rights through administrative regulations (secondary legislation), as long as the derogation is authorized by "a statute that befits the values of the state of Israel and

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99. This provision also follows a model set by the Canadian Charter of Rights and Freedoms. Section 33 of the charter states:

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

Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

100. Hok Yevu Basar Kafu [Import of Frozen Meat Law], 1994 S.H. 104 (1994).

101. *See supra* note 91 and accompanying text.

102. Basic Law: Freedom of Occupation, *supra* note 69, § 4; Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."[103] This change was not politically motivated but had rather a practical goal: to enable the Knesset to provide for the principles only and leave the details for administrative rule-making.

The amendments to the new Basic Laws illustrate the difficulty of transforming a legal system from a tradition of an unwritten constitution and parliamentary sovereignty to one which accepts constitutional restrictions on legislation. These amendments have not changed the definition of the rights protected by the new Basic Laws: freedom of occupation, life, personal liberty, privacy. The amendments only redirect the challenge of shaping the balance of power between the developing constitution and the political forces struggling for unlimited legislative power. The equilibrium established by the two Basic Laws is found in their limitation provisions: derogating legislation must "befit the values of the State of Israel" and be "directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary."[104] In addition, Basic Law: Freedom of Occupation includes a formal entrenchment provision following its original version, on the one hand,[105] and a special provision authorizing direct infringement of the right of freedom of occupation in an express statute (but only for limited periods), on the other.[106] However, as already stated, the limitation provisions are the core of the protection of the rights recognized by the new Basic Laws. Therefore, the question remains: What is the meaning of the limitation provisions, included now in both the new Basic Laws? Do they provide for judicial review of future legislation? This matter was not addressed expressly by the amendments to the Basic Laws. Only Basic Law: Freedom of Occupation is formally entrenched, but both the new laws contain limitation provisions that impliedly suggest the possibility of judicial review.

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103. Basic Law: Freedom of Occupation, *supra* note 69, § 4.

104. *Id*; Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

105. The new version of Basic Law: Freedom of Occupation preserves the formal entrenchment provision included in the original version. Section 7 of the new version is a repetition of section 5 of the old version.

106. Basic Law: Freedom of Occupation, *supra* note 69, § 8.

VII. QUESTIONS OF CONSTITUTIONAL INTERPRETATION

Following the historical overview, the constitutional change brought by the new Basic Laws must be discussed and evaluated. Any examination of the Basic Laws will inevitably become an interpretive discussion. The scope of these laws is far from self-evident, especially Basic Law: Human Dignity and Freedom. Does it apply only to those rights expressly mentioned, thus excluding equality, freedom of religion and freedom of speech, or does it merit a more generous interpretation? Should the law's provisions be considered superior to later infringing legislation in spite of the lack of entrenchment? The answers to these interpretive questions will decide the constitutional future of Israel. In this part of the Article, I will address these questions using competing interpretive methods advocated by American and Israeli scholars.

Notwithstanding the diversity of nuances, the writing in the field of constitutional interpretation may be divided into three major schools: text-centered, history-centered, and value-centered. In this section, I will try to review the general methods advocated by different schools, evaluating at the same time their suitability to the Israeli constitutional problem. My preference is not to exclude any method at this preliminary stage but rather evaluate it in light of the current interpretive project. This decision is justified also by the possibility of integration of interpretive arguments, as suggested by Richard Fallon.[107]

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107. For a discussion of "the commensurability problem" of interpretive methods in American constitutional law and a suggestion of a "coherence theory" for an aggregate use of them, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987). The important writings of Barak about interpretation in Israeli law also advocate an integrative approach, although one different from that suggested by Fallon. According to Barak, the ruling principle in legal interpretation is a quest for the purpose of legislation, as distinguished from the intent of the legislator. *See* Aharon Barak, Interpretation in Law (1992–1994) [hereinafter Interpretation]. For a shorter version, see Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 Cardozo L. Rev. 767 (1993) [hereinafter *Hermeneutics*].

A. Text-Centered: Textual and Structural Approaches

I will first consider the methods of constitutional interpretation that look for answers in the constitutional text.[108] I begin with this approach because it fits basic intuitions about the idea of interpretation.

Text-centered analysis has two levels. The first level of textual interpretation concerns simply the meaning of the words contained in the text. The second level of textual interpretation examines the context — interpreting not only the words standing by themselves, but also in reference to the constitutional context.[109] However, definitive answers are not always apparent even when both levels of analysis are employed. While advocating the "start with the text" approach, the self-explanatory capability of words, and the existence of "easy cases" in constitutional law, Frederick Schauer admits also the existence of "hard cases," in which the language does not produce definite answers.[110] He argues only against complete nihilism in legal interpretation. However, when the case is a hard one and open-textured terms are at stake, the language may not be the final arbitrator. Language only limits the interpretive alternatives.[111] Laurence Tribe and Michael Dorf emphasize the importance of integration of the constitutional provisions, thereby taking the context into consideration.[112] However, as useful as this method may be, it is also not always capable of producing a single result.[113] With these warnings in mind, I will pursue textual (including contextual) interpretation in regards to the new Basic Laws, and more specifically Basic Law: Human Dignity and Freedom, a true "hard case."

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108. For the method of textual interpretation, see Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985); Michael J. Perry, *The Authority of the Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551 (1985).

109. *See* Schauer, *supra* note 108, at 419.

110. He argues only that the majority of cases are easy ones. *See id.* at 414. For a discussion of the notion of an easy case, see *id.* at 404–14.

111. *Id.* at 430–31.

112. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 58–60 (1991).

113. For discussion and criticism of the application of this approach to Bowers v. Hardwick, 478 U.S. 186 (1986), see Cass R. Sunstein, The Partial Constitution 105–06 (1993).

1. The Scope of Rights

What are the textual arguments regarding the content of the rights enumerated in Basic Law: Human Dignity and Freedom? Does the text exclude rights not specifically mentioned in it or rather supply a basis for their inclusion? The few scholarly articles already addressing the new Basic Laws have found textual basis for the inclusive interpretation.[114] This interpretive approach has been based upon two principles found in the express text: the principle of "human dignity" and the principle of a "democratic state." Section 1A of Basic Law: Human Dignity and Freedom, preceding the specific sections already discussed, states the following: "The purpose of this Basic Law is to safeguard human dignity and freedom, in order to entrench in a Basic Law the values of the State of Israel as a Jewish and democratic state."[115] Judith Karp, a deputy attorney general who participated in the process of drafting, contends that human dignity in a democratic state necessarily includes the right to equality.[116] Aharon Barak, scholar and Supreme Court judge, expresses an even broader view, stating that human dignity in the Israeli democracy encompasses, among other values, equality, freedom of speech, freedom of religion, and freedom of association.[117] These proposals for interpretation are not based only on the text, but they are within the limits of the text, or, in Schauer's terminology, within its "frame."[118]

However, while facing an open-textured and value-laden term like "human dignity," it is impossible to pursue textual interpretation alone. The question is no longer the general controversy over the appropriateness of textualism. It is also not a matter of nihilism. I believe the issue is rather a matter of honesty — acknowledging that while discussing human dignity we are unable to disconnect ourselves

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114. *See infra* text accompanying notes 116–17.

115. This was section 1 of the original version of the Basic Law. It is now preceded by the new section 1 discussed *infra* in the text accompanying notes 120–22 and 170–71.

116. Karp, *supra* note 66, at 345–61.

117. Aharon Barak, *Zechuyot Adam Muganot: HaHekef ve-haHagbalot* [*Protected Human Rights: Scope and Limitations*], 1 Law & Gov't in Isr. 253, 256–61 (1992–93). A more detailed discussion is found in 3 Barak, Interpretation, *supra* note 107, at 416–33. *See also* David Kretzmer, *The New Basic Laws on Human Rights: A Mini Revolution in Israeli Constitutional Law?* 26 Isr. L. Rev. 238, 246 (1992).

118. Schauer, *supra* note 108, at 430.

from cultural and moral associations. There is no way to avoid that.[119] From a textual perspective, the term "human dignity" is capable of including the concept of equality. However, it would be intellectually dishonest to claim that equality is mandated by the text alone. My conclusion is that the text of Basic Law: Human Dignity and Freedom is capable of providing for some human rights not specifically mentioned within it. However, this should be only a preliminary conclusion to be evaluated also in light of other methods of interpretation which will be discussed later on.

The text of the new amendments to the Basic Laws strengthen the argument supporting the more inclusive interpretation. During the legislative process, the supporters of the constitutional endeavor managed to include in the final draft of the amendments a provision that reflects their democratic spirit. As a result, a new section 1 was added to both Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom, stating that "the basic rights of every person in Israel are based upon the recognition of the value of every person, the sanctity of his life, and his being freeborn, and they will be respected in the spirit of the values of the Declaration of the Establishment of the State of Israel."[120] This provision provides a textual basis for making interpretive use of the Israeli Declaration of Independence, which emphasizes the value of equality,[121] not specifically mentioned in the provisions of the new Basic Laws. This possibility will be explored further with reference to the value-centered modes of interpretation.[122]

2. Judicial Review

Is the textual approach capable of answering the question of judicial review under the two new Basic Laws? This question is seriously raised in relation to Basic Law: Human Dignity and Freedom, which lacks formal entrenchment. Here, the textual approach

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119. In Barak's interpretation, the text plays a particularly minimal role. For him, the text is only a starting point. *See generally*, Barak, *Hermeneutics*, *supra* note 107, and Barak, Interpretation, *supra* note 107. However, I think that it is not necessary to accept Barak's textual minimalism in order to reject a solely textualist approach to the interpretation of Basic Law: Human Dignity and Freedom.

120. Basic Law: Freedom of Occupation, *supra* note 69, § 1; Basic Law: Human Dignity and Freedom, *supra* note 68, § 1.

121. *See supra* note 29.

122. *See infra* Part VII.C.

may prove more useful. Reading the text independently of the historical claims to be discussed later,[123] the availability of judicial review is a relatively easy conclusion: if judicial review of future legislation is not available, then the limitation provisions in the two Basic Laws and the immunity given to existing legislation in Basic Law: Human Dignity and Freedom are meaningless.[124]

An opposing textual argument may be based upon a comparison to other Basic Laws, or a comparison between the two new Basic Laws themselves. In the past, Basic Laws were interpreted as providing for judicial review limited to the protection of entrenched provisions.[125] Basic Law: Human Dignity and Freedom lacks formal entrenchment. Therefore, the argument continues, Basic Law: Human Dignity and Freedom lacks the textual "formula" necessary for the establishment of judicial review. In my opinion, this is a relatively weak textual argument. After all, the former Basic Laws did not contain limitation provisions, and the meaning of such a provision is still unclear. It is possible to argue that Basic Law: Human Dignity and Freedom introduced a new form of entrenchment — not a formal, technical entrenchment (enabling the Knesset to pass contradicting legislation with a special majority) but rather a substantive entrenchment (authorizing it to pass statutes infringing upon civil rights so long as the limitation provision of the Basic Law is satisfied).[126] As mentioned above, Basic Law: Freedom of Occupation includes both a formal entrenchment[127] and a limitation provision.[128] However, the fact that Basic Law: Freedom of Occupation includes "double proof" of judicial review does not contradict the availability of judicial review established by the limitation provision of Basic Law: Human Dignity and Freedom.[129]

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123. *See infra* Part VII.B.

124. *See supra* text accompanying notes 91–95.

125. *See supra* text accompanying note 86.

126. For more textual arguments, *see* Karp, *supra* note 66, at 371–74.

127. Basic Law: Freedom of Occupation, *supra* note 69, § 7.

128. *Id.* § 4.

129. Generally speaking, this is also the interpretation advocated by scholars already mentioned, but not only for textual reasons. *See* Barak, *supra* note 4, at 20–22; Karp, *supra* note 66, at 379–81; Kretzmer, *supra* note 117, at 245–46; Claude Klein, *Hok Yesod Kevod HaAdam veHeiruto — HaAracha Normativit Rishonah* [*Basic Law: Human Dignity and Freedom — An Initial Normative Assessment*], 1 Hamishpat 123 (1993). It may be added that Barak and Karp suggest that there are two competing interpretations within the view that the limitation provision implies judicial review of legislation. The "strong" interpretation suggests that future statutes may be valid only if they pass the

The truth is that the argument opposing judicial review derives its power not from the text itself but rather from the domain of history and original intent.

B. History-Centered: Original Intent

If the text is open-textured and capable of diverse interpretations, why not adhere to the "objective" test of history and base interpretation on the "original intent" of the legislators? The "original intent" approach is an important one in the American constitutional debate, devoutly supported and opposed with no less enthusiasm.[130] In this context, it would be superfluous to restate the course of the debate. In general, the support of "original intent" derives from the promise of neutrality and de-politicization of law, with Robert Bork as its characteristic advocate.[131] The opposing view attacks the idea of being ruled by "dead men," and highlights the pragmatic difficulties in the application of originalism.[132]

1. Original Intent or Original Intents

The new Israeli Basic Laws present a special test case for originalism. The supporters of this method might claim that the Israeli example is an ideal case for interpretation through original intent. After all, the relevant events are recent, and all the politicians involved are still available to testify as to the original intent. Following this rationale, the political opponents of the Israeli constitutional project could argue that Basic Law: Human Dignity and Freedom gained its political support due to the exclusion of the rights not expressly mentioned and its lack of entrenched provisions. Therefore, they would assert that there is no place for advocating a broad

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tests set by the limitation provision. According to the "weak" interpretation, an infringing statute may be valid if (and only if) it expressly states that it is meant to be valid notwithstanding the provisions of the Basic Law.

130. Representative writings are quoted *infra* at notes 131–32.

131. *See* Robert H. Bork, The Tempting of America — The Political Seduction of the Law (1990). *See also* Raoul Berger, Government by Judiciary (1977); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989). A more moderate version of originalism is advocated in Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

132. *See* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 Cal. L. Rev. 1482 (1985); Ronald Dworkin, Law's Empire 359–81 (1986).

interpretation of the concept of human dignity, nor for the availability of judicial review. A further historic argument in the same direction asserts that past proposals to enact a Basic Law expressly providing for judicial review did not gain enough political support.[133]

Do these clear findings prove the clarity and consequent superiority of originalism? Not necessarily. The Israeli experience may well be an excellent modern example of the false promise of original intent.

The implicit premise of originalism is that all legislators shared the same intent, which is to be discovered by the interpreter. After all, it refers to one original intent. However, this premise lacks real foundations, at least in modern reality. It may have some foundation in the special case of the American formative period, when the lawmakers were a relatively homogeneous group.[134] But modern society is different. The Israeli Knesset surely did not have any common and agreed upon intent when voting for the passage of Basic Law: Human Dignity and Freedom.[135] Some Knesset members voted in favor of the compromise in order to ignite a new constitutional era.[136] Others were willing to support the same compromise only because they believed the draft would not have this effect.[137] And if so, why should the views of the opposition rule the interpretation of the accepted compromise? In other words, the legislative process of the new Basic Laws may prove to be a better test case for the nihilism of public choice theory[138] than for originalism.

Paradoxically, it may be argued that the new amendments to the Basic Laws, advocated by a lobby hostile to the idea of judicial

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133. *See* Hatza'at Hok Yesod: Hakika [Proposed Basic Law: Legislation], Hatza'ot Hok [H.H.] 133 (1976) [hereinafter Proposed Basic Law: Legislation]; Proposed Basic Law: Legislation, H.H. 326 (1978); Proposed Basic Law: Legislation, H.H. 147 (1992). For a discussion of the newer draft, see Itzhak Zamir, *HaBikoret HaShiputit al Hukiyut Hukim* [*Judicial Review of Statutes*], 1 Law & Gov't in Isr. 395 (1992–93). An even more recent draft, Proposed Basic Law: Legislation, H.H. 89 (1993), does not provide for judicial review.

134. *See supra* note 12.

135. *See* Karp, *supra* note 66, at 357–58, 365–67 (citing different approaches from the parliamentary discussions preceding the voting).

136. *See id.*

137. *See id.*

138. Generally, public choice theory states that collective choice processes fail to express the preferences of the individuals participating in the voting process. For legal applications of this theory, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice — A Critical Introduction (1991).

review,[139] provide an "originalist" argument in support of it. Looked at more closely, they recognize the availability of judicial review. Its availability was probably the premise of the drafters: What else, then, can be the motivation to amend provisions defining the standards that future legislation has to meet?

2. Representatives' Intents and Popular Intent

Another possible challenge to the limiting interpretation is that it improperly separates the new Basic Laws from the tumultuous public opinion during the period preceding the legislative process. I believe that without the broadly-shared public feelings of disgust with the political system and with the perceived omnipotence of politicians,[140] the new constitutional initiative could not have prevailed. Neither would it have been supported by those Knesset members who believed it inconvenient not to support the New Basic Laws in the face of public opinion. I do not claim that the Israeli public had any particular expectations as to the interpretation of the legal concept of "human dignity"; nor do I claim that the issue of judicial review as such was discussed by lay people. But I do believe there was a general hope for restraint of irresponsible politicians willing to trade the long-term well-being of the state for political support of Knesset members representing narrow interests, or even only their own self-interest. And if that is so, a better interpretation of Basic Law: Human Dignity and Freedom is one which recognizes judicial review of legislation in order to restrain politicians and prevent unscrupulous politics. Through judicial review, the court would be able to invalidate legislation infringing upon protected rights when it does not "befit the values of the State of Israel,"[141] is not "directed towards a worthy purpose,"[142] or "exceeds what is necessary."[143] True, attributing intentions to public opinion without reliance on a formal process of elections is problematic; but it is no less legitimate than speculating on the original intent of the Knesset.

From the perspective of present Israeli law, I would add that original intent is not a dominant method of interpretation, even in the

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139. *See supra* text accompanying notes 96–100.

140. *See supra* text accompanying notes 55–63.

141. Basic Law: Freedom of Occupation, *supra* note 69, § 4; Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

142. Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

143. *Id.*

context of standard legislation. The history of legislation is a relevant factor to be considered among others, but it does not play a decisive role.[144] Therefore, it is highly unlikely that originalism will suddenly prevail in the interpretation of the new Basic Laws. However, as previously explained, the rejection of original intent as a decisive method is not formalistic but rather based upon substantive reasons: it is incapable of fulfilling its promise to provide an objective interpretive answer. This conclusion does not disregard history; it only acknowledges that history is indefinite.

C. Value-Centered: Basic Values

The use of values in constitutional adjudication has been the source of an inexhaustible controversy in American literature. Some consider it essential.[145] Others consider it the original sin.[146] The debate goes back at least as far as the controversy over the decision in *Lochner v. New York*.[147] Two different conclusions are drawn from the rejection of *Lochner*. For some, *Lochner* was wrong because the Court erred in its choice of values.[148] According to others, the Court's error was the very use of values not expressly adopted in the text, which caused the court to drift into the political domain and upset the decision of the majority in a democracy.[149] Again, this Article does not attempt to solve the controversy but rather to evaluate the opposing views within the context of Israeli constitutional change.

At the outset, it is important to remember that due to the special constitutional history of Israel, the use of values was always considered a legitimate and essential part of constitutional adjudication. This was the meaning of Israel's unwritten

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144. *See* 2 Barak, Interpretation, *supra* note 107, at 351–406.

145. Representative writings are Bickel, *supra* note 45, and Ronald Dworkin, Taking Rights Seriously (1977).

146. At least "seduction," according to Bork. *See supra* note 131.

147. 198 U.S. 45 (1905). In this decision, the Supreme Court held unconstitutional a maximum-hours labor statute on grounds that it interfered with liberty of contract. The decision is representative of the views of the Supreme Court at the time. These views changed only in the 1930s. The decision marking the end of the era of *Lochner* jurisprudence is Nebbia v. New York, 291 U.S. 502 (1934). This decision upheld the constitutionality of a statute fixing the price of milk.

148. *See, e.g.*, Tribe & Dorf, *supra* note 112, at 66.

149. The classic writings opposing judicial appraisal of values are: Hand, *supra* note 47; Wechsler, *supra* note 6; and Bork, *supra* note 131.

constitution.[150] The court was expected to express the shared values of society and use them as an aid both in interpreting laws and providing solutions when there were no applicable statutory rules. What were the values recognized as "basic"? According to the Supreme Court, these are mainly the basic values of every enlightened society, such as liberty and equality.[151] Another underlying theme was the historic mission of the state of Israel as a Jewish state. But this judicial consciousness was perceived as strengthening the same ideas, deep-rooted in Jewish heritage and valued especially because of their denial to Jewish people for many generations.[152] The court assisted itself by using historical and cultural sources, such as the Israeli Declaration of Independence, which are not formally binding but have a substantial persuasive power.[153]

This is not to say that the use of values by the Israeli Court has always been free of controversy, nor that it will be so in the future. First, even prior to the constitutional change discussed in this Article, the public attitude toward the court's rulings varied, according to the context. For example, the public usually sympathizes with judicial review of public officials, but this sympathy weakens when national security is at stake.[154] Also, religious society tends to offer a competing view of "Jewish values," a view deriving from religious doctrine.[155] A second concern, and one more relevant to the current change, is that the court's past rulings were subject to the supremacy of the legislature. Therefore, the clash with the principle of majoritarian democracy was a soft one. The legislature, the formal representative of majority will, was capable of overruling a principle declared by the court. The potential of a legislative amendment legitimized the judicial endeavor. A third warning against reference to values in the future may be that the resort to unwritten values is

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150. *See supra* Part IV.C.

151. *See supra* text accompanying notes 31–36.

152. This understanding of the core values of Jewish tradition is evidenced also by the Foundations of Law, 34 L.S.I. 181 (1980). Section 1 of the law states: "Where the Court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage." *Id.* § 1.

153. *See supra* notes 29–30.

154. *See* Gad Barzilai, Ephraim Yuchtman-Yaar & Zeev Segal, Beit HaMishpat HaElyon BeEyn HaHevrah HaYisraelit [The Israeli Supreme Court and the Israeli Public], 108–10 (1994).

155. A comparison to Christian politics in the United States may be interesting. For example, see Laurence H. Tribe, Abortion — The Clash of Absolutes 165–67 (1990).

justified as long as the written definitions are not available. According to this argument, in an era of a written constitution, the values excluded from the written document are not legally binding. This is a similar argument to the one stated by those opposing the American unwritten constitution.[156]

1. The Scope of Rights

In what way should values be of assistance in interpreting the new Basic Laws, and especially Basic Law: Human Dignity and Freedom? My answer is that values are necessarily relevant to the understanding of the scope of rights recognized by the Basic Laws. Their open-textured terminology requires resort to values — not personal values, but rather the values of Israeli society as a whole. If human dignity is not to be an empty slogan, if it is to have meaning, this meaning can only be derived from the values held by the society for which this principle was enacted. In other words, by using value language, the drafters of the Basic Law authorized the court to assist itself by reference to the values shared by the constituents of Israeli society.

As a matter of fact, it seems that the new Basic Laws both foresee and encourage a value-oriented interpretation. They consist of declaratory provisions that expressly mention the values that they are supposed to represent and protect. The first provision of the two Basic Laws states that "the basic rights of every person in Israel are based upon the recognition of the value of every person, the sanctity of his life, and his being freeborn, and they will be respected in the spirit of the values of the Declaration of the Establishment of the State of Israel."[157] The second provision elaborates on this, stating that "the purpose of this Basic Law is to safeguard [the rights enumerated in it],[158] in order to entrench in a Basic Law the values of the State of

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156. *See supra* note 38. This argument is strongly opposed by Barak, who believes that interpretation of Basic Laws should always resort to the basic values of the system. *See* Aharon Barak, *Parshanutam shel Hukei-Yesod* [*The Interpretation of Basic Laws*], 22 Mishpatim 31, 44–45 (1992); 3 Barak, Interpretation, *supra* note 107, at 182–85; Barak, *Hermeneutics*, *supra* note 107, at 773. My discussion of the issue is limited to the evaluation of the new Basic Laws.

157. Basic Law: Freedom of Occupation, *supra* note 69, § 1; Basic Law: Human Dignity and Freedom, *supra* note 68, § 1.

158. "Freedom of occupation" — in § 2 of Basic Law: Freedom of Occupation; "Human dignity and freedom" — in § 1A of Basic Law: Human Dignity and Freedom.

Israel as a Jewish and democratic state."[159] All this, in addition to the limitation provisions mentioned before, according to which future legislation that infringes on the rights protected by the Basic Laws must "befit the values of the state of Israel."[160] Against this background, the resort to values seems to be inevitable.

Does the idea of "human dignity" encompass the rights not mentioned expressly in the text? In a book dedicated to former Justice William Brennan, the unifying theme of the articles was the understanding of human dignity as a value underlying human rights.[161] Alan Gewirth writes that "human rights are based upon or derivative from human dignity. It is because humans have dignity that they have human rights."[162] This view is embodied in article 1 of the Universal Declaration of Human Rights, which states that "[a]ll human beings are born free and equal in dignity and rights."[163] Does this mean that the term "human dignity" is all-inclusive and therefore contains "all rights" not specifically enumerated? I am reluctant to state such a broad conclusion, although it is tempting. "Human dignity" in the context of Basic Law: Human Dignity and Freedom is not only a moral concept but a legal principle used in a legal context. In this context, it may not be faithful enough to the text (including its structure and constructive logic) to state that "human dignity" stands for all the rights not expressly mentioned. If that were so, all specific provisions would have been redundant. "Human dignity," as any other legal principle, should also have limits. What are these limits? A review of the rights not enumerated[164] may enable one to distinguish between rights inseparable and integral to the idea of human dignity and other rights only related to it. It is too soon to specify the application of this distinction. It should be exercised in view of the particular cases the court will confront in the future. However, there are some answers that seem to be relatively clear.

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159. Basic Law: Freedom of Occupation, *supra* note 69, § 2; Basic Law: Human Dignity and Freedom, *supra* note 68, § 1A.

160. Basic Law: Freedom of Occupation, *supra* note 69, § 4; Basic Law: Human Dignity and Freedom, *supra* note 68, § 8.

161. The Constitution of Rights: Human Dignity and American Values (Michael J. Meyer & William A. Parent eds., 1992).

162. Alan Gewirth, Human Dignity as the Basis of Rights, *in id.* at 10.

163. Universal Declaration of Human Rights, art. 1, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948).

164. The "missing" rights include, at least, freedom of expression, freedom of association, freedom of religion and equality.

First, I share the view that there is no human dignity without equality.[165] Our perception of ourselves as deserving human beings is inseparable from the principle of equality. Equality is a component relevant to every human relationship, not only to a political society (in contrast to freedom of association, for example). According to John Rawls, equality is the offspring of having "the capacity for moral personality," and therefore generally inseparable from humanity.[166] The segregation problem in the United States can also illuminate the special nexus between equality and human dignity. The vice of the "separate but equal" doctrine was really the denial of the human dignity of African-Americans.[167] It is not surprising to acknowledge that one of the most important Israeli precedents establishing the (then unwritten) principle of human dignity carried also an important message of equality: specifically, the Supreme Court's decision invalidating a search of inmates that included compulsory enemas in order to detect drugs.[168] The Court ruled that this procedure was repugnant to the value of human dignity.[169] The message of equality was inseparable, the court emphasizing that prisoners are entitled to the same rights as other Israeli citizens.

The recognition of equality as a legal norm ingrained in the Basic Laws, especially in Basic Law: Human Dignity and Freedom, is further strengthened by the new section 1 added by the recent amendments. As previously mentioned, this provision clarifies that the values of the Israeli Declaration of Independence are a major source of inspiration for the new Basic Laws.[170] It will not be superfluous to quote, once again, in this context one of the Declaration's most sacred promises, that "[t]he State of Israel . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex."[171]

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165. This view was advocated especially by Karp, *supra* note 66, at 351–53.

166. John Rawls, A Theory of Justice 505–06 (1971).

167. *See* William A. Parent, Constitutional Values and Human Dignity, in The Constitution of Rights, *supra* note 161, at 47, 59.

168. Katalan v. Prisons Auth., 34(3) P.D. 294 (1979).

169. *Id.* at 298.

170. *See supra* text accompanying notes 120–22.

171. 1 L.S.I. 3, 4 (1948).

2. Judicial Review

Is value-oriented interpretation also capable of contributing to the resolution of the question of judicial review? Probably not. I do not think there is a strong argument for judicial review only by resort to the long-lasting values of Israeli society. On the other hand, I do not think that these values contradict such an interpretation. The question of judicial review by the courts is a political question addressing possible structures of government. As such, it lies outside the domain of values. Societies inspired by similar basic values may adopt different approaches toward judicial review, as exemplified by the differences in the organization and scope of jurisdiction of the courts in Western democracies.[172] Therefore, the answer to this question will be based upon the interpretive methods discussed earlier.

D. Interim Conclusion

The argument posed thus far suggests answers to the interpretive questions the Israeli system is facing following the enactment of the new Basic Laws. The answers to these questions will determine the significance of the constitutional change brought about by these Basic Laws. Use of different interpretive methods tends to lead to the conclusion that a significant change has indeed occurred, despite drafting compromises that shaded the text with some vagueness. The indications of the change are found in the text. However, they are not supported solely by the text. The recognition of some of the rights not expressly mentioned is derived from the concept of human dignity in a democratic state. In my opinion, a supposedly originalist claim against this conclusion fails its own test. That is, within the complex background of the new Basic Laws, it is impossible to establish one agreed-upon intent. The only genuine intent was to form a compromise, raising the question: what is the content of this compromise? And if popular expectations are also considered within the originalist account, there is another reason to prefer the interpretation recognizing judicial review of future legislation.

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172. *See supra* note 44.

VIII. QUESTIONS OF JUDICIAL LEGITIMACY

The interpretive conclusion regarding the new Basic Laws is not the end of this constitutional discussion. The Israeli system will now face the same unresolved problems raised by judicial review in the American system: invalidation of the so-called "will of the majority" and adjudication on the border of politics.[173] In other words, it will face the legitimacy question: Should the courts be allowed to defeat laws enacted by a democratic legislature? This question is recurrent in American constitutional theory. Learned Hand's resistance to rule by Platonic guardians[174] is a relatively extreme, yet representative, expression of the unease with judicial review in substantive matters.[175]

In some respects, the Israeli Supreme Court, while exercising judicial review, may be in a more difficult position than its American counterpart. First, the court is asked to establish its constitutional authority after a significant formative period in which protection of civil rights against infringing legislation was not available. In the United States, by contrast, *Marbury v. Madison*[176] was a relatively early decision. Second, the Israeli Supreme Court is about to begin practicing judicial review in a less innocent phase of national development. The American Supreme Court had the opportunity to establish itself as a constitutional court before it had to face the bitter controversies tearing apart modern society. *Roe v. Wade*[177] was not the first constitutional case of the American Supreme Court.[178] In present-day Israel, many equally controversial cases will be the first to welcome the court's new jurisdiction.

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173. These questions are explained and discussed *infra* in Parts VIII.A, VIII.B.

174. Hand, *supra* note 47, at 73. This is a metaphor using Plato's theory of a state ruled by philosophers.

175. *See generally* Paul W. Kahn, Legitimacy and History 135–51 (1992).

176. 5 U.S. (1 Cranch) 137 (1803).

177. 410 U.S. 113 (1973).

178. It is true that the American Supreme Court had to confront difficult value-oriented controversies also in the distant past, e.g., in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). However, even then, the Supreme Court benefited from the legitimacy acquired during a few decades of judicial review.

A. The Theoretical Question

As previously noted, the legitimacy problem is perceived as a question of constitutional theory: how judicial review can be reconciled with the premise of government by the people. The ambition of scholars has been to form a model for judicial review that does not interfere with the will of the majority. The theories guided by this ambition have failed. Herbert Wechsler advocats application of "neutral" principles (not influenced by ideology),[179] but a closer study proves that no principle is inherently neutral.[180] Alexander Bickel claims that the Supreme Court is not counter-majoritarian when it applies the "enduring values of society,"[181] because it is the best-equipped institution to represent the popular understanding of these values.[182] But, at best, the Court can only profess to represent the public, and in many cases there is no indication that it actually does so. After all, many constitutional decisions are controversial.[183] John Hart Ely claims that the solution can be found in judicial abstention from applying substantive values, narrowing the limits of intervention to the protection of fair process.[184] However, taken seriously, Ely's theory is also based on substantive judgments. There is no objective test for recognizing defects in the political process and for defining which minority groups are in need of protection.[185] The failure of these theories is imputed to the impossible goal that they professed to achieve. Judicial review necessarily interferes with the will of the majority.

The theoretical discussion should, therefore, reconstruct its understanding of the problem. The question is not how judicial review can avoid obstructing the will of the majority but rather why it is justified in doing so. The answer to this question derives from the

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179. Wechsler, *supra* note 6.

180. *See* Kahn, *supra* note 175, at 138–42.

181. Bickel, *supra* note 45, at 26.

182. *Id.* at 25–26.

183. *See* Kahn, *supra* note 175, at 142–47.

184. John Hart Ely, Democracy and Distrust (1980). Ely's book is representative of the process-based constitutional theories. It is inspired by Justice Stone's famous footnote 4 in United States v. Carolene Prods. Co., 304 U.S. 144 (1938), which raises the possibility that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 152–53.

185. *See* Kahn, *supra* note 175, at 147–51. *See also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

recognition of human rights as a moral value, deserving of protection. The democratic rule of the people is a highly regarded value, but the rights of the individual are likewise highly regarded, and not of lesser importance.[186] This is still a partial answer. It explains why it is justified to overrule the will of the majority in the name of individual rights. It must be further explained, however, why this function should be granted to the courts. Indeed, as mentioned before, there are legal systems in which the regular courts do not exercise the power of judicial review.[187] In the context of the current discussion, it may suffice to claim that the courts are better arbiters of individual claims than the legislature. Constitutional scholars have given some reasons in support of that claim: judges are free, for example, from the "threat" of re-election[188] and more likely to form a community of discourse.[189] In addition to these considerations, I would like to emphasize another characteristic of adjudication before a court that makes courts well suited to protect individual rights: adjudication is a process of addressing the rights of particular individuals. The court, in contrast to the legislature, sees the individual — his grievance and his hurt. Legislatures tend to address the "public interest." It may even be said that the legislature is prejudiced toward the needs of the collective, whereas individuals are more nebulous. From the legislature's perspective, individuals exist mostly as parts of larger groups. Only the courts deal with the individual directly. Therefore, they are less likely to disregard his inviolable rights.

This is certainly not a full discussion of the theoretical aspects of the legitimacy problem. It only professes to describe the theoretical discourse that the enactment of the new Basic Laws may prompt. I do not carry it on, because the more urgent expressions of the legitimacy problem in Israel are not going to be theoretical but rather social and political. These expressions of the problem should be at the center of the current discussion.

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186. This is basically the liberal view. I agree with Rawls that "[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." Rawls, *supra* note 166, at 3.

187. *See supra* note 44.

188. This is the typical case and the constitutional rule in regard to federal judges.

189. Frank Michelman, *The Supreme Court, 1985 Term: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986).

B. The Cultural-Political Question

A more pragmatic view of the legitimacy problem addresses the fear that a judicial decision to invalidate legislation repugnant to the rights protected by the new Basic Laws will not be considered legitimate by the political system and the public at large. More specifically, the question is whether the shift to judicial review of legislation will be supported. As it begins to practice judicial review in the framework of the new Basic Laws, the Israeli Supreme Court will expose itself to the risk that the political system will resist the change and argue against the court's constitutional authority. It is vital to assess this risk and consider how the Israeli Supreme Court should view it. The American Supreme Court is not susceptible to the same risk at this stage of its history. But, for a beginner, it is a justifiable fear. The amendments and proposed changes to the new Basic Laws may illustrate the fragility of the future of judicial review in Israel.

1. Existing Legal Culture

Although the recognition of judicial review in the framework of the new Basic Laws is considered a revolutionary step, it is a continuation of principles already established in Israeli constitutional law. Therefore, existing legal culture may be one source of legitimacy. As stated before, the supremacy of the laws of the Knesset was already restricted. Entrenched provisions of past Basic Laws were considered superior to regular legislation. Statutes infringing upon such provisions were invalidated by the Supreme Court.[190] In other words, the constitutional authority of the Supreme Court was already established before the enactment of the new Basic Laws. Israeli constitutional law had already separated itself from the English doctrine of sovereignty. In jurisprudential terminology, it can be said that at this point in the development of the legal system, the Israeli "rule of recognition"[191] is different from the English rule.[192]

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190. *See supra* text accompanying notes 85–88.

191. This is the terminology established by H.L.A. Hart, The Concept of Law (1961). The rule of recognition determines the criteria which govern the validity of the rules of the legal system.

192. For an application of this concept in the constitutional context, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987); Frederick Schauer, Amending the Presuppositions of a Constitution *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson

Admittedly, constitutional adjudication in the sphere of civil rights is the most delicate aspect of judicial review. Its commencement is not going to be a trivial development. However, the concept that serves as its foundation is at least not completely foreign to the Israeli legal culture.

2. Institutional Concerns: The Status of the Court

The developments in the legal culture should also be understood in their institutional context. It is important to state that the Israeli Supreme Court enjoys an almost unprecedented prestige in the eyes of the Israeli public. Against a background of disappointing political leaders and deteriorating political norms, the Supreme Court is generally perceived as a source of hope for the ordinary citizen. It is perhaps the only institution capable of restraining the power of the government, when the government oversteps its bounds.[193] In other words, the public tends to support the court's legitimacy.[194] This political reality is, of course, vital for a court facing a definitive period in its history.

3. Historic Moments and Constitutional Revolutions

It is customary to think that new constitutional practices are born in conjunction with transformative historic events. This is a relatively representative description of the circumstances that have given rise to many constitutions, the American Constitution being a paradigmatic example.[195] In other words, the prototypical constitutional revolution is an offspring of a historic revolution. It occurs at a "historic moment." With this in mind, another question arises in the Israeli context as to whether it is appropriate to interpret the new Basic Laws as authorizing the court to invalidate future legislation, and thereby recognize a constitutional revolution, even though there is no historic revolution to serve as a supporting background.

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ed., 1995).

193. In the last few years, the state comptroller has also enjoyed a similar prestige.

194. For a recent study, see Barzilai, Yuchtman-Yaar & Segal, *supra* note 154, at 177–81.

195. The American Constitution was drafted more than ten years after the outbreak of the Revolutionary War, but it was an integral part of the process of forming a government as a result of this revolution.

The link between historic circumstances and the foundations of the constitution is important. After all, a constitution is supposed to express the basic understanding of a society about its form of life. However, I believe that historic changes that are relevant to the constitutional discussion are not limited to bloody revolutions which profess to form an alternative government. History proves that societies go through transformative changes even when the government is not challenged by a formal revolution. A social crisis may force society to face itself and transform.[196] When a certain society goes through such a process, the change brought about by it may be no less transformative than the results of a "real" revolution. It also may bring about a constitutional revolution.

The link between transformative periods of national history and constitutional transformation was recognized and explored by Bruce Ackerman.[197] According to Ackerman, there are periods in the lives of nations in which the basic premises of the system are questioned in a way that compels popular awareness. He claims that a decision of change on the background of such circumstances — a constitutional moment — should be recognized as having a transformative constitutional power, equivalent to a constitutional amendment.[198]

One possible answer to the legitimacy problem faced by the Israeli Supreme Court makes use of Ackerman's theory of constitutional moments. More specifically, the argument is that the enactment of the new Basic Laws was an answer to the problem of unrestrained politics, a problem that was controversial and debated vigorously in Israel in the second half of the eighties and into the nineties.[199] This debate transcended to form a new constitutional moment, which is an appropriate time for fundamental constitutional changes, such as a new approach to judicial review. The new Basic Laws express the general expectations of the public amidst this constitutional moment. Therefore, an application of judicial review in

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196. On this more moderate understanding of constitutional revolution in the context of a social crisis, see Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 Neb. L. Rev. 701 (1989).

197. This theory is most elaborately explained in Bruce Ackerman, We The People (1991).

198. For the gist of this theory, see *id.* at 6–7. Ackerman names three main constitutional periods in American history: the Founding, Reconstruction and the New Deal. *See id.* at 40–41.

199. *See supra* text accompanying notes 55–63.

the framework of these Basic Laws will be perceived as legitimate by the Israeli public. On this note, it is not superfluous to add that about one month after the enactment of the new Basic Laws (in their original versions), the new Basic Law: The Government was enacted.[200] This Basic Law established separate and direct elections for the prime minister's post, a change that was promoted by popular demonstrations[201] and gained wide public support. This additional constitutional change, inspired by public opinion, tends to strengthen the recognition of a constitutional moment.[202]

At this stage, it is too early to evaluate the appropriateness of this interpretation of the developments in public life in Israel. Also, in many respects, the constitutional moment mentioned has not yet elapsed. The scope of protection of civil rights against infringing legislation is still debated, as the new amendments to the Basic Laws[203] suggest. Therefore, one could argue that the final turn of the current constitutional moment is not yet decided. However, since the new Basic Laws were clearly inspired by the political events of the eighties and the beginning of the nineties, their interpretation as bringing about a real constitutional change should be seriously considered.

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200. *See supra* note 24.

201. *See supra* note 63.

202. A few years earlier, when Ruth Gavison discussed the prospects for enactment of an Israeli Bill of Rights, she was pessimistic, not seeing any indication of a transcendence over normal politics:

> Today it would seem almost strange to conduct arguments about the basic premises of the state in the 'midst' of normal politics. It appears that the unique opportunity for a Bill of Rights has passed, at least for now . . . .
>
> The power to make a Constitution has not elapsed, but the opportunity has gone. Israel needs another moment of national elation to allow agreement on the formulation of a Constitution.

Gavison, *supra* note 19, at 153–54. However, it is suggested that the events which took place later on started a new period of constitutional consciousness.

203. *See supra* text accompanying notes 69–70 and 96–99.

4. Judicial Consciousness

Realistically, I believe that the legitimacy of a new constitutional practice of judicial review is very much dependent on the policy adopted by the Israeli Supreme Court. The court will have to adjust its judicial consciousness to the new constitutional era.

As previously explained, in establishing Israel's unwritten constitution, the Supreme Court developed a value-oriented form of adjudication.[204] A celebrated law review article, entitled *The Decline of Formalism and the Rise of Values in Israeli Law*,[205] states that this form of judicial reasoning became dominant during the eighties, owing in part to the degeneration of national politics.[206] During this period, the court was willing to adopt an "activist" approach — to declare new norms as derivatives of general principles and then enforce them against the government when necessary.[207] Viewing this development, some may argue that the court has no significant adjustment to make; it has only to follow its value-oriented form of adjudication. But it is misleading to think so. In the past, judicial activism was accompanied by restraints. It fell short of invalidating legislation, and, theoretically, could be overruled by the Knesset. Now, these restraints are gone. The court must be aware of this change and be more cautious. The value of invalidating a law will have to be weighed against the counter-majoritarian difficulty and against the problem of legitimacy. The additional power granted to the Court will have to be accompanied by an added sense of self-restraint. The court will have to "earn" its legitimacy.

This is not to say that the court will abandon its resort to values. The new Basic Laws are about values. As already noted, value-free constitutional theories have collapsed one after the other, when proved to be based upon concealed value-judgments.[208] If so, what can be the meaning of judicial "caution"? The collapse of theories may indicate that the answer is not necessarily a matter of

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204. *See supra* Part IV.C.

205. *See* Mautner, *supra* note 55.

206. The article refers also to the influence of cultural and social changes in Israel. *See id.* at 571–85.

207. A recent edition (vol. 17, no. 3, of Jan. 1993) of the Tel Aviv University Law Review was dedicated to a discussion of judicial activism in Israel.

208. *See supra* the discussion of the theories of Wechsler and Ely, in the text accompanying notes 179–85.

constitutional theory.[209] It is rather a matter of judicial consciousness. From this perspective, there may be more in Bickel's *Least Dangerous Branch* than is currently acknowledged. Bickel argued that the court should strive to represent the values of society. Understood as constitutional theory, this argument is not sufficient.[210] However, it is an important contribution to the shaping of judicial consciousness: "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and — the short of it is — it labors under the obligation to succeed."[211]

IX. A FUTURE-ORIENTED SUMMARY

The Israeli legal system is facing a promising yet unclear future. The enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom was aimed at renewal of the constitutional project which had been neglected in the past for lack of political support. However, the drafting of the new Basic Laws was also influenced by political compromises which resulted in ambiguities regarding the scope of the change. This Article has addressed these ambiguities and dealt with the interpretive difficulties posed by them. An interpretive study proves that it is possible to see through these ambiguities. This Article advocates the conclusion that Basic Law: Human Dignity and Freedom, and not just Basic Law: Freedom of Occupation, authorizes the Supreme Court to invalidate future legislation infringing on the rights protected by it, and that these rights are not only the ones specifically enumerated.

However, it is still important to remember that the change has not been completed. First, not all recognized human rights are included in the new Basic Laws. Second, past legislation (at this stage almost all existing law) is immune from judicial review. These are disturbing deficiencies, which will have to be cured.

In the meantime, the socio-political battle over the scope of judicial review continues. As these lines are written, the constitutional project is facing another confrontation originating from the religious opposition to judicial review where religious legislation is at stake. The

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209. Kahn even asserts that "constitutional theory has reached an end." Kahn, *supra* note 175, at 210–23.

210. *See supra* text accompanying note 183.

211. Bickel, *supra* note 45, at 239.

governing coalition, which needs all the political support it can get in order to further its peace initiatives, has to decide whether to accept more demands aimed at securing the constitutional status of those laws encroaching upon religious values.[212] These demands[213] reflect the widely shared recognition of the potential ingrained in the "constitutional revolution" initiated by the new Basic Laws and the changes it may ignite in the Israeli legal system. They also demonstrate the fear of some political players of giving up the advantages of legislative supremacy.[214] The Israeli Supreme Court must begin its constitutional endeavor against this very sensitive background. The Court will have to take it into consideration and yet not be deterred. Using Bickel's words once again, it will have to "labor . . . under the obligation to succeed,"[215] its success having a central role in making the completion of the constitutional change possible.

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212. *See supra* text accompanying notes 51, 81–82.

213. The political pressure comes from the same religious party (Shas) that pressed the coalition to support the 1994 amendment to the new Basic Laws, discussed, *supra*, in the text accompanying notes 96–100. The demands are, basically, two: (1) the entrenchment of the present religious legislation (by supporting a new proposed amendment to Basic Law: Human Dignity and Freedom stating the need for a special majority vote for legislation in religious matters); (2) a joint agreement to support future legislative proposals aimed at preserving the present "status quo" in religious matters, in case it is changed as a result of judicial review.

214. *See supra* text accompanying notes 40–43.

215. Bickel, *supra* note 45, at 239.