

ISRAEL USHERS IN A CONSTITUTIONAL REVOLUTION: THE ISRAELI EXPERIENCE, THE CANADIAN IMPACT

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THE CONSTITUTIONAL REVOLUTION

"Parliament can do no wrong," goes the old English saying, "but it can do several things that might look pretty odd." The Israeli legal system has been constructed on the basis of the principle of "parliamentary sovereignty," adopted from England, according to which the Knesset is "omnipotent." "The vital principle to which we hold," wrote Justice Menahem Elon of the Israeli Supreme Court, "is that the validity of a law enacted by the Knesset is not subject to judicial review. A founding principle of our democratic system, with its three branches of government, is that we do not query the acts of the legislature in enacting its laws."¹

One exception, however, has been created to this leading principle. The Supreme Court of Israel, sitting as the High Court of Justice, has held in four different cases that a law enacted by the Knesset is void on the grounds that it conflicts with the principle of equality in the electoral process.² This case law relies on grounds that the Knesset itself has declared in a specific provision of the Basic Law — that the right of equality shall not be infringed save by a law enacted by a special majority of 61-members.³ The annulment of the conflicting laws relied primarily on the technical ground that the laws declared void were not enacted with this special majority. According to the "supremacy of parliament" principle, which underlies this exception, it is understood that a 61 member majority may infringe the principle of equality by, for example, conferring an advantage upon the larger political parties in the allocation of surplus votes, thus violating the principle of "one person one vote."⁴

In the above-mentioned cases, the High Court of Justice refrained from setting out an express rule regarding the Court's power to review the legality of Knesset laws. Instead, the Court relied on the absence of any contention to the contrary, i.e., that it did not have such a power. Nevertheless, it is clear that the High Court of Justice will respect the power of the Knesset to enact an "entrenched" provision in a Basic Law which cannot be overruled by an ordinary majority. This jurisprudence, which stressed that the rule of law binds the legislator, did not itself give rise to any divisive conflict between the courts and the Knesset. Nevertheless, it should be noted that these decisions, in spite of their limited application, paved the way for the development of a constitutional framework in a country without a written constitution.

In March 1992, a significant event took place in the Israeli constitutional arena. The Knesset enacted two new Basic laws: the *Basic Law: Freedom of Occupation* and the *Basic Law: Human Dignity and Liberty*.⁵ These laws, which Justice Aharon Barak termed a "constitutional revolution" and "a constitution in miniature,"⁶ created a new era in Israeli constitutional law. They recognized fundamental rights — freedom of occupation, the right to property, the right to freedom, privacy and human dignity — and provided that these rights could not be infringed save by legislation which meets certain specific criteria. This approach, recently affirmed when the Knesset re-enacted the *Basic Law: Freedom of Occupation*,⁷ imposed restrictions on the power of the Knesset to pass any law it pleased.

THE "LIMITATION CLAUSE" AND "OVERRIDE CLAUSE"

The Israeli constitutional revolution was greatly influenced by the *Canadian Charter of Rights and Freedoms*.⁸ As in the *Canadian Charter*, "limitation clauses" and "override clauses" were incorporated in Israeli constitutional legislation.⁹ The "limitation clauses," which were included in both the *Basic Laws: Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), are of special importance in the newly evolved constitutional structure. The provisions were intended to place constraints on future legislation enacted by the Knesset and thus deviate from the principle of "parliamentary sovereignty" which has characterized the Israeli legal system since the establishment of the State in 1948.

The "limitation clauses" provide that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required".¹⁰ Unlike the *Basic Law: Freedom of Occupation*, the *Basic Law: Human Dignity and Liberty* does not have an entrenching provision expressly excluding amendment by an ordinary law of the Knesset. It nevertheless seems clear that the very inclusion of the "limitation clause" created a basic law of a superior status: the Knesset is not empowered to infringe the rights recognized by the law — in whatever way it sees fit — through its regular legislation. Still, the precise legal status of such a Basic Law is open to discussion.

One theory holds that Basic Laws enjoy a special status due to the fact that they form part of the future constitution of the state. It has thus been suggested that a provision in such a law may only be amended by another Basic Law (even though enacted by a regular majority) which explicitly affirms the validity of the amendment notwithstanding any provision of the original Basic Law being amended.¹¹ A different approach holds that ordinary legislation may also supersede a "limitation clause," provided, however, that it specifically declares that it is valid despite the provisions of the Basic Law.¹²

In my view, the first approach is to be preferred. It recognizes the absence of an entrenched provision, thus enabling a deviation from the Basic Law by a regular majority. At the same time, it requires that the regular majority express its will in a Basic Law

affirming its validity notwithstanding the provisions of the Basic Law being amended. Such a requirement strengthens the status of a Basic Law marked by a "limitation clause."¹³

In any event, it would appear to be accepted by the Israeli legal system that the mere existence of a "limitation clause" prevents the Knesset from infringing, on a whim, the fundamental rights of individuals. The new Basic Laws open the door to judicial review of statutes to an extent previously unknown in Israel. Thus, the "limitation clause" makes it possible for a court to annul a Knesset law if, in its view, it conflicts with the fundamental rights safeguarded by the Basic Laws and does not "accord with the values of the State of Israel" — an imprecise term of uncertain boundaries.¹⁴

In 1994 the Knesset re-enacted the *Basic Law: Freedom of Occupation*, primarily with the aim of incorporating an "override clause" into the legislation. This provision enables the legislature to enact, by a special majority, a regular law which will be valid in spite of the fact that it contradicts the essence of the Basic Law. Such an "override clause," which is also contained in the *Canadian Charter*,¹⁵ was included to prevent the importation into Israel of non-Kosher meat. Briefly, the Israeli Supreme Court had, in an earlier decision of October 1993, declared the prohibition on the import of non-Kosher meat to be contrary to the *Basic Law: Freedom of Occupation*, which was enacted in 1992. In order to overcome the problem caused by this decision, the "override clause" was incorporated in the new *Basic Law: Freedom of Occupation*, enacted in 1994, which replaced the 1992 Basic Law. Following the enactment of the *Basic Law: Freedom of Occupation* in 1994, the Israeli Knesset enacted the Import of Frozen Meat Law (1994), which prohibits the importation of non-Kosher meat. The Law was passed by a special majority of members of the Knesset, as required by the "override clause" in the aforementioned new *Basic Law: Freedom of Occupation*.¹⁶

It should be noted that the Israeli "override clause" differs from section 33 of the *Canadian Charter*, *inter alia*, by the fact that in Israel a special majority is needed in order to overcome the effect of the *Basic Law: Freedom of Occupation*. Shortly before the enactment of this Basic Law in 1994, Israeli Supreme Court Justice Aharon Barak wrote a letter to the Chairman of the Knesset's Judiciary

Committee, which was preparing the bill for final reading. Justice Barak, stating that his letter was confined to remarks of a judicial character, referred to the Canadian "override clause" as a possible clause for adoption by the Knesset. In public discussions it was mentioned that the "override clause" is very rarely used in Canada. It is hoped that the same restrained approach will be adopted in Israel.

THE JUDICIARY v. THE LEGISLATURE

The fact that legislation has not confined the power to annul laws to a special constitutional court (such as in France, Germany and Italy) has opened the gates to a phenomenon with which Israel is as yet unfamiliar. That the legislature has been silent regarding the question of the forum competent to annul legislation is not considered to preclude judicial review.¹⁷ This silence has resulted in a situation where every court is competent to annul any law which conflicts with the basic laws relating to freedom of occupation and human dignity.¹⁸

The constitutional revolution relating to the annulment of a law which does not satisfy the "limitation clause" was sparked by a decision of the District Court of Tel Aviv delivered in March 1994.¹⁹ In this case, the court was considering the Agricultural Sector (Family) Arrangements (Amendment) Law, which came into force in August 1993. In a detailed decision, the judge held that the law infringes upon the right to property (a right recognized in the *Basic Law: Human Dignity and Liberty*), since the creditors would be prejudiced by a provision which to some extent reduced the power of the court to give judgment in debt proceedings. "The Amendment Law," held the judge, "negates the rights of the creditors to have their property right in the debt adjudicated before the court, and subjects them to the powers of the receiver, a fact which retrospectively infringes the property rights of these creditors." In the view of the judge, the law infringed the principle of equality by favouring that part of the agricultural sector to which the provisions of the law applied.

The law was thus found to conflict with the "limitation clause," which requires the law to accord with the "values of the State of Israel," including the principle of equality, which is one of its cornerstones.²⁰ In the light of the above, the judge held that the provisions of the Knesset law are void "to the extent that they increase the exclusive powers of the receiver to hear debt proceedings...and negate

the power of the court to consider the same matters."

From a legal point of view, it is clear that the decision of the District Court affects only the parties to the action, and does not constitute a binding precedent for other cases. However, the case created a new constitutional situation. For the first time in Israel, a court has held that a provision of a Knesset law is void as being contrary to the "values of the State of Israel." For the first time in Israel's legal system, a court, which was not the Supreme Court, held that the majority in the legislature had infringed a fundamental principle of democracy, the principle of equality — a value-laden term subject to differing interpretations. Such a ground for the annulment of a law was unknown to the Israeli legal system prior to the enactment of the two recent Basic Laws.²¹ Before the outbreak of the constitutional revolution, the annulment of a law on the ground that it conflicted with the principle of equality would have been considered inconsistent with the Israeli legal system. The fact that the first decision to implement the new approach was taken by a District Court, and not by the Supreme Court, emphasizes the radical and far-reaching nature of this new legal development.

Even when one recognizes the importance of judicial review of Knesset legislation, as I do, the question remains whether it is appropriate that every court should be able to engage in this process. Such a decision requires a judicial determination which is difficult from a legal standpoint and sensitive from a societal standpoint. This is particularly so where the matter concerns the annulment of a law on the basis that it conflicts with principle of equality or another fundamental human right. In this context, I agree with the argument that a determination negating the validity of a law may lead to a real confrontation between the courts and the legislature. Such a determination requires the exercise of the highest possible discretion by a court with a maximum of prestige.

Consequently, it would be desirable to concentrate the right to negate a law within the jurisdiction of the Supreme Court.²² It is my submission that the annulment of Knesset legislation by any court — Magistrate or District — will create chaos. It would be difficult to justify, for example, a situation in which one driver is found innocent because of a judicial decision that the law in accordance with which he is being tried is null and void, whereas another driver, appearing before a judge who determines that the relevant law is valid, is liable to a fine.

The decision of the District Court which negated a law of the Knesset on the grounds that it infringed property rights, contrary to the principle of equality, may open the gates to further judicial decisions over a wide range of matters, as has occurred in Canada and the United States. Following this breakthrough, Israel now faces a new and special constitutional era, even before the enactment of a written constitution. In this contest, the courts will play a vital role in the protection of human rights, while drawing inspiration from other democratic legal systems, headed by Canada, which provides the model for the two new Basic Laws.²³

CONCLUSIONS

With the enactment of the Basic Laws in respect of Human Dignity and Freedom of Occupation, the State of Israel entered into a new era. Human dignity, as a broad and all-embracing right which encompasses the whole range of fundamental principles as well as specific rights, has evolved, in Israel, into a basic right. The climax of the constitutional revolution — which unfolded so quietly, and without the promulgation of a comprehensive formal constitution — ensued with the possibility of annulling primary legislation, on the grounds that it was contrary to the values of the State of Israel. This formula, which has found expression in the “limitation clause,” is both broad and ill-defined. Indeed, it is more far-ranging in scope than the mere annulment of a law which is contrary to any specific constitutional provision.

In addition to their power to annul specific laws, the Basic Laws have far-reaching implications for the interpretation of existing legislation and the delimitation of the authority of governmental agencies. In a recent line of decisions, the Israeli Supreme Court has elucidated the properties of the Basic Laws. The Court has held that under the terms of the *Basic Law: Human Dignity and Liberty*, human dignity means the right of a person to his life, and the right of his relatives, after his death, to inscribe non-Hebrew characters on his tombstone, if they see fit.²⁴ Similarly, it has been held that courts must be mindful of human dignity and freedom and only in rare and exceptional cases should they order a person suspected of having committed a criminal offence to be held in prison until the conclusion of proceedings against him.²⁵ Overly stringent regulations in the field of the execution of judgments against debtors were found to operate within the ambit of human rights and

were annulled.²⁶ The right to freedom of movement, which is recognized in the Basic Law, caused the Supreme Court to hold that an order restricting the right of a person to leave the country on the grounds of a debt is justified only in special cases.²⁷ The court has also held that the Basic Laws should guide IDF officers in the exercise of their military powers in territory subject to the control of the State of Israel, i.e. Judea, Samaria and the Gaza Strip, despite the fact that formally, the Basic Laws apply only within the territory of the State of Israel proper.²⁸

Recognition of human rights in the *Basic Law: Human Dignity and Liberty* is general and all-embracing, and may even evolve into a substitute for a constitution which expressly addresses basic rights such as equality or freedom of expression. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process and more. The Knesset is debating a detailed bill for a charter of basic human rights which expressly refers to these rights.²⁹ However, in the light of conflicting political views, particularly over freedom of religion, it is doubtful whether this bill will be enacted. Thus, it may be expected that the Israeli Supreme Court will interpret the existing Basic Laws in such a way as to incorporate within them the entire spectrum of fundamental human rights.

In any event, in enacting the new Basic Laws, the State of Israel has joined the family of nations which believe that limitations must be set on the right of a majority to derogate from fundamental human rights. In interpreting these Basic Laws, the Israeli judiciary will rely on the fact that the State of Israel is Jewish and democratic and is committed to equality for all its citizens, Jewish and non-Jewish alike. The Israeli courts will draw upon the wisdom of other legal systems which have allotted to the concept of human dignity its rightful place at the head of the hierarchy of human rights.

The repeal of legislation on the basis that it does not respect basic values or impair human rights more than necessary in a democratic society is an accepted concept in Canada, the United States, Germany and other states. In Israel it is still too early to say how the constitutional revolution will be adhered to when put into practice. The incorporation of the “notwithstanding clause” in the *Basic Law: Freedom of Occupation* (1994)³⁰ is the Parliament’s first reaction to the new reality that it now enjoys limited supremacy.

In an illuminating book recently published, Justice Aharon Barak of the Israeli Supreme Court describes the constitutional revolution, explaining that "[i]n the past, human rights were subject to the laws. Today, the laws are subject to human rights."³¹ This new reality, under which the Parliament can do wrong, would have to be followed by a development of constitutional remedies. Unlike the Canadian *Charter*, the Israeli new Basic Laws do not include any specific provision relating to the force or effect of a law which has been declared by the Court to be unconstitutional.³²

Still, it could be submitted that the Israeli courts can declare a law to be void. Such power can be implied from a specific limitation mentioned in the Basic Laws which relate to legislative power. Such a limitation is exemplified by the "limitation clauses" in the new Basic Laws. It is within the powers of the courts to declare a law to be void *ab initio* or void *ex nunc*, from the time of the judicial decision. The Israeli court can, in my opinion, follow the Canadian approach, and suspend the entering into force of the nullity declaration.³³ The Israeli courts can also read into the law provisions which will abolish its unconstitutionality, instead of reading down the law.

All possible practices under which a law would be struck down only as a last resort, are highly advisable in the first stages of a constitutional revolution. It can be foreseen that the Israeli Supreme Court will enter into the new era with caution and respect for the Legislature, without overlooking human rights which are the basic element of a constitutional democracy. □

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The abbreviations mentioned in this article are used in the Israeli legal system:

L.S.I..	Laws of the State of Israel (Official Translation into English).
H.C.J..	Israeli Supreme Court sitting as a High Court of Justice.
P.D..	Piskei Din (Hebrew) (Supreme Court Judgments).
S.H..	Sefer Hahukim (Hebrew) Laws of the Israeli Parliament (the Knesset).

Endnotes

1. H.C.J. 142/89 *Tnuat Laor (Laor Movement) v. Speaker of the Knesset*, 44(3) P.D. 529 at 555 (Hebrew) [hereinafter *Laor Movement*].
2. H.C.J. 98/69 *Bergman v. Minister of Finance*, 23(1) P.D. 693 (Hebrew). For an English translation, see *Judicial Review of Statutes*, 4 Israel. L. Rev. 559 (1969); H.C.J. 246/81 *Derech Eretz Association v. Broadcasting Authority*, 35(4) P.D. 1 (Hebrew); H.C.J. 141/82 *Rubenstein v. Speaker of the Knesset*, 37(3) P.D. 141 (Hebrew). See also *Laor Movement*, *supra* note 1.
3. The Israeli parliament, the Knesset, is composed of 120 members.
4. H.C.J. 148/73 *Kniel v. Minister of Justice*, 27(1) P.D. 794 (Hebrew).
5. See Appendices 1 and 2.
6. See, for example, A. Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1 *Mishpat Umimshal* 9 (Hebrew); A. Barak, "Protected Human Rights: Scope and Limitations" (1993) 1 *Mishpat Umimshal* 253 (Hebrew); A. Barak, "Protected Human Rights and Private Law" in *Klinghoffer Book on Public Law* (Jerusalem: Sacher Institute, 1993) 163 (Hebrew).
7. See Appendix 2.
8. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].
9. The limitations provisions in the Israeli *Basic Laws: Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), were somewhat influenced by section 1 of the Canadian *Charter*. The Canadian provision, which was mentioned in the Israeli parliamentary debates, states as follows:
 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Similarly, the "override clause" in the *Basic Law: Freedom of Occupation* (1994) (section 8), was drafted under the influence of section 33 of the Canadian *Charter*, which provides that:

 - 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate not-

withstanding a provision included in section 2 [fundamental freedoms] or sections 7 to 15 [legal and equality rights] of this Charter.

- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

10. The "limitation clauses," which are similar in both Basic Laws, should be read in the spirit of the new provision incorporated in the *Basic Law: Human Dignity and Liberty*, which was amended by a provision of the *Basic Law: Freedom of Occupation* (1994). The latter legislation inserts the same provision in both Basic Laws, which is entitled "basic principles." The provision reads as follows:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

The Declaration of the Establishment of the State of Israel (14 May 1948), proclaims, *inter alia*, that "THE STATE OF ISRAEL... will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture..."

It is evident that by the incorporation of the new provision the principles of the Declaration of Independence merge with the reference to "the values of the State of Israel" in the limitations clauses.

11. See A. Barak's articles, *supra* note 6.
12. M. Elon, "Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the *Basic Law: Human Dignity and Personal Freedom*" (1993) 17 *Tel Aviv Univ. L. Rev.* 659 at 684 (Hebrew). See also D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 *Israel L. Rev.* 238 at 242.
13. A total of nine Basic Laws have been enacted in Israel since 1958. These Laws, which relate, *inter alia*, to the parliament, the executive branch and the judiciary, do not contain "limitation clauses." According to a 1950 policy decision of the Israeli parliament, Basic Laws will one day form the constitution of the State of Israel. For reviews of the structure of Israeli constitutional law prior to the enactment of the 1992 Basic Laws, see generally, A. Shapira, "Judicial Review Without a Constitution: The Israeli Paradox" (1983) 56 *Temp. L.Q.* 405; I. Zamir, "Rule of Law and Civil Liberties" (1988) 7 *Civ. J.Q.* 68; A. Maoz, "Defending Civil Liberties Without a Constitution: The Israeli Experience" (1988) 16 *Melb. U. L. Rev.* 815; Z. Segal, "A Constitution Without a Constitution: The Israeli Experience and the American Impact" (1992) 21 *Capital U. L. Rev.* 1.
14. See Appendices: *Basic Law: Human Dignity and Liberty* (1992), sections 1 and 8 and *Basic Law: Freedom of Occupation* (1994), sections 1 and 4. These two Basic Laws are the first laws enacted in Israel which make specific reference to Israel's Declaration of Independence. See *supra* note 10.
15. See *supra* note 8.
16. See especially section 8 of the Basic Law, Appendix 2.
17. The absence of a specific provision indicating the appropriate forum for constitutional scrutiny in the American constitution has not barred judicial review of statutes since the decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For an argument that a similar lacuna in Israeli basic laws does not preclude judicial review see I. Zamir, "Judicial Review of Statutes" (1993) 1 *Mishpat Umimshal* 395 at 408-410. This approach is open to debate. When a Basic Law or Charter of Rights is amended in modern times, when questions of judicial review are under discussion, it seems highly advisable that the legislature should express its will explicitly. Nevertheless, in my opinion, judicial review remains possible because of the existence of express limitations on legislative power, such as those found in a "limitation clause."
18. See I. Zamir, *ibid.* at 408-410. The question of the validity of a law may arise in a lower court — Magistrate or District — where the contention is raised in civil or criminal proceedings which are competently brought before the court. Such an attack on the validity of legislation may be entitled an "indirect attack" as the validity of the law is not the primary cause of the legal proceedings. A direct attack on the constitutionality of a law of the Knesset, where it is the sole ground for the legal proceeding, may be initiated in a petition to the Supreme Court of Israel sitting as a High Court of Justice. Such a quest for judicial review may be

described as a "direct attack." The Supreme Court sits then as a court of first and last instance.

19. Tel Aviv, Civil File 2252/91 *Shirutei Ashrai Mischari (Israel) Ltd. (Commercial Credit Services (Israel) Ltd.) v. Givat Yoav*. Unreported (16 March 1994), Judge Henia Stein, District Court of Tel Aviv-Jaffa. In November 1994, the Israeli Supreme Court started hearing oral arguments in an appeal of the Districts' Court's decision. The Supreme Court is hearing the appeal in a special panel of nine Justices (out of 14 Justices who are members of the Court). The Israeli Supreme Court sits usually in a panel of three Justices.
 20. This principle is mentioned in the Israel's Declaration of Independence, dated 14th May, 1948, which as noted guarantees "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". See *supra* note 10.
 21. See *supra* notes 1-4 and the accompanying text.
 22. See I. Zamir, *supra* note 17. The view that the right to negate legislation should be limited to the Supreme Court found expression in the proposed bill entitled the Basic Law: Legislation, which the then Minister of Justice, Dan Meridor, tabled in the 12th Knesset in January 1992. By the terms of this bill, the jurisdiction to negate legislation would have been given to a court for constitutional matters, namely, the Supreme Court sitting with 9 or more Justices. However, the bill was not even given a first reading because of the opposition of religious elements to judicial review generally, and to the institution of the Supreme Court as a constitutional court, in particular. This approach led the current Minister of Justice, David Libai, to table a new bill in the Knesset for a Basic Law: Legislation, in which the section dealing with the establishment of a constitutional court was eliminated.
 23. See *supra* note 9. The decisions of the Supreme Court of Canada and Canadian legal literature are often cited by the Israeli Supreme Court and by Israeli scholars when considering the new Basic Laws. The strengthening links between the Israeli and Canadian legal systems were emphasized in a legal conference held in Jerusalem in December 1992. The conference, which was attended by Supreme Court justices from both countries and by leading scholars, was held under the auspices of the Canada-Israel Legal Co-operation Programme and the Law Faculty of the Hebrew University of Jerusalem. The articles which furnished the background for discussions are being compiled in a book. See *Chartering Human Rights* (Canada-Israel Law Conference, Canada-Israel Legal Cooperation Programme, Faculty of Law, the Hebrew University of Jerusalem, 1992).
- For illuminating Canadian legal writings on the Charter, see for example: P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992); L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup. Ct. L. Rev. 469; L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L. J. 541; L.E. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" (1992) 42 U. Toronto L. Rev. 207.
24. Civil Appeal 294/91, *The Burial Society "Jerusalem Community" v. Kastenbaum*, 46(2) P.D. 464 (Hebrew).
 25. Criminal Applications 2169/92, *Suissa v. The State of Israel*, 46(3) P.D. 338 (Hebrew).
 26. H.C.J. 5304/92 *Farach v. The Minister of Justice*. Unreported (22 October 1993) (Hebrew).
 27. Criminal Applications 6654/93 *Binkin v. State of Israel*. Unreported (12 December, 1993) (Hebrew).
 28. H.C.J. 2722/92 *Al-Amarin v. The Military Commander of the Gaza Strip*, 46(3) P.D. 693 (Hebrew).
 29. The Judiciary Committee of the current Knesset (the 13th Knesset) has, over the years 1992-1994, considered a number of drafts for a *Basic Law: Basic Human Rights*. No bill has yet been laid before the plenary, due to the absence of political consensus. The principal areas of dispute relate to the relationship between religion and state, on one hand, and security needs *vis-à-vis* principles of democracy on the other.
 30. See *supra* note 9.
 31. A. Barak, *Interpretation in Law — Constitutional Interpretation* (Volume Three, 1994) 29.
 32. See section 52(1) to the *Charter*. It is reminiscent, however, of the Canadian Bill of Rights which also lacked an enforcement provision.
 33. See *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1.

APPENDIX 1

Basic Law: Human Dignity and Liberty* [As Amended by Basic Law: Freedom of Occupation (1994)]

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.¹

1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

2. There shall be no violation of the life, body or dignity of any person as such.

3. There shall be no violation of the property of a person.

4. All persons are entitled to protection of their life, body and dignity.

5. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner.

6.(a) All persons are free to leave Israel.

(b) Every Israel national has the right of entry into Israel from abroad.

7.(a) All persons have the right to privacy and to intimacy.

(b) There shall be no entry into the private premises of a person who has not consented thereto.

(c) No search shall be conducted on the private premises or body of a person, nor in the body or belongings of a person.

(d) There shall be no violation of the secrecy of the spoken utterances, writings or records of a person.

8. There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required,

or by regulation enacted by virtue of express authorization in such law.

9. There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defence Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a Law and to an extent no greater than required by the nature and character of the service.

10. This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law.

11. All governmental authorities are bound to respect the rights under this Basic Law.

12. This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.

Yitzhak Shamir, Prime Minister

Chaim Herzog, President of the State

Dov Shilansky, Speaker of the Knesset

* Passed by the Knesset on the 12th Adar Bet, 5752 (17th March, 1992) and published in *Sefer HaChukkim* No. 1391 of the 20th Adar Bet, 5752 (25th March, 1992); the Bill and an Explanatory Note were published in *Hatza'ot Chok*, No. 2086 of 5752, p.60.

The Basic Law was amended in March 1994 (*Sefer Ha-Chukkim* of 5754, p.90); the amendment is incorporated in the present text.

1. For the official English text of the Declaration of the Establishment of the State of Israel, see LSI, vol. 1, p.1.

Translation from the Hebrew and notes prepared by Deputy Attorney General Shlomo Guberman and Dr. Carmel Shalev, March 1994.

APPENDIX 2A

Basic Law: Freedom of Occupation (1992)** **[Repealed by the Basic Law: Freedom of Occupation (1994)]**

1. Every citizen or resident of the state may engage in any occupation, profession or business; this right shall not be restricted save by statute, for a worthy purpose and for reasons of the public good.

2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.

3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.

4. Emergency regulations shall not have the power to amend, temporarily suspend or place conditions on this Basic Law.

5. This Basic Law shall not be amended save by a Basic Law enacted by a majority of Knesset members.

6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

** Enacted by the Knesset on 28th Adar A, 5752 (3 March 1992). The Bill and explanatory comments were published in H.H. 2096, of 17th Tevet 5752 (12 December 1991), p. 102. The Law was published in Sefer Hachukkim No. 1387 of 7th Adar B, 5752 (12 March 1992).

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APPENDIX 2B

Basic Law: Freedom of Occupation***

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.¹

2. The purpose of this Basic Law is to protect freedom of occupation, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

3. Every Israel national or resident has the right to engage in any occupation, profession or trade.

4. There shall be no violation of freedom of occupation except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law.

5. All governmental authorities are bound to respect the freedom of occupation of all Israel nationals or residents.

6. This Basic Law shall not be varied, suspended or made subject to conditions by emergency regulations.

7. This Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knesset.

8. A provision of a Law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a Law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such Law shall expire four years from its commencement unless a shorter duration has been stated herein.

9. Basic Law: Freedom of Occupation² is hereby repealed.

10. The provisions of any enactment which, immediately prior to this Basic Law would have been of effect but for this Basic Law or the Basic Law repealed in section 9, shall remain in effect two years from the commencement of this Basic Law, unless repealed earlier; however, such provisions shall be construed in the spirit of the provisions of this Basic Law.

11. In Basic Law: Human Dignity and Liberty³:

(1) Section 1 shall designated 1A and shall be preceded by the following section:

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

(2) At the end of section 8, the following shall be added: "or by regulation enacted by virtue of express authorization in such Law."

Yitzhak Rabin, Prime Minister
Ezer Weizman, President of the State
Shevah Weiss, Speaker of the Knesset

*** Passed by the Knesset on the 26th Adar 5754 (9th March 1994) and published in *Sefer Ha-Chukkim* No. 1454 of the 27th Adar 5754 (10th March 1994), p.90; the Bill and the Explanatory Notes were published in *Hatza'ot Chok* No. 2250 of 5754, p.289, and No. 2227 of 5754, p.128.

Translation from the Hebrew and notes prepared by Deputy Attorney General Shlomo Guberman and Dr. Carmel Shalev, March 1994.

1. For the official English text of the Declaration of the Establishment of the State of Israel, see LSI, vol.1, p.1.
2. This Basic Law: Freedom of Occupation repeals and replaced the former Basic Law on freedom of occupation, enacted in 1992 (*Sefer Ha-Chukkim* of 5752, p.114).
3. The Basic Law includes an amendment to Basic Law: Human Dignity and Liberty, enacted in 1992. (*Sefer Ha-Chukkim* of 5752, p.150).