A CONSTITUTIONAL REVOLUTION: ISRAEL'S BASIC LAWS

Justice Aharon Barak

The following is the text of a speech delivered by the Honourable Justice Aharon Barak of Israel's Supreme Court on May 18, 1992 upon receiving the degree of Doctor of Philosophy, Honoris Causa, from the University of Haifa.

Not everyone knows this, but recently a revolution has occurred in Israel. I am speaking of a constitutional revolution, in which the Knesset, as the constitutive branch, enacted *Basic Law: Human Dignity and Freedom*, and *Basic Law: Freedom of Occupation*. The first law provides that no person's life, body or dignity shall be violated, by virtue of being human. A person's property shall not be violated. Every person is entitled to protect his or her life, body and dignity. Every person has freedom from imprisonment, detention or extradition. Every person has the right to leave Israel, and every Israeli citizen has the right to enter Israel. Everyone has the right to privacy and confidentiality. A person's private domain may not be entered without his or her consent. No search may be made of a person's private domain, on his body, of his body, or his personal effects. The confidentiality of a person's conversations, writings and records may not be violated.

Basic Law: Freedom of Occupation stipulates that an "ordinary" law can restrict the freedom to engage in an occupation only if it is enacted "for a worthy purpose and for reasons of the public good." *Basic Law: Human Dignity and Freedom* provides that human dignity and freedom may be infringed only "by a statute that befits the values of the state of Israel, which is directed towards a worthy purpose and only to the extent necessary."

By virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status — much like the situation in the United States, Canada and many other countries. This is clear with regard to *Basic Law: Freedom of Occupation*, which the Knesset itself entrenched by stipulating that it may not be changed except by a Basic Law passed by an absolute majority of Knesset members. It is less clear in the case of *Basic Law: Human Dignity and Freedom*, which was not so entrenched; but the minimalist interpretation of that Basic Law requires, in my opinion, that any ordinary legislation which contradicts the provisions of the Basic Law without stating explicitly that it is doing so will not be valid. To be sure, in the past the courts in Israel, the Supreme Court foremost, also recognized basic human and civil rights. In terms of content, the new basic rights do not effect a real revolution. In a long line of judgments, the Courts have recognized, in the words of Justice Landau, those "fundamental rights that are not written in any book, but which emanate directly from the character of our state as a democratic, freedom-loving state."

Through these judicial decisions, most of the basic rights set out in the new legislation have already been recognized. Indeed, the revolution is not one of content so much as of force. With the enactment of the Basic Laws, these fundamental rights have become "inscribed in the book." From now on, they bind not only the citizens and residents, and not only the administrative authorities, such as the government and local authorities. From now on, they bind the Knesset itself. Above the Knesset as the legislative branch stands the Knesset as constitutive branch, and above the ordinary law of the Knesset stand the two Basic Laws. The people are sovereign, and the Basic Laws are supreme. A Knesset law may no longer infringe the basic rights mentioned, unless it is enacted for a worthy purpose, even then only to the extent necessary, and it fits the values of the state of Israel as a Jewish, democratic state.

As with all constitutional legislation, the two Basic Laws are sometimes phrased in generalities. They employ "majestic generalities." They contain inherent conflicts between individual rights and public needs, such as the freedom from detention on one hand, and the legislation regarding administrative detention on the other; or freedom of property versus expropriation for public needs; or freedom of movement as against preventing exit from Israel for security reasons. The principal organ of state that must pour content into the majestic generalities, and must resolve the inherent conflicts, is the judiciary — primarily the Supreme Court.

The Israeli society has imposed upon us, the Justices of the Supreme Court, the task of giving content to the molds for human rights that will befit our values as a Jewish democratic state. We must do so in complete subservience to the words of the Basic Laws. We must do so by taking a broad view of Israeli society, against the background of its whole national experience. We must mirror the *Ani Ma'amin* of our sovereign

life, for in Justice Agranat's words, "it is a well-known axiom that the law of a nation should be studied through the looking-glass of its national life." We must set our eyes to the past, to the roots of our culture, tradition and religion. We must go back to our history, as the basic laws are the outcome of the history of a people and a society. We must intertwine our efforts with the judicial approaches to human rights that we have recognized thus far. We must draw inspiration from the universal human rights accepted by modern democracies. We must give expression to the social and ethical developments of Israeli society. We must crystallize the modern self-understanding of Israeli society; in other words, its very identity. There is no single philosophical and economic social conception underlying this society. We are a pluralistic society. Naturally, our identity will be complex and many-faceted.

As Justices of the Supreme Court, we will have to give content to the Basic Law's avowed purpose of "entrenching in a Basic Law the values of the state of Israel as a Jewish democratic state." What is a Jewish state, and what is a democratic state? We dealt with this in the past when we interpreted Knesset laws. Now we will have to deal with it not only to interpret the existing law, but also in the framework of determining the validity or invalidity of Knesset laws. It may already be said that the term "Jewish and democratic" does not contain a contradiction, but rather a completion, a complementing. As President Shamgar remarked in another context: "The existence of the State of Israel as the state of the Jewish people does not negate its democratic character, just as the Frenchness of France does not negate its democratic character." The State is Jewish, not in the religious sense, but in the sense that Jews have the right to immigrate here, and that their national experience is that of the State. (This manifests itself, *inter alia*, in the language and the state holidays.)

The fundamental values of Judaism — which we bequeathed to the whole world — are our basic values. I am referring to the values of love of humanity, sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of the law-maker, and other such eternal values. The reference to these values is on a universal level of abstraction. The state is democratic, by recognizing institutions and organs built upon majority rule, by providing full equality among all its citizens and by its recognition of basic human and civil rights.

The task that the new legislation has placed upon us is weighty. It requires sensitivity, wisdom and responsibility. It demands not only legal erudition, but an understanding of life. It is based on an awareness of the legal historical and social developments that we have witnessed and those yet to emerge. It is founded on enlightened analysis of Israeli law, and on reference to the law of enlightened nations from which we may draw inspiration. It requires patience and tolerance. It needs public trust and understanding. It presumes a strength of spirit to withstand the passing winds of the hour, whether of the leaders or the masses. It is based on the understanding that without a society and security, individuals have no existence; and without individuals and their natural rights, the society has no reason to exist. The judge cannot be naive and see a security problem in everything. The rule of law, equality and human rights *are* the security of the state. Nor can a judge be innocent and place individual rights as the supreme, exclusive value. A constitution is not a blueprint for national suicide, nor are Basic Laws a platform for social annihilation. The task is weighty. I am convinced that we will discharge it. Israel has the best of judges, at all levels. Now that we have been given the tools we will do the work.

Justice Aharon Barak of the Supreme Court of Israel.