

# Reconciling Parliamentary Sovereignty and Judicial Review: On The Theoretical and Historical Origins of the Israeli Legislative Override Power

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## Introduction

It is often asserted that a formal constitution does not demand judicial review over primary legislation.<sup>1</sup> Rather, a country may conceive other mechanisms to protect the constitution from intrusion by the regular political bodies.<sup>2</sup> The question arises whether the

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1. By formal constitution, I mean a constitution that enjoys the following three characteristics: Identification, supremacy, and entrenchment. Identification means that it is relatively easy to identify what comprises the constitution. There is a commonly accepted document that citizens and elites alike refer to as the country’s constitution. Supremacy means that the legal system includes a hierarchy of norms under which the constitution is treated as supreme over regular law. Thus, a regular statute may not infringe constitutional provisions. Entrenchment means that the constitutional amendment process is more arduous than the amendment of regular law. Obviously, different countries offer a spectrum of these characteristics, and the fulfillment of the requirements is often a matter of degree rather than of kind. Cf. Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy?*, 28 MISHPATIM 21, 34–37 (1997).

2. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 99–113 (Norman Dorsen et al., eds., 2d ed. 2010); Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006).

reverse holds true. Can we envision a country that exercises judicial review over primary legislation yet lacks a formal constitution? Israel seems to provide an interesting case study in this regard. Prior to the famous 1995 *United Mizrahi Bank* decision,<sup>3</sup> in which the Israeli Supreme Court decided to treat Israel's Basic Laws as its formal Constitution,<sup>4</sup> Israel's Supreme Court exercised judicial review over primary legislation without a formal constitution to expound.

It is also regularly contended that American-style judicial review, under which the courts are empowered to invalidate statutes, is not compatible with parliamentary sovereignty. Parliamentary sovereignty has traditionally been understood to require three cumulative conditions: (1) that parliament may enact any statute except one that restricts its successors; (2) that constitutional law is on par with regular law and may be enacted or amended like any other statute; and (3) that no judicial review power over primary legislation is granted to the courts.<sup>5</sup> Thus, the British Human Rights Act of 1998 formulated the incompatibility framework, under which the superior courts may issue declarations of incompatibility but not invalidate statutes, to avoid granting the courts the final say regarding constitutional matters.<sup>6</sup> In fact, since many in Britain believe that parliamentary sovereignty is still their fundamental constitutional principle, this principle is one of the main obstacles to the adoption of a formal British constitution.<sup>7</sup> Israel, however, disproves this convention as well. Prior to 1995, although the Court exercised American style judicial review, under which it ordered not to apply statutes, the Israeli constitutional system was one of parliamentary

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3. CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Collective Vill.* 49(4) PD 221 [1995] (Isr.) [hereinafter *United Mizrahi Bank*]. It was partially translated in 31 *ISR. L. REV.* 754, 764 (1997). See also full translation at 1995-2 *ISR. L. REPORTS* 1, available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf).

4. See Part I below for discussion of the nature of Basic Laws.

5. See ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39 (8th ed. 1915). However, there has been some relaxation of these requirements in the twentieth century. See, e.g., Anthony Bradley, "The Sovereignty of Parliament—Form or Substance?," in *THE CHANGING CONSTITUTION* 25, 25–58 (J. Jowell & D. Oliver eds., 6th ed. 2007).

6. Bradley, *supra* note 5. See also Gardbaum, *supra* note 2. The superior courts that are empowered to issue declarations of incompatibility are enumerated in section 4 of the Human Rights Act, 1998.

7. In fact, in the U.K. Parliament's official site, parliamentary sovereignty is described as "the most important part of the UK constitution." See *Parliamentary sovereignty*, U.K. PARLIAMENT, <http://www.parliament.uk/about/how/sovereignty/> (last visited on Sept. 15, 2011).

sovereignty, under which constitutional law was handled on par with regular law, as elaborated below.<sup>8</sup>

This article contributes to a better understanding of Israel's constitutional system, as well as its implications for comparative constitutional law. In the Israeli context, this article will first focus on the period preceding the *United Mizrahi Bank* decision. Part I will establish that Israel's constitutional system during the founding era (1948-1992/5) was based on parliamentary sovereignty.<sup>9</sup> To do so, it will discuss the understanding of the relevant political actors of Israel's Parliament (the Knesset), and its constitutional powers prior to *United Mizrahi Bank*. It will analyze how both the Knesset and Israel's Supreme Court treated the enactment of Basic Laws during that era. The article will argue that both bodies viewed Basic Laws as being on par with regular laws, a perspective that is compatible with parliamentary sovereignty.

Part II will attempt to explain the Court's exercise of American-style judicial review against the backdrop of the tradition of parliamentary sovereignty during the founding era. It will analyze the renowned *Bergman* decision, given in 1969, in which the Court, for the first time in Israel's constitutional history, exercised its judicial review in refusing to apply a statute.<sup>10</sup> It will offer six different interpretations of *Bergman*, which served as the prevailing precedent for the exercise of judicial review before *United Mizrahi Bank*. I contend that all six interpretations suggest that the Court's actions, although atypical of parliamentary sovereignty systems historically, may align with parliamentary sovereignty.

Part III will suggest a new understanding of how the Knesset's compliance with the Court's exercise of judicial review did not amount to a legislature's acquiescence that a formal constitution existed in Israel during the founding era. While the widespread scholarly understanding<sup>11</sup> shared by the Justices in *United Mizrahi*

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8. See Parts I to III below.

9. The founding era stretched from 1948, when the Israeli State was founded, until 1992, when the Knesset enacted the Basic Laws dealing with individual rights, or even until 1995, when *United Mizrahi Bank* was decided. If 1992 is the defining closing date, then it was mainly the Knesset that brought about the change in the constitutional regime. If 1995 is the defining closing date, then the Court, no less than the Knesset, played a dominant role in bringing about the change in the constitutional regime.

10. HCJ 98/69 *Bergman v. Minister of Fin. and State Comptroller* 23(1) PD 693 [1969] (Isr.) [hereinafter *Bergman*] (an English translation is available in 4 ISR. L. REV. 559 (1969)).

11. See, e.g., Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250, 259 n.40 (2005); Gal Dor, *Governmental*

*Bank*<sup>12</sup> is that the Knesset agreed to judicial review even before the 1990s, this article suggests that the Knesset actually circumvented judicial review prior to *United Mizrahi Bank*. The Knesset responded by retroactively revalidating statutes previously ruled unconstitutional by the Supreme Court.

Part IV explains how *United Mizrahi Bank* has changed the law since its occurrence, thus showing the decision's significance. The article analyzes how *United Mizrahi Bank* revolutionized Israel's constitutional law, dividing Israel's constitutional history into "before" and "after" phases. *United Mizrahi Bank* is considered one of the most famous comparative constitutional decisions ever given by a national supreme court,<sup>13</sup> yet many Israeli scholars discount its importance.<sup>14</sup> This article presents its significance in light of the law that existed before the decision, thus exposing the extraordinary role a supreme court may play in the formation of a formal constitution.<sup>15</sup> This is atypical. Usually, elected bodies serve as leaders of constitutional change and claim a mandate from the People to bring

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*Avoidance Versus Judicial Review: A Comparative Perspective on Israeli Decision-Making Strategies in Response to Constitutional Adjudication*, 13 TEMP. INT'L & COMP. L.J. 231 (1999); Hans. Klinghoffer, *Legislative Reaction to Judicial Decisions in Public Law*, 18 ISR. L. REV. 30 (1983); Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1233 (1970). Cf. Claude Klein, *Semantics and the Rule of Law*, 9 MISHPATIM 79 (1978) (criticizing the *Ressler* decision); 1 AMNON RUBINSTEIN, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 377-379 (4th ed. 1991) [hereinafter *CONSTITUTIONAL LAW OF ISRAEL* (4th ed.)] (criticizing the retroactive technique of the Knesset for its moral inadequacy but finding it constitutionally effective and valid).

12. See e.g., *United Mizrahi Bank*, *supra* note 3, at 285, 288, 292-93, 325 (Shamgar, President); 353, 383 (Barak, President); 468-69 (Zamir, J.); 513-14 (Cheshin, J.).

13. See, e.g., ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); DORSEN ET AL., *supra* note 2, at 103-13; Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004); R.A. POSNER, *HOW JUDGES THINK* 362-68 (2008).

14. See, e.g., Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007); Yoseph .M. Edrey, *Constitutional Revolution?*, 3 MISHPAT UMIMSHAL 453 (1996). Yoram Shachar frequently asserts this claim in scholarly discussions because he does not believe that there have been any substantial consequences to Israel's constitutional revolution. (I refer to Shachar's view with his consent.)

15. For academic voices suggesting that the Court invented a formal constitution in *United Mizrahi Bank*, see, e.g., POSNER, *supra* note 13, at 362-68; Gavison, *supra* note 1, at 28-33, 110, 123, 132; Martin Edelman, *The Status of the Israeli Constitution at the Present Time*, 21 SHOFAR 1 (2003).

about change while unelected political bodies, such as courts, serve as resistant branches, trying to preserve the constitutional status quo.<sup>16</sup>

Though Israel has been omitted from the international literature on the Commonwealth model of constitutionalism, I contend that post-*United Mizrahi Bank*, Israel enjoys a hybrid formal constitution protected by judicial review that fits this new model.<sup>17</sup> Furthermore, in contrast to the founding experience, the political branches now either redraft statutes to substantively align with courts' instructions regarding their constitutionality or overwhelmingly comply with judicial decisions that invalidate statutes.

To explain this momentous *United Mizrahi Bank* decision, I finally offer in Part V four different theories of legitimacy that comport with the backdrop of Israel's constitutional development. These theories attempt to legitimize the Israeli Supreme Court's extraordinary role in the formation of the Israeli Constitution.

Part VI brings the article to a close with a discussion of the implications of this case study on comparative constitutional law. Using Israel as a case study, this article offers three important lessons for comparative constitutionalism: Firstly, it elaborates on the mechanisms available within a parliamentary sovereignty tradition to introduce judicial review. These mechanisms include legislative self-entrenchment; the *ultra-vires* doctrine; the protection of core democratic values; and the application of a "manner and form" approach.

Secondly, Israel's experience also reveals that the "notwithstanding" mechanism, which enables the regular legislature to override the constitution (or the court's interpretation of it) for a

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16. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006).

17. Gardbaum, *supra* note 2; MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010). These writers include Canada, Britain, New Zealand, and lately even Australia within the Commonwealth model. But see GIDEON SAPIR, *CONSTITUTIONAL REVOLUTION IN ISRAEL* (2010) (Hebrew), which discusses the commonwealth model in the Israeli context as a model for future Israeli development. While Gardbaum, Hiebert and Tushnet focused on Canada, New Zealand and the United Kingdom, Sapir applies their work in the Israeli context. In his book, Sapir offers three possible models—a constitution as a gag rule, a constitution as a dialogue and a constitution as protecting basic values—for Israel's future development. These models are distinguished based on the reason for constitutional formation.

defined period,<sup>18</sup> is not a Canadian invention, as it is treated by leading Canadian constitutional scholars.<sup>19</sup> Rather, this mechanism has deep roots in parliamentary sovereignty systems and is a natural development of common-law interpretation techniques, under which there is a presumption against implied repeal of fundamental rights.<sup>20</sup> This presumption is overcome if the legislature uses explicit override language.

Lastly, the article suggests that a court might exercise American-style judicial review over primary legislation, in the sense of not applying statutes, even within a system of parliamentary sovereignty, if—as in Israel—both the Court and the legislature minimize the significance of judicial review. In the case of pre-*United Mizrahi Bank* Israel, the Court veiled the constitutional meaning of its actions, dismissing the use of judicial review as something not to be considered revolutionary. Similarly, by upholding the Court's decisions rather than competing with the latter for hegemony, the Israeli legislature has been able to trivialize the use of judicial review, casting it as formalistic with little effect. This is a unique phenomenon in the comparative constitutional world. In other systems, it is clear that the Court cannot fully make use of judicial review while remaining in the context of parliamentary sovereignty.

Comparing Israel's founding experience with both its post-*United Mizrahi Bank* period and Canadian experience reveals that the drafting of the constitutional arrangements is no more important than their actual operation by the various political players. Specifically, the way both the legislature and the court interpret and utilize “notwithstanding” clauses may either strip constitutionalism of its ability to protect core values and rights, or strengthen it. In light of Israel's and Canada's experiences, I explain how *not* to interpret override clauses if one desires robust constitutionalism.

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18. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 215–21 (2010). However, the legislature should not be authorized to retroactively revalidate statutes struck down by the court, as further elaborated in Parts III–VI below.

19. 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 174 (5th ed. 2007) (“The power of override seems to be a uniquely Canadian invention, which makes judicial review suspensory only.”).

20. Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

## I. The Political Actors' Grasp of Parliamentary Sovereignty

To explain how Israel's Supreme Court employed judicial review against the backdrop of the Knesset's sovereignty, it is first necessary to establish the fact that Israel's constitutional system was based on parliamentary sovereignty during the founding era. In this Part, I argue that the treatment of the Basic Laws by the Knesset and the Court prior to *United Mizrahi Bank* demonstrates that Israel's "rule of recognition" at the founding era was that of parliamentary sovereignty.<sup>21</sup>

### A. The Status of Basic Laws

#### 1. Why Were Basic Laws Enacted in Israel?

The young Zionist State was founded in 1948 on the remnants of its immediate predecessor, the British Mandate. To avoid legal chaos, the new State adopted (by statute) the law that existed at the time of the State's founding, but with the alterations required due to its establishment. The adopted law included British judicial decisions that served as precedents for the new State.<sup>22</sup> Not only did British law influence the new legal system through official adoption, but Mapai, the political party which led the Israeli government almost exclusively from 1948 to 1977, and its leader David Ben-Gurion, were also strong advocates of the British legal tradition of parliamentary sovereignty.<sup>23</sup> As Israel was based on a parliamentary rather than presidential system, the government enjoyed the confidence of a majority of seats in the Knesset.<sup>24</sup> Thus, both elected branches—the government and

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21. H.L.A. HART, *THE CONCEPT OF LAW* 100–10 (2d ed. 1994) (writing that the ultimate rule of recognition is identified by the practice of courts, officials and private persons of the legal system).

22. Law and Administration Ordinance, 5708-1948, OG No. 2 p. 1, § 11 (Isr.). See Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 *ISR. L. REV.* 324 (1975); Aharon Barak, *The Israeli Legal System—Tradition and Culture*, 40 *HAPRAKLIT* 197, 202–05 (1992).

23. See 1 AMNON RUBINSTEIN & BARAK MEDINA, *CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 26 (5th ed. 1996) [hereinafter *CONSTITUTIONAL LAW OF ISRAEL* (5th ed.)]. See also Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 *ISR. STUD.* 193 (1998); Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR. L. REV.* 259, 266–67 (1999).

24. The elections to the Knesset also determine the identity of the government. The President (fulfilling mainly a symbolic role) assigns the task of establishing a government to a Knesset Member that enjoys the support of a majority in the Knesset. See Basic Law: The Government, 5761, SH No. 1780 p. 158, § 7 (Isr.). Since the government needs the confidence of the Knesset to rule, it is composed of representatives of political parties that enjoy a majority of MKs. *Id.* at § 3. Though Basic Law: The Government was replaced



the Knesset—venerated the British legal tradition and looked to it for guidance throughout Israel's founding era. In addition, during its first years, the British legal system, more than any other, influenced the new Israeli courts' jurisprudence. The judges often cited British cases as inspiration and to back their decisions.<sup>25</sup> The latter was not surprising, as many of the judges were educated in the British tradition.<sup>26</sup> This way all three branches of government used the British model of parliamentary sovereignty as a model to imitate during the founding period.

How does the enactment of the Basic Laws fit in with this British influence? Prima facie, they do not easily fit with British legal influence as they demarcate constitutional law from regular law, in contradistinction to one of parliamentary sovereignty's major premises.<sup>27</sup> Basic Laws' origins may be found in United Nations General Assembly's Resolution 181, dated November 29, 1947, which prescribed the adoption of a democratic constitution by the Jewish State.<sup>28</sup> The Israeli Declaration of Independence of May 14, 1948, envisioned a constitution, in accordance with this U.N. Resolution, yet Israel has legislated and enacted only regular and Basic Laws.<sup>29</sup>

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twice since its first adoption, these arrangements portray the law as it existed during the founding period.

25. In 1956, the primacy of British references reached a peak with 40% of references in Israeli Supreme Court decisions being of British origin. This percentage declined gradually and consistently, with no particular identifiable reason according to Y. Shachar, R. Harris & M. Gross, *Citation Practices of the Supreme Court, Quantitative Analyses*, 27 MISHPATIM 119, 152, 157–59 (1996).

26. Of the Supreme Court Justices serving in the years 1948–1980, 20% were educated in England, 20% were educated in Israel and 32% were educated in Germany. See ELYAKIM RUBINSTEIN, *JUDGES OF THE LAND* 142 (1980). For the ramifications of these demographics, see Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 ISR. STUD. 159, 185 (1998) (arguing that Israel's "German" Supreme Court judges were "Anglophilians").

27. For parliamentary sovereignty's major premises, see DICEY, *supra* note 5 and accompanying text.

28. See Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question, G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947), available at <http://www.prospectsforpeace.com/Resources/UN/UNGAR181.pdf>. This resolution prescribed said steps for both the Jewish and Arab states in preparation for their independence after the British mandate ended in Israel.

29. See *Declaration of Establishment of State of Israel*, ISR. MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel> (last visited Nov. 4, 2011).



Basic Laws have been enacted in Israel as part of a compromise, known as the *Harari Resolution*, passed by the First Knesset.<sup>30</sup>

The First Knesset was elected with the primary role of enacting a constitution. Its election campaigns focused on the various proposals for a constitution advocated by the political parties.<sup>31</sup> Despite this, even during the election, it became clear that the Knesset would also function as a regular legislative assembly.<sup>32</sup> Due to the latter, the legislative and constitutive tasks were merged into the role of one body, consistent with the European constituent assembly model, but deviating from the American model of separate assemblies for each task.<sup>33</sup> Originally, the Israeli Declaration of Independence envisioned the American model,<sup>34</sup> but the outbreak of the War of Independence postponed the election of the Constituent Assembly from November 25, 1948, to January 25, 1949.<sup>35</sup> Moetzet Ha'am (the Provisional State Assembly), which issued the Declaration of Independence and served as a temporary legislative assembly, refused to extend its legislative role without a direct appeal to the people.<sup>36</sup> Therefore the assembly was dissolved allowing the new Constituent Assembly to perform both legislative and constitutive functions.<sup>37</sup>

Contrary to expectations, the First Knesset could not agree on whether or not it wanted to adopt a constitution. Prime Minister David Ben-Gurion and the governing Mapai party believed that the British model of parliamentary sovereignty was preferable, whereas

30. Knesset Resolution from the 13th of June, DK (1950) 1743 (Isr.).

31. Nimmer, *supra* note 11, at 1239, n.92; Yechiam Weitz, *General Elections and Governmental Crises*, 9 ISRAEL AT THE FIRST DECADE 10 (2001). "Only in this election was the constitutional issue brought to the voter decision as a matter of legal requirement." *United Mizrahi Bank*, *supra* note 3, at 486 (Cheshin, J.).

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

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

34. The Declaration contemplated that Moetzet Ha'am will serve as Israel's interim Parliament until elected and regular governmental bodies were created according to a formal constitution. See 1 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 50–51.

35. Weitz, *supra* note 31, at 10–12.

36. See Uri Yadin, *The Transition to a Constituent Assembly Act*, in 1 IN MEMORIAM URI YADIN 79, 79–82 (Aharon Barak & Tana Spanic eds., 1990) (speech on January 17, 1949). Moetzet Ha'am included representatives of both the Jewish population in Israel and the Zionist movement.

37. The Transition to a Constituent Assembly Ordinance, 5709-1949, OG No. 42 p. 105, §§ 1 and 3 (Isr.).

right-wing minority leader, Member of Knesset (MK) Menachem Begin, supported the American model of a supreme constitution. Ben-Gurion believed that the young state had a different starting point than the American founding. It had no federal structure and was not established as a rejection of the British model. Israel most needed not a supreme constitution unalterable by regular means and protected by judicial review as in the United States, but rather a strong basis for the rule of law, meaning the rule of every statute, and for democracy in the sense of majority rule. Ben-Gurion argued that a supreme constitution would undermine citizens' confidence in both the rule of law and the role of the judiciary.<sup>38</sup> The latter's position was not surprising considering the political hegemony Mapai enjoyed. Mapai saw no reason to relinquish its control of national legislation by adopting a constitution.

Ben-Gurion also argued that it was too early for Israel to adopt a Constitution, when most of its expected population was still living in the Diaspora. He also thought that Israel just had its constitutional moment in the form of the Declaration of Independence that enjoyed unanimous support from the Jewish political parties and population and the State was not ready for yet another constitutional moment.<sup>39</sup> Furthermore, many members of the Orthodox Jewish political parties believed that Israel did not need a formal constitution, since Jewish religious law was or, more accurately, should be seen as its constitution. Some MKs also worried about the results of adopting a constitution while under emergency rule.<sup>40</sup>

Instead, the First Knesset adopted the *Harrari Resolution*. According to the Resolution, the task of proposing a constitution was entrusted to a Knesset committee that would draft chapters of the constitution that the Knesset would enact as Basic Laws. When the task was complete, all Basic Laws would be unified in one document to serve as Israel's Constitution.

As expected of a compromise, everyone understood this resolution differently. The status of the Basic Laws enacted prior to

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38. See DK (1950) 812–820 (Isr.).

39. *Id.* at 820.

40. Benyamin Neuberger, *The Constitution Debate in Israel*, in GOVERNMENT AND POLITICS IN ISRAEL unit 3, 25–37 (1990); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995); Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73 (2000); Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585 (2003).

the completion of the constitution was unclear: During the interim period would these laws be treated as regular laws or as superior to them? How would the constitution be consolidated—by a special enactment process or technically? Could other bodies propose Basic Laws—as in fact happened with most Basic Laws<sup>41</sup>—or only the committee? Who would determine when the constitution was complete; did the First Knesset contemplate a deadline? These ambiguities were intentionally left for future Knessets to address, since the First Knesset failed even to reach a consensus on the most fundamental question: Whether a constitution was at all desired.<sup>42</sup>

The First Knesset did not enact any Basic Laws. Later Knessets enacted a total of twelve Basic Laws, ten dealing with the structure of government and division of power between the different branches and only two, enacted in 1992, dealing with individual rights.<sup>43</sup> In fact, the Justices in *United Mizrahi Bank*, decided in 1995, regarded the enactment of the two individual rights Basic Laws—Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation—as a “constitutional revolution,”<sup>44</sup> as it was the first time in Israel’s history that Basic Laws dealt exclusively with individual rights. For the first time in Israel, Basic Laws were also substantively entrenched (i.e., a limitations clause). By substantive entrenchment, I mean that the laws themselves set substantive criteria that any infringing statutes would have to fulfill. The 1992 Basic Laws require

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41. 2 AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 731 (6th ed. 2005) [hereinafter CONSTITUTIONAL LAW OF ISRAEL (6th ed.)].

42. Neuberger, *supra* note 40, at 38–40.

43. Before 1992, the following Basic Laws were enacted: Basic Law: The Knesset, 5718, SH No. 244 p. 69 (Isr.); Basic Law: Israel Lands, 5720, SH No. 312 p. 56 (Isr.); Basic Law: The President of the State, 5724, SH No. 428 p. 118 (Isr.); Basic Law: The Government, 5728, SH No. 540 p. 226 (Isr.); Basic Law: The State Economy, 5738, SH No. 777 p. 207 (Isr.); Basic Law: The Army, 5736, SH No. 806 p. 154 (Isr.); Basic Law: Jerusalem the Capital of Israel, 5740, SH No. 980 p. 186 (Isr.); Basic Law: The Judiciary, 5744, SH No. 110 p. 78 (Isr.); Basic Law: The State Comptroller, 5748, SH No. 1237 p. 30 (Isr.). The Knesset completely replaced Basic Law: The Government twice. For the history of enactment, see 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 687–730; 2 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 41, at 821–79. In 1992, the Knesset enacted the two Basic Laws dealing with individual rights as further elaborated in the text. In April 2009, the Knesset enacted and then amended, in 2010, Basic Law: The State’s Budget for the Years 2009 and 2012 (Special Provisions) (Provisional Enactment), 2009.

44. *United Mizrahi Bank*, *supra* note 3, at 352–55 (Barak, President). Barak, more than any other speaker, is identified with coining the term “constitutional revolution” to describe the enactment of the 1992 Basic Laws. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9, 9–13 (1992).

that any statute that infringes upon their provisions must pass the following cumulative four-part substantive test: (1) the conflicting provision must be in a statute or authorized by a statute; (2) the infringement must be compatible with the values of a Jewish and democratic State; (3) it must be done for a proper purpose; and (4) it must be proportional.<sup>45</sup> Until then, Basic Laws sometimes included provisions dealing with procedural, but not substantive, entrenchment. That is, they set a special amendment process, usually requiring the consent of a specified supermajority of MKs to amend them.<sup>46</sup>

2. *Did the Knesset Treat the Basic Laws as Constitutional in Nature?*

The Knesset did not differentiate between the enactments of regular and Basic Laws; rather, both were enacted via the same legislative process of three readings.<sup>47</sup> In the Knesset, members often spoke of the Knesset as sovereign and entitled to enact any law. Even when enacting Basic Laws, members emphasized that the Knesset was enacting them as an exercise of its sovereignty.<sup>48</sup> Sometimes, during the enactment process, MKs would also highlight the importance of Basic Laws for their constitutional content, and as an implementation of the Harrari Resolution.<sup>49</sup> Employing the same legislative process for regular laws and Basic Laws is characteristic of parliamentary sovereignty systems.

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45. Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.); Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 4 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994).

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

47. The legislative process consists of three readings for each bill. The first reading is the one in which the statute is introduced to the Knesset and a vote takes place on whether to refer the bill to the committee stage. The second reading takes place after the bill emerges from the committee stage, and during this reading, a vote takes place on each section separately to allow a vote on objections to particular provisions. The last reading is on the bill as a whole as the content has been defined in the second reading. If it is a bill that has been proposed by a private MK, there is an additional preliminary vote to the three regular readings. CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 41, at 733–43.

48. See, e.g., *United Mizrahi Bank*, *supra* note 3, at 496–501 (Cheshin, J., citing MKs' speeches). In fact, in the first five editions of the classic book on Israel's constitutional law, the Knesset was portrayed as sovereign. The fifth edition was published in 1996 after the Israeli constitutional revolution, but nonetheless chapter 11 was entitled "the sovereignty of the Knesset and its limits." CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 409.

49. On the Harrari Resolution, see *supra* notes 30 and 41 and 42 and accompanying text.

Even the number of MKs participating in the enactment of Basic Laws was no higher than that typical of regular enactments. Basic Laws often passed with the presence of only a few MKs.<sup>50</sup> In fact, the two revolutionary Basic Laws regarding individual rights were enacted in 1992 with only a minority of MKs present. Basic Law: Freedom of Occupation passed its first reading with a vote of twenty-one to sixteen, and the final reading passed with the support of twenty-three MKs and none against. Basic Law: Human Dignity and Liberty passed its first reading with the vote of forty to twelve, and the final reading with the support of thirty-two MKs and twenty-one against. Many MKs, including coalition members, preferred to spend their time campaigning for the upcoming election rather than participating in the Basic Laws' enactment.<sup>51</sup> In fact, these 1992 Basic Laws were enacted in March 1992, three months before general elections were held, during what some considered a legislative lame duck period, with accompanying legitimacy problems characteristic of such transition of power.<sup>52</sup> For most Basic Laws, there is not even an official record of the number of MKs supporting their enactment; only six of the twelve Basic Laws even have partial data of the MKs' vote.<sup>53</sup> The Knesset simply did not treat Basic Laws differently than regular laws.

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50. Cf. Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1, 2 (2007), available at: [http://www.harvardilj.org/2007/08/online\\_49\\_medina/](http://www.harvardilj.org/2007/08/online_49_medina/) (asserting that "the bulk of the Basic Laws passed by a decisive majority.").

51. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 918.

52. See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005); BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999); John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317 (2003); Jack M. Beerermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006); Jack M. Beerermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003); Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. (forthcoming 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736088](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736088).

53. There is no record on MKs' votes on Basic Law: Israel Lands, 5720, SH No. 312 p. 56 (Isr.); Basic Law: The President of the State, 5724, SH No. 428 p. 118 (Isr.); Basic Law: The Government, 5728, SH No. 540 p. 226 (Isr.), except for the vote on first reading of fifty-one to twenty-three MKs (DK (1966) 2533 (Isr.)); Basic Law: The State Economy, 5735, SH No 777 p 206 (Isr.); Basic Law: The Army, 5736, SH No. 806 p. 154 (Isr.); Basic Law: The Judiciary, 5744, SH No. 110 p. 78 (Isr.); and Basic Law: The State Comptroller, 5748, SH No. 1237 p. 30 (Isr.).

It has, however, been suggested that in 1994 the Knesset replaced Basic Law: Freedom of Occupation with a new one, this time with the presence and support of sixty-seven to nine MKs on third reading.<sup>54</sup> With this replacement, the Knesset also amended some sections of Basic Law: Human Dignity and Liberty. Thus, the broader support of MKs in 1994 remedied the slim support granted to these Basic Laws in 1992.<sup>55</sup>

While tempting, there are numerous difficulties with this assertion. In 1994, the Knesset replaced Basic Law: Freedom of Occupation on the advice of the Supreme Court that such a move was advisable if it wanted to guarantee that a statute prohibiting the importation of nonkosher meat would survive constitutional scrutiny.<sup>56</sup> In the 1994 Basic Law: Freedom of Occupation, the Knesset adopted an override clause to the effect that the Knesset could enact, with the support of an absolute majority of MKs (61 out of 120), an infringing statute explicitly proclaiming its validity despite its conflict with the Basic Law. This override would be valid for four years, unless a shorter period was provided for in the infringing statute.<sup>57</sup> The government, headed by Prime Minister Rabin, had to replace the Basic Law if it wanted to retain the ultraorthodox political party, Shas, in the coalition.<sup>58</sup>

Thus, the 1994 Basic Law: Freedom of Occupation passed hastily, within less than a month.<sup>59</sup> Some MKs wrongly assumed that they were voting for the statute prohibiting the importation of non-kosher meat rather than for the Basic Law.<sup>60</sup> Many of the most important provisions in the Basic Law were not included in the original draft and appeared only in the second and third readings, with MKs unaware of their change of content.<sup>61</sup> Both Prime Minister

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54. See DK (1994) 5439 (Isr.).

55. See Dan Meridor, *Court Rulings in light of the Basic Laws*, in CONSTITUTIONAL REFORM IN ISRAEL AND ITS IMPLICATIONS—CONFERENCE PROCEEDINGS, JUNE 1994 69, 70–71 (1995). See also 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 915.

56. HCJ 3872/93 Meatrael Ltd v. Prime Minister and Minister of Religions 47(5) PD 485, 505 [1993] (Isr.). The decision was given on October 22, 1993.

57. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.).

58. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 922–23.

59. The government publicized the draft of the Basic Law on February 14, and the Basic Law had become law already on March 10, 1994. See Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90 (Isr.).

60. See Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 MISHPAT UMIMSHAL 443, 445–46 (1994) [hereinafter Bendor, *Defects*].

61. *Id.* at 445–47.



Rabin and Shas later “discovered” that the Basic Law they had voted for included reference to the Declaration of Independence and felt “cheated.” They had learned, after their vote, of the Basic Law’s declaration that the rights enumerated in it and in Basic Law: Human Dignity and Liberty would be respected in the spirit of the principles embodied in the Declaration of Independence.<sup>62</sup> This Shas and Rabin never intended to enact or so they claimed. Because of the reference to the Declaration of Independence in the amended Basic Law, Shas never returned to the coalition despite the fact that the Basic Law was amended only to enable its return.<sup>63</sup> This history of enactment does not easily support the “redemption” story that has been ascribed to the 1994 enactment. The majority of MKs enacting the 1994 Basic Law: Freedom of Occupation does not attest to broad, deep and decisive support for the Basic Laws.

In addition, the Knesset placed Basic Laws that were supposedly of constitutional nature on the same level as regular statutes. Thus, the Knesset amended Basic Laws using regular statutes as well. Furthermore, the Knesset did not treat the Basic Laws with the respect usually accorded to a formal constitution. It frequently amended Basic Laws to suit new political conditions, as exemplified by the prohibition on importing nonkosher meat.<sup>64</sup> Placing constitutional statutes on par with regular statutes is one of the main characteristics of parliamentary sovereignty in the Diceyan tradition.<sup>65</sup>

The main differences between Basic Laws and regular statutes as far as their enactment was concerned were the following: First, the title “Basic Law,” as opposed to simply “Law,” and the absence of a year mark separated the former from regular legislation, placing them in a category of their own; second, Basic Laws usually dealt with constitutional as opposed to regular issues, although some regular statutes addressed constitutional matters,<sup>66</sup> and some Basic Laws contained quotidian concerns.<sup>67</sup>

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62. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 1 (Isr.) and the amended new § 1 of Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150 (Isr.).

63. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 924.

64. *See, e.g.*, Bendor, *Defects*, *supra* note 60.

65. *See* DICEY, *supra* note 5 and accompanying text.

66. Two notable examples are The Woman’s Equal Rights Law, 5711-1951, SH No. 82 p 248 (Isr.) and The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.).

67. *See* 1 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 375–77.



### 3. *How Did the Court Perceive the Basic Laws?*

The Court often ruled on cases based on the assumption that the Knesset was the sovereign.<sup>68</sup> Wherever possible, it would interpret statutes in conformity with basic individual rights. The Court would infer in every statute a general objective purpose to protect individual rights and promote the basic values of the legal system, in addition to its specific subjective legislative purpose. Nevertheless, when such an interpretation was not possible, the statute would prevail over individual rights that were simply considered judge-made common-law rights. For example, in the early years of the State's founding, Jewish couples who wished to be wed in a civil ceremony, rather than according to Jewish law, claimed that the 1953 statute imposing Jewish religious law on every marriage and divorce of Jewish Israeli citizens and inhabitants infringed upon their freedom of religion—or more precisely, their right to be free from religion.<sup>69</sup> They were denied a remedy. The Court unequivocally ruled that individual rights, even if embodied in the Declaration of Independence, could not prevail over explicit conflicting statutes.<sup>70</sup>

However, this did not prevent the judges from interpreting statutes creatively and contrary to legislative intent in an attempt to respect individual rights during the founding era.<sup>71</sup> In this regard, prior to the *United Mizrahi Bank* decision, Israel at least had an *interpretive constitution*. That is, it had a common-law constitution with interpretive force when construing statutes.<sup>72</sup> In addition, the Court required the executive branch to respect individual rights and not infringe upon them by secondary legislation or executive acts, unless it had an explicit statutory authorization to do so.<sup>73</sup> This kind

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68. See, e.g., CA 228/63 Azuz v. Ezer 17(4) PD 2541, 2547 [1963] (Isr.) (Berenzon, J.) (“There is no doubt that according to Israel’s constitutional law, the Knesset is sovereign and may enact any statute it desires.”); HCJ 112/77 Fogel v. Broad. Auth. 31(3) PD 657, 664 [1977] (Isr.) (Landau, Deputy President) (“This is how we earned a quasi-judicial Bill of Rights . . . that is subordinate to the sovereign will of the Knesset as a legislative assembly.”).

69. Jurisdiction of Rabbinical Courts (Marriage and Divorce) Law, 5713-1953, SH No. 134 p. 165 (Isr.).

70. CA 450/70 Rogozinski v. Israel 26(1) PD 129 [1971] (Isr.).

71. 1 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 41, at 68.

72. Gardbaum, *supra* note 2, at 728 (using the expression “interpretive” bill of rights with respect to New Zealand).

73. See, e.g., HCJ 262/62 Peretz v. Local Municipality Kfar Shemaryahu 16 PD 2101 [1962] (Isr.); HCJ 337/81 Miterani v. Minister of Transp. 37(3) PD 337 [1983] (Isr.).

of a constitution may align with the traditional theory of legislative sovereignty.<sup>74</sup>

Also, like the Knesset, the Court did not treat Basic Laws as supreme. It allowed the Knesset to amend Basic Laws using regular statutes,<sup>75</sup> applying the general maxims of interpretation onto Basic Laws, so that a subsequent regular statute could repeal an earlier Basic Law.<sup>76</sup> Besides, an earlier regular statute which was specific in nature would prevail over a later general Basic Law.<sup>77</sup> Thus, there was no formal constitution seen as supreme over regular enactments, but rather all legislation enjoyed similar status as part of a system based on the tradition of parliamentary sovereignty.

### B. Legislative Self-Entrenchment Power

Against this background of parliamentary sovereignty, both the Knesset and the Court treated the Knesset as enjoying self-entrenchment power—that is, the power to entrench its enactments against repeal by a simple random majority of MKs present. The Knesset utilized this power when enacting statutes that included procedural or substantive entrenchment provisions. While procedural entrenchment made the amendment process more arduous, substantive entrenchment set substantive criteria that infringing statutes must fulfill. The Knesset primarily exercised this entrenchment power to protect against the random amendment of the Basic Laws' provisions. Still, few Basic Laws were eventually entrenched. In fact, Basic Law: Human Dignity and Liberty lacks procedural entrenchment, although it contains substantive entrenchment. Its proponents had tried to include a provision requiring an absolute majority of MKs (61 out of 120) for its amendment, but the proposal was one vote short of majority support.<sup>78</sup> Basic Law: Freedom of Occupation, on the other hand,

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74. For recent British debates regarding the compatibility of purposive interpretation and parliamentary sovereignty, see J. W. F. ALLISON, *THE ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS* 186–236 (2007).

75. See, e.g., H CJ 148/73 *Kniel v. Minister of Justice* 27(1) PD 794, 795 [1973] (Isr.) [hereinafter *Kniel*]; H CJ 60/77 *Ressler v. Chairman of the Elections to the Knesset Cent.Comm'n* 31(2) PD 556 [1977] (Isr.) [hereinafter *Ressler*].

76. *Kniel*, *supra* note 75; *Ressler*, *supra* note 75.

77. *Lex specialis derogat generali*. CrimA 107/73 *Negev v. Israel* 28(1) PD 640, 642 [1974] (Isr.) (Berenzon, J.).

78. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 23, at 921–22 & n.40.

does enjoy procedural entrenchment demanding the support of an absolute majority of MKs to amend it.<sup>79</sup>

Entrenchment provisions are not unique to Basic Laws and can be found in regular enactments as well. The Knesset used entrenchment in statutes dealing with economic matters when it wanted to indicate to the public its commitment to a certain economic policy.<sup>80</sup> It also attempted to entrench some of its statutes regarding the territory of the Israeli State and its borders.<sup>81</sup>

Procedural entrenchment provisions usually did not exceed the requirement that a statute be amended by the support of an absolute majority of MKs.<sup>82</sup> One may even argue that such a requirement is disconnected from entrenchment, but merely a demand that MKs be present when enacting certain policies, i.e., a form of quorum

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79. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 7 (Isr.).

80. The Protection of the Israeli Public Investment in Financial Assets Act, 5744-1984, SH No. 1121 p. 178, § 3 (Isr.), requires an absolute majority of MKs for its amendment to signal to the public that the government would not unilaterally alter the conditions of financial instruments such as state bonds. Until 1995, there was also a procedural entrenchment provision in section 45b of The Bank of Israel Act, 5714-1954, SH No. 164 p. 192 (Isr.) (inserted by amendment 15 enacted in 1985, SH No. 1156 pp.201-203), requiring an absolute majority of MKs to amend section 45a. The entrenchment aimed at restricting the government's authority to borrow money from the Central Bank, thus increasing the amount of money available in the market.

81. For example, Jerusalem's territory may not be relinquished but by amendment of Basic Law: Jerusalem the Capital of Israel, which requires the support of an absolute majority of MKs. Basic Law: Jerusalem the Capital of Israel, 5740, SH No. 980 p. 186, § 7 (Isr.).

A government's decision to relinquish territory that is officially part of Israel's territory is subject to Knesset's authorization by an absolute majority vote. The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) Act, 5759-1999, SH No. 1703 p. 86, § 2 (Isr.). This section however is not itself entrenched and may thus be amended by regular majority vote. HCJ 1169/07 Rabes v. Israel's Knesset (unpublished, 2007), available at: <http://elyon1.court.gov.il/files/07/690/011/B02/07011690.b02.pdf>. Recently, the Knesset enacted The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) (Amendment) Act, 5771-2010, SH No. 2263 p. 58 (Isr.), in which it requires to hold a referendum before the elected bodies decide to relinquish territory that is annexed to Israel. It is mainly relevant with regard to East Jerusalem and the Golan Heights, since Judea and Samaria were never officially annexed. If at least eighty MKs support the relinquishment of territory, then the requirement to hold a referendum may be ignored.

82. This is true of Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 7 (Isr.) (entrenching the entire Basic Law); Basic Law: Jerusalem the Capital of Israel, 5740, SH No. 980 p. 186, § 7 (Isr.); Basic Law: The Government, 5761, SH No. 1780 p. 158, § 44 (Isr.) (entrenching the entire Basic Law); Basic Law: The Knesset, 5718, SH No. 244 p. 69, § 4 (Isr.); Basic Law: State Economy, 5738, SH No. 777 p. 207, § 3b(c) (Isr.).

requirement.<sup>83</sup> Usually, in the absence of entrenchment provisions, the Knesset has no quorum requirements and a statute may be enacted with even the smallest presence of MKs.<sup>84</sup> Although an absolute majority requirement was the most prevalent procedural entrenchment form, exceptions may be found, including entrenchment provisions requiring the consent of two-thirds of MKs (80 of 120).<sup>85</sup>

Surprisingly, when the Knesset exercised its entrenchment power, it often enacted entrenchment provisions with simple random majority rather than the support of the supermajority required to overcome the entrenchment.<sup>86</sup> Thus, a small majority could have seized power to entrench policies that did not enjoy the support of even an absolute majority at the time of their enactment, let alone later on.<sup>87</sup>

Prior to the enactment of the 1992 Basic Laws, substantive entrenchment existed only in a few regular statutes.<sup>88</sup> Usually, substantive entrenchment required an explicit amendment (or override) of the provision at stake.<sup>89</sup> In other words, substantive entrenchment (merely) reversed the regular interpretation maxim that a later statute may impliedly repeal an earlier statute.<sup>90</sup>

83. *United Mizrahi Bank*, *supra* note 3, at 535–42 (Cheshin, J.).

84. Basic Law: The Knesset, § 25.

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

86. Thus, for example, Basic Law: The Government, enacted in 1992, in § 56, required the support of an absolute majority of MKs for its amendment. This Basic Law, however, was enacted by a vote of fifty-five to thirty-two MKs in the last reading. DK (1992) 3862–63 (Isr.). Similarly, Basic Law: Freedom of Occupation passed in 1992 the third reading by a vote of twenty-three to zero MKs. DK (1992) 3392–93 (Isr.). However, section 5 included an entrenchment provision requiring an absolute majority of MKs for its amendment. Moreover, even the enactment of Basic Law: Freedom of Occupation of 1994 did not enjoy the requisite absolute majority support required for its amendment since many of the most important provisions within it did not appear on first reading.

87. On the legitimacy difficulties of asymmetric entrenchment, see John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003).

88. The Woman’s Equal Rights Law, 5711-1951, SH No. 82 p. 248, § 1a (Isr.); The Budget Principles Law, 5745-1985, SH No. 1139 p. 60, § 3a (Isr.); Commodities and Services Control Law, 5718-1957, SH No. 240 p. 24, § 46(b) (Isr.).

89. *See, e.g.*, H CJ 104/87 *Nevo v. Nat’l Labor Ct.* 44(4) PD 749, 764 [1990] (Isr.), H CJ 256/88 *Medinvest Herzliya Med. Ctr. v. CEO of Minister of Health* 44(1) PD 19, 42–46 [1989] (Isr.), H CJ 1438/98 *Conservative Movement v. Minister of Religions* 53(5) PD 337, 385–88 [1999] (Isr.) (Cheshin, J.), H CJ 4124/00 *Yekutieli v. Minister of Religious Affairs* (Jun. 14, 2010), *Nevo Legal Database* (by subscription) (Isr.).

90. For the rationale of this maxim, see Petroski, *supra* note 20.

To conclude, the enactment process of the Basic Laws reflected a tradition of parliamentary sovereignty under which there is no substantive distinction between the treatment of regular and constitutional law. The Court, too, saw the division between regular and Basic Laws as “mere semantics.”<sup>91</sup>

## II. How Does Judicial Review Fit with Parliamentary Sovereignty?

What was the force behind the entrenchment provisions? Did the Court enforce the entrenchment provisions against a noncompliant Knesset attempting to amend an entrenched provision without the necessary majority required?

Prior to *United Mizrahi Bank*, only four times did the Court enforce an entrenchment provision against a noncompliant Knesset.<sup>92</sup> On all four occasions, the provision was section 4 of Basic Law: The Knesset, which defines the nature of the electoral system in Israel, as follows:

The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Election Law. This section shall not be varied save by a majority of Members of Knesset.<sup>93</sup>

On all four occasions, the Knesset attempted to infringe upon the norm of “equal elections,” found at the core of any fair elections in a democratic society. This norm protects both the right to equal vote (every eligible citizen has one vote) and the right to equal access to power (every eligible citizen may be elected), unless an absolute majority of MKs agreed to the retraction. Each time, the Court demanded that the Knesset either amend the infringing law in a way that would respect equal elections norms or reenact the infringement with the necessary support of an absolute majority of MKs. Until one of the latter conditions was upheld, the Court ordered the elected branches not to apply the infringing statute.

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91. *Ressler*, *supra* note 75, at 560.

92. *Bergman*, *supra* note 10; H CJ 246/81 *Agudat Derech Eretz v. Broad. Auth.* 35(4) PD 1 [1981] (Isr.) [hereinafter *Agudat Derech Eretz*]; H CJ 141/82 *Rubinstein MK v. Chairman of the Knesset* 37(3) PD 141 [1983] (Isr.) [hereinafter *Rubinstein*]; H CJ 172, 142/89 *Laor Movement v. Chairman of the Knesset* 44(3) PD 529 [1990] (Isr.) [hereinafter *Laor Movement*].

93. See *Basic Law: The Knesset–1958*, THE KNESSET, [http://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm) (last visited Sept. 15, 2011).

### A. Theorizing *Bergman*

The first decision on this topic was given in 1969, in the groundbreaking *Bergman* case. In *United Mizrahi Bank*, Justice Zamir treated *Bergman* as a precedent for the existence of judicial review power over primary legislation, thereby anchoring the timing of the “constitutional revolution” with the *Bergman*, rather than the *United Mizrahi Bank*, decision.<sup>94</sup> Is this handling of the *Bergman* decision justified?

Dr. Bergman was a Tel-Aviv attorney. He appealed to the Israeli Supreme Court, serving as the High Court of Justice, arguing against the validity of a 1969 finance law that granted public funding for the (then) upcoming general elections.<sup>95</sup> He claimed, *inter alia*, that the finance law treated the political parties competing at election unequally, because it provided public funding only to political parties already represented in the outgoing Knesset, thus discriminating against newly founded political parties. As such, the finance statute violated the “equal elections” norm guaranteed by section 4 of Basic Law: The Knesset without enjoying the support of a “majority” of MKs during its enactment.<sup>96</sup> Bergman sought and won an injunction to prevent the execution of the finance law.

The *Bergman* decision is six pages long, standing in sharp contrast to the length of the *United Mizrahi Bank* decision. The opinion of the Court is laconic and veils more than it reveals. Although the Court ordered the legislature to either reenact the finance law in a way that aligns with equal elections norms or reenact the infringement with the necessary majority, it did not explain why, if at all, it had the power of judicial review over primary legislation. The (then) Attorney General, Meir Shamgar, later the President of the Court when *United Mizrahi Bank* was decided, was so convinced of his victory that he did not bother to argue against the Court’s judicial review authority. Instead, Shamgar requested that the Court allow him the opportunity to argue against such authority if it became

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94. *United Mizrahi Bank*, *supra* note 3, at 468.

95. Elections to the Knesset and Local Authorities in the Year 5729 (Financing, Limitation of Expenses and Auditing) Law, 5729-1969, SH No. 5729 p. 48 (Isr.) [hereinafter Finance Act].

96. The stated Finance Act, *supra* note 95, passed first reading by a majority of twenty-four to two. The Knesset’s records of third reading merely state that the law was “adopted,” without recording the count of the votes. The Petitioner argued that this session too was not attended by a majority of MKs, and the Attorney General did not dispute that. *Bergman*, *supra* note 10, at 696.

relevant.<sup>97</sup> His request was *de facto* denied, without justification, probably due to the pressing need to reach a decision before the upcoming election.<sup>98</sup> Later, the *Bergman* decision would serve as precedent for the Court's judicial review power. But what theory should be attributed to it? How could this decision be generalized and serve as future precedent? Based on *Bergman's* precedent, when, if at all, was judicial review over primary legislation justified?

At least six different theories may be offered to explain the Court's decision in *Bergman*, each of which suggests a different scope of the Court's judicial review power.

### 1. *Basic Law Counts: Constituent Authority Theory*

The first is that all "Basic Laws" were supreme and should be treated as part of Israel's formal constitution. This interpretation treats the Knesset as enjoying constituent powers in addition to its legislative powers, and these constituent powers are exercised when enacting "Basic Laws" alone. Thus, any regular statute, such as the finance law mentioned above, that infringes upon Basic Laws' provisions, must pass a constitutional "limitations test," which the finance law failed to do as it conflicted with the Basic Law and lacked majority support.<sup>99</sup> This theory allows a constitutional future to Israel since it ascribes to Israel's legislature continuing constituent powers, exercised by the use of the title "Basic Law" at enactment stage, without necessitating a break with the past and a new beginning.

While this theory may have been plausible at the time of the *Bergman* decision, it did not align with later Court decisions during this era. Later decisions did not treat Basic Laws as supreme, as elaborated in Part I. Thus, this is not the best available theory to explain the *Bergman* decision.<sup>100</sup>

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97. *Bergman*, *supra* note 10, at 696.

98. *Bergman* petitioned the Court on April 30, 1969, and the decision was given on July 3 that year. *Bergman*, *supra* note 10. The elections were held on October 28, 1969. See also Peter Elman, Case Comment, 4 ISR. L. REV. 565, 566 (1969); Claude Klein, Case Comment, 4 ISR. L. REV. 569, 572 (1969).

99. See Claude Klein, *A New Era in Israel's Constitutional Law*, 6 ISR. L. REV. 376 (1971); C. Klein, *The Constituent Power in Israel*, 2 MISHPATIM 51, 55 (1970).

100. "Best" in the Dworkian sense; see RONALD DWORKIN, *LAW'S EMPIRE* (1986). For support, see also Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 416 (1983).



## 2. *Entrenchment Counts: A Sovereign Power that Restricts Itself*

A second possible theory is one that emphasizes the importance of entrenchment and not “Basic Laws.” In other words, when a later statute conflicts with an entrenched provision of an earlier statute, whether the entrenchment appears in a Basic Law or in a regular statute, the entrenched provision prevails. Thus, the conflicting statute must fulfill the requirements of the entrenchment to survive judicial scrutiny. Since the finance law at stake in *Bergman* violated equal elections norms without the majority support required by the entrenched provision of section 4 of Basic Law: The Knesset, it failed scrutiny. This entrenchment theory lines up with the remedy the Court proposed in *Bergman*: To reenact the finance act with the support of the necessary majority.<sup>101</sup> It also enjoys theoretical support from H.L.A. Hart, who argued that two concepts of sovereignty were possible: The first was that of a sovereign that could not restrict itself; the other was a sovereign that could restrict itself, but once restricted, was no longer sovereign with respect to the issue entrenched.<sup>102</sup> Recognizing the Knesset’s power to entrench means Israel chose the second concept of sovereignty in the Hartian sense. Furthermore, the fact that the Court imposes entrenchment on bridging Knessets seems to suggest not only that the Knesset enjoys entrenchment powers, but that the powers are actually effective.<sup>103</sup>

It should be noted, that it is not clear whether the finance law mentioned in *Bergman* conflicted with section 4 of Basic Law: The Knesset in the following manner: The wording of section 4 seems to suggest that only amendment, not infringement, of section 4 would require the support of an absolute majority. The finance law in no way attempted to redefine equal elections norms, but rather infringed upon it in a specific election. The *Bergman* Court was not aware of the distinction between infringement and amendment existing in constitutional jurisprudence, as it was not explicit in Israel’s constitutional jurisprudence until *United Mizrahi Bank*,<sup>104</sup> and thus

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101. On the legislative self-entrenchment power, see, e.g., Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773 (2003); McGinnis & Rappaport, *supra* note 87.

102. HART, *supra* note 21, at 149.

103. Cf. DICEY, *supra* note 5, at 21 (“That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure.”).

104. *United Mizrahi Bank*, *supra* note 3, at 274–76 (Shamgar, President).

applied section 4 to the case at hand. In fact, the legislature was made aware of this distinction only by Barak, the then Deputy Chief Justice, in his letter to the Chairman of the Constitution, Legislation and Justice Committee of the Knesset on January 11, 1994, responding to the Knesset's draft of Basic Law: Freedom of Occupation of 1994, which replaced the 1992 version.<sup>105</sup> Nonetheless, ever since the *Bergman* decision, section 4 of Basic Law: The Knesset has been interpreted in a way that a majority is required for both amendment and infringement. In other words, "amendment" includes infringement regarding section 4 alone.<sup>106</sup> This is a manifestation of how sporadic the Israeli constitutional development has been.

The entrenchment theory assumes that what counts is solely entrenchment, not the constitutional status of the enactment that includes the entrenchment.<sup>107</sup> However, the question remains whether the Israeli Supreme Court would have reached the same result in *Bergman* were this an entrenchment in a regular statute, as opposed to a "Basic Law." Although the Knesset has entrenched both "Basic Laws" and regular statutes, there is no legal case yet dealing with an infringement of procedural entrenchment provisions in regular statutes. The Court did apply substantive entrenchment provisions in regular statutes by requiring that a later statute infringing upon them do so explicitly, rather than implicitly.<sup>108</sup> The theory of entrenchment, therefore, may explain the *Bergman* decision.

### 3. *Combination of Entrenchment and Basic Law*

A third plausible theory is that only entrenched "Basic Laws" prevail over later conflicting regular statutes. In other words, the combination of a "Basic Law" and an entrenchment provision is

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

106. See *supra* note 92, enumerating three later cases in which the court interpreted the section in this way. Barak now supports reinterpreting section 4 of Basic Law: The Knesset so that absolute majority will be needed only for amending the Basic Law and infringement will be handled by a judicially imposed limitations clause similar to the one at place with regard to the 1992 Basic Laws dealing with individual rights. See *supra* note 45 with regard to the limitations clause. See also BARAK, PROPORTIONALITY, *supra* note 18, at 182–87.

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

108. See *supra* note 89 and accompanying text.

necessary to overcome the democratic maxim that later statutes prevail over earlier ones.<sup>109</sup> This interpretation restricts the effectiveness of legislative self-entrenchment to constitutional matters only, to prevent undue burden on the legislature's sovereign powers. In other words, the advantage of such a theory, in addition to enabling the adoption of a formal constitution by the legislature without a revolution and a new beginning (like the first theory discussed above), is that it puts inherent limits to the Knesset's entrenchment powers. Supposedly, the Knesset's entrenchment powers are recognized only in the context of constitutional matters.

In fact, prior to *United Mizrahi Bank*, the Court de facto applied the *Bergman* precedent in only three cases, all of which dealt with the protection of section 4 of Basic Law: The Knesset.<sup>110</sup> Thus, the *Bergman* decision applied de facto only to Basic Laws that were entrenched. In addition, one may find support for such a proposition in judicial decisions.<sup>111</sup> Even Justice Aharon Barak, as late as 1990, in *Laor Movement*, emphasized that "there is normative supremacy to an entrenched Basic Law"<sup>112</sup> and "this entrenchment is valid in our system, because we recognize the Knesset's authority to act as a Constituent Authority."<sup>113</sup> Nowhere in this decision does Barak suggest that even Basic Laws, which are not entrenched, are supreme.

#### 4. *Ultra Vires Doctrine*

A fourth theory that may be presented as an explanation of the *Bergman* decision is that of self-dealing or usurpation of power. According to this theory, the Court treated the finance act at stake in *Bergman* as the product of self-dealing on the part of MKs. By preventing public funding for new political parties, members of the legislature were effectively trying to limit their electoral competition

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

110. See *supra* note 92 and accompanying text. The later judicial decisions' understanding of the precedential nature of the case is important in determining its contribution. See RUPERT CROSS & J. W. HARRIS, PRECEDENT IN ENGLISH LAW 45-47 (4th ed. 1991).

111. See also HCJ 306/81 Plato Sharon v. Knesset Comm. 35(4) PD 118, 135-36 [1981] (Isr.) (Landau, President) (writing that judicial review is possible only in the context of entrenched statutory provisions, or even entrenched Basic Laws).

112. *Laor Movement*, *supra* note 92, at 539.

113. *Laor Movement*, *supra* note 92, at 539.

and entrench themselves in office.<sup>114</sup> The Court thus treated the finance act as the usurpation of the Knesset's legislative powers and beyond its authority to legislate. Although the Knesset enjoys legislative powers, those are granted by the people at election. The people, however, never granted MKs the power to entrench themselves in office.<sup>115</sup> Understood as such, the power of judicial review is limited to cases of gross usurpation of power, much like the famous British seventeenth century *Dr. Bonham's Case*.<sup>116</sup> In fact, as already mentioned, in all subsequent cases in which the Court exercised the power of judicial review over primary legislation, it was always in the case of section 4 of Basic Law: The Knesset and always involved self-dealing by MKs.<sup>117</sup> This theory of self-dealing may be described as a strand of common-law constitutionalism theory, under which courts impose the most fundamental values of the legal system on the legislature, even without a formal constitution to expound.<sup>118</sup>

The difficulty with the theory arises, however, on the remedial front. In all cases dealing with the infringement of section 4 of Basic Law: The Knesset, the Court granted the Knesset the option to either remove the violation of self-dealing or reenact the violation with the support of an absolute majority of MKs. If the Court treated self-

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114. See also HCJ 7111/95 Union of Local Authorities in Isr. v. Knesset 50(3) PD 485, 509 [1996] (Isr.) (Cheshin, J.) (writing that in all four cases—*Bergman*, *Agudat Derech Eretz*, *Rubinstein* and *Laor Movement*—the Knesset's legislation amounted to self-dealing).

115. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE, § 141 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). See also J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 180–86 (1955). During both World Wars, however, the British Parliament extended its life to meet the emergency.

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

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

118. See T. R. S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001); Paul Craig, *Constitutional Foundations, the Rule of Law and Supremacy*, 2003 PUB. L. 92; David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT'L J. CONST. L. 183 (2009).

dealing as a usurpation of legislative power, it is not clear why the support of an absolute majority of MKs would remedy this conflict.<sup>119</sup>

##### 5. *Ely's Democratic Enhancement Process Theory*

A fifth possible theory is that nothing was decided in the case. Retired President Landau, who wrote the *Bergman* decision, used similar words to describe the *ratio* of the case in articles published in both 1971 and 1996.<sup>120</sup> The 1996 article was written by Landau as a response to the *United Mizrahi Bank* decision. He was upset with both Shamgar and Zamir for using his opinion in *Bergman* as a precedent for the *United Mizrahi Bank* decision. Landau felt that *Bergman* could not serve as precedent for either the assertion that Israel has a formal constitution in the form of “Basic Laws” or that the Court has the power of judicial review over primary legislation. He read his own *Bergman* decision to mean that “all the constitutional questions were left open.”<sup>121</sup>

While Landau's proposition seems peculiar in light of the remedy granted in the *Bergman* case, the decision does lack an explanation for the Court's judicial review authority. If a precedent is judged by its reasoning rather than its outcome, no theory that may be relied upon in future cases was offered in *Bergman*.<sup>122</sup>

It may be further suggested that because of the distinctiveness of the issue at stake—i.e., ensuring equal elections to the legislative assembly—no one has ever challenged the Court's judicial review authority to protect the very foundation of a democratic society. This is in keeping with J. H. Ely's theory, suggesting that the court is justified in exercising judicial review only to enhance the democratic process.<sup>123</sup> In other words, while the *Bergman* case was pending, the urgency of coming to a decision at election time meant that the

119. It is interesting to compare this remedy to the corporate context. When confronted with directors' or controlling shareholders' self-dealing, many times the remedy is to require approval from a panel of noninterested constituents.

120. Moshe Landau, *The Supreme Court as Constitution Maker for Israel*, 3 MISHPAT UMIMSHAL 697, 699–700 (1996) [hereinafter Landau, *Constitution Maker*]. See also Moshe Landau, *The Constitution as a Supreme Law of the State?*, 27 HAPRAKLIT 30, 30 (1971) (writing that “the Supreme Court refrained from answering these [constitutional] questions”).

121. Landau, *Constitution Maker*, *supra* note 120, at 700.

122. See CROSS & HARRIS, *supra* note 110, at 47–48 (regarding how to determine the ratio where the reasoning is lacking from the decision).

123. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ely was highly influenced by *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

Attorney General was never granted his request to argue against the Court's judicial review authority. In later cases, the Attorney General probably felt that, in such a fundamental matter as ensuring equality in impending elections, she would not want to insist on questioning or undermining the Court's judicial review authority. Rather, the overriding concern was to remedy any statute that might infringe upon the equality of elections.<sup>124</sup> With no one to challenge the Court's judicial review authority, the *Bergman* decision became a precedent for the Israeli Court's power of judicial review over primary legislation.

In this sense, even if the *Bergman* decision was revolutionary, the scope of the revolution was limited to ensuring equal elections. The Court enjoyed judicial review power only in the context of enhancing democratic processes where the regular mechanisms of checks and balances failed to achieve equality in the political realm. Obviously, this is no small matter. Equal elections norms are part of the very essence of a democratic society. Despite this, prior to *United Mizrahi Bank*, Israel was still very far from a fully formed constitution.<sup>125</sup>

#### 6. *Manner and Form Requirements*

A sixth plausible theory is that the *Bergman* decision enforced a quorum requirement on MKs. As discussed above, Israeli law usually enforces no attendance requirements on MKs in order to enact laws. Section 4 of Basic Law: The Knesset necessitated such attendance by demanding the support of a "majority" of MKs to amend it. The Court enforced such a "quorum" or "attendance" requirement because it aligned with democratic theory. Section 4 did not require the support of more than the majority to amend a statute if all members were attending and participating in the debate. But the *Bergman* decision should not be understood as precedent for the validity of any entrenchment provision that exceeds the requirement of an absolute majority of MKs. Such an entrenchment provision

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124. See, e.g., *Agudat Derech Eretz*, *supra* note 92, at 6 (stating that the Attorney General decided not to raise challenges to the Court's judicial review authority because he seeks the Court's opinion on the merits whether there was any infringement on equal elections norm).

125. In fact, Justice Grunis, in a dissenting opinion after *United Mizrahi Bank* was decided, expressed support for the exercise of judicial review in the limited context of Ely's theory. See H CJ 6427/02 Movement for Quality Gov't v. Knesset 61(1) PD 619, 798–810 [2006] (Isr.). For support of Ely's theory in Israeli academic circles, see e.g., Moshe Cohen-Eliya, *Towards a Procedural Limitation Clause*, 10 MISHPAT UMIMSHAL 521 (2007).

would not be in line with basic democratic principles of majority rule.<sup>126</sup> This is, in fact, how Justice Cheshin interpreted the *Bergman* decision in his *United Mizrahi Bank* dissent. Cheshin recognized the validity of procedural entrenchment provisions as long as they did not require the support of more than a majority of MKs. He viewed such entrenchment provisions as essentially “quorum,” “attendance” or “manner and form” requirements which were valid whether they appeared in regular statutes or Basic Laws.<sup>127</sup>

The “manner and form” approach tries to distinguish itself from legislative self-entrenchment in the sense that only procedural, and not substantive, restrictions on future legislation are possible. Further, any restriction should be subject to majority rule and thus not amount to true entrenchment. In addition, the procedural restriction is compatible with parliamentary sovereignty because it is perceived to be within parliament’s domain to define how it enacts law. As long as parliament acts according to the predefined procedure, it may also amend the legislative process.<sup>128</sup> Judicial review that results from the “manner and form” theory is also distinguished from judicial review of internal proceedings of the legislature. This is so, since “manner and form” applies only when the predefined legislative process is codified in a statute, not internal rules of the legislative bodies.

## B. Compatibility with Parliamentary Sovereignty

Are these six different theories (offered above to explain the *Bergman* decision) compatible with parliamentary sovereignty? The first three theories enable judicial review in the context of imposing on a sovereign legislature its own self-imposed restrictions. Thus, if what counts is the title “Basic Laws” (first theory), then the Knesset uses this title to indicate its desire to entrench the enactment at stake. If what counts is entrenchment per se (second theory), then the

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126. See, e.g., Roberts & Chemerinsky, *supra* note 101; Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986) (contending that entrenchment is constitutional only if done by a hierarchical authority).

127. *United Mizrahi Bank*, *supra* note 3, at 535–47.

128. See, e.g., Sir W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 139–145 (3rd ed. 1943); R. F. V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 1–31 (2d ed. 1964); Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54 (1953); R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L.J. 215 (1991); M.H. Tse, *The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v. Canada (Attorney General)*, 18 NAT’L J. CONST. L. 71 (2005).



Knesset's authority is unlimited, unless it imposes limits upon itself in the form of entrenchment. If what matters is the combination of the title "Basic Law" and an entrenchment provision (third theory), then the Knesset uses such combinations, and only such combinations, to limit itself. Under all three theories, if judicial review becomes effective, then the unlimited sovereign body becomes restricted. Its sovereignty is ultimately curtailed. These theories may align with parliamentary sovereignty only in the second Hartian sense, not the traditional Diceyan way.

The last three theories enable judicial review without truly restricting majority rule of the legislature. The underlying commitment of these theories is to hold democracy as a fundamental, common-law constitutional value that is protected by the courts as a last resort. Thus, if only in cases of gross usurpation of legislative power does the Court intervene (fourth theory), then even in seventeenth century Britain there is precedent for the exercise of judicial review power to protect against conflict of interests. Even in a parliamentary sovereignty system, the regular mandate granted by the people at election does not include the power of the legislature to entrench itself in office. If "nothing" was decided in the case (fifth theory), then it is due to the Knesset's consent, rather than by the Court's verdict, that equal elections norms have prevailed even against subsequent conflicting statutes. Further, such an approach aligns with Ely's democratic theory that judicial review power is justified only as an enhancement of democratic mechanisms. Only then is judicial review democratic, not counter-majoritarian. If it is only a quorum requirement that the Court is enforcing (sixth theory), then entrenchment provisions are not truly entrenchment but rather absolute majority requirements. According to such theory, the Knesset is not only sovereign but also unlimited. These last three theories thus better align with traditional parliamentary sovereignty concepts in the Diceyan sense. Under all six theories, Israel's particular legislative and judicial history prior to *United Mizrahi Bank* suggests the coexistence of judicial review and parliamentary sovereignty.

### III. The Knesset's Response: Trivializing Judicial Review

#### A. How Did the Knesset Respond to the Exercise of Judicial Review?

##### 1. *The Bergman Decision and the Validity Act of 1969*

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

Under the amended finance law, enacted twelve days after the *Bergman* decision, established political parties already represented in the outgoing Knesset received the bulk of their financing ahead of the election, while the new competing political parties were granted funding retroactively and only if successful at the polls. Also, under the new finance statute, existing parties were granted funding according to their percentage of seats in the outgoing Knesset while new parties were granted funding according to their percentage of MKs in the incoming legislature.<sup>129</sup> While established political parties still enjoyed some advantage at election by receiving the money upfront, MKs believed that the amended finance law conformed to the *Bergman* Court's suggestion that the law fulfill the requirements of "substantive," rather than "formal," equality norms at elections.<sup>130</sup> This amended finance law passed with the support of at least sixty-one MKs in all three readings as required under section 4 of Basic Law: The Knesset.<sup>131</sup>

Prima facie, this response of the Knesset grants great respect to the Court's judicial review power and attempts to comply with the substantive requirements of equality set forth in section 4 of Basic Law: The Knesset. This would have been an accurate portrayal of the

129. See Elections to the Knesset and the Local Authorities in the Year of 5729 (Funding, Expenditure Limits and Auditing) (Amendment), SH No. 5729 p. 201 (Isr.) (passed on July 15, 1969). The *Bergman* decision was given on July 3, 1969.

130. *Bergman*, *supra* note 10, at 700. Some Opposition MKs believed all political parties should have been granted funding according to their percentage of seats in the new Knesset to minimize the inequality between existing and new political parties, but their position was rejected. See DK (1969) 3581–3583 (Isr.).

131. It passed first reading with the support of eighty MKs, five against and two abstaining. DK (1969) 3592 (Isr.). It passed second reading with the support of no less than sixty-seven MKs with regard to each of the sections of the bill. It passed third reading with the support of seventy-six MKs, six against and two abstaining. DK (1969) 3678–79 (Isr.). Interestingly, MK Uri Avneri complained that MKs were absent during the discussions and appeared for the actual vote alone. *Id.* at 3580.

Knesset's reaction, but for the Knesset's subsequent and very bold actions. The Knesset—to avoid risking another challenge to the (now) amended finance act—enacted a unique statute entitled “Elections (Certification of the Validity of Statutes) Act of 1969” (hereinafter the “Validity Act”).<sup>132</sup> This Act certified retroactively and through reference that all existing enumerated statutes dealing with the upcoming elections were valid. With the retroactive validation, MK Shmuel Tamir argued that the Knesset was “trying to revive the dead.”<sup>133</sup> The Knesset enacted this Validity Act by an absolute majority of MKs to guarantee that it conformed to the majority requirements of section 4 of Basic Law: The Knesset.<sup>134</sup>

What was peculiar about the Knesset's move was not only that it was done retroactively, but that the Validity Act itself, rather than the potential infringing election statutes, was passed by the required absolute majority. Furthermore, the statute did not even identify all statutes that may enjoy its protection, using a general language that it applies to “every other provision of law dealing with elections to the Knesset or election propaganda to the Knesset as they are phrased at the time this statute becomes effective.”<sup>135</sup> The Chair of the Constitution, Law and Justice Committee of the Knesset, MK Moshe Unah, explained that the law should cover even future law that “may be enacted tomorrow in the Knesset.”<sup>136</sup>

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132. Elections (Certification of the Validity of Statutes) Act, 5729-1969, SH No. 568 p. 204 (Isr.). *See also* DK (1969) 3679-83 (Isr.). It stated:

“1(a) To remove doubt, it is hereby provided that the provisions included in election laws for the Knesset are valid for all law and intents and purposes from the day of their enactment.

(b) In this section, “election laws for the Knesset” mean Elections to the Knesset Statute [combined version], 1969; Elections (Propaganda Ways), 1959; Elections to the Knesset and the Local Authorities in the Year of 5729 (Funding, Expenditure Limits and Auditing), 1969; and every other provision of law dealing with elections to the Knesset or election propaganda to the Knesset as they are phrased at the time this statute becomes effective.”

133. DK (1969) 3680 (Isr.).

134. It passed first reading with a majority of seventy-nine MKs, six against and one abstaining. DK (1969) 3592 (Isr.). It passed second reading with a majority of seventy MKs, eight against and five abstaining. It passed third reading with a majority of sixty-eight MKs, eight against and five abstaining. DK (1969) 3683 (Isr.). Uri Avneri complained that MKs were not present at discussion but came to vote alone also with regard to this statute. *Id.* at 3681.

135. *See supra* note 132.

136. DK (1969) 3679 (Isr.). MK Uri Avneri criticized this technique for “revalidating” not only what was already done illegally (and even not identifying the acts for MKs to know) but with regard to future illegalities as well. *Id.* at 3681.

This is a technique of overriding (“to remove any doubt as to the validity of the enactment”) a provision in a Basic Law in a regular statute, yet the override language does not even include any specific reference to the constitutional norm infringed. Neither does it give any accountability regarding how the constitutional norm was infringed, if at all. With this Validity Statute, the Knesset sought to grant “immunity” to election statutes from judicial review, as was explicitly stated at the time the bill was introduced.<sup>137</sup> The Court has accepted this override technique as valid and effective in both *Agudat Derech Eretz*<sup>138</sup> and *Ressler*,<sup>139</sup> stating that the Validity Act’s purpose was clear—“to prevent litigation as to the validity of election laws” and thus this Validity Act “cures any defect” that might have fallen in the election laws.<sup>140</sup> Interestingly, Dorit Beinish, Israel’s current President of the Israeli Supreme Court, defended the validity of the Validity Act as representative of the State Attorney in the *Ressler* case.

Professor Benjamin Akzin wrote of this ratification technique:

[A]ll I can say is that with all my sympathy for politicians who, angry at a referee who steps in to point out a ‘foul,’ decree that from now on their ball-games should proceed without a referee, this is not a particularly elevating spectacle. That the referee himself has suggested such a possibility does not make it more palatable.<sup>141</sup>

Furthermore, retroactive revalidation of statutes would become the prevalent method of the Knesset to deal with the exercise of judicial review by the Court during the founding era. The Knesset would exploit this method in three out of the four cases, in which the Court exercised judicial review. The Knesset would also use the combination of reference and retroactive validation with general *semi-“notwithstanding”* language that makes no specific reference to the constitutional norm that has been infringed to deal not only with

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137. Draft Bill Elections (Certification of the Validity of Statutes), 1969, HH 322 (Isr.).

138. *Agudat Derech Eretz*, *supra* note 92, at 16.

139. *Ressler*, *supra* note 75, at 559–60. In *Ressler*, Petitioners challenged inter alia the validity of the Validity Act, arguing it should have amended section 4 of Basic Law: The Knesset via a Basic Law and not a regular law. The Court rejected this argument stating that the difference between a regular statute and a Basic Law was “semantic” alone. *Ressler*, *supra* note 75, at 560.

140. *Ressler*, *supra* note 75, at 559.

141. Benjamin Akzin, *Judicial Review of Statute*, 4 ISR. L. REV. 559, 576, 578 (1969).

the *Bergman* decision but also the *Laor Movement* decision discussed below.<sup>142</sup>

## 2. 1981 Elections Campaign: Agudat Derech Erez Decision

Retroactive revalidation of a statute struck down was evidenced in *Agudat Derech Eretz* as well.<sup>143</sup> Under existing election laws, valid in 1981, each political party participating in the elections was entitled to twenty-five minutes of propaganda on the radio and ten minutes on television (“general party time”). The political parties that were represented in the outgoing Knesset deserved an additional four minutes in the radio and four minutes on television for each MK that served in the outgoing Knesset (“individual time”). This statutory arrangement was valid, according to the Court, because it was protected by the Validity Act enacted in 1969.<sup>144</sup>

The Knesset decided to amend election laws, believing that the existing arrangement gave undue advantage to a small political party comprising of one MK in comparison to the number of minutes an individual MK received, if she were a member of a large political party.<sup>145</sup> It thus adopted in 1981 amendment 6 to Election Law (Propaganda Ways) under which two minutes would be reduced from the general party time allocated to all political parties on the radio and television while two additional minutes on both the radio and television would be added to each political party for each MK that sat in the outgoing Knesset.

Agudat Derech Erez, who intended to participate at elections as a new political party (not represented in the outgoing Knesset), petitioned the Court against this amendment. The petition asserted that the amendment violated equality norm, set in section 4 of Basic Law: The Knesset, by granting undue advantage to existing parties when compared to new political parties.

The Court ruled in favor of the petitioners on May 29, 1981, by granting an injunction that prevents the execution of the law, unless it was passed with the required majority of sixty-one MKs in accordance with section 4 of Basic Law: The Knesset. The Court did not supply reasons for its decision, leaving the reasoning to be issued at a later

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142. See *infra* Part III.A.3.

143. *Agudat Derech Eretz*, *supra* note 92. See also Klinghoffer, *supra* note 11, at 33–34.

144. See, e.g., *Agudat Derech Eretz*, *supra* note 92, at 16 (Barak, J.).

145. *Agudat Derech Eretz*, *supra* note 92, at 5 (Landau, President, citing the explanation to the bill).

time.<sup>146</sup> The reasoning was finally handed down two months later, on July 28, 1981.<sup>147</sup>

In the interim, between the grant of the injunction and the grant of reasoning, the Knesset enacted amendment 7 to the Election Law (Propaganda Ways) during its recess and in a special session.<sup>148</sup> The statute was passed in a single day in all three readings.<sup>149</sup> Amendment 7 reenacted Amendment 6 with regard to increase of individual propaganda time but omitted that part of the amendment that intended to decrease general propaganda time for all parties. Amendment 7 received retroactive validity from April 9, 1981, instead of June 15, 1981, the time it was truly enacted.<sup>150</sup>

One could argue that the Court's decision had real bite. The Court required the change of propaganda time to be enacted by the support of at least sixty-one MKs and this was in fact done by the Knesset. The Knesset supposedly did so openly and deliberately, paying the public political price in terms of accountability. In addition, one could argue that the Knesset did not reduce the general propaganda time for all political parties and thus Amendment 7 improved the overall equality, between old and large political parties versus new and small political parties, when compared to Amendment 6 that was struck down.

But one can reach this conclusion only if one is very formalistic. Substantively, this constitutional dialogue between the Knesset and the Court was deficient in three ways: First, the Knesset did not even await the Court's reasoning of why it found the statute violating equal elections norm. This shows lack of minimal respect to the Court. It was the Knesset's duty at the very minimum to hear the Court's reasoning and consider it before deciding on its actions.<sup>151</sup> In fact, MK

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146. *Agudat Derech Eretz*, *supra* note 92, at 4 (Landau, President).

147. *Agudat Derech Eretz*, *supra* note 92, at 30.

148. DK (1981) 2903 (Isr.).

149. *Id.* The statute passed first reading twice. On June 3, 1981, sixty MKs supported the Act and six were against. *Id.* at 2907. Because the support was less than sixty-one MKs, the Knesset voted again on June 15, 1981, with seventy-three MKs supporting the Act and ten against (first reading), sixty-five for and one against (second reading), and sixty-four in favor and one against (third reading). DK (1981) 2938, 2945 (Isr.).

150. Elections Law (Propaganda Ways) (Amendment No. 7), 5741-1981, SH No. 1031 p. 331 (Isr.). Draft Bill Elections (Propaganda Ways) (Amendment No. 7), 1981 HH 443 (Isr.).

151. The Knesset has probably done so because of the looming elections, which took place on June 30, 1981. However, this should have been no excuse for the Knesset to act accordingly. It could have left the current propaganda law intact and amended it only with regard to later elections.

Mordechai Virshuvsky protested in the Knesset that this enactment passed too quickly with no adequate consideration. “We don’t even know why the Israeli Supreme Court, in quite a historical decision, with a majority of five Justices [the entire panel], in a special [wide] panel, decided to invalidate the statute of the Knesset.”<sup>152</sup> He also stated that it was not even clear whether Amendment 7, about to be enacted, continues the violation of equal elections norm or not.<sup>153</sup> MK Gideon Hausner argued that with this enactment the Knesset was actually sending the Court a message: “We don’t care, whatever you decide on the merit of the case, your opinion is of no concern to the Knesset.”<sup>154</sup> MK Shulamit Aloni argued that this amendment was “overruling” the Court and provides no real protection for the minority from majority abuse.<sup>155</sup> It is interesting to note that the Israeli Supreme Court in the *Velner* decision, dealing with the Knesset’s attempts to protect the religious status quo from change brought about via judicial decisions, ruled that it was the Knesset’s duty to listen to the Court’s reasoning and consider it on the merits, not preempt it by a general override that insulates the status quo from judicial change.<sup>156</sup>

Second, the Knesset gave retroactive revalidation to the change in election laws. This overrules the Court’s decision and represents an undue interference in the effect of the Court’s decision with regard to the past.

Third, the content of the statute does not truly obviate the problem of inequality in elections. As the Court explained in its reasoning, published after Amendment 7 was enacted, the main problem with Amendment 6 was not the two minutes reduction in the general propaganda time granted to all parties but the great gap between the times allotted existing and large parties versus new and small political parties.<sup>157</sup> This gap was largely retained under Amendment 7. In fact, Justice Beiski explicitly stated that the main difficulty with Amendment 6 was the increase in the individual

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152. DK (1981) 2902 (Isr.).

153. *Id.*

154. *Id.* at 2903.

155. *Id.* at 2902–03.

156. HCJ 5364/94 *Velner v. Chair of Labor Party* 49(1) PD 758, 790–92 [1995] (Isr.) (Barak, Deputy President).

157. *Agudat Derech Eretz*, *supra* note 92, at 15 (Barak, J.), 27 (Beiski, J.), 29 (Ben Porat, J.).



propaganda time, not the change in the general propaganda time.<sup>158</sup> This increase was retained under Amendment 7.

*Agudat Derech Eretz* provides additional support that the power of judicial review during the founding era was very weak and formalistic. It was largely overruled and ignored by the Knesset.

### 3. *The Laor Movement Decision in 1990*

Another example of the Knesset's end run around the Court's authority is found in the *Laor Movement* decision.<sup>159</sup> In that case, the statute at issue infringed upon the principle of equal elections in violation of Section 4 of Basic Law: The Knesset.<sup>160</sup> Two weeks after the elections for the twelfth Knesset—the same Knesset that enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation—the Knesset's finance committee decided, and later ratified by statute, to retroactively increase the public funding granted to the political parties that had competed in the previous election. This was done to cover huge deficits that the parties suffered as a result of the preceding electoral campaign.

Prima facie, the increase did not infringe upon the principle of equal elections, since all elected political parties would have enjoyed it equally. De facto, the statute, if valid, would have permitted political parties to spend more money than their economic fortunes allowed for campaigning if they could safely assume they would be part of the majority in the forthcoming legislature and could then enact a statute with retroactive funding increase. This would have heavily distorted election results, since small parties that were insecure about their electoral success would be unable to spend equally with large political parties whose future place in the Knesset was guaranteed. The retroactive funding would have meant unequal elections in real time.

To be valid, section 4 required that this retroactive funding statute pass with the support of a majority of MKs, i.e., sixty-one MKs. The majority opinion in the *Laor Movement* decision struck down the statute because it was not passed with the requisite majority of MKs in all its readings. In the preliminary reading, which was required in addition to the three regular readings since the statute was proposed by a private MK, there was no absolute majority

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158. *Agudat Derech Eretz*, *supra* note 92, at 27.

159. *Laor Movement*, *supra* note 92.

160. The Financing Political Parties (Amendment 8) Act, 5733-1973, SH No.1266 p. 6, § 2 (Isr.).

present.<sup>161</sup> Thus, the majority opinion chose the solution that aligned with the language of sections 4 and 46 of Basic Law: The Knesset (requiring absolute majority “in all phases of legislation”) and reached its desired result of invalidating an outrageous statute. Deputy President Menachem Elon, who wrote the majority opinion, explicitly explained that between two possible interpretations of the Basic Laws, one should prefer the interpretation that grants better protection to the norm of equal elections from gross infringements.<sup>162</sup> But Justice Barak dissented, finding the repugnant statute valid. He interpreted sections 4 and 46 to mean that no absolute majority was required in a preliminary reading, as opposed to the three regular readings.<sup>163</sup>

The Knesset approved of Barak’s dissent, since it meant that it did not need an absolute majority in preliminary readings. We can say ironically that the easier it became to violate equal elections norms, the better—from the Knesset’s perspective.<sup>164</sup> A month after the *Laor Movement* decision, the Knesset amended, within a single day, with the support of at least sixty-one MKs, section 46 of Basic Law: The Knesset to read explicitly that majorities were necessary only in the “three readings” rather than in “all phases of legislation.”<sup>165</sup> The Knesset further provided that this amendment would apply retroactively from August 6, 1959—that is, stretching

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161. *Laor Movement*, *supra* note 92, at 554–74 (Elon, Deputy President, and Maltz, J.) (decided on July 1, 1990).

162. *Laor Movement*, *supra* note 92, at 568.

163. *Laor Movement*, *supra* note 92, at 544–51. Justice Barak may have chosen this position strategically. The majority opinion struck down the outrageous statute and thus his decision did not affect the result of the case. Instead, he wrote an extremely important obiter in this decision. The obiter dealt with the question of whether the statute may be invalidated for violating not Basic Law: The Knesset but equality as a defining fundamental value of the legal system. Barak held in obiter that jurisprudentially the court may be justified in striking down statutes, even without a formal constitution, if they are grossly repugnant to the most fundamental values of the legal system. He suggested, however, that the Court in Israel should not act upon such power yet as it would be against the current prevailing social consensus as to the scope of the Court’s power. With this obiter, Barak laid the grounds for common-law constitutionalism discussed below.

164. Some MKs offered a different explanation for this action. They suggested that they wanted to strengthen individual MKs’ ability to propose private statutes rather than concentrating this power in the government alone. DK (1990) 4973 (Isr.) (Amnon Rubinstein, MK).

165. Basic Law: The Knesset (Amendment 11), 5750-1990, SH No.1329 p. 196 (Isr.). The vote on the statute was composed as follows: Ninety for, sixteen against, one abstaining (first reading) (DK (1990) 4980 (Isr.)); eighty-two for, five against, no abstaining (second reading); seventy-six for, thirteen against, no abstaining (third reading) (DK (1990) 5006 (Isr.)).

back retroactivity for roughly thirty years.<sup>166</sup> It also explicitly stated that any past statute that amended section 4 without an absolute majority during the preliminary reading was nonetheless valid from the time of its enactment, yet again using a semi-notwithstanding language (“to remove any doubt”). Furthermore, the Knesset did not even identify the statutes that may benefit from this retroactive revalidation, using a general reference language that any statute would enjoy this protection.<sup>167</sup> This enactment annulled the *Laor Movement* majority opinion retroactively, thus, running against basic principles of separation of powers. In fact, during the Knesset’s discussions, MKs made clear that they intended this amendment to apply to the finance statute that was struck down in the *Laor Movement* decision.<sup>168</sup> MK Mordechai Virshovsky contended that “this was a retroactive amendment to something that was already retroactive.”<sup>169</sup> An appeal to the High Court against this enactment was rejected in the *Blum* decision. A day after Basic Law: Human Dignity and Liberty was enacted, Justice Barak wrote that this retroactive revalidation technique was valid, and he found no difficulty in retroactive amendment of Basic Laws.<sup>170</sup>

We may conclude that, in three out of four cases—*Bergman*, *Derech Eretz* and *Laor Movement*—the Knesset circumvented the Court’s exercise of judicial review by using retroactive revalidation of infringing statutes. In two out of the three mentioned, *Bergman* and *Laor Movement*, the Knesset further revalidated the statutes by way of reference, using a semi-notwithstanding language that prevented the success of later challenges to their constitutionality.<sup>171</sup> MKs were aware of the similarity between their reactions to the *Bergman* and *Laor Movement* decisions, some viewing both as “revalidation laws” or even statutes “to circumvent the High Court.”<sup>172</sup>

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166. Basic Law: The Knesset (Amendment 11), 5750-1990, SH No.1329 p. 196, § 2 (Isr.).

167. *Id.* at § 3.

168. DK (1990) 4972 (Isr.).

169. *Id.* at 4974.

170. See H CJ 410/91 Blum v. Chairman of the Knesset 46(2) PD 201 [1992] (Isr.) [hereinafter *Blum*] (affirming the validity of Basic Law: The Knesset (Amendment 11), 5750-1990, SH No.1329 p. 196 (Isr.)).

171. Only in the *Rubinstein* case did the Knesset abide by the substantive judgment of the Court and did not circumvent it retroactively. See Dor, *supra* note 11, at 244; *Rubinstein*, *supra* note 92.

172. DK (1990) 4972–73 (Isr.).

## B. The Nature of the Constitutional Dialogue

This method of omnibus revalidation by way of reference, present in two of the four cases discussed above, raises a constitutional problem: Instead of forcing the legislature to consider each infringement on constitutional provisions for its own sake and determine the propriety, desirability, and constitutionality of that infringing provision, the legislature only pays lip service to the status of the Basic Law. This is not the kind of respect we demand of legislative assemblies when it comes to constitutional provisions.<sup>173</sup> It also does not enable the legislature to self-consciously and publicly take responsibility for infringing the Constitution. How can either legislative members or the public assess the constitutional ramifications and the severity of the infringement if there is no discussion of the nature of the infringement? It is a blank check for circumventing the Constitution.

This, in fact, has been some of the harsh criticism raised against the famous *Ford* decision in Canada.<sup>174</sup> In *Ford*, the Canadian Supreme Court upheld the validity of an omnibus override on the part of Quebec's legislature, which took the form of a standard general provision inserted in all past statutes. This general override stated that all past statutes were valid notwithstanding the Canadian Charter of Rights and Freedoms, and it was done to protest the adoption of the Charter without Quebec's consent.<sup>175</sup> Weinrib, for example, criticized the *Ford* decision for enabling the Quebec legislature such robust override of the Charter. Instead, she suggested that the override mechanisms should have been interpreted to demand more specificity on the part of the legislature with regard to which rights were infringed by which statutes and whether such infringement was justified. The degree of specificity required might be a function of the right's importance.<sup>176</sup>

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173. The duty of respect is explicitly provided for in Basic Law: Human Dignity and Liberty, § 11: "All governmental authorities are bound to respect the rights under this Basic Law." Similar provision appears in Basic Law: Freedom of Occupation, § 5. *Basic Law: Freedom of Occupation (1994)*, THE KNESSET, [http://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm) (last visited Nov. 3, 2011).

174. See, e.g., Lorraine Eisenstat Weinrib, *Learning to Live With the Override*, 35 MCGILL L.J. 541 (1990); Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, 90 n.114 (1984).

175. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 (Can.) [hereinafter *Ford*].

176. Weinrib, *supra* note 174, at 555 (leaving open the question of what degree of specificity would be sufficient).

The Knesset's technique consisted of not only omnibus revalidation of infringing statutes by way of reference but also retroactive effect to such actions. The retroactive revalidation was present in three of the four cases discussed. The main constitutional difficulty with granting retroactive validity to infringing statutes is the general problem of the "rule of law," which requires that legislation generally have only prospective application.<sup>177</sup> If the legislature can *retroactively* circumvent the constitution, then the constitution cannot be deemed supreme. Indeed, the only part in Quebec's sweeping general override of the Charter that was overruled by *Ford* was its retroactive applicability.<sup>178</sup> In contrast, the Israeli Supreme Court saw no difficulty in retroactive revalidation on the part of the Knesset.

Thus, while the prevailing scholarly understanding is that the Knesset acquiesced to the *Bergman* progeny, and thereby consented to judicial review over primary legislation, it is my contention that a careful analysis of how the Knesset responded reveals a very different outcome.<sup>179</sup> The Knesset's method of certifying infringing statutes retroactively by way of reference actually mirrors the way the Knesset placed even entrenched Basic Laws on par with regular statutes during the founding era. That the Israeli Supreme Court repeatedly validated the Knesset's technique shows that it, too, treated the Basic Laws as part of a parliamentary sovereignty tradition during this era.<sup>180</sup>

Moreover, even as late as March 26, 1992, Barak, too, accepted the Knesset's retroactive validation technique, treating entrenched Basic Laws as part of Israel's parliamentary sovereignty tradition.<sup>181</sup> Only in January 1994, when responding to the Knesset's initial draft of amendment to Basic Law: Freedom of Occupation, did Barak write in a letter to the Knesset that it is questionable whether the Knesset as a constituent assembly is authorized to amend the constitution

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177. See LON L. FULLER, *THE MORALITY OF LAW* 51–63 (rev. ed. 1969). See also Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?*, 10 OTAGO L. REV. 631 (2004) (criticizing retroactivity also in the context of electoral laws).

178. See *Ford*, *supra* note 175.

179. For the prevailing understanding, see *supra* notes 11 and 12, and accompanying text.

180. *Ressler*, *supra* note 75. In *Ressler*, the Court accepted the legitimacy of the Validity Act and thus refrained from reviewing certain provisions of an election law that was protected under the Act.

181. See *Blum*, *supra* note 170.

retroactively.<sup>182</sup> Both the Knesset's and the Court's own actions thus support a parliamentary sovereignty model for Israel prior to *United Mizrahi Bank*.

#### IV. How Revolutionary was *United Mizrahi Bank*?

We now understand the constitutional status of both the Basic Laws and judicial review prior to *United Mizrahi Bank*. This will enable us to appreciate the scope of the revolution formed with the *United Mizrahi Bank* decision.

Prior to *United Mizrahi Bank*, the Court did not provide a coherent theory explaining why it could enforce entrenchment provisions on noncompliant Knessets. It did not even explain whether it consciously treated absolute majority requirements as entrenchment. Justice Landau, deciding in 1969 the first case that exercised this power of judicial review over primary legislation, explicitly declared that "the Court was not deciding the issue,"<sup>183</sup> due to the urgency of deciding the case on its merits.<sup>184</sup> Since the 1969 *Bergman* decision, the Knesset adhered to the Court's ruling probably because it too felt the need to respect equal elections norms and not infringe upon them without the required support of an absolute majority of MKs. Thus, prior to the *United Mizrahi Bank* decision in 1995, there was no real judicial or legislative discussion of the Court's scope of judicial review authority over primary legislation.

*United Mizrahi Bank* changed everything. The Court utilized the first case challenging the constitutionality of a statute as incompatible with the 1992 Basic Law: Human Dignity and Freedom to declare a "constitutional revolution" brought about by the 1992 enactment. This was done, as discussed above, despite the fact that the enactment of the 1992 Basic Laws did not amount to a special process characteristic of constitutional rather than regular politics. Neither did the substantive entrenchment provisions of the 1992 Basic Laws

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182. Barak, *Amendments*, *supra* note 105, at 549. The Knesset has accepted Barak's recommendations on how to draft the amendment, including his advice on the distinction between infringement and amendment of the Basic Law.

183. *Bergman*, *supra* note 10, at 696 (translated in 4 ISR. L. REV. 560 as "[w]e have decided not to do so because for obvious reasons the material problems facing us in these hearings call for [a] speedy solution and consideration of the preliminary constitutional questions would necessitate a lengthy hearing on its own. We shall therefore leave the matter of justiciability as requiring further consideration. Obviously nothing that we shall say here is intended to express any view on this point.").

184. For Justice Landau's view of his *Bergman* decision, and his critique of its use in *United Mizrahi Bank*, see *supra* notes 120–121 and accompanying text.

necessitate such a revolution, as they appear also in regular statutes in countries that lack a formal constitution.<sup>185</sup> The decision is thus exemplary of the Israeli Court's extraordinary role in the formation of a constitution.

The Court, in an eight to one decision, clarified that it viewed the Basic Laws as Israel's formal Constitution and that, as a result, it had the power of judicial review over primary legislation.<sup>186</sup> The decision further introduced the distinction between constitutional amendment, on the one hand, and infringement by regular statute, on the other, into Israel's jurisprudence. It decided that in the future the Knesset may amend a Basic Law only by means of a Basic Law, and not by mere enactment. That is, the statute amending the Basic Law must be accompanied by the word "Basic" in its title. It also determined that any regular law infringing upon a Basic Law must satisfy the Basic Laws' requirements with regard to infringement to be valid.

Before this decision, no one knew Israel had a constitution. The *United Mizrahi Bank* decision clarified that Israel has one, at least according to the Court. If, in the past, Basic Laws that were not procedurally entrenched were treated as regular laws, a Basic Law was now required to amend them.<sup>187</sup> If substantive entrenchment in a regular law was previously interpreted as requiring mere explicit repeal, now substantive entrenchment in a Basic Law would supposedly require the Knesset to abide by the substantive requirements.<sup>188</sup> In fact, since *United Mizrahi Bank*, the Knesset has largely accepted the Court's judicial review "trumping" power as manifested time and again in its willingness to either amend regular statutes found by the Court to be unconstitutional,<sup>189</sup> or to let statutes

185. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 202–03 (2010) (recognizing that New Zealand has a statutory Bill of Rights with a limitations clause but its status is that of regular law).

186. If one could have argued that *United Mizrahi Bank* left it vague whether all Basic Laws or just the 1992 Basic Laws enjoy the status of supreme law, later cases clarified that the *United Mizrahi Bank* holding pertained to all Basic Laws and that they are all treated as supreme. See, e.g., HCJ 212/03 Herut-The Nat'l Movement v. Chairman of the Elections Cent. Comm'n to the Sixteenth Knesset 57(1) PD 750 [2003] (Isr.); EA 92/03 Mofaz v. Chairman of the Elections Cent. Comm'n to the Sixteenth Knesset 57(3) PD 793 [2003] (Isr.).

187. *United Mizrahi Bank*, *supra* note 3, 406–07 (Barak, President).

188. But see Justice Cheshin's dissenting views discussed *infra* Part V.

189. Since *United Mizrahi Bank*, the Court found (by at least a majority) that eight statutes or provisions thereof were unconstitutional. These cases include: HCJ 1715/97 Lishkat Menahalei HaHashkaot in Isr. v. Minister of Treasury 51(4) PD 367 [1997] (Isr.) (ruling unconstitutional the regulation of brokers practicing in the field for a substantial time); HCJ 6055/95 Tzemach v. Minister of Def. 53(5) PD 241 [1999] (Isr.) (ruling



lapse into desuetude. Furthermore, when the Knesset has chosen to amend statutes, it has overwhelmingly complied with the Court's specific instructions as to how to amend the statutes to be constitutional.<sup>190</sup> No longer did the Knesset revalidate statutes retroactively, by way of reference, as was done until *United Mizrahi Bank*. If, before, judicial review over primary legislation manifested itself only with regard to section 4 of Basic Law: The Knesset and more specifically the norm of equal elections, now the power would extend to other constitutional issues, primarily individual rights. The

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unconstitutional the detention of soldiers to up to ninety-six hours without appearance before a magistrate); H CJ 1030/99 MK Oron v. Chairman of Knesset 56(3) PD 640 [2002] (Isr.) (finding the law legalizing existing pirate radio stations unconstitutional); H CJ 1661/05 Hamoeza Haezurit Hof Aza v. Israeli Knesset 59(2) PD 481 [2005] (Isr.) (finding the compensation provisions for evacuation of Gaza settlements unconstitutional); H CJ 8276/05 Adalah v. Minister of Def. (Dec. 12, 2006) Nevo Legal Database (by subscription) (Isr.) (finding a provision in a statute exempting the State from tort liability for acts done in hostility areas, that are not war acts, unconstitutional); H CJ 2605/05 Human Rights Dep't v. Minister of Fin. (Nov. 19, 2009) Nevo Legal Database (by subscription) (Isr.) (invalidating privatization of prisons); CrimA 8823/07 John Doe v. Israel (Feb. 11, 2010) Nevo Legal Database (by subscription) (Isr.) (invalidating a section in a provisional statute applicable to suspects in security offenses because of due process concerns); H CJ 4124/00 Yekutieli v. Minister of Religious Affairs (June 14, 2010) Nevo Legal Database (by subscription) (Isr.) (invalidating part of a budget statute but only prospectively with regard to the next budget year).

It should also be noted that it has been debated how to interpret H CJ 7052/03 Adalah v. Minister of Interior Affairs 61(2) PD 202 [2006] (Isr.) (dealing with the constitutionality of a provisional statute severely restricting entrance to Israel of people from belligerent areas). According to the result of the case, a majority left the statute intact. According to the reasoning, there may have been a majority in favor of striking the statute down.

190. In three of the eight cases in which there was a majority opinion invalidating a statute or part thereof—*Lishkat Menahalei Haskaot*, *Tzemach*, and *John Doe*—the Knesset responded within a few months by amending the legislation in line with the Court's instructions on how to remedy their unconstitutionality. See *Regulating the Practice of Advising on Investment and Managing Investment Profiles (Amendment 4)*, 1998, S.H. 250; *Military Judging Act (Amendment 36)*, 5760-2000, S.H. No. 1734 p. 152 [Isr.]; *Criminal Procedure Act (Detainee Suspected of Security Offense) (Provisional Act) (Amendment 2)*, 5771-2010, S.H. No. 2269 p. 118 [Isr.]. The *MK Oron* and *Human Rights Department* decisions terminated Channel 7 Radio Broadcast and the intended opening of a private prison respectively. The *Adalah* case is respected so that the State does not enjoy immunity from suits for tort acts that are not "war acts." See, e.g., *CA 1864/09 Estate of Ahmed Sacafi v. Israel* (Sept. 7, 2011) Nevo Legal Database (by subscription) (Isr.). The government has implemented the *Hamoeza Haezurit Hof Aza* decision through a special administrative body, Tnufa, that dealt solely with the difficulties of those evacuated from their houses. See PRIME MINISTER'S OFFICE, <http://sela.pmo.gov.il/PMO/Hitnatkut/HomePage.htm> (last visited Nov. 4, 2011). Only with regard to the *Yekutieli* decision is there a petition against the constitutionality of the Knesset's enactment in reaction to the Court's decision. H CJ 616/11 Israeli Students Union v. Israel (undecided), see Documents, NEWS1, [http://www.news1.co.il/uploadFiles/580074489116669.doc&usg=AlkJrhg1WLb3AcKl0yVXxAPJX\\_7kRfKg2A](http://www.news1.co.il/uploadFiles/580074489116669.doc&usg=AlkJrhg1WLb3AcKl0yVXxAPJX_7kRfKg2A) (last visited Nov. 4, 2011).

*United Mizrahi Bank* Court created a dual-tier of enactments where none existed before. If this is not a revolution, what is?

### V. Legitimizing *United Mizrahi Bank*

In *United Mizrahi Bank*, the Justices offered three different theories to explain their judicial review power over primary legislation. Eight of the nine Justices sitting in the case held that such power is only possible in the context of a formal constitution. This position stands in sharp contrast to the Court's practice during the founding era, as discussed above. The Justices ruled Israel has a formal constitution, in the form of the Basic Laws. Only Justice Cheshin dissented, holding that such judicial review power can exist without a formal constitution. He believed Israel lacked a formal constitution because the People never consented to adopting one. Nonetheless, Cheshin treated the Basic Laws as setting "manner and form" requirements that the Knesset must fulfill. If it did not, the Court was authorized to so hold. Even substantive entrenchment provisions may be translated to "manner and form" requirements by providing the Knesset the choice either to comply with them substantively or explicitly override them procedurally. Procedural entrenchment, on the other hand, to comply with majority rule, will be read as requiring no more than an absolute majority support to amend statutes.<sup>191</sup> Cheshin's dissenting opinion thus remained faithful to Israel's parliamentary sovereignty tradition.

Within the majority opinion, a dispute arose between retiring President Shamgar and the incoming President Barak regarding the constitutional theory that justifies both recognizing the Basic Laws as Israel's Constitution and deriving from it their power of judicial review.<sup>192</sup> Shamgar held that the Knesset created a supreme constitution through its power of self-entrenchment. He recognized the Knesset's power to bind itself both procedurally and substantively. The products of entrenchment were the Basic Laws which should be treated as Israel's Constitution. Shamgar thus adopted Hart's theory that it is possible to conceive of a sovereign

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191. *United Mizrahi Bank*, *supra* note 3, at 529–64 (Cheshin, J.).

192. The Courts (Consolidated Version) Act, 5744-1984, SH No. 1123 p. 198, § 15 (Isr.) allows each retiring judge, within three months of her retirement, to write opinions in cases that she heard while sitting on the bench. *United Mizrahi Bank* was decided during Shamgar's first three months of retirement.

Three other Justices joined Barak's theory to create a plurality opinion while three others remained undecided which of the two theories—Barak's or Shamgar's—was preferable.

legislature capable of restricting its sovereignty.<sup>193</sup> He recognized a weak-form constitution based on a sovereign parliament's power to entrench some of its enactments. This constitution would do its job of protecting fundamental values, as long as successor parliaments would abide by the entrenching provisions. When they do not, it will be up to the Court to decide whether to coerce them to abide by the entrenchment. So far, in contrast to the experience in other parts of the common-law world,<sup>194</sup> the Israeli Court does in fact coerce Parliament to abide by the entrenchment, thus establishing de facto a constitutional regime. It is a very shaky regime, since most of the Basic Laws are not even entrenched and may be easily amended by a mere random majority of MKs, as long as they title the enactment "Basic Law." Those Basic Laws that are entrenched usually require a majority of sixty-one MKs to be amended, and the governmental coalition usually controls a majority of MKs.<sup>195</sup>

Barak, in contrast, held that the Knesset enjoyed dual powers of both a legislative and a constituent assembly. Only in its capacity as a constituent assembly was the Knesset authorized to adopt a constitution (in the form of Basic Laws) that binds the Knesset in its capacity as a regular legislative assembly. He doubted whether the Knesset in its capacity as a regular legislative, as distinguished from constituent, chamber was authorized to entrench its enactments due to democratic concerns.<sup>196</sup> While Barak's dualist theory is attractive and resembles the American popular sovereignty theory,<sup>197</sup> it may be construed by some as somewhat artificial in light of Israel's parliamentary sovereignty history, as discussed above. It, too, is

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193. *United Mizrahi Bank*, *supra* note 3, at 283–94 (Shamgar, President); HART, *supra* note 21, at 149.

194. See discussion in *supra* note 103. Even Hart, on whose writings Shamgar relies when discussing the two concepts of sovereignty, openly admits that the concept of a self-restricting sovereign has been rejected de facto. HART, *supra* note 102.

195. Since Israel has a parliamentary system and its electoral system is based on proportional representation, the government, which enjoys the support of a majority of the Knesset, usually consists of many coalition partners with different constitutional agendas and it would require their consent to constitutional change. Since the constitutional revolution, some political parties have even included in their coalition agreements that no amendment of the Basic Laws would be done without their consent. Thus, it may prove a challenge, after all, for the government to master the necessary absolute majority.

196. *Mizrahi Bank*, *supra* note 3, at 355–91 (Barak, President).

197. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160–229 (1992); ACKERMAN, *FOUNDATIONS*, *supra* note 16; ACKERMAN, *TRANSFORMATIONS*, *supra* note 16; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

ultimately weak and is subject to the Knesset's power to amend the Basic Laws by simple or absolute majorities according to the Basic Laws' provisions.

With an awareness of the inherent weak form of constitutionalism they establish against a parliamentary sovereignty tradition, all Justices in *United Mizrahi Bank* were careful to couple their theory with implicit references to commitment to foundational constitutional values of Israel's constitutional system. They left for future court decisions to define these foundational values. Thus, Shamgar wrote of inherent limits to entrenchment power and hinted at Israel's foundational values as Jewish and democratic, Barak wrote of the "unconstitutional constitutional amendment" or abuse of constituent power, and Cheshin spoke of democracy as a foundational value.<sup>198</sup> In this way, the Court guaranteed that, although the legislature may easily amend the Basic Laws, it did so in the shadow of foundationalism, knowing that not every amendment to the Basic Laws will be treated by the Court as constitutional. If it fundamentally violates Israel's core foundational values, the Court may find it either unconstitutional or against foundationalist common-law constitutional values. Traces of such foundationalist theory are latent in the United States,<sup>199</sup> but explicit in Germany ("unconstitutional constitutional amendment");<sup>200</sup> India ("essential constitutional features");<sup>201</sup> and the United Kingdom ("common-law constitutionalism").<sup>202</sup> In fact, since *United Mizrahi Bank*, the political branches have largely refrained from amending the 1992 Basic Laws dealing with individual rights. Such respect, however, is not granted to the Basic Laws dealing with the structure of government, which are still subject to frequent amendment.

Although omitted from the international literature on commonwealth constitutionalism, as mentioned above, Israel, like

198. *Mizrahi Bank*, *supra* note 3, at 293 (Shamgar, President), 406–08 (Barak, President), 522–64 (Cheshin, J.).

199. Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163–90 (Sanford Levinson ed., 1995). Cf. ACKERMAN, *FOUNDATIONS*, *supra* note 16, at 3–33.

200. Articles 1, 20 & 79(3) of the German Basic Law; DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 48, 542 (2d ed. 1997).

201. *Kesavananda Bharati v. State of Kerala* A.I.R. 1973 S.C. 1461 (India); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 *INT'L J. CONST. L.* 460 (2006).

202. For supporters of common-law constitutionalism, see *supra* note 118.

Commonwealth countries (notably Canada, the United Kingdom and New Zealand), has thus succeeded in creating a middle ground between the sovereignty of the legislature and the supremacy of the Constitution (or, some would say, of the Justices).<sup>203</sup> After *United Mizrahi Bank*, Israel enjoys a formal supreme constitution in the form of the Basic Laws that are protected via judicial review. This Constitution, however, is vulnerable to the light entrenchment requirements provided for in the Basic Laws. While it is too early to make a final judgment, it seems that the political branches so far largely respect this constitutional transformation in their willingness to abide by Court's decisions to invalidate statutes.<sup>204</sup> This cooperation stands in sharp contrast to the behavior of those branches during Israel's founding era, when they paid merely lip-service to the meaning of judicial review and constitutionalism, as discussed above.

## VI. Lessons for Comparative Constitutional Law

### A. Aligning Parliamentary Sovereignty with Constitutionalism

We have seen that Israel's constitutional system prior to *United Mizrahi Bank* functioned under parliamentary sovereignty. It lacked a formal constitution, treating constitutional and regular law alike. Nonetheless, it enabled the exercise of American style judicial review under which a court could decide not to apply a statute. It is thus a case that shatters the conventional axiom that judicial review over primary legislation is exercised only, or mainly, to protect a formal constitution. It further rejects the aphorism that no judicial review of primary legislation is possible within a true parliamentary sovereignty tradition, Dicey notwithstanding.

What methods are available to introduce judicial review within a parliamentary sovereignty tradition? Israel's experience suggests a number of alternative mechanisms. One option is the use of "soft" procedural entrenchment—that is, not exceeding the requirement of an absolute majority support of members of parliament to amend a statute. If this requirement is not respected by the legislature, the court could coerce the legislature to abide by its own self-imposed

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203. For a comprehensive treatment of Israel's post-*United Mizrahi Bank* constitutional dilemmas, see Rivka Weill, *The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1739625](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739625).

204. See *supra* note 190 and accompanying text.

soft entrenchment. Because the procedural entrenchment does not exceed the absolute majority requirement, it aligns with legislative majority rule and is thus democratic.

Another mechanism is the use of *ultra-vires*—the legislature’s usurpation of power doctrine when conflicts of interest arise, such as the legislature’s decision to entrench itself in office. The legislature, as the people’s representative, does not enjoy more power than granted to it at election. This doctrine has strong roots in parliamentary sovereignty tradition tracing back to *Dr. Bonham’s Case* of the seventeenth century.<sup>205</sup>

A third mechanism is quorum or “manner and form” requirements, which enable the court to declare that certain statutes are simply not law because they were not enacted in accordance with the appropriate predetermined legislative procedure. If “manner and form” requirements do not exceed absolute majority requirements, they, too, conform to majority rule.<sup>206</sup>

Last, but not least, is the use of judicial review to protect core democratic values in accordance with Ely’s theory. Under this approach, the use of judicial review would not be perceived as counter-majoritarian. All these methods represent a “soft” form of constitutionalism that conforms to parliamentary sovereignty.

These mechanisms of soft-form constitutionalism, which may align with parliamentary sovereignty, can assist the constitutional system to evolve over time into stronger forms of constitutionalism, as evident in Israel’s second phase of constitutionalism. In fact, two of the three theories of constitutionalism offered in *United Mizrahi Bank*—“manner and form” and legislative self-entrenchment—are still based on parliamentary sovereignty traditions. Even foundationalist commitments, if they are to democracy itself, have their historical roots in parliamentary sovereignty systems.

Israel’s experience thus suggests that formal constitutions may be adopted, both empirically and normatively, in an evolutionary fashion without “constitutional moments.” It also shows that unelected bodies, such as a Supreme Court, may lead or play a dominant role in bringing about constitutional change. It ultimately demonstrates that, although the concepts of parliamentary sovereignty and governance by formal constitution are considered polar opposites, the two may interrelate.

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205. See sources on *Dr. Bonham’s Case* cited *supra* note 116.

206. On the difference between “manner and form” and entrenchment, see *supra* Part II.



## B. Theoretical Roots of Override Power

Israel's constitutional experience also sheds light on the theoretical roots of the "notwithstanding" power. How did the Israeli legislature come to possess this override power when no express "notwithstanding" clause existed in the Basic Laws during Israel's founding era? In fact, the "notwithstanding" clause is considered a Canadian invention to bridge parliamentary sovereignty in the British style with the supremacy of the Constitution in the American style. It represents a compromise struck between the federal Prime Minister Pierre Elliott Trudeau, who desired American constitutionalism, and the heads of the Provinces, who wanted to protect their sovereign powers. The compromise granted the courts judicial review power to invalidate statutes, but allowed the legislatures to overcome these judgments by exercising the "notwithstanding" doctrine. That is, the legislatures may reenact the infringing statute using explicit override language or they may even use this power preemptively, before a court has ruled on the constitutionality of the statute.<sup>207</sup> Thus, the legislatures are forced to debate and ultimately pay a political price for infringing rights. The Israeli experience with override language predates the 1982 Canadian Charter, however.

It is less known that the "notwithstanding" clause was not invented in 1982 with the adoption of the Charter,<sup>208</sup> but rather first appeared in the Canadian Bill of Rights of 1960.<sup>209</sup> Furthermore, the two documents—Charter and Canadian Bill of Rights—differ substantially. The Canadian Bill of Rights was enacted as regular federal legislation subject to simple majority change, while the Charter was enacted through a special dualist process that gained federal consent along with all of the Provinces, except Quebec.<sup>210</sup> The Charter may be amended only through special majorities.<sup>211</sup> Thus, in the 1960 context, the "notwithstanding" provision *enhanced* the

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207. Gardbaum, *supra* note 2, at 721–22; Stephanopoulos, *supra* note 11.

208. Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 226 n.22 (2002) (discussing controversies surrounding the origins of the notwithstanding clause but failing to mention that it first appeared in the Canadian Bill of Rights of 1960).

209. Canadian Bill of Rights, 1960 S.C., ch. 44, § 2 (Can.). *See also* 2 HOGG, *supra* note 19, at 173; Hiebert, *supra* note 17, at 13; Gardbaum, *supra* note 2, at 719–21. Paul Weiler who, according to his testimony, fathered the notwithstanding clause in the Charter did ascribe its origins to the Bill of Rights of 1960. *See* Weiler, *supra* note 174, at 80 n.97.

210. 2 HOGG, *supra* note 19, at 15–16, 28–29.

211. Section 38 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, Ch. 11 (U.K.).



stature of the Bill of Rights, which would otherwise be equal to any regular statute.<sup>212</sup> In the 1982 context, the notwithstanding clause *lessened* the status of the Charter, which is otherwise supreme.<sup>213</sup> The Israeli experience, with the override during its founding era, fits more naturally with the mechanism of the Canadian Bill of Rights of 1960 than with that of the Charter, since the override operated against a background of parliamentary sovereignty. But it is unlikely that the Israeli legislature was aware of this Canadian clause when using its override.

My suggestion is that the Israeli experience with the “notwithstanding” practice should also be divided into two periods: Before and after the enactment of the 1992 Basic Laws dealing with individual rights. In the first period, there was no formal “notwithstanding” clause in the Basic Laws. There was also no Canadian influence. Nonetheless, the Israeli Court, within a parliamentary sovereignty tradition, enabled the legislature to either abide by or amend an entrenched provision in Basic Law: The Knesset. In response, the legislature often overrode the provision instead of amending it, an option that the Court had not explicitly made available to it. The legislature thus perceived the override as a substitute for amendment. This was possible because the override power was not limited in time like its Canadian Charter counterpart, which established a sunset provision of five years for the effectiveness of the override unless the legislature actively renews it.<sup>214</sup> Instead of amending the Basic Law, the Israeli legislature thus clarified that, in a conflict between the infringing statute and the entrenched Basic Law, the former should prevail. The override was a tool of statutory interpretation to overcome a presumption against implied repeal of fundamental rights within a parliamentary sovereignty tradition. This is also why the override was repeatedly used by the Israeli legislature and accepted as valid by the courts.

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212. The Canadian Bill of Rights was initially effective only as an interpretive constitution. The courts, under its guidance, attempted to interpret statutes in a way that respected the rights protected by the Bill. Eventually, ten years after its adoption, the Canadian Supreme Court interpreted the Canadian Bill of Rights as authorizing judicial review to invalidate statutes that could not be interpreted as aligning with the Bill and there was no explicit override language in them. *R. v. Drybones*, [1970] 3 S.C.R. 282 (Can.). Nonetheless, there is general agreement that even after this momentous decision, the Canadian Bill of Rights failed to successfully protect rights. This in turn led to the adoption of the Charter in 1982. See Gardbaum, *supra* note 2, at 719–21.

213. 2 HOGG, *supra* note 19, at 22–23; Gardbaum, *supra* note 2, at 722. Cf. Heibert, *supra* note 17, at 13.

214. Section 33 of the Charter.

In fact, Justice Shamgar in *Agudat Derech Eretz* explicitly stated his opinion that the entrenchment provision of section 4 of Basic Law: The Knesset was intended to require that every infringement of equality norm be done “self-consciously and explicitly.”<sup>215</sup> “This way we will preserve constitutional clarity, which is important, inter alia, also because it has an educational element towards the general public. It is important that every citizen will know, that an infringement of equality norm took place, and what was the purpose for which it was done.”<sup>216</sup> The Justices expressed similar ideas in the *Rubinstein*<sup>217</sup> and *Laor Movement*<sup>218</sup> decisions.

Thus, the “notwithstanding” mechanism has strong roots in parliamentary sovereignty traditions and is a form of explicit repeal requirement. No wonder similarities may be found in two countries that have been greatly influenced by the British tradition—Canada and Israel.<sup>219</sup> This may also explain why the Canadian Supreme Court in *Ford* interpreted the notwithstanding clause as setting merely formal requirements.<sup>220</sup> It may further explain why in both Canada and Israel the legislatures may enact an override clause with regular or absolute majorities respectively. As long as the majority required does not exceed an absolute majority, it is still compatible with the “manner and form” theory in general and parliamentary sovereignty traditions in particular.<sup>221</sup>

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215. *Agudat Derech Eretz*, *supra* note 92, at 23.

216. *Agudat Derech Eretz*, *supra* note 92, at 23.

217. *Rubinstein*, *supra* note 92, at 158 (Shamgar, Deputy President).

218. *Laor Movement*, *supra* note 92, at 557, 571 (Elon, Deputy President).

219. 2 HOGG, *supra* note 19, at 22–23 (interpreting the override clause in the Canadian Bill of Rights as a “manner and form” device); Weiler, *supra* note 174, at 80 n.97 (treating the override clause in the 1960 Canadian Bill of Rights as a manner and form device). *Cf.* Tse, *supra* note 128 (arguing that the override clause in the Canadian Bill of Rights cannot be explained as a “manner and form” device because in 1960, “manner and form” restrictions could have been imposed on Canada only from above, via the British Parliament). Tse thus contends that no judicial review should have been allowed under the Canadian Bill of Rights. Tse’s argument is unpersuasive since it is based on the desire to protect parliamentary sovereignty, but under Tse’s analysis, the Canadian legislature was not sovereign in any case during that period.

220. *Ford*, *supra* note 175, para 33 (“Section 33 lays down requirements of form only. . .”). Canadian scholars criticized the Court for this formalistic interpretation of the override power. *See, e.g.*, Weinrib, *supra* note 174.

221. Another explanation may be that the more arduous the override procedure becomes, the more incentive there is for the legislatures to amend the Constitution rather than override it for a limited period. This is so, since the override process becomes closer to a constitutional amendment process. We may, however, prefer that the legislatures resort to the override, in the hope that the override will eventually lapse and protection of rights be strengthened. *Cf.* Stephanopoulos, *supra* note 11 (arguing in favor of requiring

In contrast, after 1992, only Basic Law: Freedom of Occupation explicitly incorporated a “notwithstanding” clause with a sunset provision, maintaining the override’s validity for only four years.<sup>222</sup> Furthermore, it was drafted following the Canadian Charter, which suggests that Canada served as an example to Israel’s development and national maturation.<sup>223</sup> This override power was utilized only to protect from judicial invalidation the prohibition against importation of non-Kosher meat to Israel discussed above.<sup>224</sup> Ultimately, Basic Law: Freedom of Occupation was amended to permanently exempt the prohibition, removing the need to override the Basic Law every four years.<sup>225</sup> Other Basic Laws do not have formal “notwithstanding” clauses, but we may read them into the Basic Laws if we accept Cheshin’s theory of “manner and form.” Under Cheshin’s theory, Parliament must either abide by substantive entrenchment requirements, or it must explicitly override them. This way, every limitations clause is potentially translated into override clauses. Substantive entrenchment is possible under Cheshin’s theory, despite his commitment to “manner and form,” because in the last resort even substantive entrenchment allows the legislature to explicitly override it.

It is difficult to ascertain from the dormancy of the override tool in Israel whether a political culture has developed that delegitimizes its use, as seems to be true in Canada.<sup>226</sup> It may be that the override

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legislative supermajority as prerequisite for the use of the override); Weiler, *supra* note 174, at 90–91 n.116 (preferring that the override clause would have to be invoked twice, before and after elections, before it becomes effective).

222. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.). Basic Law: The Knesset provides for holding elections every four years. Thus, the legislature that might renew the override will be different from the one that previously enacted it. Potentially, it can enable elections to discuss or even focus on intended use of the override power. So far, this has not occurred.

223. 3 AHARON BARAK, INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION 634 (1994).

224. See HCJ 4676/94 Meatrael Ltd. v. Israel’s Knesset 50(5) PD 15 [1996] (Isr.).

225. Basic Law: Freedom of Occupation, § 8(b). In my opinion, this amendment was necessary not only to lift the Knesset’s burden to override the Basic Law every few years due to the sunset mechanism of the override clause, but because repeated override amounts to de facto amendment and should be done accordingly.

226. In Canada, the override clause largely fell into desuetude because of Quebec’s abuse of it in the *Ford* case. This caused widespread resentment against the override power in the other provinces and on the federal level. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 83 (1997) (“In practice, section 33 has become relatively unimportant, because of the development of a

has been marginalized because de facto Cheshin's theory has been misunderstood or rejected by the political branches. His theory was definitely a minority opinion on the Supreme Court. Nonetheless, if the override ever gains general applicability in Israel, its roots should be attributed to "manner and form" theories of interpretation. I conclude that the override power is not a Canadian invention per se, nor is it merely a tool that offers an intermediate ground between two extremes: Parliamentary sovereignty on the one hand and a supreme constitution on the other. Rather it is an institution deeply rooted in the common-law world in general and parliamentary sovereignty systems in particular. This should serve as a cautionary note for those who would support the adoption of the override in systems foreign to parliamentary sovereignty traditions, such as the United States.<sup>227</sup>

### C. The Institutional Dialogue and Override Power

Finally, Israel's experience suggests that the way the parliament reacts to a Court's ruling is no less important than the mechanism chosen to exercise judicial review. In constitutional law, history and political facts cannot be divorced from theory but must be analyzed in tandem. Prior to *United Mizrahi Bank*, while the Court remained laconic in its reasoning about why it enjoyed the power of judicial review—to the point of even disguising it as "nothing was decided"—the legislature cooperated with equal trivialization of the matter. The legislature formally abided to the Court's decisions, yet substantively circumvented judicial review by retroactively revalidating statutes previously ruled unconstitutional using its override power. This is why, despite the use of American-style judicial review, Israel maintained a fully fledged parliamentary sovereignty system during its founding era.

In contrast, post-*United Mizrahi Bank*, the Knesset no longer circumvents the Court's judicial review power. Instead, the Knesset either fulfills the Court's substantive instructions on how to amend

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political climate of resistance to its use."); Hiebert, *supra* note 17, at 11; Gardbaum, *supra* note 17.

227. For American scholarship apparent admiration of the override, see, for example, Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003); TUSHNET, *supra* note 17; Stephanopoulos, *supra* note 11. Weiler also wrote that a congressional override technique may be suitable for Americans and may in fact be used more prudently in a presidential, rather than a parliamentary, system. Weiler, *supra* note 174, at 84–92. On comparing American and Canadian constitutional dialogues, see, for example, Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347 (2006).

invalidated statutes to redeem their constitutionality or leaves the Court with the final say, without attempting to revalidate statutes, declared unconstitutional by the Court, using an override language.<sup>228</sup> Thus, although it is still early to say with certainty, it seems that post-*United Mizrahi Bank* Israel is transforming from parliamentary sovereignty to robust constitutionalism. Furthermore, this transformation is made possible only through the cooperation of the different branches of government. Even if *United Mizrahi Bank* represents extreme activism on the part of the Justices, post-*United Mizrahi Bank* dialogue may establish legitimacy for the Constitution through the acquiescence of the political branches of government. Time will tell.

What is also clear from Israel's experience pre- and post-*United Mizrahi Bank* is that, if judicial review is to have meaning, the "notwithstanding" mechanism cannot be interpreted to enable the retroactive revalidation of statutes by way of reference. Nor should it serve as a replacement for normal channels of constitutional amendment. Rather, a "notwithstanding" mechanism must apply only on a going-forward basis and must refer specifically to the constitutional provisions abridged, so that the legislature openly takes responsibility for breaching (or not conforming to) high constitutional standards.

I conclude that, while recent literature has focused on *United Mizrahi Bank*, understanding Israel's past is fascinating not only to expose the Court's unique revolutionary role in deciding *United Mizrahi Bank*, but more importantly for the lessons it offers for comparative constitutional law.

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228. See *supra* Parts IV & V. In contrast, both the Knesset and the administrative branch frequently ignore the Supreme Court's decisions in the administrative area rather than follow the ruling. See JUDITH KARP, STATE NON COMPLIANCE WITH JUDICIAL DECISIONS REPORT, available at <http://www.acri.org.il/pdf/karp1.pdf>.

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