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# Between Basic Norms and Basic Laws: Human Rights and the Supreme Court in Israel

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## Introduction: Basic Norms

Coincidentally, the year 1948 marks the [Declaration of the Establishment of the State of Israel](#) (May 14) as well as the enactment of the [United Nations' Universal Declaration on Human Rights](#) (December 10). The preambles of both declarations mention the atrocities of [World War II](#) as a motivating historical cause for their enactment, and both include a commitment to democratic and universal principles of human rights. The two documents serve as a useful point of entry and reference regarding the topic of human rights in Israel.

The signatories of the Declaration of the Establishment of the State of Israel (henceforth “Declaration of Independence”) committed themselves and the newfound state to universal principles of human rights and basic fairness in a paragraph immediately following the declaration of the independence of the state itself:

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; 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 will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

It is important to note that the signatories were representatives of all major Jewish groups present under the [British mandate](#) in 1948: Ultra-orthodox, national-religious, secular left and secular right and both socialist and non-socialist. In other words, the commitment to the aforementioned universal principles of human rights was not accepted by a small segment of the Jewish population but rather, by the majority, more than eight months before the first national elections took place. This commitment can be seen as part of Israel's *basic norms*.

Basic norms are core values and practices that are shared by most members of a political community and as such lay at the heart of their system's political culture. Basic norms may or may not be enacted into abiding laws but their existence has an important function in the political behavior of citizens and political elites, particularly in the way laws are interpreted and how regulations are executed.<sup>[1]</sup> As will be argued below, this overall commitment to democratic and universal norms explains the protection of basic human rights in Israel despite the lack of a formal constitution and in the face of several decades without basic laws dealing with human rights.

Another noteworthy observation about the relation between the two declarations is the frequent reference in the Declaration of Independence to international standards, norms and bodies. The term United Nations appears in the Declaration of Independence seven times and the United Nations General Assembly is referred to four times. Furthermore, the [Balfour Declaration](#) (1917), the Mandate of the League of Nations and the Charter of the United Nations are mentioned in the Declaration of Independence as well. Such a strong emphasis on international bodies and legal instruments is unparalleled in other declarations of independence. Israel's Declaration of Independence thus illustrates the great importance that the founding members ascribed to international recognition and universal standards.

The commitment to these universal standards would be tested shortly after Israel's declaration of independence, which was immediately followed by

the invasion of the surrounding [Arab armies](#). No less significant were the challenges of applying the universal principles and ideals enumerated in the Universal Declaration on Human Rights to all Israeli citizens, Jews and Arabs alike, given the insolvency of the new state and the deep suspicion that existed between the Jewish and Arab citizens of Israel. Although there would be many points of tension between human rights and other values and interests in the political history of Israel, the overall commitment to these norms remained strong throughout the history of the state.

### **Early Decades: Human Rights and Deocracy in an Underdeveloped Constitutional Framework**

Until 1992, the importance of basic norms to human rights in Israel can be viewed in light of the political system's underdeveloped constitutional framework. The founders of Israel had failed to fulfill their commitment to establish a "Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948." The Constitutive Assembly (elected on January 25, 1949, after the end of the 1948 War) turned itself into Israel's first [Knesset](#) (i.e. parliament). Meanwhile, the members of the newly-formed Knesset could not agree on the content of a full-fledged constitution due to conflicts of interest and insufficient will. Instead, the first Knesset adopted a compromise resolution, known as the Harari Decision on June 13, 1950, to enact a series of "basic laws" that would serve as chapters of a future constitution, once the enactment of all basic laws was completed.

Given the fact that the first [basic law](#) was enacted a decade after independence and that the first two basic laws pertaining to human rights were passed as late as 1992, the formal legal documents involving human rights in Israel were, for many decades, underdeveloped and without special legal status in Knesset legislation. Although human rights were protected in judicial precedents (see below), these precedents did not have the status of a law. Therefore, the Knesset had the power to legislate laws inconsistent with human rights, at least until 1992. Put simply, until 1992 human rights were not entrenched nor protected by laws and the Knesset could have theoretically legislated laws that hampered human rights without stepping outside the bounds of Israeli law.

The lack of a formal constitution does not mean that Israel did not have legal documents defining the powers of the branches of government and the relationship between the citizens and the state. Much of the legal system that existed during the British Mandate was transplanted into the

Israeli system immediately after the Declaration of Independence to ensure legal continuity and a functioning legal framework in the new state. On February 16, 1949, the first Knesset enacted its first law, the Transition Law, which defined the powers and functions of the Knesset, the Government and the President.<sup>[2]</sup>

Nevertheless, the Transition Law had the legal status of only a regular law and it could have been changed or canceled by a simple majority in the Knesset. Similarly, human rights were not yet enshrined in special legislation. Furthermore, due to the declaration of a state of emergency, the government was entrusted with extensive powers to issue emergency regulations that could have been used to override or suspend laws and trump human rights. In fact, until the enactment of “[Basic Law: The Knesset](#)” in 1958, the Knesset could have prolonged its term, delayed or suspended elections and made many other modifications and limitations on the democratic process by a simple majority vote. Furthermore, Israel was forced to declare a state of emergency upon its independence and never canceled it. It has been in a state of war and hostility with its surrounding Arab neighbors for several decades. It also has a significant Arab minority consisting of twenty percent of the total population and several deep social and political cleavages within the Jewish community, to mention only some of the main challenges.

It seems puzzling, then, that there continued to be a persistence of democracy and a protection of human rights in Israel given the context of Israel’s underdeveloped constitutional system and compared to the experience of other countries that degenerated into non-democratic regimes in the face of less daunting challenges. One reason that democracy and human rights were largely protected is due to the importance of basic norms as guiding principles of political behavior for the public and political elite alike. Not all these norms have been written into abiding laws and some took a long time to find explicit expression in legislation, but the commitment to these norms by a majority of Israeli society preceded the state of Israel and its legal system. The basic norms of adherence to democratic institutions and a democratic process were part and parcel of Zionist institutions and practices since [the first Zionist Congress](#) in Basel, Switzerland in 1897. The basic norm of equality, which is strongly emphasized in the Declaration of Independence, was rooted in the pioneering ethos and practices of the early Jewish settlers of the late 19<sup>th</sup> century.

As core elements of political culture, basic norms may often be more

important to understanding a political system, including its human rights record, than the dry letter of the law. Many countries have elaborate constitutions with articles enumerating various rights, yet violations of human rights are widespread within them. Even a long-established and vibrant democratic country like the United States has seen the disenfranchisement of African Americans under the Jim Crow system in the South as late as the 1960s. The denial of basic participation rights to African Americans was due to a political sub-culture that was prevalent in the South and that did not see nor treat African Americans as equals, despite the illegality of these practices under the Fourteenth Amendment of the Constitution. Conversely, in Israel there were weak formal constitutional barriers that would prevent the government and the Knesset from suspending democracy, banning parties or prohibiting Arab citizens from voting in Israel's first decade of elections. Such anti-democratic acts were not attempted, however. Arab citizens of Israel could vote members into the Knesset from the very first elections and their votes were courted by several [Zionist](#) and non-Zionist parties. Several Arab parties that were affiliated with the dominant party (Mapai) remained a formal part of its government coalitions until 1977, notwithstanding the Military Administration that was placed on many Israeli Arabs until 1966. <sup>[3]</sup>

Basic norms were important for the protection of democracy and human rights in the sense that they served as a compass of what was and was not allowed in the absence of a more detailed legal-normative map. As will be shown below, these basic norms were also often referred to and relied upon in important judicial decisions.

## **The Supreme Court: Legal Creativity, Activism and Human Rights**

Whereas basic norms were invaluable to the protection of human rights in its early decades, basic norms and political culture alone did not advance and develop a human rights regime in Israel. Indeed, the topic of human rights in Israel cannot be fully understood without discussing the role of the Israeli Supreme Court (henceforth "Supreme Court") in defending and extending the realm of human rights in Israel.

### *Instruments for Human Rights Protection until 1992*

The [Supreme Court](#) in Israel has two functions. It hears appeals against the decisions of the District Courts and as such it serves as the highest

Appellate Court. Beyond this function, the Supreme Court also sits as a High Court of Justice. Article 15(c) of "[Basic law: The Judiciary](#)" stipulates that the High Court of Justice "shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court." Furthermore, Article 15(d)(2) defines the formal powers of the High Court of Justice "to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting." Although this basic law was not enacted until 1984, these powers have been respected since Israel's earliest years.

Until 1992, however, there was no law that could be regarded as a human rights charter. Despite its importance as a common reference point in legal interpretation, the Declaration of Independence itself does not have the status of a law. Hence, for many years, the courts in Israel had few formal legal tools with which to protect human rights, let alone strike down Knesset legislation. Moreover, judges were, for the most part, very cautious in the language of their rulings and showed restraint in dealing with Knesset legislation and government acts, including petitions concerning human rights. The High Court of Justice declined to hear many petitions for two main reasons: First, it dismissed petitions on the grounds of *standing*, namely, the pleading person's ability to demonstrate that he or she was directly affected by a certain Knesset legislation or government act. Second, the court dismissed petitions on the grounds of their *justiciability*, namely, the degree to which a matter was considered to be inside or outside the scope of issues which the court considered itself authorized to adjudicate (see Hofnung 1996, 1999). The narrow, cautious and formalistic interpretations that judges applied to these two legal criteria were self-imposed constraints of the courts in the early decades.

During Israel's early decades, however, the Supreme Court shaped its relationship with the two other branches of government by developing and expanding several important legal instruments. These legal instruments became part of a growing legal arsenal with which the courts protected human rights. A brief discussion of the Supreme Court functions and legal tools is relevant in this context.

An important function of the Supreme Court is the direct manner in which citizens can appeal to it as the High Court of Justice. Contrary to the United States court system in which pending appeals concerning human rights may take months or years before reaching a decision in the Supreme

Court, a plaintiff in Israel can receive an immediate relief in burning matters of human rights. For instance, in 1979 a convict petitioned the High Court of Justice to prevent prison authorities from forcing him to receive an enema in order to determine whether he was hiding drugs inside his body.<sup>[4]</sup> -The convict received immediate support and the invasive practice was prevented. Similar real-time intervention often involves political matters such as the legality of army actions or government decisions. In comparison, the highly important lawsuit against forced segregation on public buses in Montgomery, Alabama was filed in February 1956 in the District Court but was only decided by the Supreme Court in November and finalized in December of that year, thereby increasing the Montgomery movement's risks of failure (Grey 2002).<sup>[5]</sup> - Thus, the swiftness in which the Israeli Supreme Court can intervene in state acts and alleviate human rights abuse is a function worth emphasizing, given that time is of great importance to human rights protection (Hofnung 1999: 44-46).<sup>[6]</sup> -

The Israeli Supreme Court's role in protecting human rights is amplified due to its "common law" features. In the "common law" system, judges take an auxiliary role in the act of legislation. A Judge's interpretation gives the law shape and form; it defines and refines the law in relation to the actual cases brought before the courts. Justice Barak (1998: 7) explains the application of the "common law" in Israel:

[The] "Israeli version" of the common law enables a range of solutions or developments—a variety of possibilities which may be deduced from Israel's heritage. In such situations, the declaration of the law by the Supreme Court is also judicial law-making. The law that existed prior to a judicial determination is not the same as that which existed subsequent to it. Before a judicial determination, the statute or basic law spoke with a number of voices. After a judicial determination, the statute or basic law speaks with a single voice. The transition from the uncertainty of multiple possibilities, to the certainty existing in one solution, involves not only a declaration of law, but also creation of law. This is "judicial legislation."

The law-making process that Justice Barak mentions is essentially a judicial precedent (or case law). The decision of the Supreme Court becomes a legal precedent that all courts must consider thereafter when dealing with similar cases. This precedent also affects the other branches of government in the sense that the Supreme Court rulings are binding to these branches as well. Over the years, the Israeli Supreme Court has

developed human rights protections through these judicial precedents. Despite, or perhaps because of, the underdeveloped constitutional system in Israel, the Supreme Court gradually established and developed these precedents as the main legal body that protects human rights in the absence of a constitution and in the absence of basic laws involving human rights until 1992.

The constraints that judges imposed on themselves in the early decades began to weaken when more activist Justices were nominated to the Supreme Court in the late 1970s and 1980s, notably under former presidents of the Supreme Court, Justice Meir Shamgar (1983-1995) and Justice Aaron Barak (1995-2006). Several important changes occurred: First, the Supreme Court significantly broadened the scope of the standing principle; opening the doors of the courts to lawsuits from petitioners not personally injured, from individuals representing a collective of people and from non-Israeli citizens. Second, the Supreme Court broadened the scope of the justiciability principle and agreed to adjudicate legal-political matters and rights-claims that were previously deliberately avoided. Third, the Supreme Court “shifted from ensuring that administrative bodies act within their own jurisdiction to a Court that applies substantive review of the contents of administrative decisions and policies” (Hofnung 1999: 43). This transition from narrow and formalistic criteria to broader and more substantive criteria was accomplished, among other things, by giving new meaning and more extensive use to the doctrine of *reasonableness*, which originated in English administrative law. According to this doctrine, a state action can be determined void if the court deems the motivation or outcome of the action unreasonable. This flexible criterion was another powerful tool that the Supreme Court used to exert a degree of judicial review over government and Knesset actions, despite no explicit authority in the law to do so. These were the legal tools that the Supreme Court developed and utilized to protect human rights in the constitutional apparatus and the basic laws that were in place until 1992.

## **Human Rights Protection from 1992**

A new chapter in human rights protection began in 1992 with the legislation of Israel’s two basic laws dealing with human rights: “[Basic Law: Freedom of Occupation](#)” and “[Basic Law: Human Dignity and Liberty](#).”<sup>[7]</sup> Following in the footsteps of other liberal members of the Knesset, [Amnon Rubenstein](#), the architect of the two basic laws, tried to pass a basic law of human rights for many years but failed to find the necessary majority in the Knesset due to the domination of right-wing



Likud governments since 1977 and the latter's dependence on the religious parties who objected to human rights laws for fear that they would undermine the status quo in matters of state and religion. After realizing that an extensive list of human rights would not pass in the prevailing political stalemate, Rubenstein advanced the idea of passing human rights not in a single basic law but in a series of four basic laws; each covering a cluster of human rights. In this way, and owing to the loss of right-wing party discipline in the last months of the Twelfth Knesset, Rubenstein managed to pass two of his four basic laws.

The rights enumerated in the two basic laws are relatively narrow in comparison to most national and international human rights instruments. "Basic Law: Freedom of Occupation" only covers the protection of freedom of vocation, whereas "Basic Law: Human Dignity and Liberty" includes the following human rights protections: Preservation of life, body and dignity (prevention of humiliation), protection of property, protection of personal liberty, freedom to leave Israel and for Israeli nationals to enter Israel and the right and protection of privacy. The two basic laws also include a stability clause that protects them from emergency regulations. On the other hand, the conditions of restricting rights in the basic laws are phrased in a language that gives the Supreme Court considerable discretion in determining the conditions and the proportionality framework required for human rights restriction.<sup>[8]</sup>

The passage of these basic laws had far reaching effects on the human rights regime in Israel. Despite the rather narrow meaning that the legislator ascribed to these two basic laws, several Justices in the Supreme Court and especially, its president, Justice Aaron Barak (1995-2006), identified the legal potential of the new legislation. Shortly thereafter, Justice Barak publicized his opinion that the two basic laws amounted to a "Constitutional Revolution" in Israel.<sup>[9]</sup> The revolutionary interpretive aspects of the laws were twofold: First, based on the special status of "Basic Law: Freedom of Occupation"<sup>[10]</sup> and the clauses that protected the rights in these laws from emergency regulations, Barak held that the two basic laws had transformed Israel into a constitutional democracy with a bill of rights and with formal legal grounds for judicial review of Knesset legislation. The Supreme Court cemented this reading of the basic laws in a 1995 ruling.<sup>[11]</sup>

Furthermore, several Supreme Court Justices considered the two basic

laws as the last missing piece in Israel's constitution. As Barak put it, "It is now incumbent upon us to recognize, to understand and to internalize the simple truth: we now have a constitution. We are a constitutional democracy" (1998: 15). In this new constitutional conception, human rights were no longer protected only against administrative actions through the judicial precedents that had been developed over the years, but also against legislation that may have contradicted human rights in the new basic laws. In this context, the Supreme Court generally adopted America's 'checks and balances' approach in which each branch of government (executive, legislative and judicial), has equal constitutional status and each holds the other accountable to "ensure the liberty of the individual" (Barak 1998: 6).

The breadth of human rights under "Basic Law: Human Dignity and Liberty" has been another major issue in human rights protection since 1992. Justice Barak and others soon identified the legal potential of article 4 of this basic law: "All persons are *entitled to protection of their life, body and dignity*" (emphases added). The rather unusual phrasing of this article originated in a hasty and confused legislative process in which an explicit resolution to remove the term dignity from that article was not implemented in the final draft of the law. A majority in the Knesset's Constitution, Law, and Justice Committee voted to remove the term dignity from this article because they agreed that "entitlement for dignity" is too vague. Nevertheless, the committee's decision was not implemented by the Justice Department and the original problematic phrasing became part of the actual basic law.-[\[12\]](#)-

The result was that Israel became one of only three countries in the world to have a *right* to human dignity; the other two being Hungary and South Africa (Shultziner 2003). As a result of the assumptions that human dignity is indeed a discrete human right, there has been a legal debate as to whether human rights that were not mentioned in the basic law can be derived from the right to human dignity. Leading those Justices who answer in the affirmative has been Justice Barak who argues that human dignity is a "framework right" that delineates additional human rights; the fact that the legislature has not yet given them an explicit legal expression does not detract from their constitutional status under the right to human dignity. Justice Dalia Dorner and others, however, have a different approach, maintaining that additional human rights cannot be derived from or receive special constitutional standing in the right to human dignity. According to Justice Dorner, other human rights are protected only when encroachment on these rights involves humiliation.-[\[13\]](#)-

The right to human dignity in Israel has had mixed results. On one hand, the scope and potential of human rights protection has certainly increased. Whether one sides with Barak's broader interpretation of human dignity or Dorner's more limited interpretation, the common ground between the two poles is that all human rights are protected to prevent humiliation. The Supreme Court's authority to determine what is a conceivable infraction of human rights and what is not, and what constitutes humiliation, as well as how to balance human rights against each other and against other values and interests, enshrines it with substantial new powers. Whereas the Supreme Court's human rights protection until 1992 included only conventional legal instruments, "Basic Law: Human Dignity and Liberty" supplied it with the open-ended and unconventional instrument in the form of the right to human dignity as well as the ability to declare invalid legislation that injures human dignity.-<sup>[14]</sup>-

On the other hand, there have been several outcomes that might adversely effect human rights protection in Israel. First, religious-conservative and secular-liberal Justices have disagreed about the definition of the right to human dignity and its implications in the actual legal cases brought before them (Shultziner 2006). It became evident that a Justice's ideological outlook effects the interpretation of human dignity and the balancing process between human dignity and other values.-<sup>[15]</sup>-Second, due to the open-ended and all-embracing nature of human dignity and the broad interpretation that was employed by some Justices, there was a risk that the concept of human dignity would lose its power (Kretzmer 2002: 174-175) or, worse, that it might become a divisive rather than a uniting term. Third, the Supreme Court's new assertive philosophy of a constitutional revolution did not go unanswered. As Menahem Hofnung correctly identified, the increased powers of the judiciary and its emphasis on human rights have caused it to be seen as a political player and resulted, paradoxically, in a "situation in which the courts' power to review future legislation and executive policies is jeopardized" (1999: 36). Backlash by the religious parties and by other right-wing circles began in the 1990s, including a major demonstration of more than 200,000 ultra-orthodox Jews against the Supreme Court in 1999.-<sup>[16]</sup>-Another political climax occurred between 2006 and 2009 with serious attempts by the Minister of Justice, Professor Daniel Friedmann, to curtail the power of the Supreme Court by introducing a constitutional court, restricting the power of the Supreme Court to overturn Knesset decisions and increasing the weight given to politicians in the appointment committee of Supreme Court justices.-<sup>[17]</sup>-

While Prof. Friedmann could not complete all of his initiatives due to the replacement of the Kadima-led government with a Likud-led government in 2009, efforts are still being made to restrict the power of the Supreme Court.

Despite this backlash against the Supreme Court, a fairly developed framework of human rights protection has been established in Israel. From the early decades when rights protection was confined to basic norms and judicial precedents, the system matured and received a legislative boost in the form of the two 1992 basic laws. The legal creativity of the Supreme Court in interpreting the entitlement for human dignity extended the protection to human rights far beyond the legislature's original intentions. The legislature maintains the power to reenact the basic laws, to change the problematic phrasing of "entitlement for dignity" and to clarify the two basic laws more generally; either by narrowing or elaborating on them. One such modification was included in 1994 when, under the pressure of the religious parties, the basic principles clause was added in both "Basic Law: Freedom of Occupation" and "Basic Law: Human Dignity and Liberty" in order to try and shape more conservative interpretation of these two basic laws:

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.

This addition to the laws, however, had no adverse effect on human rights protection in Israel. While the Declaration of Independence recognizes the right of Jews to self-determination and free immigration to Israel, it also recognizes universal principles and states that Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex." In fact, the addition of the basic principles clause made it possible to rely more directly on the universal aspects that are enshrined in the Declaration of Independence. The legislature has neither modified the two basic laws since 1994 nor reversed the human rights revolution of 1992. The legislature's acceptance of this new reality or its lack of sufficient will and ability to reverse it, brings us full circle to the meaning of the basic norms of the Declaration of Independence.

## **Human Rights in Practice**

The sections above outline general issues pertaining to human rights in the changing context of the Israeli constitutional system. In the following sections, two topics involving human rights protection in Israel will be discussed: Democratic rights, and religious and human rights. The choice of these two general topics illustrates how the Supreme Court grappled with and decided on cases in which central values and interests were in tension with certain human rights that were at the heart of democracy on the one hand, and on cases which require a definition of Israel's character as a Jewish state on the other. The discussion also exemplifies the theoretical points made above and the evolution in the Supreme Court's thinking and practice regarding human rights.

### *Political and Democratic Rights*

Basic political rights are considered to be in the first generation of the international human rights regime and they lay at the heart of the [Universal Declaration of Human Rights](#). A core cluster of political rights that are prerequisites of democracy, based on a procedural definition of what a democracy is (Dahl 1998), are termed "democratic rights" and they include freedom of expression, freedom of assembly and association and the right to vote and run for office in free and periodic elections.<sup>[18]</sup> These core rights are also upheld in the Declaration of Independence that ensures complete political equality. Protection of these rights, however, was not obvious and posed challenges given the underdeveloped nature of the legal system and other insecurities that Israel experienced in its early years.

"Freedom of opinion and expression" which includes "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media."<sup>[19]</sup> This right was tested in a legal case known as *Kol Ha'am*.<sup>[20]</sup> In 1953, the Minister of Interior ordered a ten-day suspension for *Kol Ha'am* and a fifteen-day closure for *Itihad*, the Hebrew and Arabic newspapers of the Communist Party in Israel, respectively. The Minister's orders followed two editorials in these communist party newspapers that blamed the government, among other things, for "provoking war" and for "profiteering with the blood of young Israelis." The editorials themselves relied on a baseless rumor published in *Ha'aretz* that indicated that the government was ready to send 200,000 soldiers to support the United States against a possible confrontation with the Soviet Union. The Minister of Interior based his order on the Press Ordinance that allowed him to suspend a newspaper if he judged that a matter appearing in the newspaper was "likely to endanger the public

peace.”

Justice Shimon Agranat was required to weigh and balance the right to freedom of opinion and expression against the interests of state security and public peace. In this landmark ruling, Justice Agranat established the supremacy of the right to freedom of opinion and expression in Israel and, no less important, he set the test of “high probability of damage to public peace” as the only legal measure by which basic political rights could be overridden. This judicial precedent not only cemented the freedom of opinion and expression as basic rights in Israel but it also provided sanction and rationale to human rights protection more generally. Justice Agranat arrived at his ruling despite the absence of official legislation ensuring the right to freedom of expression. Indeed, Justice Agranat anchors his ruling in Israel’s basic democratic norms and references their expression in the Declaration of Independence:

The legal system, according to which Israel’s political institutions were established and operate, *testifies* that this is indeed *a state whose foundations are democratic*. Moreover, the words that have been declared in the *Declaration of Independence* – and in particular the establishment of the state “on the *principles of freedom*” and *guaranteeing freedom of conscience* – mean that Israel is a *freedom-seeking state*. True, the declaration “is not a constitutional law that can rule in actual fact about fulfilling various laws and regulations or about their invalidation” ... but to the extent that it “*expresses the vision of the people and its ‘I believe’* ... it is our duty to pay attention to the words that have been declared in it when we interpret and give meaning to the laws of the state... For it is a known axiom that *one should study the laws of a people in the prism of that people’s national life.*”<sup>[21]</sup>

The strong reliance on basic norms and political culture are evident in this judicial precedent, which would become a common reference point and guide in many future court decisions involving human rights protection. No less significant is the fact that the legislature and the government would immediately comply with and respect the judicial legislation set by the court. The authority of the Supreme Court to make such a decision and its reliance on interpreting the meaning of basic norms, rather than a reliance on explicit law, would not be challenged.

Similarly interesting challenges to democratic rights emerged in the case of the right to “freedom of peaceful assembly and association” and the right “to take part in the government...directly or through freely chosen

representatives”.-<sup>[22]</sup>-In Israel, the democratic process and democratic rights were the first to receive constitutional standing with special protection under “Basic Law: The Knesset” in 1958 which stated: “The Knesset shall be elected by general, national, direct, equal, secret and proportional elections... this section shall not be varied save by a majority of the members of the Knesset” (Article 4). The right to “vote in elections to the Knesset” (Article 5)-<sup>[23]</sup>-and the right to “be elected to the Knesset” (Article 6) are also included in this basic law.

The dilemma Israel faced was not whether or not to hold elections and maintain a democratic system, but rather to determine if and what type of limitations on political rights could possibly be allowed to defend democracy. The question of what defending democracy entails is of course not unique to Israel. But the reality is that Israel has had a significant Arab minority since its establishment and the Jewish majority doubted the loyalty of this minority because significant segments of the Arab population supported the surrounding Arab nations’ invasion between 1948 and 1949. Furthermore, Israel’s proportional representation system allowed and even encouraged an elaborate multiparty system in which extremist elements from the far right and the far left of the political spectrum could easily win seats in parliament.-<sup>[24]</sup>-

Though the right to vote was upheld for minority and extremist groups in Israel, the question of allowing representatives of these groups to freely organize and run for the Knesset was a different political and legal matter. Occasionally, before elections, these issues would arise over the freedom of assembly and the right to run for the Knesset (see also Shamir and Weinshall-Margel 2005).

Before the elections of 1965, the Central Elections Committee (henceforth CEC) disqualified a far left-wing candidate’s list called “The Socialists’ List” that sought to run in the sixth Knesset elections. The CEC disqualified the Socialists’ List because five of its ten members were affiliated with the *Al-Ard* (the Land) group that was previously banned for reasons of endangering state security due to allegations of collaboration with foreign agents. Members of the CEC also stated that the members of the Socialists’ List wanted to compete in the Knesset elections to win a parliamentary immunity that would assist the group in its struggle against the state itself. The Knesset Election Law allows a disqualified list to appeal CEC decisions and so the matter was brought before the Supreme Court in a case known as the *Yardor* decision.-<sup>[25]</sup>-

In the majority opinion, Justice Agranat and Justice Zussman upheld the CEC's disqualification decision. They accepted the argument that the Socialists' List challenged the right of Israel to exist and argued that a democracy should defend itself from elements that seek to use the democratic system to undermine it; despite the lack of an explicit legal authority granting such disqualification power to the CEC. In the minority opinion was Justice Cohen whose opinion would, in later years become the sentiment of the majority. Justice Cohen argued that the CEC lacks the legal authority to disqualify a list based on substantive or ideological reasons and refers to article 29(2) of the "Universal Declaration on Human Rights," which determines that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law." Moreover, Justice Cohen argued that even lists that do in fact challenge the state should be allowed to run because Israel is no longer in an existential crisis as it was in 1948 and that the only criterion to disqualify a party should be an explicit legal authority similar to the one which was established in the *Kol Ha'am* decision, namely that the danger to the state is "concrete, certain, and imminent."

The same issue would arise again in 1984 before the elections to the eleventh Knesset. This time the CEC disqualified two candidate lists: The Progressive List for Peace (PLP) and [Kach](#). The CEC disqualified the PLP on the grounds that on its list were former *Al-Ard* members and sympathizers with Israel's enemies and on the basis of the Defense Minister's testimony to the CEC that there are subversive elements in some of the groups affiliated with the PLP. The Kach list was disqualified because its principles were racist and contradicted the basic norms of the Declaration of Independence in the sense that Kach called for stripping Israeli Arab citizens of their rights. Moreover, Kach members publicly supported terror acts against Arabs and sought to inflame hatred between Jews and Arabs. The two groups petitioned the Supreme Court in what is known as the *Neiman I* decision.- [\[26\]](#) -

In this case, the Supreme Court overturned the CEC's decision and established that the basic democratic right to be elected to office could not be limited without an explicit legal sanction and that only in extreme cases and after very strict legal tests could basic democratic rights be encroached upon. Accordingly, the Supreme Court recommended that the legislature set in law constitutional criteria for disqualification. Paradoxically, the underdeveloped legal stipulations regarding basic democratic rights allowed the Supreme Court to use a doctrine that holds that rights must be



guaranteed and protected unless explicitly stated otherwise.

The PLP and Kach both managed to pass the election threshold in 1984, with two and one seats respectively. One year later, the Knesset took up the task presented to it by the Supreme Court and amended “Basic Law: The Knesset” by including section 7(A) which stipulates that “A candidates’ list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism.” The ambiguity of the clause allowing disqualification based on the negation of the Israel as a Jewish state as well as the question of what constitutes an incitement to racism would be brought up before the Supreme Court several times in the course of the next two and a half decades.

The first test to the modified basic law would be prior to the next Knesset elections in 1988. Then, the CEC did not disqualify the PLP (by a margin of a single vote) but did disqualify Kach for incitement to racism and negation of the democratic character of the state. Kach appealed to the Supreme Court in a case known as *Neiman II*-<sup>[27]</sup>-but this time, the court upheld the CEC’s decision. The same scenario came about again with the disqualification of Kach and Kahana Chai prior to the 1992 elections and the disqualification of Moledet-Gesher-Tzomet in the 1998 local elections (Shamir and Weinshall-Margel 2005: 117).

There would be far more attempts to disqualify Arab Israeli candidates’ lists than there would be to disqualify far-right Jewish groups. Specifically, after the outbreak of the Second Intifada in 2000, new amendments were made in Article 7(A) of “Basic Law: The Knesset” to prohibit “a candidate list or an *individual candidate*”-<sup>[28]</sup>-from taking part in the elections if their “goals and actions [...] support the armed struggle of a hostile state and/or terrorist organization against Israel” (Article 7(A)3). These amendments targeted Arab members of the Knesset such as Dr. Azmi Bishara and Dr. Ahmad Tibi, who publicly supported groups that were engaged in an armed struggle against Israel. Nevertheless, it is somewhat ironic that the last four de facto disqualifications of candidates’ lists that were upheld by the Supreme Court were actually of radical Jewish groups; the last being in the local elections of 1998.

Despite common disqualification attempts of Arab Israeli parties and candidates before elections, no Arab party had in actual fact been

prevented from running since the Yardor ruling of 1965. The total number of disqualifications to date is five: One Arab list and four Jewish lists (three of them being essentially of the same Kach list).

An especially contentious episode of attempted party disqualifications occurred before the 2003 elections (see also Shamir and Weinshall-Margel 2005). The Supreme Court was required to decide on several appeals against the CEC's confirmation of Baruch Marzel, a former member of the Kach group (which since 1994 had been banned as a terrorist group) who was ranked second on a new far-right list. This was pending Supreme Court affirmations for the CEC's disqualification of Dr. Azmi Bishara and Dr. Ahmad Tibi and an appeal against the disqualification of the *Balad* list that had identified itself with the banned *Al-Ard* group.<sup>[29]</sup> The Supreme Court overturned all disqualifications, pending and non-pending. The standards and tests for disqualifying an individual or a party that the majority of Justices applied in this ruling are very close to the ones that would be needed to convict a person in criminal law. This essentially allows almost anyone to run in elections because candidates that do not meet these standards would be breaking other laws that would make them face trial regardless of the basic law.

The correct balance between basic democratic rights and other important interests, according to the Supreme Court, is that Israel should tolerate even outliers and extremist groups which challenge democracy and state legitimacy. Justice Barak mentions in his decision that the democratic process itself often solves some of the dilemmas of a defending democracy. Indeed, Baruch Marzel was allowed to run but his list did not garner enough votes to cross the election threshold. Conversely, Dr. Ahmad Tibi, who the CEC also attempted to disqualify before the elections to the sixteenth Knesset, would be appointed Deputy Speaker of the Knesset in the next two parliaments.

## Religion and Human Rights

The Universal Declaration of Human Rights enumerates several rights that were included to insure that people's religious beliefs and practices would be respected and protected. The historic context for the creation of religious freedom was the complete disregard for the rights of religious communities and the deliberate persecution of Jews before and during World War II. In the Declaration of Independence, the founding members declared the "establishment of a Jewish state... to be known as the State of Israel" and that Israel "will ensure *complete equality* ... to all its

inhabitants *irrespective of religion, race or sex*” and that it will ensure *freedom of religion and conscience*. Some of these elements raise interesting human rights dilemmas in the Israeli context. The first issue is the legal definition of Israel as a Jewish state. The second issue is the authority and power that religious elites hold over certain rights of their group members, whether or not all those members agree to the religious elite’s authority or share its theological worldview and practices.

## **A Jewish and Democratic State**

In the declaration of Independence, the founding members declared that Israel is a Jewish state in which Jews could fulfill their right to self-determination according to the United Nations 1947 partition plan. The declaration does not define Israel as a religious entity. In fact, the word “god” does not appear in the Declaration of Independence. Instead the ambiguous combination “rock of Israel” (*Tzur Israel*) was used as a compromise term by the secular and religious drafters, each interpreting the term according to a different worldview. Alongside a declaration of a Jewish state, democratic and universal principles of human rights are emphasized in the text. The 1992 human rights basic laws (in their amended versions) also mention that their purpose is “to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”

The dilemmas and potential tensions between the Jewish and democratic facets of Israel is implicit in the discussion above, whereby on one hand the Jewish component was interpreted by Kach in a way that sought to exclude and discriminate against non-Jews and on the other hand there are those who challenge the very notion of any Jewish character to the state whatsoever. Moreover, the Jewish community in Israel has its own share of disagreements about the content that should be cast into the term Jewish state. The issue of human rights in a Jewish state thus involves Israel’s non-Jewish citizens on the one hand and multiple and possibly conflicting meanings of the term within the Jewish community on the other. The dual definition of Israel as both Jewish and democratic was raised in Supreme Court decisions that revolved around these broad concepts and necessitated interpretations of their meaning and modes of relationship.

The issue of the meaning of Israel as a Jewish state with regards to its non-Jewish citizens was raised in the case of Adel Ka’adan against the Israel Land Administration which was known as the *Ka’adan* decision.<sup>[30]</sup> Adel Ka’adan petitioned the Supreme Court after being told that he could not

buy a house or land in Katzir, a communal settlement, because he is Arab. The special legal status of Katzir allows it discretion in accepting residents as well as in selling lands to Jews alone. Among the many legal issues brought before the court was the argument that allocation of state lands to separate settlements of Jews is legal because it fulfils the constitutional values of Israel as a Jewish state.

Chief Justice Barak referred to this argument in his decision, which was supported by the majority of Justices on the panel who also upheld Ka'adan's petition. Justice Barak posits that the values of Israel as a Jewish state are already manifested in the fact that Jews have easy access to becoming Israeli citizens, that Hebrew is an official language, that official holidays reflect the national resurrection of the Jewish people and that Jewish tradition is a central cultural aspect of society. Yet, according to Justice Barak, a Jewish state does not enable discrimination but in fact forbids it and "necessitates equality between religions and nationalities." <sup>[31]</sup> -By employing this interpretational approach to the term "Jewish state", the Supreme Court has minimized the potential tension between the terms "Jewish" and "democratic."

This decision, of course, is not the only interpretation that the Supreme Court could have chosen. Religious or more conservative Justices may have given the term "Jewish state" a broader meaning which may balance human rights and other important values and interests differently (see examples below).

In fact, elsewhere Justice Barak refers directly to the legal function of Jewish law in interpreting modern Israeli law (Barak 1998). While recognizing the importance of Jewish law as an inspirational source in interpreting legislation, Justice Barak argues that Jewish law does not have a superior interpretive standing relative to other values. Rather, Jewish laws, especially when they imply particularistic meaning, should be balanced with other fundamental values. When consulting laws and values from the vast Jewish tradition, only those values that are harmonious with the democratic character of the state should inform and enrich legislative interpretation or judicial legislation. To use Justice Barak's words, "We are a democratic state in which there are non-Jewish minorities. Only those fundamental values of Jewish Law that are compatible with this character become part of our system and only they may be taken into account" (Barak 1998: 18-19). This interpretive approach essentially means that Israel can be Jewish only to the extent that it does not come into conflict with its democratic fundamentals.

A similar approach can be observed in the way that Supreme Court Justices balanced between human rights and central values of Jewish tradition in cases that involve tensions within the Jewish community. In two such cases, the Supreme Court was required to decide between community values and Jewish tradition and the rights of deceased persons and their family members who wished to deviate from their contracts with the Jewish burial company (*Kadisha*) and write on the deceased tombstone in non-Hebrew captions.<sup>[32]</sup> In both cases, the two secular Supreme Court Justices were in the majority against a dissenting religious Justice. The secular Justices emphasized the individualistic aspect of human dignity whereas the religious Justice stressed communitarian aspects of Jewish tradition and its emphasis on the dignity of the community. Accordingly, the secular Justices ruled in favor of individual rights over collective Jewish values such as uniform Hebrew captions on tombstones in cemeteries run by the ultra-religious *Kadisha* organization (see also Shultziner 2006).

Another example of tension within the Jewish community was the *Bar Ilan Road* decision.<sup>[33]</sup> In this case, city officials had ordered the closure of the Bar Ilan road in Jerusalem during the Sabbath following pressures and demonstrations by ultra-religious Jews who argued that the section of the road that passes in the midst of their neighborhoods should be closed throughout the Jewish day of rest and not during prayer times alone, as was the status quo. The Supreme Court was required to balance restrictions on the freedom of movement against the value of the [Sabbath](#) and the religious sentiments. As in the previous examples, a majority of Justices in the Supreme Court upheld freedom of movement within the state over religious values and sentiments. In general, the Supreme Court tends to choose interpretations of “Jewish state” that favor and protect human rights over Jewish values that might come into conflict with rights.

## Religious Law and Equality

A second set of issues pertaining to human rights and religion is related to the special legal status of religious courts and the extent to which religious law can effect public life in Israel. The constitutional status of religious courts in Israel dates back to the time of Ottoman rule. The Ottomans introduced the *millet* system, which granted religious minorities a high degree of autonomy in conducting their own community affairs. The structure of the *millet* system strengthens religious elites and empowers them over members of their respective community. This system was

maintained under the British mandate and continued in Israel as religious courts have authority in family laws, most importantly in matters of marriage and divorce. The human rights issues that are involved in this context reflect the degree to which religious courts and other state bodies can rely on religious law even when the law conflicts with individuals' rights or when not all members of the relevant community agree to the religious elite's rulings. Under this topic fall several rights that are mentioned in the Universal Declaration on Human Rights, including equality before the law, freedom of religion, and the right to have equal rights to marriage, during marriage and at its dissolution (Articles 7, 16, 18).

Tensions between conservative religious doctrines and human rights mounted in the 1980s, especially regarding issues of gender equality (see Kremnitzer 2001). In 1988, Lea Shakdiel petitioned the Supreme Court after the Minister of Religious Affairs obstructed her nomination to the religious council in the city of Yeruham on the grounds that she was a woman.<sup>[34]</sup> -The main state arguments were that religious councils deal with significant religious matters in which women do not participate according to Jewish tradition and that the inclusion of a woman in such a context would paralyze the activity of the council and hence jeopardize important religious services to the community.

The three Justices on the panel, standing by the decision of religious Justice Menachem Elon, accepted the petition against the Minister of Religious Affairs and ruled that the exclusion of women from state administrative bodies was discriminatory based on sex and hence contradicted the fundamental principle of equality in the Declaration of Independence and was explicitly forbidden according to the Women's Equal Rights Law of 1951.<sup>[35]</sup> -Justice Barak added that even though no basic principle is absolute, the principle of equality could be balanced with other public interests only if it could be convincingly shown that the insistence on the application of equality will significantly hinder other public interests, such as provision of religious services. Yet, even when such conflict does occur, Justice Barak continued, the principle of equality would be balanced with other interests only as a last resort and after all other legal options had been exhausted. The decision in Shakdiel's appeal established that religious law could not be applied beyond the domain of family law if it conflicts with human rights.

Lea Shakdiel became the first woman to serve on a religious council in Israel. The Supreme Court's ruling also impacted religious groups and

religious standards. The ruling accelerated processes of integration of other women in religious administrative bodies and it reduced the gap between strict conservative religious doctrines and human rights standards (Kremnitzer 2001: 102).

Nevertheless, a gap remains between religious law and human rights. Indeed, while religious Justice Elon and secular Justice Barak agree that equality should prevail over religious law and traditional Jewish practices, they disagree as to whether distinction based on sex could be allowed in other matters. Justice Elon posits that “discrimination on legal-religious grounds is allowed in the case of legal prohibition and approval pertaining to matters of marriage and divorce...”<sup>[36]</sup>-whereas Justice Barak does not concur. This is not an insignificant matter as it goes to the heart of the relationship between the civil and religious laws in Israel. This issue is further complicated given the long-standing status accorded to the religious courts in the domain of family law and the explicit exemption granted by the legislature to religious law in this domain, as, for example, in article 5 of Women’s Equal Rights Law (1951), which stipulates that the law itself cannot impair religious laws of marriage and divorce. Similarly, article 10 of “Basic Law: Human Dignity and Liberty” (1992) provides protection to the validity of laws – including religious laws – that existed prior to the commencement of the basic law.

Soon after the enactment of “Basic Law: Human Dignity and Liberty,” the Supreme Court heard an appeal by Hava Bavli who argued that upon her divorce she was deprived of her property and financial rights by the religious courts.<sup>[37]</sup>-Her appeals were previously turned down twice by the religious courts and once by the District Court on the grounds that it has no jurisdiction over the decision of the religious courts. In a groundbreaking decision, the Supreme Court declared the decision null and void on the grounds of unreasonableness and returned the matter to the religious court. The Supreme Court also ruled that the Equal Rights of Women Law applies to the decisions of the religious courts, despite the explicit order in the law that says it is inapplicable to matters of marriage and divorce (article 5). The religious courts were instructed to respect, protect and apply the principle of equal division of marital property even if it was not guaranteed according to Jewish Law (*Halacha*) (Kremnitzer 2001: 116-118). While this principle is important, the religious courts have been often slow to adjust themselves to the new directives of the secular courts (Scolnicov 2006).

A similar conflict between religious laws and civil laws involved the

separate Muslim religious courts in Israel.<sup>[38]</sup> -An Israeli Muslim woman and her daughter filed a suit in the Muslim (*Sharia*) courts to obligate a man to whom the woman was not married to undergo DNA testing to determine whether he was the father of the woman's daughter and thus obligated to pay child support. The Muslim court denied the woman's suit on the grounds that Muslim law does not recognize fatherhood without formal marriage or without acknowledgement from the man that he is indeed the father. The woman appealed to the District Court but her appeal was rejected on the grounds that matters of marriage and divorce within the Muslim community are beyond the jurisdiction of the civil courts. The woman then appealed to the Supreme Court.

In this case, the Supreme Court acknowledged the Muslim court's authority to determine that the man was not the father according to Muslim law. Yet, the Supreme Court Justices did not accept the outcome in which the child would be deprived of her rights to know who her father was and to receive child-support. To overcome this problem, the Supreme Court applied legal creativity in deriving from the right to human dignity the right to receive support from the civil courts when one's dignity is at stake, as well as the right of a child to know the identity of his or her parent.<sup>[39]</sup> - Furthermore, the Supreme Court distinguished between fatherhood according to Muslim Law and Civil Law. The Muslim man may not be considered the father of the child according to the Muslim Law but he can be considered the father according to Civil Law and the latter trumps the former for the purpose of child support. Accordingly, the Supreme Court accepted the appeal unanimously and ordered the District Court to reexamine the petitioners' suit based on its merits, and hence paved the way for the woman's and her child's rights to be respected.

In sum, the high degree of legal authority in family laws that religious elites have over members of the religious group means that the question of religion and human rights in Israel is very much one of freedom *from* religion; not only freedom of religion. Specifically, religious courts have power and authority over certain basic rights of citizens who may not be religious themselves and possibly not even accept the logic of religious law as a basis for certain rulings that affect their rights. Both in matters of civil law and religious law and in matters concerning the Jewish character of the state, the Supreme Court has chosen legal doctrines that have minimized the potential tension between human rights and other important interest and values.



## Future Challenges

The strength of the democratic process and the protection of human rights are due to basic norms that are shared by a majority of Israeli society. These norms served as the normative compass that guided the legislature, the executive and the judiciary to respect human dignity and liberty well before the enactment of the “Basic Law: Human Dignity and Liberty” in 1992. These norms continue to effect human rights in Israel to this day.

Even though basic norms provided an overall umbrella of human rights protection, the legislature was slow to make human rights into formal positive laws due to complicated internal political reasons. In this context, the Supreme Court took it upon itself to establish and develop a system of judicial precedents that served as an alternative source of legislation and protection of human rights. Eventually, the two basic laws of 1992 also gave partial expression to the normative and legal reality that was established in judicial legislation. Protection of human rights existed prior to these basic laws and would have surely continued even without them based on the legal ingenuity that the Supreme Court illustrated in utilizing and expanding existing doctrines such as reasonableness or directly relying on the basic principles of the Declaration of Independence. These developments within the Supreme Court certainly received a massive boost with the enactment of “Basic Law: Human Dignity and Liberty.” Human rights protection was especially expanded and heightened due to the open-ended right to human dignity which received a broad interpretation and a wide meaning from the Supreme Court.

Yet, despite the important role that the Israeli Supreme Court played in human rights protection, Israel, like all other democracies, is not without its human rights dilemmas and problems. The Supreme Court cannot solve each and every human rights problem. For instance, the continued Israeli control of the [West Bank](#) for over four decades under the international law of “belligerent occupation” raises political questions and human rights questions (see Kretzmer 2005), but the Supreme Court can do little to change the roots of the regional political reality that gives rise to these dilemmas. The same human rights standards that apply in Israel cannot be upheld in the West Bank but the causes of this reality are not entirely in the hands of Israel.

A human-rights regime similar the one that exists within Israel cannot currently exist in the West Bank and Gaza (which is no longer under direct Israeli control) due to the ongoing fighting between Israel and Palestinian

militias that target Israeli civilians, as well as fighting between the two main Palestinian factions, [Fatah](#) and  [Hamas](#). Accordingly, Israel applies the international law of belligerent occupation (a set of rules that applies to governing lands that were obtained following belligerency) in the West Bank because Israel has not applied its sovereignty to the West Bank (except a limited area in East Jerusalem) or to [Gaza](#). In this respect, a discussion of human rights within Israel is somewhat similar to a discussion on human rights in any other democracy that has been or still is involved in belligerent occupation.

Furthermore, Arab citizens of Israel lag behind in some social and economic parameters compared to their Jewish counterparts, even though they are equal *de jure*. Although there are special affirmative-action laws that aim to help close the social, economic and educational gaps between Jews and Arabs in Israel, there is still much work to be done. The Supreme Court alone cannot solve these problems. Just as protection of democracy and human rights can be accomplished without a constitution, social, economic and educational inequalities as well as negative attitudes can persist despite laws that forbid discrimination and uphold equality. In this context, the social gaps and inequalities that exist in Israel are not very different than those that exist in long-standing democracies; but this does not mean that the situation is justified and should not be improved. This is the work for political and social players.<sup>[40]</sup> There is already a solid legal ground on which problems can be rectified and challenges can be met.

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[1] ———. "The concept of basic norms is borrowed and developed from Avram Diskin's work and lectures (see also Diskin 2003: 33-41).

[2] ———. "Gradually, these powers and functions were defined in basic laws. Nine basic laws were enacted until 1992. These basic laws cover institutional and constitutional aspects such as the powers of the legislature (1958), the president (1964), the government (1968, 1992, 2001), the army (1976), the judiciary (1984), the state comptroller (1988), as well as matters that do not usually find expression in constitutions such as the state lands (1960), the state economy (1975), and Jerusalem, the state's capital (1980).

[3] ———. "A military administration was applied in 1948 over the main areas where Arab citizens of Israel resided following the end of the 1948-1949 fighting in which some of them took part. This administration included restrictions on movement (requiring special permits) and was accompanied by land appropriation, surveillance, and undue interference with respect to work permits, movement permits, and political organization (Cohen 2006). The military administration was gradually lifted until it was completely repelled in 1966.

[4] ———. "HCJ 335/79, *Arie Ben-Benjamin Katalan v. Prison Authorities*.

[5] -*Browder vs. Gayle*, 142 F. Supp. 707 (1956).

[6] -This is not to say that the Supreme Court necessarily and immediately chooses to intervene in every case brought before it and some cases of sensitive nature may drag for long years.

[7] -It should be noted that a new version of “Basic Law: The Government” was also enacted in 1992. The new law introduced direct elections of the Prime Minister and it came into effect in 1996, but was repelled in 2001 due to its adverse effects in fragmenting the party system and destabilizing the political system.

[8] -The language in the violation clause of both basic laws is that there shall be no violations of the rights enumerated in the laws “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*” (emphases added). Basic Law: Human Dignity and Liberty (Article 8); Basic Law: Freedom of Occupation (Article 4).

[9] -Justice Barak did not coin the term ‘Constitutional Revolution’ regarding the basic laws, but he was certainly the most active in advocating this notion and the person most associated with it. The title of his 1992 paper concisely captures his philosophy: ‘The Constitutional Revolution: Protected Human Rights’ (see Barak 1992 – in Hebrew).

[10] -Article 7 of this basic law determines that it cannot be changed unless by a new basic law passed by at least 61 members of Knesset.

[11] -CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*, 49 (4) PD 221. Most of the Justices, legal scholars, and even most politicians did not object to this groundbreaking interpretation, though some academics, such as Ruth Gavison, did voice their objections.

[12]

-For more details about this problematic legislative procedure and other fatal flaws of 'Basic law: Human Dignity and Liberty' see (Shultziner 2007 – in Hebrew).

[13]

-HCJ 4541/94 *Miller v. Minister of Defense*.

[14]

-Justice Barak (1994: 288-289 – in Hebrew) used the term “unconventional” in a paper entitled ‘Human Dignity as a Constitutional Right’: “to the conventional weapon of regular law interpretation, was now added the unconventional weapon of invalidating regular law that injures human dignity and does not fulfill the stipulations of the ‘violation of rights’ clause.”

[15]

-For example: CA 294/91 *Hevra Kadisha v. Lional Aria Kestenbaum*; CA 5016/96 *Horev Lior et al. v. Minister of Transportation et al.*; CA 6024/97 *Shavit Fredrika v. Hevra Kadisha Gahsha Rashlatz*; CA 506/88 *Sheffer v. State of Israel*.

[16]

-David Sharrock, ‘Jerusalem comes to standstill’ *Guardian* 15 February, 1999.

[17]

-Ze’ev Segal, ‘Slam the Supreme Court’ *Haaretz* June 11, 2007.

[18]

-The Universal Declaration of Human Rights (1948) deals with the political rights of freedom of opinion and expression, freedom of peaceful assembly and association, and the right to take part in the government in Articles 19, 20 and 21, respectively. These rights are also reaffirmed in the International Covenant on Civil and Political Rights (1966, Articles 19, 21, 22), of which Israel is a party. These international documents, however, do not have the status of laws in Israel.

[19]

-The Universal Declaration of Human Rights, Article 19; see also International Covenant on Civil and Political Rights, Article 19.

[20]

-H CJ 73/53 *Kol Ha'am Company Ltd. v. Minister of Interior* 7 PD 871.

[21]

-Section 5 to Justice Agranat's decision, my translation and emphases.

[22]

-Universal Declaration of Human Rights, Articles 20(1) and 21(1); see also International Covenant on Civil and Political Rights, Article 25.

[23]

-In Israel, the right to vote is also not withheld from convicts.

[24]

-Israel had an election threshold of 1% until 1992, 1.5% from 1992-2003, and 2% since then, all of which are considerably low compared to other parliamentary democracies and enable small groups to win representation in the Knesset. In Israel's electoral history, the average number of parties that manage to cross the election threshold and gain Knesset seats is 11.8 parties, and never fewer than nine.

[25]

-H CJ 1/65 *Yardor v. Chairman of the Central Election Committee for the Sixth Knesset*, PD 19(III) 365.

[26]

-EA 2/84 *Neiman v. Chairman of the Central Election Committee for the Eleventh Knesset*, PD 39(II) 225.

[27]

-EA 1/88 *Neiman v. Chairman of the Central Election Committee for the Twelfth Knesset*, PD 42(IV) 177.

[28]

-Disqualification of individuals, rather than a candidates' list, is conditioned on a Supreme Court's affirmation of the CEC's decision (Article 7(A)(b)] of Basic Law: The Knesset.)

[29]

-All decisions were in the same ruling: EC 11280/02 and 50/03 *The Central Elections Committee for the Sixteenth Knesset v. Mk Ahmad Tibi, Azmi*

*Bishara*; EA 55/03 and 83/03 *Pines et al. v. The Central Elections Committee for the Sixteenth Knesset*.

[30]

-HCJ 6698/95 *Ka'adan v. Israel Land Administration* PD 54(1), 258.

[31]

-Section 31 to Justice Barak ruling in the *Ka'adan* decision (Ibid). A similar narrow definition is given by Barak in LCA 7504/95 *Yassin v. Party Registrar*, 50(2) PD 45, 62.

[32]

-CA 294/91 *Hevra Kadisha v. Lional Aria Kestenbaum*; CA 6024/97 *Shavit Fredrika v. Hevra Kadisha Gahsha Rashlatz*.

[33]

-CA 5016/96 *Horev Lior et al. v. Minister of Transportation et al.*

[34]

-HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* PD 42(2) 221.

[35]

-Women's Equal Rights Law, 5711-1951, 5 LSI 33. Israel is also a party to the Convention on the Elimination of all Forms of Discrimination against Women though this international document does not have the status of law in Israel.

[36]

-Section 21 to Justice Elon's decision (Ibid - my translation).

[37]

-HC 10001/92 *Bavli v. the Grand Rabbinical Court* 48(2) PD 221.

[38]

-CA 30771/90 *Plonit v. Ploni* 49(2) PD 528.

[39]

-Sections 14-17 to Justice Heshin's decision (Ibid).

[40]

-Israeli governments seem to be taking this task more seriously in recent years. See for example 'Olmert: Israel's non-Jews suffer from



inequality' *Jerusalem Post* Feb 21, 2008.

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