THE ISRAELI CONSTITUTIONAL REVOLUTION: THE CANADIAN IMPACT IN THE MIDST OF A FORMATIVE PERIOD

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THE CONSTITUTIONAL REVOLUTION: FIRST STEPS

In a previous article[1] I dealt with the "Constitutional Revolution" which took place in Israel under the influence of the *Canadian Charter of Rights and Freedoms*.[2] This significant event in the Israeli constitutional arena occurred when, in 1992, the Israeli Parliament (The Knesset) enacted two Basic Laws — The Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty.[3] These laws recognize fundamental rights such as freedom of occupation, the right to property, and the right to freedom, privacy and human dignity. As in the Canadian Charter, limitation clauses were incorporated in the Basic Laws.

No override (or notwithstanding) clause was included in the Basic Laws when originally enacted. It was for the purpose of including an override clause, in order to prevent the importation of non-Kosher meat into Israel, that the Knesset re-enacted the Basic Law: Freedom of Occupation in 1994. The Israeli override clause differs from Section 33 of the Canadian Charter, *inter alia,* in that the clause can only be invoked by a special majority in the Knesset (61 out of 120 members).[4] The override clause also states that no law is immune from provisions of the Basic Law unless it states expressly that it is enacted notwithstanding the Basic Law. The override shall expire four years from its commencement, unless a shorter duration is expressly provided for.

Given these requirements, the Israeli Knesset enacted two laws notwithstanding the Basic Law: Freedom of Occupation. The first one — the Import of Frozen Meat Law enacted in 1994 — forbade, subject to certain exceptions, the importation of meat without a Kashrut certificate. In December 1994, the Knesset enacted a new law, Import of Frozen Meat Law (Amendment), which extended the definition of meat to include all kinds of meat and meat products fit for human consumption. The name of the statute was changed to the Meat and Meat Products Law, 1994.

Unlike the Canadian Charter, the Israeli Basic Laws do not include any clause which is equivalent to the "primacy clause" of the Canadian Charter. Section 52 of the Charter provides that "[t]he Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency of no force or effect." Nor do the Israeli Basic Laws include a remedies clause similar to section 24(1) of the Charter.[5] In light of these silences, it is of special importance to follow the Israeli Supreme Court's concept of the judicial power to declare laws unconstitutional. A further question relates to the scope of judicial review adopted by the Court once it has decided that such a power exists.

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1 Z. Segal, "Israel Ushers In a Constitutional Revolution: The Israeli Experience, The Canadian Impact" (1995) 6 Constitutional Forum Constitutionnel 44.

2 Part I of the Constitution Act 1982, being schedule B to the Canada Act 1982 (U.K.) 1982, c.11 [hereinafter the Charter].

3 These two laws were enacted in March 1992. In 1994 the Knesset re-enacted the Basic Law: Freedom of Occupation primarily with the aim of incorporating an "override clause" into this Basic Law. For the text of these laws and an analysis see Segal, *supra* note 1.

4 See *supra* note 1 at 45-46. The Basic Law: Human Dignity and Liberty does not, at present, include an "override clause."

5 See section 24(1) to the Charter.

When my previous article was written (at the end of 1994), the Israeli Supreme Court was in the midst of hearing oral arguments in an appeal of the District Court's decision which declared a law invalid because of its unconstitutionality.[6] On November 9, 1995, the Israeli Supreme Court announced its decision, by an expanded panel of nine Justices, in the case of the *United Mizrahi Bank Limited*[7] — a decision which might be retitled the "Israeli *Marbury* v. *Madison*."[8] The decision of the Israeli Supreme Court entails about 360 pages. It contains a wide-ranging analysis related to many aspects of Israeli Constitutional Law including, *inter alia*, the Constitutional power of the Knesset to bind itself by a "limitation clause." The express recognition of such power in the judgment of the Court is of major importance to Israel as a constitutional democracy. I shall restrict myself in this short article, however, to points which might be of interest to the readers outside the boundaries of Israel. A Canadian reader might find the Israeli Supreme Court's decision of special interest due to the influence of Canadian Charter jurisprudence. Such influence can be demonstrated by the *Mizrahi Bank's* decision as well as by the 1996 *Meatreal* decision[9] which relates to the standing of the notwithstanding (override) clause.

JUDICIAL REVIEW OF STATUTES: A SELF-RESTRAINED APPROACH

In the *Mizrahi Bank* case the Supreme Court heard appeals which related to the constitutionality of a Knesset Law enacted in 1993. The law, which dealt with debts owed by the agricultural sector, deprived creditors of the relief usually available through execution procedures in the courts. The law established a special mechanism for the payment of these debts and barred creditors from seeking redress in the courts. Section 3 of the Basic Law: Human Dignity and Liberty states: "[t]here shall be no violation of the property of a person." Under Section 8 of the same law, the "limitation clause" provides: "[t]here shall be no violation of rights under this Basic Law except by law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required ... ." Three creditors took action in the District Court for repayment of the debts, submitting that the law relating to the agricultural sector was in breach of Section 3 and was, therefore invalid. The debtors relied mainly on the "limitation clause," contending that the law satisfied the conditions in that section. The District Court declared the law unconstitutional and invalid, as it infringed on the property rights of the creditors and did not meet the criteria established in the limitation clause.[10]

The Supreme Court unanimously upheld the constitutionality of the law which was under attack. The Justices stated that a person's "property" encompasses debts owing to him, including contractual rights. Since the conditions of the limitation clause were fulfilled, the Court found the law constitutional and valid. In spite of the powers to reduce the amount of the debt owed to the "rehabilitators," the Court was of the opinion that the arrangement, establishing special machinery to ensure the payment of the debts, was sufficient.

The importance of the decision does not stem, of course, from the concrete decision which dealt with a specific law. Rather, the main importance which might be attached to this landmark case is that it represents the first Supreme Court pronouncement that every court in the country enjoys the power to declare laws unconstitutional and invalid. This is only true if the law violates basic rights which are recognized by the Basic Law, and goes beyond the exceptions specified in the limitation clause. Such a judicial pronouncement — especially in the absence of any express constitutional provision which recognizes the supreme status of the Basic Laws and the validity of judicial review of statutes — constitutes a "constitutional revolution" and a new era in Israeli constitutional law.

The Supreme Court's decision presents a clear and strong majority view — with only one Justice

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6 See Segal, *supra* note 1 at 46-47.

7 See *United Mizrahi Bank Ltd., and others, appellants* v. *Migdal Cooperative Village and Others, respondents* (Civil Appeal 6821/93) 49(4) P.D., p. 222 (Hebrew) (P.D.=Piskei Din-Supreme Court Judgments) [hereinafter *Mizrahi Bank Decision*]. For a summary in English, see A.F. Landau "Justices: Courts have right to review statutes" "Basic Laws Enhance Human Rights," The Jerusalem Post (1, 8 January 1996). See also D. Kretzmer, "A Landmark Court Decision," The Jerusalem Post (10 November 1995).

8 See Segal, *supra* note 1, fn. 17 and accompanying text.

9 See *Meatreal Ltd. and Others, Petitioners* v. *The Knesset and Others, Respondents* (High Court of Justice 4676/94) (not yet published, Hebrew). The decision was given in November 25, 1996 by a panel of nine Justices. For a summary in English see A.F. Landau, "Supreme Court Confirms Validity of Kashrut Law" *The Jerusalem Post* (9 December 1996) [hereinafter *Meatreal* decision].

10 See Segal, *supra* note 1 at 46-47.

dissenting on this point — that the Knesset enjoys the power to enact Basic Laws which are chapters in Israel's Constitution. These laws bind all public authorities, including the Knesset itself, and the Courts entertain the power to declare laws invalid. Prior to these constitutional developments, human rights in Israel were subject to the laws of the Knesset, but it now has became part and parcel of Israeli democracy that the laws of the Legislatures are subject to human rights as embodied in the two Basic Laws.

In his wide-ranging judgment the President of the Israeli Supreme Court, Justice Aharon Barak, stressed the importance of judicial review of statutes in a democratic society. Justice Barak mentioned the American case of *Marbury* v. *Madison*,[11] as a source of inspiration for recognizing the power of the Courts to declare laws unconstitutional in spite of the absence of an express provision in the constitution. In a key sentence in his opinion, Justice Barak said:

> In enacting the basic laws which relate to fundamental human rights, the Knesset expressed its view as to the Supreme constitutional legal status of these Basic Laws. Today the Supreme Court expresses its legal approach which approves this constitutional supreme status . A constitutional chain has been established which relates to the constitutionality of a constitution in general and to the constitutionality of Human Rights, which were recognized in the Basic Laws, in particular.

Once the power of the courts to declare laws unconstitutional was established, the Court focused on the extent to which this power could be used. The extent of this power is, in my view, the most important aspect of any judicial system which recognizes the power to annul legislation. A court reluctant to use its power, even when the use of such a power is demonstrably justified in a democratic society, deprives judicial review of its prime objective of scrutinizing legislative acts so as to strengthen the foundations of democracy.

In the *Mizrahi Bank* case the Supreme Court, unlike the District Court, decided that the law under attack was constitutional, in spite of its conflict with the right of equality before the law. In so ruling, the Court, in my opinion, reflected its reluctance and hesitation to use its power to invalidate legislation. Such a restrained approach should be examined in order to avoid diminishing the Court's possible contribution to the functioning of Israeli democracy. It so happened that, up to May 1997, no legislation was declared invalid within the framework of the "constitutional revolution" in Israel.[12] The Court expressed its view[13] that it is better to narrow the application of a law by way of interpretation than to declare it invalid.[14] If such an approach can be justified *en principe*, it should not be used to reach an unreasonable interpretation of an existing law in order to enable the court not to declare a law unconstitutional. In so doing, the Courts refrain from playing their judicial-educational role in safeguarding constitutional values.

This attitude of judicial self-restraint is very clearly stated in the *Mizrahi Bank* case. Justice Barak states that Courts:

> must examine the constitutionality of a law, and not its reasoning. The question is not if the law is good, efficient or justified. The only question is whether the law is constitutional. A 'socialist' legislature and a 'capitalist' one might enact different laws which meet, each one of them, the demands of the 'limitation clause.'

"The legislature," Justice Barak noted, "is entitled to a margin of appreciation and to a reasonable amount of room to maneuver while enacting." In so ruling, Justice Barak referred to approaches in Canadian constitutional law as a model for the Israeli Supreme Court to follow.[15]

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[11] See *supra* note 9 and accompanying text.

[12] On June 2, 1996 a panel of thirteen Justices of the Israeli Supreme Court approved the constitutionality of a validation law which related to the sums paid as a "radio and television fee." See High Court of Justice 4562/92 *Zandberg* v. *The Broadcasting Authority* (not yet published, Hebrew).

[13] *Ibid.*

[14] The Israeli Supreme Court adopted the German concept that "If a statute lends itself to alternative constructions for and against its constitutionality, the court follows the reading that saves the statute, unless the saving construction distorts the meaning of its provisions." See D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) 58.

[15] Justice Barak mentions P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) 882. It should be noted that the Israeli Constitutional and Administrative Law stresses, at present, the requirement of proportionate effect as the most important element of the "limitation clause." Israeli judgments and academic

Justice Barak's view in this context reflects the attitude of the other Justices as well. Justice Meir Shamgar expressed his opinion, in an all-embracing analysis, that:

> The court is not asked to declare what is, in its opinion, the most logical or justifiable legislation to deal with the problem under consideration. The Court is called upon to examine only if the legislation, *grosso modo,* fits a state which is democratic and Jewish.

In referring to the limitation clause, Justice Shamgar quoted American Supreme Court judgments which stressed that the Courts should not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to enact laws.[16] It seems evident that the other seven Justices share, in this context, the same view of judicial self-restraint. Justice Eliezer Goldberg expressed this attitude in saying that "[t]he laws are presumed to be constitutional and every doubt, which relates to the question of constitutionality, should operate to approve the constitutionality of a statute."

It seems evidently clear that, for the time being, the Israeli Supreme Court is adopting a rigid approach which tries to avoid declarations of legislative invalidity. It is, in my submission, a neglect of the Court's duty to serve as the ultimate guardian of the rule of values and human rights. Such an attitude might reflect the atmosphere under which the Israeli apolitical independent Supreme Court is operating. The Court is under ongoing attacks from government because of its broad concept of judicial review which relates to administrative action.[17] These attacks are amplified by the religious faction which finds the Court too activist in dealing with matters of religious importance. Contrary to these attitudes, the Israeli public-at-large ranks the Israeli Supreme Court very highly among the institutions which enjoy a high level of public legitimation and confidence.[18] In research completed before the enactment of the Basic Laws, 65 per cent of the Israeli population approved of the principle that the Supreme Court should have the power to declare laws unconstitutional if those laws do not satisfy the basic essence of Israeli democracy, including the safeguarding of human rights. Only 10 per cent expressly rejected the idea of giving the Courts such power. This research shows that the public-at-large is ready to let the Israeli Supreme Court develop the basics of democracy, thus enhancing a liberal approach to human rights.[19] In exercising its powers of judicial review of statutes, the Israeli Supreme Court might play a very significant role in subjecting the legislature to the rule of law and basic democratic values.

THE STANDING OF THE NOTWITHSTANDING (OVERRIDE) CLAUSE

As noted, an "override clause" was incorporated into the re-enacted Basic Law: Freedom of Occupation.[20] In the 1996 *Meatreal Case*[21] the Israeli Supreme Court examined for the first time the constitutional status of a law which was enacted under the protection of the override. The petitioners in the case were importers and dealers in meat products on a large scale. They submitted that the laws which were enacted under the override would seriously affect their business. They petitioned the Supreme Court, sitting as a High Court of Justice, to declare the law invalid on the grounds that it offended against the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty.

As to the first Basic Law, which includes the override clause, the Court mentioned the Canadian Charter override, stressing the fact that the override was incorporated into the Israeli Basic Law under Canadian influence. The Court observed that the Canadian override is similar in some respects and different in others,[22] and noted the discussion on the

writings refer in this regard, *inter alia*, to *R.* v. *Oakes* (1986) 1 S.C.R., 103.

16 Justice Shamgar mentioned the decision of *Ferguson* v. *Skrupa* 372 U.S. 726 at 729-30 (1963).

17 See Z. Segal "Administrative Law" in A. Shapira, K.C. De Witt-Arar, eds, *Introduction to the Law of Israel* (The Hague: Kluwer Publications, 1995) at 59-71.

18 See Y. Peres, E. Yuchtman-Yaar, *Trends in Israeli Democracy: The Public's View* (Boulder: Lynne Rienner, 1992). A public opinion poll, which was conducted in January 1997, reveals that 84 per cent of the Israeli population have trust in the Supreme Court. The research was conducted by Professors E. Yaar and A. Nadler and Dr. T. Herman of T. Steinmetz Center for Peace Research. See *Ha'aretz* (2 February 1997) 13B.

19 See G. Barzilai, E. Yuchtman-Yaar, Z. Segal, *The Israeli Supreme Court and the Israeli Public* (Tel Aviv: Papyrus Publishing, Tel-Aviv University, 1994) at 182-183, 216 (Hebrew).

20 See *supra* note 4 and text following.

21 See *supra* note 10.

22 See the text following *supra* note 3.

override in Canadian academic literature.[23] Justice Aharon Barak, writing for a unaminous Court, referred to an argument raised in Canada that a law, enacted under the protection of the override, is not immune from judicial review if it contradicts the basic values of a democratic state.[24] Justice Barak adopted this argument. He explained that a law, enacted under the protection of an override clause, might violate the limitation clause in all its substantive aspects. Yet, Justice Barak expressed the opinion that such a law cannot infringe on the "most basic fundamental principles which our constitutional scheme rests upon." The broad power of the override clause, recognized by the Supreme Court in its ruling, relied on the concept that the aim of the override clause was to enable the legislature to fulfill its social and political aims, even if they violate the freedom of occupation and do not comply with the requirements of the limitation clause. In the *Meatreal* case, the Court said that the impact of the Meat Laws, which forbade the importation of non-Kosher meat, did not impair the essence of the constitutional regime and, therefore, was constitutionally valid in light of the override clause. It is clear from the decision that the conclusion adopted here coincides with the approach adopted in *Mizrahi Bank* case, which gives the legislature a very large margin of appreciation in which to manoeuvre.

In the *Meatrel* case, the Supreme Court also referred to the argument that the Meat Laws infringed the right to property, the right to equality, and the right to the freedom of conscience. Without ruling on whether all those rights are covered by the Basic Law: Human Dignity and Liberty, the Court examined what effect the override clause in the Basic Law: Freedom of Occupation might have on rights contained within the Basic Law: Human Dignity and Liberty, which does not include its own specific override clause.

Referring to the Canadian Supreme Court decision in *DuBois*,[25] Justice Barak held that any constitutional provision — such as an override clause — will have an impact on the interpretation of all other constitutional provisions. Thus, Justice Barak observed, the power of a law which was enacted under an override clause might operate in relation to other basic rights which are recognized in a law which does not itself include an override clause. Such an influence exists if the other rights are infringed in a minor way as a secondary result. In so ruling, the Court noted, that the rights embodied in Basic Law: Human Dignity and Liberty will be safeguarded from any major substantive injury. In the Court's view, the injury to all the rights raised in this case, including the injury to the Freedom of Occupation, was not substantial or meaningful. The Court concluded that the laws which forbade the importation of non-Kosher meat are protected by the override clause which is an integral part of the constitutional scheme.

It should be noted that the wide-ranging recognition of the constitutional power of the override clause in the *Meatreal* decision might encourage different sectors in the Israeli society to use their political influence in order to incorporate an override clause in the Basic Law: Human Dignity and Liberty. If such an idea, already suggested by some in the religious community, succeeds in the Israeli Knesset, the "constitutional revolution" might take a step backward. The Supreme Court in the *Meatreal* decision had to show respect for the express use of the override clause, but this judgment might serve as a catylyst for such a dangerous trend. Yet it should be deduced from the decision that the Supreme Court will not approve a total destruction of basic constitutional values through laws enacted under the auspices of an override clause.

CONCLUSIONS

The "constitutional revolution" in Israel is brand new. In the five years which have passed since the enactment of the two Basic Laws, the Supreme Court has attributed great influence to the new laws in the process of interpreting existing laws. Such an influence is exemplified in the criminal arena. The recognition of "human dignity" and "freedom" as basic rights led the Supreme Court to the development of substantive due process and doctrines such as "outrageous governmental conduct" serving as a defence against

[23] Justice Aharon Barak, who wrote the opinion for the whole court, mentioned the following Canadian articles: L. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L.J. 541; P. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L.R. 293; J. Whyte, "On Not Standing For Notwithstanding" (1990) 28 Alta. L.R. 347; P. Macklem, "Engaging the Override" (1991) 1 Nat. J. Con. Law 27; Weiler, "Rights and Judges in Democracy: A New Canadian Version" (1984) 18 J. of Law Reform 51.

[24] B. Slattery, "Override Clauses under Section 33" (1983) 61 Can. Ber Rev. 391; Arbess, "Limitations on Legislative Override" (1983) 21 Osgoode Hall L.J. 113.

[25] See *Du Bois* v. *R.* [1985] 2 S.C.R. 350 at 356.

criminal charges.[26] These aspects, which also are part of the "constitutional revolution," are beyond the scope of this essay. Still, it should be noted that the influence of the two Basic Laws, which relate to human rights, is being felt in every field of the law. The Supreme Court ruled that its impact should be given due weight in the application of existing laws, the enactment of new laws, and to any administrative action. In 1996 and 1997 the Israeli Parliament enacted new, much more liberal laws in relation to arrests. It was noted in the legislation that Parliament is fulfilling its duty, required of all governmental authorities, "to respect the rights under this Basic Law." The Basic Law: Human Dignity and Liberty specifies that "[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner." The right might be limited only "to an extent no greater than required."

Still, the main test of the "constitutional revolution" is the Court's readiness to declare laws unconstitutional. In the absence of any specific legislation which provides for judicial review of statutes, it is clear that the Israeli Supreme Court, while recognizing the power of consitutional review in the *Mizrahi Bank* case, stated that Courts enjoy the power to declare laws unconstitutional. The same attitude has been adopted in Canada and the United States. It is my submission — especially within the framework of the Israeli society — that only the Supreme Court should exercise such power because of the special sensitivity of judicial review. Such an approach was put before the Israeli Knesset in 1992, with the intention of formulating a law which will recognize judicial review of statutes, but has been ignored since then.[27]

The Israeli Supreme Court opened a new constitutional era in the *Mizrahi Bank* case, which established the principle of judicial review of statutes under the Basic Laws. In my previous article,[29] I concluded that "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."[28] Now, after the *Mizrahi Bank* and *Meatreal* decisions have been rendered — together with the *Zandberg* case[29] — I am inclined to think that the Supreme Court has been too cautious in exercising its power of constitutional review of statutes. In order to play its significant constitutional role as a watchdog of human rights — a role which the Israeli Supreme Court plays magnificently in relation to administrative action — the Supreme Court should overcome its reluctance to review of statutes. It is my belief that in the continuation of this formative period, the Supreme Court will follow in the footsteps of the American Supreme Court, the Federal Constitutional Court of Germany,[30] and the Canadian Supreme Court. It is a well-established principle that laws should be struck down only as a last resort. Sometimes it so happens that the annulment of a law is the only possible way to safeguard democracy. I am confident that the Israeli Supreme Court will not ignore its function as protector of democracy when the legislature clearly acts contrary to the fundamental values of democracy.❑

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26 See *supra* note 1.

27 For an analysis see Z. Segal, "Judicial Review of Statutes — Who Has the Authority to Declare a Law Unconstitutional" 28 Mishpatim 239 (Hebrew).

28 See *supra* note 7 at 48.

29 See *supra* note 13.

30 For a general discussion of this Court, see M. Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'" (1994) 31 Common Market Law Review 235.