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# Constitutional Law of Israel

Suzie Navot

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**KLUWER LAW**  
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## Chapter 2. Constitution

### §1. INTRODUCTION

27. Israel has no one official document known as 'The Constitution'. Even so, by virtue of the enactment of the Basic Laws concerning human rights in 1992 (Basic Law – Human Dignity and Liberty, and Basic Law – Freedom of Occupation), it has been argued that Israel thereby adopted a constitution.<sup>1</sup> In fact, since the nineties of the previous century, the Israeli governmental-judicial structure has been conducted in a manner consonant with a constitutional democracy. There are supreme norms, expressed in its Basic Laws; the powers of the legislative branch are limited; and laws are subject to judicial review. Israel's new Constitution' is not complete, for it still lacks the chapters dealing with basic human rights such as freedom of expression and the principle of equality. This situation is the result of a historical compromise, and of a judicial decision of monumental significance, as we shall presently observe.

1. Barak: 'The Israeli Constitution: Past, Present, and Future' 43 *Hapraklit* (1997 In Hebrew) (iss. 1-2) p. 24.

### §2. HISTORICAL SURVEY

28. After the termination of the British Mandate, on the 14 May 1948, the members of the People's Council convened<sup>1</sup> and declared the establishment of the State of Israel. The People's Council became then the 'Provisional Council of State', which was the supreme organ of the State. The Declaration of Independence included a provision regarding the election of a 'Constituent Assembly' which was to frame a constitution. Following the election of the Constituent Assembly, the Provisional Council of State dispersed and its legislative powers were transferred to the elected Constituent Assembly, which in effect possessed both legislative and constituent authority. In its first session, on 17 February 1949, the Constituent Assembly enacted the Transition Law, 1949, by force of which the Constituent Assembly turned itself into 'the First Knesset'.

1. A group comprising 33 members who represented the Jewish Community in Palestine, in all its political streams.

29. It is undisputed that the First Knesset, having been elected as a Constituent Assembly, was empowered to frame a constitution for the State of Israel, but due to political disputes between the various parties regarding the political character of the State, the Knesset was unable to decide upon an acceptable version of a constitution. Finally, in 1951 the compromise proposal of MK Harari (known as the Harari Decision)<sup>1</sup> was adopted, under which:

The First Knesset charges the Constitution, Law and Justice Committee with preparing a draft of the State Constitution. The Constitution will consist of separate chapters, each chapter constituting a Basic Law in its own. The chap-

ters will be presented to the Knesset . . . and all of the chapters shall be consolidated into the State Constitution.

1. It is emphasized that this decision of the Knesset did not have the force of law, and as such is not legally binding.

30. Before the First Knesset's term was over, it enacted the Second Knesset (Transition) Law, 1951, under which the 'The Second Knesset and its members shall have all the powers which the First Knesset and its members had'.

The Law also stated that 'This Law shall also apply mutatis mutandis to the transition to the Third Knesset and any subsequent Knesset'.<sup>1</sup> The aim of this law was to ensure that with the transition from the first to the second Knesset and to every subsequent Knesset, constitutional continuity would be maintained.<sup>2</sup>

1. Sections 5 and 10 of the Transition Law to the Second Knesset.
2. CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221 (herein-after *Mizrahi Bank*). The issue of 'constitutional continuity' was disputed until the *Mizrahi Bank*, when Justices Shamgar and Barak ruled in the majority opinion that the constitutional continuity had not been severed, against the dissenting opinion of Justice Heshin. According to Justice Shamgar 'The powers of the Constituent Assembly were concentrated and consolidated in powers of the Knesset as the legislative authority. I unreservedly recognize the continuing power of the Knesset to enact constitutional legislation'. According to Justice Barak: 'There is no doubt in my mind that today we must adopt a single, unequivocal decision: The constitutional continuity was not severed. The Second Knesset was vested with the powers of the Constituent Assembly. Indeed, any other conclusion would be inconsonant with our national experience' See *Mizrahi Bank*, pp. 367-368. In Justice Heshin's dissenting opinion he contended that the authority of the Constituent Assembly did not include the 'inherent authority' to transfer its constituent authority to another, and nor did acquire the authority to transfer its authorities. See *Mizrahi Bank*, p. 486. For an English short version of this case see *Mizrahi Bank v. Migdal (the Gal Amendment) - translated extracts with commentary* in 31 *Israel Law Review* (1997) 754.

31. What emerges is that the First Knesset dispersed without having framed a constitution. The First Knesset decided to avoid the enactment of a formal constitution with the compromise of enacting Basic Laws in the future. This was a breach of the obligation imposed upon it by the Declaration of Independence, and prompted a plethora of academic debates over the years, primarily regarding the question of whether the First Knesset's power to frame a constitution (i.e., the constituent power) was actually transferred to all subsequent Knessets. Over the years however, and based on the Harrari decision, the Knesset enacted a number of Basic Laws, and in many senses, this perpetuated the presumption that when the Knesset exercises its 'constituent power' and enacts a 'Basic Law' - it is not adopting a regular law.<sup>1</sup>

1. A. Rubinstein & B. Medina, *The Constitutional Law of the State of Israel* (6th. ed. 2005) (In Hebrew) p. 22. See also R. Gavison, 'The Constitutional Revolution: Description of Reality or Self-Fulfilling Prophecy?' 28 *Mishpatim* (1997) (In Hebrew) 21, 70. See also Justice Heshin's position in the *Mizrahi Bank* judgment. In his view 'deviation (from the fundamental principle of majority rule) can only be done by an appropriate procedure for the enactment of a constitution . . . we speak of 'national consensus', 'the root conceptions of Israeli society', 'a social covenant' (*ibid.*, at pp. 524-525). 'The day on which the constitution is granted is a day of festivity. All are aware that the authorized power is about to enact a constitution . . . a constitution is given in complete awareness . . . , with the nation's willingness to accept the burden of a constitution' (*id.* 475).

32. Following are the 11 Basic Laws enacted by the Knesset since 1958, by virtue of the Harrari decision:

- Basic Law: The Knesset (1958);
- Basic Law: The Israeli Lands (1960);
- Basic Law: The President of the State (1964);
- Basic Law: The Government (1968, replaced in 1992 and in 2001);
- Basic Law: The State Economy (1975);
- Basic Law: The Army (1976);
- Basic Law: Jerusalem, the Capital of Israel (1980);
- Basic Law: The Judiciary (1984);
- Basic Law: The State Comptroller (1986);
- Basic Law: Freedom of Occupation (1992, replaced in 1994);
- Basic Law: Human Dignity and Liberty (1992, amended in 1994).

33. We will presently see that common denominator of all eleven Basic Laws was the addition to the word 'Basic' to their name, and the decision not to mention the year of enactment. This is indicative of the intention to place them above regular acts of legislation. The legislative intent was to enact a 'constitution in stages': In other words - each chapter of the future Israeli constitution would consist of a Basic Law. Even so, the Knesset failed to make a clear distinction between a Basic Law and a regular law. On occasion, the term 'Basic Law' is used even though in terms of its content, the law does not belong in the framework of a constitution. Most of the Basic Laws were adopted in accordance with the procedure for adopting regular legislation, and most of them are highly detailed, in a format similar to the regular legislation, as opposed to constitutional legislation.

34. In terms of the institution-based topics of the constitution dealing with separation of powers, the structure and powers of the sovereign authorities, we can see that the task of enacting Basic Laws is almost complete. Apparently, the one Basic Law still missing is the one dealing with legislative procedures, which is also supposed to deal with the power for judicial review of laws. The missing Basic Law, known as Basic Law: The Legislature - is also intended to regulate the normative status of Basic Laws, the manner of their enactment, and to confer the power for judicial review of a regular law that contradicts the provisions of the Basic Laws, as known in most constitutional states. In terms of the chapter dealing with human rights, the Knesset to date has only enacted two Basic Laws, and numerous important rights have yet to merit constitutional anchorage in Israel. A significant portion of the work regarding constitutional recognition of human rights is therefore still at the Knesset's doorstep.

35. One of the interesting questions that arose following the Harrari decision and the enactment of the Basic Laws, concerns the normative status of the Basic Laws. Arguably, from the moment of their enactment the intention was that they be located at the apex of the Kelsian pyramid of norms, that is, above the regular laws, by virtue of their being the chapters of Israel's future constitution. The counter argument is that essentially, they still have the status of regular laws, and supreme

normative status will only be conferred on them with the completion of all of the Basic Laws, when all of the chapters are consolidated into the State Constitution. The question is highly significant, both in terms of the relationship between a regular law and a Basic Law, and naturally, from the perspective of the possibility of judicial review of legislation.

### §3. THE STATUS OF THE BASIC LAWS BEFORE 1992

36. The status of the Basic Laws was discussed extensively in Israeli academic circles over the years, for the Harari Decision, which introduced the concept of Basic Laws, was silent on this issue.

One of the hallmarks of a constitution is naturally the fact of it being a stable document with a special procedure for its amendment. The search for these features in the Israeli Basic Laws reveals an interesting phenomenon; the vast majority of the Basic Laws were passed without any 'entrenchment' provision i.e., a provision stating that the Basic Law can only be amended by a special majority of members of the Knesset. Hence, Basic Laws in Israel can be either revoked or amended with the same facility required for the revocation or amendment of regular Knesset legislation.<sup>1</sup> The absence of the entrenchment provision may tip the scales in favour of the view that the Basic Laws have no superior normative status, and are in fact regular laws, designated for incorporation within the State constitution at the appointed time. According to this approach, the existing Basic Laws will all be simultaneously conferred constitutional status upon the completion of the legislation of all the Basic Laws, and their consolidation into the State Constitution.

But, Basic Law: the Knesset of 1958 established three entrenched provisions requiring a special majority for their amendment (a majority of 61 of 120 members of the Knesset). Even here, these provisions comprise three sections only, out of 46 sections included in the original Basic Law: The Knesset.

The question of the status of the Basic Laws in Israel arose precisely in the context of one of the entrenched provisions of Basic Law: The Knesset, which deals with the electoral system.

1. As we will observe below – a vote by way of a regular majority of those present, in three readings, suffices.

#### 37. Section 4 of the Basic Law: the Knesset provides:

The Knesset shall be elected by general, country-wide, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be amended, save by a majority of the members of the Knesset.

This article actually protects the Israeli electoral system and its entrenchment may be considered as the minimum of all possible entrenchments, meaning that there must be at least 61 positive votes out of 120 in order to amend the article.<sup>1</sup> In 1969,

the Supreme Court had to deal with the status of this entrenched article in view of a regular law that appeared to contradict with its provisions.

1. The other entrenched provision those days, were Articles 44 and 45 in the Basic Law: the Knesset and Article 42 in the Basic Law: the Government of 1968. These provisions established a special protection for those Basic Laws against emergency ordinances. See further discussion on this matter in Part 5, Chapter 3: (Emergency Laws). Today Israel has two Basic Laws completely entrenched: Basic Law: the Government and Basic Law: Freedom of Occupation.

38. Before the Knesset election in 1969, the Knesset adopted a law providing financing from public funds for the coming elections. The fund allocation was based upon party representation in the outgoing Knesset, meaning that new parties, non-represented in the outgoing Knesset, would be deprived of any funding under the law. The law was passed by an ordinary majority. The Petitioner, Dr. Bergman, questioned the compatibility of the new law with the entrenched Section 4 of the Basic Law: the Knesset. According to this section 'the Knesset shall be elected by general, country-wide . . . equal . . . and proportional elections'. The petitioner maintained that the financing law infringed upon the principle of equality included in Section 4.<sup>1</sup> The Supreme Court accepted the petitioner's argument and decided that the allocation system constituted a grave violation of the principle of equality, mentioned in Section 4. But the Court failed to deal with the most important questions arising in the case, meaning the status of the Basic Laws and the power of the Court for judicial review of a regular law contravening the Basic Laws. These questions remained unanswered until 1995.

1. HCJ 98/69 *Bergman v. Minister of Finance*, 23(1) PD 693. For an English translation of the Bergman case see 4 (1969) *Israel Law Review* 559.

39. Despite the *Bergman* ruling, the Supreme Court refused – until 1995 – to recognize the normative supremacy of Basic Laws. For example in the *Negev* case,<sup>1</sup> the Court ruled that Section 21 of the Standards Law, 1953, was not invalid by reason of its contravention of Section 31(b) of the Basic Law: the Government, which is not entrenched. Justice Berenson even ruled that the Basic Law has no special status, and added that in fact, it was quite the opposite: The Standards Law is *lex specialis* as distinct from the Basic Law: the Government, which is a general law, and the rule is that the specific law prevails over the general law.

1. HCJ 107/73 *Negev Automobile Service Station Ltd. v. State of Israel*, 28(1) PD 640.

40. At the same time, where a general law contravened an 'entrenched provision' of a Basic Law, it was determined that the Court is entitled to interfere with the legislative act, and declare it to be invalid. Thus in the *Laor* judgment the Court wrote:

A law of the Knesset – whether a 'regular law' or a basic Law – which purports to alter an 'entrenched' provision (the requirement of a special majority – meaning a formal entrenchment), without attaining a majority of the Knesset, contradicts the entrenchment provision of the Basic Law. Due to the legal status of the 'entrenched provision' it takes precedence. Where there is a

conflict between the entrenched provision and a provision purporting to alter it without having attained the required majority, the normal rules do not apply, according to which a posterior law supersedes earlier law. This conflict is governed by the principle of the normative supremacy of the entrenched Basic Law.<sup>1</sup>

1. H CJ 142/89 *Laor Movement v. the Knesset Speaker*, 44(3) PD 529, at 539.

41. However, the theory of judicial review of legislation had yet to be adjudicated and provided with a sound foundation in Israeli law. The financing law in *Bergman* was thus invalidated without any theoretical basis or justification. Justice Landau, who wrote the judgment, expressly stated that he was not discussing the constitutional issues raised by the judgment; for example the possibility of declaring the invalidity of a statute and the court's power to do so. Despite the supposed normative supremacy of the entrenched section, in fact the Knesset could overcome the special majority requirement of Section 4 of the Basic Law: The Knesset, quite easily. It needed to pass a law that infringed the principle of equality, ensuring its adoption by a majority of 61 votes. In such a case, the Supreme Court, naturally, would be powerless to declare the invalidity of the law.<sup>1</sup>

1. In fact, laws concerning the principle of equality in the elections were passed by a majority of 61, clearly indicating the Knesset's intention to infringe the principle of equality. For example, the amendment of the Basic Law: The Knesset, which permits the disqualification of parties by reason of the contents of their platform. This amendment, which will be dealt with in depth further on, was passed by a majority of 61 Knesset members; the assumption was that the denial of a party's candidacy for the Elections violates the principle of equality in the elections, guaranteed by Section 4 of the Basic Law: The Knesset.

42. Until 1992, the Supreme Court had recognized the supremacy of a 'formal' (request for a majority) entrenched provision in a Basic Law, but had not yet invested the Basic Laws themselves with normative supremacy. Meaning that in the absence of entrenched provisions, a regular law could alter and even violate every arrangement prescribed in any Basic Law. In a number of cases, the Court specifically stated that the Basic Laws were not normatively superior to 'regular Knesset' legislation. This meant that the Knesset did not automatically limit its legislative power by passing the Basic Laws. The Knesset was still sovereign and had unlimited power to pass any legislation it chose. The Basic Laws did not harm the supremacy of the Knesset. With relative ease, the Knesset could still overcome the formal entrenchment provisions. The Court itself was not requested to discuss the normative status of the Basic Laws, or the constituent power of the Knesset, until the adoption of the Basic Laws concerning human rights in 1992.

#### §4. THE NORMATIVE STATUS OF BASIC LAWS AFTER 1992

43. The constitutional dealing with human rights in Israel was the result of a political compromise. The draft version of Basic Law: Human and Citizen Rights had been discussed in the Knesset for years, but did not crystallize into a Basic Law. In a State in which there is no clear division between religion and state, the

recognition of a Bill of Rights in the format adopted in the constitutional democratic states, was a particularly controversial issue. The establishment of the State as a 'Jewish State' in accordance with the Declaration of Independence provoked a host of questions as to many basic freedoms. After a few unproductive decades of deliberations over a Draft of a Basic Law, a compromise emerged, in the spirit of the aforementioned Harari Decision: The Basic Law: Human and Citizen Rights would be divided into chapters and compilations of rights, each of which would be adopted as a Basic Law. Just as the State Constitution was to emerge 'chapter by chapter' by the ongoing enactment of Basic Laws, so too, the Bill of Human Rights would crystallize in stages, by the enactment of a Basic Law for each right or collection of rights. This compromise was intended to allow the enactment of Basic Laws for human rights, and to leave pending the discussion of the 'problematic' rights such as freedom of religion, conscience, equality etc. This original idea enabled the Knesset to overcome the opposition of various members, paving the way for the enactment of the two Basic Laws: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.<sup>1</sup>

1. For detailed discussion on these Basic Laws, see Part 4, Chapter 2 (fundamental rights and liberties).

44. The enactment of the Basic Laws regarding human rights in 1992 was accompanied by a significant change in the meaning of constitutional 'entrenchment'. Until then, the conception of 'entrenchment' in the Israeli Legislature connoted 'structural' or 'formal' entrenchment. The idea was that only a Knesset majority had the power to amend a provision of a Basic law. Basic Law: freedom of Occupation reiterated this idea when it included a section that entrenched the entire law, conditioning any amendment upon mustering a majority of 61 Knesset members.

45. This formal requirement of a majority in order to amend the new Basic Law was not the only entrenchment to be included. The Basic Laws embody the idea of the inherent relativity of human rights. Infringement of human rights is therefore permitted where committed for worthy purposes in accordance with the rules prescribed in the Basic Law itself. In this context, the Israeli Legislator adopted a criterion similar to the criterion prescribed by the Canadian Legislator, called the 'limitation clause'. Accordingly, a 'regular' law that 'violates' any one of the human rights expressly stipulated in the Basic Law is valid, only if it satisfies the cumulative conditions stipulated in the limitation clause:

The rights according to this Basic Law shall not be infringed except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required.<sup>1</sup>

The limitation provision defines the conditions under which it is permitted to infringe the right to human dignity and liberty and the freedom of occupation. Its function is two fold: It limits the power of a law to violate human rights on the one hand, and it limits the protection conferred to those rights on the other hand.

1. Section 8 of the Basic Law: Human Dignity and Liberty. A similar provision appears in the Basic Law: Freedom of Occupation.

46. The limitation section was an innovation in the Israeli legislature, establishing a 'substantive entrenchment' or 'substantive limitation' – and not just a formal 'majority' entrenchment – of the Knesset's power to enact a law that contradicted a Basic Law. It was now clear that if the Knesset attempted to enact a law infringing the rights enumerated in the Basic Law: Human Dignity and Liberty, in divergence from the conditions prescribed in the limitation clause, such a law would be invalid, even if passed by a majority of the Knesset Members. The substantive limitation on the Knesset's power to infringe Basic Laws engendered a radical change in the overall structure of Israeli Constitutional Law, a change in the status of all Basic Laws, and led to the recognition of the power for judicial review of laws. Being nothing less than a transformation of the entire system, this development has been termed 'The Constitutional Revolution'.

#### §5. THE CONSTITUTIONAL REVOLUTION<sup>1</sup>

47. Despite the absence of formal entrenchment in the Basic Law: Human Law and Dignity, in the *Mizrachi Bank*,<sup>2</sup> judgment of 1995, the Supreme Court ruled that the limitation clause is in fact intended to limit the Knesset's powers as the legislative authority. In an opinion with far reaching consequences, to be discussed below, the justices of the Supreme Court addressed the question of the validity of a law enacted by the Knesset, which infringed one of the fundamental rights enumerated in the Basic Law, and which – as argued – did not satisfy the requirements of the limitation clause. Basic Law: Human Dignity and Liberty lacked any formal entrenchment provision with respect to the majority necessary in order to amend it, and thus for purposes of the question before it, the size of the majority that adopted the infringing law was immaterial. In its judgment, the Court ruled that under these circumstances, irrespective of the majority by which it was passed, an infringing law could be declared void. Following this argumentation, the Supreme Court finally gave judicial recognition to the principle of judicial review of laws, not only in the formal sense of examining whether the required majority was mustered, but also in the substantive sense, i.e., the possibility of invalidating a law that contradicted the substantive provisions established in the Basic Law. Generally referred to as the 'Constitutional Revolution', this judgment established the constitutional guidelines for the supremacy of the Basic Laws, judicial review of legislation, and the principle of a limited Knesset. The State of Israel underwent a constitutional metamorphosis: from being a state based on the English model of parliamentary sovereignty, it became a constitutional state.

1. The issue will be discussed extensively in Part 2, Chapter 5, on judicial review.

2. *Mizrachi Bank*, *ibid.* This judgement is one of the most significant constitutional judgments in the history of the State of Israel.

#### I. The *Mizrachi Bank* Judgment

48. In this case, in an expanded panel of nine judges, the Supreme Court considered the question of whether a law passed after the adoption of the Basic

Laws of 1992 violated the right of property guaranteed in the Basic Law: Human Dignity and Liberty, and if so, whether it satisfied the conditions of the limitation clause. The appeal was rejected on the merits, and the law was declared to be consistent with the limitation clause. But this time, unlike in the *Bergman* case, the Court chose to adjudicate all of the constitutional aspects raised by the petition, including questions such as:

- Which body is empowered to frame a constitution?
- What is the status of the Basic Laws in Israel?
- What changes occurred in the legal system following the enactment of the Basic Laws in Israel concerning human rights in 1992?

The main thrust of the judgment focussed on the status of Basic Laws. In the introduction to his ruling, Justice Barak, President of the Supreme Court, (hereafter: President Barak), wrote that:

In March 1992 the Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty were adopted. Their adoption heralded a fundamental change in the status of human rights in Israel. They became constitutional rights. The constitutional revolution took place in the Knesset in March 1992. The Knesset granted the State of Israel a constitutional Bill of Rights.<sup>1</sup>

President Barak stated that the Basic Laws are the product of the constituent power of the Knesset, an authority that it has possessed since the days of the First Knesset, and which was transferred to each subsequent Knesset. His approach is based on the concept of constitutional continuity;<sup>2</sup> the Knesset has possessed constituent authority since the First Knesset, meaning that whenever the Knesset passed a 'Basic Law', it was actually exercising its constituent power.<sup>3</sup> Accordingly, the Knesset has the formal legal authority to frame a Constitution and the Basic Laws have constitutional status.

1. *Mizrachi Bank*, Justice Barak, *ibid.*, at p. 352.

2. According to his approach, the Knesset's constituent authority was based on the creation of the State on 15 May 1948. The first norm of the positive Israeli law was the legal determination that the Provisional Council of State is the supreme legislative organ of the State. The Provisional Council of State dispersed and transferred its powers to the Constituent Assembly. The Constituent Assembly enacted the Transition Law, 5709–1949, which transferred all of the powers of the Constituent Assembly to the First Knesset. This Knesset enacted the Second Knesset (Transition) Law, 5711–1951, which provided that the Second Knesset and the Third Knesset and all subsequent Knessets, would have all the powers, rights and duties which the First Knesset had. From this he inferred the principle of constitutional continuity, which ensured the transmission of 'all the powers' which also included the transmission of constituent authority.

3. For further discussion see C. Klein, *Théorie et pratique du pouvoir constituant* (PUF Paris) (1996).

49. Justice Heshin took a different approach, maintaining that the Knesset is not authorized to frame a constitution, because it does not possess constituent power. According to Heshin, the chain of constitutional continuity was altered, the chain of continuity broken. The First Knesset was not authorized to transfer its

constituent power to the Second Knesset and what began as a 'one time mission' will always retain its 'unique' character. However, Justice Heshin's view was not the majority view of the Supreme Court judges.

50. Some of the judges sitting in the panel in the *Mizrachi Bank* case, and particularly President Barak, based the supreme status of Basic Laws on their being the product of the Knesset's constituent power. The doctrine of constituent power provides the best explanation of the social and legal history of the State of Israel, and in their opinion it also reflects the ideal; that is, the Knesset should have constitutional power. Vesting the Basic Laws with 'constitutional' status compelled the Israeli Supreme Court to recognize the Knesset's constituent authority. Both President Shamgar<sup>1</sup> and President Barak expressly noted that the result they had arrived at was a desirable one. 'In my view, the Knesset's power is not limited to the enactment of Basic Laws and extends to the framing of an entire constitution. I also think that it should do so and give it my full support'.<sup>2</sup>

1. In this judgment there were two 'Presidents' serving in the Supreme Court: the departing president Shamgar, and the incoming president Barak. Accordingly they both bore the title 'President'.
2. Justice Shamgar in *Mizrachi Bank*, *ibid.*, at p. 286.

51. In the wake of the *Mizrachi Bank* case, the accepted view today is that the Knesset is vested with two 'crowns'; it is both the legislative power and the constituent power. When the Knesset establishes norms as a constituent power (Basic Laws) they are endowed with 'constitutional' status, i.e., they are at the apex of the normative pyramid. It follows therefore that the norms enacted by the Knesset in its legislative capacity are regular laws, and hence subordinate to the norms established by the constituent power. The sovereignty of the Knesset is therefore limited by the norms established by the Knesset itself, in its constituent capacity.

52. Naturally, the conclusions of this approach also affect the issue of judicial review of laws that infringe a Basic Law. In the footsteps of the American tradition, the Israeli Supreme Court established that the exercise of judicial review does not require explicit authorization. Much like in the American case, *Madbury v. Madison*,<sup>1</sup> the Israeli Supreme Court arrogated itself the power to invalidate the Knesset's legislation, despite the absence of any constitutional provision authorizing it to do so.

1. 5 US (1803) 137.

53. The identification of a Basic Law is based on a 'formal' criterion – its title. The eleven laws bearing the title 'Basic Law' are the products of the exercise of constituent power. 'The Knesset exercises its constituent authority . . . when it gives it external expression in the form of a norm, and views it as a "Basic Law" (with no indication of the year of its legislation)'.<sup>1</sup>

1. *Mizrachi Bank*, *supra* n. 6, p. 403, by President Barak. According to this test, which is now the only test, the question arises as to whether the Knesset is liable to misuse its constitutive power in order to enact inappropriate Basic Laws. This question is dealt with in Part 2, Chapter 5, on judicial review.

## §6. THE OUTCOME OF THE CONSTITUTIONAL REVOLUTION

54. The *Mizrachi Bank* ruling marked a change in the Israeli constitutional conception. The normative supremacy of the Basic Laws means that in any case of contradiction between a provision established in a Basic Law and a principle established in a 'regular' law, the principle determined in the Basic Law prevails.<sup>1</sup> The 1995 ruling in *Mizrachi Bank* thus endowed all the Basic Laws in Israel with constitutional status.

1. *Ibid.*, at p. 406, by President Barak: In the enactment of a Basic Law we find ourselves at the highest normative level. This dictates the conclusion that a Basic Law, or any of its provisions, can only be changed by another Basic Law. A Basic Law can be changed by a regular law only if the Basic Law contains an express provision to that effect.

55. Not only did the Court recognize the normative supremacy of the Basic Laws – it also recognized the Court's right to judicial review of a law, which is accepted practice in the majority of constitutional democratic states. Though the judgment was criticized, in practice the Knesset accepted it and acted accordingly. For example, one of the consequences of the constitutional move was that the Knesset was forced to amend the Basic Law: Freedom of Occupation when it enacted a law that *prima facie* did not meet the requirements of the limitation clause.<sup>1</sup> In the amendment to the Basic Law (adopted in the framework of a Basic Law, by a majority of 61) a clause was added that enabled the Knesset to 'override' the limitation clause. This section, referred to as the 'override clause', was influenced by the parallel provision of the Canadian Charter of Rights and Freedoms.

The override clause stipulates that:

A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with Section 4, [the Limitation Clause – S.N.] if it has been included in a law passed by a majority of the members of the Knesset [61 MK's – S.N.] which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from the date of its commencement.<sup>2</sup>

1. In the framework of the coalition agreement with the Ultra-Orthodox parties, the Government undertook to pass a law prohibiting the importing of meat that had not received a 'Hecsher certificate'. The Court hinted that the adoption of such a law would violate the Basic Law: Human Dignity and Liberty without fulfilling the requirements of the limitation provision.
2. Section 8, Basic Law: Freedom of Occupation.

56. This clause effectively permits the Knesset to adopt legislation that violates the freedom of occupation, without satisfying the requirements of the limitation clause, provided that the law was adopted by an absolute majority of the MK's and expressly stipulates that it is effective 'notwithstanding' the provisions of the Basic Law. However, since its enactment the Knesset has only once had recourse to the override section – to enact a law permitting the import of 'unkosher' meat.

57. Since 1995 the Supreme Court has conducted judicial review of Knesset legislation that is repugnant to the entrenched rights of the new Basic Laws, but

the review has been cautious and measured, and to date, only four laws have been invalidated.<sup>1</sup> The constitutional revolution also affected the status of the Basic Laws adopted before 1992. While the limitation clause was not included in the pre-1992 Basic Laws, one of the Supreme Court justices suggested that the Court 'lend' the limitation clause to the old Basic Laws, on the basis of an analogy with the new Basic Laws.<sup>2</sup> Concededly, this view is still exceptional, but it may portend the future direction of Supreme Court decisions.

1. See: *Mizrah Bank*, supra n. 6; H CJ 6055/95 *Zemach v. Minister of Defence*, 53(5) PD 245; H CJ 1715/97 *Israel Investment Managers Bureau v. Minister of Finance*, 51(4) PD 364; H CJ 9910/03 *Oron v. Knesset Chairman*, 56(3) PD 640.
2. Justice Zamir in the *Hoffnung* case, H CJ 3434/96 *Dr. Menachem Hoffnung v. Knesset Chairman*, 50(3) 70-73.

58. The *Mizrachi Bank* judgment also engendered a transformation in the public perception of the importance attaching to Basic Laws. Recent years attest to a growing awareness – in the Knesset and among the public at large – that the enactment of Basic Laws was an act of groundbreaking importance. Awareness of the need to evaluate legislation in terms of its compliance with the provisions of the Basic Laws<sup>1</sup> has become a cornerstone of the legislative process. Today the Knesset evaluates the constitutionality of any bill tabled for debate or voting, ensuring compliance with the principles established in the *Bank Mizrahi* decision.

There is also an enhanced understanding of the importance of the stability of the Basic Laws and the need to avoid amendments of Basic Laws based on narrow, temporal and partisan considerations. For example: The amendment to the Basic Law that accompanied the instalment of Ehud Barak's Government in 1999 was subjected to scathing public criticism, when the Knesset approved the amendment of Section 33 of the Basic Law: The Government, which enlarged the number of members in the government. The amendment was 'necessitated' by the 'need' to enable the appointment of a larger number of ministers.<sup>2</sup>

1. A. Rubinstein, 'The Knesset and the Basic Laws concerning Human Rights', 5 *Mishpat U' Mimosha* (2000) (In Hebrew) 339.
2. See H CJ 5160/99 *The Movement for the Quality of Government in Israel v. Constitution, Law and Justice Committee of the Knesset*, 53(4) PD 481. The most concrete case concerned an attempt to add a second deputy Prime Minister to Sharon's government in 2005. In the framework of the coalition negotiations between the *Likud* party and the *Labour* party, the *Labour* party's condition for entering the coalition was that *Labour* chairman then, Shimon Peres would be appointed to the position of Deputy Prime Minister. The position however was already taken. For internal party reasons, the Prime Minister preferred to amend the Basic Law: The Government, by adding an additional deputy. The initiative drew severe public criticism, both from public figures and from leading jurists, and solving coalition problems by amending the law was rejected. This case too is indicative of the serious attitude to the Basic Laws, and of the view that they should be not be changed on the bases of narrow, temporal, political needs.

59. Moreover, the *Mizrachi Bank* ruling and the Basic Laws concerning human rights lead to the constitutionalization of Israeli Law. These rights pulse through the arteries of all areas of the law, influencing their contents. Every legal realm and legal norm must now adapt itself to the new constitutional 'regime'. Consequently, although the Basic Law: Human Dignity and Liberty includes a section that pre-

vents the invalidation of laws enacted prior to its enactment, the Israeli Supreme Court interprets the prior legislation 'in the light of' the Basic Law and under its influence. Indeed, the Basic Laws also ushered in the interpretative revolution, wherein the Court must interpret every legislative act, regulation, order, or even contract in a manner that harmonizes them with the new Basic Laws.

60. The 'Constitutional Revolution' caused a prodigious quantity of academic writing in Israel, and scathing criticism as well – its main target being the phenomenon of 'judicial activism' manifested in the initiative, spearheaded primarily by the Supreme Court. It was claimed that the Supreme Court had arrogated to itself the authority to grant a constitution to the State of Israel, by way of a judicial decision.<sup>1</sup> However, despite the criticism, the Constitutional Revolution was thoroughly internalised by the Israeli legislature.

1. For example, this was the view of the Justice Landau, a previous President of the Supreme Court.

61. Since 1995, the Supreme Court has the power to judicially review any Knesset legislation violating protected human rights. But it is important to remark that the Knesset intentionally prevented the judicial review of laws enacted prior to the commencement of the Basic Law: Human Dignity and Freedom. Section 10 of the Basic Law provides: 'This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law'. This means that all laws that were in force in March 1992 will remain in force, and a contravention of the provisions of this Basic Law will not expose the offending section to invalidation. Laws enacted in Israel since 1948 until 1992 are thereby entrenched against constitutional judicial review. The arrangement itself was the product of a political compromise, creating, in the words of Prof. Barak, 'a constitutional anomaly'.<sup>1</sup> Nevertheless, the interpretation of the old law is influenced by the enactment of the Basic Law and is conducted 'in the spirit' of the provisions of the Basic Law.

1. A. Barak, *Constitutional Interpretation* (1994) (in Hebrew), p. 562.

62. Summing up, the Basic Laws of 1992 and the *Mizrachi Bank* judgment are the most impressive constitutional development since the establishment of the State. Today, Israel is a constitutional state like most world countries. The significance of the occasion was eloquently expressed by President Barak in the first paragraph of the *Mizrachi Bank* decision, while festively declaring that the State of Israel had joined the other constitutional states:

In March 1992 the Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty were adopted. Their adoption signalled a fundamental change in the status of human rights in Israel. They became constitutional rights. . . . A 'regular' law of the Knesset cannot alter them. A regular law cannot infringe protected human rights unless it satisfies the requirements established in the Basic Laws. Failure to fulfil these constitutional requirements transforms a regular law into an unconstitutional law. It is a law flawed by a constitutional defect, and the court is liable to declare it invalid. Israel is



a constitutional democracy. We have joined the community of constitutional states (including the United States, Canada, Germany, Italy, and South Africa) who have a constitutional Bill of Rights. We became part of the revolution of human rights that characterizes the second half of the twentieth century . . . judicial review of the constitutionality of laws that infringe human rights became the legacy of the vast majority of states. This revolution did not pass over us either. We joined it in March 1992.<sup>1</sup>

1. *Mizrachi Bank, ibid.*, at p. 352.

63. The State of Israel can now be said to have a formal constitution, but it must be remembered that this constitution is not complete and has even been referred to as a 'lame constitution'. Not all of the Basic Laws are entrenched, thus being exposed to amendment with relative facility; and the framing of the constitution awaits completion by the enactment of additional Basic Laws.

The constitutional revolution itself is a 'fait accompli'. The authority for judicial review of laws contravening the Basic Law concerning Human Rights is undisputed. It would seem however that apart from acknowledging, and even internalizing the Supreme Court's move, the Knesset has yet to recover from that move to the extent of becoming an active partner to the constitutional enterprise. Paradoxically – it seems that the constitutional revolution actually discontinued the process of creating the Israeli constitution. Since 1992, no Basic Laws have been enacted by the Knesset. The reason is that the constitutional revolution produced tremendous tension between the authorities, i.e., the Supreme Court and the Knesset, the latest having eventually halted the constitutional process. From a political perspective as well, it is doubtful whether there is majority support in the Knesset for the completion of the constitution.

#### §7. CHARACTERISTICS OF BASIC LAWS

64. The common denominator of all eleven Basic Laws lies in the addition of their formal identification – i.e., 'Basic' – to the title of the law, and the intentional non-stipulation of the year of their adoption. *Prima facie*, according to the Harari decision, this suffices for the establishment of the presumption that the law is a Basic Law, namely – a chapter of Israeli constitution. The import of this approach is that the Basic law is identified by one factor only – the 'formal' aspect: A Basic Law is a law bearing the title 'Basic Law'. Proponents of this approach concede that the formal criterion is somewhat arbitrary, but that it is preferable for purposes of legal certainty.<sup>1</sup>

1. I. Zamir, 'The Basic Laws: Towards the Constitution' (Preface to book: *Basic Law: The Knesset*) (1993) (in Hebrew) 13.

65. On the other hand, Israeli academics have generally rejected the formal aspect as the sole and conclusive characteristic. According to Prof. Zamir, a former judge of the Supreme Court, the Basic law is characterized as belonging to the Constitution by virtue of the style of its 'formulation': a constitution should establish

fundamental principles, of general applicability, succinct in language and majestic in formulation. A broad formulation of general principles affords the Court flexibility in interpretation, as is required in order to adapt the constitutional provisions to changing exigencies without having to frequently amend it, thereby diminishing its stature.

66. Proponents of this 'stylistic' or 'formulation' aspect, base their approach on the provisions appearing in the existing Basic Laws, such as the provisions of Basic Law: The Knesset, on the subject of immunity: 'The members of the Knesset shall have immunity; particulars shall be prescribed by Law'; 'The building of the Knesset shall have immunity; particulars shall be prescribed by Law'; or the provisions of Basic Law: The State Economy: 'The State Budget shall be prescribed by Law', etc. By this aspect, the supremacy of the Basic Laws is manifested in the manner of their formulation.

67. The difficulty with this approach is that empirically, significant portions of the existing Basic Laws are formulated in a highly detailed manner, bearing precisely the same format of regular legislation. In the *Mizahi Bank* case, there is a proposal for a material/substantive examination. In other words, whether the contents of the Basic Law belong to the matters customarily dealt with in a constitution. A Basic Law is such if it has 'constitutional content', if it deals with fundamental principles, the structure of the regime, human rights, etc. The problem with this approach is that it grants broad discretion to the Court, thereby promoting legal uncertainty. For example, if a Basic Law can be identified by its material content, the Court could rule that a regular law has 'constitutional character', and endow it with normative supremacy.<sup>1</sup> In the absence of a Basic Law to regulate legislative process and the enactment of Basic Laws, the approach today refers to all three aspects, the most prominent of them being the formal aspect, which is the most expressive of the Knesset's desire. To date, the Supreme Court has refrained from expressly conferring constitutional status to a law just by virtue of its constitutional content.<sup>2</sup>

1. Hints of this approach can be found in the decisions of the Supreme Court, for example, in relation to the constitutional status of the Law of Return and of the Equal Opportunities for Women Law. The question of the normative status of these laws was left unsolved and requiring further examination.
2. Despite the comments made by judges on various occasions regarding the 'constitutional' character of regular laws such as the Law of Return (a law entitling every Jew to immigrate to Israel and receive automatic citizenship, by virtue of his being Jewish) and the Equal Opportunities for Women Law. To date, these laws are regular laws.

#### §8. PROCEDURES FOR AMENDING THE BASIC LAWS

68. In the wake of the *Mizrachi Bank* case and the ensuing decisions, the Basic Laws adopted were conferred supreme normative status, meaning that their amendment is conditional upon the Knesset exercising its 'constituent authority'. In terms of the normative hierarchy, the Basic Laws are positioned above the regular laws.

69. This rule applies even where the Basic Law does not include an entrenchment provision. The upshot is that until *Mizrachi Bank*, the amendment of a Basic Law or a section thereof could be done by a regular law. Nowadays, a Basic Law can only be amended by way of another Basic Law. To amend a Basic Law the Knesset must exercise the same authority that it exercised in its enactment: its constituent authority. Accordingly, a Basic Law can only be amended by way of a Basic Law:

There was a change in the Knesset's legislative policy, manifested by these two Basic Laws; and by anchoring the new and appropriate conception of the normative hierarchy, it is now possible to adopt a uniform legislative criterion, according to which an amendment of any Basic Law can only be done by way of a Basic Law.<sup>1</sup>

1. *Id.*, per Shamgar, at 272, Section 26.

70. Nonetheless, the majority of the Basic Laws lack an entrenchment provision prescribing the need for majority of Knesset members for their amendment. The result is that theoretically, a non-entrenched Basic Law can be changed and even repealed by a simple majority of two Knesset members. This is the main weakness of the Israeli Constitution, which does not require an unequivocal, special, majority even for purposes of its amendment.