CA 6821/93
LCA 1908/94
CA 3363/94

United Mizrahi Bank Ltd.
v.

1. Migdal Cooperative Village
2. Bostan HaGalil Cooperative Village
3. Hadar Am Cooperative Village Ltd
4. El-Al Agricultural Association Ltd. CA 6821/93

1. Givat Yoav Workers Village for Cooperative Agricultural Settlement Ltd
2. Ehud Aharonov
3. Aryeh Ohad
4. Avraham Gur
5. Amiram Yifhar
6. Zvi Yitzchaki
7. Simana Amram
8. Ilan Sela
9. Ron Razon
10. David Mini
v.
1. Commercial Credit Services (Israel) Ltd
2. The Attorney General LCA 1908/94
1. Dalia Nahmias
2. Menachem Nahmias
v.
Kfar Bialik Cooperative Village Ltd LCA 3363/94

The Supreme Court Sitting as the Court of Civil Appeals
[November 9, 1995]
Before: Former Court President M. Shamgar, Court President A. Barak, Justices D. Levine, G. Bach, A. Goldberg, E. Mazza, M. Cheshin, Y. Zamir, Tz. E Tal

Appeal before the Supreme Court sitting as the Court of Civil Appeals
Appeal against decision of the Tel-Aviv District Court (Registrar H. Shtein) on 1.11.93 in application 3459/92,3655, 4071, 1630/93 (C.F 1744/91) and applications

for leave for appeal against the decision of the Tel-Aviv District Court (Registrar H. Shtein) dated 6.3.94 in application 5025/92 (C.F. 2252/91), and against the decision of the Haifa District Court (Judge S. Gobraan), dated 30.5.94 in application for leave for appeal 18/94, in which the appeal against the decision of the Head of the Execution Office in Haifa was rejected in Ex.File 14337-97-8-02. The applications were adjudicated as appeals.

The appeal in CA. 6821/93 was rejected. The appeals in LCA 1908/94 and 3363/94 were accepted, and the files were returned to the District Courts to continue adjudication.

Editor's Synopsis

The Family Agricultural Sector (Arrangements) Law was adopted by the Knesset in 1992, as part of an attempt to rehabilitate Israel's agricultural sector following a severe economic crises. To that end, the law established a body called the "rehabilitator," which was granted broad authority to settle, restructure and cancel debts that had been created up to the end of 1987. In 1993, the Knesset found it necessary to intervene again, and amended the law. Among other changes, the Family Agricultural Sector (Arrangements) (Amendment) Law, 5753-1993, redefined the debts subject to the law, and extended the applicable time period so that debts incurred until the end of 1991 also fell within the scope of the law and the authority of the rehabilitator.

Following the adoption of the Primary Law, but prior to the adoption of the Amending Law, the Knesset enacted Basic Law: Human Dignity and Liberty. Section 10 of the Basic Law stated that the Basic Law "shall not affect the validity of any Law in force prior to the commencement of the Basic Law.

CA 6821/93 concerned a suit brought by the appellant in the District Court against the respondents who had guaranteed the debt of the Cooperative Agricultural Fund Ltd. The respondents requested that the matter be transferred to the jurisdiction of the rehabilitator, in accordance with the Amending Law. The Court granted the request. The appellants argued on appeal that the Amending Law violated their property rights under s. 3 of Basic Law: Human Dignity and Liberty, and was contrary to s. 8 of that Basic Law, which establishes that there shall be no violation of rights under the Basic Law except "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required, or by regulation enacted by the virtue of express authorisation of such Law."

LCA 1908/94 concerned debts incurred by the appellants for the rental of agricultural equipment. The District Court held that the provisions of the Amending Law that extended the period of debts were incompatible with s. 8 of the Basic Law and were void. While the Amending Law served a proper purpose, the Court found that it applied selectively to a part of the public and was therefore incompatible with the values of the State of Israel.

LCA 3364/94 addressed the District Court's decision to reject the request of the appellants to transfer their matter to the jurisdiction of the rehabilitator. The Court found that the debt had been incurred in 1988 and thus did not fall within the scope of the Primary Law. The stay of proceedings and the transfer of the debt to the jurisdiction of the rehabilitator were a result of the Amending Law. The Court held that the Amending Law infringed creditors' rights beyond what was established in the Primary Law. While the Primary Law was immune to review under the provisions of s. 10 of the Basic Law, those provisions did not apply to the Amending Law, which was, therefore, subject to review under s. 8.

The three cases represented the first instances in which Israeli courts annulled a law passed by the Knesset on the grounds of unconstitutionality due to a violation of fundamental rights established in a Basic Law. Inasmuch as the three cases raised the same fundamental questions of constitutional law, the appeals were heard together before an expanded bench of nine judges of the Supreme Court.

In deciding the appeals, the Supreme Court was called upon to address the questions of whether or not the Knesset possessed constituent authority to frame a constitution and limit its own legislative authority thereby, and whether Basic Laws enacted by the Knesset enjoy supra-legislative status. After establishing the place of Basic Laws in the legislative hierarchy and the ramifications of a conflict between regular legislation and Basic Laws, the Court addressed the specific issue of whether the Amending Law violated rights established under Basic Law: Human Dignity and Liberty and whether the violation was incompatible with s. 8 of that law, and the consequences of such a violation.

Each of the nine judges wrote a separate opinion. The primary approach of the Court is set out in the opinion of President Barak. According to President Barak, the Knesset's authority to frame a constitution derives from the doctrine of constituent authority. The Knesset derives its constituent authority from the First Knesset by means of constitutional continuity. This view of the Knesset's constituent authority best reflects the national consciousness and legislative history of the State of Israel. The Knesset, therefore, acts in two capacities. It enacts laws as a regular legislature, and it adopts Basic Laws in its capacity as constituent assembly. Basic Laws so enacted enjoy supra-legislative, constitutional status. Judges Bach, Goldberg, Levin, Mazza, Tal, and Zamir concurred in their separate opinions.

Former President Shamgar based the Knesset's authority to frame a constitution upon constituent authority deriving from the Knesset's unlimited sovereignty. It is the Knesset's unlimited sovereignty that underlies its authority to frame a supra-legislative constitution that can limit the legislative power of future Knessets.

In his dissenting opinion, Justice Cheshin agreed that the First Knesset was granted the power to frame a constitution, but argued that the First Knesset's constituent authority was not transferable, and it was not transferred to subsequent Knessets. Moreover, According to Cheshin, J., constituent authority must be unequivocal, yet Court precedent and Israel's legislative history do not reflect such a clear view of the

Knesset's authority, and the legislative history of the Basic Laws does not support a conclusion that the Knesset believed it was adopting legislation of a constitutional nature in enacting them.

The Court unanimously held that although the Amending Law violated the property rights of creditors, the provisions of the Amending Law were consistent with the requirements of s. 8 of Basic Law: Human Dignity and Liberty. The appeal in CA 6821/93 was therefore dismissed, and the appeals in CLA 1908/94 and CLA 3363/94 were upheld and the decisions of the District Court were set aside.

(*Per* Shamgar, P.) The Basic Law did not infringe pre-existing laws, but applies only to laws adopted following its entry into force. The Amending Law was adopted following the entry into force of the Basic Law.

Two primary theories explain the Knesset's power to enact legislation of a constitutional nature: The theory of unlimited sovereignty and the theory of constituent authority. Of theses two theories, that of unlimited sovereignty more accurately expresses Israel's legislative history, its accepted legal concepts, and the case law of the Supreme Court.

The Knesset has the power to enact laws of every type and content, and can formally or substantively entrench the fundamental values of the State of Israel, and thereby limit its own power and that of subsequent Knessets. The extent of the Knesset's power to limit itself is a question of constitutional policy. Both the theory of unlimited sovereignty and that of constituent authority recognize the Knesset's power to limit itself.

In terms of preferred law, a Basic Law should be changed only by another Basic Law. In this regard, a distinction must be drawn between changing a right as opposed to infringing it. An infringement does not change the basic right.

(*Per* Barak, P.) The Knesset's power to adopt a constitution derives from its constituent power. The source of the Knesset's constituent power is the sovereign, that is, the people. This approach can be grounded upon three models: 1) constitutional continuity, 2) the recognition rule, 3) the best explanation for the socio-historical and legal history of the system.

Regardless of the legal situation that existed following the dissolution of the First Knesset, and even if there never was a Constituent Assembly, Israeli law currently recognizes the power of the Knesset to adopt a constitution. This is supported by the Knesset's understanding of its role, the platforms of the various political parties, the consensus of opinion of jurists and legal scholars, the decisions of the Supreme Court, and the Knesset's reaction to those decisions.

Due to the fact that a Basic Law is of a higher normative level, it can only be changed by another Basic Law.

In wielding its constituent power, the Knesset can limit its authority to change Basic laws, and thus create "rigidity" of constitutional provisions. The Knesset's power to limit itself and thus entrench the provisions of a Basic Law derives from its authority to adopt a formal constitution.

The theory of constituent power addresses the question of the Knesset's authority to limit its own power when wielding constituent power, but it does not provide an answer to the question of whether the Knesset can limit itself when it employs its normal legislative power. This question can be left for further review. We can also leave for further review the question of whether there is a substantive difference between the entrenchment of a regular law that requires an absolute majority, as opposed to a provision requiring some greater majority.

True democracy recognizes the constitutional power to entrench basic human rights against the power of the majority. This limit upon majority rule does not infringe democracy, but rather realizes it. Granting the majority the power to harm the rights of the minority is undemocratic. Protecting the individual, the minority, and the fundamental values of the legal system against the power of the majority is the democratic act.

A democracy of the majority alone that is not accompanied by a democracy of values is but a formal, statistical democracy. True democracy limits the power of the majority in order to protect society's values.

The human rights defined in the Basic Laws in absolute terms are relative rights. Human dignity, liberty, property, movement, privacy and freedom of occupation are not absolute rights, but can be infringed in order to preserve the social framework. The constitutionality of the infringement does not diminish the constitutional status of human rights. The constitutionality of an infringement means that a regular law that meets the conditions established by the constitution can infringe a constitutionally protected human right.

When the Basic Laws do not state the remedy for the infringement of a constitutional right, legal tradition provides the conclusion that the remedy for an unconstitutional law is abrogation by the courts.

A law is presumed to be constitutional, and a party seeking to challenge that presumption bears the burden of proof. As for the constitutionality of an infringement, the burden falls to the party arguing that the infringement is constitutional. This is the appropriate approach, as it places the burden upon the party best suited to bear it, viz. the state. However, inasmuch as the issue does not arise in the case before the Court, it can be left for further review.

(*Per* Cheshin, J.) In addressing the question of whether the Knesset possesses constituent power, a distinction must be drawn between the power to adopt a formal constitution and the power to adopt entrenched laws. The power to adopt entrenched laws does not, in and of itself, imply constituent power.

When the Constituent Assembly – the First Knesset – completed its term without adopting a constitution, the Knesset's right to adopt a constitution in accordance with the Declaration of Independence ceased. The only continuity that was preserved was in regard to legislation, not constitutional issues. The Constituent Assembly's authority to adopt a constitution was a one-time, non-transferable power.

The Knesset does not have constituent authority, nor does it enjoy unlimited sovereignty. The Knesset is the Knesset, and it possesses only legislative authority.

Insofar as the Knesset's power to limit itself, a distinction must be drawn between procedural limitation by requiring a special majority, and substantive limitation.

Once the Knesset has established legislative procedures, it must follow those procedures until it expressly repeals them and replaces them with new procedures. The establishing of new procedures must be carried out in accordance with the old procedures. In other words, the Knesset is limited by the procedures that it establishes in regard to legislative procedure.

The question of quorum and that of voting are matters of organizational procedure. The voting rules are established in Basic Law: The Knesset, which establishes that the Knesset decides in accordance with the democratic principle of majority and minority, and that the votes of absent and abstaining members are not counted. In the absence of a constitution that establishes otherwise, the Knesset can decide upon any combination of the variables of quorum, absentees and abstainers, and any combination will be legitimate and legal. The one limitation is that of the principle of democracy. The basic democratic principle of "majority" must be preserved.

A requirement of an absolute majority of sixty-one votes is not only consistent with the majority principle it is the principle itself. An absolute majority is not a special or privileged majority, but rather it is the true majority derived from the democratic theory of majority. A requirement of an absolute majority is not an instance of self-limitation. Such a requirement limits the possibility of abstention or setting off, but the ability to abstain or to arrange a set off is not one of the elected representative's rights.

In the current legal regime, and in the absence of the power to adopt a constitution, a provision requiring a majority greater than sixty-one votes is manifestly undemocratic. A sixty-one vote majority is the upper limit, and in establishing anything beyond that the Knesset deviates from its authority.

The power to abrogate Knesset legislation should be reserved exclusively to the High Court of Justice. The doctrine that applies to secondary legislation is not appropriate to primary legislation.

Once it has been shown that a law infringes a basic right, the burden of proof falls to the party claiming that the law is constitutional. The presumption that the law is constitutional applies to the secondary evidentiary burden, as opposed to the burden of proof that must be born by the governmental authorities.

(*Per* D. Levin, J.) The Basic Laws constitute chapters of the Israeli constitution. The framers of Israel's Declaration of Independence intended that legislation be effected on two parallel levels: A constitution to be adopted by the constituent authority, which would express the fundamental human rights on the basis of the vision of Israel's prophets, and the regular, day-to-day legislation to be conducted by the legislature.

The Declaration of Independence indicates that the source of the Knesset's authority to adopt a constitution is its constituent power. The fact that there have been delays in the process of adopting a constitution since the election of the Constituent Assembly does not change or influence the source of the legislature's authority in advancing constitutional legislation. Constituent power continues to exist until the task of adopting a constitution is completed.

The party claiming the infringement of a basic right or who challenges the lawfulness of a law due to such infringement bears the burden of showing that a constitutionally protected basic right was infringed. If that burden is met, then the burden of showing that the law meets the justifying conditions passes to the party seeking to uphold the law.

(*Per* Zamir, J.) The Knesset's power to limit itself, both formally and substantively, derives from its status as a constituent assembly. The theory of constituent power provides an adequate theoretical explanation and a practical tool for the Knesset and the Court to address constitutional issues, and is the preferable theory.

(*Per* Bach, J.) In principle, there is no difference between a requirement of a sixty-one-vote majority to amend or repeal a law and a more extreme requirement. A law is adopted by a regular majority of those participating in the vote. Absence or abstention is the right of every Knesset member. If the Knesset is not empowered to adopt constitutional legislation, and if a subsequent Knesset can repeal any law by the normal means, then it is difficult to understand why a law requiring a sixty-one-vote majority would be an exception.

The fear of negative phenomena that may materialize in the future by recognition of the Knesset's unlimited power to employ Basic Laws to limit the power of subsequent Knessets to change or amend Basic Laws is more theoretical than real. It may be assumed that in a proper democracy, certain things will not occur.

The question of who bears the burden of proof is very relevant to the question of whether the Amending Law meets the requirements of s. 8 of Basic Law: Human Dignity and Liberty, and should be addressed. Once established that the law infringes the right to property, it is necessary to ask who must bear the burden of showing that the law meets the requirements of the Basic Law.

A law that infringes liberty or property or some other basic right is not presumed, a priori, to be void, and it will not be deemed void unless proven otherwise. The

presumption must be that a law has been duly enacted, unless it is shown that it infringes a basic right and does not meet the requirements of s. 8 of the Basic Law. Anyone claiming that a law should be declared void must convince the court of the facts of the infringement and show that the law does not meet the conditions set out in the Basic Law.

(*Per* Tal, J.) The case before the Court does not require that the Court decide upon the fundamental questions regarding the powers of the legislature and its status, and they may be left for the appropriate time. For the purpose of the matter before the Court, it is sufficient to establish the normatively superior status of the Basic Laws by which the Knesset's regular legislation is reviewed.

(*Per* Goldberg, J.) Harmony amongst the branches of government requires drawing a "red line" between judicial review of legislation and involvement in legislation. The court must be careful not to cross the line. The court is not a substitute for the legislature, and it does not supplant the legislature's discretion with its own. Therefore, only a finding that the legislature did not meet the conditions of s. 8 of Basic Law: Human Dignity and Liberty requires that a law be declared unconstitutional. Any other intervention by the court would blur the borders required by the separation of powers.

In examining the constitutionality of a law, the presumption is that the law is constitutional, and any doubt must weigh in favor of upholding the law rather than voiding it. Therefore, the party arguing against the law must bear the burden of proof that the law is unconstitutional. That party must show that the law extremely deviates from the scope of a reasonable infringement intended for a proper purpose. The burden also includes the secondary evidentiary burden of showing that there is a specific alternative that would realize the proper purpose while inflicting substantially lesser harm to the protected right.

(*Per* Mazza, J.) In terms of the burden of proof, the state bears the burden of convincing the court that the infringement is intended for a proper purpose, and that the means chosen are appropriate to achieving that purpose. The party claiming that the infringement is unconstitutional bears the burden of showing that the government should have chosen a less harmful alternative. However, it is not clear that this must always be the case. It may be that this is the correct approach only in regard to economic harm, whereas the infringement of other basic rights may justify placing the entire burden upon the state.

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Basic Law: The Government: ss. 42, 50 (c), 50 (d), 56, 56 (d), 59

Basic Law: Human Dignity and Liberty, ss. 1, 1A, 2, 3, 5, 8, 10, 11,12
Basic Law: Israel Lands
Basic Law: Jerusalem, The Capital of Israel
Basic Law: The Judiciary: ss. 10, 17, 22
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Second Knesset (Transition) Law, 1951, ss. 1, 5, 6, 9, 10.
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[3] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; **IsrSJ 1 90**.

[4] HCJ 75/76 *'Hilron' Ltd v. Fruit Production and Marketing Board (Fruit Board)* [1976] IsrSC 30(3) 645.

[5] CA 723/74 *HaAretz Newspaper Ltd v. Israel Electric Corporation* [1977] IsrSC 31(2) 281; **IsrSJ 9 226**.

[6] HCJ 337/81 *Miterani v. Minister of Transport* [1983] IsrSC 37(3) 337.

[7] EA 2/84 *Neiman v. Chairman of Elections for Eleventh Knesset; Avneri v. Chairman of Central Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; **IsrSJ 8 83**.

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[35] HCJ 1/81 *Shiran v. Broadcasting Authority* [1981] IsrSC 35(3) 365.
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[40] HCJ 120/73 *Tobis v. Government of Israel* [1973] IsrSC 27(1) 757.
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[50] HCJ 693/91 *Efrat v. Director of Population Register, Ministry of Interior* [1993] IsrSC 47(1) 749.
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For the appellant in HCJ 6821/93 — M. Asif.
For respondent 1 in LCA 6821/93 — A. Vinder, Z. Slilat.
For respondent 2 in LCA 6821/93 — Z. Moshe.
For respondent 3 in LCA 6821/93 — M. Cohen.
For respondent 4 in CA 6821/93 — Y. Amitai.
For petitioners in LCA 1968/94 — D. Dinai, M. Dinai.
For respondent 1 in LCA 1908/94 — A. Posner, E. Golan.

JUDGMENT

President (Ret) M. Shamgar

1. *The provisions of the Principal Law.*

The central question in each of the appeals before this court is identical: Does the Family Agricultural Sector (Arrangements) (Amendment) Law, 5753-1993 (hereinafter – the Amending Law) violate the provisions of Basic Law: Human Dignity and Liberty, and should it therefore be regarded as void. Consequently, we have consolidated our hearing of the three appeals.

2. As indicated by its title, the Amending Law amends the Family Agricultural Sector (Arrangements) Law, 5752-1992 (hereinafter – the Principal Law), which came into force on August 13, 1993.

As stated in the Explanatory Note cited in the draft law of the Family Agricultural Sector (Arrangements) Law, 5752-1991, the Principal Law purported to forge a new framework for alleviating the deep crisis that had already beset the agricultural sector a number of years earlier. Generally, its thrust was, on the one hand, to facilitate the rehabilitation of the agricultural sector, being premised on the preference of rehabilitation over liquidation, and on the other hand, it avoids the channeling of public funds for purposes of rehabilitation.

Legislative intervention in formulating arrangements for the agricultural sector is apparently unavoidable, given the failure of the various arrangements that preceded it. Its proponents contend that "they left the agricultural sector in a deep crisis and at times even exacerbated the situation" (draft law of the Family Agricultural Sector (Arrangements) Law, p. 92).

(b) The provisions of the Principal Law stipulate that a 'rehabilitator' may be appointed for 'an agricultural organization,' for agricultural corporations connected thereto, or for 'agricultural associations' included in the organization and its members, or for what the law refers to as 'a rehabilitation zone.' The 'rehabilitator' does precisely that. He is charged with compiling the data pertaining to the debts, ascertaining resources, and settling debts. An 'agricultural association' is a cooperative association classified as a *moshav ovdim* (=workers arrangement), a *moshav shitufi (*=cooperative arrangement) or a *kfar shitufi* (=cooperative village). The law further relates to all of the *kibbutzim* (=collective arrangements) in the Golan, the Jordan Valley, and in the other locations specified in the First Schedule, and the corporations specified in the Second Schedule. An 'agricultural organization' is a

cooperative association whose members include agricultural associations, as specified in the Third Schedule of the Law.

(c) The Principal Law provided that a proceeding dealing with a basic debt or the guarantee of a basic debt could neither be initiated nor continued save in accordance with the provisions of the aforementioned law (s. 7 of the Law). The rehabilitator was to determine both the basic debt and the total sum owed by each agricultural unit, in accordance with the all the information at his disposal. The terms 'debt' and 'basic debt' were defined in s. 1 of the Principal Law, as follows:

"'debt' – principal, linkage differentials, interest, compounded interest, commission and expenses';

basic debt – a debt incurred *during the period that terminated on the determining date*, or a debt incurred in order to pay a debt as stated, or a debt as stated, determined in a judgment, even if given after the determining date, and which is one of the following: (1) a debt of an agricultural association; (2) the debt of an agricultural organization; (3) the debt of an agricultural unit, apart from an agricultural association and an agricultural organization, which stems from his business as an agriculturalist" emphasis mine – M.S.)

"the determining date" is the 10th Tevet 5748 - 31 December 1987. This means that, in essence, the Law dealt with debts incurred until that date.

(d) Where a proceeding was transferred to the rehabilitator as stated, other proceedings being conducted against the same debtor relating to the basic debt will also be transferred to the rehabilitator.

(e) A creditor or debtor in a proceeding for collection of the basic debt or a guarantee for the basic debt may notify the person conducting the proceeding that the provisions of the aforementioned law are applicable to him. If such notice is given, the person conducting the proceeding will order the discontinuation of the proceeding and its transfer to the rehabilitator, if satisfied that the conditions for its discontinuation have been satisfied Where the debtor is an agriculturalist, or member of an agricultural association, he may inform the person conducting the proceeding that he does not desire the application of the provisions of the law."

3. Section 15 of the Principal Law prescribes that if the rehabilitator determines the value of the basic debt of the agricultural unit, he shall deduct a sum equal to twenty percent of the debt. Should the rehabilitator determine in a reasoned decision that special, justifying circumstances obtain, he may reduce an additional sum which may not exceed ten percent of the debt.

Section 21 of the Principal Law both adds to and broadens the authority for cancellation of debts:

> "21. Cancellation of Debts: Where the rehabilitator deems that the debtor is unable to repay his debt even after the realization of his assets under section 20, he is authorized to cancel the additional debts, at a rate that does not exceed forty percent of the debt in arrangement. Where the debtor was an agricultural association which is a border arrangement, a member of the said association, or an agriculturalist resident on the border, the rehabilitator shall cancel the balance of the debt that the debtor is unable to repay."

Regarding the handling of debts, s. 11 of the Principal Law completes the picture, providing the following determinations which the rehabilitator may make for each agricultural unit, in accordance with the provisions of the law: (1) the sum of his debts to the various creditors; (2) his repayment capacity; (3) the sum of the debt that will be paid, either in cash or installments; (4) the sum of the debt by reason of the replacement of the guarantee under section 16 of the Principal Law; (5) the sums of the reductions under the aforementioned s. 15; (6) whether assets are to be realized for payment of the debt; (7) whether part of the debt should be cancelled, and if so, at what rate; (8) the manner in which the debt is allocated between the various creditors, and the manner of allocating the consideration received from realization of assets.

Where the rehabilitator determines all of the above, it will be regarded as the arrangement of the agricultural unit's debt, and the rehabilitator will notify the creditors and the debtors of the balance, to which they may object within thirty days after notice has been given. Where special circumstances obtain, the rehabilitator is permitted to extend the period. Where an objection is filed, the rehabilitator rules on the debts and rights following a hearing, after which he informs the parties of his decision.

Provisions of the Law – The Amending Law

4. The explanatory note to the Amending Law of 5753 (Explanatory Note to Family Agricultural Sector (Arrangements) (Amendment) Law 5753-1993), which preceded the Amending Law, summarily states that "in the wake of

judgments pertaining to the debt, it became necessary to clarify a number of matters that were stipulated in the proposal…." (*ibid* p. 292)

Section 1 of the Amending Law prescribes new definitions for the terms "debt," "tax debts," and "total debt" (which in the wake of the amendment were included in section 1 [of the Principal Law]), as follows:

"'debt' – a financial obligation irrespective of whether its date of payment has arrived or not, including the principal, linkage differentials, interest, compound interest, commission, and expenses, including tax debts; "tax debt" – any sum owed by a person pursuant to any legislation concerning the imposition of tax or compulsory payment that the Finance Minister charged with implementation of collection thereof; "total debt" – the debt of a financial unit as of the 24th Tevet 5752 (31 December 1991) and with respect to an agriculturalist and a member of an agricultural association – any debt as stated, provided that it stem from his occupation as an agriculturalist, provided that regarding a debt owed by a member of an agricultural association to the agricultural association of which he is a member, any debt as stated, unless the agricultural association proves that a particular debt did not stem from his occupation as an agriculturalist."

In the definition of the "basic debt" the concluding section was amended, and it now states that the aforementioned term includes "a debt that was incurred after the determining date for payment of the debt (in accordance with its definition in the opening part of the said definition – M.S), including as a result of an arrangement or the recycling of the debt."

As mentioned above, s. 7 of the Principal Law deals with the freezing of proceedings, and by force of the Amending Law, it deals with the "total debt" – a term which as stated, was defined anew. Instead of referring to the basic debt as referred to in the Principal Law, the components of the debt for arrangement were enumerated anew in section 17, as they were amended in the Amending Law, as follows:

'The debt for Arrangement: 17 (a) The rehabilitator will fix the arrangement debt in accordance with the total debt, after having deducted, for purposes of the arrangement, the reductions stipulated in section 15, and having added the guarantee substitute pursuant to section 16, all of the above to be re-valued as of 24th Tevet, 5752

(31 December 1991) (hereinafter – "arrangement debt").

(b) The reduction will be re-valued in accordance with the consumer price index and the addition of 7% linked annual interest.

(c) The arrangement debt will be re-evaluated until the arrangement date by being linked to the consumer price index, according to the rate of the increase in the index as known on the arrangement date, as opposed to the index for the month of November 1991, and the addition of linked interest as stated, at the rate of 5% per annum.

(d) Where a arrangement debt was re-evaluated pursuant to sub-section (c), all other debts owed by reason of that debt, beginning as of 29 Tevet 5752 (31 December 1991), due to interest, linkage differentials, exchange rate differentials, commissions, and obligations for which any creditor customarily charges all of his debtors, apart from commission for issuing a credit line with those creditors who normally charge such commission – shall be void.'

The law also introduced many other additional adjustments that need not be enumerated here.

The thrust of the Amending Law is thus expressed in the extension of the period during which the debts incurred are to be handled by the rehabilitator - hence the date 31 December1997 was replaced by 31 December 1991. It further provided for the reevaluation of debts as stated in the aforementioned definition of "the arrangement debt," and it introduced additional changes that are not merely technical.

This brings us to the appeal at hand.

The Judgment of the Lower Court

5. In LCA 1908/94, which we treated as if leave for appeal had been granted, application for leave for appeal was filed against the decision of the Tel-Aviv Jaffa District Court (CF 252/92; Motion 5025/92*). The appellants contest the lower court's determinations as they relate to the provisions of the Amending Law, to the extent that they broaden the rehabilitator's authority to clarify the debts defined as a "basic debt" and to settle them, while concurrently denying that authority to the court. The claim is that these determinations do not satisfy the requirements of the limitation clause of section 8 of the Basic Law: Human Dignity and Liberty, and are therefore void; and that the appellants' rental debts for which payment is due after the 31 December 1987 cannot be considered as a basic debt.

The proceedings began when the respondent (hereinafter – "Credit Services") filed a monetary action against the appellants (the *moshav* and nine of its members), for a debt incurred for the renting of equipment, and a further request for the return of the equipment. The appellants filed an application for a stay of the proceedings and their transfer to the rehabilitator, pursuant to provision 7 (b)(1) of the Principal Law, as per its wording at the time, namely that a basic debt is a debt of an agricultural entity incurred during the period that terminated on 31 December 1987.

Credit Services opposed the request, arguing that the claim related to the balance of the debt as of 15 December 1991, as a result of which it could be not be considered as a "basic debt." The Amending Law was published on 13 August 1993. The Amending Law broadened the provisions of s. 7 so that a stay of proceedings could be sought in respect of a debt that wholly or partly constituted a total debt or a guarantee for a total debt. As mentioned, a total debt is a debt of an agricultural entity as of 21 December 1991. In other words, the requirement to grant an application to transfer proceedings to the rehabilitator extends for an additional four years after time of the amendment. The claim in the case at hand relates to a debt dated 15 November 1991, hence it falls within the period to which the Amending Law applies. Credit Services argued that the provisions of the Amending Law were invalid, and that the court was not obliged to stay proceedings pertaining to the overall debt. Moreover, it was argued that the distinction between a basic debt and a non-basic debt was still valid and relevant for purposes of ruling on the application for a stay of proceedings.

Credit Services argued in the lower court and before this court that the Amending Law infringes a right protected by the Basic Law: , and does not satisfy the requirements stipulated in s. 8 which provides that:

> 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.'

As stated, the violated right is the right conferred by s. 3 of the Basic Law, which provides that there shall be no violation of a person's property. In the instant case, the violation affects the creditors, including the Credit Services.

Section 10 of the Basic Law provides that the Basic Law will not affect the validity of any law (*din*) in effect prior to the commencement of the Basic Law, i.e. on 20 Adar Beth 5752 (25 March 1992). The preliminary question addressed by the lower court was, therefore, whether s. 10 also applied to amendments of a law already in effect before 25 March 1992, if they came into force after the commencement of the Basic Law. The lower court opined that the legislation of new provisions for existing laws, following the commencement of the Basic Law, is subject to review in accordance with the provisions of the Basic Law; this was the legislative intention as evidenced in Basic Law. In this context, the court distinguished between provisions without which the existing law (protected by s. 10) could not be applied, and provisions that constituted a new arrangement, not essential for the continued activity under the existing law.

The court noted that it was inconceivable that the Basic Law protected rights infringed by laws enacted after the Basic Law, but did not offer such protection if the later infringing law was enacted as an amendment of an existing law, and was not essential for the implementation of the existing law. Any other interpretation would render meaningless all the provisions of Basic Laws which restrict the scope for violating a Basic Law, such as s. 8 of Basic Law: Human Dignity and Liberty. According to this test, the Principal Law would be protected by force of s. 10, but that protection would not extend to the aforementioned amendment of 5753 [1993], which actually broadened the infringement of property rights.

The District Court further commented that the aforementioned s. 8 is not an entrenched provision of a Basic Law, but nonetheless, a Basic Law by definition enjoys normative supremacy, and all subsequent legislation must

adapt itself to the provisions of the Basic Law, in accordance with its limitation clause. This premise yields the conclusion that the court is authorized to examine the consistency of the later law with the Basic Law, and to draw conclusions from its inconsistency with the provisions of the Basic Law. The Amending Law was enacted after the enactment of the Basic Law, and as such, the court is empowered to examine whether its provisions violate a right protected under the Basic Law. Should the answer be in the affirmative, it continues to examine whether the provisions of the Amending Law satisfy the requirements enumerated in s. 8 of the Basic Law. In accordance with that examination the court can determine the constitutionality of the Amending Law.

The lower court dismissed the argument of the appellant's learned attorney, that the Amending Law did not infringe the right of property. He pointed out that the Amending Law broadened the range of creditors included in the purview of the law under discussion, and even broadened the scope of infringed property rights. In doing so, it abrogated the court's authority to preside over proceedings concerning debts created during four years additional to those stipulated in the Principal Law, ordering instead that they be transferred to the rehabilitator.

According to the lower court, just as the Principal Law included far reaching provisions that infringe the property rights of creditors with respect to the basic debt by preventing them from litigating before the court and subordinating them to the rehabilitator's authority, so too, the Amending Law contains similar, far reaching provisions that infringe the property rights of those creditors included within its purview, for debts created during the four years added on to the years stipulated in the Principal Law. In doing so, the Amending Law negated the right of these creditors to litigate with respect to their property rights in these debts, subordinating them to the rehabilitator's authority. This is a violation of the creditor's property rights (LCA 1759/93 *Cohen v. Bank Hapoalim Ltd,* [1]).

The lower court held that the infringement of the creditor's property rights in a debt other than a basic debt finds expression in the duty to transfer the debt for treatment by the rehabilitator, and denying him the option of having it adjudicated in court and of enforcing it in the Execution Office. The infringement is the result of the conferral of authority upon the rehabilitator to spread debt payments and to give instructions to foreclose on the debtor's assets, thereby limiting the creditor's right to foreclose on the asset, as he could have done in the Execution Office. The rehabilitator is also authorized

to cancel part of the debtor's debt.

This led the court to examine the provisions of s. 8 in order to examine whether the violation of the property right in the Amending Law satisfies the conditions of the limitation clause under s. 8. In doing so, the court erred in its description of the background facts. The District Court mistakenly thought that the Principal Law was not applicable to the entire kibbutz sector. It also deviated from examining the provisions of the Amending Law only, and instead examined the conformity of the Principal Law to the conditions of s. 8 of the Basic Law. The court concluded that comparison of the statute's provisions to its declared purpose in the Explanatory Note reveals an unexplained and imbalanced preference for that part of the agricultural sector that is governed by the provisions of the Principal Law and the Amending Law, and discrimination against the sector to whom the provisions do not apply. The court ruled that, against the background of the Explanatory Note that presents the law as a panacea for the entire sector, the unexplained preference for a certain sector is inconsistent with the democratic principles of the State of Israel.

Instead of ensuring that the financial burden flowing from the provisions of the Principal Law and the Amending Law would be born by the entire public, it was only imposed on part of the public (i.e. on the creditors of debtors belonging to the agricultural sector, to whom the law applies). Placing the burden on only a part of the public creates inequality. The lower court contended that the derogation from contractual undertakings and the duty of keeping promises is anathema to an appropriate societal-value based arrangement. Legislation of this kind is inconsistent with the values of the State of Israel.

The legislature's attempt to rescue and rehabilitate the agricultural sector is a commendable goal, but imposing this goal on just a part of the public amounts to the realization of that goal in a manner that is inconsistent with the values of the State of Israel. Regarding the question of whether the Amending Law serves an appropriate purpose, the lower court noted that there was nothing to indicate that broadening the violation of property rights by way of the Amending Law was done for an appropriate purpose, i.e. an objective that could not have been attained by way of the Principal Law.

No indication was given of the consideration of other alternatives for achieving that objective, apart from the arbitrary violation of private property. Consequently, it has been neither explained nor proved that the infringement of the Amending Law is to an extent that does not exceed that which is

necessary. In the lower court's view, the absence of balances in the Amending Law and the critical mass of violations of rights, warrant the conclusion that the law is inconsistent with the values of the State and that its infringement exceeds that which is necessary.

Under the above analysis, the provisions of the Amending Law, to the extent that they broaden the rehabilitator's exclusive authority to examine arrangement debts that are not considered as basic debts, do not fulfill the requirements of the limitation clause in s. 8 of Basic Law: Human Dignity and Liberty. Accordingly, these provisions are void. In view of this, the court ordered the respondents to present evidence showing that the debt at issue was a basic debt, as defined in the Principal Law (i.e. prior to the commencement of the Amending Law).

6. In CA 6821/93, the lower court adjudicated an action against nine defendants, based on their guarantee to the bank for a debt of the Collective Agricultural Fund Ltd in liquidation). The five respondents filed notice regarding the discontinuation of the action and its transfer to the rehabilitator, in reliance on s. 7 of the Principal Law. In view of the section's amendment and its coming into force on 13 August 1993, they argued that it would be improper to continue proceedings concerning the debt guarantee, save in accordance with the Amending Law, given that if it was proven to the court's satisfaction that part of the debt was a guarantee for the total debt, then it would be bound to discontinue the proceedings regarding the guarantee and transfer them to the rehabilitator.

The court noted that whereas the debts of the farmers and the members of the agricultural association included in the purview of a total debt are only those which stemmed from the debtors' work as farmers, this restriction did not apply to an agricultural entity not defined as a farmer and a member of an agricultural association. Any debt of an agricultural entity, which is not a farmer and member of an agricultural association, is a total debt, irrespective of its source and how it was created, provided that it existed on 31 December 1991.

It is not disputed that the respondents incurred their debt, the subject of the action, by force of their guarantee to a private company, which was not an agricultural company, and hence its debt was not a total debt. The question requiring our decision is whether the debt of an agricultural entity as of 31 December 1991, which arose from a guarantee for a debt that was not a total debt, is nonetheless a "total debt" for the purposes of the law. According to the definition of the term "total debt" in Amending Law, the answer is in the

affirmative. As explained above, a total debt is any debt of an agricultural entity, apart from that of a farmer and a member of an agricultural association of 31 December 1991, regardless of its source.

What emerges is that the court's view was that the statement of claim indicated that the proceeding related to the respondents' total debt. The proceeding should therefore be discontinued and referred to the rehabilitator. This was the grounds of the appeal before us. It was only upon appeal that the appellant claimed that the Amending Law contravened the provisions of s. 8 of the Basic Law, and that this was grounds for invalidating it. We therefore joined this appeal to the current litigation.

7. In LCA 3363/94, an application for leave of appeal was filed against the District Court's decision (LCA 18/94), in which the application for leave of appeal against the decision in Execution File (Haifa) 02-14337-978 was adjudicated as the appeal itself. We adjudicated the application as if it were the appeal itself.

In the lower court's aforementioned decision, it decided not to stay the proceedings against the appellants, not to transfer them to the rehabilitator, and to overturn the decision of the Head of the Execution Office. The court held that the litigation related to a debt that was incurred in 1988. The need to establish a date resulted from the fact that the total debt in the main file was, in the lower court's view, only vaguely defined. It will be recalled that it referred to "(1) the debt on a particular date, as determined by the rehabilitator…"; and in sub-section (2) "regarding an agricultural corporation – the debt on a particular date as established by the rehabilitator…" In the lower court's opinion this definition yielded an unsatisfactory result, because it would in fact lead to discrimination between different categories of debtors (as well as between the different creditors) inasmuch as one standard date was not fixed for all of them. The Amending Law accordingly fixed a standard date for all of the debtors.

The court noted that the actual fixing of the date on 31 December 1991 in the definition of the total amended debt did not infringe the creditors' property rights. The basis of the infringement derived from the fact that fixing this date forced the creditors to terminate the proceedings (or not to commence them) with respect to the debt, if it was proven to the satisfaction of the court, the head of the Execution Office, the Registrar or the arbitrator, that the debt under adjudication was either partially or entirely a total debt or a guarantee for a total debt. Under the Principal Law, the proceedings would only be frozen if it were proven that the basic debt was incurred after the period

ending on 31 December 1987.

The court mentioned that from the moment that the proceedings were frozen and transferred to the rehabilitator, the latter was authorized to do the following:

1) to rule that the debt would be spread out for payment over a period that would not exceed seventeen years and six months from the date of the arrangement (s. 19 (a) of the Principal Law after its amendment by the Amending Law). The court regarded this as infringing the creditors' right to foreclose on their property during the period of debt installments because, had the adjudication not been transferred to the rehabilitator (under the Principal Law), the duration of the installments period would not have been fixed.

(2) Under s. 20 of the Principal Law after its amendment by the Amending Law, the rehabilitator was entitled to order foreclosure on the non-agricultural assets of the debtor, apart from on his residential dwelling, providential funds, and assets for production as specified in ss. (b)(3)(a). The provisions of this section similarly infringe the creditor's property when they are not consistent with the other rules governing foreclosure, receiving or execution proceedings.

There was a similar broadening of the authority to strike out debts at a rate that did not exceed forty percent of the settled debt, and there was a concurrent broadening of the basis for the debts to be settled, which also related to the total debt and not just to the basic debt. It therefore follows that the Amending Law infringes the creditors' property, above and beyond the provisions of the Principal Law.

The commencement date of the Principal Law preceded that of the Basic Law. However, s. 10 of the Basic Law does not relate to legislative amendments enacted after the commencement of the Basic Law, and does not exclude them from the category of provisions that require examination and assessment in accordance with s. 8 of the Basic Law. The normative entrenchment appears in the "limitation clause" of the Basic Law, which restricts the legislature's authority in accordance with the provisions established therein. Relying on the limitation clause, the court considered itself authorized to declare the invalidity of the law that postdated the Basic Law, and which in the court's view did not satisfy the conditions stipulated in the limitation clause. In view of the invalidity of the Amending Law, the court ruled that the new final date should be ignored, i.e. 31 December1991, and that the provision in the Principal Law that allowed the rehabilitator to determine a specific date for each single debtor should be restored, (s. 12 of

the Principal Law). Consequently, the lower court cancelled the decision of the Head of the Execution Office, and returned the file to the Execution Office instead of transferring it to the rehabilitator. This gave rise to the current appeal.

8. In conclusion, each the three files, briefly summarized above, raise an identical question, namely: What is the legal validity of the Amending Law in view of the provisions of Basic Law: Human Dignity and Liberty, and is the infringement of property therein constitutional?

9. *Basic Law: Human Dignity and Liberty*

(a) The examination of the three files forming the subject of our deliberations will proceed in the following order:

(1) Section 10 of the Basic Law provides that nothing in the Basic Law shall detract from the validity of the law that was in force prior to the commencement of the Basic Law. Accordingly, we will first examine the application of the Basic Law to an amendment of the existing law, in so far as the Basic Law is not applicable to the existing law itself. Should we conclude that s. 10 of the Basic Law applies to an amendment, it terminates our discussion of the question of constitutionality, because the import of such a conclusion would be that the Amending Law is protected by s. 10, and the substantive provisions of the Basic Law are not applicable to it. Should we conclude that the Amending Law does not fall within the purview of s. 10 then we will proceed to the following stages of examination:

(2) At the second stage we will examine the principles guiding constitutional legislation.

(3) At the third stage we will examine the application of s. 3 of the Basic Law (protection of property) to the Amending Law.

(4) Should we conclude that s. 3 of the Basic Law is applicable to the instant case in the sense that the Amending Law infringes the right of property, we will proceed to the final stage of the examination: We will have to decide whether the Amending Law satisfies the requirements of s. 8 of the Basic Law, which bears the title "Infringement of Rights," and which enumerates the conditions for the validity of a law, notwithstanding its infringement of basic rights as evidenced by its provisions.

(b) For clarification of the data, we reiterate that our concern is with an amendment to the Principal Law.

The Principal Law came into force on the 12 March 1992. The Basic Law

came into force on 25 March 1992, and the Amending Law came into force on the 13 August 1993.

In other words, the Principal Law came into force prior to the Basic Law, but the Amending Law was enacted after the commencement of the Basic Law. Our first question will therefore be the question of the application of the Basic Law to the Amending Law.

The Application of the Basic Law to the Amendment of the Existing Law

(a) Section 10 of the Basic Law provides as follows:

> 'Validity of Laws This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.'

Regarding the applicable law before the effective date of the Basic Law, i.e. 25 March 1992, no question arises in the present context. The Principal Law came into effect on 12 March 1992, admittedly, just a few days before the commencement date of the Basic Law. Nonetheless, the unequivocal wording of s. 10 removes the Principal Law from the category of laws that might be influenced, for good and for bad, by the Basic Law's provisions.

The question that must occupy us concerns the implications and the influence of the Basic Law on the Amending Law in this case. In terms of the pertinent dates, the picture is simple. The Amendment came into force on the 13 August 1993, i.e. a date following the commencement of the Basic Law. Plainly, therefore, the Amendment is governed by the Basic Law. The Basic Law does not affect the validity of the law in existence prior to its own commencement, from which one can infer that it does apply to all legislation enacted after its commencement, and may even derogate therefrom. The Amending Law did not exist before the commencement of the Basic Law, and so, by the wording of s. 10, the Basic Law is applicable to the Amending Law. Needless to say, this still does not affect the validity of the Amending Law, for even if subject to the Basic Law, it is still necessary to conduct the examination in accordance with sections 3 or 8 of the Basic Law, or both of them.

(b) Firstly, however we will dispose of the more far-reaching arguments, which attempt to support the respondents' claim that the Amending Law is not governed by the Basic Law despite the fact that it was enacted after it. They claim that a legislative amendment follows the principal law; it relates to its provisions and does not deviate from the principles established therein, irrespective of whether its adjustments and changes are of a practical nature, or on the level of law or principle. The ancillary follows the principal, and an

amendment should therefore be regarded as part of the principal law. Just as the principal law is not subject to the Basic Law, so too the amendment at issue before us should be exempt.

Alternatively, it was claimed that there may be cases in which an amendment constitutes a substantive change and innovation in the law, and should be regarded independently. Thus, every amendment must be examined in accordance with its substance. The argument in our case is that the amendment is not a substantive one, and that the Amending Law treats of the same subjects as the Principal Law, of which it forms a part.

11. From a legal standpoint, I cannot accept the arguments treating of the application of s. 10 to the Amending Law as cited above, that are intended to persuade us that the Basic Law does not apply to the Amending Law. Furthermore, the proposed hypothesis also raises numerous practical difficulties.

The innovation of the Basic Law was its establishment of criteria for the examination of the constitutionality and validity of a law. It created new, substantive criteria, unprecedented, apart from the beginning of s. 4 of Basic Law: The Knesset. It established norms for the examination of the contents of a law, and subjected all governmental agencies to the duty of abiding by those norms. Needless to say, the court, too, is a governmental agency, serving as the judicial branch, which is one of the three branches of government under our constitutional structure (HCJ *Flatto Sharon v. Knesset Committee*, (hereinafter the *Flatto Sharon* case, [2], at p. 141).

The legislature drafted s. 10 because it was aware that laws enacted prior to the Basic Law contradicted it. The legislature did not wish a sudden upheaval of the existing law, preferring legal stability. In its view, the existing law required systematic, cautious examination, assessment and screening, prior to subjecting it to the norms of the Basic Law. This process is not required with respect to a statutory amendment, just as it is not required with respect to a new law. The legislative stage is the appropriate stage for the examination and assessment of new legislation or statutory amendment, in terms of consistency with the protection of human rights afforded by the Basic Law, as is the legislature's custom with draft laws.

A principal law and a statutory amendment exist in their own right. The legislative authority deliberates over any statutory amendment from the time of its inception, just as it examines all primary legislation. Indeed, each of its provisions operates as primary legislation irrespective of its substantive

connection to the provisions of the existing law. Adoption of a statutory amendment that refers to existing legislation, instead of enacting separate and independent legislation lacking a substantive connection to the existing legislation, results from the desire to organize the law in a rational, organized manner, concentrating all of the provisions treating of a particular matter in consolidated legislative frameworks, and preventing contradictions between them. The old and the new are connected both nominally by their title, and substantively, in terms of their content, but in terms of their validity, the law presenting the amendment is valid in its own right, as a separate, independent legislative act, deriving its power directly from the legislature's act. The attachment of the amending statute to the amended statute is expressed primarily by the statute's title, but does not reflect the essence of the amendment. An amendment may be technical or formal, effecting no substantive change, or it may amend – and change – the existing law. In other words, the title of the amendment does not attest to its content, but rather to the desire to create organized legislative frameworks, all dealing with a defined issue under the same rubric.

Establishing distinctions and differences in accordance with the contents of an amending law generally creates dilemmas and anomalies. Needless to say, even a seemingly technical, formal amendment may have far reaching consequences in terms of its substantive results. Consider, for example, emergency economic measures enacted for a period of three months that have been extended by an amending law for a period of five years. There can be no doubt regarding the change in the meaning and implications of the amendment in comparison with the principal law, despite the fact that the change was ostensibly just an extension of validity of an existing provision.

13. Summing up: The above leads to a double conclusion that derives from the wording, the essence and purpose of the Basic Law: (a) In terms of its wording, we observed that the Basic Law states that its provisions do not affect the validity of the law in force prior to its coming into effect. This means that a law that was not in force prior to the coming into force of the Basic Law, but only thereafter, will not be subject to the reservation regarding the inapplicability of the Basic Law. If s. 10 does not apply, it means that the legislature's plain and simple intention is that the criteria of the Basic Law, and the human rights safeguards therein, must be complied with..

(b) In terms of its purpose, the Basic Law attempted to maintain the existing law, at this stage, but did not extend its aegis to new law, by which it would have divested itself of its content and purpose. Adoption of a rule that

the application of s. 10 to new law would be assessed in accordance with the law that existed prior to the Basic Law would mean that the adornment of any new law with the title of a statutory amendment would suffice to exempt it from the application of the Basic Law. Needless to say, on a practical level, this would present no problem. The totality of laws is sufficiently broad to accommodate the placement of all new legislation in the formal framework of the existing law. However, this approach would be inconsistent with both intention and the act of the legislature, which created the Basic Law to be complied with, and not to be divested of content. The presumption is that the legislature does not waste words, nor enact a law, especially not a Basic Law, in vain.

The bottom line is that a statutory amendment, like any other statutory provision, is a separate, new legislative act, to which the non-application clause of s. 10 of the Basic Law does not apply.

14. As a matter of practice too, we must establish clear demarcation lines, rather than be drawn into vague distinctions. An attempt to determine the degree of substantive innovation in a statutory amendment, and its new implications for the entire legal system would give rise to unending litigation and interpretation. Instead, a simple and unequivocal boundary must be established, based on the date of the amendment. The water-shed date is the date of adoption of the Basic Law.

In other words, as explained above, it would be a particularly onerous undertaking to conduct a separate substantive examination of the contents of each provision of each and every statutory amendment, and even of the component parts of each provision (because, conceivably, an innovation may derive from part of the provision). On a practical level, such a proposal would trigger endless legal debate and prevent establishing clear, sharp legal distinctions. It would contribute to legal uncertainty, rather than achieve the desired opposite result..

The import of legislation must be clear and readily intelligible in terms of its content and implications, and should not be complicated by leaving it open to a debate – which would be imperative in each and every case – upon the applicability of the normative limitations in the Basic Law.

15. In view of this I think that the Amending Law is subject to the provisions of the Basic Law.

16. Having ruled that the Basic Law applies to the Amendment, the first imperative is an examination of the classificatory principles governing the

various forms of legislation. *Inter alia*, this involves discussion of the status of the Basic Law in our legal system, and the status of regular legislation in the light of the various forms of constitutional legislation. We will now proceed to examine the guiding principles that determine the various legislative formats and the distinctions among them.

The Connection Between a Regular Law and a Basic Law

17. The need to examine legislative principles stems from our conclusion that the Amending Law – being a regular law rather than a Basic Law – is not exempt from the scope of application of the Basic Law. We must examine the question of the standing of a regular statute enacted after the Basic Law came into force, if its provisions appear to infringe rights protected under the Basic Law. As stated, our concern is with a statutory amendment that is a regular law, and not a Basic Law, and that does not specifically state that it violates a protected right.

Our examination will proceed from the general to the specific. In other words, the subject will *first* be addressed on a theoretical level, beginning with a discussion of the fundamental legislative structure. For the moment, I will avoid expressing an opinion on whether the specific statutory amendment under discussion contravenes the Basic Law.

Following this, we will proceed to the *second* stage, and examine the status and significance of the Basic Law applicable in the instant case – Basic Law: Human Dignity and Liberty.

At the *third* stage we will apply our conclusions and examine the Amending Law in terms of its relationship to the provisions of the Basic Law.

18. The two Basic Laws enacted about three years ago – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation – were intended to constitute an integral part of the Israeli bill of rights. Prior to the commencement of the Basic Laws, these basic rights were anchored in precedent that has formed part of positive Israeli law since the establishment of the State. In the framework of statutory interpretation, the case law has repeatedly emphasized that the various basic rights included in our positive law enjoyed a unique status as criteria guiding the crystallization of the law's political and legal conceptions, as the guiding light in the formulation of the law and as guidelines for judicial review of the acts of courts, secondary legislation, and the various agencies of the executive branch (see HCJ 1/49 *Bejerano v. Minister of Police* [3]; HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [4]; HCJ 75/76 *'Hilron' Ltd v. Fruit Production and Marketing*

Board (Fruit Board) [5], at p. 653 opposite letter E; CA 723/74 *HaAretz Newspaper Ltd v. Israel Electric Corporation* [6]. at p. 295 opposite letter E; HCJ 337/81 *Miterani v. Minister of Transport* [7]; EA 2/84 *Neiman v. Chairman of Elections for Eleventh Knesset; Avneri v. Chairman of Central Elections Committee for Eleventh Knesset* [8]. Today, some of these rights belong to the constitutional section of our statutory law, by force of their inclusion in Basic Laws: Human Dignity and Liberty and Basic Law: Freedom of Occupation. In the determination of substantive criteria for primary legislation they were preceded by s. 4 of Basic Law: The Knesset. The two new Basic Laws took a broader approach in aiming to define basic rights in creating a statutory bill of human rights for Israel. Just as s. 4 of Basic Law: The Knesset established substantive conditions for future legislation in the matters regulated by s. 4, the two new Basic Laws establish guidelines for all regular legislation pertaining to the rights in their scope. Judicial review has thus been extended. It is now possible to review the lawfulness of primary legislation enacted after the commencement of the Basic Law, in accordance with the criteria established in the aforementioned Basic Laws.

This means that not only were basic rights defined as such in primary legislation, being upgraded from common to statutory law, but they were also endowed with supra-normative status, in relationship to both primary and secondary legislation, in the manner and to degree stipulated by the provisions of the Basic Law. The realization of the decision adopted by the First Knesset – the Harrari Decision – to which we shall shortly return, has thus proceeded from the stage of defining the sovereign authorities, their powers and their functions, to the formulation of a bill of rights.

For the first time, basic civil rights have been clearly and directly expressed in constitutional legislation.

Though there is still no complete, comprehensive bill of rights encompassing all basic rights, two initial, important chapters have now attained statutory status. An important part of the definition of liberty has been firmly established in the law in written constitutional form.

A fundamentally important conclusion is that it is now possible to judicially review the constitutionality of primary legislation in light of statutorily established constitutional norms, by examining the constitutionality of the legislation under the criteria of the Basic Laws.

The Normative Hierarchy: Basic Law, Statute, Secondary Legislation

19. An understanding of the new Basic Laws requires reference to the principles for interpreting the relationships among various legislative acts. We will examine the relationship between statutes, between regulations and between regulations and statutes. The typical case is that in which the *regular law* establishes a provision that may protect a particular right. Let us imagine that a subsequent law stipulates that there is no protection for that right. In other words, it removes the protection or derogates from its scope or depth. The later law may absolutely negate the right or divest it of its content (i.e. a "*variation*" including the "annulment" of the right); alternatively, the later law may restrict *the protection conferred to the right without varying or annulling it (i.e. an "*infringement" of the right). Incidentally, later on in our comments we will expand on the concepts of "variation" and "infringement" and the distinctions between them.

In both cases ("variation" and "infringement") the later law may either vary or infringe the right protected in the earlier law. The earlier *law* recedes in the face of the later *law*, in the words of the dictum *lex posterior derogat priori* ("and bring forth the old because of the new"; Leviticus, 26:10) [117]. The most recent legislative pronouncement is usually the decisive one.

The analytical starting point is that when the legislature wishes to vary or infringe a protected right it does so either explicitly, or by way of a clearly contradictory stipulation in the wording of the new provisions, which is inconsistent with its predecessor. In any case, an attempt should be made to uphold laws dealing with the same subject matter and to reconcile them. Thus, the interpretative presumption is that a right protected by a regular law is not changed or infringed by later regular legislation, unless otherwise stated or implied (see HCJ 428/86; HCJ App 320/86; *Barzilai v. Government of Israel,* [9] at p. 542). In other words, the interpretative presumption is that the two laws, one later and one earlier, are consistent with each other. The wording of the later law may refute this presumption, but if the presumption is refuted, the valid positive law is the law determined in the later law. The presumption is that the later law is the most up-to-date expression of the legislative intention and reflects the current objective of the legislative system. In other words, the *prima facie* rule is that statutes do not contradict each other (one statute versus another statute) but if that rule is contravened, either explicitly or implicitly, the later statute has the upper hand.

The aforementioned rule is qualified by an exception: If the earlier law is a specific law as opposed to a later more general one in terms of the issue at hand, then the specific law takes precedence over the general one: *lex specialis*

derogat generali. This rule applies when dealing with two regular laws containing conflicting normative provisions, and the difference between them is expressed by the degree of specificity of their provisions.

The rules described above are guidelines that elucidate the relationship between two legislative acts, but they are not exhaustive. Another presumption with roots in our system is that the legislature protects and promotes basic rights, and this is a guiding presumption in legislative construction (see e.g. HCJ 75/76 [5] *supra*, and CA 723/74 [6] *supra)*. Together with that presumption, we are also assisted by the aforementioned doctrinal rules governing the relationships between statutes: an earlier statute versus a later statute, a specific statue versus a general statute.

20. A conflict similar to the one described above may also arise between two provisions of secondary legislation, in the form of regulations enacted by administrative or other agencies competent to enact regulations. The presumption is that the regulation is legitimate from an administrative perspective. The question is what happens when two regulations conflict. The theoretical construct governing the decision in the case of contradictory regulations is identical to that of contradictory statutes. An effort must be made to reconcile them or to reach a conclusion as to their validity or invalidity, having reference to the particular laws by force of which the regulations were enacted. The rules outlined above are similarly applicable to secondary legislation: hence a later regulation supersedes an earlier regulation; a specific regulation supersedes a general regulation.

21. Another, distinct question is what the law is when a *regulation* contradicts the provisions of a *statute*. The question becomes even more acute when dealing with the question of the law of a special and later regulation that contradicts a general law that preceded it. *Prima facie*, a simple application of the interpretative principles adumbrated above leads to the conclusion that the special provision should override the general provision. Moreover, later legislation should override earlier legislation. Reasoning *a fortiori*, a later, specific provision should therefore prevail over an earlier, general one. The conclusion is that any later, specific provision would unequivocally prevail over any earlier, general provision. However, this conclusion does not apply to circumstances in which a regulation contravenes statute, for a statute is always of superior normative status. A derivative question is what the rule is where a special or later *regulation* is in conflict with a *statute*. The answer is that the regulation is of inferior status. The rules pertaining to the primacy of later legislation over earlier legislation or the primacy of a special provision over a

general one only apply within the same legislative framework, in other words, statute versus statute or regulation versus regulation.

The reason for this is that our legal system, like any system of law, is based on a *normative hierarchy*. The *normative hierarchy* results from and reflects various *forms of power*. We will proceed to clarify this point.

The legal structure is based on the axiomatic assumption of a stratified system of norms; each strata or level derives its validity from the power that engendered the norm, as in the case of primary and secondary legislation (i.e. regulation). A statute is positioned on a higher normative level than a regulation, and hence it need not surprise us that when in conflict, the statute prevails. Absent specific authorization in the primary law, secondary legislation can neither vary nor infringe statutory provisions. In this context it is irrelevant whether the regulation preceded the law or post dated it. It is similarly irrelevant if the regulation is specific or general with respect to the matter regulated therein. In any case, a regulation is normatively subordinate to a statute and therefore a regulation that contradicts a statute is subject to the remedies of administrative law, which provide for full or partial annulment. Logically, the regulation's subordination to the statute derives from the formal, fundamental conception of normative hierarchy in any legal system. To the extent that it relates to the connection between a regulation and a statute, the normative hierarchy is formally expressed in section 16 (4) of the Interpretation Ordinance [New Version], which provides that:

> 'Enactment of Regulations: 16: Where the law confers on the authority the power to enact regulations, the regulations enumerated in the following provisions shall apply to the enactment and the effect of such regulations unless another intention is implied:
>
> …..
>
> (4) A regulation shall not contradict the provisions of any law.'

The reference here is to "any law" (my emphasis M.S) and not just the law conferring the power to enact specific, conflicting regulations, the legal validity of which are being assessed. This is an additional expression of the general distinctions made under the legislative hierarchy.

In this context it bears special mention that even absent the provision in s. 16(4), a regulation purporting to vary or infringe a statute would be subject to the hierarchical principles explained above, which are the guiding principles in the examination of the validity of a law.

What is the source of the principle of the normative hierarchy of legal norms? As mentioned, the answer lies in the types of powers that confer authority to legislate or promulgate regulations, respectively. The legal system endows various authorities with the power to establish legal norms, in other words, legally binding rules of conduct. These powers are systematically organized, deriving their force from the essence of the empowerment. The power to enact primary legislation is not analogous to the power to promulgate secondary legislation, which can only stem from a specific empowering provision included in the primary legislation. The legislative branch – the Knesset – has the power to legislate laws of all kinds; the executive branch generally has the power to enact secondary legislation, by force of its empowerment in primary legislation. However, the Knesset, too, is empowered to enact secondary legislation, e.g. the Knesset Regulations (s. 19 of Basic Law: The Knesset) or decisions pertaining to pensions of office holders, which constitute secondary legislation (see HCJ 89/83 *Levi v. Chairman of Knesset Finance Committee* [10]). In other words, there are cases in which the same authority is empowered to establish different legislative norms, belonging to different normative hierarchies. This means that the same institutional source is empowered to pass legislative acts of varying obligatory power, and it also establishes the connection between them and their subordination to one another

In view of the network of powers described, with all due respect, there is no foundation for the doctrine of the institutional pyramid developed during the sixties (Prof B. Akzin, *The Doctrine of Governments* at p. 40) whereby each normative level of legislative authority has a sole and exclusive institutional coordinate, meaning that every stage on the normative hierarchy of legislation has a unique counterpart on the institutional ladder, and that in principle, different stages on the normative hierarchy can never flow the same level of the institutional hierarchy. As observed above, the same institution may be empowered to establish norms on different levels. Hence the Knesset's power to enact secondary legislation, as mentioned above, is universally accepted. The existence of a mutually exclusive connection between each stage of the normative hierarchy and the institutional ladder empowered to create legislation, is a doctrine that is alien to our legal system, and is

inconsonant with the allocation of powers among law- making institutions. The normative legislative hierarchy finds expression in the subordination of each level to the level above it, and not by reference to its correlate on the ladder of institutional sources. The same institution may establish both the supreme norm and the lower norm. Any theoretical doctrine that analyzes a functioning legal relationship must anchor itself in the legal reality; it cannot exist in a vacuum, but must have reference to the existing legal structure, which is an inescapable given. It cannot sever itself from the subject it seeks to analyze, and any thesis that ignores it is unrealistic. From this we can only conclude that the pyramid theory described by Professor Akzin, is contradicted here (and not only here) by the existing structure of the power network.

22. (a) The authority to enact secondary legislation is included in the primary legislation of the legislature. A minister cannot enact legislation in the absence of statutory empowerment; an authority cannot enact bylaws in the absence of statutory empowerment, and the Knesset is not authorized to make decisions pertaining to salary or pensions without an empowering clause such as s. 10 of Basic Law: Judiciary, s. 1 of the Holders of Public Office (Benefits) Law, 5729-1969 or similar laws.

Secondary legislation is the product of empowerment in primary legislation. A law enacted by the legislative authority is superior to a regulation of the Knesset itself, or of any other statutory or executive authority, because the regulation can only be enacted by force of the power conferred in the primary legislation. In other words, the conferral of differentiated legislative functions to the same institution does not create a situation in which all of the powers coexist, side by side, ostensibly on the same level. Conferral of a number of functions to the same institution leaves intact the need to establish a hierarchy that defines the legal or constitutional status of those powers above one another. The normative legislative hierarchy is the soul of an appropriate constitutional structure.

(b) As we noted, secondary legislation can neither vary nor infringe a statutory provision. To complete the picture we will add that the assertion pertaining to the hierarchical relations between a law and a regulation is *prima facie* contradicted by the existence of another form of regulations that can infringe a law, namely – emergency regulations. As stated in the law conferring the power to enact them, "An emergency regulation may alter any law, suspend its effect or modify it…" (s. 9 (b) of the Law and Administration Ordinance, 5708-1948). (An "ordinance" is a law passed by the Provisional

Council of State, see s. 7 (a) of the Law and Administration Ordinance; and see also s. 2 (a) of the Transition Law, 5709-1949, and compare with what is now s. 50 of the new Basic Law: The Government, enacted in 1992). What this means is that the Minister's authority to invalidate a law by force of emergency regulations is exceptional, but it too is explicitly conferred in primary legislation and qualified by the restrictions delineated therein. This power of secondary regulation to alter a law does not derive from the secondary legislation itself, but rather from the law that empowered the government or a minister to enact it. In the absence of explicit statutory empowerment to enact secondary legislation that infringes the law, secondary legislation cannot alter or infringe a law (in this context see the Supervision (Products and Services) (Amendment No.18) Law, 5750-1990, following our judgment in HCJ 256/88 *Medianwest Medical Center Herzliya Ltd v. Director of Ministry of Health* [11]. If it varies or infringes it, it will be subjected to the remedies granted by the judicial forum regarding secondary legislation that deviates from its defined boundaries.

23. Summing up: The subordination of secondary legislation to the law flows from the secondary legislator's subordination to the conditions of empowerment explicated by the primary legislative authority, i.e. the sovereign legislature – the Knesset. Incidentally, in using the term "sovereign" my intention is not to interpretations taken from public international law. In our conception, the sovereign is the people. In my understanding, the Knesset is "sovereign" i.e. independent and supreme, in the sense that no other authority, legislative or otherwise, prevails over it in its power and its authorities. The reason lies in the source of its power: It was elected by the people, which as stated, is the sovereign.

The hierarchy of norms thus derives from the nature of the powers. The normative system is not one-dimensional, but rather hierarchical – a ladder with different levels. Primary legislation is on a higher normative level than secondary legislation (i.e. "regulation," "bylaw," "order" and the like).

The Position of Constitutional Legislation

24. On a normative scale, the *constitutional* act is on a higher level than the regular law. By its essence and purpose, it is designated to operate at a supreme normative level. In terms of constitutional theory, in a possible conflict between the constitution and a law, the constitution has the upper hand. It is inappropriate for a regular law to override a constitutional provision. A regular law *cannot* override a constitutional provision other than by way of an *explicit* constitutional provision included therein, or by way of a constitutional provision (constitution or Basic Law) that *generally* defines – not necessarily in relation to a specific constitutional provision – the possible forms of infringement. See for example, s. 12 of the proposal for Basic Law: The Judiciary (27 *Hapraklit* (5731) 140,141), which discusses "a claim against the validity of a law." And see also s. 8 of Basic Law: Freedom of Occupation, of 1994, which states the following:

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

This means that the general constitutional principle laid down in the Basic Law, Freedom of Occupation can be infringed by regular legislation, provided that it is done in the manner set forth in the aforementioned section 8. Section 8 is not only prescriptive – it is also proscriptive, in the sense of invalidating regular legislation that infringes freedom of occupation, if it does not satisfy the conditions of section 8. This is the import of the wording of s. 8, and this is the rule for a law that does not conform to its provisions. Subject to such changes as are necessitated by the transition from one specific subject to another, our comments here regarding Basic Law: Freedom of Occupation apply to the relationship between any regular law and a constitutional

provision currently included in a Basic Law, which contains qualifying provisions regarding its variation or infringement, and regular legislation.

Summing up this point: Some Basic Laws lack qualifying provisions regarding regular legislation that changes or infringes their conditions. These laws do not fully express their supreme normative status vis-à-vis variation or infringement, and an entrenched or privileged status represents an appropriate and desirable ideal. Other Basic Laws, such as the two Basic Laws enacted in 1992, which include restrictions that entrench their normative hierarchy, are already a reality.

The Constitutional Norm – Structure and Form

25. (a) The basic assumption of our approach is that the primary legislator is the supreme source of authority in the legislative realm, by virtue of which he is authorized to enact laws of differential normative authority on the hierarchical scale. He is authorized to enact constitutional legislation and authorized to enact regular legislation. He is the direct source of all primary legislation, and in a small number of cases, as noted, he is also the source of secondary legislation; indirectly – he is the source of all secondary legislation.

(b) As mentioned above, constitutional legal theory recognizes the existence of a normative legal level above that of the regular law, referred to variously as "constitution" or "Basic Law." The Harrari Decision of 1950, to which we shall return, distinguished between a Basic Law and a constitution. In our comments below, for simplification, we will, as far as possible, use the word "constitution."

The people have the power to frame a constitution. This assertion derives from the accepted conception that sovereignty resides with the people. Constitutional legislation is the product of the people's decision by way of its elected representative – the sovereign Knesset.

Incidentally, according to German constitutional interpretation, which naturally relates to the constitutional structure there, the absence of a direct, unmediated decision by the people to adopt a constitution by way of a referendum does not diminish the validity of a constitution enacted by way of legislation, and to that end it is sufficient that the constitution be enacted by the representative parliamentary body (see Von Muench/ Kunig, *Grundgesetz-Kommentar*, Band 1., 4, Verlag Beck (Muenchen, 1992) 11, but cf. V. Mangoldt, Klein, Starck, *Das Bonner Grundgesetz*, 3 Aufl. Band 1 Anm. Vl 11). Naturally, the approaches to this subject are not uniform and different countries have adopted a variety of approaches.

26. (a) All of our comments above regarding the nature of the normative hierarchy apply *mutatis mutandis* to the relationship between a regular law and the constitution. The power of regular law to alter or infringe constitutional provisions may be conferred by force of the constitutional provision itself, as for example, s. 8 of Basic Law: Freedom of Occupation, cited above. Arguably, the absence of any such provision may indicate that the legislature chose not to complement the creation of a supreme normative level with a provision qualifying the validity of any contradictory regular legislation. This was the case with the legislative proceedings of Basic Law: The Knesset, which designated the provisions limiting conflicting legislation to a small number of its sections only, leaving the majority of its sections with no substantive position on the validity of conflicting regular legislation. The same conclusion similarly arises from the wording of most of the other Basic Laws, which treat of the institutions of government and their branches, as well as with the judiciary.

As a result, the Knesset amended provisions in Basic Laws by way of a regular law (see e.g. The Knesset (Number of Members in Committees) Law 5754-1994, which repealed s. 21 (c) of Basic Law: The Knesset; s. 86 (e) of the Knesset Elections Law [Consolidated Version] 5729-1969 which contradicts s. 17 of Basic Law: The Judiciary. This same is true for s. 64 of the Courts Law [Consolidated Version] 5744-1984. This court has also ruled on a number of occasions in the past that nothing prevents the amendment of a Basic Law by means of a regular law (see e.g. HCJ 107/73 *'Negev' – Automobile Service Stations Ltd v. State of Israel Ltd* (hereinafter – the *Negev* case) [12]) (Justices Berinson, Witkon, H. Cohn); In HCJ 148/73 *Kaniel v. Minister of Justice*, (hereinafter – the *Kaniel* case) [13]), President Agranat, Justices Landau and Kister, addressing this point, stated: "We find no support in the language of the Basic Law… that an implied change under the concluding section of s. 46 (of Basic Law: The Knesset – M.S.) must be accomplished by means of a Basic Law or a special law" (*ibid*, at p. 796). In my view, this ruling should be seen in the context of its period, and as an interpretation that did not anticipate the legislative constitutional developments and the emergence of a comprehensive constitutional doctrine.

However, as we will presently see, the two new Basic Laws of 1992 provide a fuller expression of the normative constitutional hierarchy, as indicated by the Knesset's general tendency in the legislation of the Basic Laws. Following the change in the Knesset's legislative policy, as expressed in both of the Basic Laws, and which anchored a new, appropriate conception

of the normative hierarchy, it is now possible to apply a standard legislative criterion by which there can no longer be any variation of any Basic Law other than by another Basic Law.

There are grounds for presuming that with the enactment of Basic Law: Legislation, this subject will be regulated comprehensively with respect to all of the Basic Laws. In view of the Knesset's legislative policy as expressed in the two aforementioned Basic Laws, nothing prevents us from already laying down the appropriate legislative procedure, and in doing so to delineate the principles required to give commensurate expression to the legislative hierarchy manifested in the enactment of the constitutional provisions. Further on we will devote some attention to the import of the new Basic Laws, in terms of legislative policy and the basic constitutional conception of the Knesset.

(b) Freedom of occupation has merited protection in our statute law insofar as it has been imbued with constitutional status in Basic Law: Freedom of Occupation. In the absence of a standard constitutional provision applicable to all Basic Laws, this Basic Law established certain provisions pertaining to a change or infringement of its provisions. The structure of Basic Law: Freedom of Occupation (which is the appropriate constitutional structure, that should be followed in all Basic Laws) prevents the possibility of an ordinary law changing or infringing a right that was established in Basic Law: Freedom of Occupation. The constitutional strictures were established in s. 4 of Basic Law: Freedom of Occupation ,providing as follows:

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

The wording of s. 8, treating of the validity of a law deviating from the aforementioned provisions, was cited above.

The import of this is that the validity of a regular law that infringes the freedom of occupation is conditional upon its fulfillment of the conditions enumerated in the aforementioned s. 8, and failure to fulfill those conditions renders the regular law invalid. Only where the *regular* law satisfies the necessary conditions (the required majority for the adoption of the law; an explicit qualification) can it suspend, for a fixed period, the validity of a *constitutional* provision with respect to the area of application of that law.

Needless to say, the conclusion emerging from the aforementioned is that the Knesset recognized the existence of a normative hierarchy by the very adoption of sections 4 and 8 of Basic Law: Freedom of Occupation. These two sections of Basic Law: Freedom of Occupation enable the "*infringement*" of a protected right, subject to the conditions enumerated by the Basic Law, and therefore deny the validity of an infringement that fails to satisfy the conditions established by the Basic Law.

As opposed to this, a "variation" of a Basic Law – as opposed to an "infringement" of one of its provisions – requires the application of the proceeding under s. 7 of Basic Law: Freedom of Occupation.

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

With respect to a variation, the normative hierarchy is expressly stated in the entrenchment of the provisions of the Basic Law.

The basic constitutional distinction between a "variation" and "infringement" is worthy of further in-depth examination, and we shall address it further on.

"Variation" versus "Infringement"

27. (a) In examining the arrangements of the supreme normative hierarchy, a distinction must be made between the "variation" of a protected right, and its "infringement." Our concern is with a right protected in a Basic Law. Any *variation* of the right (restriction or expansion, supplementation or annulment) requires legislative action on the Basic Laws level. The requirement that a change or variation be effected in or by way of a Basic Law stems from the analytical basis of the legislation of Basic Laws in our legal system. By force of the normative legislative hierarchy, any variation of an act on a particular (normative) level must be effected by an act on the *same* or a *higher* normative level. Secondary legislation cannot change a law. Regular legislation cannot change a Basic Law, which is located at the apex of the normative scale.

The Basic Laws are the cornerstone of the Israeli Constitution. This was also the Knesset's explicit position in its decision on 13 June 1950 (the Harrari Decision). As such, a distinction ought to be made, for purposes of constitutional and legislative clarity, between basic legislation, which provides the constitutional foundation, and regular legislation. This concludes our

discussion in regard to "variation." I am aware of the statements of this Court (Justice Berinson, Witkon, and H. Cohn) in the *Negev* case [12], the *Kaniel* case [13] (Justices Agranat, Landau, and Kister) and HCJ 60/77 *Ressler v. Chairman of Central Elections Committee for Knesset* (hereinafter – *Ressler* case [14]) (Justices Etzioni, Y. Cahn, and Asher), according to which Basic Law: The Knesset provided no grounds for the assertion that a (implied) change of a Basic Law must perforce be effected by the enactment of a Basic Law, and that it could also be effected in the form of regular Knesset legislation. They were expressing the existing situation in which many of the Basic Laws were not formally entrenched.

(b) As the development of the constitution progresses, and with it the imperative of establishing an analytical basis for the adoption of constitutional legislation, it is appropriate, as emphasized above, that we adopt a new direction that expresses the existence of a normative legislative hierarchy. In other words, against the background of the two new Basic Laws that directly deal with the protection of fundamental rights, this expanded bench now has the opportunity to establish an entire system, adjusted to our present constitutional umbrella, as this Court did in a different context in HCJ 98/69 *Bergman v. Minister of Finance* (hereinafter "the *Bergman* case") [15]. From now on, all Basic Laws should be governed by a legislative policy that expresses the doctrine of normative hierarchy, by which a Basic Law can be varied only by another Basic Law.

(c) This brings us to the term "infringement." An infringement does not purport to alter the scope of the right itself. The thrust of the infringement is that it 'enables the normative existence of a legislative act that infringes the arrangements provided by the Basic Law' (as per my honorable colleague, the President: A Barak, *Interpretation in Law*, vol.3, Constitutional Interpretation (Nevo, 5754) 48). By its very nature, an infringement is special and defined, i.e. localized.

According to this fundamental distinction between "variation" and "infringement," the first Knesset and Local Authorities Elections (5730) (Financing, Limitation of Expenses and Audit) Law, 5729-1969, which was the subject of the *Bergman* case, included an "infringement" of the principle of equality entrenched in s. 4 of Basic Law: The Knesset, which states:

'Section 4: System of Elections	The Knesset shall be elected by general, national, equal, secret and proportional elections, in accordance

> with the Knesset Elections Law; *this section shall not be amended, save by a majority of the members of the Knesse*t.' [emphasis mine – M.S.]

The Knesset and Local Authorities Elections (5730) Law did not purport to *vary* the aforementioned section 4. The purpose of the financing law was not to establish that there would no longer be equality in the electoral system. It infringed the principle of equality in a specific, clearly delineated area. In other words, the *result* of the Knesset and Local Authorities Elections (5730) (Financing, Limitation of Expenses and Audit) Law was an infringement of the principle of equality set forth in s. 4 of Basic Law: The Knesset.

In the *Bergman* case [15], the Supreme Court gave a broad construction to the requirement of a special majority in Basic Law: The Knesset. *Firstly*, the Court's unanimous view was that the requirement in the concluding part of s. 4 places a hurdle before any "variation" of s. 4 of Basic Law: The Knesset in the form of the requirement for a special majority. Accordingly, the principle of equality in elections cannot be annulled other than by a majority of the members of the Knesset, meaning that the election system can only be changed by force of special majority. *Secondly*, by implication the court inferred that the requirement of s. 4 also presents an obstacle to any "infringement" of the protected value in the Basic Law. In other words, s. 4 of Basic Law: The Knesset includes a quasi "override clause" with respect to a variation. Its essence is formal, and its form is the requirement of a special majority pursuant to s. 4 of Basic Law: The Knesset. This clause is anchored in the constitutional provision and inherently creates the constitutional tool governing cases of possible infringement of the principle from among those stipulated in the aforementioned s. 4. The override clause in the concluding part of s. 4 enables an infringement of the protected value, provided that it be effected by way of a special majority. Section 4 of Basic Law: The Knesset, as opposed to s. 8 of Basic Law: Freedom of Occupation, of 1998, and similar to s. 4 thereof, does not posit a requirement of specificity, as one of its conditions for the validity of an infringement of a protected value. The infringement will be valid even without explicitly derogating from the Basic Law (i.e. it may be done "implicitly," provided that it is adopted by a special majority).

Summing up, theoretically speaking, a variation is distinct from an infringement. However, in the *Bergman* case [15], the Court also applied the limitations regarding the variation of a Basic Law to legislative provisions that contradicted the principle of equality in the Basic Law, in other words, that

only infringed it. This point is of particular interest because in the context of retrospective constitutional critique it has often been argued that in the *Bergman* ruling [15] the Supreme Court attempted to curtail the scope of judicial intervention dictated by the normative constitutional hierarchy. However, the decision itself indicates that in viewing the Local Authorities (Elections) (Financing, Restriction of Expenses and Auditing) Law as invalid by reason of not having been adopted by the requisite majority, the Court not only adopted an innovative, broad approach, without any explicit authorization, but also broadened the scope of the aforementioned section 4, and included regard of any "infringement" as a "variation" referred to in the Basic Law. Needless to say, in my view, the Court acted lawfully and within the scope of its powers.

The Knesset was aware of the distinction between a variation and an infringement, which explains why Basic Law: Freedom of Occupation uses the term "there shall be no infringement" in its limitation clause. The purpose of the provision in s. 8 of Basic Law: Freedom of Occupation is to establish criteria for reviewing legislation that infringes the provisions of the Basic Law, in an attempt to circumvent the principles established in the Basic Law. The provision does not establish criteria for the variation or abrogation of a Basic Law. The variation of Basic Law: Freedom of Occupation is explicitly governed by s. 7.

What has been said thus far in regard to Basic Law: Freedom of Occupation demonstrates the general theses. Basic Law: Human Dignity and Liberty and its variation or infringement will be treated below, at the appropriate juncture.

28. (a) The thesis presented regarding the normative legislative hierarchy indicates that the appropriate legal approach is that from now on, a regular law can neither vary nor infringe a constitutional provision, in the absence of explicit authorization in a constitutional provision. If the statutory provision varies or infringes a constitutional provision then the conflicting statutory provision will be subject to the counter remedies originating in constitutional law. Such a remedy may be the annulment of the conflicting statute. It may be a more restricted remedy than the extreme remedy of annulment, such as partial annulment (application of the "blue pencil" rule), where such a remedy is available, having consideration for the overall constitutional context. The remedy may also be of a relative character in terms of the time dimension (of retroactive, or prospective application), in terms of application, etc. At all events, we deem it settled law that where a normative provision of a lower

status deviates from a higher normative provision, the court seized of the matter is authorized to conduct a procedure of judicial review, and to provide a constitutional remedy.

(b) The judiciary shoulders the burden of upholding the rule of law, if a matter is submitted for its decision in the statutorily prescribed ways. Implementing the rule of law includes maintaining the sources of authority and the hierarchy of norms. It follows that if secondary legislation contradicts the law, the court is authorized to grant a remedy. Similarly, if a law contradicts a constitutional provision, the court is authorized to grant a remedy. As we mentioned, what was once the ideal situation with respect to constitutional legislation in general has largely become the real position with respect to the two Basic Laws enacted by the Knesset in 1992, Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty.

29. We elaborated on the description of the appropriate constitutional structure, and it should be added that our concern is not merely with the demarcation of formal legal structures. A structure is designed for its contents. Division into normative hierarchies does not just express the distinction between a substantive legal rule (a law) and the methods of implementation and legal procedures (secondary legislation). The apex of the normative pyramid (the Basic Law) is the statutory expression of the institutional values of our fundamental political and social views. It is the repository not only of the definitions and power divisions among the central branches of government, but also for the bill of human rights. It proclaims and protects those rights that make us into a society premised on liberty, human dignity, and equality, and expresses the values of the State of Israel as a Jewish and democratic state. As such, the enactment of two new Basic Laws is an important stage in the development of a constitution, and in the transformation of values that constitute part of *our common law*, as an expression of precedent, into *statutory law* of privileged and unique status. In my minority opinion about twenty years ago in CA 723/74 [6], I addressed the issue of the meaning and interpretation of the basic rights that form part of our common law. As written there (*ibid:* 294-295):

> ‘The absence in Israel of a unique piece of legislation of preferential legal status that embodies its constitutional principles does not mean that we have no statutes with constitutional content, or that constitutional legal principles defining the basic rights of man and the citizen are absent from our system of law. The law in Israel embraces, according to our understanding and

concepts, basic rules concerning the existence and protection of the liberties of the individual, even before the proposed Basic Law: Human and Citizen's Rights is enacted.

The new draft Basic Law is intended to formulate principles and to designate their boundary lines. Its central task is to fix them firmly in statute so as to ensure their protection against the ravages of time. Its purpose is to express the values by which the ordinary citizen should be educated and to stand in the way of those who would seek to trespass on his rights. But even now, basic rights are protected in our basic legal conception, and form a substantive part of Israeli law. First and foremost among these is freedom of expression. It is no secret that the integration of these rights into our law derives from the system of government that we covet (H.C. 73/53, 87/53, *Kol Ha'Am Co. v. The Minister of the Interior* [3], at p. 876), but the obligation to honor them in practice is not merely an expression of political or social morality, but has legal status.

…

Any limitation of the boundaries of such a right and of its scope, which arises from legislation, will be narrowly construed so as to give the aforesaid right maximum effect and not to restrict it in the slightest beyond what is clearly and expressly required by the legislature's words (HCJ. 75/76, *"Hilron" v. The Fruit Production and Marketing Board,* at p. 653). Freedom of expression and a provision of law that limits it do not enjoy equal, identical status, but rather, to the extent consistent with the written law, one should always prefer the maintaining of the right over a provision of law that tends to limit it. In sum, the standard for protecting freedom of expression as the primary consideration when it clashes with another right should be given full expression not only when the legislature enacts the law's provisions, but also in the interpretation of the law and the application of its provisions in circumstances in which its substance and effect are tested in practice.'

See also FH 9/77 *Israel Electric Corporation, Ltd., et al v. "Ha'aretz" Daily Newspaper Ltd*, [16], following the earlier minority opinion in HCJ 75/76 [5] and in FH 27/76 *Hilron" v. The Fruit Production and Marketing*

Board [17], which discussed a basic right similar to the subject under discussion – freedom of occupation.

The Source of Constituent Authority

30. (a) The question deriving from our comments above, and which now requires our attention is whether Basic Law: Freedom of Occupation, and similarly – Basic Law: Human Dignity and Liberty, are located at the apex of the normative hierarchy, commanding the power to define what is permitted and what is forbidden in regular primary legislation.

(b) Methodologically, it would be appropriate to begin with a preliminary question of general application beyond these two specific Basic Laws, and that is fundamental to the entire doctrine of a normative hierarchy. The question asks what is the source of the Knesset's authority to create acts of supra-legal standing, and to enact laws that limit the scope of the Knesset's authority to enact regular laws in the future, or Basic Laws of specific content or significance. The principle of legality states that in the absence of the authority to enact a normative act of defined content, a body is powerless to create it. An administrative agency cannot enact a law. Were it to draft a normative act, which it calls a "law," such an act would lack the normative effect of a law. The reason is that the administrative agency lacks the authority to enact laws. The Knesset alone is the legislative branch, and it enacts the laws. This brings us back to the original question: What is the source of the Knesset's authority to create legislative acts of differing hierarchical levels, in other words, secondary legislation, primary legislation, and constitutional legislation. Is there any basis for the analytical thesis that the Knesset lacks the legal power to frame a constitution, or any other supra-legal legislation that is normatively superior to regular legislation?

(c) The second question pertaining to the examination of the Knesset's constitutional authority is whether the Knesset has the authority to limit its own authority and that of subsequent Knessets by passing legislation of a supra-legal character, applicable to constitutional and regular legislation of the Knesset, and thereby limit the Knesset's legislative authority in the future.

(d) An examination of these issues requires at least a cursory review of our constitutional history, to which the following comments are devoted.

31. (a) *The Declaration of Independence*

The declaration of the establishment of the State of Israel on 5 Iyar 5708 (14 May 1948) – the Declaration of Independence – was a political act of legal import, under both public international and municipal law. It was promulgated

by the People's Council that convened on the eve of the State's establishment. The Declaration of Independence related to the establishment of initial governmental authorities, and stated, inter alia, that:

> *'WE DECLARE* [emphasis in source – M.S] that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May 1948), *until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948,* (emphasis mine – M.S). The People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called *Israel*'

The People's Council became the Provisional Council of State and the People's Administration became the Government until the establishment of elected bodies pursuant to the constitution which was to be adopted by the elected Constituent Assembly.

The Provisional Council of State became the first parliament of the independent state, and the Government was responsible to it (in the closing section of s. 2 of the Law and Administration Ordinance). The Provisional Council of State was the supreme body, with unlimited authority. In the words of Prof. H. Klinghoffer "The Establishment of the State of Israel: Historical – Constitutional Survey" *Klinghoffer Volume on Public Law*, Y. Zamir, ed.(Harry and Mishael Sacher Institute for Legislative Research and Comparative Law, 1993) (hereinafter – Klinghoffer Volume), 53, 74-75:

> 'The absence of any statement of its powers is evidence that those powers were not intended to be limited. From this we may conclude that the basic norm of the State of Israel can be found in this statement, which transforms the People's Council into the Provisional Council of State.'

Professor Klinghoffer noted (*ibid,* at p. 75) that a literal construction of the Declaration of Independence would lead to the simultaneous existence of the Provisional Council of State and the Constituent Assembly. In the author's view this structure was the result of an oversight on the drafter's part. In any event, the Constituent Assembly (Transition) Ordinance, 5709-1949 clearly stipulates that the Provisional Council of State was to dissolve immediately upon the convening of the Constituent Assembly. The result was that the

Constituent Assembly remained as the exclusive body that was also responsible for regular legislation. Had the constitutional structure continued to exist in the format established in 1949, then the same institution, i.e. the *Constituent Assembly*, would have been charged with both constitutional legislation and regular legislation.

As it turned out, the First Knesset enacted all of the regular laws as well as laws which were constitutional in terms of content and substance (such as the Law of Return, 5710-1950, or Women's Equal Rights Law, 5710-1951).

(b) The Constituent Assembly

The provisions of the Declaration of Independence regarding the establishment of a constituent assembly, pursuant to the United Nations resolution of 29 November 1947, lead to the enactment of the Constituent Assembly Elections Ordinance, 5709-1949. The Provisional Council of State correctly regarded itself as authorized to initiate constitutional deliberations, and even appointed a committee for that purpose.

The elections to the Constituent Assembly were not held on the date scheduled by the Declaration of Independence, and the date was deferred by the Provisional Council of State (s. 1 of the Constituent Assembly Elections Ordinance, 5709-1949). The elections were held at the beginning of 1949 and as mentioned, by force of the Constituent Assembly (Transition) Ordinance, the Provisional Council of State was dissolved.

The Constituent Assembly immediately changed its name, and in the first law that it adopted – The Transition Law – it determined that the parliament of the State of Israel would be called the "Knesset" and that the Constituent Assembly would be called the "First Knesset." From this statutory provision as well as from statements of Knesset members it can be inferred that a single legislative body was created, to which the authorities of the Constituent Assembly were also transferred.

What this means is that there was a single parliament that adopted the role imposed upon the Constituent Assembly in the Declaration of Independence, assumed all of its powers and authorities, which were never actually defined beyond what was stated in the Declaration of Independence and in s. 3 of the Constituent Assembly (Transition) Ordinance ('The Constituent Assembly shall, so long as it not itself otherwise decide, have all the powers vested by law in the Provisional Council of State'), and which simultaneously continued to carry out its regular legislative functions.

As Professor Klinghoffer describes in the aforementioned article, at p. 75-76.

> '…This deviation from the Declaration of Independence was effected by force of a special law enacted by the Provisional Council of State, in other words: by legally changing the arrangement set forth in the Declaration of Independence. And finally, the most important question: Did the Constituent Assembly comply with the directive of enacting a constitution, and if not – did it abandon the conception of legal continuity that was grounded in the Declaration of Independence. *The Constituent Assembly*, which after convening changed its name to the "First Knesset," complied with that requirement at the very most by its adoption of laws with constitutional content, the *legal status of which was not superior to that of regular laws*…the Declaration of Independence did not specify a period of time within which the constitution must be enacted, and the transfer of the powers of the Constituent Assembly to the Second Knesset and every subsequent Knesset was authorized by a special legal arrangement. This is a sort of *continuing transfer, which, so long as it remains in place, confers upon the Israeli legislature, as a perpetual inheritance, the authority to enact a constitution*.' (emphasis mine – M.S)

Professor Klinghoffer was clearly expressing the idea of a continuing, direct chain of authority, by which the authority of the Constituent Assembly in its entirety was transferred to the Israeli parliament, i.e. the Knesset *as such*, endowing it with the authority to enact constitutional legislation, in addition to its authority to enact regular legislation. As such, the Knesset was vested with the authority to enact a constitution.

(c) *The Transition Law and the Harrari Decision*

Needless to say, the Transition Law itself, which was the only legislative act of the Constituent Assembly in that capacity, did not bear the title of "Basic Law," being no different at all from regular legislation in terms of its name, its method of adoption, or any other relevant aspect. Nonetheless, its contents are constitutional. Hence, having discarded the title expressing its constitutional nature and creating constitutional continuity, the legislative authority at that time failed to establish any clear expression indicating the distinction between regular and constitutional legislation.

(d) At no stage did the Knesset abandon the task of enacting a constitution for the State. The preeminent expression of the Knesset's power, and its aforementioned task is the Harrari Decision of 13 June 1950, which provided:

> 'The First Knesset charges the Constitution, Law and Justice Committee with the preparation of a proposed constitution for the State. The constitution will be composed of chapters, with each chapter comprising a Basic Law unto itself. The chapters will be brought before the Knesset if and when the Committee completes its work and all the chapters together will constitute the *Constitution for the State*' (Knesset Proceedings, vol. 5, at p. 1743 (emphasis mine –M.S.).

It is unlikely that the Knesset members assumed that all the chapters would be prepared during the tenure of the First Knesset. Presumably they understood that this was an ongoing enterprise. Returning to the legislative history as expressed in the Knesset protocols, there are grounds for assuming that most of them were interested in that continuity. This found expression in the provisions of s. 5 of the Second Knesset (Transition) Law, 5711-1951, that provided that the Second Knesset and its members were to have all the powers, rights, and duties which the First Knesset and its members had. This provision was supplemented by s. 10, which provided that the Transition Law would apply *mutatis mutandis* to the transition to the Third and any subsequent Knesset for as long as the Knesset does not adopt "another law" concerning the matters dealt with by the Transition Law. The question of whether Basic Law: The Knesset fits the definition of "another law" for purposes of the aforementioned s. 10, is disputed.

Since then, the Knesset has adopted eleven Basic Laws. It functioned as a legislative system with integrated goals, authorities and powers that enabled it to concurrently exercise legislative powers for constitutional and regular legislation. The legislative authority is also the constituent authority and the latter is also the legislative authority. The conception of an integrated legislative system wherein one institution operates both as a regular legislative authority, and a constitutional authority, is mentioned by Professor Kelsen.

Professor Kelsen wrote: (H. Kelsen, *Pure Theory of Law*, (Berkley, 1967) 223):

> 'It is possible that the organ specifically and formally authorized to create, abolish or amend ordinary statutes having the character of a constitution is different from the organ authorized to create,

> abolish or amend ordinary statutes. For example, the former function may be rendered by an organ different from the latter organ in composition and electoral procedure, such as a constituent national assembly. *But usually both functions are performed by the same organ* [Emphasis mine - M.S].

In other words, according to Kelsen, the same institution is capable of fulfilling two distinct functions (regular and constituent). This view is also taken by Prof Uri Yadin, the first head of the legislation department of the Ministry of Justice, and thereafter head of legislative planning, in a lecture given on 6 March 1949 (See "On the Transition Law," *Uri Yadin Volume:, The Man and His Work*, vol. I, A. Barak and T. Shpanitz, eds. (Bursi, 1990) (hereinafter – *Uri Yadin Volume*, at p. 93-94):

We now proceed to the sections of the Transition Law dealing with the rules governing the Knesset. The first section provides that the parliament of the State of Israel will be called the "Knesset" and that the constituent assembly will be referred to as the "First Knesset." While it would seem that these sections deal only with issues of language, in fact their import extends beyond conferring appellations. The Constituent Assembly, elected as a single-task institution, was given the same name as the parliament, which was a permanent institution to be elected on a periodic basis. This largely divested the Constituent Assembly of its temporary character, and it was *incorporated as the first link of the chain of parliaments that would operate as the legislative branch of the State'* [emphasis mine M.S].

In other words, the powers of the Constituent Assembly were subsumed within the powers of the legislative authority. In view of this, I unreservedly recognize the Knesset's continuing authority to enact constitutional legislation.

The Doctrine of the Knesset's Unlimited Sovereignty and the Doctrine of the Constituent Authority

32. (a) We now return to the question presented above: What was the source of Knesset's authority to enact constitutional legislation? I will preface my remarks by mentioning that there are those who altogether deny the Knesset any authority to enact constitutional legislation. The unique element of a constitution is that it establishes the formats and the rules for what is permitted and forbidden in future legislation. According to this approach, the Knesset lacks the authority to establish limitations that are prospective, or

even limitations that require the votes of more than a majority of the Knesset members. I do not accept this approach.

I have read the opinion of my honorable colleague, Justice Cheshin, who attempts to establish a theoretical basis for his thesis that the Knesset lacks constituent authority, and that as a result, it is similarly powerless to enact statutory provisions that curtail the legislative branch with respect to its future legislation, as detailed and elaborated in his opinion. I cannot accept his approach. Forty five years have elapsed since the aforementioned Harrari Decision, in which the Knesset charged its *Constitution*, Law and Justice Committee to prepare, in its own words, a *proposed constitution for the State*, which would be composed chapter by chapter. During the intervening years, the Knesset has enacted eleven Basic Laws in the framework of fulfilling its constitutional mission. To cast doubt today on the Knesset's legislative-constitutional authority contradicts, in my view, the most reasonable legal interpretation of the State's parliamentary development and the law that has developed in the interim. Furthermore, the view that all constitutions are formed in accordance with same, standard format, dictated exclusively by the nature of the subject at hand, cannot be reconciled with the facts of diverse constitutions emerging in each state as the product of its own discretion, considerations and specific circumstances. There are no standard formats in this matter.

(a) The Knesset defines its own powers and capacities, in accordance with the mandate granted to it by the nation, a mandate renewed in periodic general elections, conducted in accordance with constitutional legislation. The demarcation of the powers and capacities of the Knesset is anchored in the life of the State and the law. The Knesset does not derive its power from any external supra-statutory legislation (cf. e.g. A.V. Dicey Introduction to the Study of the Law of the Constitution, 8th ed. (London, 1924) 106. It is the Knesset that establishes the various categories and fields of legislative provisions from beginning to end. The critical views of Knesset members regarding the course and mode of the framing of Israel's constitution, cited by my honorable colleague should be viewed against the background and in the context of the time and place in which they were expressed. One must not forget that the majority of Knesset members who were critical at the time of the slow pace of the framing of the complete constitution, or even of the failure to execute a single, immediate constitutional act, subsequently gave their full support to the enactment of Basic Law: The Knesset and the other Basic Laws, as chapters in the

gradually emerging constitution, in their belief in the Knesset's power to enact constitutional legislation, according to its choice and decisions.

To my mind there is, at the present stage, no legal justification to support either the diminution of the Knesset's powers, or the assertion regarding any inherent limitation of their scope.

(b) On the other hand, there are approaches that view the Knesset as authorized to enact constitutional legislation. The constituent authority of the Israeli legislature stems from the power consolidated in its hands during the course of its legislative history, from the basic norm that emerged in the early stages of the State's existence, and from legislation that charted Israel's constitutional path in framing a constitution, first as a single act and thereafter as a task to be executed in stages.

(c) Two principle doctrines acknowledge the Knesset's authority to enact constitutional legislation. The first is the doctrine of the Knesset's unlimited sovereignty. The second is the doctrine of constituent authority. The two doctrines are not exclusive. There are others, some variations of one of them, and some separate doctrines that stand alone. I will devote a few words to each of the two aforementioned theories.

(d) The doctrine of the Knesset's unlimited sovereignty proceeds from the assumption that the Knesset is the supreme legislative authority and that its powers are unrestricted, barring such limitations as it may establish for itself. No legislative body is superior to the Knesset, and it is empowered to enact any law, whether constitutional or regular. Its authority also comprises and integrates the authority to enact constitutional legislation that was not exhausted from the establishment of the State and subsequent to the elections for a Constituent Assembly.

In other words, the Knesset, as such, consolidates and merges all the powers of the Provisional Council of State, the Constituent Assembly, the legislature established according to the Transition Law, of the Second Knesset (Transition) Law, and of Basic Law: The Knesset. All of these were transferred to each and every Knesset and thus exist and are maintained.

Inter alia, all the powers of the constitutional legislature were transferred to the Knesset. Its legislation creates the various normative hierarchies. The Knesset operates in that capacity without any internal allocation or division into different institutions based on one body's supremacy over another. The Knesset has discretion to decide whether its

legislative product will belong to the supreme constitutive level or the regular legislative level, and in enacting constitutional legislation, by virtue of its unlimited powers, it also establishes the supremacy of the constitutional law over the regular law, and is authorized to determine conditions applicable to regular legislation for the purposes of adjusting it to the norms determined in the constitutional legislation.

All legislative acts are performed by the Knesset in that capacity. It is the supreme and all-powerful legislative authority of the State. This is the monistic conception of the Knesset's powers, as a monolithic body capable of performing various categories of acts, at its own discretion.

The Knesset's powers are not truncated and disjointed from constitutional developments, but have always faithfully represented and reflected them. Its great, multifaceted powers are the result of its unifying the entirety of the powers transferred to it in the course of our constitutional history. It is not required to divide itself up, or change its image, form or legal status in order to exercise its broad powers.

Justice Berinson's description is most appropriate:

> 'There can be no doubt that under this state's constitutional regime, the Knesset is sovereign. It is empowered to pass any law, and to determine its contents as it sees fit'(CA 228/63 *Azuz v. Ezer* [18], at p. 2547).

Incidentally, Justice Berinson's demurer in that judgment with respect to the Knesset's authority to invalidate a law, did not relate to an entrenched statutory provision, such as s. 4 of Basic Law: The Knesset. See the Bergman case [15], decided by a panel of which Justice Berinson was a member.

Consequently, the Knesset is authorized to enact laws on two legislative levels, both on the constitutional level (a complete constitution or Basic Laws) and on the regular legislative level. As noted above, it also assumed the authority to enact certain forms of secondary legislation. In the framework of its unlimited authority, the Knesset is at liberty to determine conditions and qualifications that are applicable to future legislation, whether constitutional or regular. This is our "constitutional arrangement" as anchored in Israel's constitutional history, in its actual legislative development, and in the case law of this Court. Constitutional continuity has never been interrupted, and the Knesset has the authority to continue to complete the task of the Constituent Assembly which was nipped in the

bud, and which by force of the Harrari Decision became the continuing and ongoing mission of the Knesset.

In summary, in my view the Knesset has the authority to enact not only Basic Laws, but even a complete constitution.

I also think that it is appropriate for it to do so, and fervently support it. In the framework of a symposium debate on the subject with Lord Diplock (M. Shamgar "On the Written Constitution" 9 *Israel Law Review* (1974) 467 at p. 471) I wrote the following:

> ' …the consolidation of the position of the Knesset as a supreme law-giver and the merger of the Constituent Assembly and the Knesset, decided on by the First Knesset, enhanced the supremacy of the Knesset.'

(e) The doctrine of constituent authority asserts that the powers of the Constituent Assembly were transferred to the Knesset that, it follows, alternatively wears "two hats" or "two crowns." There are times when it acts as a constituent authority, superior in terms of normative status to the Knesset as a regular legislative authority. As a constituent authority the Knesset is competent to enact constitutional legislation. There are times when it acts as a regular legislative body, and as such it is – in the hierarchy of authority – on a lower level than the Knesset when acting as a constituent authority [see e.g.: C. Klein "The Constituent Authority in the State of Israel" 2 Mishpatim, (1970) 51; C. Klein, "A New Era in Israel's Constitutional Law," 6 Israel Law Review (1971) 376; C. Klein, "Special Majority and Implied Change," 28 Ha-Praklit, (1972-73) 563; C. Klein, "Semantics and the Rule of Law – Reflections and Appeals on HCJ 66/77 Y. Rassler v. Chairman of Central Knesset Elections Committee, 9 Mishpatim (1978) 79; C. Klein, "Human Dignity and Liberty – Initial Normative Assessment" 1 Hamishpat (1993) 123).]

The constituent assembly doctrine finds expression in academic literature in two forms, or perhaps with two point of emphasis: In other words, it is a single doctrine, with different versions that give primacy to different aspects. Among its proponents there are those who view the separation between the constituent authority and the legislative authority not just as a functional separation but also as an institutional separation. On the other hand, there are those for whom the doctrine is based on a functional separation, creating different levels on the normative hierarchy.

The conception of institutional division was first expressed in the writing of M. Sternberg, in his essay, "An Additional Law or a Supreme Normative Layer, 16 Molad (1958) 284, 287), where he wrote:

> 'Consequently, the collective of persons known as the Knesset also functions as a body known as the constituent body, functioning parallel to the Knesset itself, its fundamental objective being to frame a constitution' [emphasis mine – M.S].

Apparently, Professor Akzin took a similar view in the aforementioned book, at p. 40 where he writes:

> '…When the same group of people fulfils these two roles, they should be viewed as operating as two separate institutions….if we are unwilling to adopt such a "formalistic" view of this process, the singular character of the constitution as opposed to the laws may lose its significance.'

I used the term "apparently" because the examples that the learned author later provides for his thesis might give the impression that the abovementioned description is more sharply defined than the factual foundation on which it rests. At all events, Professor Akzin's aforementioned description relies on his theory of the correlation between the scale of legislative authorities and the institutional scale. In other words, each authority has an exclusive institutional correlate authorized to exercise that authority. As explained above, I reject that approach.

According to the thesis presented by Sternberg and Akzin, the two institutions exist in tandem, or one as part of the other, and operate alternately as legislative authorities. In terms of its essence and normative classification, a legislative act is classified in accordance with the cloak (or "hat") worn by the legislative authority at that time. What this means is that from time to time there is an institutional metamorphosis, dictated by the nature of the legislative material being dealt with by the legislature.

As opposed to the conception premised upon institutional division, there is another approach, according to which there is no institutional division, but rather a functional legislative division, which affects the position of the legislation on the normative legislative hierarchy. Under the alternative conception of the analytical foundations of constituent authority, the Knesset is a single institution that provides the anchor for both constituent authority and regular legislative authority. By virtue of the Knesset's standing as a constituent authority, the Basic Laws were enacted.

Consequently, they constitute the supreme norm in the light of which the constitutionality of a regular law is examined. The normative level reflects the nature of the function performed by the Knesset when it enacts the relevant legislative provision.

(f) Of these two principle doctrines - the doctrine of the unlimited sovereignty of the Knesset and the doctrine of constituent assembly - I definitely prefer the first, namely, the doctrine of the unlimited sovereignty of the Knesset. To my mind, it more accurately reflects the legislative history, the accepted, recognized legal approaches and this Court's case-law (see M.Shamgar, "The Knesset's Authority in the Constitutional Realm, 26 Mishpatim (1995) 3).

I considered whether it would be appropriate in this opinion to cite the reasons, and by implication also the arguments for and against each of these two doctrines. I decided in the end that such a discussion is unnecessary in the present circumstances, because it is not necessary in order to examine the conformity of the amending statute to the provisions of the Basic Law. The main point is that, in my opinion, each of the two doctrines answers the question that I posed above, namely, whence the authority of the Knesset to produce legislative acts of constitutional standing. Therefore I leave this matter to be dealt with at the appropriate place and time.

Self-Limitation of the Knesset

33. This brings us to a second, separate question, namely, whether the Knesset is competent to enact legislative provisions that limit its own future legislative powers. In my opinion, the Knesset holds every authority including the authority to limit itself by means of legislation. This is essential for the creation of a sound constitutional framework. In order to confer entrenched, elevated status upon fundamental rights there is a need to limit the future regular legislative authority and to subordinate its legislation to the normative values that constitute the various fundamental rights. In the absence of the power of limitation, constitutional provisions that define fundamental rights are left with no stable protection for the future. At least since the Bergman case [15], we have acknowledged that this Court is competent to decide on the validity of legislation that contradicts or violates a Basic Law

The question of whether parliament can bind itself by entrenching laws in either a procedural or a substantive manner derives primarily from the

classic English constitutional doctrine, which at the time rejected the theory that Parliament could bind itself or any subsequent parliament. The clear enunciation of the theory that Parliament cannot limit its own legislative authority is often demonstrated by citing from the comments made by Lord Bryce, one of the ministers in the Gladstone government in England, who explained in an address to Parliament in 1886:

> 'There is no principle more universally admitted by constitutional jurists than the absolute omnipotence of parliament. This omnipotence exists because there is nothing beyond parliament, or behind parliament… There is one limitation and only one upon our omnipotence and that is that we cannot bind our successors. If we pass a statute purporting to extinguish our right to legislate on any given subject, or over any given district, it may be repudiated and repealed by any following parliament – aye even by this present parliament on any later day' [emphasis mine – M.S.].

These comments from Parl. Deb. (4th Ser.) 1218-1219 (1886 305) were cited for example by Prof. B. Nimmer in his study "The Uses of Judicial Review in Israel's Quest for a Constitution" 70 Colum.L.Rev (1970) 1217, 1227-1228, and remained a firmly entrenched tenet of English jurisprudence until the last two decades. They are the foremost hallmark of the doctrine of Parliamentary Supremacy in accordance with the Dicey school (see for example, in the tenth edition Introduction to the Study of the Law of the Constitution (10th ed. London (1959) by E.C. Wade; G. Phillips Constitution and Constitutional Law, 7th ed. 1963 London) and many others.

Echoes of this approach in Israeli academic writing can be found in the article of A. Likovski, "The Court and the Legislative Supremacy of the Knesset," 3 Isr.L.Rev. (1968) 345, 364; see also: A. Likovski, Can the Knesset Adopt a Constitution which will be the Supreme Law of the Land, 4 *Isr.L.Rev*. (1969) 61; Prof. A. Rubinstein, "Israel's Piecemeal Constitution" 16 *Scripta Hierosolymitana* (1966) p. 201; Prof. B. Akzin, "Problems of Constitutional and Administrative Law," International Lawyers Convention in Israel (Jerusalem 1959) 163.

My answer to this problem is anchored in the Knesset's power – as the sovereign assembly – to enact all manner of legislation, of any content, including legislative entrenchment (procedurally or substantive) of fundamental values of the State of Israel, and in so doing, to bind itself and

any subsequent Knesset, subject to the power to amend or revoke that limitation in the manner stipulated by the Knesset. The distinguishing characteristic of these values is a broad social consensus. On the face of it, this theory entails the diminution of the absolute legislative power of the Knesset, since by a single constitutional act one Knesset can limit both its own legislative power, and that of another Knesset. However this is the classic constitutional paradox of the sovereignty of the legislature: assuming that the Knesset is sovereign, it is permitted to perform any act, including the imposition of limitations on the Knesset. In other words, the limitation of the Knesset detracts from the sovereignty of the Knesset. However, this effect is the result of the actions of the Knesset itself. It is the Knesset that legislates and in so doing it imposes limitations, and it is the Knesset that is authorized to remove the limitations on its power by means that it has established for itself.

From a logical perspective, the Knesset's power to limit itself is a possible and logical solution (Prof. Y. Englard, Introduction to Jurisprudence (Yahalom, 1991) at p. 110) In fact:

> 'Nothing prevents a legal norm from relating not only to particular forms of conduct of people but also to its own validity and the manner of its change. Just as the legislature can determine the limits of applicability of a norm in terms of time and place, it can determine that a particular norm cannot be repealed or changed, whether by itself or by any other entity' (ibid ,at p. 110-111).

The issue was also addressed by Professor Hart in his book The Concept of Law (2nd ed. Oxford, 1994) at p. 149, where he states:

> 'Under the influence of the Austinian doctrine that law is essentially the product of a legally untrammelled will, older constitutional theorists wrote as if it was a logical necesssity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed ab extra, but also from its own prior legislation. That Parliament is sovereign in this sense may now be regarded as established, and the principle that no earlier Parliament can preclude its "successors" from repealing its legislation constitutes part of the ultimate rule of recognition used by the courts in identifying valid rules of law.

It is, however, important to see that no necessity of logic, still less of nature, dictates that there should be such a Parliament; it is only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity. Among these others is another principle which might equally well, perhaps better, deserve the name of 'sovereignty' This is the principle that Parliament should not be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would then at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows to it. The requirement should be that from the moment of its existence Parliament should be free from legal limitations including even those imposed by itself, is, after all, only one interpretation of the ambiguous idea of legal omnipotence' (emphasis mine – M.S.).

According to Professor Hart a system in which the parliament is authorized to limit itself is an even better reflection of the concept of "sovereignty," which is the adjective he uses when relating to the [English] Parliament. In other words, according to Professor Hart, a parliament that is also authorized to limit its power by force of its own legislation gives expression thereby to its unlimited power and authorities, which stem from and within itself, and not by force of any other external abstract hierarchy. According to Professor Hart, the Knesset's power to limit itself need not flow from another body, of a higher institutional status, but rather can stem from the same institutional source, i.e. from the parliament as such.

The border line of the Knesset's power to limit itself is a function of constitutional policy. The solution presented here is that the Knesset is permitted to limit itself in accordance with its own discretion. It can restrict both the form of the legislation and the content of legislation. The judicial branch has given legal effect to the Knesset's desire to restrict its power.

Furthermore, Dicey's classical doctrine that parliament cannot limit itself has lost ground even in the country of its conception (see P. Craig, "Unitary, Self-Correcting Democracy and Public Law," 106 *L.Q.Rev.* (1990) 105). In other words, the English system – a constitutional system from which we have drawn extensively – imposed restrictions on the legislative power of the legislature. These restrictions were imposed in the framework of the United Kingdom ratifying the European Communities Act, 1972 and especially by reason of sections 3 (1) and 4 (2). In case law, see: *Factortame Ltd. v. Secretary of State for Transport* (No. 2 (1991)

[102], at 108; *MaCarthy Ltd. v. Smith* (1981) [103], at 200. English academic writing on the English law on this point is rich: see e.g.: G. Winterton, "The British Grundnorm. The Parliamentary Supremacy Re-Examined" 92 L.Q.Rev. (1976) 591. Professor Akehurst provided the following summary of the legal position in England ("Parliamentary Sovereignty and the Supremacy of Community Law," The British Yearbook of International Law – 1989 (Oxford, 1990) 351, 357, in the following words:

> 'English courts will apply an act of Parliament which expressly states that it is intended to violate or repudiate a rule of community law, or to repeal, amend or limit the application of the European Communities Act; but in all other cases they will recognize the supremacy of community law over the sovereignty of the British Parliament' (emphasis mine – M.S.).

As stated, the subordination of the English legislature to normative provisions that curtail its legislative power was done by force of the Parliament's own legislation. English law recognizes a provision of superior normative standing, its supremacy having been conferred by the legislature in the wake of England's joining the European Community. All the same, the supremacy is relative in the sense that the legislature can override it by force of explicit legislation. Similarly, the Knesset, too, can override the standing and the content of a constitutional provision by force of later constitutional legislation, or legislation enacted by force thereof, that complies with the conditions and qualifications specified in the constitutional legislation. Naturally, the English constitutional arrangements are not the same as ours. Nonetheless, in this context I would like to draw attention to s. 8 of Basic Law: Freedom of Occupation. Here, too, we find a situation in which if the language of the later legislation is explicit, the self-limitation of the legislation does not create a constitutional barrier.

The source of the Knesset's competence to submit its own legislative power to substantive limitations may be derived from the doctrine of the constituent assembly or it may be derived from the doctrine of the inherent unlimited authority of the legislature to enact any law, including a law whereby it limits itself. Both doctrines lead to the conclusion that our House of Representatives has authority in the constitutional realm, that is: in principle, it is within the Knesset's power to frame a constitution and

even to demarcate the contents of future legislation, and this circumscription complies with the principle of legality.

I made my comments above to show that the doctrine by which the Knesset is unable to limit itself, for example by way of a requirement of an entrenched majority, also had its supporters in our own legislature and scholarly literature. The scholarly sources of the opponents of the Knesset's power of self-limitation derive from the English legal tradition, which has itself changed in the interim in its own way..

Self – Limitation in Case Law

34. (a) Our constitutional tradition supports the proposition that the Knesset is empowered to limit itself with respect to fundamental issues. It can limit itself on a formal level in terms of the method of adopting a new law (such as a requirement of a special majority – s. 4 of Basic Law: The Knesset, and sections 9 (a) and 34 of Basic Law: The State Economy; s. 54 of Basic Law: The Government of 1992; sections 44 and 45 of Basic Law: The Knesset; s. 42 of Basic Law: The Government of 1968, and s. 56 of Basic Law: The Government of 1992; s. 25 of Basic Law: The President of the State; s. 22 of Basic Law: The Judiciary). The limitation may occur on a substantive level (for example, s. 4 (opening words) of Basic Law: The Knesset or s. 4 of Basic Law: Freedom of Occupation).

(b) Case-law has not challenged the proposition that the Knesset has the power to issue normative acts with supra-legal status. This Court adjudicated the subject of the entrenched provisions of s. 4 of Basic Law: The Knesset in the Bergman case [15], and the subject arose again in HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* (hereinafter – the *Derech Eretz* case) [19]. Section 4 of Basic Law: The Knesset came to the fore once again in HCJ 141/82 *Rubinstein v. Knesset Speaker* (hereinafter – *Rubinstein* [20]. In HCJ 142/89. Laor Movement v. Knesset Speaker, on page 571 Deputy President Elon stated that by force of its constitutional sovereignty, the Knesset had the authority to pass any legislation that it deemed appropriate, and we have no license to question the legislative act.

In the Laor case [21], my distinguished colleague President Barak noted that the entrenchment bestowed on the provisions of s. 4 of Basic Law: The Knesset 'is binding in our legal system, because we acknowledge the Knesset's authority to act as a constituent authority and to prepare Basic Laws that will become the various chapters of the State Constitution' (ibid,

at p. 539). Nothing in that paragraph contests the Knesset's authority to establish entrenched provisions in the constitutional realm, or the Supreme Court's power to invalidate a law that contravenes an entrenched provision (see my comments in HCJ 669/85 *Kahana v. Knesset Speaker* [22]).

35. In my view, based on all of the above we can conclude that our constitutional tradition has in fact endorsed the Knesset's power to limit itself, and in fact the Knesset's self-limitation has merited sovereign approval, in the first stage by formal self-limitation and at the second stage by substantive limitation. With respect to formal self-limitation ,the first guiding rule is the Bergman [15] rule. A law presuming to violate the principle of equality that was not adopted by the required majority is defective, and subject to a constitutional remedy. The legislative authority – the Knesset – accepted this Court's ruling in Bergman [15]. It removed the inequality that affected the new lists participating in the elections, and passed the Elections Financing Law, 5733-1973, together with the Knesset Elections (Confirmation of Validity of Laws), 5729-1969. In the course of the years, a constitutional custom and understanding has been established that the Knesset is endowed with the power of self-limitation with respect to formal aspects. This constitutional custom has the merited seal of approval of all of Israel's branches of government – the legislative branch, the executive branch and the judicial branch (*Derech Eretz* [19*], Rubinstein* [20], *Laor* [21].

The recognition of the Knesset's ability to limit itself on the formal level led to the conclusion regarding the power of the Knesset to limit itself on the substantive level. Indeed, rationally, there is no room to distinguish between formal and substantive limitations. As Prof. Nimmer correctly pointed out in the article cited above, at p. 1231:

> 'Logically, there can be no ground for distinguishing between the powers to fetter future parliaments substantively and procedurally, either there is power to do both or there is power to do neither' (emphasis mine – M.S.).

At the same time, the limitation is not unrestricted. Patently, boundaries must be imposed on the extent to which the legislature may be fettered. It is not necessary to delineate these boundaries here, as there is consensus that in relation to basic rights such as those found in Basic Law: Human Dignity and Liberty – no difficulty is posed by the fundamental recognition of substantive or content-related limitation. In other words, we do not need to delineate these boundaries for the purpose of the discussion before us,

and we may leave this issue open. In any event, on one hand, it is possible to take into account fundamental principles of our system as a Jewish and democratic state. On the other hand, tension exists between the principle of protection and the stability of fundamental principles and the need for flexibility. These and other arguments are serious and persuasive. Thus, for example, there is a view which holds that broad and substantive fettering of the Knesset may violate the principle of majority rule to an inappropriate extent (for details see R. Gavison, "Controversy over Israel's Bill of Rights," 15 Isr. Y. H. R. (1985) 113, 127).

Summing up this point, there is no logical obstacle to the Knesset limiting itself procedurally or substantively. Likewise, in so far as concerns fundamental rights and the principles of our constitutional regime, there is currently no legal or substantive hindrance or indeed obstacle of a legal policy or constitutional nature precluding the Knesset from limiting itself procedurally or substantively.

Summary regarding constitutional legislation

36. In summary, the phenomenon of Basic Laws in our legal system, viewed precisely discloses the following: the Knesset pursues a constitutional program. This program is being executed on a chapter by chapter basis. The Basic Laws form the constitutional infrastructure of the State of Israel. Today, most of their provisions do not possess normative supremacy by virtue of their own status, albeit they are "constitutional laws" by nature and description. The Knesset may decide, even at present, that some of these Laws or parts of them will possess normative supremacy. It did so, for example, in Basic Law: Freedom of Occupation. It was also entitled to do so in Basic Law: Human Dignity and Liberty, which is the twin brother of Basic Law: Freedom of Occupation and some of the provisions of which (Section 1 and the amendment to Section 8) were adopted on 20 Adar 5724 (9.3.94) as part of Basic Law: Freedom of Occupation of 1994.

The methodology of constitutional legislation

37. (a) Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty were born together, and it is possible to learn about one from the other, both in terms of similarities and in terms of disparities.

(b) Basic Law: Human Dignity and Liberty does not contain a simple and direct entrenchment provision such as that found in s. 7 of Basic Law: Freedom of Occupation. In order to classify Basic Law: Human Dignity

and Liberty we must consider the general interpretive sources that are ordinarily available to us. First, it is titled "Basic Law," and as such it is directly connected to the Harrari decision. This per se is sufficient to categorize it.

Following the Harrari decision, legislation was formulated in this country bearing the title "Basic Law." This heading clarifies the status of the law. In the absence of such a sign of recognition, is it possible to turn to an examination of the specific law in order to try and learn about its constitutional nature from its language and its contents, including from its status, purpose and objectives? Is it perhaps the case that there can be no constitutional provision save one that bears the title "Basic Law"? According to every legal and historical thesis, the Transition Law was enacted by the Constitutive Assembly. It does not bear the title "Basic Law." Is it a constitutional provision?

What is the status of the Law of Return and the Women's Equal Rights Law that were enacted by the First Knesset, which directly and expressly wielded the powers of the Constituent Assembly? Both are of a manifestly constitutional nature; however, do they form part of our constitutional legislation?

These are difficult questions, but I shall leave them aside as not pertinent to the present case. Nonetheless, it is appropriate to set out a number of guidelines for future constitutional legislation, as even if we assign the enactment of a constitution to a constituent authority, we are still left with the question of the line which that authority must follow when identifying appropriate issues for inclusion in a constitution and the method of legislation and substantive classification that it must adopt.

38. (a) First, there are a number of principal characteristics which distinguish a constitution from an ordinary law. A constitution deals with fundamental principles. It seeks to accord the principles a guiding status in so far as concerns other legislation and the acts of the state authorities in general. This principle is known in German constitutional theory as Vorbehalt Des Gesetzes (see Sections 1(3), 20(3) and 79(3) of the German Basic Law; New Challenges to the German Basic Law, C. Starck, ed. (Nomos, 1991) 162; R. Herzog, Staat und Recht im Wandel (Keip, 1993) 150. The constitution is the outcome of the will of the nation, and accordingly it is generally adopted, in other legal systems, in a unique one-time process. A constitution is occasionally characterized by relative inflexibility in relation to ways of amending it. A constitution is

occasionally characterized by limitations on the possibility of infringing rights protected by it (and on occasion even by the absence of any possibility of "infringement"). Nonetheless, there are systems, such as that of New Zealand, in which the bill of rights does not have special status compared to ordinary legislation.

Second, the language of a Basic Law itself should indicate that it has a special normative status. For example, if a law states unequivocally that it has special or entrenched constitutional status, then we are dealing with a law possessing formal constitutional status (i.e., possessing normative superiority relative to ordinary legislation). This is also true if the law establishes exact conditions for the validity of a law which seeks to infringe a protected right. In other words, a Basic Law's attitude, revealed in its contents, regarding its own status carries paramount weight in determining the normative classification of the Basic Law.

Put differently, a constitution possesses certain substantive aspects (the structure of the regime, fundamental rights and principles) and certain fundamental aspects (such as the manner of adoption and amendment of the constitution, the name of the law, its language, style, formulation, concepts). A constitution is characterized by the conciseness of its formulation. A constitution is characterized by abstractness.

Third, it is possible to examine the manner in which the law is integrated into the constitutional structure of the system. Constitutional structure is examined in the light of the constitutional history. It is examined through the constitutional acts performed by the Knesset. A constitutional law serves a certain purpose – it is designed to alter a certain normative reality. Understanding the law requires that we examine the legal situation that the law is intended to change. We must aspire to realize its purpose. If it is a Basic Law, understanding it requires that it be situated logically and harmoniously within three primary circles. The broad, external circle is that of the fundamental principles of our system. The second circle is that of constitutional legislation – the "Basic Laws." Our narrow specific circle is, in the present case, the integration of Basic Law: Human Dignity and Liberty with its twin – Basic Law: Freedom of Occupation – within our constitutional system.

These two Basic Laws are the first in the bill of rights (as distinct from the institutional Basic Laws). They entered our legal world in close proximity in terms of time and circumstances, and they were even amended

concurrently. To a large extent, therefore, they coexist. It is particularly important that they be interpreted harmoniously.

Fourth, an understanding of the substance and purpose of Basic Law: Human Dignity and Liberty requires that appropriate weight be given to the legislative intent and the constitutional history of the Basic Law. The constitutional history and legislative intent are discerned from the legislative history and incarnations of the bill, from hearings in the Knesset, from the changes introduced into the Basic Law during the second and third readings in the Knesset, and from the law's record after its enactment. Special importance must be attached to the legislative intent in the present circumstances. These remarks are not directed at the literal interpretation of any particular idea but to the overall concept.

The legislative will, in so far as it can be ascertained, should provide the starting point. The difficulties in ascertaining it are indeed many, but we should not be tempted to exaggerate them. In most cases, it is at least clear what the legislature did not want. (Prof. A. Levontin, "Interpretation: Climes and Synthesis," Klinghoffer Volume, at pp. 269, 277-278).

From a determination of the characteristics of the legislation we now turn to the tests applicable to the Basic Law before us. Does it establish statutory arrangements that reflect its place on the normative hierarchy, or will its protections of fundamental rights sway in every wind in so far as variation or infringement of its provisions? Is it similar, in this sense, to the provisions of most of the Basic Laws that preceded it, which lack entrenchment clauses?

Basic Laws: Variation and Infringement

39. (a) The Basic Laws form the constitutional infrastructure of the State of Israel in the spirit of the Harrari decision and its realization. Had the issue of "variation" arisen in the present case, i.e., had the Amending Law been intended to change the Basic Law, I would immediately have presented the principle whereby, according to correct constitutional theory, variation of a Basic Law must always be effected by a Basic Law. The concept of a normative constitutional hierarchy presented above leads to the conclusion that a more highly positioned statute cannot be varied in form or content by legislation lower in the constitutional hierarchy. This is not true of the converse position. In other words, legislation higher in the constitutional hierarchy can amend a statutory provision lower in the constitutional hierarchy. In this context, the issue of "implied amendment"

may arise. However, I shall not address that issue, and will leave it for the appropriate opportunity. The same conclusion emerges from the practice of the Knesset. In this regard, note should be taken of the amendment to Basic Law: Human Dignity and Liberty that was effected in 1994 by means of Basic Law: Freedom of Occupation.

As mentioned, we are not concerned here with a "variation." The question arising concerns an "infringement." Each of the Basic Laws sets out express provisions in regard to possible infringement of a fundamental right: Sections 4 and 8 of Basic Law: Freedom of Occupation and s. 8 of Basic Law: Human Dignity and Liberty. First, it is necessary to examine whether there is an infringement of a fundamental right. If the answer is affirmative, then did the law comply with the conditions of the limitation clause or not? What is the outcome where there is an infringement that is incompatible with the requirements of the relevant limitation clause, which establishes the limitations and conditions for valid legislation notwithstanding its infringement of a fundamental right?

(b) The issue of "infringement" is a complex one. There are numerous alternative theories regarding the distinction between an infringement that is contrary to law and one that complies with the requirements of the law. I shall present them and indicate the one that I believe should be preferred.

The first theory holds that every ordinary law of the Knesset may infringe a right protected by a Basic Law. According to this view, the relationship between a Basic Law and every ordinary law is no different than the relationship between any two ordinary pieces of legislation of the Knesset. This first possibility is based on the *Negev* case [12] (at p. 642, opposite letter G). It follows from the *Negev* case [12] that an ordinary law (Standards Law, 5713-1953) may infringe a principle established by a Basic Law (Basic Law: the Government), when the relationship between the two is a regular interpretive relationship between two pieces of legislation (such as a special law vis-à-vis a general law). As Justice Berinson stated there: "the fact that the Standards Law is a special law compared to Basic Law: the Government which is a general law, accords the special law priority over the general law" (see also the *Kaniel* case [13] and the *Ressler* case [14]).

Judgment was reserved concerning the *Negev* case [12] in later case-law: in HCJ 119/80 OM 224/80 *HaCohen v. Government of Israel* [23] at p. 283, the question of the possibility of a provision of a Basic Law infringing a later ordinary law was left open (ibid, at p. 283). In my view,

the *Negev* judgment [12] was not intended to refer to normative constitutional hierarchy but to the status of a specialized statutory provision versus the provision of a general law, and no more. Further, the judgment referred to a Basic Law that was not accorded any entrenched status whatsoever, either directly or impliedly by virtue of its provisions.

To summarize, the first possibility holds that, in the absence of a qualifying provision, there is no normative difference between an ordinary law that seeks to infringe a Basic Law and a Basic Law that seeks to do the same.

The second thesis holds that a Basic Law enjoys limited normative priority. According to this view, an ordinary law may infringe a Basic Law; however, this should properly be done by the Knesset in an express manner. An infringement of a law that is not expressly made has no legal force. A law that infringes a right protected by a Basic Law, without an express statement to that effect, does not have the legal force to do so. Such a law is subject to constitutional remedies by virtue of its unconstitutionality. This thesis has been accepted by a number of scholars. It has been approved by former Deputy President Elon, who stated that "reason dictates that a statute that seeks to vary a provision of Basic Law: Human Dignity and Liberty should state that it is made notwithstanding the provisions of this Basic Law, or some similar expression, but no more" (M. Elon, "The Way of Law in the Constitution: The Values of the Jewish and Democratic State in Light of the Basic Law: Human Dignity and Liberty," 17 *Tel-Aviv University Law Review (Iyyunei Mishpat*) (1993) 659, 662). This view has been accepted by Ms. J. Karp, (J. Karp, "Basic Law: Human Dignity and Liberty – A Biography of Power Struggles," I *Mishpat uMimshal* (1993), 323, 332). She writes that the supremacy of the Basic Law is merely relative:

> 'This does not mean complete negation of the legislature's power to override a Basic Law and dismantle it. In the same way as formal entrenchment does not restrict the legislature in relation to the content of its legislation, but only in relation to the process of variation (the requirement of a special majority), so too implied entrenchment is capable of restricting the legislature only in relation to the procedure of the variation, i.e., on condition that there is an express statement by the legislature regarding its desire to override the Basic Law' (*ibid*, at p. 324; emphasis mine – M.S.).

In her opinion:

> 'The Basic Law embodies a compromise: the court is indeed accorded the power to adjudicate regarding the invalidity of the law. However, this power is limited and ends in the face of an express statement by the legislature regarding its desire to deviate from the Basic Law… '(*ibid*).

These comments are prima facie also applicable to the case of "infringement" only. Prof. Weisman too, accepts the second possibility as the correct interpretation of the validity of the infringement enacted in a Basic Law: "as the provision in Section 8 (of Basic Law: Human Dignity and Liberty – M.S.) is not entrenched (in the same way as the other sections in this Basic Law were not entrenched) it follows that the Knesset is not precluded from enacting statutes in the future, the contents of which cannot be reconciled with the limitations established in Section 8 of the Basic Law, provided that this is done expressly and clarification of this intention is given." (Y. Weisman, *Property Law The Institute* (Sacker Institute for Legislative Research & Comparative Law, 1993) 38; emphasis mine – M.S.).

The third possibility acknowledges the supremacy of a Basic Law per se and strengthens it. According to this view, a lawful "infringement" of the Israeli bill of rights is possible only if it meets the requirements consistent with the theory of a normative hierarchy. This thesis is premised on the unitary nature of the bill of fundamental rights, i.e., of Basic Law: Human Dignity and Liberty, Basic Law: Freedom of Occupation and other Basic Laws that may be enacted by the Knesset in the future in regard to basic rights. These Basic Laws will form a unified whole. The Knesset expressed its desire regarding the normative classification of the Israeli bill of rights. Following the Harrari decision, it presented these rights in the form of Basic Laws. In so doing, it assigned them to a constitutional normative hierarchy. A variation or infringement outside the framework of the limitation clause, which too forms part of the Basic Law, may only be carried out by a law of equal status, i.e., by means of a Basic Law or on the basis of an authorization in a Basic Law (see s. 8 of Basic Law: Freedom of Occupation of 1994, which not only illustrates this interpretive approach but also shows that the Knesset adopted it in practice).

These are the three principal options relating to the normative classification of a Basic Law in relation to the possibility of an

"infringement" of a protected right that does not satisfy the conditions of the limitation clause.

My choice is the third option. I have already mentioned above that in view of the constitutional policy of the Knesset, as expressed in the two new Basic Laws, it is appropriate from now on to hold that no variation of any Basic Law may be carried out save by a Basic Law, and it would be right to hold that no "infringement" of a Basic Law may be carried out save by a Basic Law or by virtue of an authorizing provision therein.

We must now turn from presenting the general approaches to an examination of the question before us regarding the application of the specific Basic Law with which we are presently concerned to the Amending Law. For this purpose, we shall examine a number of provisions in the Basic Law.

The Basic Law versus the Amending Law

The Supremacy Clause

40.(a) Basic Law: Human Dignity and Liberty does not contain a supremacy clause, nor does Basic Law: Freedom of Occupation. Basic Law: Human Dignity and Liberty does not even contain an entrenchment clause, like s. 7 of Basic Law: Freedom of Occupation, which provides that:

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

The absence of a clear supremacy clause does not compel the conclusion that the status of a Basic Law is equivalent to that of an ordinary statute.

A supremacy clause, had one existed, would certainly have been persuasive of the fact that the law possesses supreme status. The Canadian Constitution stated that it was 'the supreme law of Canada.' Section 52(1) of the Constitution Act, 1982, declares unequivocally: 'The Constitution of Canada is the supreme law of Canada.' This normative supremacy engenders the constitutional remedy whereby: 'any law that is inconsistent with the clauses of the Constitution is, to the extent of the inconsistency, of no force or effect' (Section 52(1) – final clause of the Constitution Act). The Canadian Constitution was taken into consideration by the drafters of the Basic Law (Karp, in the article cited above, at p. 331).

The German Basic Law (the *Grundgesetz*) provides in Section 20(3) –

> 'Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.'

Translated:

> 'The legislature shall be bound by the constitutional order; the executive and the judiciary by law and justice.'

By the way, the German legal commentary is aware of the tautology expressed in the words "law and justice."

Section 1(3) of the German Basic Law, which is similar to Section 11 of Basic Law: Human Dignity and Liberty and Section 5 of Basic Law: Freedom of Occupation, provides:

> 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.'

Translated:

> 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.'

The German constitution subjects the activities of the *legislature*, executive and judiciary directly to the provisions of the constitution. It is undisputed that the German Basic Law manifestly embodies the notion of supremacy.

It is possible to adduce numerous additional examples (for example, s. 140 of the Austrian constitution of 1920 – the *Bundes-Verfassungsgesetz* (B-VG)).

(b) As noted, Basic Law: Human Dignity and Liberty does not contain a supremacy clause. The Basic Law does not incorporate a provision to the effect that it is a supreme law in the State of Israel. The draft bill Basic Law: Legislation, as may be seen from its history since it was first published in 1971 (see (1971), 27 *HaPraklit* 140; the draft Basic Law: Legislation of 1976; the draft Basic Law: Legislation of 1978; the draft Basic Law: Legislation of 1992; the draft Basic Law: Legislation of 1993) was intended to establish the subservience of ordinary legislation to basic legislation, however, the proposal has not yet developed into law.

(c) The Basic Law that we are examining also does not contain a provision, as proposed, to the effect that "a law will not contravene a Basic Law save if passed in the Knesset plenum by the votes of two-thirds of the members of the Knesset and unless it expressly states that it is valid notwithstanding the provisions of the Basic Law" (s. 5(d) of the draft Basic Law: Legislation of 1992).

Basic Law: Freedom of Occupation states that a statutory provision that infringes freedom of occupation *will be valid* in certain circumstances, even if it is incompatible with s. 4 (i.e., even if it does not meet the requirements of the limitation clause). The explicit affirmative also implies its negative, namely that *ab initio*, a statutory provision that is repugnant to sections 4 or 8 of the Basic Law is invalid. Basic Law: Freedom of Occupation therefore addresses the question of the *validity* of laws that infringe a provision in a Basic Law (similar to the European Union Convention, Article. 177(B), *Costa v. Enel* (1964) [108] at 590). As we shall see below, a similar conclusion follows from the provisions of sections 8, 10 and 11 of Basic Law: Human Dignity and Liberty.

To summarize this point, Basic Law: Freedom of Occupation does not contain a supremacy clause, albeit it refers to the manner of its variation and the *validity of infringing legislation*. Basic Law: Human Dignity and Liberty does not contain a supremacy clause, *but it refers expressly to the validity of infringing legislation and thereby designates a mandatory route and binding standards*. In s. 8, this Basic Law defines the boundaries of possible infringement and thereby impliedly establishes its supremacy relative to infringing legislation.

Rigidity

41. (a) Basic Law: Human Dignity and Liberty does not enjoy rigidity. There is no express provision that a special majority is needed to vary the Basic Law. The variation is a statutory act by virtue of which the scope of protection accorded to certain rights varies for good or for bad. Indeed, we have already repeatedly clarified that the "variation" is distinct from the "infringement." Variation undermines the right itself. "Infringement" does not vary the protected right. It merely enables the infringing statute to circumvent the constitutional remedy in given circumstances.

As noted above, in consequence of the 'variation' it is conceivable that the protection accorded to a right will be more restricted; for example, by amending the Basic Law by restricting its scope, repealing a particular

provision in it or repealing the entire Basic Law. On the other hand, the protection can also become broader by reason of the variation, for example, by the addition of protected rights or by elevating the normative supremacy of the protected values.

(b) We have seen that there is no requirement for a special majority or for a special process to vary the Basic Law before us.

Subject to future legislation (such as Basic Law: Legislation), the process for changing a Basic Law follows the same *stages of legislation* as an ordinary law, i.e., a draft Basic Law is published in the same way as an ordinary bill. The draft Basic Law is enacted in three readings. Every Knesset member may table a Basic Law through a private member's bill, in the same way as every Knesset member may table any ordinary private bill. The Knesset Regulations apply to the enactment of a Basic Law, just as to the enactment of an ordinary statute. Indeed, this is "the unbearable lightness of legislating and amending Basic Laws" (Dr A. Bendor, "Flaws in Enacting Basic Laws" 2 *Mishpat uMimshal* (1994), 443, 444). The absence of any element of rigidity is of interpretive significance. My distinguished colleague the President referred to the inherent importance of rigidity as a distinctive feature of a constitution. The rigidity of a constitution demonstrates its supremacy over an ordinary law, "so that in the event of a contradiction between the provisions of a constitution and the provisions of an ordinary law, the constitution will prevail (A. Barak, *Judicial Discretion* (Papyrus, 1987) 319).

For an illustration of the frequency of rigid provisions in a constitution it is possible to turn, for example, to the Constitution of the United States (Article V); the Constitution of Canada (Art. 52(3) of the Constitution Act, and Part Five of that Act); the Constitution of Australia (Art. 128 of the Commonwealth of Australia Constitution Act); the German Constitution (Art. 79 of the Grundgesatz für die Bundesrepublik Deutschland – the Basic Law for the Federal Republic of Germany, which creates absolute rigidity in regard to its provisions); the Constitution of Ireland (Art. 48). Were it not for considerations of space, it would be possible to list a number of articles in each of the existing constitutions in order to demonstrate the approach to rigidity that each employs, whether by way of entrenchment or some other approach.

d) *Rigidity as a Recognized Constitutional Characteristic in Case Law*

With the establishment of the right to freedom of occupation in a Basic Law, it has achieved supra-legislative status. One of the distinguishing characteristics of this special status ... is the relative entrenchment of that right even against the mighty hand of the legislature (HCJ 3385/93, 4746/92 *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [24] at p. 259).

Indeed, Basic Law: Freedom of Occupation is a typical constitutional creation, as stated s. 7 of that law states: "This Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knesset." No similar provision exists in Basic Law: Human Dignity and Liberty.

42. The relative weight of the absence of rigidity generated either by formal entrenchment or otherwise, is strengthened in the light of three arguments:

a) *First*, the absence of entrenchment was not an error on the part of the legislature. The absence of entrenchment is conscious and deliberate. The *draft* Basic Law: Human Dignity and Liberty included a provision regarding formal entrenchment. This provision was not approved. It failed by a single vote during the process of voting on reservations preceding the final adoption of the Basic Law. In contrast, as noted, Basic Law: Freedom of Occupation incorporates a formal entrenchment provision. Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation are closely related. This relationship is substantive and chronological. "Substantive" – because these two normative creations deal for the first time with protected basic rights. "Chronological" – because these two creations evolved within the framework of the first specific process of legislation of a charter of human rights in our legal system (what Karp termed the "atomization" of basic rights, in her article cited above at p. 338). These Basic Laws were debated in the Knesset at around the same time, and were subsequently addressed in the same legislative process in 1994. The normative reality is that the Knesset chose to reject the proposed entrenchment of the Basic Law. This is a fact – the situation was not one of an oblivious legislature. Nonetheless, as noted, the law does contain additional provisions that are of significance in regard to the effect of other legislation that infringes its provisions.

b) *Second*, we explained that "variation" of the protected right (including its repeal or nullification) is a graver and more serious act in

terms of its significance than "infringement" of that right. This is undisputed. Reason dictates that the actions required to "vary" the protected right are of greater significance than the actions required to locally "infringe" that right. On the assumption that the legislature is consistent and logical, it is difficult to believe that the converse will become true, so that the grave (the variation) will become simple (ordinary majority) and the simple (infringement) will become grave (special majority and express). In other words, the absence of rigidity in relation to variation has ramifications for the absence of rigidity in relation to infringement.

This point is worthy of elaboration. We have considered the requirement for a clear distinction between "variation" of the right and the possibility of "infringing" it. The logical constitutional structure is that the process of "variation" be more complex and intricate. This is the most profound infringement of fundamental principles and the structure of the system. In contrast, the logical constitutional structure requires that the process of "infringement" of a protected constitutional right be simpler than that of "variation." It is difficult to accept the interpretive solution that "infringement" requires more severe conditions than "variation." In contrast, a proposition to the effect that identical conditions are required for "variation" and "infringement" may be reconciled with a coherent constitutional theory (see the *Bergman* case [15]). However, the higher the hurdle facing an "infringement" compared to that of a "variation," the weaker the logic of the interpretive solution. In other words, the more severe the legal requirements for an "infringement" compared to those applicable to a "variation" – the more the interpretive approach loses internal strength.

Third, a possible conclusion regarding the absence of rigidity is tied to our constitutional tradition prior to the enactment of the Basic Laws in 1992. To my regret, our constitutional approach has not yet adopted the thesis that the very labelling of an act as a "Basic Law" vests it, *per se*, with normative supremacy. Our system takes the view that a Basic Law that is not formally entrenched is almost indistinguishable – in terms of its formal normative status – from an ordinary law. I used the word "almost" because the Knesset has seldom varied a Basic Law by means of an ordinary law. Nonetheless, we gave examples above of how it enacted provisions in an ordinary law that conflicted with a Basic Law. Moreover, from our current and developing constitutional perspective, it cannot be

said that the fate of a non-entrenched Basic Law is identical to that of an ordinary law for all intents and purposes. On the contrary, our Basic Laws form the basis of the constitution of the State of Israel. The Basic Laws treat of the structure of the state regime and its powers. Following the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, the Basic Laws also treat of fundamental human rights in Israel. Consequently, I take the view that 'in our interpretive approach, we must refer to the Basic Laws as "constitutional laws"' (Barak, in his book cited above, *Judicial Discretion*, at p. 520). The "constitutional plan" of the State of Israel, as I termed the realization of the ideal of constitutionalization, is the consolidation of the Basic Laws into a general, uniform treatise – 'all the chapters together will constitute the Constitution of the State' (the Harrari decision, at p. 1743). On the path towards this consolidation, Basic Law: Legislation will be enacted, and this will "immediately vest preferred status upon all the constitutional provisions in the Basic Law relative to any other legislation and protected or entrenched status from the point of view of the constitutional possibility of varying them or indirectly curbing the scope of their application" (M. Shamgar, "Legislation, Adjudication and Civil Rights," 37 *HaPraklit* (1987) 5, 6).

However, in the present situation, in the absence of a statutory provision, the Basic Law, *ipso facto*, has no entrenched status. It enjoys no formal or inherent rigidity or supremacy. In the absence of statutory entrenchment, the prevailing perception has been that a statutory provision does not possess special, privileged status merely because of its inclusion in a Basic Law. Provisions that enjoyed supremacy were characterized by rigidity. The classic example in shaping our constitutional thinking was Section 4 of Basic Law: The Knesset.

43. To summarize, Basic Law: Human Dignity and Liberty lacks the typical feature that accords supremacy, namely, an *express* statutory provision, whether as a provision in the Basic Law itself or a general provision in a Basic Law of general application, such as Basic Law: Legislation, which is in preparation. A constitution reflects fundamental principles. Fundamental principles are guiding rules of policy. Accordingly, they are characterized by stability and do not lapse and vary. The constitution is characterized by being entrenched against the winds of change. The interpretive outcome whereby we have before us a *constitution* that is open to *modification* by any majority is disappointing, as it does not

appropriately express the constitutional logic and purpose that it should comprise. In other words, there is no doubt that the Basic Law is a constitutional act that is a chapter in the constitution being developed according to the Harrari decision, however, this *alone* is insufficient to decide that it is possible to invalidate any law repugnant to its provisions.

Nonetheless, as we have shown and shall see, there are other provisions in the Basic Law before us that grant it privileged, special status, and that compensate for the absence of other constitutional traits, as described above. We shall now turn to a discussion of these.

The Limitation Clause

44. Section 8 of Basic Law: Human Dignity and Liberty ("violation of rights") provides that:

> 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by such a law enacted with explicit authorization therein.'

Section 8 of the Basic Law before us is a principal provision that treats of the normative status of the Basic Law

It is undisputed that this provision is of great importance insofar as concerns preventing possible attempts to infringe a protected right by secondary legislation. Until the adoption of the Basic Law, fundamental rights were protected against infringement by secondary legislation, by means of the case law alone. In the *Miterani* case [7] I stated that 'the fundamental objective is clear, namely that it is right and appropriate, from the point of view of the existence of the right to freedom of occupation, that only the words of the primary legislature may *restrict it'* (*ibid*, at p. 352). If this is true in relation to freedom of occupation, it applies *a fortiori* to human rights. No restrictions may be imposed upon a fundamental right that derives from our being a "free society" 'except under an express provision of statute' (*ibid*, at p. 353). This principle has become rooted in our legal approach. The Basic Law anchored it in a "constitutional" law – a Basic Law; 'there shall be no violation' except by law.

However, the dispute does not revolve around the significance of the limitation clause in connection with *secondary legislation*. Possible disputes may arise in connection with the significance of the limitation clause in relation to *primary legislation*. Primary legislation that meets the conditions of the limitation clause does not, of course, pose a problem. The

potential difficulty, and the source of the dispute that I seek to address revolves around a law that does not comply with the limitation clause. In other words, what is the fate of a statute that is inconsistent with the values of the State of Israel as a Jewish and democratic state? Take a statute which is compatible with the values of the State of Israel, but the goal of which is to advance an improper purpose – what is its fate? Take a statute that is compatible with the values of the State of Israel and the purpose of which is proper, but at the same time is not "proportional" – it violates a protected right 'to an extent greater than is required' – what is it's fate?

The answer is unequivocal. A literal reading shows that a statute incompatible with the conditions of the limitation clause does not have the power to infringe a protected right. Accordingly, it should not be accorded operative significance, and its validity should not be recognized if it purports to infringe a protected right. This interpretation follows the "plain meaning." From the "affirmative" (the possibility of a infringement if the statute complies with the conditions of the limitation clause), it infers the "negative" (the absence of the possibility of infringement if the limitation clause is not complied with). *Expressio unius est exclusio alterius* – the set of "affirmatives" comprises all the cases in which it is possible to infringe a protected right. The "negative" constitutes all those cases in which it is not possible to infringe a protected right.

The very enactment of the provisions of s. 8 elevates the Basic Law to a higher status, from which we may critically observe and examine other, non-Basic legislation that treats of issues addressed by the aforesaid Basic Law. The aforesaid interpretive rule grants the Basic Law its vitality. This is particularly true when we seek to utilize the interpretive rule to achieve the far-reaching result whereby an "ordinary" law – enacted after the commencement of the Basic Law, and which does not meet the conditions of the "limitation clause" – is of no effect. In view of the language of s. 8, it is immaterial in this regard if this "*ordinary*" law was enacted with an "ordinary" majority or a "special" one. Likewise, it is immaterial whether or not this ordinary law states expressly that it was enacted "notwithstanding the provisions of Basic Law: Human Dignity and Liberty."

The following is unequivocal: Whatever the language of a later ordinary law may be, if the law does not satisfy the "validity condition" ("limitation clause") of the Basic Law, or it is not legislation of the appropriate normative level, i.e., a Basic Law – it has no force. The creation of the

aforesaid normative barrier to legislative variation reflects the adoption of a broad substantive interpretation of constitutional legislation. We are acquainted with the comments of the late President Agranat that, 'when the issue relates to a document that determines the framework of the state regime, the court must take a "spacious view" of the powers that the document enunciates' (FH 13/60 *Attorney-General v. Matana* [25] at p. 442). A constitutional text must be interpreted from a spacious view and with the intention of giving force to the constitutional imperative embodied in it. Its construction should not be narrow, technical or formalistic, but as broad as the horizon. The view must embrace the substance, which is reflected in the human rights that are at the heart of our constitutional principles.

45. According to the plain meaning, the aforesaid s. 8 carries great weight. It says 'there shall be no violation.' We are trying to specify the normative character of the Basic Law. On our scales, the section weighs heavily in countering the absence of rigidity in the Basic Law.

The Validity of Laws Provision

46. Section 10 of the Basic Law is the only provision in the Basic Law that employs the language "validity of any law." It provides that 'This Basic Law shall not affect the *validity of any law* (*din*) in force *prior* to the commencement of the Basic Law' (emphasis mine – M.S.). The negative implies the affirmative. It follows that s. 10 impliedly provides that this Basic Law can affect the validity of any law (*din*) enacted subsequently to the entry into force of the Basic Law. This means that the Basic Law *has* the power to affect the validity of a law enacted *after* the commencement of the Basic Law. The very existence of this provision shows that the Basic Law is capable of influencing the "validity of a law," as were it not for the fact that the Basic Law could influence the validity of a law there would be no need whatsoever for a provision preserving the validity of certain laws. In other words, it is only the power of the Basic Law – by its nature and related consequences – that compelled the establishment of a qualifying provision regarding earlier laws, such as that contained in the aforesaid s. 10.

The provision in s. 10 informs us that the validity of a "law" which is enacted following the commencement of the Basic Law is subject to judicial review according to the standards set out in the Basic Law. If a person were to argue that the intention to preserve exiting law underlying s. 10 is more restrictive and the section is directed solely at the interpretive

rule whereby "an earlier law retreats before a later law," the answer would be that it cannot possibly be the legislative purpose. First, there is no evidence of this in the legislative record (e.g. the Knesset Proceedings). Second, it is difficult to assume that this is the objective purpose of the Basic Law, for if it were, the law would appear valueless. According to this reasoning, a law enacted prior to the Basic Law preserves its validity, under s. 10, notwithstanding any provision in the Basic Law, whereas a law subsequent to the Basic Law supersedes the Basic Law, according to this view, because it is later. What, then, did the Basic Law add by its enactment? In my view, the provision in s. 10 informs us that the Basic Law possesses normative supremacy, as it can affect the validity of a law. It does not define the scope of the supremacy and its degree; this is dealt with by another provision of the Basic Law. Section 10 does not delineate the boundaries of the possibility of violation that ensues from this supremacy, but it is difficult for a faithful interpreter to dispute that it indicates normative supremacy.

The Principal Law is shielded from judicial review by virtue of the Basic Law. The Amending Law, i.e., the amendment to the Principal Law, which is the subject of our review, is *subject to review* by virtue of the Basic Law, i.e., the Basic Law has the power to violate the Amending Law, which was enacted after the Basic Law.

A further lesson may be learned from the "validity of laws" provision: the application of the Basic Law is immediate. The law is not directed entirely at the distant future, i.e., the date of consolidation of all the Basic Laws into a single, complete constitution. It is not an interpretive pillar-of-fire. The Basic Law has immediate operative effect. This is the rule in our legal system: upon publication in the Official Gazette, the law enters into force, if not otherwise stated in the law itself. The validity of laws provision reinforces this clear, inevitable conclusion. The Basic Law has immediate effect. It is not merely declarative.

The Respect Clause

47. Section 11 of the Basic Law provides that: "All governmental authorities are bound to respect the rights under this Basic Law" (cf. s. 1(3) of the German Basic Law quoted above). The Basic Law refers to this provision by the marginal title "Application," i.e., it defines the scope of application of the law. This provision is commonly referred to as "the respect clause."

There are three "branches of government" – the legislature, the executive and the judiciary. In principle, the directives of the legislature will naturally fetter the executive and the judiciary. The application clause is unnecessary in order to achieve that result. The application clause is needed – apart from its didactic aspect – in order to clarify that the legislature, too, is subject to the provisions of the Basic Law in regard to 'the rights under this Basic Law.' It guides the legislature and in a way limits it. The legislature cannot disregard the Basic Law, as it too is obliged to respect it.

This provision indeed requires that respect be accorded by 'each of the governmental authorities,' even if it is not as unequivocal and clear in terms of its wording as its counterparts in the German and Canadian constitutions. It does not refer expressly and in detail to the legislative, executive and judicial authorities. It does not state that the legislature is subordinate to it (in contrast to s. 32(1) of the Canadian constitution).

Respect requires, first and foremost, reference to the Basic Law and the rights protected in it. This obligation is embodied in the very duty to respect. This provision does not negate the power of the supreme legislature to enact laws, but it provides the conceptual and positive basis for the requirement that a violation of the provisions of the Basic Law must take a unique form. It is not possible to enact a law repugnant to the respect provision. Indeed, this could have been expressly stated, and in this regard see s. 8 of Basic Law: Freedom of Occupation.

To remove all doubt, I would add that the inferior drafting, in comparison to foreign legislation, does not detract from the weight that should be accorded to the statutory provision of s. 11.

48. To summarize this point, the respect provisions set out in s. 1 ('these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel') and in s. 11 of the Basic Law with which we are concerned, guide the legislature to enact laws in the light of the rights protected in the Basic Law. This legislation should, appropriately, be *conscious and deliberate*, express and not implied.

The Ceremonial Element – Basic Principles and Purpose

49. A constitution is a ceremonial act. The Constitution of the United States begins with a ceremonial Preamble. This is true of most of the principal constitutions that can provide a basis for comparison. The ceremonial preamble of the constitution of the Fifth Republic of France is famous. The same is true of the constitutions of India, Germany and others.

Section 1 of Basic Law: Human Dignity and Liberty provides, in ceremonial, historic language, that:

> 'Fundamental human rights in Israel are founded upon recognition of the value of the human being, and 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.'

Section 1A is supplements the above, setting out the purpose of the Basic Law, stating:

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

This preamble is characteristic of a constitutional act that inherently determines not only the place of the law in the normative hierarchy, but also its internal force and the spirit in which other laws will be reviewed. An ordinary legislative act does not open with a general, ceremonial declaration. Section 1 instructs us to respect basic rights 'in the spirit of the principles of the Declaration of the Establishment of the State of Israel., Before us is a constitutional act, both by reason of the festive, historical language of s. 1, and because of the referral to the Declaration of the Establishment of the State of Israel. This declaration is our "Declaration of Independence," which is both the birth certificate and the identification card of the state as an independent, political, sovereign entity.

In this context, it is proper to recall that the Declaration of the Establishment of the State also included a reference to the intention to adopt a constitution. In other words, the principle of constitutionality was born with the establishment of the State, and the reference to the entire complex – i.e., the Declaration – in the final clause of s. 1 of the Basic Law also expresses the historical constitutional link to the details in the Declaration, and the intention to adopt a constitution.

50. In conclusion: Section 1 of the Basic Law presents – in a substantive manner – the constitutional supra-statutory aspect of the Basic Law in two ways. First, s. 1 of the Basic Law is, by its title and content, a section of "basic principles." It serves as a guide to the details of the constitutional act. It is clear that an ordinary law, possessing ordinary normative status, does not open with a ceremonial declaration of the basic principles of the State of Israel. There is no law or Basic Law that adopted this language apart from Basic

Law: Freedom of Occupation. Indeed, there is consensus that Basic Law: Freedom of Occupation, too, possesses normative supremacy, and the legislation of the Knesset in 1994 emphasized this: The interpretive *connection* between these two Basic Laws is strengthened in the light of the incorporation of amendments to Basic Law: Human Dignity and Liberty within the enactment of the new version of Basic Law: Freedom of Occupation. It may conceivably be argued that the provisions that were added to Basic Law: Human Dignity and Liberty in s. 11 of Basic Law: Freedom of Occupation (the new s. 1 and the final clause of s. 8) are subject to s. 7 of Basic Law: Freedom of Occupation, which provides for rigidity in relation to variation of the Basic Law. However, this question, too, may be left open.

In any event, an act comprising a provision treating of the basic principles of the legal system possesses unequivocal constitutional ramifications. Second, it displays a clear, commonly accepted characteristic of every constitution around the world, i.e., the name and ceremonial preamble that presents the basic values of the State of Israel. Third, the reference to the Declaration of Independence provides an indication of the constitutional task imposed on the Knesset. As we have seen, we do not need further identification of the Basic Law as such, as its name testifies to its character. However, we are searching for provisions by which to discern that its force is superior to other primary legislation, and the declarative provisions at its beginning strengthen the *ratio legis* of these provisions, which we find in ss. 8, 10 and 11 of this Basic Law. To allay any misunderstanding: we are not seeking ratification of the constitutional identity of the Basic Law, but rather of its superior force.

51. As earlier noted, alongside the section treating of basic principles (s. 1 of the Basic Law), we find the provisions of s. 1A, which address the purpose of the law. Section 1A represents a shift from the general to the particular. The purpose of the Basic Law is to anchor "human dignity and liberty." "Anchor" means establish, strengthen and create. The concept "human dignity and liberty" must be construed together with the name of the Basic Law ("Basic Law: Human Dignity and Liberty"). In other words, the protection is accorded to the basic principle of human dignity and liberty. This principle is divided into its components, i.e., into the basic rights themselves. The purpose provision – which is a general provision – must not be interpreted as if it merely applies to some of the provisions of the Basic Law, i.e., the last clause of s.2 ("preservation of life, person and dignity") and s. 5 ("personal freedom"). The protection of "human dignity and liberty" is understood in

light of the title and substance of the law – as protection of the entire fabric of rights set out therein. The anchoring is not established in an ordinary law. It is carried out by means of the mechanism of a Basic Law ('in order to anchor in a Basic Law'). The purpose provision – like its older sibling (the basic principles provision) – goes to the very foundations of our legal system: 'the principles of the State of Israel as a Jewish and democratic state.'. The principles of our system are a synthesis between the State of Israel being a "Jewish state" and the State of Israel being a "democratic state" (see Elon, in the article cited above). The State of Israel is a Jewish state. The State of Israel is a democratic state. I will recall here what I said in a similar case, EA 1/88 *Neiman et al v. Chairman of the Election Committee to the Twelfth Knesset* [26] at p. 189, in connection with the integration of these two values:

'There is no truth in the argument regarding an imagined contradiction between the different clauses of s. 7A. The existence of the State of Israel as the state of the Jewish people does not negate its democratic nature, just as the French character of France does not negate its democratic nature. The great principle expressed in clause (1) does not negate the one in clause (2) and the two can coexist in perfect harmony.'

The absence of any contradiction, as claimed, was already emphasized in President Agranat's remarks in the above Election Appeal 1/65 at p. 385:

> 'There can be no doubt – as is clearly shown by the statements made in the Declaration of the Establishment of the State at the time – that not only is Israel a sovereign, independent nation that aspires to freedom, and is characterized by the rule of the people, but that it has also been established as a Jewish state in the land of Israel, because the act of establishment was carried out, primarily, by virtue of the natural and historical right of the Jewish people to live like any other people, in its own right in its sovereign state, and this act represented a realization of the aspiration of generations for the redemption of Israel.'

My esteemed colleague Deputy President Elon also referred to this in the above Election Appeal 2, 3/84, at p. 297:

> 'The *democratic* nature of the State of Israel was expressed in the Declaration of Independence, which speaks of the complete equality of social and political rights for all citizens, without distinction of religion, race or sex, and guarantees freedom of religion, conscience, language, education and culture. These

> principles are our guiding light. The *Jewish* nature of the State of Israel was expressed in the Declaration of Independence by the very definition of the state as a *Jewish state*, and not merely a state of *Jews*, by opening its gates to Jewish immigration and the ingathering of the exiles (as manifested itself later in the Law of Return, 5710-1950, etc.). These principles too are guiding lights for us. The totality of these rights is the crucible in which the *special* image of the Jewish state was forged. The leading thinkers of Zionist philosophy, its movements and streams, Jews holding different points of view, citizens of the State of Israel, members of different ethnic groups and religions, all debated and continue to debate the significance and application of the totality of principles found in the Declaration of Independence to the practical life of the Jewish State.'

Judaism's perception of human dignity ensues from what is said in Genesis 1:27 [B], according to which man is created in the image of God, every human being is created in the Divine image, all are equal, and all are worthy of human dignity.

52. The provisions introducing the Basic Law embody, as aforesaid, a clear constitutional message. In this context, two points must be emphasized: the ceremonial opening is common to Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Both contain a basic-principle provision and both contain the purpose provision. The language of the respective provisions is identical. This is clear, objective evidence of the conceptual similarity between the two Basic Laws. These two laws are cut from the same cloth. They are different organs of the same body. Thus, we must aspire to harmony between them, subject to variations clearly ensuing from the purpose – objective and subjective – of Basic Law: Human Dignity and Liberty. The second point concerns the nature of a constitution as a didactic document. A constitution possesses educational value. 'A significant matter, – writes Deputy President Elon, referring to the provisions of the Basic Law, 'for education and learning, educators and students, young and old' (Elon in the article cited above, at p. 682). True, I wrote that 'the proper protection of a certain freedom is not achieved solely by declaring its existence,' however, I added that 'we should not underestimate the didactic value of the declarative statement…' (*Miterani* case [7], at p. 355). One of the principles of a constitution is its inherent educational value.

Protection Against Emergency Legislation

53. The provision regarding the stability of the law (s. 12 of the Basic Law) states : -

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

The entrenching provision against emergency regulations is vital to a constitutional act. The constitutional act deals with the fundamental principles of each system. Emergency legislation ("emergency regulations") may supersede protected rights if it is limited in terms of time, purpose and proportionality (relativity). The protection against emergency regulations is found in other provisions in our law (such as s. 42 of Basic Law: the Government of 1968, s. 44 of Basic Law: the Knesset, s. 25 of Basic Law: The President of the State. A constitutional provision is characterized by the fact that it also incorporates special protection against emergency legislation.

The aforesaid s. 12 must be read together with s. 50(d) of Basic Law: the Government of 1992, which regulates the promulgation of emergency legislation, repealing s. 9 of the Law and Administration Ordinance (s. 59 of Basic Law: the Government of 1992). Section 50(d) provides that: '(d) Emergency regulations may not prevent recourse to legal action, or prescribe retroactive punishment *or allow infringement upon human dignity*' (emphasis mine – M.S.). In other words, following the entry into force of the new Basic Law, there is no possibility of violating "human dignity" by way of emergency legislation. The aforesaid s. 50(d) meshes in substance with the s. 12 before us. Clearly, the aforesaid s. 50(d) is intended to add to s. 8 of Basic Law: Human Dignity and Liberty and not to detract from it.

The Mission of the Basic Law

54. A constitution is characterized by abstract, short, laconic provisions. A constitution does not treat of technical details. It is not tax legislation.

The normal legal structure of every system is characterized by the fact that the higher one climbs on the normative ladder, the more abstract and general the provisions, the lower one descends on the normative ladder, the more

detailed and concrete the provisions (Englard, in the book cited above, p. 13 *et seq*.). An ordinary law is of a less abstract character than a constitution. Secondary legislation (regulations) is less abstract than a law.

Basic Law: Human Dignity and Liberty is an example of a typical constitutional act in the declarative language of the Basic Law; the concise drafting of its provisions, and the degree of abstractness. The Basic Law indeed lacks some of the identifying characteristics included in its twin Basic Law, i.e., Basic Law: Freedom of Occupation. However, this does not detract from the fact that Basic Law: Human Dignity and Liberty is quintessentially constitutional: it concerns protected fundamental rights; it treats of the protection of the most basic values of our society. These values are of those of human dignity.

The values that the Basic Law protects are the basic value of the State of Israel as 'a Jewish and democratic state.'

55. A distinction must be drawn between hierarchical supremacy and a determination of the tools for implementing that supremacy. The supremacy of a Basic Law over ordinary legislation ensues from the status of this law in the normative hierarchy. However, its power to *annul the validity* of another law is effected by virtue of the provisions contained in it: the *limitation* provision (s. 8), the *validity of laws* provision (s. 10), and the *respect* provision (s. 11). These three are the principle cornerstones by virtue of which the principle of supremacy progresses from theory to practice. All have the power to show – on the level of objective interpretation – that notwithstanding the absence of formal rigidity, we are not confronting a legislative act that is similar to most of the provisions of the other Basic Laws. We are facing a new juridical phenomenon: a legal document that not only possesses *hierarchical* supremacy and priority in the normative hierarchy, but also contains mechanisms upon which the standards for implementing that supremacy are shaped.

Legislative Intent

56. The legislative intent can be learned from the language of the law, which includes an expression of the purpose established by the legislature. From inception and entry into legal force, the law – in its content, structure, place in the legal system, and relationship and approach to other laws – faithfully reflects the intention of the legislature. The purpose arises from the law and not from an external source. 'What is important,' in the words of the late Justice Silberg, '"is not what the legislature wanted to say but what it said' (CrimA 282/61 *Yihye v. Attorney-General* [27] at p. 636). At the same time, it

is possible to discover trends and reservations by reference to preparatory work or Knesset deliberations. In this regard, I wrote in HCJ 4031/94 *'Bezedek' Organization v. Prime Minister of Israel* [28] at pp. 11-12:

> 5. (a) The contents of the deliberations in the Knesset provide a backdrop to the trends and doubts of the members of parliament. As will be recalled, the law must be interpreted in accordance with its language as adopted by the Knesset, however, the *travaux preparatoires* or the deliberations in the legislative chamber that preceded legislation, often provide aids to further understanding of the processes and trends driving the wheels of the legislation. (Civil Appeal 486/85 *Manager of Purchase Tax and Compensation, Haifa v. Ethiopian Commerce Co. Ltd. et al*, at p. 407; HCJ 151/82 *Bar Ilan et al v. Manager of Land Betterment Tax, Netanya*, at p. 659).

Legislation does not occur in a vacuum. (HCJ 58/68 *Shalit v. Minister of the Interior et al*, at p. 513; A. Barak, *Interpretation in Law*, Vol. B, Interpretation of Legislation (Nevo, 1993) 351). It grows and emerges from within the political, social or legal reality, or is designed to serve their needs. 'The exigencies of the reality within which legislation is enacted is important for the interpretation of the legislation' (Barak, *ibid*.; see also HCJ 547/84 *Ha'emek Poultry, Cooperative Agricultural Society v. Ramat Yishai Local Council et al*, at p. 143). But note that when we turn to the legislative history, including the deliberations at the preparatory stage, we do not consider the personal interpretation of any particular member of Knesset regarding certain expressions contained in the law. The public utterances of the members of Knesset cannot replace the interpretive act of the court, which relies on the language of the law and its purpose. A review of the comments of a member of Knesset may illuminate the general purpose of the legislation. However, it is of less value than the meaning of the law as adopted at the conclusion of the legislative process (see also HCJ 142/89 *Laor Movement v. Knesset Speaker*, at p. 544).

The authoritative interpretation is not to be found in the comments of members of the Knesset but in the statements of the court, and relies first and foremost on the language of the law as enacted by the Knesset upon the conclusion of the deliberations and legislative process (FH 36/84 *Y. Teichner et al v. Air France Airways*, at p. 619).

Accordingly we said:

> 'The ultimate, decisive construction of a law at any given time is in the hands of the court…' (HCJ 306/81 *Flatto-Sharon v. Knesset House Committee* at p. 141 opposite letter E)

57. The legislative history is important. Yet, 'from what was said (in the instant case – M.S.) in the Knesset it is difficult to reach any conclusions regarding the thought processes, agreements or consensus concerning the normative status of the Basic Law….' (Karp, in the article cited above at p. 365). It is absolutely clear that the language of the Basic Law is the product of compromise. One of the architects of the Basic Law was the Chairman of the Constitution, Law and Justice Committee, MK U. Lynn. He noted that: 'this law was prepared in the understanding that we must reach a consensus among all the parties in the house' (*Knesset Proceedings*, vol. 125 (1992) at p. 3782). The message of compromise appears throughout the deliberations of the Knesset: 'There were far reaching concessions compared to every other constitution in the world, because we wished to reach that general agreement that we indeed attained' (*ibid.*, at p. 3783). During the First Reading, the members of the Knesset voted on the status of the Basic Law as a constitution. However, this perception relied upon the rigidity provision that appeared in the draft law and was ultimately omitted from the Basic Law as enacted. MK E. Haetzni said: 'actually we are starting a process of a written constitution. This is not a simple matter, and we must know what we are doing here' (*Knesset Proceedings*, vol. 124 (1992) at p. 1528). The Minister of Justice, Dan Meridor, insisted during the First Reading that the proposed Basic Law 'establishes protection against the arbitrariness of a law that is enacted and contravenes and violates human rights…' (*ibid.*, at p. 1531). The principal deliberations took place during the Second Reading. I have already mentioned that the Chairman of the Constitution, Law and Justice Committee opened by stating that the Basic Law was prepared over the course of many sessions of the Constitution Committee: 'and I emphasize: the Constitution, Committee, that is the Constitution, Law and Justice Committee by virtue of its being the Constitution Committee of the Knesset of Israel' (*ibid.*, 125, at p. 3782). *Prima facie*, this is an unequivocal statement. However, later the Chairman of the Committee states:

> 'We are not transferring the weight to the Supreme Court. We are not doing what was once proposed in Basic Law: the Legislature or in Basic Law: Human Dignity. We are not establishing a

> Constitutional Court, or a court with the power to invalidate laws' (*ibid.*, at p. 3783).

MKs Eitan and Haetzni question the Chairman of the Constitution Committee regarding the organ that would determine the compatibility of ordinary legislation to the Basic Law (s. 8 of the Basic Law). The Chairman of the Committee responds: "the legislature decides and the court decides.' However, he immediately adds: 'this is the system existing today and there is no other' – 'even today the court can interpret laws.' To the question posed by MK Eitan regarding the invalidation of laws, the Chairman of the Constitution Committee responds:

There is no need to invalidate laws. One does not invalidate a law. The law must be made for a proper purpose, not merely an arbitrary law. The question returns: What is the fate of an "arbitrary law"? MK Lynn concluded that:

> 'The power has not been transferred to the court system. The power remains in this House; and if, heaven forbid, it appears from our experience with this law that we made a mistake, and the interpretation given to the law does not coincide with the true intention of the legislature, the Knesset has the power to change the law (*ibid*., at p. 3788).'

Minister of Justice Dan Meridor took a different stance, expressly asserting the normative supremacy of the Basic Law: 'The power of the Knesset to legislate is not unrestricted because in every democratic regime there are limits on what it is permissible for the majority to do' (*ibid*., at p. 3788). The bill – the Minister of Justice stated – 'is very important because it establishes a balance among the branches in Israel, and it certainly establishes an area or boundary beyond which human rights cannot be violated' (*ibid*.).

From the above it follows that the Basic Law was intended to be a compromise. Its contents do not reflect the optimum that it could have comprised. It was intended to be a more moderate act than the proposed Basic Law: The Legislature. That is the reason why the Knesset did not adopt the rigidity provision.

58. In consequence of the comments made during the deliberations in the Knesset, I would add that clearly the creation of a constitution is not equal in theoretical significance to the transfer of competence to engage in judicial review to the Supreme Court. However, patently, a provision regarding the normative hierarchy which enables a decision to be made concerning the lack of validity of a law accords immediate jurisdiction to the court. The judicial

branch is an important device for the practical existence of a constitution. It ensures that the constitution is not a purely declarative political document, as well as that the review of constitutionality will not be confined to self-review by the Knesset (*autocontrole* in the terminology of Prof. Nikilitz in L. Favoreu & J. A. Jolowicz, Le Controle Jurisdictionnel Des Lois ((Paris & Aix-en-Provence, 1986) 79). In view of the provisions of Basic Law: The Judiciary and in the absence of any other provision, there is no other entity – apart from the court (general or special) – which can decide upon the constitutionality of a law, i.e., its compatibility with norms and conditions set out in the Basic Law. I said in the *Flatto-Sharon case* [2] at p. 141:

> 'Each of the branches of government is required, on occasion, to interpret a statute, because the implementation of primary legislation frequently – and in practice always – involves a position being taken on its substance and content. However, the final, conclusive interpretive decision regarding the law, like its validity at any given time, is within the province of the court, and regarding issues brought for examination within the court system, it is within the province of the supreme judicial instance.'

The Supreme Court is the competent interpreter of the language of the law, as well as its condition at any given time.

The enactment of a constitution means the transfer of power to society, to its values and to its principles. The Supreme Court in a constitutional regime is a tool for enforcing the *will of the legislature*, which is the elected representative of the people, upon all those who continue to enact laws or perform governmental acts, including the primary legislature itself.

The distinction between the primary legislature and the other entities lies in the fact that the primary legislature is also empowered to determine ways for removing the fetters by which it chains itself. The court only places before the legislature's own words are engraved, accompanied by a competent interpretation. It is the function and competence of the court to indicate what is within the realm of the permissible and what is completely prohibited. As a judicial authority, the court is the faithful, competent construer of the words of the legislature.

In so doing, the court does not subordinate the legislature to values and principles that are separate from its own, since the values and principles of the court are the very ones that express the concepts of the state and society. These are in essence the values formulated by the legislature itself, or are

formulated in the law since the establishment of the state in the Declaration of Independence and by virtue of s. 11 of the Law and Administration Ordinance. The court subordinates the legislation to the values and principles of the constitution, the one that has been written and the one that is essentially part of our positive law. The court is the principal tool for ensuring the existence and respect of the constitution.

59. The draft bill Basic Law: Human Dignity and Liberty opens with an Explanatory Note, stating at p. 60:

> 'This bill is intended to provide constitutional protection to the basic human right to life, freedom, integrity of the person and human dignity' (*ibid*., at p. 60; emphasis mine – M.S.).

I assume that the Knesset members were cognizant of the full significance of the explanatory remarks and of the Basic Law itself. Indeed, as is customary, from a procedural point of view, the Basic Law was adopted in accordance with the ordinary regulations of the Knesset. The Basic Law was not passed by a vote of the majority of the members of the Knesset but only by the vote of the majority of those participating. No public debate preceded the vote. In this, the Basic Law is distinct from other constitutions. Most constitutions are created upon the establishment of the state or in an open, public process following profound ideological debate. A constitution is formed in moments of "constitutional enlightenment." A constitution is formed, generally, following an event of historic importance (independence and sovereignty; revolution, political change).

Some of the members of Knesset sought to accord the Basic Law formal constitutional status (like the sponsor of the Basic Law, MK Amnon Rubinstein, and the then Minister of Justice Dan Meridor). Some perhaps were not aware – at the time – of all the legal ramifications of the Basic Law that immediately arose from its provisions. It will never be possible to establish all the individual intentions of the members of Knesset so as to shape the collective will of the legislature from them. In practice, there is always a range of subjective desires in a democracy. Many are the thoughts in the mind of man [Proverbs 19:21]. Any subjective purpose does not negate the conclusion regarding the objective legislative purpose *arising from and within* the Basic Law, as explained above.

Integrating Basic Law: Human Dignity and Liberty in the Constitutional Structure

60. Fundamental human rights in Israel were entrenched in the case law of the Supreme Court from the dawn of the State of Israel, as is well known. The ordinary position is that the legislature drives the wheels of legislation in order to accomplish a particular social goal. This presumption provides the foundation for the supremacy of the Basic Law, even when it merely seeks to provide statutory approval to a normative reality. The change achieved by means of a Basic Law is the addition of a tier to the protection of human rights in the State of Israel. *This is the protection against legislation*. We have recognized human rights since the establishment of the state before the Basic Law. They were afforded broad interpretation before Basic Law: Human Dignity and Liberty. Their protection led to the invalidation of *secondary legislation* and administrative acts without the Basic Law. Prior to the Basic Law, their protection did not lead to any invalidation of *primary legislation*. This is a new possibility contributed by the Basic Law. Removing this contribution from it deprives it of its added value relative to the situation that preceded Basic Law: Human Dignity and Liberty. In other words, the immediate question that would arise is what does the Basic Law provide which did not exist prior to and without it.

61. Recognition of the normative supremacy of the Basic Law is consistent with the affiliation of the State of Israel to the countries of the free world. The vast majority of the countries of the free world possess a constitutional structure, i.e., possess a supreme normative structure that regulates the basis of the regime and the fundamental rights of the citizen. Even Great Britain is now subject to a system of constitution review system within the European framework.

The State of Israel's membership in this family of nations contributes to the conclusion that this time our legislature sought to realize the granting of supremacy to the Basic Law.

62. A very important point for the interpretation and understanding of Basic Law: Human Dignity and Liberty, is to see it in the light of Basic Law: Freedom of Occupation. This view is anchored in the perception of the two Basic Laws as a single complex. Technically, we have before us two pieces of legislation. Substantively, we have before us a single act. Accordingly, these two pieces of legislation must be treated as statutory twins. The entrenchment provision (s. 7) in Basic Law: Freedom of Occupation grants a stable, well-protected status to the rights ensured by that Basic Law. Basic Law: Freedom

of Occupation is a clear constitutional act. It is difficult to understand the rationale for the absence of a provision similar to the aforesaid s. 7 in Basic Law: Human Dignity and Liberty. The aspiration for statutory and constitutional harmony is an institutional cornerstone of our legal theory. This concept captivates us. It is right that there be appropriate constitutional harmony between these two Basic Laws. These two acts are two branches emerging from the same trunk. Their basic principles are identical; their purpose is identical; their language is almost identical; their application is identical; their substance is identical. Against this background, the inclusion of ss. 4 and 7 in Basic Law: Freedom of Occupation is logical. It enables moderate, temporary and limited violation of a protected right without the need to take the step of changing the Basic Law itself. Engaging in frequently repeated changes to the Basic Laws is an undesirable phenomenon. A developed state does not amend its fundamental normative frameworks on a daily basis. This possibility provides the appropriate breathing space to the Knesset.

The Basic Law before us does not contain a provision similar to s. 8 of Basic Law: Freedom of Occupation, which deals with a nonconforming law. It follows that no law may be enacted which violates rights in Basic Law: Human Dignity and Liberty that does not meet the conditions and limitations contained in s. 8 of Basic Law: Human Dignity and Liberty, save by means of varying the Basic Law. A Basic Law is varied by means of a Basic Law.

The Status of Basic Law: Human Dignity and Liberty - Summary

63. The detailed examination set out above shows that in terms of its structure and character, the name, content and form of the Basic Law present a set of characteristics that accord it a special constitutional status as compared to the institutional Basic Laws. It is also clear that there is no basis for the thesis that the Basic Law does not belong to the supreme normative tier because it lacks the additional markers declaring supremacy or entrenchment. This also follows from a consideration of the legislative purpose within the customary legal meaning of that term (i.e., what follows from the language and purpose of the law, as distinct from the subjective motives of any particular member of the legislative branch).

I have pointed out that determining the status of the Basic Law as opposed to other legislation should properly be carried out by granting appropriate weight to the legislative purpose. I mentioned that the legislative purpose that was formulated by the legislature: 'The public and the courts owe loyalty to "the legislative intent" as it appears in the statute books, and an intention that cannot be found expressed in the statute itself is not law' (HCJ 131/65 *Sevitzky*

v. Minister of Finance [29] at p. 378). Interpretation in accordance with the purpose of the law is carried out with loyalty to the intention of the legislature. Indeed, we are not entitled to grant a constitution the status of complete normative supremacy without this being anchored in the will of the Knesset. However, the same reverse is also true. We cannot deprive a constitution of its status in the normative hierarchy because this contravenes the will of the Knesset, as reflected in the Basic Law, its language and content. Loyalty to the will of the Knesset binds us, whether we believe the law to be good or bad. This is the *empathic* aspect of adjudication (Levontin, in the article cited above, Klinghoffer Volume, at p. 290).

Before us is a tier of the Israeli constitutional structure, whose place in the constitutional normative hierarchy finds concrete expression in the limitation that it imposes on other legislation.

Variation of a Basic Law: Summary

64. (a) The time has come to summarize our view regarding both the manner of enacting constitutional legislation in general, and the manner of lawfully changing the two Basic Laws treating of human rights or infringing their provisions.

(b) There are two aspects to the issue of the amendment of a basic right included in a Basic Law: the substantive theoretical aspect and the formal constitutional aspect. There can be no doubt that the substantive aspect has ramifications for the formal constitutional aspect, and that the two are intertwined. With regard to the substantive aspect, I said in the *Miterani* case [7] (at p. 355, opposite letter C):

> 'Establishing defined, special ways for amending a basic right is, to a great extent, the principle means, guaranteeing that the matter be examined properly from a substantive point of view. A right should not be restricted other than after careful consideration and debate, because curtailing the scope of the right may lead, as a consequence, to a degree of distortion of the character of the social or political regime. We have said that the place of a basic right in a given legal system mirrors the degree to which the substantive rule of law exists, and amending the scope of the right will inevitably affect the continued existence of the rule of law. From this ensues the importance of establishing defined statutory ways, through which alone it is possible to change the application and scope of the basic right.'

From here we move to the constitutional rules. The starting point is that legislation entails a normative hierarchy. The hierarchy is built on three principle rungs, according to the order of their importance on the ladder of legislative values: secondary legislation, ordinary primary legislation, constitutional primary legislation (i.e., a Constitution or Basic Laws). Changes in legislation, from the point of view of content and form, *may only be accomplished by means of statutory activity on the same or a higher normative rung*. This means that a Basic Law cannot be changed by the enactment of an ordinary law; ordinary, primary law can be changed solely by ordinary, primary legislation or by a Basic Law (which, as noted, is at a higher normative rung in the normative constitutional hierarchy). "Change" for this purpose, includes repeal, amendment, addition or derogation.

(c) Change generally refers directly to a provision that is to be changed. However, it is conceivable that a provision will be enacted in a *Basic Law* that contradicts an existing Basic Law or violates it, but is not expressed in the form of a direct amendment of the existing Basic Law (such as a provision in one Basic Law that effects changes in the Knesset electoral system, without providing for compatibility of language in s. 4 of Basic Law: the Knesset). Indeed it is preferable to have an express statement that the new contradictory provision changes the existing provision, however, this should not be seen as a legal requirement, inasmuch as the solution to the contradiction can be attained, in any event, and as is customary, by way of legal interpretation, for example, by adopting the guideline whereby later legislation is preferable to earlier legislation, and special legislation is preferable to general legislation, or by way of the rules governing implied repeal, or by other rules of construction that seek to examine the question whether the new can be reconciled with the old, and if not, what is the conclusion that must inevitably be derived from this. The remarks here concerning change apply to infringement of a provision in one Basic Law, by means of a provision in another Basic Law. There is no legal obstacle to the creation of circumstances of infringement, and the solution to a question such as this will be achieved by the customary modes of interpretation, as mentioned above.

(d) There is no need for a special majority of members of Knesset in order to vary a Basic Law, save if this is expressly required, as a precondition, in the Basic Law being amended or in another Basic Law that sets out general provisions regarding the variation of Basic Laws (such as Basic Law: Legislation, the enactment of which is now being considered). Limitations on

the manner of varying a Basic Law can only ensue by virtue of legislation in a Basic Law.

So far we have considered the connection between one Basic Law and another. We now turn to the question of the relationship between an ordinary law and a Basic Law.

Violation of a Basic Law by an Ordinary Law – Summary

65. (a) We have made it clear that the adoption of the theory of the normative hierarchy leads to the conclusion that it is *not* possible to *vary* a Basic Law by means of ordinary primary legislation, i.e., by an ordinary law, but only by a Basic Law. Is it possible to *infringe* the provisions of a Basic Law by means of regular primary legislation?

(b) An infringement of a Basic Law can be the indirect outcome of the language of the Basic Law, and principally of its abstract character, expressed in general, broad language, that often require reconciling, and consideration of practical daily life and the concrete needs of the public and the individual. Let us take the example of arrests: every arrest contravenes the clear, unequivocal provision of s. 5 of Basic Law: Human Dignity and Liberty, whereby:

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

The meaning of this statement is clear – there is no arrest. Can an organized political framework exist without arrests in certain circumstances, even if these are of the most limited and narrow nature? The answer to this is – no. A statutory provision is required that enables arrests. However, a provision that enables arrests, which is not shaped in the form of a Basic Law, violates the provision of the said Basic Law. It violates the basic right defined in s. 5 of the Basic Law. The way to reconcile the general, broad provision of the Basic Law and the needs of state and society is to permit the violation of the principle set out in the Basic Law, in defined, contingent circumstances.

(c) It follows from the above that, notwithstanding the existence of basic rights, in particular rights that are broadly defined, it is essential to preserve the possibility to enact laws in defined cases, while deviating from the important principle expressed in the definition of the basic right in the Basic Law. It is right to ensure that the violation of the Basic Law that is deemed to be lawful and permissible, will be cautious and circumspect in terms of the extent to which it infringes the great principle of protection of the basic right found in the Basic Law.

(d) Creating the possibility for deviation from full, unqualified protection that ensues from the inclusion of a basic right in a Basic Law, can assume various forms. A violation of a basic right is only possible by virtue of law (see the *Miterani* case [7] at p. 360 opposite letter A). There are constitutions that create basic rights together with accompanying provisions whereby a law may determine otherwise. Thus, for example, s. 49 of the draft proposal of Basic Law: Bill of Human Rights, states that: 'Every person is entitled to enter into a contract; this right shall not be violated *save by law*' (emphasis mine – M.S.). The significance of this is that every law can vary or limit the scope of the basic right.

There are those who criticize the described, insufficiently restricted system, that attaches a provision to a basic right whereby *every* law can set out a different provision (see Dr P. Lahav and Dr D. Krezmer, "The Bill of Human and Civil Rights in Israel: A Constitutional Achievement or a Sham," 7 *Mishpatim* (1976) 154; Dr Shiloh's reply, "On 'Absolute Rights' in the Proposed Basic Law: Bill of Human and Civil Rights," at p. 539, and the authors' reply, "Who's Afraid of 'Absolute' Rights?" at p. 541).

(e) Another method – and I do not intend here to exhaust the alternatives – sets out detailed guidelines regarding the substance of the statutory provision in which, and by virtue of which, there may be a violation of a basic right contained in the Basic Law, which will be constitutional notwithstanding its violation of the Basic Law. An example of this is s. 8 of Basic Law: Human Dignity and Liberty, which provides:

> 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.'

An identical provision may be found in s. 4 of Basic Law: Freedom of Occupation. In other words, it is not sufficient that the violation of the basic right be carried out in a statute or by virtue of explicit authorization therein, there is an additional substantive condition *that the content of the law meet the additional conditions* set out in s. 8 or s. 4 above, as appropriate.

(f) Basic Law: Freedom of Occupation added an *additional array of circumstances* in which an ordinary law can violate a basic right and still be regarded as constitutional. Section 8 of Basic Law: Freedom of Occupation, titled "*Effect of Nonconforming Law,"* states:

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

The two identical provisions – s. 4 of Basic Law: Freedom of Occupation and s. 8 of Basic Law: Human Dignity and Liberty – and s. 8 of Basic Law: Freedom of Occupation (which does not have an equivalent in Basic Law: Human Dignity and Liberty), are provisions that permit violations of a basic right. One (identical ss. 4 and 8, respectively) sets out substantive conditions for permitting the violation. The second (s. 8 of Basic Law: Freedom of Occupation) sets out conditions of form and length of duration of the nonconforming law.

(g) A violation of a basic right which has been defined in a Basic Law is possible, therefore, *according to conditions* contained in the Basic Law and subject thereto.

Is it conceivable to have a violation in a manner not delineated in advance in a Basic Law? In other words, can an *ordinary* law violate a basic right defined in a Basic Law *without meeting the conditions* detailed, for example, in s. 4 and s. 8 above, or s. 8 of Basic Law: Freedom of Occupation, all of which deal with violations of rights in the Basic Law? The answer to this is no, as we shall explain.

The answer to this question follows from our previous remarks concerning the normative hierarchy, and indeed is inescapable – impliedly – by reason of the 1992 legislation. When the Knesset sought to add a statutory provision enabling a deviation from the provisions of Basic Law: Freedom of Occupation, and a deviation as noted goes beyond what is permitted according to the existing provisions of the said Basic Law, it believed that it had to amend the Basic Law: Freedom of Occupation and, by means of a new Basic Law, add an additional provision that would enable a deviation from the provisions contained in the initial version of the Basic Law of 1992. In other words, an amendment to the Basic Law is possible only by means of a Basic Law, and a deviation from the principles of a Basic Law requires the existence of provisions in the Basic Law enabling it. Accordingly, in 1994, the Knesset added the aforesaid s. 8 to Basic Law: Freedom of Occupation. The Knesset delineated the additional exclusive means by which it is possible to violate a

basic right contained in a Basic Law, beyond what is stated in the aforesaid sections concerning violation already contained in the Basic Laws; this and no more. The Knesset does not lack competence to vary the Basic Laws, to add to them or detract from them, or, as we have seen, even to enact a provision (such as the one known in legal terminology as the "notwithstanding clause" in the Canadian constitution), whereby it is possible to violate a basic right even without meeting the requirements of ss. 4 and 8, respectively, in the two Basic Laws. However, such legislation is in the nature of a variation of the Basic Law, and requires the enactment of an *authorizing provision* in the Basic Law. An authorizing provision as aforesaid may be unique to a particular Basic Law or general for all the Basic Laws, and may enable the enactment of laws without limitation of number, provided only that they are enacted in the manner established by the authorizing provision and for the period set out therein (if such conditions are provided). It is also possible that the amendment to the law will authorize the Knesset to legislate on a *specific* matter while violating the Basic Law. However, *amendments to the Basic Law must always be carried out by a Basic Law*.

In conclusion, the violation of a basic right may only arise from a provision which authorizes such an enactment, *set out in a Basic Law*, and after the conditions set out by the Knesset in the Basic Law have been met. This means, *expanding* the possible types of violation of a basic right defined in a Basic Law, requires a variation of the Basic Law, and a variation of a Basic Law can only be carried out by a Basic Law. An ordinary law that does not meet the criteria of the limitation clause cannot violate a protected basic right, even if it is expressly states that it is doing so, *if there is no express provision in a Basic Law permitting this method to be adopted*.

(h) The conditions set out in s. 8 of Basic Law: Freedom of Occupation point to the extent to which the Knesset is stringent when establishing additional conditions for deviating from a basic right defined in a Basic Law. It requires both a special majority and an express statement, and even limits the validity of the law to four years from the date of commencement.

So far we have referred to the general guidelines regarding variation of a Basic Law or violation of its provisions. We shall now turn to the two Basic Laws with which we are here concerned.

Application of the Rules to the Two Basic Laws

66. (a) Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation are in the nature of constitutional legislation. These are laws that

are titled Basic Laws. That is to say, these Basic Laws are directly connected to the constitutional mission of the Knesset according to the Harrari decision, and as such, join the array of Basic Laws adopted by the Knesset since then. This should be seen as integration into our constitutional system, i.e., legislation that has been enacted in accordance with the approach that has developed in our constitutional tradition. It is possible to learn from this that these Basic Laws constitute a link in a chain of constitutional acts on the way to the formulation of the complete constitution. From the point of view of their formal status, there is general agreement that these are Basic Laws that constitute chapters in what, in accordance with the Harrari decision, will ultimately form a single, complete constitution.

(b) As opposed to Basic Law: Freedom of Occupation, Basic Law: Human Dignity and Liberty is not entrenched, and is similar to the majority of the Basic Laws and the majority of provisions contained therein. This does not detract from the formal, normative status of the Basic Laws *per se*, as were it we to say so – we would be disregarding the clear, manifest, declared activity of the Knesset since the Harrari decision.

(c) We have already mentioned that consideration must be given, *inter alia*, to the constitutional coupling between Basic Law: Freedom of Occupation and the Basic Law before us. Both herald the transformation of basic rights into enacted constitutional norms. We have seen this, if such be necessary, as support for the normative status of Basic Law: Human Dignity and Liberty.

On the other hand, it would be wrong to disregard the express difference in the provisions of the two aforesaid Basic Laws at the point that is most relevant to our examination. Whereas one Basic Law: Freedom of Occupation, establishes an entrenchment provision in relation to the variation of its provisions (s. 7) and separately in its s. 8 regarding provisions that violate its provisions beyond what is stated in s. 4, the second refrains from doing so. This was because of the approval of a reservation at the time of voting on the Second Reading in the Knesset, which removed the entrenchment provision that had been included in the bill.

The coupling described at the time of original enactment and at the time of the amendment in 1994, thus, preserved a difference at a point material for our purposes. This does not alter the determination that a Basic Law cannot be varied save by a Basic Law and that its provisions cannot be violated save by virtue of a provision in a Basic Law delineating methods for doing so.

(d) The constitutional nature that is emphasized – from the point of view of the content of the Basic Law before us – finds methodical expression, *inter alia*, in the chain of provisions that singles out the connection between the Basic Law and other statutory acts and grants special status to all the provisions contained in it. I am referring here to s. 8 (Violation of Rights), s. 10 (Validity of Laws), and s. 11 (Application) of the Basic Law. This series of provisions in the Basic Law (ss. 8, 10 and 11) shows that the law established provisions that directly impact upon the manner of legislation permitted in the future.

(e) The very legislation of the Basic Law led to a change in the normative reality. As we have already noted, even before Basic Law: Human Dignity and Liberty, the freedoms it enumerates were part of our positive law, however, it was not possible, according to the decisions we had handed down until then, to engage in judicial review that would subject a statute (in contrast to secondary legislation or administrative acts) to judicial examination of its constitutionality, save if it contained an entrenchment provision that allowed an examination of the extent to which it was being formally respected in the concrete case before the court. Since the *Bergman case* [15] an examination of the legality or constitutionality of a statute is carried out by *means* of judicial review. Adoption of this process over many years, on repeated occasions, without objection, creates an accepted pattern of constitutional action.

(f) What conclusion must be drawn from the contents of the aforesaid ss. 8, 10 and 11 in Basic Law: Human Dignity and Liberty?

Section 8 – to which we referred above in detail – limits legislation that violates a right protected in a Basic Law. This is a central provision in relation to the normative status of the Basic Law. It follows from it that a statute that violates a basic right among those enumerated in the Basic Law, and that does not meet the conditions set out in s. 8, is invalid. This conclusion is strengthened in light of the statement in s. 10, whereby the Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law. The significance of this is that the Basic Law can affect the validity of a law enacted subsequent to the commencement of the Basic Law. What can impugn the validity of a law? Failing to meet the provisions of the Basic Law. This conclusion is strengthened in light of the provisions of s. 11, whereby all the government branches, including the legislature, are required to respect the rights under this law. Respect for rights also includes refraining from violating them, save to the extent permitted under s. 8.

If we were to say that such an aforesaid law, which violates a basic right, can be valid without relying upon statutory authorization or a special pronouncement of the legislature, even if it does not meet the demands of the said s. 8, it would be as if we were to say that the aforesaid s. 8 is of a purely declarative nature. In other words, it is as if we were to hold that s. 8 is a statement that cannot be legally enforced or that it is, in practice, devoid of meaning. This conclusion contravenes the clear intention of the Knesset and contradicts the manifest statutory purpose. Such an interpretation is also contrary to the rules that apply in such cases. According to these rules, the utterances of the legislature must be upheld and given effect, and an attempt must even be made to reconcile provisions that *prima facie* contradict each other (*ut res magis valeat quam pereat*).

Accordingly, the aforesaid s. 8 may be seen as an effective restriction on legislation that seeks to violate those basic rights set out in the Basic Law before us. This restriction has legal ramifications, i.e., it has power to affect the validity of a law. The aforesaid s. 8 is a provision within the Basic Law. In other words, s. 8 is a provision that belongs to the constitutional normative tier. Accordingly, it cannot be repealed or varied save in the appropriate constitutional way, i.e., by means of a Basic Law.

(g) It is not necessary to have a special majority in order to vary Basic Law: Human Dignity and Liberty, and no other procedural or substantive provisions dictate the manner of legislation, apart from the rule relating to legislation in accordance with the constitutional hierarchy mentioned above.

(h) Can the Knesset enact a law that violates a basic right contained in Basic Law: Human Dignity and Liberty? The answer to this is affirmative, but subject to conditions, as will be explained below:

(1) The Knesset is competent to enact a Basic Law that violates a basic right: the question of a violation by a subsequent Basic Law will then be clarified through the customary means of interpretation applicable to the interpretation of two pieces of legislation at the same constitution level, or, in the alternative –

(2) The Knesset can enact ordinary legislation that violates a basic right, within the boundaries authorized by the Basic Law, enumerated in s. 8 of Basic Law: Human Dignity and Liberty, in s. 4 of Basic Law: Freedom of Occupation, or s. 8 of Basic Law: Freedom of Occupation, as appropriate. The Basic Law sets out the conditions for the validity of ordinary legislation as aforesaid.

A question that remains open is the extent to which the Knesset is entitled, either as a constituent assembly or as a monolithic legislative branch, to violate a fundamental right, even by way of a Basic Law, and the scope of judicial review over the same. We shall leave this question open.

The Basic Law and the Amending Law

67. The Amending Law with which we are dealing in this judgment is not an amendment to the Basic Law. The Basic Law before us also does not contain a provision similar to s. 8 of Basic Law: Freedom of Occupation.

The significance of this is that the Amending Law will only be valid if it does not violate *ab initio* one of the basic rights protected in Basic Law: Human Dignity and Liberty. In the event that it does violate a right as aforesaid, it will only be valid if it meets the requirements of s. 8 of Basic Law: Human Dignity and Liberty. Accordingly, we must now examine, first, whether the Amending Law violates the *property* of a person. If our conclusion is negative, then there was *no* room for the conclusions of the court of first instance in two of the cases being considered here jointly, and in the arguments of the appeal in the third case, the hearing of which we joined with the two applications for leave to appeal, in which we were asked to declare the invalidity of the Amending Law. If our conclusion is affirmative, i.e., that the Amending Law does infringe a protected basic right, we will be compelled to move to the next stage of the examination, in which we shall examine whether the Amending Law meets the conditions set out in s. 8 of the Basic Law, i.e., whether it should be regarded as valid and enforced, notwithstanding the violation of the property of a person stemming from it.

Protection of Property – Section 3 of the Basic Law

68. Section 3 of the Basic Law provides as follows:

> 'Protection of property There shall be no violation of the property of a person.'

Two questions arise in connection with this section. The first is general and concerns the nature of a violation of property; the second is particular, namely, whether the specific law before us, i.e., the Amending Law, violates the right to property. The question who is a "person" for the purpose of s. 3 does not arise in the case before us.

69. Accordingly, we shall turn to the question of the violation of the right to property.

(a) What is property for the purpose of the said s. 3? This question is *prima facie* difficult, because the Basic Law, consistent with its concise language, does not set out a definition of the term "property." This concept has many facets, and one scholar has even drawn an analogy between the concept of "property" and an iceberg in which the invisible part exceeds the portion open to view (K. M. Minogue, "The Concept of Property and its Contemporary Significance," XII (1980) *Nomos* 10). Thus, it is appropriate to interpret this concept in every case on the basis of the relevant purpose and context.

In order to establish the correct boundaries of the term we must balance its fundamental purposes:

On one hand, we are concerned with a constitutional provision. It is intended to protect private property and the individual's right to property. It is significant in terms of the social concept upon which it is based. The right is one of the expressions of liberty. It is a type of guarantee of the right of ownership. The character of the protection of property, as an act guaranteeing human liberty is what connects this right with the right to human dignity, as a guiding principle in our worldview in general and in the Basic Law in particular: freedom to act in the area of property guarantees the right to self determination and prevents the individual from being transformed into a mere object (Muench/Kunig, Grundgesetz, *supra*, at 824). It is intended to prevent the deprival or dilution of the individual's to property. It must be afforded effective protection. As a constitutional provision, it must be interpreted in a broad and general way.

Accordingly, the term "property" for the purpose of the issue before us, applies *prima facie* both to a right *in rem* and to a right *in personam*. For the purpose of preventing the deprival of an individual's property right it is irrelevant whether one is a depriving a right in real property or in another appropriate right ,whether one is negating a right *in rem* or whether one is suspending the right of a person against a defined debtor only. As my esteemed colleague Justice Cheshin stated in LCA 7112/93 *Tzudler v. Yosef* [30], "property" in the Basic Law also applies to rights that are not property rights in the classic sense (see the comprehensive and instructive article by Prof. Y. Weisman, "Constitutional Protection of Property," 42 *HaPraklit* (1995) 258, 267).

The emphasis is, as noted, on the purpose, and focuses principally on preventing the deprivation of a person's possessions. This is the violation that the Basic Law seeks to prevent. Accordingly, for the purpose of constitutional protection, the term "property" goes beyond the definition used in other areas

of property law (see Prof. Y. Weisman, 16 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1990) 53). In my view, it also includes the denial of obligatory rights.

(b) As we are concerned with the first proceedings in this court in connection with s. 3 of the said law, I will make a number of general comments regarding the approach taken to this issue in other countries. When the term "violation" is used, the intention in this context is generally to the consequences of the economic and fiscal activities of the state that play a significant role in the implementation of the needs of the state. In this area, i.e., violation of *property*, it is customary, for example in the United States, to follow the guiding policy that has been adopted in recent years in the interpreting the Fifth and Fourteenth Amendments to the Constitution. Under this interpretative approach, at the stage of judicial review, great weight is given to the policy underlying the words of the legislature, provided that it is possible to show due process of law and a rational connection to the legislative purpose. Thus, *for example*, American case law generally restricts intervention in tax legislation (*The Constitution of the U. S. of America, Analysis and Interpretation*, Prepared by the Congressional Research Service (Washington, 1973) 1170, 1174; M. R. Cohen, "Property and Sovereignty," 13 *Cornell L. Q. Rev* (1927-28) 8, 24; *Grosjean v. American Press Co*. (1936) [85]). According to the approach pursued in the United States, the court should not be transformed into a body that will act as the supreme overseer of the economic and fiscal policy expressed in statute. Voice has even been given to the extreme view that the only matters subject to review are 'deprivations of property that are arbitrary in the sense that they serve no legitimate governmental objective or that they are viciously motivated' (Frank I. Michelman, "Property as a Constitutional Right," *Wash. and Lee L. Rev* (1981) 1097, 1098).

German constitutional interpretation, too, expresses reservations regarding intervention in tax law, save if extreme irregularities are found – *Uebermaessige (Konfiskatorische) Besteuerung*, i.e., excessive taxation of a confiscatory nature (see the comments of Muench / Kunig, *supra* at 839; Herzog, *supra* at 282).

However, it is clear that the reference to other constitutions and their implementation is comparative only. In the protection it extends to the rights under its aegis, every constitution expresses its own unique hierarchy of social values and the conceptions of its society. It is unnecessary to add that there is also an entire range of political considerations that accompany the formulation

of a constitution. Thus, for example, in Canada it was decided to refrain from including a prohibition on infringing property in the Charter of Rights.

The drafters of the Canadian constitution refrained, at the conclusion of the deliberations, from including an express statement regarding the protection of the right to property in the Charter, because of the fear of the consequences of allowing judicial review over the substance of economic legislation.

The range of considerations that come before the courts in this context has been discussed in the foreign legal literature. Thus Allen stated:

Clearly, an extremely generous view of the constitutional provisions would severely hamper the ability of the legislature to govern. Property cannot extend to every right or interest, even of an economic nature; neither can every act which affects property be considered a deprivation of property. Nevertheless, the *courts have generally advocated giving property a wide scope*. Those limitations of the guarantees which have arisen are found in the interpretations of "*deprivation*" or "*acquisition*"' (T. Allen, "Commonwealth Constitutions and the Right Not to Be Deprived of Property" 42 *Int. & Comp. L. Q*. (1993) 523, 527 (emphasis mine – M.S.), and see also N. K. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society," 86 *Mich L. Rev*. (1987-88) 657, 662).

Professor Hogg (Canada) states his view in the same spirit:

> 'The reason that generosity should give way, rather than the stringent standard of justification, concerns the policy-making role of the courts. If the scope of the guaranteed right is wide, and the standard of justification is relaxed, then a large number of *Charter* Challenges will come before the courts and will fall to be determined under section 1. Since section 1 requires that the policy of the legislation be balanced against the policy of the *Charter*, and since it is difficult to devise meaningful standards to constrain the balancing process, judicial review will become even more *pervasive*, even more *policy-laden*, and even more *unpredictable* than it is now. While *some judges* will *welcome* such *extensive powers*, most judges will be concerned to stem the wasteful floods of litigation, to limit the occasions when they have to review the policy choices of legislative bodies, and to introduce meaningful rules to the process of *Charter* review. These purposes can be accomplished only by restricting the scope of *Charter* rights' (P.W. Hogg, "Interpreting the Charter of

> Rights: Generosity and Justification,' 28 *Osgoode Hall L. J.* (1990) 817, 819-820; emphasis mine - M.S.).

German constitutional interpretation comments in connection with the legislature's decisions regarding economic, social and welfare matters:

> 'In Bezug auf Prognosenentscheidungen des Gesetzgebers belaesst das BVerfG dem Gesetzgeber im wirtschafts, sozial-und gesellschaftspolit. Bereich einen weiten (Prognose-) Spielraum: "Die Verfassung billigt dem Gesetzgeber bei der Einschaetzung der fuer die Allgemeinheit drohenden Gefahren einen Beurteilungsspielraum zu; er ueberschreitet ihn nur dann, wenn seine Erwaegungen so offensichtlich fehlsam sind, dass sie vernuenftigerweise keine Grundlage fuer gesetzgeberische Massnahmen abgeben koennen' (BVerfGE 38, 61)' (Muench / Kunig, *supra* at 60).'

And in translation:

> 'With regard to the decisions that include future assessments by the legislature, the Basic Law leaves the legislature broad room to maneuver, in relation to the economic, welfare and social areas: "The constitution grants the legislature wide room, in so far as relates to assessment of the anticipated risk to the public. It (the legislature) only exceeds its boundaries if its considerations are so clearly and visibly erroneous, that they cannot provide reasonable grounds for taking legislative steps' (judgment of the Constitutional Court 38, 61).

In other words, the court will intervene if the considerations of the legislation are so clearly and visibly erroneous that they cannot be regarded as providing a reasonable basis for statutory intervention.

So far we have referred to the views in a number of other countries that, in similar circumstances to ours, call for caution and restraint and for preserving the areas that are intended for judicial review as an outcome of the Basic Law.

(c) On the issue of taxes here, see the different views as expressed in the articles of Prof. A. Yoran, "The Constitutional Revolution in Taxation in Israel," 23 *Hebrew Univ. L. Rev. (Mishpatim)* 55, 60 (1992) and of Prof. Y. M. Edrey, "Constitutional and Normative Obstacles for the New Tax Legislation," 8 *Taxes* Vol. 6 (1994) p. a20.

(d) The form of examination acceptable here is one which marches one step at a time along the route delineated in ss. 3 and 8 of Basic Law: Human Dignity and Liberty. However, the application of the powers vested in the court should properly be exercised in a way that refrains from turning the court into a body that actively shapes the economic policy that it deems to be more correct or preferable.

The court does not invalidate economic or other legislation by reason of the fact that it is incorrect in its view, or that its provisions seem to the court to have undesirable economic ramifications. The court examines the constitutional aspect, i.e., the aspect of human rights as translated into the conditions of ss. 3 and 8 of the Basic Law. I also accept the view taken by the interpreters of the German constitution whereby there will be no intervention save if the approach is so clearly and visibly erroneous that it is not possible to regard it as a reasonable basis for legislative intervention.

The main focus of the great rule in s. 3 is actually not the definition of the term "property" but the link between the object of the legislation and the activity applicable to it. In other words, the subject of the provision in s. 3 is "violation of property." Violation of property for our purpose was illustrated by reference to constitutional acts possessing substantive personal repercussions, for example, those by virtue of which the property of a person is confiscated, without proper compensation, in an arbitrary or other substantive breach of his rights. It is not intended that the court will exercise its constitutional rights in respect of the imposition of every fee or stamp tax that is not onerous, merely because, in the nature of things, it imposes a duty to make some payment. If every marginal issue such as this were to be made the subject of examination under s. 8, the courts would become engaged in long, tiring debates in every case of insignificant changes of tax rates, the State would be required to adduce evidence justifying the tax, and the courts would ,in practice, become seals of approval or disapproval for *every fiscal act*. Such a development is undesirable.

The implementation of the powers of the court should properly be carried out while preserving the balance between the principle of the separation of powers, on one hand, and the duty of the court to review constitutionality, on the other hand. Vesting of power to engage in judicial review must be exercised without any tendency to decide about all matters, lock, stock and barrel. On one hand, caution is necessary in order not to paralyze the wheels of the economy, and on the other hand openness is required to hear the cry of the injured individual. This requires professionalism and wisdom. The core of

judicial review in relation to property is human rights, and not the reshaping of economic policy.

In conclusion, in my view, the tendency of constitutional legislation in the area of property is not for the court to turn into the supreme reviser of the economy and financial system and examiner of the wisdom of the economic policy. It is not intended that within the framework of constitutional supervision the court will reorganize the economic order in a manner that it deems more just or more sensible.

70. We will now turn to questions that arise in relation to the Amending Law that is before the Court. As learned counsel for the state argued, the Amending Law was born in order to correct flaws and operating difficulties in the Principal Law:

The interpretation of the courts and the flawed language of the Principal Law created a complex, inefficient process, leading to duplicate proceedings, superfluous expenses, legal and economic uncertainty and the deferral of the issue of a final "rehabilitative judgment," which is the goal of the Principal Law: comprehensive and swift ordering of the debts of the agricultural unit.

According to the argument of the State, the Amending Law was designed to remove the lack of clarity, in order to cast off the difficulties created by contradictory judgments of the courts and doubts regarding the proper interpretation of different definitions in the Principal Law. As described in the beginning of our comments, the definition of "basic debt" was expanded; *inter alia* the definition of the term "debt" was changed; it was clarified that no distinction should be drawn between "debt" and "obligation"; the definition of "total debt" was changed by expanding it and applying it to debts existing on 24 Tevet 5752 – 31 December 1991; a reformulation was enacted of s. 7 of the Principal Law which clarified the provisions regarding the cessation of any proceedings concerning a debt or guarantee.

Naturally, reference is not only to the elimination of uncertainties. The essence of the matter is not the language of the amendments but their substance and significance. They contain an expansion – both for the purpose of clarification and also primarily in consequence of lessons learned – of the arrangements in the agricultural sector to which the law applies, and discontinuation of every process to collect debts ordinarily applied in our system. The purpose is to replace the ordinary legal process with a statutory arrangement that includes the possibility of *wiping out debts.* According to the Amending Law, the latter possibility is broader than that established in the

Principal Law. The right of a creditor may be cancelled completely or to a considerable extent.

In this regard it is unimportant that similar arrangements were in place prior to the Principal Law or prior to the Amending Law. We have clarified that the Amending Law stands on its own feet, for our purposes, because it was enacted following the commencement of the Basic Law. The establishment of an absolute duty to transfer processes regarding debts to the Rehabilitator, and the possibility of engaging in a wider elimination of debts than was previously available, comprises a *violation of property*. It is sufficient for this purpose to turn to the provisions of ss. 21 and 22 of the Principal Law, as amended by the Amending Law.

In this context, I said in LCA 1759/93 [1], at pp. 150-151:

> 'In reducing and spreading the debt there is, of course, a violation of the property of a third party to whom the agriculturalist owes his debt, and this constitutes a change of the arrangement originally established between the parties. This violation is post-contractual and therefore is doubly serious. In this connection it is important to recall that a third party is not necessarily a bank or other financial body (as was intended in the beginning, as stated in the Explanatory Note: "a debt originating in credit given to an agricultural unit by a *bank*…" – M.S.) but may also be a private person who lent money to that agricultural unit for the purpose of his business as an agriculturalist or granted him any service, and now the amount of the debt to which he is entitled is being reduced: for example, a private person who performed any work for that agriculturalist or supplied him with commodities, such as transport or seed supplies, carried out for the purpose of the agricultural activities of the debtor – will receive only part of the consideration.'

My opinion was a dissent. However, this was not the case in so far as concerned the above characterization of the Principal Law, or any other similar provision that amends and expands it. See also in this context *Louisville Bank v. Radford* (1935) [86] (hereinafter: the *Radford* case [86]) and *cf. Wright v. Vinton Branch* (1937) [87], there Justice Brandeis stated at pp. 456-457, summarizing the *Radford* case [86] (in which he also gave judgment):

> 'The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause. The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that, as applied to mortgages given before its enactment, the statute violated that Amendment since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken. It was not held that the deprivation of any one of these rights would have rendered the act invalid, but that the effect of the statute in its entirety was to *deprive the mortgagee of his property without due process of law*' (emphasis mine – M.S.).

The nature of the Amending Law as one similar to bankruptcy law does not detract from the conclusion stated above. The existing bankruptcy laws are protected by s. 10 of the Basic Law. Their nature as provisions enabling the debts to be wiped out, i.e., violation of the right to property, would have been the subject of examination had they been enacted following the commencement of the Basic Law. Naturally, this does not affect the examination under s. 8 of the Basic Law, an examination which is the outcome of our conclusion according to s. 3 of the Basic Law.

71. A legal arrangement regarding the *cancellation of debts* of significant scope amounts to a taking of property from the holder of a debt and accordingly possesses the character of a violation of property. For this purpose, it is immaterial that even in the absence of this arrangement, the creditor would have had other legal measures available to him for collection that also would conceivably have included the possibility of a certain cancellation of debts – such as bankruptcy proceedings.

What is decisive in relation to s. 3 is the character and consequences of the legislation under examination, and not the question of the existence of similar legal alternatives. This is not the case in relation to s. 8 of the Basic Law, to which we shall return.

72. The burden of persuasion regarding the existence of a violation of property is on the party claiming it, and he must prove his version of events on the balance of probabilities (FH 4/69 *Noiman v. Cohen* [31], at p. 290) and not beyond any reasonable doubt as is customary in criminal proceedings.

73. The conclusion that follows from the aforesaid is that the Amending Law *violates the right to property*. As explained, the determination that particular legislation contains a violation of property is not the end of the story from the point of view of the constitutionality of the legislation. The door is still open to prove that *notwithstanding* the violation, the Amending Law falls within the range of cases in respect of which s. 8 of the Basic Law provides that the violation does not lead to the invalidation of the legislation. We shall therefore turn to the said s. 8.

Violation of Rights – Section 8 of the Basic Law

74. Section 8 of the Basic Law provides as follows:

> 'There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required or by regulation enacted by virtue of express authorization in such law.'

These are the cumulative elements of the aforesaid constitutional provision:

(a) The violation is carried out by means of a law or *under* a law by virtue of express authorization in it;

(b) The law fits the values of the State of Israel;

(c) The law is designed for a proper purpose;

(d) The violation is to an extent no greater than required.

75. Section 8 reflects a balance between the constitutional interests and the interests reflected in the legislation that is subject to constitutional review. The determination regarding the existence of the right in the Basic Law and the duty to safeguard and respect it does not create absolute conclusive protection, which one cannot exclude and to which there are no exceptions. Rights are not absolute. They are constructed on a reality of a balance between the rights and the needs of all the individuals making up society, and the right of the state and society in general to exist.

The significance of this is that in every discussion regarding a constitutional right, a balanced view is required that takes into account not only the right of the person complaining of the violation, but also the rights of others who might be harmed by the unique, unbalanced grant of the right. This does not mean that rights are always equal and that it is not possible to determine preferences and priorities among them. The cry to save human life has priority over the right of a person to enjoy his afternoon rest. There are

circumstances in which freedom of speech supersedes the right of a person to his good name. The solution is obtained, as noted, by means of balances that play a substantive role in every constitutional theory. Section 8 presents the substantive and principal balance required for recognition of rights under the Basic Law before us.

Deputy President Elon referred to the relativity of a basic right in HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* [32], at p. 242, stating:

> '… It is an important rule that a basic right is not absolute but relative, and its existence and preservation are maintained by finding the suitable balance between the various legitimate interests of the two individuals or of the individual and the public, interests that are all anchored and protected by law.'

My esteemed colleague President Barak writes:

> 'Human rights are not absolute. These are relative rights that are dependent on the existence of a social framework that maintains them. The limitation clause expresses the social character of human rights set out in the Basic Law. These rights do not look at the individual as an isolated island; they do not deal with the individual's relationship with himself. Human rights set out in the Basic Law look at the individual as part of society. They deal with the individual and his relationship with others. They assume the existence of close connections between individuals. According to the view of the limitation clause, the individual is a social creature. Indeed, the very existence of human rights assumes the existence of human society, in which mutual relations exist among the individuals in it. However, the limitation clause goes a step further. It also assumes the existence of a state that needs to realize national goals. It is based on the existence of government, which is designed to promote national purposes. Its premise is that the power of government given to the state is essential to its existence and to the existence of human rights themselves. The limitation clause reflects a national compromise between the power of the state and the right of the individual' (Barak, in the work cited above, *Interpretation in Law*, Vol. 3., at p. 745).

This is the reason why the aforesaid s. 8, which sets out conditions limiting the validity of legislation that violates a right set out in the said Basic Law,

also limits thereby the protection afforded by the Basic Law, as it sanctions a violating provision and leaves it valid. In other words, it is possible to have a violation of a basic right that will be regarded as valid because it satisfies the conditions of s. 8.

Section 8 governs cases where there is a violation of a right – such as in the instant case where we have concluded from the substance of the law that it contravenes the provisions of s. 3 of the Basic Law. Section 8 prevents the invalidation of the law on constitutional grounds, if it meets the requirements of balance that it enumerates. Section 8 therefore contains a provision possessing a dual load: one negative and the other positive.

The limitation clause, in the words of my esteemed colleague President Barak, 'assumes the violation of a human right that is intended to protect a human right' (*ibid*., at p. 476). The components of the limitation clause must be interpreted in this spirit: the significance and purpose of the conditions that are intended to create a balance between contradictory legitimate rights and create a hierarchy of preferences among various interests, all of which are designed to safeguard the essential values needed to maintain human dignity and liberty. A legitimate social interest may also be included in this zone, because – as noted – there may be circumstances where the violation of the right of a person is an act that is essential to save or succor many others. By the way, from this point of view, the legal structure described has a certain similarity to the standards applicable to the defense of "necessity *strictu senso*" in criminal law.

Breach of Law or by Law

76. A provision that seeks to restrict a basic right must rely on an express statement in a law or ensue from an act that relies on an express authorization in a law (see also the *Miterani* case [7]). The reliance on a statutory provision or on a provision relying on an express statement in a law is intended to formally anchor the provision in the written words of the primary law in Israel, in contrast to the abstract legal rule learned from the law. This is a qualification as to form that envelops a trend relating to content. The issue of form embodies – by virtue of its nature – the formality that relies on legality, and strengthens it.

With regard to the law that we are examining here, i.e., *the Amending Law*, the answer to the above requirement is clearly visible: The Amending Law is a law of the Knesset, and as such it meets, without any shadow of a doubt, the first condition of s. 8.

A Law Befitting the Values of the State of Israel

77. No rights under the Basic Law before us may be violated save by a law 'befitting the values of the State of Israel.' We learn of the values of the State of Israel for our purposes from ss. 1 and 1A of the Basic Law, which state:

Section 1 Basic Principles	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 respected in the spirit of the principles of the Declaration of the Establishment of the State of Israel.'
Section 1A Purpose	The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.'

The values of the State of Israel are the values of a Jewish and democratic state. A reminder of the principles underlying these values is set out in s. 1A, which is quoted above. Thus, the requirement that a violation of a basic right – in order for it to be regarded as a lawful violation – will rely on statute that is not general and vague. Not every law contains a limitation that exempts a violation of a basic right from its constitutional ramifications. Only a law that, from the point of view of its character and substance, meets the criteria embodied in s. 8 will satisfy the conditions of the aforesaid component of the statutory provision with which we are dealing.

78. In my view, the Amending Law – like its predecessor the Principal Law – befits the values of the State of Israel. Everyone acknowledges that a very grave crisis has befallen the agricultural sector, a crisis that has already lasted a number of years. Faced with the possible collapse of thousands of agricultural household units, the human suffering entailed in this, many agriculturalists' loss of property and future – and consequently also the potentially substantial harm to the entire agricultural sector – the legislature chose to implement the option of an arrangement accompanied by

rehabilitation, which it regarded as preferable to mere bankruptcy. In creating the idea of an arrangement with creditors that involves injury to creditors and their property, the law is not innovative. This possibility already exists under the laws of bankruptcy and corporate liquidations. However, the existence of a similar earlier model is not sufficient *per se* to deprive the new legal measure of its character as violating property. The new, innovative elements in the Principal Law and in the Amending Law are those that deny the status of the court and establish the form of the rehabilitation arrangements. As an aside it may be said that the idea of rehabilitation also gradually entered the field of bankruptcy and liquidation law (in the meantime through practical court guidance and not through comprehensive legislation).

Legislative action to save an economic sector has also been undertaken in other democratic countries, so that here too, the law before us does not represent anything new, see for example, the American Bankruptcy Judges, U. S. Trustees and Family Farmer Act, 1986. The intervention of the legislature, in the words of the bill which preceded the Principal Law (Family Agricultural Sector (Arrangements) Draft Bill), in order to find arrangements for the agricultural sector became even more vital after earlier arrangements failed to prove themselves, and left the agricultural sector in a deep crisis, that, it has been argued, even aggravated that crisis.

The legislation before us reflects the values of a society that believes in the responsibility of the state for the fate of its citizens, and that nurtures the sense that the citizens of the state are also responsible for each other. Paying attention to the fate of the working person is a worthy and even essential attribute of a regime possessing humane values, which recognizes the equality of human beings and is willing to provide the legal tools needed to provide possible solutions to their problems. Clearly, a debt arrangement is often dependent upon the cancellation of some debts or putting in place a moratorium of a similar character, and these violate the rights of the creditors.

79. It seems to me that the courts whose decisions stand before us within the framework of CLA 1908/94 and 3363/94 expanded the court's role to a degree greater than was necessary in inquiring into the question *whether the legislation befits the values of the State of Israel*. The court does not sit in judgment in order to administer the State economy. It does not rewrite the law. It does not transform secondary into primary in order to determine that legislation that it deems defective or otherwise wanting is inconsistent with the values of the State of Israel. The court is not called upon to declare what, in its opinion, would be a more fitting or enlightened legislative solution. The court

is called upon to determine, in the context of s. 8, whether the subject statute, according to its general purpose, *grosso mondo*, is consistent with a Jewish and democratic state. Justice Black of the Supreme Court of the United States said in this regard:

> 'Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is unwise or incompatible with some particular economic or social philosophy…'

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns* and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to *the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies*, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned ... with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure' (*Ferguson v. Skrupa* (1963) [88], at 729-730 (*per* Black, J., for unanimous Court) (The case references have been omitted – M.S.).

I am aware of the fact that the approach to the argument regarding the violation of *property rights* is not uniform in every country, and that the various constitutional systems reveal a range of approaches, beginning with Canada's complete avoidance of the constitutional debate on this issue, through the determination of a low level of willingness to intervene in matters of violation of property in the Supreme Court of the United States, and ending in courts that are active and intervene more in the review of political economic measures.

The approach whereby there is room to expand the scope of intervention, by entrusting the court with the task of an economic and material examination of every detail, condition and qualification in a law, in contrast to a substantive examination of the law will, in my opinion, grant the court powers that should be reserved to other branches, i.e., it will place the court in the position of a quasi-supreme legislative chamber which conducts supreme

supervision *for the sake of it*, and holds the power of veto over policy (as distinct from constitutionality) expressed in the law being considered by it.

An example of the approach that I find unacceptable is the determination by one of the courts in the matter before us, that the Amending Law does not befit the values of the State of Israel by reason of the fact that it only applies to the *moshavim* (arrangements) (and not to the *kibbutzim* (collective arrangements)). This determination – which, by the way, is also imprecise factually – is an example of a misguided basic approach, according to which only if the *scope of* the general *application* of the law meets the *court's satisfaction*, can it be concluded that it is consistent with the values of the State of Israel. Economic legislation resulting from economic policy determines the scope of its application in light of the legislature's discretion and in light of various economic factors that are not within the court's knowledge or expertise. It is not for this that the power to engage in constitutional review was granted to the court, whether in Israel or in any other place where constitutional review of this type is conducted. In this context we should recall the decision of the Canadian legislature not to include the subject of infringement of property in the Charter.

80. Let us now turn from the general to the particular. The courts of first instance found a series of flaws in the law, which led them to conclude that it does not befit the values of a Jewish and democratic state:

(a) As noted, the law only regulates the problem of a part of the agricultural sector, i.e., the *moshavim*, and in the opinion of the court, this is a violation of equality.

(b) The burden is imposed only on what the court termed a "random" and "unidentified" section of the public, i.e., on the *creditors of the agriculturists* who participate in the arrangement, as distinct from the imposition of the burden on the *public as a whole*. According to the court, this too amounts to a violation of equality.

There is no substance to the view taken by the lower court in CLA 1908/94 to the effect that the operation of the program which the law seeks to serve, by the imposition of debts on the creditors alone, amounts to a process that is inconsistent with the values of the State of Israel. The belief that the values of the State of Israel require that the *entire* tax-paying public bear the burden of covering the insolvency of defined public sectors has no basis. Had the Principal Law and the Amending Law not been enacted, the execution laws or the bankruptcy laws or both would have applied to the collection of the debts

and the attempts to reach an arrangement. Would the financial loss ensuing from partial or non-existent collection of the debts of those unable to pay what they owed been imposed under these laws upon the public as a whole? Clearly, the answer to this is – no; and no one has ever suggested that this be done.

The same is true in relation to the argument, which is factually wrong, concerning the failure to cover the debts of the *kibbutzim.* As mentioned, the law applies to the debts of a certain number of named *kibbutzim.* Moreover, other measures have been taken to deal with the debts of the *kibbutzim,* then and now. However, even if the issue of the debts of the *kibbutzim* had not been included in the arrangement before us, this would not have deprived the law of its character as a law befitting the values of the State of Israel. The question facing the court was whether the law, which sought to settle the debts of thousands of households within the agricultural sector, was compatible, in terms of purpose and substance, with a democratic and Jewish state. The answer to this is affirmative, because the arrangement of debts in a broad economic sector is a worthy activity, both here and in other democratic countries in which farmers encounter similar difficulties. The legislature saw fit to choose, from among the alternatives, a solution that is not applied to all the citizens who have encountered economic hardship. This does not lead to the conclusion that it is unconstitutional.

With regard to the covering of debts by way of partial cancellation or the covering of debts using public funds, a law may establish an arrangement with creditors on the basis of cancelling debts and violating property without this being regarded as a conclusion that does not befit the values of the State of Israel or of any other state in the free world. For example, Jewish law in relation to the cancellation of debts (Deuteronomy, 15, 1-11 [A]) of course harms only creditors and not the entire public. The same is true of the modern laws of bankruptcy throughout the world. This is an economic necessity. Achieving rehabilitation by means of arrangement of debts, even if this involves cancelling some of those debts, is on occasion the only way out, but this still does not mean that all the tax payers, *as distinct from those who maintained connections with the debtor as part of their livelihood,* are required to cover the debts and be responsible for their arrangement.

In conclusion, the court was mistaken in its belief that only a law that settles the debts by imposing the burden on the entire public, and which encompasses in its provisions all types of agricultural debtors (and why only agricultural?), is a law befitting the values of the State of Israel, and that every

other law is deprived of this attribute and so-to-speak violates equality. As mentioned, the approach of the court reveals, to a large extent, an incorrect assessment of the function of the court and its discretion in relation to the issue under discussion. Instead of a relevant and realistic assessment of the law that was enacted, the court decided that constitutionality attaches only to modes of enactment that are optimal in terms of their wisdom or justice, *according to the court's view*; in so doing, the court did not act within the scope of s. 8, but beyond and outside it.

In this context I accept the comments of Prof. F. Raday ("Privatizing Human Rights and the Abuse of Power," 23 *Mishpatim* (1994) 21, 52) as also cited in the Attorney General's response:

> ' … In the choice between the various concepts of justice in the privatization of human rights, different pictures are seen by the court and the legislature. This fact leads them to choose different versions of justice: the legislature – the macro-socio-economic version of justice and collective justice; and the court – the legal-formalistic and individualistic version of justice. According to the principles of constitutional democracy in Israel, when there is a clash between these versions, the court must respect the policy of justice chosen by the legislature, being the version of justice that cannot be accused of not being for a proper purpose or of being inconsistent with the values of the State of Israel.'

See also *Williamson v. Lee Optical Co*. (1955) [89], 489, where it was held:

> 'The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind… The legislature may select one phase of one field and apply a remedy there, neglecting the others... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination…'

And at pages 487-488:

> '… the law needs not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'

To summarize this point: a reasonable, non-arbitrary solution expressed in a law can befit the values of the state, even if the court would have chosen a solution that would have been more just or sensible, *in its opinion*, had it been given the choice. The error of the court in cases such as the one before us lies in the search for a *single* solution, which it views as optimal, and only in which, it identifies the law that befits the values of the State of Israel. The court must be cognizant of the fact that there may be a wide variety, in the nature of a zone or area, of possible alternative solutions, and that every type of provision contained therein may fit the values of the state. Only a law that completely exceeds the array of legal alternatives will be rejected as lacking the attribute of compatibility.

Intended for a Proper Purpose

81. The words "proper purpose" describe a purpose that is positive from the point of view of human rights and the values of society, including the purpose of establishing a reasonable and fair balance between the rights of different people who hold interests that are sometimes inconsistent with each other. A proper purpose is one that creates a foundation for living together, even if entails a compromise in the area of granting optimal rights to each and every individual, or if it serves interests that are essential to the preservation of the state and society. In the event that the law possesses a number of intertwined purposes, great, albeit not decisive, weight will be accorded to its dominant nature. At the same time, the secondary purposes should not be disregarded and their ramifications for human rights should be examined.

Thus, in order to satisfy the condition of s. 8, it is necessary to examine whether the legislation that violates the basic right – and which is examined under s. 8 – is of sufficient importance and weight to justify the violation of the right. It is not possible to ascribe importance and weight to a trivial purpose, whose constructive value is negligible, if the outcome is a substantive violation of a basic right. In order to justify a violation of a right, appropriate importance and weight must attach to the *sought for purpose*. In other words, the desired purpose must be important and essential in order to justify a violation of a right (see also the Canadian judgment *R. v. Oakes* (1986) [114]).

The purpose that emerges from the law may become visible between its lines upon perusal and examination only; however, it must be discernable, even if it is not declared, in order for it to be weighed against the violation and its significance. As mentioned, the persuasive burden rests upon the party claiming the existence of a proper purpose.

Moreover, the proper purpose must emerge upon examination by the court. For this purpose, the court is not bound exclusively by purposes borne in mind by the legislature. Certainly, there is a presumption that the legislature acted in good faith, and in any event we must not search for the concealed motives of individuals making up the legislative branch, in contrast to the purpose considered by the legislature as a collective legislative organ (see HCJ 620/85 *Miari* v. *Knesset Speaker* [33], at p. 187). The court examines the purpose that guided the legislature, as expressed in the reasoning of the person who proposed the law and in the majority opinion as formulated. At the same time, it may also become apparent at the time of examination of the final draft of the law and its ramifications.

82. (a) In CLA 1908/94 the court held that the purpose of the Amending Law is not proper. According to the court, there was no indication of the fact that broadening the violation of the property rights of the creditors by the Amending Law was done for a proper purpose that could not have been achieved and realized by the Principal Law. The court stated that the Explanatory Note to the bill did not contain any details regarding the reasons for the amendment, and also at the time of the presentation of the issue in the Knesset, no relevant details were given regarding the difficulties of operating the Principal Law.

In the words of the court:*

> '… there is no explanation in the Amending Law why, in order to save the agricultural sector, it is necessary to broaden the violation of the fundamental principles of our society and the basic rights of its citizens…'

In consequence of this, the court concluded that, in addition to the above, it also had not been proved that the violation was "to the required extent," an issue that we will address separately.

(b) I find the argument that the purpose of the Amending Law is the same as the purpose of the Principal Law to be reasonable. Both treat of the same issue, i.e., the effort to resolve the crisis in the agricultural *moshav* sector. This purpose is not 'a violation of the basic principles of our society.' The Amending Law did not introduce anything new to the basic purpose, but sought to reconcile difference, remove doubts, perfect methods and make modes of operation more efficient, in the light of the lessons of the past. As we

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* P.M. 1994 (3) 243, at p. 263.

have explained, the non-application of the Basic Law to the Principal Law does not deprive the court of its ability to examine the compatibility of the Amending Law to the principles of the Basic Law, so as to determine whether the Amending Law has a different purpose than that espoused by the Principal Law, in respect of which the explanations were fuller and more detailed.

Indeed, provisions that are not invalidated in the Principal Law, by reason of the provision in s. 10 of the Basic Law, may be invalidated in the Amending Law, which does not enjoy a similar provision regarding non-application. However, a close examination of the provisions of the Amending Law does not lead to the conclusion in the present case that the purpose, i.e., the solution to the crisis in the agricultural sector, is unworthy or that the purpose which is worthy *per se* is nonetheless flawed by reason of the fact that no details are given of the problems and difficulties ensuing from the operation of the Principal Law that required it to be amended. It should be clarified – as guidance for the future – that it would have been appropriate to inform the court of the cases in which the various courts had handed down decisions that were not uniform or were restrictive and which made it difficult to implement the provisions of the law. In the hearing *before us*, the following decisions, *inter alia*, were mentioned: OM (Jerusalem) 1635/92 [78]; OM (Tel-Aviv) 1229/93 [79]; LCA 3466/92 *Artrekt Bankrupts v. Bankruptcy Trustee* [34]; OM (Tel-Aviv) 49299/88 [80]; OM (Tel-Aviv) 1657/89 [81].

The term "basic debt" was interpreted in different ways, the question of the interest led to dispute, there were decisions regarding the severance of the hearing between the court and the Rehabilitator and further derivative matters, which required a clearer and more precise statement of the solution to the disputes raised before the court, in order to allow the attainment of the purpose set out by the legislature in the Principal Law.

As noted, it would have been correct, from the point of view of the State, to have presented in greater detail to the lower court the vast case-law which, so it was claimed before us, was contradictory and problematic. However, even if, regrettably, this was not done (and in the future it would be appropriate to follow this course) this, on its own, does not render the single and unequivocal purpose invisible and outside the judicial knowledge of the court. Indeed, in this case the court itself had dealt with some of the previous disputes that turned the legislative wheels and led to the enactment of the Amending Law.

To summarize this point: the purpose that faced the legislature was proper. There was no room for the conclusion that the delineation of the measures chosen to deal with the purpose confronting the legislature was unreasonable

or fell outside the "zone" of proper purposes and measures. A decision regarding non-intervention by the court need not rely on the ratification of the one-and-only optimal solution. There may be a number of solutions, each of which serves a proper purpose.

Violation to an Extent No Greater than is Required

83. This component of s. 8 addresses proportionality. It examines if the *degree* of the violation of a right is reasonably proportional to the purpose ensuing from the legislation (see also Prof. Z. Segal, "The Grounds for Disproportionality in Administrative Law," 39 *Hapraklit* (5760) 507).

The purpose deals with the idea, the basic policy and the violation *per se*; in contrast, the 'extent no greater than is required' deals with the scope of the violation, measures and modes. It should be recalled that s. 8 treats of cumulative conditions: the conclusion that the *purpose* is proper is not enough. In addition, the *means* adopted must be within the realm of proportionality.

What is examined is whether the means adopted are essential and required in order to achieve the purpose, and whether they are in reasonable proportion to the purpose. A number of alternative measures may be possible to achieve a certain purpose, *each of which* meets the conditions of being essential and required. The court will invalidate a means that *exceeds* what is required or is not *suitable* to achieve the desired purpose.

In this connection, Justice White of the Supreme Court of the United States put forward the following premise in the case of *Vance v. Bradley* (1979) [90] at 97:

> 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'

The German constitutional system describes the essential points of proportionality (*Verhaeltnismaeszigkeit*) in four stages:

> '1. Der Eingriff darf nur im Interesse des Gemeinwohls und nicht zu sachfremden Zwecken erfolgen (*Gemeinwohl*); 2. Die im Gesetz angeordnete Masznahme musz ein brauchbares Mittel zur

> Erreichung des vom Gesetz angestrebten Zweckes sein (*Eignung*); 3. die im Gesetz angeordnete Masznahme darf sich durch keinen milderen Eingriff ereichen lassen, d.h. die Masznahme musz das schonendste Mittel zur Erreichung des Gesetzeszweckes sein (*Erforderlichkeit*); 4. Mittel und Zweck muesen in einem angemessenen Verhaeltnis zueinander stehen (Zumutbarkeit; Verhaeltnismaeszigkeit im engeren Sinne) (Muench / Kunig, *supra*, at 54).

And in translation:

1. Intervention may only be carried out for the benefit of the public and not for extraneous purposes (the benefit of the public).

2. Performing the step ordered by the law must be an efficient measure (efficacious, performable) in order to achieve the purpose to which the law aspires (compatibility).

3. The step ordered by the law is not achievable by utilizing a less serious measure. In other words, the step must be the less harmful measure needed to achieve the purpose of the law (necessity).

4. The measure and the purpose must have a suitable relationship to each other (compatibility, proportionality in the narrower sense).'

In other words, the following conditions are required:

1. The legal measure adopted must be for the benefit of the public;

2. It must be a usable and suitable measure to achieve the purpose of the law;

3. It must be the *least harmful measure* to achieve the statutory purpose;

4. The measure and the purpose must be *reasonably* related to each other.

84. In the above-cited work on *Interpretation*, my esteemed colleague President Barak suggested three sub-tests for examining proportionality (*Interpretation in Law*, Vol. 3, at p. 536). I shall set out their gist below:

(a) Is the measure *suitable* or unsuitable to achieve the purpose? A connection of suitability is required between the purpose and the measure.

(b) Is it possible to achieve the same purpose using other measures that are *less harmful* to the protected human right?

(c) Is the violation of the right *so serious that we should relinquish* the achievement of the full, proper purpose and adopt measures that are

significantly less harmful to the protected human right (even though the full purpose will not be achieved)?

Test (c) above is, in my view, more a conclusion than a standard. In any event, in my view, it raises difficult questions in the area of judicial review of economic legislation: Will the court decide, for example, that the proposed taxation is too high in order to achieve a particular purpose that is found to be proper, and cancel it completely? Or perhaps it will set a lower tax ceiling? Will it decide, for example, that a moratorium will only apply to 25% of the debts and not to 40% of them? The court faces a proper purpose. The measure is suitable to achieve it. There is no reasonable measure that is less harmful to achieve the proper purpose. Is it conceivable that, in such circumstances, the court will order a retreat from the proper purpose that has been adopted as the economic policy of the legislature, i.e., order that the achievement of the proper economic purpose be renounced in whole or in part?

In my opinion, the court should examine whether the measure is *substantially related to the proper purpose and whether the measure adopted is rationally related to the proper purpose*. The substantive test corresponds to subsection (b) above. The logical test corresponds to test (a) above. *The court examines whether the measure chosen is related substantially and rationally to the proper purpose*.

Put differently, in my opinion it is necessary to establish as a cumulative test by which a measure will be regarded as being of appropriate proportionality if it:

(a) is related substantially to the purpose, i.e., the test of compatibility; and that

(b) it is rationally related to the purpose; and

(c) among the array of measures to achieve the purpose, there is no similar or close measure, which is included in the *zone of reasonable possibilities*, that can achieve that purpose.

85. With regard to the aforesaid test (c) which is the product of the theory of stages (*Stufentheorie*) it should be added and clarified that we are referring to a search for a less harmful measure within a range or zone of similar or close possibilities, and it is not necessarily possible to stay at the bottom of the ladder, i.e., apply the most lenient option. Moreover, in order to search for the measure that is least harmful, the court does not redraft the purpose and does not redraft the program. Facing it is a purpose and measures as formulated by the legislature, and it examines them in terms of their substance, consequences

and ramifications. If the purpose is proper, and if the measure is suitable to achieve the purpose and is substantially related to it, and if the measure is rationally related to the purpose, and if there is no measure less severe that falls outside the zone of admissible alternatives, then the court is entitled to regard it as a measure that does not exceed what is required.

This is the place to add a clarification regarding the burden of persuasion in connection with the "appropriate extent." The sweeping duty to show the application of s. 8 rests on the party claiming its existence. However, within the framework of the specific examination of the element of the "appropriate extent" the evidentiary burden shifts to the party claiming the existence of a violation. What does this mean? The state adduced evidence regarding the existence of the other elements, namely, that the violation was carried out by means of a law or under a law; the law befits the values of the State and the law is intended for a proper purpose. The party claiming the existence of less severe alternatives beyond the zone of possibilities adopted by the legislation bears the burden of bringing the evidence. In other words, the State presents the path chosen by it, and of course the set of factors underlying that choice. However, it does not have to, and cannot, of its own initiative, lay out the entire range of endless other possibilities that could have been pursued to achieve the same objective. This is something that is completely unfeasible. The party asserting the existence of another course of action, which is less grave, fairer, more reasonable, and which can justify the intervention of the court to invalidate the conditions authorizing the legislation, as these arise from s. 8, bears the burden of bringing evidence, and if he does not show the existence of such alternatives, we will be compelled to conclude that the path chosen by the legislature does not exceed the appropriate degree.

To summarize the discussion of this element of s. 8, I would emphasize again that the court must not take upon itself the general function of reshaping purposes and economic or fiscal policies, respectively. This is not justified in a healthy constitutional relationship between the branches. The legislature determines the policy, and on that basis delineates the purposes and measures. In the words of my esteemed colleague the President, *ibid*., at p. 553, the question that the judge must ask himself is not what is the law that draws a proper balance between the needs of the individual and the needs of the whole which 'I would have enacted had I possessed the power.' The question that the judge must ask himself is: 'does the law that was in fact enacted draw a balance between the needs of the individual and the needs of the whole in a manner that satisfies the requirements of the limitation clause.' If the answer

to this question is positive, the judge must acknowledge the validity of the law and its power to legally violate a protected human right, even if the choice of purpose or means does not seem desirable to the judge and he would have chosen a different mode of action. As already mentioned, the judge is not responsible for examining the wisdom of particular legislation but only for examining its constitutionality.

86. We shall also consider the measures before us in accordance with these tests. I am not persuaded by the contention that the measure exceeds the degree necessary and required, is greater than required and that it is possible to achieve the required solution by another means. Every state arrangement of debts entails a search for exhaustive means of paying the debts, while attempting, in so far as possible, to preserve the economic unit to which the arrangement applies. Arrangement of debts often entails the relinquishment of some of the debts or suspension of collection. This is the general framework that was adopted here. It serves the purpose. It is consistent with the purpose that has been found to be proper, and there are no grounds for invalidating it.

87. To summarize: The Amending Law satisfies the requirements of s. 8 of the Basic Law, and therefore the violation of property ensuing from the Amending Law must be regarded as a constitutional violation. Accordingly, in my view, there was no room for the declaration of the invalidity of the Amending Law.

88. We have written at length. The primary reason for this is the need to try to present the guidelines that will serve us in the future when examining the constitutionality of laws under Basic Law: Human Dignity and Liberty.

In this context, it is proper to recall that in countries possessing a constitutional tradition longer than our own, it is customary to examine claims of unconstitutionality with caution and restraint. Unique rules have been shaped to serve the courts that are asked to decide upon the invalidity of legislation on constitutional grounds. Justice Brandeis dealt with this issue extensively in his judgment in *Ashwander v. Tennessee Valley Authority* (1936) [91].

The *Ashwander* case [91] concerned the purchase of facilities, land and stored energy by the Tennessee Valley Authority from the Alabama Power Company. Some of the stockholders in the Alabama Company brought an action for the invalidation of the contractual transaction, *inter alia*, on the grounds that it exceeded the constitutional powers of the Federal Government.

Justice Brandeis reiterated the rules requiring restraint when engaging in an examination of constitutionality, stating:

> 'Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.' *Blair v. United States* 250 U.S. 273, 279.
>
> …
>
> The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress' (*ibid., at 341, 345*).

He added a series of guidelines (*ibid.*, at pp. 345-346), which were based on previous extensive case law, and which can also provide us with material for thought, after independent sifting and harmonization.

89. There are the guidelines set out by Justice Brandeis:

(a) The court will not pass upon the constitutionality of legislation in *nonadversary* proceedings, because deciding such a question is legitimate only in the last resort, and as a *necessity* in the determination of real, earnest, and vital controversy between litigants. *Inter alia*, the judge noted that a party beaten in the legislature could not transfer to the courts an inquiry as to the constitutionality of the legislative act.

(b) The court will not customarily decide questions of a constitutional nature unless it is *absolutely necessary* to a decision of the case.

(c) The court will not formulate a rule of constitutional law broader than is required by the *concrete facts before it* to which it is to be applied.

(d) The court will not pass upon a constitutional question although properly presented, if there is *some other ground* upon which the case may be disposed. If a dispute can be decided on either of two grounds, one involving a constitutional question, the other a question based on statutory construction or general principles, the court will decide only on the basis of the ground of the second type.

(e) The court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

(f) The court will not pass upon the constitutionality of a statute upon complaint of one who has availed himself of its benefits.

(g) When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that the court first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

With regard to the fifth rule above, both here and in England and in the United States, the right of standing has been expanded in contemporary times, and it has also been granted in defined circumstances to persons who have not been *directly* injured by the action of the authority (see here: HCJ 852, 869/86; HCJApp 483, 486, 487, 502, 507, 512-515, 518, 521, 523, 543/86, 1, 33/87 *Aloni v Minister of Justice* [35]; HCJ 1/81 *Shiran v. Broadcasting Authority* [36]; HCJ 428, 429, 431, 446, 448, 463/86; HCJApp 320/86, [9]; and see also H. W. R. Wade, *Administrative Law* (Oxford, 5th ed., 1982) 583; Dr Z. Segal, *Right of Standing in the High Court of Justice* (Papyrus, 2nd ed., 1994).

90. As noted, the fundamental approach expressed in the rules, and the spirit emerging from them are worthy of attention and thought, because the experience gathered in other places in the area under discussion here can assist us. We do not reject comparative study and research in any field of law, and generally it proves valuable.

91. In CA 6821/93, the appellant raised an alternative argument whereby 'even if the court decides that the amendment is valid and applies to these proceedings, under the law in its amended format the provisions of the Gal law should not be applied to the respondents.' According to the appellant 'the decisive question in this case is the identity of the principal debtor, and the fact that the guarantor is obliged to pay the debt by virtue of his guarantee does not turn the debt into the debt of the guarantor and thereby lose its connection to the principal debtor.' The appellant adds that the construction whereby the debt of the guarantor who is an agricultural unit is deemed to be a "total debt," contravenes the restrictive policy that the Supreme Court ascribes to the provisions of the law.

The appellant's contentions must be dismissed. The purpose of the law, i.e., the attempt to resolve the severe crisis affecting the agricultural sector by way of creating a new framework that would enable the rehabilitation of the agricultural sector, and the clear language of the law (see the definition of "debt" and "total debt" in s. 1 of the Principal Law), show that whereas the debts of an agriculturalist and a member of an agricultural association, which

are included within the definition of a "total debt," are limited to those that stem from the business of these debtors as agriculturalists, no such restriction is placed in relation to an agricultural unit, that is not an agriculturalist and member of an agricultural association. Every debt of an agricultural unit, that is not an agriculturalist and member of an agricultural association, is a total debt, without distinction as to the source from which it stems and how it accrued, provided, however, that it existed on 31 December 1991.

Conclusion

92. The principle findings in my judgment are as follows:

(1) Legislation in Israel is constructed on the basis of a normative hierarchy.

(2) At the top tier of the normative hierarchy stands constitutional legislation.

(3) Our constitutional legislation is expressed today in the Basic Laws. These will eventually be combined in a single, complete, unified constitution.

(4) Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty are constitutional legislation.

(5) The supreme sovereign legislature is the Knesset: it is the Knesset that is empowered to enact constitutional legislation and to enact ordinary legislation. It is also empowered to promulgate regulations if it so determines in law.

(6) No provision contained in one of the said Basic Laws may be varied or repealed, save in a Basic Law or by virtue of it. It is right to adopt this principle in relation to all the Basic Laws.

(7) A provision contained in one of the said Basic Laws cannot be violated save by a Basic Law or by virtue of it. It is right to adopt this principle in relation to all the Basic Laws.

(8) The Knesset is empowered, through its legislation, to place restrictions on future legislation whether that legislation be constitutional or ordinary. The self-limitation may be formal or substantive.

(9) An amendment to an existing law that was enacted after the commencement of Basic Law: Human Dignity and Liberty is subject to the provisions of the said Basic Law.The court is competent to engage in judicial review of the constitutionality of legislation.

(10) The Amending Law being considered in these appeals violates property; however, it meets the requirements of s. 8 of Basic Law: Human Dignity and Liberty and accordingly is valid.

93. The Basic Laws are the defensive shield of the citizen's rights. Their interpretation within the framework of this judgment will clarify and strengthen, preserve and entrench them. This was the intention of the legislature when enacting the Basic Law, and this is the purpose of the interpretation undertaken by the court.

94. Accordingly, I would uphold the appeals in CLA 1908/94 and 3363/94 and set aside the judgment of the lower court and dismiss the appeal in CA 6821/93.

There is no order as to costs.

President A. Barak

In March 1992, the Knesset enacted Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. The enactment of these two Basic Laws effected a substantive change in the status of human rights under Israeli law. Such rights became constitutionally protected and were accorded supra-legislative constitutional status. They cannot be changed by 'regular' legislation. A regular law cannot infringe a protected human right unless the constitutional requirements set forth in the Basic Law have been met. The failure of a regular law to meet those requirements renders it unconstitutional. Such a law is constitutionally flawed and the Court may declare it void.

Israel is a constitutional democracy. We have now joined the community of democratic countries (among them the United States, Canada, Germany, Italy and South Africa) with constitutional bills of rights. We have become part of the human rights revolution that characterizes the second half of the twentieth century. The lessons of the Second World War, and at their center the Holocaust of the Jewish people, as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda. International accords on human rights have been reached. Israel has acceded to them. International tribunals have been established to address issues of human rights. The new constitutions include extensive sections treating of human rights – particularly at the head of those constitutions and in their unique entrenchment provisions. Judicial review of the constitutionality of laws infringing human rights has become the norm in most countries. This revolution has not passed us by. We joined it in March 1992.

A. The constitutional revolution in human rights

1. The constitutional revolution occurred in the Knesset in March 1992. The Knesset endowed the State of Israel with a constitutional bill of rights. This revolution was many years in the making and was the result of a multi-dimensional legislative process. At its foundation rests the recognition that the Knesset is the body that has the authority to enact a constitution for Israel. The Knesset is not only empowered to adopt 'regular' legislation; it is also empowered to adopt a constitution. The Knesset exercised this authority in enacting two Basic Laws on human rights. In so doing it created a supreme, supra-legislative constitutional norm. In the normative hierarchy that was thereby created, the two Basic Laws treating of human rights stand above regular legislation. A conflict between a provision of one of these two Basic Laws and a provision of a regular statute leads to the invalidation of the offending statute.

2. When it enacted the Basic Laws pertaining to human rights, the Knesset expressed its position with regard to the supreme legal-constitutional status of those laws. Today the Supreme Court expresses its legal position confirming that supreme status. Thus the legislative branch is in accordance with the judicial branch. The constituent authority coincides with the judicial authority. An order has been established regarding the constitution in general and regarding the human rights set forth in the Basic Laws in particular. The Knesset did not create the Basic Laws *ex nihilo*. Rather, the Knesset enacted the two Basic Laws in accordance with its constituent authority. This authority is granted to the Knesset, as is evident against the background of the Declaration of Independence, the establishment of the Constituent Assembly, the Harrari Decision, and the ten Basic Laws that the Knesset has enacted from 1958 until the enactment of the Basic Laws dealing with human rights (Basic Law: The Knesset; Basic Law: Israel Lands; Basic Law: The President of the State; Basic Law: The Government (old and new); Basic Law: The State Economy; Basic Law: The Army; Basic Law: Jerusalem Capital of Israel; Basic Law: The Judiciary ; Basic Law: The State Comptroller). The Supreme Court did not create something *ex nihilo*. Our decision today is consistent with established precedent, beginning with the *Bergman* case (HCJ 98/69 *Bergman v. Minister of Finance* [15]). As recently as last year, we recognized the Knesset's authority in this regard (see HCJ 726/94 *Clal Insurance Co. Ltd v. Minister of Finance* [37]). Today we continue on the same path.

3. The constitutional revolution in the field of human rights is built upon the foundation of judicial precedent. The Knesset has used its constituent

authority to endow a number of legally protected human rights with constitutional supra-legislative status. Without the established legal underpinning, the constitutional change could not have been effected. 'We would not have arrived at the secure position that human rights occupy today without the strong foundation established by the judges who preceded us' (CrimApp 537/95 *Ganimat v. State of Israel* [38], at p. 414). It would not have been possible to construct a constitutional framework in the area of human rights had not the established judicial precedent been in place. Without judicially protected human rights, constitutionally protected human rights would be unknown to us. Without Israel's democratic past there is no basis for Israeli constitutional democracy in the present or the future. The constitutional revolution in the area of human rights is the product of the jurisprudential developments in the protection of human rights. This constitutional structure is built upon a foundation of legal precedent. In this way, clear expression is given to the 'ongoing cooperation' between the Court and the Knesset (Justice Agranat, The Contribution of the Judiciary to the Legislative Enterprise, 10 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1984) 233). Moreover, the new constitutional law must be interpreted against the backdrop of the general national experience. Constitutionally protected human rights must be understood in the context of established judicial precedent. This precedent does not diminish in power. It continues to be a source of interpretive insight in construing constitutionally protected human rights.

4. The constitutional revolution is not manifested by the simple recognition of human rights. This recognition has long been established in Israeli judicial precedent. Rather, the constitutional revolution is seen in the changed constitutional status of human rights; the constitutional revolution is seen in the establishment of constitutional status for 'basic principles' according to which 'fundamental human rights in Israel are founded upon a recognition of the value of the human being, the sanctity of human life and the principle that all persons are free...' The constitutional revolution is expressed in the determination that human rights 'will be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel' (s. 1 of the Basic Law: Human Dignity and Liberty; s. 1 of the Basic Law: Freedom of Occupation). The constitutional revolution is expressed in the granting of constitutional status to the clause that a person's honor and freedom must be protected 'in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state' (s. 1A of the Basic Law: Human Dignity and Liberty; see also s. 2 of the Basic Law: Freedom of Occupation). Accordingly, the legal rights of a person in Israel are no longer unwritten (Justice Landau in

HCJ 243/62 *Israel Broadcasting Studios Ltd v. Gary* [39] at p. 2415). They have become constitutional rights, engraved upon the pages of the constitution and enjoying normative supremacy. A regular law that infringes a constitutional right in a manner that is inconsistent with the values of the State of Israel as a Jewish and democratic state, that does not serve a proper purpose, and that violates the right to an extent greater than is required is an unconstitutional law and may be declared void. When a regular law infringes a constitutional right protected in the Basic Law: Human Dignity and Liberty, does not meet the requirements of the limitation clause and provides – expressly or implicitly – that it is intended to infringe a human right, such a law is unconstitutional and the Court may declare it void. This is the essence of the constitutional change. This is unprecedented. Until now the prevailing view in Israel was that 'the all-powerful legislature may permit harm to citizens without any legal or judicial limits.' (Justice Sussmann in HCJ 163/57 *Lubin v. Tel-Aviv-Jaffa Municipality* [40], at p. 1079; 'This is the decree of the legislature; if it leads to discrimination, such discrimination is sanctioned by legislation and is therefore lawful and not invalid' (Justice H.H. Cohn in HCJ 120/73 *Tobis v. State of Israel* [41], at p. 359). Justice Berinson has summarized this as follows:

> 'It is beyond doubt that according to the prevailing constitutional rule of the State, the Knesset reigns supreme and it is within its power to enact any law and fill it with content at its whim. One may not consider the possibility that the clauses of a legally enacted law might be declared invalid for one reason or another' (HCJ 228/63 *Azuz v. Ezer* [18], at p. 2547).

This constitutional outlook has now changed. The Knesset is no longer all-powerful in exercising its legislative authority. In the area of human rights, the Knesset has limited its legislative powers by exercising its constituent authority. This is the basic constitutional change. For the first time, in March 1992, the Knesset established a range of constitutional human rights that limit the legislative power of the Knesset and that condition their infringement upon the realization of the values of the State of Israel as a Jewish and democratic state. For the first time the Supreme Court affirms the constitutional supra-legislative effect of the Knesset's action. In light of the novelty of this issue, because of the different opinions on this matter and against the background of the comprehensive decision of my colleague President Shamgar, it is fitting that I address various questions that arose before us in an attempt to answer them.

In the first part of this decision I discuss the constitutional framework. In this section, I address the question of whether the Knesset is authorized to enact a constitution for Israel. I will answer this question in the affirmative, for the Knesset has not only legislative power, but also the power to enact a constitution for Israel; in other words, it is endowed with constituent authority. In the context of this section I address the question of how the Knesset makes use of its constituent authority and whether, in fact, it did so properly in enacting the two Basic Laws treating of human rights. I answer this question affirmatively as well. I examine the normative status of the two Basic laws and their relation to regular legislation. I then conclude the examination of the legislative framework with the question of whether, in light of the two Basic Laws, judicial review can lie of the constitutionality of regular legislation. The answer to this question is also affirmative.

In the second section I concentrate on the Basic Law: Human Dignity and Liberty. I begin with an examination of its constitutional implications. I briefly discuss the scope of the protected rights, and will concentrate primarily on the nature of the right of property, which the Appellants claim has been violated. I consider the Knesset's power to infringe protected rights by analyzing the limitation clause.

In the third and final section of my decision I consider whether the provisions of the Family Agricultural Sector (Arrangements) (Amendment) Law infringe constitutionally protected rights. I answer this question in the affirmative. Against this background I consider whether the law, which infringes those rights, meets the requirements of the limitation clause. I answer this question affirmatively, as well.

B. The constitutional framework

I) The source of the Knesset's authority to enact a constitution for Israel

a) The doctrine of constituent authority

5. The opening question is, of course, whether the Knesset is endowed with the authority to enact a constitution for Israel ('constituent authority') and, if so, what is the source of this authority. President Shamgar has proposed several views on this matter. Choosing between them is not necessary in order to decide the issue before us in this appeal. I will therefore present my opinion in this matter.

It seems to me that that most appropriate view is that the Knesset is endowed with constituent authority. This power derives from the central constitutional fact that Knesset was given the authority to enact a constitution

for Israel. The Knesset does not create this authority for itself. It is not granted to the Knesset by a Basic Law or by any other law enacted by the Knesset. In order to frame a constitution, which will be placed above the law in the normative hierarchy, there must be an Archimedean foothold located outside the constitution or the law, which provides the Knesset with the authority to adopt a constitution. The constitution cannot create the authority by which it will be created. Statute cannot create a constitution to which statutes will be subject. Nor can legislation create the authority by which it will be created. The enactment of a constitution always requires a foothold outside the legislative body. This foothold must come from the people, whose will is supreme. Thus, the doctrine of the Knesset's constituent authority is based upon the principle that this authority derives from the sovereign, i.e. the people. Constituent authority endows the Knesset with the power to enact a constitution for Israel (as embodied in the Basic Laws). This authority endows the Knesset with the power to enact regular laws as well as to act in other ways (for example, to supervise the government). Indeed, the Knesset wears a number of 'hats' or 'crowns,' among them the crown of constituent authority – under which the constitution is adopted (by enactment of the Basic Laws) – and the crown of legislative authority, under which legislation is adopted. Three legal models may illustrate this view. Each model stands alone as a basis for the doctrine of constituent authority. That all lead to the same conclusion lends that conclusion greater weight. I will begin with a brief introduction to each of the three models. I will then present the constitutional facts that sustain the models.

b) Presentation of the three models

(i) Constituent authority is derived from the basic norm

6. The first model is based upon the importance of constitutional continuity. Under this model, the basic norm for Israel (the *Grundnorm*, according to Kelsen, see H. Kelsen, *Pure Theory of Law* (Knight trans. 1967), at p. 193) is that the Provisional Council of State is the supreme authority of the State of Israel (see I.H. Klinghoffer, "The Establishment of the State of Israel: Constitutional History," *Klinghoffer Book on Public Law*, (ed. I. Zamir, 1993), at p. 74). The Provisional Council of State declared in the Declaration of Independence that a constitution would be drawn up 'by the elected Constituent Assembly' In addition, the Provisional Council of State declared itself the legislative body (in the Law and Administration Ordinance, 5708-1948).

The Constituent Assembly was elected (on January 25, 1949), and with its

establishment the Provisional Council of State was dissolved. Its powers passed to the Constituent Assembly (Transition Law) 5709-1949. The Constituent Assembly therefore had two main powers: constituent authority and legislative authority. The same entity was given two functions, two 'crowns' or 'hats' as it were: one constituent (to adopt a constitution), and the other legislative (to enact 'regular' legislation). This arrangement, in which constituent and legislative authority are granted to the same entity, is widely accepted (see Akzin, *The Doctrine of Governments*, vol. 2 (1966), at p. 35; Klein, 'Constituent Authority in the State of Israel,' II *Hebrew Univ. L. Rev. (Mishpatim)* 52 (1970)). The Constituent Assembly provided (in the Transition Law) that 'the legislature of the State of Israel will be known as the "Knesset." The Constituent Assembly will be known as the "First Knesset." The delegates will be known as "Members of Knesset."'
(s. 1). The First Knesset (i.e. the Constituent Assembly) devoted considerable time to debating the matter of the constitution. These debates concluded with a compromise decision (the "Harrari Decision"), according to which:

> 'The First Knesset charges the Constitution, Law and Justice Committee with the preparation of a proposed constitution for the State. The constitution will be composed of chapters, with each chapter comprising a Basic Law unto itself. The chapters will be brought before the Knesset if and when the Committee completes its work and all the chapters together will constitute the Constitution for the State' (*Knesset Proceedings*, vol. 5, at p. 1743).

Before it dispersed, the First Knesset provided that all of its powers would pass to subsequent Knessets (Second Knesset) (Transition) Law, 5711-1951). To avoid doubt, it was emphasized that this transfer would also include all powers of the Constituent Assembly (see s. 9). The Second Knesset dealt with the preparation of Basic Law: The Knesset but did not succeed in adopting that law. Only the Third Knesset succeeded in adopting the first Basic Law: Basic Law: The Knesset. Since then, Basic Laws have been enacted by the various Knessets. From this brief survey, the first model concludes that the constituent authority of the Constituent Assembly has rested continuously in the hands of the Knesset.

(ii) Constituent authority is derived from the rule of recognition

7. The second model supporting the Knesset's constituent authority is not based upon constitutional continuity. Rather, this model examines the constitutional structure as it exists at any given time. It is based upon the thesis of Professor Hart. Professor Hart distinguishes between primary and secondary norms. Secondary norms determine how the primary norms are created, how they may be changed and how disputes concerning them may be resolved. Among the secondary norms the "rule of recognition" occupies a preeminent position (see H. L. A. Hart, *The Concept of Law* (second edition, 1994), at p. 100). This rule determines how primary norms are created as well as their relative status – which is a superior norm and which is subordinate. The rule of recognition is determined by the Court, which does not make this determination at its own whim. Rather, it reflects the views of the community as to the way in which norms (including constitutional norms) are created. Under this model, one may determine that the rule of recognition of the State of Israel is that the Knesset is endowed with both constituent and legislative authority. This determination does not reflect a subjective judicial position. It reflects an objective position as to the "system of national life" of the State of Israel (Justice Agranat in HCJ 87/53 *Kol HaAm Co. Ltd v. Minister of Interior* [4], at p. 884). The basic understanding of today's Israeli community – expressing our entire national experience – is our national consciousness that the Knesset is the body authorized to enact a constitution for Israel. This consciousness originated before the establishment of the State, and in the preparations for the framing of a constitution. This consciousness was crystallized in the Declaration of Independence. It took on real form in the elections for the Constituent Assembly. It was consolidated in the socio-legal understanding that the Knesset is endowed with constituent authority. It became part of our political culture. Based on these factors the Justices of the Supreme Court determine today that according to the rule of recognition of the State of Israel, the Knesset was given constituent and legislative authority; that the Knesset is authorized, in using its constituent authority, to limit its regular legislative authority; and that the constituent acts of the Knesset stand above its legislative acts. The historic journey – upon which the first model is based – is an important factor in the second model as well. Constitutionality and the constitution are not merely formal instruments. They are not mere law. They are the product of the national experience, of society, education and culture. They reflect the national experience. Our national experience, in today's comprehensive view, leads to the conclusion that the Knesset has the authority to enact the constitution.

(iii) Constituent authority is the best interpretation of social and legal history

8. The third model for the constituent authority of the Knesset is also an empirical model. It seeks the best interpretation of the entire social and legal history of a given system at a given time. This is Professor Dworkin's model (see R. Dworkin, *Law's Empire*, (Cambridge, 1986); R. Dworkin, *A Bill of Rights for Britain* (London, 1990)). Under this model one may conclude that a given body (such as the parliament) is empowered to enact the constitution for a country if that conclusion is the best interpretation of the body of social and legal history of that country. In applying this model to Israel, it appears that the interpretation that best fits the entirety of Israel's social and legal history since its establishment is that the Knesset is empowered to enact a constitution for Israel. This conclusion is based upon the same factors as those underlying the first and second models. Thus the best interpretation of our constitutional history is not that the Knesset wasted its time by spending over forty years preparing a constitution; the best interpretation of our constitutional history is not that some of the entrenched provisions of the Basic Laws are unenforceable; the best interpretation of our constitutional history is not that the various judicial decisions dealing with the Basic Laws miss their mark. On the contrary: in interpreting our legal and social history, its ways and its traditions, as that history presents itself today – against the background of the Declaration of Independence, the establishment of the Constituent Assembly, the Harrari Decision, the election campaigns in which the stated goal of the parties was the adoption of a constitution, the enactment of twelve Basic Laws that include entrenchment and limitation clauses, judicial precedent and the reaction of the Knesset thereto, and the position of the legal community – the inescapable conclusion is that the most fitting interpretation of our history is that the Knesset is endowed with constituent authority. This is the most fitting explanation for the Knesset's power to establish that a Basic Law may only be changed by another Basic Law, that the regime anchored in a Basic Law may be amended only by a law passed by a specified majority (a majority of the Members of Knesset or other greater majority) or by a law that meets substantive requirements, that the Knesset is empowered with constituent authority such that it may create a constitutional norm that limits the ways in which it may be changed and entrenches itself against regular legislation. Indeed, the most fitting interpretation of the entirety of the socio-legal history of the State of Israel is that deeply ingrained in the social and legal consciousness of the Israeli community is the perception that the Knesset is empowered to adopt a constitution for Israel. This is part of our political

culture. This is the most fitting interpretation of our social and legal history from the establishment of the State until today.

c) The constitutional data underlying the three models

(i) Survey of the constitutional data

9. The three models do not derive from the judge's subjective perception. They do not arise from his personal desire to recognize or refuse to recognize a constitution for Israel. They are the result of an objective analysis of the constitutional history of the State of Israel. They result from the constitutional recognition of the Israeli community against the background of our short legal history. They result from an understanding of the social facts upon which the Israeli system is built. These are the constitutional facts from which the three models derive, each from its own perspective. I will now present these factors. I open with those factors that evidence constitutional continuity (paragraphs 10-18). These factors are particularly important in the context of the first model, which sees constituent authority as derived from the basic norm. Of course they serve the other two models as well. I then move to the Knesset's perception of itself (paragraphs 19-31). This is also an empirical factor that provides the basis for the Court's conclusion according to each of the three models. From there I will focus on the understanding of scholars and commentators (paragraphs 32-34). This factor is an important one, for it presents the view of the Israeli legal community as to the Knesset's authority to enact a constitution for Israel. This is important in all three models, particularly the second and third. Finally I will discuss the judicial caselaw of the Supreme Court (paragraphs 35-37). Two Supreme Court decisions have adopted the doctrine of constituent authority in its entirety. In the context of these constitutional factors, I will discuss the body of judicial precedent, which implicitly recognizes the normative supremacy of the Basic Laws. I will complete this analysis with a number of conclusions that are common to all three models and which arise from this objective data.

(ii) Constitutional continuity

10. May 15, 1948 is the point of departure for the view that the Knesset has constituent authority. On that day the State of Israel was established. The basic norm of the State – its superior norm, which is not itself part of the body of positive law, but provides a basis for the other legal norms of the state – is that the Provisional Council of State is the supreme legislative institution of the State (see Stemberg, "The Basic Norm of the Law In Israel," 9 *HaPraklit* (1952) 129. Professor Klinghoffer suggested this in stating that:

> 'In order to claim constitutional continuity in Israel's present legal system, one may look at how authority was transmitted in the past. The Declaration of Independence does not refer to the powers of the Provisional Council of State until the statement in which the National Council declares itself the Provisional Council of State. There is, however, no doubt that the Provisional Council of State was seen as the supreme authority of the new state. The absence of any statement of its powers is evidence that those powers were not intended to be limited. From this we may conclude that the basic norm of the State of Israel can be found in this statement, which transforms the National Council into the Provisional Council of State' (Klinghoffer, *ibid*., at p. 74).

In a similar vein, Professor Rubinstein states:

> 'The Council's authority to delegate to itself this power in the Declaration is without precedent. This is the beginning of the process of original creation that characterizes the inauguration of a new governmental regime which does not derive its existence from any previous or other regime' (A. Rubinstein, *The Constitutional Law of the State of Israel*, (expanded fourth ed., vol. 1 (1991)), at p. 42).

The Provisional Council of State decreed in the Declaration of Independence that a constitution would be enacted by the Constituent Assembly, which in turn would be elected no later than October 1, 1948. It thus gave expression to the Resolution of the General Assembly of the United Nations of 28 November 1947, according to which 'the constituent assembly of each State will enact a democratic constitution for its respective State.' As stated in Israel's Declaration of Independence:

> 'We hereby declare that as of the termination of the Mandate at midnight, this night of the 14th and 15th May, 1948, and until the setting up of the duly elected bodies of the State in accordance with a Constitution, to be drawn up by a Constituent Assembly not later than the first day of October, 1948, the present National Council shall act as the provisional administration, and shall constitute the Provisional Government of the Jewish State, which shall be known as "Israel."'

The Provisional Council of State published the proclamation and enacted the Law and Administration Ordinance, 5708-1948. This statute provided,

inter alia, that 'the Provisional Council of State is the legislative authority' (s. 7(a)). The Provisional Council of State similarly enacted the Constituent Assembly Elections Ordinance. In the course of its activity, it appointed a special committee on the constitution headed by Mr Z. Warhaftig. 'The committee's function was to collect, clarify and organize proposals and material and to prepare a draft constitution that would be submitted with comments and criticism by the minority of the committee for the use of the Constituent Assembly' (Rubinstein, *ibid.*, at p. 44). Indeed, the accepted view then was that the Assembly would prepare and draft a constitution for Israel. The Supreme Court expressed this view in the *Al-Carbotelli* case [42], in the context of a review of existing precedent as to the status of the Declaration of Independence (HCJ 10/48 *Ziv v. Acting District Commissioner of Tel-Aviv* [43], at p. 85). It stated that 'the Court did not accept the claim that the Declaration of Independence is a constitution, against which the validity of legislation will be measured until the Constituent Assembly enacts a constitution as provided in the Declaration' (HCJ 7/48 *Al-Carbotelli v. Minister of Defense* [42], at p. 13).

11. The Constituent Assembly was elected on January 25, 1949. As stated in the Declaration of Independence, its role was to draft a new constitution for the State. According to the original plan, and as envisioned by the Declaration, upon its election the Constituent Assembly was to have existed simultaneously with the Provisional Council of State. These two were to have been separate entities, each with its own composition and its own function. The Provisional Council of State was to have continued to exist in its role as legislative body. Its role was to enact the laws of the new State as they were needed. As evidenced by its name, this was to have been a provisional entity, which was to have been replaced by the 'duly elected bodies of the State in accordance with a Constitution' (Israel's Declaration of Independence). The Constituent Assembly, whose only role was to enact a constitution for the State, was meant to operate alongside the Provisional Council. The Provisional Council of State was not elected by all the citizens and its composition was set by the Law and Administration Ordinance. The Constituent Assembly was chosen by a general election in which all the members of the Israeli community participated. In fact, the parallel existence of both of these bodies was not long lasting, for with the establishment of the Constituent Assembly, the Provisional Council of State was dissolved. This dissolution was not an unexpected step. It was planned in advance. It was clear to all that the Constituent Assembly would be engaged in both legislative and constituent activities. This was reflected in the campaigns and proposals of the candidates

for election to the Constituent Assembly, which related to all the issues on the national agenda and not constitutional matters alone.

12. The next link in the chain of constitutional continuity was the decision of the Provisional Council of State to dissolve itself. Professor Yadin has discussed the factors on which this decision was based:

> 'According to the Declaration, the tenure of the Council of State was to have ended on October 1, 1948. From that day, at the latest, the activities of the elected and regular authorities were to have commenced in accordance with the Constitution, which was to have been adopted in the meantime by the Constituent Assembly. However, the specified date passed without the adoption of a Constitution and without the establishment of regular, elected governmental bodies. According to the Declaration of Independence, the Provisional Council of State and the Provisional Government were to have continued to function not only until the election of the Constituent Assembly, but until the establishment of new governmental bodies in accordance with the new Constitution. The role of the Constituent Assembly was limited to the preparation and adoption of the Constitution, and the task of regular legislation was to have remained in the hands of the Provisional Council of State until after the Constituent Assembly completed its work. Until that time, the two entities were to have existed in tandem and the Provisional Government was to have continued to function until after the election of a parliament in accordance with the new Constitution. This plan was tied to the cut-off date of 1 October1948; all phases were intended to have been implemented within only four months (between 15 May 1948 and 1 October1948). The drafters of the Declaration cannot be criticized for this plan. They signed the Declaration before enemy aircraft appeared in the skies over Tel Aviv (albeit only one day earlier), before seven nations invaded the State, and they could not have foreseen the events of the next few months. In retrospect, in light of the events that took place following the establishment of the State, it is clear that the original plan could not have been implemented. The existence of the Provisional Council of State could no longer be reconciled with the simultaneous existence of the Constituent Assembly. It was

> therefore necessary to impose upon the Constituent Assembly all of the functions of the Council of State' (*Sefer Uri Yadin*, Barak and Shefnitz, eds. (1990), at p. 80).

Together with its decision to dissolve, the Provisional Council of State decided that all of its powers would pass to the Constituent Assembly. This transfer was effected by the legislative action of the Provisional Council of State, in the form of the Constituent Assembly (Transition) Ordinance, 5709-1949. This law provided that 'the Provisional Council of State shall continue in office until the convening of the Constituent Assembly of the State of Israel; upon the convening of the Constituent Assembly the Provisional Council of State shall dissolve and cease to exist' (s. 1). It was further provided that the Constituent Assembly 'shall, so long as it does not itself otherwise declare, have all the powers vested by law in the Provisional Council of State' (s. 3). Similarly it was provided that the Constituent Assembly would act 'in accordance with the rules governing the meetings of the Provisional Council of State, with the necessary changes, as long as the Constituent Assembly has not otherwise decided' (s. 2(d)). The Provisional Council of State debated whether or not to provide in advance that the Constituent Assembly was required to prepare a constitution and whether to prescribe the period within which such a constitution should be adopted. It was suggested that the law provide that 'the Constituent Assembly will adopt a basic constitution for the State and, during the period of its operation, will be the legislative body of the State.' A majority decided, however, not to issue any directives in this regard. 'We will therefore leave the Constituent Assembly absolutely free as to both its function and its term' (*Sefer Uri Yadin*, *ibid.*, at p. 81). It should be emphasized that the decision regarding the dissolution of the Provisional Council of State and the passing of its authority to the Constituent Assembly was taken during the term of the Provisional Council of State. The members of the Provisional Council of State – and accordingly all Israeli citizens who voted in the elections for the Constituent Assembly – were aware that they were electing a body that would have both legislative and constituent authority, and would be authorized to oversee the government as well.

13. With the dissolution of the Provisional Council of State and the transfer of its powers to the Constituent Assembly, the latter was endowed with dual authority – legislative and constituent. Again, the original scheme of two entities with different powers was not realized. Henceforth, the constitutional basis would lie in a single entity – the Knesset – that acted with various

powers (legislative and constituent, as well as others). The same body (the Knesset) therefore has two roles, or two main functions ('two hats'). It is authorized to enact a constitution and it has the powers that were given to the Provisional Council of State. 'Thus the Constituent Assembly, which was endowed by the Declaration with only one function – drafting the Constitution – took on the additional role of legislative authority' (Rubinstein, *ibid.*, at p. 43). 'It was the Provisional Council of State that, upon its dissolution, presented the Constituent Assembly with an established fact: the unification of both functions within one framework' (Rubinstein, at p. 448). There is no doubt that the Constituent Assembly (which has both constituent authority and regular legislative authority) was authorized to enact a Constitution. The fact that, with the dissolution of the Provisional Council of State, the Constituent Authority also became endowed with regular legislative authority does not negate its authority to enact a constitution. It should be noted that it is a common practice the world over for the Constituent Assembly to serve as a legislative authority as well (see Rubinstein, *ibid.*, at p. 448). Professor Kelsen discussed this as follows:

> 'It is possible that the organ specifically and formally authorized to create, abolish or amend statutes having the character of a constitution is different from the organ authorized to create, abolish or amend ordinary statutes. For example, the former function may be rendered by an organ different from the latter organ in composition and electoral procedure, such as a constituent national assembly. But usually both functions are performed by the same organ' (H. Kelsen, *Pure Theory of Law*, (1967), at p. 223).

As Professor Akzin has stated:

> 'Under the democratic model, even if a proposed constitution is destined to be approved by referendum, it is prepared by the constituent assembly, which is chosen by electoral procedures similar to those by which the members of the legislative body will be chosen, or – in the case of a revolution – according to the system preferred by the provisional authority. In such cases the constituent assembly acts as both the entity that prepares the constitution and, if the state is governed by a parliamentary system, as the legislative body and overseer of the government as well' (Akzin, *The Doctrine of Governments*, vol. 2 (1966), at p. 35).

In a similar vein Professor Klein has noted:

> 'The constituent body may continue to function for an extended period; during this period the constituent body functions as a legislative body as well. This may be described as a transitional period. The constituent body is not required to adopt the constitution as one document, and it may adopt a number of separate constitutional laws' (Klein, 'Constituent Authority in the State of Israel,' II *Hebrew Uni. L. Rev. (Mishpatim)* (1970) 52).

Recently Professor Ackerman has reiterated:

> 'There is nothing sacrosanct about a special constitutional convention. Although such a convention is likely to take the task of constitutional formulation seriously, many plausible texts have also been produced by constituent assemblies that have exercised plenary power on normal legislative matters as well' (B. Ackerman, *The Future of Liberal Revolution*, (1992), at p. 59).

Thus the federal constitutional model of the United States, in which there are two separate institutions – a constitutional convention that adopts the constitution, and a regular legislature (Congress and the state legislatures) that enacts regular laws – is not the only way in which a constitution may be adopted. Even in the United States, state constitutions (as opposed to the federal constitution) have been adopted by constituent authorities that functioned as legislative authorities as well (see III *Encyclopedia of the Social Sciences*, (1953), at p. 245). It is interesting to note that in more than one Eastern European state that has recently undergone constitutional changes, constituent and regular legislative activities have been carried out by the same body. In most cases it was the regular parliament that was endowed with constituent authority. In Israel the Constituent Assembly was given the additional authority of regular legislation, as well as all the powers of the Provisional Council of State.

14. The next stage in constitutional continuity was the enactment of the Transition Law, 5709-1949. This was the most important piece of legislation enacted by the Knesset (now acting as both the constituent and legislative authority). This statute provided that 'the legislative body of the State of Israel will be known as the "Knesset." The Constituent Assembly will be known as the "First Knesset." A delegate to the Constituent Assembly will be known as a "Member of Knesset"' (s. 1). It also provided that an enactment by the Knesset would be denoted "law" (s. 2). The Transition Law 1949 did not

affect the dual authority of the Constituent Assembly (now the "First Knesset"). Indeed the First Knesset engaged in lengthy debates on the subject of the Constitution (see Knesset Proceedings, vol. 5, at p. 714). No claim was made that the First Knesset was not empowered to do so. All agreed that the Knesset, as the constituent assembly, was authorized to enact a constitution for the State. The ensuing debate dealt with whether the Knesset was required to enact a constitution, and with the proposed content of the constitution. This debate continued for several months. It took place both in the Constitution, Law and Justice Committee and in the First Knesset plenum (for a report of these debates see *The State Constitution – Report of the Constitution, Law and Justice Committee in the Matter of the Constitution for the State and the Debate in the First Knesset Plenum*, published by the Knesset in 1952). It is common knowledge that the Prime Minister, David Ben-Gurion, opposed a constitution. Nonetheless, he did not deny the Knesset's authority to enact one, stating as follows:

> 'No one could, and even today no one can say that there will be no constitution. The matter depends upon the Knesset's decision. If the Knesset decides that there will be a constitution – there will be a constitution. If the Knesset decides that for now there will be no constitution – there will be none' (*supra*).

The First Knesset (i.e. the Constituent Assembly) concluded this debate with a compromise decision adopted on June 13, 1950. This decision was initiated by MK Harrari and is therefore called the Harrari Decision, which provides as follows:

> 'The First Knesset charges the Constitution, Law and Justice Committee with the preparation of a proposed constitution for the State. The constitution will be composed of chapters, with each chapter constituting a Basic Law unto itself. The chapters will be brought before the Knesset if and when the Committee completes its work and all the chapters together will constitute the Constitution for the State' (*Knesset Proceedings*, vol. 5, at p. 1743).

This was a compromise decision. It left several options open. On the one hand, it accepted the principle that there would be a formal constitution and that the idea of a constitution would not be abandoned. On the other hand, it accepted the principle that the constitution would not be enacted immediately as one discrete document, but rather chapter by chapter, over the course of time, which would certainly extend beyond the term of the First Knesset.

Nevertheless, after this decision no one disputed the Knesset's authority to enact a constitution for Israel. The Harrari Decision was not intended to negate the Knesset's authority to enact a constitution and, as a "decision" of the Knesset, it could not negate this authority. Thus, the significance of the Harrari Decision was, as it stated, that the Constitutional Committee would prepare a constitution for the state in "installments." It was clear to all that this would not be an immediate procedure. It was clear to all that it would not be completed by the First Knesset. Professor Rubinstein has rightly noted that:

> 'There can be no doubt as to the First Knesset's authority to enact a constitution or laws of a constitutional character that stand above regular legislation. The change in the name of the Constituent Assembly certainly did not constitute a change in its nature. Even the consolidation of its functions – legislative and constituent – did not change anything' (Rubinstein, *ibid.*, at p. 448).

The First Knesset dispersed without the Constitution, Law and Justice Committee having prepared a proposed constitution, and without any part of a constitution having been brought before the Knesset plenum.

15. During the term of the First Knesset – i.e. the Constituent Assembly – no constituent action was undertaken. The Knesset had to enact a special law to decide upon its dissolution. In so doing, the Knesset was aware that it had not only regular legislative powers, but also constituent powers. It sought to ensure that all powers with which it was invested would pass to subsequent Knessets as well. This act seems superfluous to me. The powers given to the Knesset were given to every Knesset. As the central organ of the State, the Knesset endures forever. There is no need for special provisions as to the Knesset's continuity other than those dealing with issues of secondary character (such as the continuity of draft laws). The reference to the "First" and "Second" Knessets and so on is only theoretical and reflects the first steps of the Israeli parliamentary system. In principle, a change in the composition of the Knesset cannot be considered a change in the Knesset. The Knesset is one body; elections and changes in the members of the Knesset do not require a formal passing of authority from one body to the next. Apparently this matter had not yet been clarified in the early days of the State and therefore – purely for caution's sake – the Second Knesset (Transition) Law was enacted in 1951. That law provided for continuity between the end of the First Knesset's term and the beginning of the Second Knesset's term (s. 1). Thus, 'the Second Knesset and its members will have all the powers, rights and

obligations as the First Knesset and its members' (s. 5). It provided further that the Second Knesset would act in accordance with the charter, decisions, precedent and procedures of the First Knesset (s. 6). Moreover, it provided explicitly in s. 9 that:

> 'Wherever in any law reference is made to the Constituent Assembly or the First Knesset, such reference shall, from the day of the convening of the Second Knesset, be deemed to refer to the Second Knesset, unless the context requires a different meaning.'

Thus it was provided that 'this law will also apply, with the necessary changes, to the Third and any subsequent Knesset, so long as the Knesset does not adopt a contrary law dealing with this matter' (s. 10). It is interesting to note that a number of Members of Knesset suggested that the law expressly provide that the 'role of the Second Knesset is to enact a basic constitution for Israel' (see *Knesset Proceedings*, vol. 8, at p. 1576). MK Bar-Rav-Hai, in the name of the majority of the Constitution, Law and Justice Committee, opposed such a provision. He noted that 'the suggested change is an empty declaration without any practical purpose. The legislative inheritance of the First Knesset is located in the records of the Knesset and is automatically transferred. The Second Knesset is sovereign. It will attend to matters at its own will ... Because there is no practical value to this change, and because the Second Knesset itself will decide whether to continue to enact Basic Laws where the First Knesset left off, or to begin this chapter anew – there is no place and no need to provide for this matter in the Transition Law' (*ibid.*, at p. 1579).

16. The First Knesset – which was also the Constituent Assembly elected for the express purpose of drafting the constitution – was dissolved. The Second Knesset was elected. Was the Second Knessset also invested with constituent authority, empowering it to enact a constitution for Israel? This is not a simple question. Had it been brought before the Supreme Court at the beginning of the Second Knesset's term, the matter could have been decided either way. On the one hand it could have been argued that constituent authority was given to the Knesset, to every Knesset, regardless of its composition. The Constituent Assembly itself provided in the Second Knesset (Transition) Law that each Knesset is empowered with constituent authority. This edict of the Constituent Assembly must be heeded. It is not appropriate for the Court to declare that the Constituent Assembly itself deviated from its own authority in such a central matter. Similarly, it could have been claimed that the Harrari Decision – which was adopted by the Constituent Assembly – determined that the constitution was to have been enacted chapter by chapter;

clearly this process would not have been completed during the term of the First Knesset. Constitutional continuity must be recognized in order to give effect to this decision of the Knesset. On the other hand it could have been contended that the Constituent Assembly derived its authority from the people – and therefore with the dispersal of the Constituent Assembly it was necessary to turn again to the people for its reelection. The Constituent Assembly was not "authorized" to transfer its authority. Thus it might have been argued that the Harrari Decision required that the powers of the First Knesset could only have been transferred to the Second Knesset by Basic Law and not by regular law.

Had I been asked to decide this constitutional question at the beginning of the Second Knesset's term, I would have asked the following question: what are the underlying beliefs of the Israeli community at this time as to the enactment of a constitution and the power of the Knesset to adopt a constitution for Israel? I would have inquired as to the best interpretation of the legal and social history in the matter of the constitutional undertaking with the convening of the Second Knesset. In this context I would have examined the flow of constitutional continuity from the Declaration of Independence. Similarly, I would have asked whether the party platforms in the elections for the Second Knesset dealt with the continuation of the constitutional undertaking and with the continuation of the Knesset's activities in endowing Israel with a constitution. An affirmative answer to these questions would have enabled me to determine even then that, despite strong assertions to the contrary, the Second Knesset was endowed with constituent authority, whether because of constitutional continuity (under Kelsen's model), or because it had become generally recognized that the Knesset was invested with constituent authority (Hart's model), or because that was the best interpretation of the legal practices of the Israeli community at that time (Dworkin's model).

I have now undertaken this examination. Thus, for example, I have studied the election platforms of all the political parties that participated in the elections for the Second Knesset. Most of the platforms include statements regarding the constitution and its implementation. Often this is a central issue. The platform of the Workers of Israel Party ("Mapai") stated that 'the Second Knesset must see the completion of the enactment of the Basic Laws as one of its first objectives.' This was followed by a long list of proposed constitutional arrangements, such as the division of powers among governmental bodies and various human rights. The platform of the Organization of General Zionists, the Centrist Party ("Z"), stated that 'adoption of the Basic Laws for the State is

an absolute necessity for the protection of the fundamental rights of every citizen.' The platform of the United Labour Party ("Mapam") provided that 'the Second Knesset must correct what the First Knesset distorted and enact a Basic Law for the State, so as to ensure, inter alia…' – and here follows a comprehensive list of matters that must be provided for in the constitution. The platform of the Herut Party ("H") asserted that 'Mapai and its supporters intentionally prevented the Constituent Assembly from fulfilling its first function: providing a basic constitution for the State. The Second Knesset must correct this dereliction.' The platform then sets forth the content of the 'basic constitution.' The Progressive Party ("P") platform stated that 'in order to protect the democratic and popular nature of our State, a constitution must be enacted. The Progressive Party regretfully notes that the First Knesset did not complete this task. Even the First Knesset's decision, as proposed by the Progressive Party representative, that the basic constitution would be constructed chapter by chapter, was not realized. The Progressive Party will fight in the Second Knesset for a constitution of deep social content, which will strengthen the rule of law in the State.'

The Platform of Agudath Yisrael provided that 'as long as a majority of the representatives of the legislative institutions do not recognize the authority of the Torah as the supreme law, which may not be contravened, Haredi Judaism will oppose the adoption of a formalized basic constitution for the State.' The platform of Mizrahi and the Nonaligned Religious Party ("B") did not mention the issue of the constitution. The platform of the Israeli Communist Party ("C") stated that 'since the establishment of the State we have fought for a republican, democratic and secular constitution.' The list of HaPoel Mizrahi (Torah Ve'Avoda) ("V") provided that 'HaPoel Mizrahi sees as the job of the Second Knesset the completion of the Basic Laws for the procedures of the government and its powers, the rights and obligations of the individual, the order of justice and the social foundations of the State. HaPoel Mizrahi will fight so that these laws will be an expression of a true democratic way of life in the spirit of the Torah of Israel.' The list of the Sepharadim Ve'Edot HaMizrah ("SD") stated that they supported the policy line of the Organization of General Zionists, the Centrist Party. The platform of Association of Yemenites for Israel ("L") did not refer to the constitution.

17. It follows that there can be no doubt that the issues of the constitution and the Basic Laws were on the national agenda, were discussed in the elections, and were the subject of clear positions taken by the various parties. It is true that the matter of the constitution and the Basic Laws was not the

only subject on the national agenda. But that is of no account. It is enough that the question was brought to the attention of the voter, who gave his opinion on the question of the constitution. If in the next Knesset election a constitution for the State were presented, and the people demanded, by electing the various parties, in light of their various platforms, to either approve or disapprove the constitution – would anyone contend that the people did not thereby express its will as to the constitution? The determining factor is clearly the understanding of the community and, consequently, the understanding of the Court. Such an understanding existed in the elections for the Second and subsequent Knessets. There is therefore no reason to negate constitutional continuity, and to deny the Second Knesset – on the basis of the arguments that we have brought – the authority to enact a constitution for Israel. Accordingly, with the convening of the Second Knesset (on December 22, 1952), the new government presented its outline plan. The first clause of the outline – before any other clause, including the clause referring to 'the concern for the security of the state and the ingathering of exiles' – provides that 'with the series of the Basic Laws that will form the basic constitution of Israel, the democratic government of the State will be strengthened and secured.' This is followed by a long list of subparagraphs, constituting approximately half of the outline, as to the content of the future constitution.

18. The question of the constitutional continuity of the Knesset's power to enact a constitution did not come before the Supreme Court in 1951, with the convening of the Second Knesset. We do not have a judicial determination of this matter. The constitutional question arises before us today, in 1995 during the term of the Thirteenth Knesset. I have no doubt that our decision today must be unequivocal: constitutional continuity was not interrupted. The Second Knesset was given the powers of the Constituent Assembly. Any other conclusion is inconsistent with our national experience. Forty-four years have passed since the Second Knesset was convened. The matter of the constitution has appeared on the agenda and has been included in all the campaigns for each of the many elections that have been held since then. During all those years the Knesset continued in the constitutional undertaking and has enacted eleven Basic Laws; it has continued to see itself as authorized to enact a constitution for Israel; it has continued to entrench the clauses of the Basic Laws against infringement by regular legislation. During all those years teachers and scholars of law have continued to see the Knesset as the authority empowered to enact a constitution for Israel. They have raised generations of students and teachers of law who, in their turn, see the Knesset as empowered with both constituent and legislative authority.

In the intervening years the Supreme Court has ruled that the entrenchment provisions of the Basic Laws have constitutional power and may invalidate contrary provisions of regular legislation. In my opinion, these facts lead to the inescapable conclusion that constitutional continuity persists. By general recognition, the Knesset – the Second Knesset and each subsequent Knesset – is authorized to enact a constitution for Israel. Today's Knesset has constituent authority. The Knesset has "two hats": the hat of constituent authority and the hat of legislative authority.

My position relies, therefore, on all of the factors that attest to a continuous constitutional history, beginning with the convening of the Second Knesset. I will continue with a description of that constitutional continuity, the constitutional understanding of the legal community, and the position of the Supreme Court up until now. I am doing so for two reasons: first, because constitutional continuity links the constituent authority of today's Knesset with that of the First Knesset (the Constituent Assembly); and second, because these objective normative facts support my conclusion that according to the rule of recognition of the Israeli legal system, our Knesset – every Knesset – is endowed with constituent authority. That is the best interpretation of the entirety of our legal and social history.

(iii) The Knesset's understanding of itself as invested with constituent authority

19. As discussed above, the Knesset's constituent authority is based upon the objective fact of constitutional continuity. This is not only the reasoned conclusion of the disinterested observer; it is the understanding of the Knesset itself. My claim is not, however, that the Knesset is endowed with constituent authority solely because it sees itself as so endowed. The Knesset may not empower itself with constituent authority by its own decision. My claim is that the Knesset's – every Knesset's – perception of itself is itself an objective factor that, in the context of the entirety of the evidence, supports the foundation on which the Court builds its legal structure. This construction is a judicial function, which is undertaken by the judge – and the judge alone. This is the great significance of the Knesset's understanding of itself. I do not claim that there is a legal obligation to enact a rigid constitution. My only claim is that the Knesset saw itself as empowered to enact a rigid constitution. Of course, the Knesset was also entitled to refrain from using this authority and enact a non-rigid constitution or no constitution at all. Thus, the Second Knesset and each subsequent Knesset saw itself as empowered to enact a constitution. They based this authority primarily on the idea of the Constituent

Assembly, on the Harrari Decision, and on the status of each Knesset as a body utilizing its constituent authority. I will begin with the Second Knesset, which, as mentioned, is the more problematic.

20. The Second Knesset dealt with the preparation of the first chapter of the Constitution of the State, Basic Law: The Knesset. The proposed law was published on October 23, 1953 by the Constitution, Law and Justice Committee of the Second Knesset. The proposal was debated by the Second Knesset plenum. In presenting the draft law for a first reading, the Chairman of the Subcommittee for Basic Laws, MK Bar Yehuda, referred to the Harrari Decision and the dissolution of the First Knesset and continued as follows:

> 'But a relatively short time thereafter, in April 1951, came the decision to elect the Second Knesset. The Second Knesset began its work at the end of August 1951. More than two years have passed since then, while the gristmill of the Constitution, Law and Justice Committee ground the proposals sufficiently to enable presentation of the first in the series of the Basic Laws. During this period we have passed a number of laws that are clearly Basic Laws by their nature, even if not in form; I refer for example to the Law of Return and the Judges Law. But these laws were put forth by the government, and the work was done in the course of the Knesset's regular routine and in the regular manner. From the point of view of fulfilling the obligation that was imposed at the time on the First Knesset in its role as the Constituent Assembly of the State of Israel, and which was passed on to the Knesset together with the latter's regular legislative work, this law is the first section of the Constitution of the State to be presented before the Knesset. It is now presented for a first reading and unfortunately I cannot know how long it will take until we reach a second reading – in other words, debate on the revised proposal – after which there will be a binding decision' (*Knesset Proceedings*, vol. 15, at p. 57).

A review of the other speeches reveals that the speakers considered themselves – as members of a body endowed with constituent authority – empowered to enact a constitution. Basic Law: The Knesset was not enacted by the Second Knesset because the political will to do so was lacking. No one contended that the Knesset lacked the legal authority to enact such a law. All participants in the 'political game' of that period were aware that they were empowered to enact a constitution.

21. The Second Knesset finished the debate with a first reading of the proposed Basic Law. The proposal was passed to the Committee and the Second Knesset thereby finished its term without adopting any Basic Law. The debate on the proposed Basic Law: The Knesset was renewed in the Third Knesset. The proposed Basic Law: The Knesset was published anew and it was thoroughly debated. No one contended that the Third Knesset was not empowered to adopt a constitution. The Third Knesset's debates were seen by all as fulfilling the Knesset's role according to the Harrari Decision, which was the decision of the Constituent Assembly (the First Knesset) to adopt a constitution for Israel. MK Harrari himself reiterated this (on October 8, 1956) when he stated that:

> 'In accordance with the decision of the First Knesset, we are not now dealing with individual laws, but rather with the chapters of the constitution of the State of Israel' (*Knesset Proceedings*, vol. 21, at p. 4).

MK Harrari read the Harrari Decision before the Knesset plenum and added that '[we] are therefore debating today one of the chapters of the proposed constitution for the State – the chapter that deals with the Knesset' (*ibid.*, at p. 6). MK Harrari concluded his remarks by stating as follows:

> 'I hope that despite the slow pace of the Knesset's work, we will succeed in completing at least two articles of the constitution for the State in this, the Third Knesset. We must not forget that when the Knesset accepted the proposal to prepare a constitution for the State it was aware of the fact that other states worked for many years in preparing their constitutions. Eleven years passed before the complete adoption of the United States constitution, which has existed for so many years; preparation of the Soviet Russian constitution lasted for thirteen years. There is therefore no reason for us to despair or to feel that the extended period of preparation has diminished our chances for an organized, orderly constitution that will be the glory of the State of Israel' (*ibid.*, at p. 6).

Thus it is clear that the Knesset saw itself as authorized to enact a constitution, and that it considered the Basic Laws to be part of the constitution. Upon completion of the first reading debate, the proposal passed to the Constitution, Law and Justice Committee. The proposal was presented for a second reading on February 11, 1958. MK Nir-Refalkes presented the proposal in the name of the Constitution, Law and Justice Committee, noting that:

> 'The Constitution, Law and Justice Committee takes particular satisfaction in presenting to the Knesset for a second reading Basic Law: The Knesset, which will be a chapter of our basic constitution, in accordance with the June 1950 decision of the First Knesset.'

In the course of the second reading the comments of several members of Knesset were adopted and a number of formal entrenchment provisions were inserted into the Basic Law. It was provided that section 4, which sets forth election procedures, 'shall not be altered save by a majority of the members of the Knesset.' Section 44 entrenched the Basic Law against the effect of emergency regulations. Section 45 provided that 'Section 44, or this section, shall not be altered except by a majority of eighty members of the Knesset.' During the debate on these entrenchment provisions, several opinions were expressed as to their meaning. No contention was made that the Knesset was not empowered to entrench provisions of a Basic Law. It must be noted that more than a year after the adoption of the Basic Law: The Knesset, on February 12, 1958, the Knesset debated Amendment (No. 3) to the Law. The purpose of this amendment was to provide that 'The majority required by this Law to for a variation of section. 4, 44 or 45 shall be required for decisions of the Knesset plenary at every stage of law-making.' This amendment was adopted. During the course of the debate, MK Zadok opposed the proposed amendment, arguing that the Knesset was not authorized to limit itself (*Knesset Proceedings*, vol. 27, at p. 2961). As mentioned above, the proposed amendment was adopted.

22. The Fourth Knesset did not enact any Basic Law. This concerned several Members of Knesset. MK Nir-Refalkes tabled a motion in this matter. He asked that the process of enacting a constitution be accelerated and referred to the Harrari Decision of the Constituent Assembly. He noted that 'meanwhile ten years have passed, during which period the Committees on the Constitution, Law and Justice of the First, Second and Third Knessets have enacted only one Basic Law – Basic Law: The Knesset, which was enacted in 1958. Our experience proves that this method of enacting a constitution has led to an anomalous situation. Twelve years have passed since the establishment of the State and not only do we have no constitution, but there is no chance that we will have one in the next fifty years (*Knesset Proceedings*, vol. 28, at p. 585).

MK Nir-Refalkes noted that the government manifesto provided that 'the Fourth Knesset should complete the enactment of the Basic Law, which will

be consolidated to form the basic constitution of the State.' He added that all factions of the house were united in this view and he requested that the preparation of the constitution be accelerated. The government response was given by the Minister of Justice, Mr Pinhas Rosen. The Minister also mentioned the Harrari Decision and the government platform. He expressed the hope that the Fourth Knesset would indeed complete the work of preparing the constitution. The debate passed to the Constitution, Law and Justice Committee. However, the Minister of Justice's hopes were not realized. The Fourth Knesset enacted only the Basic Law: Israel Lands. The Fifth Knesset enacted Basic Law: The President of the State. In the Sixth Knesset, the focus on the enactment of Basic Laws was intensified. On November 23, 1965 the Constitution, Law and Justice Committee established a subcommittee that dealt solely with the constitution. This subcommittee was headed by MK Zadok and succeeded in preparing one Basic Law, Basic Law: The Government, which was passed by the Seventh Knesset.

23. Between the enactment of Basic Law: The Knesset in 1958 and the enactment of the two Basic Laws dealing with human rights, the Knesset passed another nine Basic Laws. Some of them included provisions (albeit minor) that formally entrenched certain provisions of the Basic Laws. The enactment of these provisions presented the Knesset with no legislative difficulty. When the Eighth Knesset was presented with a first reading of the proposed Basic Law: Legislation, 5736-1976 – the proposal that entrenched all of the Basic Laws and provided for judicial review of the constitutionality of regular legislation – it had no practical difficulty with this entrenchment. Aside from a few isolated Members of Knesset, all factions of the house were in agreement as to the Knesset's authority to enact a constitution for Israel and its power to entrench provisions of the constitution. Many of the speakers expressly noted that the Knesset was thereby acting in accordance with the Harrari Decision (see Knesset Proceedings, vol. 76, at p. 1704; *Knesset Proceedings*, vol. 78, at p. 954). This was the case when the draft Basic Law: Legislation was presented to the Ninth Knesset for a first reading (*Knesset Proceedings*, vol. 83, at p. 3975). The third proposal of the Basic Law: Legislation was debated in a first reading in the Thirteenth Knesset (*Knesset Proceedings*, second session, at p. 4302; third session, at p. 936). Aside from several isolated members of Knesset, no objection was raised as to the entrenchment of the Basic Laws. There was a debate, of course, as to the strength of the entrenchment, but the common position of most members of the Knesset was that this was a political and not a legal question, since the Knesset was empowered to entrench the Basic Law if it so desired.

24. I will now address the question of continuity and the constituent authority of the Knesset as to the Basic Laws dealing with human rights. Proposals dealing with human rights were already included in draft laws presented to the Committee on the Constitution of the Provisional Council of State. However, legislation in this area did not proceed. With the completion of Basic Law: The Knesset, the Constitution, Law and Justice Committee announced that the next Basic Law would deal with human rights. This did not occur. Against this background, on January 15, 1964 MK Klinghoffer presented to the Fifth Knesset the proposed Basic Law: Charter of Basic Human Rights, 5724-1963. This was a comprehensive, impressive proposal for a constitutional settlement with regard to human rights in Israel. The proposal provided for substantive and formal entrenchment. It provided that 'this law may be amended only by a majority of two thirds of all members of Knesset' (s. 73). It provided for the possibility that human rights could be infringed by regular legislation, but only if that legislation met substantive standards. In the comments to the proposal that were submitted to the Knesset, MK Klinghoffer referred specifically to the Knesset's constituent authority to enact a constitution for Israel:

> 'In the matter of the authority to adopt a fixed constitutional law, it must be noted that this authority passed from the First Knesset (which was elected as the Constituent Assembly) to the Second Knesset, and thereafter from Knesset to Knesset' (Second Knesset (Transition Law), ss. 5 and 10) (*Knesset Proceedings*, vol. 38, at p. 801).

The government opposed this initiative. The Minister of Justice, Mr Dov Yosef, argued forcefully against MK Klinghoffer's initiative. He noted, *inter alia*, that 'I do not think that there is a law that stands "above the regular legislature." We do not have two legislatures. We have only the Knesset, and in my opinion, a law of the Knesset cannot limit its right to legislate, and if there is such a provision in a law, the Knesset is entitled, in my opinion, to cancel the clause that ostensibly limits its rights' *(ibid.*, at p. 789*)*. The Justice Minister added that it would be otherwise if we had a constituent assembly. MK Begin retorted that 'We have a Constituent Assembly as well.' (*ibid.*, at p. 789).

MK Klinghoffer also responded to the Justice Minister as follows:

> 'The Knesset is the heir to the Constituent Assembly. The Fifth Knesset is empowered with the authority of the Constituent Assembly to enact a constitution, and this is in accordance with the Constituent Assembly' (Transition) Ordinance and the Second Knesset (Transition) Law (*ibid.*, at p. 793).

MK Klinghoffer's proposal failed (on January 15, 1964).

25. A number of years passed. The public climate changed (see Lahav and Kretzmer, "The Charter of Human and Citizen's Rights in Israel: A Constitutional Achievement or Hocus-Pocus," 7 *Hebrew Univ. L. Rev. (Mishpatim)* (1976) 154). The Constitution, Law and Justice Committee of the Seventh Knesset continued with the work of the Subcommittee on Basic Laws. The Committee was headed by MK B. Levy. The Committee held comprehensive debates. The draft Basic Law: Human and Citizen's Rights was published by the Committee. The proposed law set forth certain human rights and limited the power of statue to infringe those rights except under certain conditions. It included provisions according to which '*contradictory statutory provisions that are adopted after the effective date of this Basic Law – are void*' (s. 20(a)). At the same time, the Basic Law did not contain entrenchment provisions. The proposal was not substantively debated in the Seventh Knesset. With the convening of the Eighth Knesset the debate on the proposal continued in the Subcommittee for Basic Laws headed by MK B. Levy. It was submitted on June 4, 1974 for a first reading. In presenting the proposed Basic Law for a first reading, MK B. Levy referred to the Harrari Decision and noted that, in enacting the Basic Law, the Knesset was acting within its constituent authority:

> 'Constituent authority, i.e. the authority to enact a constitution for the State, was transferred from the Constituent Assembly, i.e. the First Knesset, to the Second Knesset and every Knesset thereafter, including the Eighth Knesset. As the Second Knesset (Transition) Law provides ... In enacting the Basic Law: Human and Citizen's Rights we are therefore acting in accordance with the constituent authority of the Knesset'(*Knesset Proceedings*, vol. 70, at p. 1566).

An extended debate on the draft law ensued. The Minister of Justice, MK Zadok, participated in the debate. He expressed his opinion that the Basic Law

should be entrenched in order to prevent infringement of basic rights by regular legislation. MK Zadok noted that:

> '… I agree that the Knesset must be given broad latitude and room to maneuver in its legislative work, but this sovereignty should not be interpreted to permit arbitrariness as to basic principles. It seems to me that the doctrine of the rule of law, which we all espouse, means that everyone is subject to the law – the government, the administration, the President, the State Comptroller – and the Knesset as well. Just as the other state institutions are endowed with a limited array of authorities, so should the Knesset's legislative powers be similarly limited, albeit with greater flexibility. The primary form taken by this limitation is the Citizen's Rights Law, in which are anchored and expressed those basic principles that form the basis for government itself' (*Knesset Proceedings*, vol. 70, at p. 2485).

MK Zadok further insisted that the proposed law was intended to 'raise the Basic Law on citizens' rights to the level of a preferred norm against which the validity of regular laws will be tested' and therefore it must be treated with great care (*ibid.*, at p. 2485). As to entrenchment of the Basic Law against regular legislation that does not meet its requirements, MK Zadok noted that:

> 'The laws that have been enacted before this Law takes effect have been enacted by the sovereign Knesset under its unlimited legislative power. They are the statutory regime under which we live and they cannot be called into question. This is not so as to laws that will be enacted by the Knesset in the future, after the establishment of the norms set forth in the Basic Law on Citizens' Rights, with the Knesset aware of and restricted by those norms the validity of those future laws will be tested against the Basic Law.'

The debate in the Knesset was comprehensive. The Knesset debated the question of whether to entrench the Basic Law – in the same way that s. 4 of the Basic Law: The Knesset was entrenched – so that the Law could be amended only by a special majority. The various rights were discussed as well. The draft law passed the first reading and was handed over to the Constitution, Law and Justice Committee. The debate in the Committee concentrated primarily on the question of whether to entrench the Basic Law. It was decided to defer the debate on this question until a decision was reached as to the fate of the Basic Law: Legislation – which was being studied by the Committee at

the same time – and which included general entrenchment provisions. What is clear is that the Members of Knesset – the plenum as well as the committee – had no doubt as to the power of the Knesset to entrench the clauses of the Basic Law: Human and Citizens' Rights. Many of the Members of Knesset referred to the Declaration of Independence, the Harrari Decision and the constitutional undertaking, and pointed to constitutional continuity. It occurred to none that the constitutional continuity was interrupted. No one contended that the Knesset was not entitled to entrench its instructions. The primary debate centered on the question of entrenchment as one of political policy (was it desirable?), and not as a legal problem (was it possible?) (see Lahav and Kretzmer; see also B. Bracha, "The Protection of Human Rights in Israel," 12 *Israel Yearbook on Human Rights* (1982) 110); R. Gavison, "The Controversy Over Israel's Bill of Rights," 15 *Israel Yearbook on Human Rights* (1985) 113).

26. The Eighth Knesset continued to debate the proposed Basic Law: Human and Citizens' Rights. MK Aridor headed the subcommittee. The proposal prepared by the Committee provided that previously enacted statutes repugnant to the Basic Law would be invalidated. The proposal did not advance in the legislative process.

27. In the Tenth Knesset, MK Professor Rubinstein renewed Professor Klinghoffer's proposal. It was put forth (on June 2, 1982) as a private draft law (Proposed Basic Law: Bill of Human Rights, 1982). In his comments on the proposal Professor Rubinstein wrote that:

> 'Since (the dismissal of Professor Klinghoffer's proposal – A.B.), it has become clear to various sectors of the community that there is a need for the enactment of a Basic Law dealing with human rights, for it is fitting that these substantive issues be entrenched in a Basic Law that stands above regular legislation.'

In his speech before the Knesset plenum MK Rubinstein added that:

> 'This draft law is intended to restrain the legislature. It is also intended to protect the citizen from legislation that infringes his basic rights, for this is the implicit meaning of the word constitution. The very word constitution means restraint of the omnipotence and sovereignty of the Knesset as a legislative body' (*Knesset Proceedings*, vol. 94, at p. 2682).

Minister of Justice, MK Nissim – unlike his predecessor of eighteen years earlier, Minister Dov Yosef – agreed to pass the proposal to the Constitution, Law and Justice Committee. In his reply, Minister Nissim noted that:

> 'Today, I too say that it is right for a constitution to be fixed and entrenched. There is no value whatsoever in laws, even those denoted Basic Laws, that are not fixed both as to their adoption and as to their amendment ... Since we are discussing a group of Basic Laws that will together form a constitution, they must be fixed and entrenched' (*ibid.*, at p. 2682).

The proposal passed to the Constitution, Law and Justice Committee. The subcommittee on Basic Laws that examined the proposal was headed by MK S. Aloni. The subcommittee held extensive debates. It examined the previous proposals that were debated by previous Knessets. It studied the European Convention on Human Rights. It examined the German Basic Law and the Canadian Charter of Rights and Freedoms. It heard from Professors Klinghoffer, Klein and Akzin. The Committee's debates were published (*Debates of the Committee on the Basic Laws of the Tenth Knesset*). An examination of the Committee's debates reveals that the participants shared the view that the Knesset is empowered and entitled to entrench human rights as constitutional supra-legislative rights. At the conclusion of the debates it was decided to present the proposal for a first reading. The proposed Basic Law: Bill of Basic Human Rights was tabled for a first reading (on March 1, 1983). The comments noted that 'there is a need for the enactment of a Basic Law on the subject of human rights, for these substantive issues should be entrenched in a Basic Law that stands above regular legislation' (*ibid.*, at p. 111). In his words of introduction, MK Rubinstein emphasized that:

> 'This proposed law is based upon the principle of entrenchment of basic human and civil rights. It also sets forth a program that, in conjunction with the proposed Basic Law: Legislation, will enable judicial review of violations of this entrenchment, of harm to the idea that human and civil rights stand above the desires of the majority and above regular and routine legislation.'

At the conclusion of his comments, MK Rubinstein noted that the debate on this proposed Basic Law continues the constitutional undertaking:

> 'This proposed law, if adopted, will come close to completing the task of adopting a constitution, which the Declaration of Independence imposed upon the Constituent Assembly, later the

> First Knesset. As we recall, Members of Knesset, the Constituent Assembly did not complete this important task. Instead of fulfilling its assignment the Constituent Assembly provided that the constitution would be given chapter by chapter by means of the Basic Laws that would be combined to form one constitution. It seems to me that when the Knesset adopts... this proposed law and the proposed Basic Law: Legislation, it will complete the work of composing the constitution. If this happens, our Knesset, the Tenth Knesset, will be remembered as the body that finally fulfilled the important task of enacting a constitution for the State of Israel, and this will be its honor and its glory, that it completed what the other Knessets did not' (*ibid.*, at p. 1514).

MK Aloni – the Chair of the Subcommittee – supported the proposed law. In her comments she referred to the Constituent Assembly (*ibid.*, at p. 1515). MK Shahal also supported the proposed law. He emphasized that 'the most important thing is the control exerted by these basic principles over the regular legislation of the Knesset ... The safeguarding of human rights in a Basic Law implies a normative preference for these principles over the clauses of a regular law of the Knesset' (*ibid.*, at p. 1518).

With the conclusion of the debate the proposal passed to the Committee on Constitution, Law and Justice to be prepared for second and third readings. The renewed debate before the Committee was comprehensive and fundamental (see *Debates of the Committee on Basic Laws of the Tenth Knesset*). The entire debate proceeded, of course, on the basic assumption – which was expressly repeated more than once – that in the context of the constitution in general, and in the case of human rights in particular, the Knesset is empowered to entrench the clauses of the constitution, whether by formal or substantive entrenchment. The proposal was not presented for second or third readings because early elections were called.

28. The debate on Rubinstein's proposal continued in the Eleventh Knesset, following the applicable continuity rules. Nonetheless, the debate on the proposal did not conclude with the enactment of the law (for an analysis of the reasons, see Rubinstein, *ibid.*, at p. 706). A significant change occurred in the Twelfth Knesset. The new Justice Minister, MK Dan Meridor, presented to the government the draft Basic Law: Human Rights. This proposal did not advance. Against this background, Members of Knesset Rubinstein and Aloni presented proposals of their own. MK Aloni presented the proposal of the subcommittee that she chaired, which had not reached the stage of second and

third readings in the Tenth Knesset. In presenting her proposal, MK Aloni commented that:

> 'In the we provided that there would be a constitution. The First Knesset decided to defer this issue chapter by chapter – and in the meantime, so that there would not be a vacuum, we adopted the laws that were previously in effect… and step by step we began to prepare the constitution of the State of Israel. However, the Basic Law: Human Rights was rejected. Still, with the passage of time, the need to adopt this law has grown' (*Knesset Proceedings*, vol. 115, at p. 401).

MK Rubinstein adopted the Justice Minister's proposal. This proposal provided for both formal and substantive entrenchment. The proposal provided for judicial review of the constitutionality of laws that improperly infringe protected human rights. The Justice Minister sought to set aside MK Aloni's proposal. He announced that the government would permit discretionary voting for MK Rubinstein's proposal. He himself – who had by his efforts advanced the Basic Laws as to human rights – explained the key points of his proposal and sought to unite the Members of the entire house in supporting it. MK Aloni's proposal was set aside. MK Rubinstein's proposal – which was also the Justice Minister's proposal – passed to the Committee. The Committee did not submit the proposed law for second and third readings.

29. Towards the end of the term of the Twelfth Knesset, MK Rubinstein, who must be credited with advancing the efforts for constitutional human rights, took a new step. He "deleted" from Minister Meridor's proposal – which had been debated by the Constitution, Law and Justice Committee – a number of rights, and submitted them for a preliminary reading as a separate Basic Law. He placed upon the Knesset table, *inter alia*, the draft Basic Law: Freedom of Occupation and the draft Basic Law: Human Dignity and Liberty. At the end of the Twelfth Knesset these two laws completed the legislative process. Thus were enacted the Basic Law: Human Dignity and Liberty (see the debates on the first reading in Knesset Proceedings, fourth session, at pp. 1235, 1527; on the second and third readings, *ibid.*, at p. 3781) and the Basic Law: Freedom of Occupation (see the debates on the first reading in Knesset Proceedings, fourth session, at p. 2595; on the second and third readings, fourth session, at p. 3390); for an analysis of the Knesset debates, see Karp, "The Basic Law: Human Dignity and Liberty – A Biography of Power Struggles," I *Mishpat uMimshal* (1993), 323). In presenting Basic Law: Human Dignity and Liberty for second and third readings, the Chairman of the

Constitution Law and Justice Committee, MK A. Lin – who contributed greatly to the enactment of the Basic Laws in the Twelfth Knesset – emphasized that the Basic Law is part of the State constitution, noting that:

> 'Basic Law: Human Dignity and Liberty was prepared in, the course of many meetings of the Committee on the Constitution, and I emphasize this: the Constitution, Law and Justice Committee in its capacity as the committee on the constitution for the Knesset of Israel' (*Knesset Proceedings*, vol. 125, at p. 3782).

30. In March 1994 the Knesset voided the original Basic Law: Freedom of Occupation and enacted in its stead a new Basic Law: Freedom of Occupation. This Basic Law also revised several provisions of the Basic Law: Human Dignity and Liberty. In presenting draft Basic Law: Freedom of Occupation for second and third readings MK Zucker noted that the debate on the Basic Law took place in the context of the Knesset's authority as a constituent assembly, stating that:

> 'I would like to remind you that today's debate is taking place while we sit as a constituent assembly. We thereby continue the long tradition of debates held in this house in its role as Constituent Assembly. We are thus continuing to fulfill the Harrari Decision, which states: we will complete the constitution of the State of Israel chapter by chapter, by means of the Basic Laws.... Since 1948 the Knesset has essentially neglected part of its duties by failing to complete the enactment of a constitution for Israel, an assignment that it undertook both in its role as Constituent Assembly and in its role as the body charged with fulfillment of the Harrari Decision. It is true that this Knesset has almost completed the institutional portion of the Israeli constitution – those Basic Laws that deal with the government and the Knesset, the army, the Israel Lands Administration, the State Comptroller, the President of the State, etc. Even though these laws are not yet entrenched and have no preferred status over regular laws, nonetheless, the Knesset, as Constituent Assembly, has taken significant strides forward in this area ... The greatest failing of the Knesset has been in the field of human rights. Only two years ago did the Knesset begin the work that was supposed to have been undertaken in 1949, the enactment of a bill of rights for the Israeli citizen. Two years ago, this Knesset,

> in a significant and revolutionary step forward, enacted two Basic Laws, the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. This step has aptly been called a constitutional revolution, which is only now beginning'(*Knesset Proceedings*, vol. 136, at p. 5362).

MK Y. Katz attacked the Knesset's work in its role as Constituent Assembly. He insisted that:

> 'Every first year law student is told that we are a constituent assembly, from the First Knesset through all of the Knessets until today. We are a constituent assembly because we have the authority to enact a constitution and the Basic Laws are part of the same future constitution' (*ibid.*, at p. 5426).

In the course of the entire debate it was clear to the members of Knesset that the Knesset was exercising its constituent authority; that they were enacting a portion of the constitution, and that they were empowered to entrench it (with formal or substantive entrenchment). They debated whether it was desirable to enable a majority of the Knesset to change the Basic Law. MK Meridor suggested that the required majority be eighty members of Knesset (*ibid.*, at p. 5426). His suggestion was rejected. No contention was made that the Knesset was not empowered to provide for such entrenchment.

31. Before completing this analysis of the Knesset's understanding of its constituent authority, I will mention five points. *First*, in every Knesset election the matter of the constitution was included as part of the party platforms. I verified this as to the passage from First to Second Knesset. In their article, Lahav and Kretzmer note that in the elections for the Eighth Knesset most of the parties promised to work towards enactment of a Constitution or Basic Laws as to human rights (see Lahav and Kretzmer, *ibid.*, at p. 153). I did not check the party platforms for other Knesset elections. It seems that this is a well-founded assumption, inasmuch as the matter of the constitution in general, and human rights in particular, found a central place in the party platforms. This is very significant. It indicates that recognition of the Knesset's constituent authority was an item on the national agenda, was debated in the political forum, and was determined by means of election results. When the Knesset dealt with the matter of the constitution and enacted the various Basic Laws, it drew its power from the people. The Basic Laws were not enacted without the people's knowledge.

Second, in four instances the Supreme Court invalidated regular legislation that conflicted with entrenched provisions of the Basic Law: The Knesset (see paragraph 35, *infra*). In accordance with those decisions the Knesset subsequently revised its regular legislation to conform to the entrenched provisions of the Basic Law. We are therefore presented with a new aspect of the Knesset's understanding of the matter. The Knesset, in exercising its legislative authority, understood well that it was bound by limitations it had imposed in accordance with its constituent authority.

Third, all of the entrenchment provisions were enacted within the framework of the Basic Laws, in the context of the constitutional process. Only in one case has a formal entrenchment provision been included in a regular law. This is in s. 3 of the Protection of Investments by the Israeli Public in Financial Assets Law, 5744-1984. That section provides that 'this law may not be changed nor may the appendix be revised unless by a majority of the Members of Knesset.' It should be noted that during the debate on the first reading of this proposed law a number of Members of Knesset expressed the view that this self-limitation was not binding since it was not included in a Basic Law. MK Rubinstein took this position, noting that:

> 'Previous Knessets have discussed the question of whether the Knesset can entrench laws against changes by simple majority, and the position has been more or less accepted – although it is still disputed – that when we are talking about the Knesset as a constituent authority, i.e. when it is acting as the framer of the constitution, when it is enacting a section of the constitution, then it can deem a particular law of superior status. If we enact, for example, a law as to human rights ... then in such a law, which is a Basic Law in the constitution, it is appropriate to provide that the constitution stands above other laws. This is recognized by jurists. This has been implicitly recognized by the Supreme Court. However, is it possible that a regular financial law be accorded such status? How can it be provided that a financial law will stand above regular legislation in future Knessets? If so, then tomorrow or next week – at some date closer to elections – the Knesset may enact a law that will forbid any change to the State budget or salaries or investments or allotments to religious institutions or allotments to settlements, unless by a majority of eighty or ninety or one hundred and twenty Members of Knesset. Why not? After all, on the eve of elections "anything goes"; this

> is popular and may not be opposed. Does anyone believe that this will be upheld in court? Does anyone believe that such a law will be considered a constitutional Basic Law? Does anyone believe that this is serious? This section is not worth the paper on which it is written' (*Knesset Proceedings*, at p. 2790).

The second and third readings took place on the same day. MK Rubinstein's questions remained unanswered. They evidence an attitude that was well accepted in the Knesset, which distinguished between Basic Laws (fruit of the Knesset's constituent authority) and regular laws (fruit of the Knesset's legislative authority). I will note also – incidentally – that in the words of introduction of Members of Knesset S. Aloni (Chair of the Subcommittee on Basic Laws) and A. Kulas (Chair of the Constitution, Law and Justice Committee) to the pamphlet on the Debates of the Committee on Basic Laws of the Tenth Knesset (1984), the two noted that:

> 'The Constituent Assembly elected in 1949 in accordance with the "Declaration of Independence" decided not to enact a constitution and not to dissolve itself. It declared itself the First Knesset, and the task of preparing the constitution was passed to it and to subsequent Knessets, which would prepare "Basic Laws" chapter by chapter. The Basic Laws would, upon their completion, be consolidated to form the constitution of the State. This decision gave the Knesset the status of the Constituent Assembly, and in this way the enactment of "Basic Laws" and their consolidation to form the constitution became subject to the initiative of the Members of Knesset and to the initiative of the government, or at least to its readiness to cooperate with the appropriate Knesset committee, the Constitution, Law and Justice Committee and the Committee on "Basic Laws."'

All this is evidence for the widely held understanding of the Knesset that it is endowed with both constituent and legislative authority, and that the enactment of a constitution is the realization of the Knesset's constituent authority. In the context of this authority a supra-legislative constitutional norm may be created.

Fourth, in the first years after establishment of the State there were many references to the Constituent Assembly, the Declaration of Independence, and the "Harrari Decision." With the passage of time – and changes in the composition of the Knesset – the rhetoric changed. This is natural. A generation goes, and a generation comes, but the national memory did not

change. The connection to the past was not severed. The Knesset continued to see itself as the heir of the Constituent Assembly, and as endowed with constituent authority.

Fifth, it is clear from the Declaration of Independence that the role (and authority) of the Constituent Assembly was to enact a constitution ('in accordance with a Constitution, to be drawn up by a Constituent Assembly'). The intention underlying this provision was that a "formal constitution" would be adopted, in other words, that 'the form of these norms would differ from that of other norms, particularly that of "regular" laws. This difference in form is expressed as a difference in the identity of the institution creating the norm ("constituent institution" as opposed to "legislature") or at least in the process of its creation. Its goal is to emphasize the normative preference for the constitution over the other norms in the State's system of positive law' (Akzin, *ibid.*, at p. 230). As to his understanding of the term "constitution" in the Declaration of Independence, Professor Akzin writes:

> 'It is well known that the great majority of the founders of the State were convinced that at the apex of the legal system of Israel would stand a formal constitution that would provide a binding framework for the statutes and other legal norms of the State. This understanding was vividly expressed in the Declaration of Independence, and a first step in its implementation was taken by the Provisional Council of State, which on 1 Tamuz 5708 (July 8, 1948) established the Constitution Committee' (Akzin, *ibid.*, at p. 231).

In a similar vein, Professor Rubinstein notes that 'the framers of the Declaration intended a formal constitution. We must also remember their clear objective that the Declaration accord with the resolution of the General Assembly of the United Nations' (*ibid.*, at p. 44). Professor Uri Yadin described this well in an article that appeared the day before elections took place for the Constituent Assembly:

> 'Tomorrow, there will be elections for the Constituent Assembly of the State of Israel, the first elections since the State was established, and the most important for a long time to come. We are not about to elect a regular parliament, one of the many that will subsequently be elected to enact laws dealing with the many routine issues of our daily lives, but a special parliament, unique in its importance, which will be charged with endowing the State with one preeminent law that will stand as a cornerstone

> throughout the democratic life of the State – the Basic Law, the Constitution' (*Sefer Uri Yadin*, *ibid.*, at p. 82).

Thus the authority of the Constituent Assembly was not defined, but its task was clear: the enactment of a (formal) constitution for the State, i.e. the creation of a supra-legislative constitutional framework. At the same time, it seems to me that the Knesset was entitled not to enact any constitution, or to enact only a "substantive" constitution. This is a political question that is not determined by law.

(iv) The understanding of writers and commentators

32. I will now discuss the views of writers and commentators. I do so first and foremost because of the great importance that every legal system attributes to its scholars. Of course, the Court provides definitive interpretation. But it is natural for the judge to draw inspiration from the words of scholars. There is also a second and more compelling reason to turn to these views. From the understanding of writers and commentators one may learn about the basic approach of the Israeli legal community to constituent authority. Clearly this does not constitute decisive proof. Nonetheless, it is important evidence which, when seen together with other factors – the objective facts as to constitutional continuity, the political debates before the elections, the Knesset's understanding of itself, the legal precedent and the Knesset's reaction thereto – grounds the foundation upon which the Court may and should determine that the Knesset – every Knesset – is endowed with constituent authority; that by the principles of Israeli law, the Knesset – every Knesset – is empowered to enact a constitution for Israel; that this is the most appropriate interpretation of the social and political history of Israel.

33. Most of Israel's scholars have viewed and continue to view the Knesset as endowed with constituent authority and therefore authorized to enact a constitution for Israel. It is true that in the past some disputed this position (see Nimmer, "The Use of Judicial Review in Israel's Quest for a Constitution," 70 *Col. L. Rev.* (1970) 1217. It is particularly fitting to mention Dr Likhovsky, who maintained that the Knesset – like the British Parliament – was not entitled to limit itself (see Likhovsky, "Can the Knesset Adopt a Constitution which will be the Supreme Law of the Land," 4 *Isr. L. Rev.* (1969) 61; see also Hornstein, "Entrenchment of the Basic Laws," 25 *HaPraklit* (1969) 648; Scheftler, "Reflections on Constitutional Questions," 26 *HaPraklit* (1971) 6). These views were debated, analyzed and rejected. They remain the minority position. Since the end of the nineteen-fifties (with the enactment of the Basic Law: The Knesset) and the end of the nineteen-sixties (with the decision in the

Bergman case [15]) the recurrent theme in Israeli constitutional literature has been that the Knesset has constituent authority, and that it is therefore authorized to adopt a constitution that will limit the Knesset in its role as legislature. Generations of law students have been inculcated with this view since the nineteen-sixties. First credit should be attributed to M. Sternberg (M. Sternberg, "A New Law or a Supreme Judicial Course," 16 *Molad* (1958) 284). Sternberg's essay was written shortly after the enactment of the Basic Law: The Knesset. The author wrote:

> 'In approving the Basic Law, the Knesset functioned not merely as a legislative authority, but as a constituent assembly charged by the Declaration of Independence with adopting a constitution for the State. The Knesset always saw itself as a supreme institution as well, authorized to fulfill the function of enacting a constitution, and on several occasions expressly declared this to be so. In section 1 of the Transition Law the Knesset provided that the Constituent Assembly would be known as the "First Knesset" and that a delegate to the Assembly would be known as a "Member of Knesset." This shows that the Knesset saw as its primary task the enactment of the constitution, and, it would seem, as its secondary task, the enactment of laws. The Second Knesset (Transition) Law provided that "wherever the law refers to the Constituent Assembly or the First Knesset it as if it referred to the Second Knesset." Section 10 of that law provides that "this law will apply, with the necessary changes, to the Third Knesset and every subsequent Knesset." Thus the group of people known as the Knesset constitutes another body as well, known as the Constituent Assembly, and it coexists, parallel to the Knesset itself, as a body whose purpose is construction of the constitution' (p. 286).

A number of years afterward, with the enactment of the first two Basic Laws, Professor Akzin expressed his opinion on the matter before us (Akzin, "Basic Laws and Entrenched Laws in Israel," 17 *HaPraklit* (1961) 230). Professor Akzin noted that in his opinion the Knesset exercises its constituent and legislative authority simultaneously. In his view, the Basic Laws are of a constitutional nature, in accordance with the Harrari Decision. Professor Akzin writes:

> 'We do not maintain, as has been claimed from time to time in the Knesset and the press, that even if the Basic Law provided for

> preferential status it could not thereby tie the hands of a future Knesset: such a claim is pure sophistry and conceptual nihilism. While this claim may be true as to England, there it is consistent with the English rejection of a formal constitution superior to the regular legislature. It has already been decided that this claim cannot stand in a country where the idea of a formal constitution has gained currency. We are referring to South Africa, whose public law is based upon English law. The public law of the State of Israel has been based, since the Declaration of Independence, upon the proposition that a constitution may be established beside the regular laws. This proposition has never been rescinded; rather, it has been repeatedly reaffirmed by the decisions of the Knesset since 1950. If there is any significance to the term "constitution," it is that the constitution itself authoritatively determines the relations between it and the other norms of the State' (*ibid.*, at p. 236).

In 1969, the first edition of A. Rubinstein's seminal work *The Constitutional Law of the State of Israel* was published. In this book, Dr Rubinstein elaborates on the constituent and legislative authority of the Knesset and on its power, in exercising its constituent authority, to enact a constitution that will limit the regular legislation of the Knesset. The author writes:

> 'The Constituent Assembly, after it changed its name to the "First Knesset," extensively debated the question of the constitution. No doubt was cast on the fact that it was indeed authorized to enact a written, formal constitution. The great dispute revolved around the question of whether it was required to do so... There can therefore be no doubt as to the Knesset's power to enact a constitution or laws of a constitutional character that stand above regular legislation… The First Knesset dissolved before its time, without adopting a single chapter of the constitution of the State in accordance with the Harrari Decision. The First Knesset's powers passed to the Second Knesset ... From this it is clear that the powers of the Constituent Assembly passed from the First Knesset to the present Knesset and to every future Knesset... No defect in this continuity can be shown, nor has the power to enact a constitution disappeared; rather it is conferred upon every Knesset' (*ibid.*, pp. 167-168).

The author reiterated this position in all four editions of his work, and the young jurists of the State of Israel were inculcated with this view.

34. A significant contribution in the area of Israel's constitution, the constituent authority of the Knesset and its parliamentary status, was made by Professor Klein (see, *inter alia*, Klein, "The Constituent Authority in Israel," 2 *Hebrew Univ. L. Rev. (Mishpatim)* (1970) 51; Klein, "On the Legal Definition of the Parliamentary Government and Israeli Parliamentarism," 5 *Hebrew Univ. L. Rev. (Mishpatim)* (1976) 308; Klein, "A New Era In Israel's Constitutional Law," 6 *Isr. L. Rev.* (1971) 373). The author wrote in 1970:

> 'The concept of constituent authority undoubtedly exists in the constitutional law of Israel. Constituent authority was conferred upon the Constituent Assembly, i.e. the First Knesset. The First Knesset did not relinquish this authority, but transferred it to the Second and every subsequent Knesset' (Klein, "The Constituent Authority in Israel,"' II *Hebrew Univ. L. Rev. (Mishpatim)* (1970) 51, 53).

Professor Klinghoffer has expressed a similar view. We have discussed his position, as he expressed it in the Knesset. He reiterated this position in his above-mentioned article as well:

> 'The Declaration of Independence did not specify a period of time within which the constitution must be enacted, and the transfer of the powers of the Constituent Assembly to the Second Knesset and every subsequent Knesset was authorized by a special legal arrangement. This is a sort of continuing transfer, which, so long as it remains in place, confers upon the Israeli legislature, as a perpetual inheritance, the authority to enact a constitution' (*Klinghoffer Book on Public Law*, Y. Zamir, ed., (1993) at p. 763); the article itself was first published in 1961)).

This is also the position of Professor Gavison. In an article devoted to the dispute on the Basic Law: Human Rights, Professor Gavison writes as follows:

> 'I accept the analysis suggested by both Klein and Rubinstein that even if the Knesset is not under such a duty, it maintains parallel powers – legislative and constituent – and that it may limit its own legislative powers while exercising its constituent powers. This analysis seems to be the most appropriate one, despite the undesirability of the length of the period for which these two kinds of distinct powers exist, and the fact that the

> Knesset itself is not keen on distinguishing between the kinds of power which it exercises' (Gavison, "The Controversy Over Israel's Bill of Rights," 15 *Israel Yearbook on Human Rights* (1985) 118).

In a similar spirit, Dr Maoz noted that the Knesset enacted the Basic Laws as to human rights as an exercise of its constituent powers, and thence stems their primary normative status (see Maoz, "Constitutional Law," *Yearbook on Israeli Law, 1992-1993*, A. Rosen-Tzvi, ed. (1994) 143). A similar position is expressed in numerous books and articles on this subject (see, e.g. Lahav and Kretzmer; *ibid.*, at p. 158); it undoubtedly reflects the position of the legal community in Israel. It is sufficient to mention that the academic faculty of the Tel Aviv University Law Faculty proposed a draft "Constitution for Israel" to the Knesset. This proposal had great influence on the advancement of the constitutional undertaking in recent years. The proposed "Constitution for Israel" was based on the Knesset's power to enact a constitution, entrench it and thereby limit the powers of the regular legislature. Note, however, that there were those who believed that there was no room for a fixed constitution. There were those who believed that it was not desirable for the constitution to include a chapter on human rights. President Landau's position in this regard is well known (Landau, "A Constitution as the Primary Law for the State of Israel," 27 *HaPraklit* (1971) 30). But even those voices did not base themselves upon a contention that the Knesset lacked the authority to enact a constitution. Rather, they were of the opinion that it was not wise to invest the Knesset with such power. Again, this short survey is not sufficient to show that only one conclusive position exists. I am aware that the judicial task is an independent one, which derives sustenance from the wisdom of others, but recognizes the personal responsibility of the judge to decide legal questions. The purpose of this survey is to show that the judicial determination, which recognizes the position that the Knesset is endowed with constituent powers, is not arbitrary, deriving from the subjective outlook of the judge, but rather is a reasonable conclusion, premised upon an objective outlook that reflects the basic opinions of the (legal) community in Israel. Another layer is therefore added to our ultimate conclusion that recognition of the constituent authority of the Knesset is the best, most fitting interpretation of Israel's legal history.

(v) Judicial precedent of the Supreme Court

35. The Supreme Court recognized the power of the Knesset to entrench the clauses of a Basic Law against regular legislation, as set forth in four decisions rendered before the March 1992 enactment of the Basic Laws as to

human rights (see HCJ 98/69 *Bergman v. Minister of Finance* [15], at p. 693; HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [19], at p. 7; HCJ 141/82 *Rubinstein v. Knesset Speaker* [20], at p. 141; HCJ 142/89 *Laor Movement v. Knesset Speaker* [21], at p. 529). At first, the matter was left for further review, but with time it was addressed clearly and explicitly. In the *Laor Movement* case [21], I noted as follows:

> 'A law of the Knesset – whether a "regular" law or a Basic Law – that seeks to change an "entrenched" provision without having been adopted by the necessary majority contradicts the entrenchment provision of the Basic Law. In light of its legal effect, the "entrenchment" provision takes precedence. In this clash between the entrenchment provision and the clause that seeks to change it without meeting the necessary majority requirement, we do not apply the standard rules of construction, according to which a later enacted law invalidates an earlier enacted law. In this clash we apply the principle that gives normative precedence to the entrenched Basic Law' (HCJ 142/89 [21], *supra*, at p. 539).

Thus the Court has recognized the Knesset's power to 'entrench' the Basic Laws against change or infringement. Otherwise, we cannot explain the invalidation of four "regular" laws for violating the principle of election parity set forth in the Basic Law: The Knesset, when these invalidations stemmed from the failure of those laws to meet a formal requirement (the special majority) set forth in s. 4 of the Basic Law. It is true that in these decisions (except for the *Laor Movement* case [21]) the Court did not employ the rhetoric of constituent authority. We cannot conclude from these decisions that this specific doctrine was before the Court at that time. However, it is clear that the Court recognized the normative primacy of the entrenched Basic Laws. This primacy is certainly consistent – and as I will explain, only consistent – with the constituent authority of a Knesset empowered to enact a constitution for the State. In the fourth case in this series, I discussed the Knesset's status as a constituent authority, noting as follows:

> 'This "entrenchment" applies in our system, for we recognize the Knesset's power to function as a constituent authority and to prepare Basic Laws that will constitute the various chapters of the State constitution. It is in this context that we recognize the power of the Knesset, acting as a constituent authority, to entrench provisions of a Basic Law against changes – whether by

> "regular" or Basic Law – that are adopted by a "regular" majority…' (*Laor Movement* case [21], at p. 539).

36. Since the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, the question of the normative status of these Basic Laws has arisen in an incidental manner in the decisions of the Supreme Court. The Supreme Court has taken the position that these two Basic Laws enjoy constitutional supra-legislative status. Justice D. Levin concluded that this was so in the first decision to address the constitutionality of Basic Law: Freedom of Occupation. Justice Levin wrote:

> 'In March 1992 a significant change occurred in Israeli law. Two Basic Laws were adopted and came into force that define and raise to a constitutional level basic civil rights .... These two Basic Laws were debated in the Knesset of Israel, as a constituent authority, and consequently, the revised version of Basic Law: Freedom of Occupation and a revision to Basic Law: Human Dignity and Liberty were enacted, and came into force on March 9, 1994 ... When these two Basic Laws came into being they erected, by their own force and in conjunction with various basic rights that had been scattered here and there throughout our case law, the foundations and walls of the Israeli constitutional edifice. This construction has not, however, been completed, and there remains more to be drafted and enacted so that the constitution may stand in its full glory, radiating its light on the institutions of government and law in Israel. Nonetheless, the work that has been done is the construction of a stable constitutional structure, protected under the aegis of the principle and values anchored in the Declaration of Independence' (HCJ 726/94 *Clal Insurance Co. Ltd v. Minister of Finance* [37], at pp. 463-464).

Thus, in the first decision to deal with the status of the Basic Laws, the Supreme Court decided – and in this regard the decision was unanimous (by Justices Levin, Strasberg-Cohen and Tal) – that the two Basic Laws on human rights were adopted by the Knesset in the exercise of its constituent authority, and they therefore enjoy constitutional supra-legislative status. In a similar vein, the Justices of this Court stated *obiter dicta* their position as to the constitutional supra-legislative status of the two new Basic Laws. My colleague Justice D. Levin so opined as to Basic Law: Freedom of Occupation and the right to freedom of occupation when he stated, in another case, as

follows:

> 'Basic Law: Freedom of Occupation ... endowed this right with formal constitutional recognition and supra-legislative status. It is transformed into a protected basic right and placed on a higher normative level than "regular" legislation or "Israeli" common law… '(HCJ 239/92 *Egged Israeli Transport Cooperation Society v. Mashiah* [44], at p. 71).

In a similar spirit, my colleague Justice Mazza stated as follows in another case dealing with the Basic Law: Freedom of Occupation:

> 'The safeguarding of the right to freedom of occupation in a Basic Law has conferred upon that right supra-legislative status. One of the distinguishing characteristics of this illustrious status ... is in the entrenchment of that right even against the mighty hand of the legislature. Again, it is not enough that a law that limits the right be explicit and unequivocal; rather, in order to effectively limit the freedom of occupation, the law must also meet the requirements of the last part of section 1, that is, the limitation must be required for a "proper purpose and for the general good"..' (HCJ 3385/93, 4746/92, *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [24], at p. 259).

In another case, Justice Strasberg-Cohen decided as follows:

> 'These laws changed the normative status of freedom of occupation in Israel. There were two primary changes: first, the possibility of invalidating a law that does not meet the criteria of the Basic Law, a possibility that did not previously exist; and second, a change in the relative status of the law, on the one hand, and the basic right on the other. If, prior to the Basic Law, it was possible to limit the basic right by means of a law that did so clearly and explicitly, and if, prior to the Basic Law, the basic right and its limitation were tested in light of the law limiting that right, now the right (for our purposes, freedom of occupation) has been given preferred status above the law that limits it, and requires an analysis into whether the limitation is consistent with the values of the State of Israel, was enacted to serve a proper purpose, and is not more restrictive than necessary' (HCJ 1225/94 *"Bezeq" – The Israeli Telecommunication Company Ltd v. Minister of Communications* [45], at p. 679).

37. The Justices of the Supreme Court took a similar approach, *obiter dicta*, as to the constitutional supra-legislative status of Basic Law: Human Dignity and Liberty. In one of the cases, which dealt with the freedom of movement (protected by s. 6 of Basic Law: Human Dignity and Liberty) I noted as follows:

> 'This right is invested with constitutional supra-legislative status. A regular law enacted after the effective date of the Basic Law that infringes the basic right and does not meet the requirements of the "limitation clause" (s. 8 of the Basic Law) is an unconstitutional law. The Court is entitled to apply the appropriate remedies. One of those remedies is to declare the law void, and set forth the effective date of the invalidity (retroactive, active or prospective)' (CrimApp 6654/93 *Binkin v. State of Israel* [46], at p. 293).

In another case I noted:

> 'With the enactment of the Basic Law, a significant change occurred in Israel. The normative status of a number of basic human rights has changed. They have become part of the State constitution. They have been accorded constitutional supra-legislative status' (CrimApp 537/95 *Ganimat v. State of Israel* [38], at p. 410).

In one of the cases, Justice Or analyzed the principle of equality. He determined that this principle may be safeguarded by Basic Law: Human Dignity and Liberty. Therefore, in his opinion, the following conclusion is required:

> 'Such a safeguard signifies the elevation of the principle of equality to a normative constitutional supra-legislative level' (HCJ 5394/92 *Huppert v. Yad Vashem Holocaust Martyrs and Heroes Memorial Authority* [47], at p. 362).

It must be emphasized that most of the decisions discuss the constitutional supra-legislative status of the Basic Laws. There is no express reference to the Knesset's constituent power. There was no need for such an express reference, since this question was not at issue. I do not contend, therefore, that one may conclude from these decisions that the Court explicitly adopted the doctrine of constituent authority (aside from the decision in the *Laor Movement* case [21], and the unanimous decision in the case of *Clal Insurance Co. Ltd* [37]). My contention is that the Court recognized the normative supremacy of the Basic

Laws, and their constitutional supra-legislative status. In so doing, the Court did not adopt those constructions that see the Basic Laws as occupying the same normative level as regular legislation.

(vi) The Knesset's constituent authority: conclusions

38. The socio-historical journey is at an end. This journey was vital. Constitutionality and the constitution are not merely formal documents. They are not mere law. They are the product of the national experience. They are society and culture. A constitution is indeed a reflection of the national experience. The words of Justice Agranat still resonate:

> 'For it is a well known axiom that a nation's law must be viewed through the lens of its national experience' (HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [4], *supra*, at p. 884).

Our system of national life, our national experience, from the establishment of the State until today, is that the Knesset is perceived by our national consciousness as the body authorized to enact a constitution for Israel. That consciousness originated before the establishment of the State and the preparations for framing a constitution. That consciousness was crystallized in the Declaration of Independence. It took on real form in the elections for the Constituent Assembly. It was consolidated in the social-legal understanding that the Knesset is endowed with constituent authority and is empowered to enact a constitution for Israel. The rhetoric of constituent authority and constituent power was particularly strong during the first years following the establishment of the State. This rhetoric weakened with the passage of time. That is natural. Nonetheless, the basic understanding that the Knesset is endowed not only with regular legislative authority but also with constituent authority accompanied the Knesset from its inception. This is evidenced by the repeated references to the Harrari Decision. The renewed rhetorical reference to the Knesset as endowed with constituent authority in the context of the enactment of the Basic Law: Freedom of Occupation in 1994 shows this as well. Indeed, the view that the Knesset is authorized to enact a constitution is deeply embedded in the social and legal consciousness of Israeli society. This is part of our political culture. On the basis of this view, we, the judges of Israel are entitled to declare today that according to the rule of recognition of the State of Israel, the Knesset is endowed with legislative and constituent authority, and that the Knesset may, in exercising its constituent authority, limit the exercise of its legislative authority.

In truth, the rule of recognition at the outset of the Second Knesset might have been different had the Supreme Court determined that constitutional continuity had been severed. But this did not happen. In my opinion this would not have happened even had the question arisen before the Court at that time. In any event, today's socio-legal reality enables the Supreme Court – in whose hands rests consolidation of the rule of recognition (see H.L.A. Hart, *The Concept of Law*, at pp. 147-154 (2nd ed., 1994)) – to identify and declare that our Knesset is endowed with both constituent and legislative authority; that it wears 'two hats'; that in enacting the constitution it may limit its regular legislative power; that its constituent actions stand above its legislative actions. Of course, while the Knesset's lawmaking power (its "legislative hat") is continuous and everlasting, its power to enact a constitution (its "constituent hat") is temporary and will terminate when the Knesset, as a constituent authority, determines that the constitutional undertaking has been completed. The constitution itself will set forth the means by which it may be revised and amended. This conclusion – the product of the rule of recognition – is also the best interpretation of our socio-legal history from the establishment of the State until today.

39. The common denominator of these three models is that the constituent authority of the Knesset always rests with the people. A constitution is not a government act that bestows a constitution upon the people. A constitution is an act by the people that creates government. It is the people that determines – according to the social philosophy developed over the course of its history – who exercises the highest authority of the State, and its rule of recognition. The Court gives expression to this social determination. The Court is the faithful interpreter of the people's will as expressed in the constitution. The Court attempts to give the best possible interpretation of the totality of the national experience. The existence of a constitution is not a logical matter but a social phenomenon. The Court interprets the 'social facts' and infers from them the constituent power of the Knesset. This interpretation is not the product of intellectual construction. It is an expression of the social reality. It reflects actual experience. It is an expression of the moral and political foundation upon which the system is based. It is the product of the historical, political, social and legal history of the system. It is the consequence of the social contract based upon the communal consensus in Israel (the *Laor Movement case* [21], *supra*, at p. 554). The Court attempts to give the best interpretation of the totality of the national experience. At times, the constituent authority remains in the hands of the people itself, which then acts directly and enacts a constitution by referendum. In most cases the nation

delegates constituent authority to a governing body. At times this is a special governing body. Generally it is an existing governing body, which is also the body authorized to enact laws. That is the case in Israel.

d) Review and critique of Justice Cheshin's position

40. My colleague Justice Cheshin rejects the Knesset's constituent authority. In his view, a Basic Law is "regular" legislation to which the label "Basic Law" has been appended. The Knesset may not limit itself. The Knesset is not omnipotent, inasmuch as it is subject, *inter alia*, to the will of the majority. A statutory clause (including that set forth in a Basic Law) providing for a formal majority "limitation" is not binding, unless the required majority is 61 members of Knesset (which is not a true limitation). A statutory clause providing for a substantive limitation in regard to the content of the provision (such as that appearing in the limitation clause) may be changed by later legislation despite noncompliance with the limitation requirement, as long as the subsequent law expressly provides for the change. Essentially, this is the classic English position, which represents the accepted view of the Westminsterian model as it is understood today in England. The legal construction that my colleague proposes in requiring an express change was raised many years ago by Professor Klein, and I referred to it myself years ago. My colleague's position that, in principle, limitation is not possible is the antithesis of the view held by my colleague President Shamgar, according to whom limitation is possible. My view – based upon the Knesset's constituent authority – falls in the "middle." It is opposed to Justice Cheshin's position on entrenchment and self-limitation in the Basic Laws. We do share basic principles – which I would like to reserve for future review – as to the effect of limitation clauses in regular laws, but that is not now the issue before us.

41. I will state at the outset that I disagree with the position held by my colleague Justice Cheshin. I agree with the view of my colleague Justice Shamgar in this matter. Indeed, consider the result: there is no constitution and the Basic Laws are but regular laws; the constitutional undertaking of more than forty years has been, so far, an unsuccessful experiment; the provisions of s. 9A of Basic Law: The Knesset, according to which the Knesset may extend its term only by a law enacted by a majority of eighty members of Knesset, are invalid; the provisions of s. 45 of Basic Law: The Knesset (according to which ss. 9A, 44 and 45 may be amended only by a majority of eighty members of Knesset), are invalid; the limiting provisions included in all drafts of Basic Law: Legislation based upon the principle that a Basic Law may not be enacted or amended unless by a majority of two-thirds of the Knesset, will not

be constitutional if adopted; the clauses set forth in the Basic Laws requiring a Knesset majority – which, in the view of my colleague Justice Cheshin, are lawful – are imperiled, for it seems to me according to his underlying premise they should be invalidated. If we wish to enact a constitution and Basic Laws, we will have to start again from the beginning. And, apparently, even such a beginning is not at all simple. Certainly we will not aspire to 'blood and fire and pillars of smoke' [*Joel* 3:3]. If we wish to adopt a constitution by non-violent means, we are faced with considerable difficulty. The Knesset would not be empowered to enact a law establishing a constituent assembly. Even presenting a proposed constitution to be adopted by the Knesset (or a body established by it) for a national referendum would pose problems that could not be easily surmounted. Indeed, my colleague places us in the same position in which England is found today – without our being part of the European community and without our being subject to the European Convention on Human Rights – and he places before our legal system the same difficulties facing England today. In my opinion all this is unnecessary, for our history is unlike England's. Our Knesset has constituent authority, by means of which it may achieve constitutional arrangements not easily realizable in England. I say this not because I desire a constitution, just as my colleague does not take his position because he desires that we not have a constitution. I take this position because it accords with my best professional understanding; it is based upon my best efforts to be objective in light of the constitutional structure and contemporary constitutional understanding. Indeed, I would consider a Knesset decision to discontinue the constitutional undertaking as legitimate, imbued with the same force as a decision to continue the enterprise. However, as long as the Knesset has not decided to abandon the constitutional undertaking, the Court must give constitutional force to that enterprise without regard to the judge's personal opinion.

42. Accordingly, the most important question remains whether the Knesset is endowed with constituent authority. My colleague's claim rests upon the view that the Constituent Assembly's constituent authority expired with the dissolution of the First Knesset. Most of his contentions have been made before. Professor Nemer, Dr Likhovsky, Mr Shefter and Mr Hornstein raised these arguments in the nineteen-fifties and sixties. My colleague returns to them. Some of these claims are stronger, some less so. As I mentioned in my opinion, had these questions arisen at the time that the Second Knesset convened (in 1951) they would have posed a problem that was "by no means simple." I added that even then these problems could have been surmounted.

Certainly these claims have weakened over the years. With the current reinforcement of the constitutional enterprise they lack real force.

43. I have addressed most of my colleague's claims in the course of my opinion. I will therefore not repeat my answers but will address a number of points that merit further discussion.

(a) My colleague stresses that the First Knesset – which everyone agrees was empowered to adopt a constitution for Israel – was not authorized to transfer that power to the Second Knesset, and even if the First Knesset was so empowered, it did not intend to effect such a transfer. My simple answer is that the principle of transfer or agency, according to which an agent is not a principal does not apply here. The Knesset was given the power to enact a constitution by means of the basic norm and according to the basic understanding of the Israeli community. This power was given to every Knesset. The First Knesset did not pass powers to the Second Knesset, just as the Twelfth Knesset did not pass legislative power to the Thirteenth Knesset. A later Knesset is not the agent of an earlier Knesset. The Knesset is the central organ of the State, and according to our constitutional structure it is endowed with both constituent and legislative authority. In any event, even according to my colleague's line of thinking, I have sought to show that the First Knesset intended (subjectively) to see the Second Knesset as its heir, and that intention was successfully implemented.

(b) My colleague has returned again to the old claims that the passage of constituent authority from the First to the Second Knesset was effected by regular laws and not by Basic Laws. This question does not arise as to the Transition Law, 5709-1949, which was enacted before the Harrari Decision. Personally, I see in this a constitutional provision, as it was indeed dubbed ("minor constitution"). Professor Yadin noted that the Transition Law was an 'act of basic legislation in the sphere of the national constitution' (*Sefer Yadin*, at p. 90). As to the Second Knesset (Transition) Law, it was enacted after the Harrari Decision, and should have been enacted as a Basic Law. It is unfortunate that this was not done. Does the entire constitutional structure therefore collapse? I have already noted that in my opinion this law was unnecessary; it was declarative in nature, emphasizing the passage from transitional to permanent status.

(c) My colleague Justice Cheshin cites as a weakness of the doctrine of constituent authority that it must distinguish between constituent and legislative acts, and that it is likely to require a determination as to whether certain provisions set forth in the Basic Law deviate from constituent

authority. My answer is threefold. First, according to the doctrine of constituent authority the distinction between constituent and legislative acts is straightforward and clear, and is subject to a simple formal test. In this my position is similar to Justice Cheshin's position, which is also subject to a simple test calling for a majority of 61 members of Knesset and no more than that. Second, indeed it may be necessary to test the constitutionality of the use of the term 'Basic Law.' I sought to leave this matter for further consideration and I maintain this position. I will note, however, that it is well accepted for courts to test the constitutionality of amendments. More than one such amendment has been invalidated as unconstitutional, and this has been not only for 'formal' reasons (such as a failure to meet majority requirements) but for substantive reasons as well (see the opinion of the Supreme Court of India in the case of *Kesavande v. State of Kerala* [113]). Consider, in this regard, the following words of the Constitutional Court of Germany:

> 'Laws are not constitutional merely because they have been passed in conformity with procedural provisions... They must be substantively compatible with the highest values of a free and democratic order, i.e. the constitutional order of values, and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law' (6 BverfGE 32 [109]).

The literature on this matter is prolific (see Barak, *Parshanut BeMishpat*, vol. 3, (1994), at p. 566, and also *infra*). Third, the need for judicial review under these circumstances is not unusual. It seems to me that even my colleague Justice Cheshin applies judicial review in similar circumstances. Thus, for example, in his view, the Constituent Assembly (the First Knesset) was unsuccessful in its attempt to transfer authority to the Second Knesset. Is this not an example of the Court setting constitutional limits? My colleague Justice Cheshin determines that the Knesset's enactment of a law (even a Basic Law) extending its term beyond four years would be unconstitutional. Is this not a case in which the Court determines the boundaries of constituent authority? It is worth noting as well the words of my colleague President Shamgar, who noted that 'there should be no doubt as to the existence of judicial review' even as to the constitutionality of the constitutional legislation itself (see paragraph 46 of his opinion).

44. My conclusion is therefore that my colleague Justice Cheshin has presented the old arguments (some better, some less so) that were raised in the nineteen-fifties and sixties. All these contentions have been answered. The

answers were sufficient when they were made. They are certainly sufficient today. As I have attempted to show, the Knesset's constituent authority does not come to it merely by inheritance from the original Constituent Assembly (according to Kelsen's view). I have reiterated that the recognition of the Knesset's constituent authority reflects the general rule of recognition of Israeli law today (according to Hart's view). This is the best interpretation of the entirety of the legal and national history of Israel, as it is understood today (according to Dworkin's view). Indeed, regardless of the legal climate at the time the Constituent Assembly was dissolved, even had there been no Constituent Assembly at all, the question remains – what is the rule of recognition of Israeli law today? Does today's Israeli law recognize the Knesset's authority to endow Israel with a constitution? I have answered this question affirmatively. To support my position, I have presented the Knesset's understanding of itself; the party platforms from various elections, which manifest the subjects on which the nation gave its opinion in those elections; the words of scholars and academics reflecting the professional consensus; the opinions of the Supreme Court; and the Knesset's response to them. All these together – with no possibility of viewing any individual element as providing the answer – provide a "factual basis" for my legal conclusion that today, as in the past, the Knesset's power to endow Israel with a constitution is recognized. My conclusion as to the Knesset's authority to enact a constitution is based upon a broad "factual basis." It is the result of the constitutional history, the Knesset's understanding of itself, the basic understanding of scholars and authors, the understanding of the electorate that voted in the various elections, the decisions and dicta of the judges and the response of the Knesset. This is where my criticism of Justice Cheshin's position lies. His position does not accord with the understanding of today's Israeli community. It is not the best explanation for the entirety of the social and legal history of the State of Israel. It does not grapple with the constitutional problem.

45. Professor Dworkin's position is germane. He addresses the question of whether the British Parliament is empowered to adopt a bill of human rights that would limit the Parliament's legislative power and prohibit Parliamentary amendment of the bill of rights, except by special majority. Professor Dworkin considers whether the Parliament's decision is in itself sufficient to create entrenchment and self-limitation, and he concludes that the answer to this question is no. He notes that the principle of parliamentary supremacy:

> '[D]oes not owe its authority to any parliamentary decision, because it would beg the question for Parliament to decide that its own powers are unlimited.'

He continues:

> 'British lawyers say that Parliament is an absolute sovereign because that seems (for most of them intuitively and unreflectively) the best interpretation of British legal history, practice and tradition. But legal history and practice can change with great speed' (R. Dworkin, *A Bill of Rights for Britain* (1990), at pp. 26-27).

And I ask: when a Justice of the Supreme Court regards our legal history, its ways and traditions, as it appears before us today – against the background of the Declaration of Independence, the convening of the Constituent Assembly, the Harrari Decision, the election campaigns in which the parties reiterated their aim to enact a constitution for Israel, the enactment of twelve Basic Laws including entrenchment and limitation clauses, the case law and the Knesset's response thereto, and the position of the legal community – does this not demand a determination that today the Knesset is endowed with constituent authority; that today, alongside its legislative authority, lies the Knesset's authority to enact a constitution? Is this not the best interpretation of our national history? Is this not the best explanation for our "system of national life" (in the words of Justice Agranat in HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [4], *supra*, at p. 884)?

46. We will now consider the question of the Knesset's power to limit its authority to amend the Basic Laws – whether the best explanation for this arrangement, against the background of our entire constitutional history is my colleague's explanation as to the nature of majority and the method of counting abstentions, or my explanation that this power is the expression of the Knesset's constituent authority. My colleague seeks to address this question from within the Knesset's enactments and its internal rules. In my view we cannot solve this problem without looking outside the Knesset. This problem may be solved according to our present understanding of the entirety of Israel's legal history. The best explanation for this understanding is that the Knesset sought to limit its legislative power as to constitutional matters; that it saw itself as functioning within the scope of the constitutional undertaking; that it saw itself as preparing a constitution for Israel. We will consider as well the entrenchment provisions of the Basic Law: The Knesset. In light of our legal and social history, is the best explanation for this requirement that the

Knesset was thereby attempting to count abstentions and non-participating votes as "votes against," out of a desire to provide for a "regular" majority? Perhaps the better explanation is that this was an attempt to create a constitutional supra-legislative norm, intended to ensure the stability of the system. Consider Basic Law: Human Dignity and Liberty. Is the best explanation for this Basic Law that the Knesset sought to prevent infringement of those basic rights by a later Knesset without consciously and expressly setting out its intention to do so (according to the position of my colleague Justice Cheshin)? Perhaps the better explanation is that the Knesset sought to prevent infringement of those basic rights by a later Knesset not fulfilling the requirements of the entrenchment provision, thereby preventing a later Knesset – one that explicitly announces its intention to deviate from the Basic Law – from achieving its goal? Is not this explanation – my explanation – the only one that reconciles the provisions of Basic Law: Human Dignity and Liberty with the provisions of Basic Law: Freedom of Occupation, which includes an express instruction – intended to achieve my colleague's interpretation in the context of this law – regarding the override clause, when such a provision is absent from the Basic Law: Human Dignity and Liberty? Is the best explanation for our legal history that the use of the term "Basic Law" is merely formal, without any underlying significance? Or is the best explanation for use of the term 'Basic Law' that the matter is substantive in character, and reflects the preeminent normative status of the Basic Law? Consider s. 1A of Basic Law: Human Dignity and Liberty, which provides that 'this Basic Law' – this and not an item of regular legislation – 'is intended to protect Human Dignity and Liberty, in order to safeguard in a Basic Law' – in a Basic Law and not in regular legislation – 'the values of the State of Israel as a Jewish and democratic state.' Is it not artificial to consider the term 'Basic Law' in this section as merely formal? Should it not be seen as the expression of a more profound legal and social outlook under which the Knesset is engaged in preparation of a constitution, in the context of which it seeks to protect human rights in order to safeguard the values of the State of Israel as a Jewish and democratic state? It should be noted that I do not claim that the issue is "black-and-white." I am well aware of the contentions of the various Members of Knesset that were raised against the constitutional enterprise; I am aware of the authors who argued against it. But when a judge must ask himself – while taking into account the entire picture – what is the outlook of Israeli society today, against the background of the multi-faceted constitutional enterprise undertaken since the establishment of the State, and in light of the two latest Basic Laws and the reactions to them, my answer is

that the Israeli Knesset is endowed with constituent authority. Indeed the judge's task is to give our legal and social history the explanation that best accords with the legal and social data.

47. Running through Justice Cheshin's opinion is his determination that recognizing the Knesset's constituent authority violates Israeli democracy. In his view, 'it is unthinkable that the representatives of a majority of the nation would take a position, but be prevented from achieving their aim of amending a Basic Law by our having erected a legal construct of dual authorities' (paragraph 69). 'It seems to me that obstructing the majority is a patently anti-democratic procedure' (paragraph 69). "True" democracy, in the view of my colleague, Justice Cheshin, is democracy in which all decisions are adopted by a majority (an absolute majority) of the Members of Knesset. 'A determination that a statute cannot be voided, amended or infringed except by a majority of more than 61 votes ... is a patently anti-democratic determination' (paragraph 97). 'When majority rule is removed, the spirit of democracy is extinguished' (paragraph 101). 'A statute enacted by the Knesset is the law of Israel, as long as it does not injure the heart of democracy, the principle of majority rule' (*ibid.*). In my opinion this is a one-sided and fragmented approach to democracy. I discuss this at greater length in that section of my opinion dealing with the basis for the judicial review of constitutionality. My basic position is that the Knesset's legislative authority to amend its laws should not *prima facie* be limited. Such limitation violates the principle of majority rule, without which there is no democracy. Such limitation enables the past to reign over the present on day-to-day matters. Such limitation enables the present majority, which chose today's Knesset, to limit a future majority, which will choose the future Knesset. One generation may thereby dictate the day-to-day behavior of another generation. In the absence of a social agreement expressed in the implicit rules of the system, such a result should not be allowed. Up to this point, Justice Cheshin and I are of the same opinion. But, at the same time, my position is that "true" democracy recognizes the power of the constitution – fruit of the constituent authority – to entrench the fundamental human rights and the basic values of the system against the power of the majority. Such a limitation of majority rule does not violate democracy but constitutes its full realization (as discussed above). In this I join my colleague President Shamgar, and with him disagree with the opinion of my colleague Justice Cheshin. Indeed we are adjudicating the matter of the constitution as well as constitutional human rights. In this context, endowing the majority with the power to infringe the rights of the minority is an undemocratic act. Protecting individual rights, minority rights and the fundamental values of the

legal structure against the power of the majority is a democratic act. Justice Jackson noted this as follows:

> 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections' (*West Virginia State Board of Education v. Barnette* [92], at p. 638).

Indeed, "true" democracy cannot exist without limitation of the power of the majority so as to protect the values of the State of Israel as a Jewish and democratic state, and so as to protect the fundamental values, of which human rights are primary. Democracy of the majority alone, unaccompanied by a democracy of values is formal, "statistical" democracy. True democracy limits the power of the majority in order to protect the values of society, 'the values of the State of Israel as a Jewish and democratic state,' and the 'recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free' (s. 1 of the Basic Law). Of course, it is possible to think otherwise. It is possible to be satisfied with "formal" democracy. But the State of Israel chose differently. Since the Declaration of Independence and up to the present day we have chosen the constitutional path. We sought to endow ourselves with a constitution that would limit the power of the majority in order to fulfill the fundamental values of the State of Israel as a Jewish and democratic state. This choice was not made by judges. It was made by the nation. Once this choice is made, the judges are required to uphold it regardless of their own personal opinions (see B. Ackerman, *We The People: Foundations* 272 (1991); J. Rawls, *A Theory of Justice* 228 (1983)). The fundamental values and basic human rights are so deep and so important that the courts of various countries are prepared – without any constitutional text – to negate parliamentary power to infringe those values. Indeed, in a number of common-law legal systems the recognition is slowly developing that certain fundamental values cannot be infringed by the legislature, even in the absence of a written constitution. The bitter experience of Nazi Germany, *inter alia*, has contributed to the understanding of this issue (see my opinion in the *Laor Movement* case [21]; Tal, "The All-Powerful Legislature: Indeed?" 10 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1984) 361; Woolf, *Droit*

Public - English Style Public Law (1995), at p. 57; and P. Joseph, *Constitutional and Administrative Law in New Zealand* (1993), at pp. 444, 454). The matter has progressed so far that, at times, courts are prepared to negate the effect of a baseless constitution (see H.H. Cohn, "Faithful Interpretation – A Third Conclusion," 7 *Hebrew Univ. L. Rev. (Mishpatim)* (1976) 5; EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [48]). We need not go so far. We have a constitutional text. We have a national history of recognizing fundamental values that stand above regular legislation. All that is left is judicial recognition that the law is constitutional. We grant this recognition today.

48. My colleague Justice Cheshin reiterates that the nation was not consulted, 'and we did not ask the nation' (paragraph 67). My colleague asks again, 'And where was the nation? Is it not fitting that we seek its opinion? On the contrary, we should turn to the nation and ask its opinion' (paragraph 63). Indeed, in a democratic state sovereignty rests in the hands of the people. The Knesset does not have sovereignty; neither does the government, nor the courts. The nation has sovereignty. The entire social and legal structure is based upon this principle. The constitution and the Basic Laws arise from the nation and depend upon the nation, and the nation may change them. The Knesset's constituent authority stems from the nation, and is recognized by the nation; the Knesset does not exercise this authority behind the back of the nation. My opinion is but an attempt to declare that the idea of the constitution and its implementation are not the province of 'jurists and a few other highbrows – two or three at most' (paragraph 71), but rather that this idea is a reflection of the national consciousness; that the idea of the constitution and its preparation began with the Declaration of Independence, which was borne on the nation's shoulders; that it took form with the elections for the Constituent Assembly; that the idea of the constitution and its preparation did not evaporate with the dissolution of the original Constituent Assembly, but continued on in the Second Knesset. The party platforms, on the basis of which the people voted in all of the elections, attest that the idea of the constitution and its preparation continued and developed in every Knesset, and that in accordance with this idea, the Knesset enacted twelve Basic Laws; that in the various elections the nation was told that the parties sought a constitution for Israel; that based upon these declarations the nation went to the polls; that there were debates in the Knesset and among the public as to the content of the constitution and the need to continue its preparation. All these together enable the Court to declare today that in Israel the nation's basic understanding is that the Knesset is endowed with the authority to enact a

constitution for Israel. Indeed, many do not know what the 'Constituent Assembly' is, nor are they aware of the significance of constituent authority. But the vast majority of the members of the public know that our Knesset is the institution from which the constitution will derive and from which it has derived.

49. It is true that no special appeal was made to the public to approve the text of the Basic Laws, as it developed in the course of the Knesset debates over the years. But such an appeal was not necessary. It may be desirable, but it is not indispensable. Direct appeal to the nation is one method of adopting a constitution, and perhaps the most desirable. But this is not the only method and it involves considerable difficulty. The constitutional history of many nations recognizes constitutions that derived authority from the nation but were not presented for direct national approval. Every nation has its history; every nation has its constitutional development. Our political and legal culture is not based upon a special appeal to the nation by means of a referendum. No referendum has taken place in the past. Our political and legal culture is not built upon "direct" democracy, but upon "representative" democracy.

Our political and legal culture also maintains that the appeal to the nation takes place in the context of the elections for the Knesset. Such elections took place in Israel, and the issues of the constitution and the Basic Laws were on the agenda. The nation was asked; nothing was done without its knowledge. Indeed, this did occur in the elections for the First Knesset – the Constituent Assembly. Preparation of the constitution was but one of the many subjects addressed in those elections. This does not negate the First Knesset's constituent authority. The nation went to the polls many times. Every time the issue of the constitution and the Basic Laws appeared on the national agenda. The nation had its say in all of the elections, with different levels of intensity, according to the subjects that were then on the national agenda. Never was the constitutional ember extinguished. I do not see a substantive difference – from the perspective of the rule of recognition of today's Israeli legal system – between the elections for the Constituent Assembly, and all other elections. In the elections for the Constituent Assembly it was clear that the subject was election of an entity with dual authority, legislative and constituent. This was the case in the other elections as well. I agree, of course, that in the first elections constituent authority was emphasized. This is appropriate, and in this regard, there is, of course, a difference between the first and subsequent elections. But I do not think that this difference is so significant as to conclude

that the first elections bestowed constituent authority upon the body elected while subsequent elections did not.

Consider the matter of the Basic Laws on human rights. Can it seriously be claimed that they were adopted without the nation's participation? The Knesset has concerned itself with the question of human rights for more than thirty years. Beginning with Professor Klinghoffer's 1962 proposal, the Knesset and the Israeli public have reckoned with the question of human rights. Problems of religion and state have been debated at length. The status of Israel as a Jewish state and as a democratic state have been debated and tested. The Twelfth Knesset adopted Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. Thereafter, elections for the Thirteenth Knesset took place. The issue of the Basic Laws was raised in the party platforms. The Thirteenth Knesset was elected and enacted a new Basic Law: Freedom of Occupation.

Indeed, the public debates did not take place only in the Knesset. Broad segments of the public expressed their opinions as to the "constitutional revolution." The issue was discussed in primary schools and high schools. The issue penetrated the public consciousness. All of these factors have constitutional significance. A constitution is not merely a legal document. A constitution expresses the national experience. A special appeal to the nation is only one of the many ways in which such a program for national life can be developed. The nation was asked and the nation answered that it desires a constitution, and that it desires constitutional human rights. Indeed, the primary dispute in the nation – and such a dispute exists – is not as to constituent authority but as to the content of the constitution. Of course this matter requires national consensus. This agreement is expressed in the enactment of the Basic Laws. The Court must give effect to this agreement. Again, I do not claim that constitutional development in Israel is ideal. The constitutional enterprise could have been arranged differently. A "national seminar" on the content and details of the constitution would have been appropriate. Increased public awareness of the public debate would have been appropriate as well. But that is not the question before us. Our task today is not to plan the constitutional enterprise in advance. We are dealing with an analysis of the constitutional enterprise in retrospect. It cannot be said that the nation did not participate in the constitutional enterprise, and that the Members of Knesset acted behind the nation's back. Everything was done openly, in the public eye. The public expressed its opinion in the elections, and chose the parties that it desired, according to many factors, including party positions on

the constitution. Now, the Court must give constitutional effect to the constitution. That is what we are doing today.

e) The Knesset's authority to enact a constitution – Summary

50. I have come to the conclusion that the Knesset is authorized to provide Israel with a constitution; that it is empowered to 'entrench' the clauses of the constitution (whether by substantive or formal entrenchment). This authority is granted to the Knesset because it is vested with constituent as well as legislative authority. I have noted the many difficulties that stand in the way of any other construction. Fortunately, there is no need to deal with these other constructions in light of the explanation that the Knesset is endowed with both constituent and legislative authority. Indeed it may be said of constituent authority that if it had not been established as a constitutional fact it would have had to be invented, as a constitutional construct, since it provides the best explanation for the legal history of Israel. However, in our case, this doctrine is established and it is reflected in our constitutional history. There is no need to invent it. It expresses our social contract since the establishment of the State until today. Without it, constitutional continuity would be severed, and the effect of all the entrenched Basic Laws creating superior norms would be called into question. Their legal status would be diminished and the constitutional enterprise would lose its operative significance. Human rights in Israel would not be elevated to constitutional supra-legislative status. The expectations of generations for a constitution and supra-legislative human rights would be frustrated. All hope for a constitution would be lost. I am aware of the difficulties that underlie the doctrine of constituent authority. Nonetheless, these difficulties are not so insurmountable as to overturn the doctrine.

51. The doctrine of constituent authority affords significant advantages. First and foremost, it reflects the governmental history, the social contract and the basic viewpoints of the Israeli community. Second, it provides an appropriate instrument for accomplishing the task. The doctrine does not deal with the Knesset's general power to limit itself. It does not take a position as to the Knesset's ability to limit itself as to matters that are not constitutional. It treats only of the process of creating a constitution and this process alone, and it provides an answer that justifies this activity. It provides an Archimedean foothold, outside of the constitution that enables its enactment. It makes it possible to turn to the people – if such is their will – in order to strengthen the ties between the people and its constitution that have weakened in past years. Third, it accords with the constitutional experience of most countries throughout the world, which have followed a similar path in preparing their

constitutions. It does not transform a "regular" law into a "special" or "elevated" or "important" or "extraordinary" or "exalted" law. It does not deal with fine distinctions as to the scope of the limitation, the essence of the 'regular' or 'special' majority, or the status of abstentions. It takes the high road in determining that a Basic Law is not a "law" at all but rather a constitution. As a result, the way is paved for a systematic and orderly development of the body of constitutional rules connected with the constitution. It facilitates Israel's entry into the democratic constitutional community. Finally, it expresses the centrality of the Knesset in the fabric of Israeli democracy. The Knesset is endowed with constituent authority. It is true that in exercising its legislative authority the Knesset is subject to limitations that arise from the basic perceptions of the community as safeguarded in the constitution and the Basic Laws, which represent our national will. Nonetheless, when the Knesset exercises its constituent authority, it is free to enact a constitution for Israel. The Knesset, endowed with constituent authority, was entrusted by the Israeli community with the fate of the constitution.

II) Basic Laws and regular legislation

a) Continuation of the constitutional enterprise and its problems

52. The Knesset is empowered to enact a constitution. This authority was granted to the Knesset with the establishment of the State. At that time it accompanied a revolutionary process of national emancipation. The original authority did not immediately come into effect. It was already clear to the Provisional Council of State that preparation of the constitution would be protracted. The Harrari Decision provided that the constitution would be adopted in stages. Because of the political situation, the constitution was at times enacted not only 'chapter by chapter' but 'atom by atom' (see Karp, "The Basic Law: Human Dignity and Liberty – A Biography of Power Struggles," I *Mishpat uMimshal* (1993), at p. 323). As a result, the constitution was adopted without any connection to a particular event. As in many countries – such as Canada, Sweden, and Spain – our constitution is the product of natural social development. It results from a continuing 'evolution,' not a one-time 'revolution' (see B. Ackerman, *The Future of Liberal Revolution* (1992), at p. 47; E. McWhinney, *Constitution Making* (1981), at p. 13; R.R. Ludwikowski and W.R. Fox, *The Beginning of the Constitutional Era: A Bicentennial Comparative Analysis of the First Modem Constitutions* (1993), at p. 194). Moreover, preparation of the Israeli constitution took place over an extended period without parallel in the constitutional history of other

countries. Constitutional preparation commonly continues for many years. It is unusual for the constitutional enterprise to continue for more than forty years. For a variety of political and social reasons this has occurred in Israel. At times, the political will to establish the constitutional authority was lacking. At other times, the matter was prevented by circumstances. Indeed, we are different from other nations, even in the enactment of our constitution.

53. This prolonged constitutional enterprise is accompanied by a number of difficult problems. The various Basic Laws differ in the generality of their language. A small number of them contain 'limitation' provisions, limiting the process by which the laws may be amended; most are silent as to amendment procedures. Some Basic Laws include 'entrenchment' provisions, dealing with the power of subsequent laws to infringe the arrangements set out in the Basic Laws. Most are silent on this matter as well. This normative reality gives rise to difficulties of interpretation and to a lack of clarity as to the constitutional scheme. There is no alternative, therefore, but to clarify the constitutional picture. Without such elucidation, we cannot understand the status and scope of the Basic Laws in general, and Basic Law: Human Dignity and Liberty in particular.

b) The normative order

54. The Knesset is endowed with constituent authority. By that authority the Knesset enacted a constitution for Israel. It did so chapter by chapter in accordance with the Harrari Decision. Each of the Basic Laws constitutes a chapter in the constitution of the State of Israel. Each chapter stands at the head of the normative pyramid (cf. B. Akzin, *The Doctrine of Governments*, vol. 1 (1963), at p. 120). Thus, the State of Israel has a constitution – the Basic Laws. Below the constitution stand our statutes, the product of the Knesset's legislative authority. Beneath the statutes stands secondary legislation, the product of authority conferred by statute. The status of each norm in the normative pyramid is determined by the nature of the authority by which it is created, which, in turn, is grounded in the pyramid of institutions. Limitation does not create normative supremacy. Even when a statute can limit itself it cannot elevate itself (see Salmon, *Jurisprudence*, 12th ed. (1966), at pp. 85, 87). Normative supremacy reflecting the constitutional nature of the norm derives only from the existence of constituent authority. A constitutional democracy is, by its nature, 'dualistic': the constitution is created by the nation, whether directly (such as by referendum) or indirectly, by granting constituent authority to a governmental body (such as a special constituent assembly or an established legislative body). Statute is created by the nation,

acting through the legislative authority. Constituent authority is supreme and ranks above legislative authority. It does not constitute mere self-limitation of the legislative authority (Rawls, *Political Liberalism* (1993), at p. 223). In Israel, constituent authority is given to the Knesset. This authority exists alongside the Knesset's legislative authority. This dual authority in the hands of the same body raises a number of questions that must be answered.

c) The use of constituent authority is effected by means of the Basic Laws

55. The Knesset is empowered to enact a constitution for the State. How does it do this? When does the norm created by the Knesset have constitutional status and when can it be said that the norm is a 'regular' law? In my opinion the answer is that the Knesset uses its constituent authority (committing a "constitutional act," in the language of Rubinstein, *ibid.*, at p. 451) when it gives external expression in the name of the norm, denoting it a "Basic Law" (without specifying the year of enactment). This formal standard is consistent with the parliamentary experience. The Knesset did not denote as "Basic Laws" legislative enactments that were not of a constitutional nature. The Knesset was careful in the past to limit the term "Basic Law" to the chapters of the constitution, in accordance with the Harrari Decision. The Knesset attributes great importance to the use of the term "Basic Law." Thus, for example, Basic Law: Human Dignity and Liberty expressly states: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic State' (s. 1A). The double emphasis of the Law is not coincidental, and it reflects the uniqueness of the Basic Law. The parliamentary reality underscores this singularity as well. A committee was established – the Constitution, Law and Justice Committee – to deal with the enactment of the Basic Laws. At times a subcommittee on the constitution was established as well.

56. Moreover, every time that a Basic Law is submitted for a preliminary or first reading before the Knesset plenum, it is emphasized that another chapter in the constitution of the State is being brought before the Knesset.

Some examples follow:

(a) In submitting the proposed Basic Law: The Knesset (*Knesset Proceedings*, vol. 15 (1953) at p. 57), MK Bar-Yehuda noted as follows:

> 'In other circumstances I might see this moment as worthy of particular note in the annals of Israeli legislation. You, Members of Knesset, even those of you who were not members of the First

> Knesset, certainly recall the very long debate between the supporters of the Basic Constitution and the Basic Laws as to the relative value of those two, as to their unique means of protection and the need to distinguish between Basic Constitution or Basic Laws and ordinary laws.'

MK Bar-Yehuda analyzed the history of the Harrari Decision and presented the first Basic Law.

(b) The second Basic Law was adopted in the Third Knesset. This was Basic Law: Israel Lands. In presenting the proposed law for a first reading, the Minister of Finance, Mr Levi Eshkol, noted as follows

> 'It is not without deep feelings of respect that I make use of the privilege and obligation bestowed upon me to present before you and explain these laws connected with Basic Law: Lands of the Nation. I feel that with my words and participation, I stand as though beside a well from which we have drawn for generations, a well "which the nobles of the people delved" [Numbers 21:18]. And now at the close of the first decade and the beginning of the second decade of the State, we approach that well to deepen it, broaden it and fit it to the new conditions that have arisen with the establishment and existence of the State of Israel' (*Knesset Proceedings*, vol. 27, at p. 2839).

(c) In presenting the proposed the Basic Law: The President of the State – the third Basic Law – for a first reading, Minister of Justice Dov Yosef noted as follows:

> 'Today I am honored to bring before the Knesset the proposal for a law that will constitute another layer in the construction of the Basic Constitution of the State' (*Knesset Proceedings*, vol. 36, at p. 963).

(d) The fourth Basic Law is the Basic Law: The Government. It was adopted by the Sixth Knesset. At that time the Knesset moved to new premises. The first ceremonial session in the new premises was devoted to a first reading of the Basic Law: The Government. In presenting the law, the Prime Minister, Mr Levi Eshkol, stated as follows:

> 'This festive day, on which the Knesset inaugurates its new home, should be noted in a distinguished piece of legislation, which deals with the rules of law and governance in the State. Basic Law: The Government is a distinguished chapter in the

> future Israeli constitution. The constitution that the Knesset obligated itself to enact by a fundamental decision made in June 1950... The government's view is that the time has come for the Knesset to devote a considerable part of its legislative work to completing the missing chapters of the Constitution' (*Knesset Proceedings*, vol. 46, at p. 2504).

(e) The sixth Basic Law is Basic Law: The Army, which was adopted in the Eighth Knesset. In presenting the proposed Basic Law: The Army for a first reading, Minister of Justice Mr Zadok emphasized that:

> 'The government has toiled for a number of years to conclude the preparation of a system of Basic Laws that will be combined to form a complete constitution. It is therefore natural that the subject of the army, which is addressed in every written constitution, be dealt with in Israel in a Basic Law, which, as mentioned, will constitute one of the chapters of the Constitution' (*Knesset Proceedings*, vol. 74, at p. 4002).

(f) The ninth Basic Law is Basic Law: The Judiciary, which was adopted by the Ninth Knesset. In presenting the proposed Basic Law: The Courts for a first reading, the Minister of Justice, Mr Tamir, noted that:

> 'I am honored to bring before the Knesset the proposed Basic Law: The Courts, a law that is intended to define the constitutional principles by which the judicial authority will function in Israel… Recently the Ministerial Committee for Legislation completed Basic Law: Legislation, including the entire issue of the Constitutional Court. In addition, in the coming week we will renew the debates on the Basic Law: Human and Citizen's Rights. Thus we have proceeded with important and expeditious steps toward the great objective of endowing the State of Israel with a constitution' (*Knesset Proceedings*, vol. 83, at p. 3216).

57. Moreover, the Knesset debates on the Basic Laws were of a singular nature. The Knesset was aware that it was preparing an additional chapter for the State constitution. The members of Knesset were aware that they were not enacting regular legislation, but constitutional legislation, with far-reaching, long-term consequences as to the law and the character of the State. The debate was ceremonial. When the Basic Laws were enacted all were aware of the importance of the moment. The unique nature of the legislation was

formally expressed by the designation of the proposal and law as "Basic Law." This designation constituted an agreed-upon sign that the matter was constitutional; that constitutional continuity extended from the days of the Constituent Assembly and the Harrari Decision; that this legislation was not like all others; that the moment was unique. The designation of legislation as a "Basic Law" is not a formal technical matter. It is the substantive expression of the process by which the constitution was enacted.

58. Of course, all this has no formal expression, beyond the requirement that the legislation be designated as "Basic Law" without a specified year of enactment. But this is not significant. The constitutional answer often derives from the constitutional system and constitutional precedent even if they have no formal anchor. Moreover, our constitutional legislation is formally anchored. This formal test – the use of the term "Basic Law" – is simple. It provides security and certainty. This test raises two questions that I would like to set aside for further consideration. The first question is what is the constitutional status of legislation that preceded the Harrari Decision and that is not designated as "Basic Law"? Primarily, should not the Transition Law of 1949 be considered part of the State constitution? I am inclined to the view that there is constitutional legislation – the result of constituent authority – before the Harrari Decision as well. That said, this question may be reserved for further consideration. The second question concerns the role of future Knesset legislation that might abuse the term "Basic Law" by designating as such regular legislation with no constitutional content. This question is by no means simple; its answer extends to the very root of the relationship between the constituent authority (of the Knesset) and the judicial authority (of the courts). This question, as well, I would like to set aside for further consideration.

d) Amendment of one Basic Law by another Basic Law

59. A Basic Law is a chapter in the State constitution. It derives from the Knesset's constituent authority. In establishing a Basic Law, we find ourselves at the highest normative level. It therefore follows that a Basic Law, or any of its provisions, can be amended only by a Basic Law. A Basic Law may be amended by regular law only if the Basic Law contains an express provision to that effect. It is, nevertheless, true that the Supreme Court has held in the past that a Basic Law may be amended by regular law (HCJ 60/77 *Ressler v. Chairman of Knesset Central Elections Committee* [14]). That decision aroused criticism (see Klein, 'On Semantics and the Rule of Law – Reflections and Appeals of HCJ 60/77 *Ressler v. Chairman of the Knesset Central*

Elections Committee' 9 *Hebrew Univ. L. Rev. (Mishpatim)* (1978) 79). Later decisions left this entire question as requiring further consideration (see HCJ 119/80 *HaCohen v. Government of Israel* [23]).

60. In my opinion, one Basic Law may be changed only by another Basic Law. This is also the position of my colleague Justice Shamgar. Professor Akzin correctly noted that:

> 'A law that has been formally designated as a Basic Law cannot be changed, except by a law that has also been formally designated as a Basic Law' (Akzin, *ibid.*, at p. 237).

Professor Klein also took this position, emphasizing that:

> 'Supremacy does not derive from the majority requirement but from the authority creating the norm. Accordingly, even unentrenched Basic Laws are superior to regular legislation and, if it wishes to amend them, the Knesset must do so by means of the appropriate amendment procedures, and not by means of enacting a different, later law.'

Indeed, if the Knesset wishes to amend the clauses of a Basic Law – for example, changing the system by which the Knesset or the Prime Minister is elected – it must do so in a Basic Law. The only case in which this is not so is when the Basic Law itself provides for a different amendment procedure. Amendment of a Basic Law by another Basic Law may be explicit or implied. Indeed, two Basic Laws occupy the same normative level and therefore must be construed according to the principles governing two norms of equal status.

61. As I mentioned above, the prevailing view in the past was that a Basic Law could be amended by a regular law. In an opinion that I handed down more than fifteen years ago, I raised doubts as to that approach (see HCJ 119/80, OM 224/80, *HaCohen v. Government of Israel* [23], *supra*). As set forth in that opinion, a Basic Law may not be amended except by another Basic Law. Therefore, the provisions of s. 4 of Basic Law: The Knesset, which establishes the electoral system, may be changed only by Basic Law. It is true that the clause itself provides that 'this section shall not be varied, save by a majority of the members of Knesset.' I suggest that we determine that this provision relates to infringement of the electoral system – similar to infringement of the principle of equality in the *Bergman* case [15] and its offshoots – and not to changing the electoral system itself. It is clear that if the subject were a change in the electoral system – such as a change from proportional representation to regional elections – then not only would a Basic

Law be required, but also a 'majority of the members of Knesset' as set forth in s. 4 of Basic Law: The Knesset.

I am aware that in the past Basic Laws were amended by regular legislation. I do not seek to challenge the force of such amendments, which were supported by the decisions of this Court. Thus, what was done in the past will remain in force. But henceforth, a Basic Law may be changed only by another Basic Law. In order to permit amendment of a Basic Law by regular legislation, the Basic Law must include an express provision to that effect, which must explicitly provide that it deals not only with infringement of the arrangement set forth in the Basic Law – as I will discuss later – but also with amendment of the Basic Law.

e) Limitation of the Knesset's power to amend one Basic Law through another Basic Law ("the problem of rigidity")

62. When the Knesset exercises its constituent authority, is it empowered to limit its constituent authority to amend the Basic Law in the future, thereby 'fixing' its constitutional enactment? Thus, for example, is the provision of Basic Law: Freedom of Occupation, by which '[t]his Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knesset' (s. 7), constitutional and binding? Is the clause of s. 45 of the Basic Law: The Knesset (according to which ss. 9A, 44 and 45 of the Basic Law may not be revised except by a majority of eighty Members of Knesset) binding? Is the Knesset authorized to provide in Basic Law: Legislation that a Basic Law may not be adopted or amended except by a majority of two-thirds of the Members of Knesset? In my opinion, the answer is yes. In exercising its constituent authority the Knesset may limit the future use of its constituent power. This derives from the very essence of the constituent function. This function aims to create a document that entrenches norms that may be altered only in a special way. The constituent function is intended by its very nature to create a formal constitution, the inherent significance of which is the establishment of provisions as to the means by which the constitution may be amended, and which may themselves be amended in accordance with these provisions, failing which the amendment is unconstitutional (the "unconstitutional constitutional amendment'). Indeed, the power of the Knesset – when it exercises its constituent authority – to limit itself, and thereby "entrench" its provisions, derives from the very grant of its authority to enact a formal constitution.

63. Most Basic Laws do not include limitation clauses. The "rigidity" of Basic Laws is expressed in only a few of the Basic Laws. We may conclude

that in the absence of a "rigidity" provision, a Basic Law may be amended by a Basic Law adopted by a regular majority. Thus, for example, Basic Law: The Judiciary or Basic Law: Human Dignity and Liberty may be amended by another Basic Law adopted by a regular majority. Note that the absence of a limitation clause does not detract from the normative status of the Basic Law as a superior norm in the Israeli legal system. The absence of a limitation clause negates the rigidity of the Basic Law in relation to other Basic Laws, and permits its amendment or infringement by a Basic Law enacted later by a regular majority. The absence of a limitation clause does not lower the status of the Basic Law to the level of regular law. A non-rigid Basic Law is still a Basic Law. It is not a "regular" law and it cannot be amended by regular legislation.

f) Basic Law and regular law

64. A Basic Law is a chapter in the constitution. It stands "above" regular legislation. As we have seen, a regular law cannot amend a Basic Law. Can a regular law affect the arrangements set forth in the Basic Law? The apparent answer is that the regular law cannot do so unless the Basic Law so permits. This conclusion follows from the supremacy of the Basic Law. Such supremacy prevents a regular law from affecting the arrangements of the Basic Law. At the same time, this supremacy itself leads to the conclusion that a Basic Law may provide for conditions and circumstances under which regular legislation may infringe the arrangements set forth in the Basic Law. The hand that gave is the hand that hath taken away. The presumption is therefore that regular legislation may not impinge upon the arrangements set forth in a Basic Law unless the Basic Law expressly provides otherwise. However, the case law of the Supreme Court has upset this presumption. The Court has decided that in the absence of an 'entrenchment' provision – i.e. a provision entrenching the Basic Law against infringement by regular legislation – the latter may encroach upon the arrangements set forth in the former (see HCJ 148/73 *Kaniel v. Minister of Justice* [13]; HCJ 60/77 *Ressler v. Chairman of Knesset Central Elections Committee* [14], *supra*; HCJ 107/73 *'Negev' – Automobile Service Stations Ltd v. State of Israel* [12]. This precedent has developed from the directive contained in s. 4 of Basic Law: The Knesset. Under that section, the election system provided for in the statute may not be changed 'except by a majority of the Members of Knesset.' This is an instance of "formal entrenchment" that protects the Basic Law against infringement by regular legislation, but permits possible infringement by legislation enacted by the special majority set forth in the Basic Law. In light of the entrenchment

provision set forth in s. 4, the Court concluded that regular legislation may infringe other arrangements set forth in a Basic Law when the Basic Law does not provide for entrenchment. If this were not the case, the clauses of a Basic Law that are silent as to entrenchment would be more strongly safeguarded against infringement by regular legislation than the clauses of a Basic Law protected by a special entrenchment arrangement that was certainly intended to strengthen rather than weaken the safeguard. While this conclusion is possible, it is not mandatory. The Court could have concluded that in the absence of an entrenchment provision, the provisions of a Basic Law may be infringed by regular legislation, but only where that infringement is explicit. It would therefore have been possible to continue to emphasize the superior normative status of the Basic Law, while at the same time maintaining the appropriate distinction between a Basic Law providing for entrenchment and a Basic Law that is silent in this regard. I would like to reserve this issue for further consideration, since Basic Law: Human Dignity and Liberty contains an entrenchment provision. The entrenchment called for in the Basic Law is not formal, requiring a particular majority in order to pass the infringing law. Rather, the entrenchment is substantive, permitting infringement by means of regular legislation only if the regular legislation meets the substantive requirements. The limitation clause set forth in section 4 of Basic Law: Freedom of Occupation and section 8 of Basic Law: Human Dignity and Liberty provides for substantive entrenchment. Under that provision, regular legislation may not infringe the human rights protected by the Basic Law unless it fulfill the substantive requirements of content. This entrenchment provision is binding. It is legal. It negates the power of non-complying regular legislation to infringe the human rights safeguarded by the Basic Law.

g) Substantive entrenchment provisions in the Basic Law and express infringement in regular legislation

65. A Basic Law provides that no legislation may infringe its provisions unless certain substantive requirements are met (substantive entrenchment). A regular law expressly infringes the clauses of the Basic Law without meeting the required substantive requirement. What is the fate of the regular law? In my opinion this regular law is unconstitutional. It may be declared void.

Indeed, just as a regular law may not implicitly infringe the clauses of an entrenched Basic Law – because it is on a lower normative level than the entrenched Basic Law – so it may not explicitly encroach upon those provisions. The express provision of the regular law emphasizes its constitutional position, enabling the judicial conclusion that the law indeed

infringes the arrangement set forth in the Basic Law. Of course, this conclusion does not apply when the Basic Law expressly provides that despite non-compliance with the substantive entrenchment provision, the Basic Law may be infringed by regular legislation meeting certain formal conditions. Such a provision may be found in the override clause set forth in section 8 of Basic Law: Freedom of Occupation. Thus, in order for regular legislation that infringes a Basic Law to be constitutionally valid, the Basic Law must contain an express provision to that effect. The fact that the Basic Law is silent in this regard precludes such infringement. The constitutional difference between an entrenched Basic Law and non-entrenched Basic Law is therefore made manifest. Both are Basic Laws. Both occupy the primary normative level. Nonetheless, they are different. The arrangements of an entrenched Basic Law cannot be infringed by regular legislation unless the entrenchment requirements are met. In contrast, the arrangements of a non-entrenched (or silent) Basic Law may be infringed by regular legislation. This distinction between the different Basic Laws will, of course, disappear with the entrenchment of all the Basic Laws, as recommended in the draft of Basic Law: Legislation.

h) Limitation in regular legislation

66. What is the rule in regard to a limitation clause included in a "regular" law, under which such law may not be amended or infringed except by regular legislation meeting specified requirements (as to form or content)? For example, what is the rule in regard to s. 3 of the Law for Protection of Public Investment in Israel in Financial Property, 5744-1984? This section provides that 'this law may not be amended nor may the appendix be revised except by a majority of the Members of Knesset.' Is there a difference in this context between a limitation that calls for 'a majority of the Members of Knesset' and one that calls for 'a majority of two-thirds of the Members of Knesset' or of eighty Members of Knesset? The answer to this question highlights the substantive difference between the doctrine of unlimited Knesset supremacy and the doctrine of constituent authority. According to the former doctrine, the Knesset may exercise its unlimited supremacy in order to limit its own legislative authority. In contrast, the doctrine of constituent authority recognizes the Knesset's power to exercise its constituent authority in order to limit its power.

The doctrine of constituent authority does not address the question of whether the Knesset is empowered to exercise its legislative authority in order to limit its future use of this authority. Because this question does not arise in

the appeal before us I would like to reserve it for further consideration. I will note only that recognizing that the Knesset may effect such a limitation by means of its constituent authority does not, in and of itself, lead to the conclusion that the Knesset may effect such a limitation by means of its legislative authority. As we have seen, the constitutional limitation prevents today's majority from changing arrangements adopted in the past. This is justified by the nature of the constitution and the rationale upon which it is based. The constitution deals with the basic issues of governmental structure and human rights. It seeks to prevent their infringement by regular legislation. It treats of the constitutional institutions – the Knesset, government and courts – whose stability must be ensured. It treats of the basic values that society endeavors to secure. A society that seeks a constitution, seeks by means of the constitution to remove certain values from the reach of the "regular" majority (see J. Rawls, *Theory of Justice* (1983), at p. 228; B. Ackerman, *We The People: Foundations* (1991), at p. 272). In contrast, recognizing the power of regular legislation to limit itself prevents today's majority from changing the day-to-day arrangements adopted in the past. Such recognition would require that we consider why one generation should be granted the power to dictate the day-to-day behavior of another generation. Indeed, recognizing the Knesset's power as a legislative authority to limit its legislative power requires a supporting constitutional doctrine. Because this question has not arisen before us, I would like to reserve it for further consideration.

67. In this regard, I would also like to reserve for further consideration the question of whether there is a substantive difference between a limitation requiring a "majority of the Members of Knesset" (an "absolute majority") and a limitation requiring a greater majority. This distinction stands at the base of my colleague Justice Cheshin's approach. For myself, I harbor grave doubts that an "absolute majority" requirement is the simple result of a democratic arrangement. According to such a requirement, an abstaining MK is seen as voting no. This abrogates the right to abstain of the MK who is truly not prepared to vote yes or no. This is a most serious abrogation. I question whether it falls within the rubric of the democratic outlook. The MK's "right" of non-participation is similarly denied, for every non-participation is construed as a vote against. The possibility of a 'setoff' between votes for and against is also denied, for the significance of every such setoff arrangement is that both are seen as votes against. All these raise most serious questions. On the surface, the "democratic majority" is a majority of the Members of Knesset actively voting. This is the case in the various parliaments around the world (see Inter-Parliamentary Union, "Methods of Voting," 32 *Constitutional*

and Parliamentary Information (1982) 179, 203). A change in the voting system requiring a majority of all Members of Knesset (and six Members) on its face calls for justification by a constitutional doctrine. It is not derived from the "voting rules" themselves (see *United States v. Baellin* [93], at pp. 507, 509). We need not decide this question in this appeal. Our issue is the entrenchment provision of a Basic Law, not the limitation clause of a regular law. I therefore wish to reserve this question for further consideration.

i) The Basic Law regarding human rights and regular legislation

68. Until this point, I have examined the status of the Basic Laws as such. I will now turn to the two Basic Laws on human rights. Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty were – as their names signify – were enacted by the Knesset under its constituent authority. They therefore occupy the highest normative level. They cannot be amended by regular legislation (either explicitly or implicitly). Can regular legislation infringe the provisions in those laws? The answer is that these two Basic Laws are not silent Basic Laws. They include entrenchment provisions. They provide for an express, detailed scheme as to the power of regular legislation to infringe the arrangement safeguarded by the Basic Laws. This scheme is constitutionally valid, and must be given effect. It is not subject to change or infringement except by Basic Law. This unique scheme is given expression in the two central provisions common to both Basic Laws, the application clause and the limitation clause. The scheme is also expressed in a third provision, the override clause, which appears only in Basic Law: Freedom of Occupation.

69. The application clause of Basic Law: Freedom of Occupation provides as follows:

> 'All governmental authorities are bound to respect the freedom of occupation of all Israeli nationals and residents' (s. 5).

The parallel provision in Basic Law: Human Dignity and Liberty provides:

> 'All governmental authorities are bound to respect the rights under this Basic Law' (s. 11).

Similar provisions appear in other constitutions (see s. 1(3) of the German Basic Law and s. 32(1) of the Canadian Charter of Rights and Freedoms). The application clause applies to all government authorities. It applies to the legislative authority, the executive and the judiciary. It applies to the central and local authorities. It applies to every authority granted power by law. This is a central provision. It declares the direct legal effect of the Basic Laws upon

the governmental authorities. It weaves the basic rights into the fabric of all governmental decisions. Above all, it obligates the legislature – one of the governmental authorities – to honor human rights. The "regular" laws are therefore subject to human rights. The regular legislature is not all-powerful. The legislative power given to the legislature is subordinate to its obligation to honor human rights. The application clause breaches the silence of the two Basic Laws as to human rights. It substantively entrenches the clauses of the Basic Law against infringement by regular legislation. It thereby expressly declares that regular legislation must honor human rights, and certainly may not infringe them, except as provided in the Basic Laws themselves. The application clause is not merely declarative. It is a substantive provision that constitutes an important axis upon which the constitutional structure depends. It is similarly expressed in other legal systems (such as Canada and Germany), in which comparable provisions are found.

70. The "limitation clause" of Basic Law: Freedom of Occupation provides as follows:

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

A parallel provision appears in Basic Law: Human Dignity and Liberty, as follows:

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

These are the key provisions in both Basic Laws. The limitation clause – as its name indicates – limits both the legislature and human rights. This is a substantive entrenchment provision. Its purpose is twofold: the constitutional protection of human rights while providing the constitutional criteria that permit infringement of human rights. These criteria – set forth in a preeminent constitutional document – provide the means by which the legislature may legally infringe human rights. Expression is thereby given to the normative relationship between Basic Laws and regular legislation. Regular legislation cannot – explicitly or implicitly – infringe the human rights safeguarded by these Basic Laws unless it meets the requirements of the limiting clause. In his

analysis of the limitation clause in Basic Law: Human Dignity and Liberty, Dr Maoz notes that this provision takes precedence over all legislation. He adds:

> 'This preference derives not from the legislature's intention not to infringe the limitation clause, but from the entrenchment – or limitation – in which the constituent authority garbed the limitation clause. In forbidding the legislature to enact a provision infringing the human rights safeguarded by the Basic Law, except in accordance with the conditions set out in the limitation clause, the constituent authority obviously nullified the legislature's power to do so, be the legislature's intent what it may.' (Maoz, *ibid.*, at p. 149)

71. The third provision that provides constitutional arrangements as to the relationship between the two Basic Laws and regular legislation is the override clause, which is found only in Basic Law: Freedom of Occupation and provides as follows:

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

This provision is unique. It expresses formal entrenchment. It was influenced by a similar provision in the Canadian Charter (s. 33) but includes several important changes. It permits the regular legislature – under certain conditions – to enact a (regular) law infringing the freedom of occupation even if the law does not fulfill the requirements of the limitation clause. The two conditions are as follows: first, the regular law must expressly provide that it has effect notwithstanding the provisions of Basic Law: Freedom of Occupation; and second, the regular law must be enacted by a majority of the Members of Knesset. When these two conditions are met, constitutional validity will be granted to a law that infringes the Basic Law for a period of four years. At the end of that period the law expires. Thus another route is opened – parallel to that provided in the limitation clause – to permit the infringement of a basic right (freedom of occupation). In using its constituent authority, the Knesset thus expressed its view that regular legislation – which does not meet the requirements of the limitation or override clause – may not infringe the freedom of occupation. No similar provision appears in Basic

Law: Human Dignity and Liberty. In this respect, the human rights set forth in Basic Law: Human Dignity and Liberty are more strongly protected against the effects of regular legislation than the freedom of occupation.

j) Legislation that lawfully infringes a protected human right

72. Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation therefore set out the legal status of regular legislation that infringes the human rights safeguarded in the Basic Laws. If a regular law fulfills the entrenchment requirements (formal and substantive) set out in the Basic Law, the regular law is constitutional. This expresses the central idea that human rights – set forth in the Basic Laws in absolute terms – are relative rights. Human dignity, freedom, property, movement, privacy and freedom of occupation are not absolute rights. They are subject to infringement in order to protect the social framework. It should be noted that the constitutionality of the infringement does not make the infringing law part of the constitution. The constitutionality of the infringement does not lower the constitutional status of human rights. The constitutionality of the infringement means that the constitutional human right is subject to infringement by regular legislation if such legislation meets the criteria set forth in the constitution. There is a substantive difference between amendment of the constitutional human right and its infringement. Amendment of the human right constitutes amendment of the constitution, and requires legislation at the same normative level, i.e. by means of a Basic Law. Infringement of a constitutional human right may be accomplished by means of regular legislation that meets the requirements of the constitution. There is no need for a constitutional edict, since the constitutional right itself does not change. Regular legislation is sufficient, as long as it fulfills the parameters set forth in the Basic Law itself.

73. The status of regular legislation that infringes a protected human right is therefore different according to each of the two Basic Laws. The right protected in Basic Law: Freedom of Occupation is subject to infringement by two alternative means. First, if the infringing legislation accords with the limitation clause; second, if it is enacted in accordance with the override clause. Regular legislation that does not meet either of these alternatives is unconstitutional and therefore void. Accordingly, regular legislation adopted by a regular majority that infringes freedom of occupation and does not fulfill the requirement of the limitation clause is unconstitutional, even if such a law expressly states that it infringes freedom of occupation. The rights safeguarded in the Basic Law: Human Dignity and Liberty are subject to infringement only by means of the limitation clause. The Basic Law does not provide a second

path in the form of an override clause. There is also no possibility of creating a judicial override clause, nor any need to. Therefore, regular legislation – by whatever majority it is enacted – that infringes a human right protected by this Basic Law, that expressly provides that it is adopted 'notwithstanding the provisions of the Basic Law' or that it is expressly intended to impinge upon its arrangements, will not be constitutional if it does not meet the requirements of the limitation clause. In the absence of an override clause, there is no means by which this express provision can save the regular law from unconstitutionality. On the contrary, an express provision such as this points up what is in fact the constitutional status of the law, facilitating the judicial determination that the law indeed violates a protected human right.

The result, therefore, is that the human rights safeguarded in Basic Law: Human Dignity and Liberty enjoy more comprehensive protection than that afforded freedom of occupation, insofar as the matter concerns infringement by regular legislation. The picture changes when the infringement (or amendment) is based upon a Basic Law. A special majority ('a majority of the members of the Knesset') is required in order to amend Basic Law: Freedom of Occupation (s. 7). A regular majority is sufficient to amend the human rights safeguarded in Basic Law: Human Dignity and Liberty. This is, without doubt, anomalous. This may be corrected by Basic Law: Legislation, which will make all of the Basic Laws, and the arrangements safeguarded therein, subject to identical requirements as to amendment or infringement.

III) *Judicial review of constitutionality*

a) Constitutional supremacy and judicial review

74. The constitution is the superior norm of the legal system. A regular law may be permitted to conflict with the clauses of the constitution only if it meets the criteria provided in the constitution itself. What is the fate of a law that does not meet these criteria? What is the remedy for an unconstitutional law? (For a discussion of these questions see A. Shapira and B. Bracha, "The Constitutional Status of the Rights of the Individual," 5 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1972) 20, 42). The answer to these questions depends first and foremost upon the provisions of the constitution itself. Often the constitution establishes – and is empowered to establish – the legal sanctions imposed upon an unconstitutional law. Thus, for example, the "Supremacy Clause" of the Canadian Charter of Rights and Freedoms (s.(1)52) invalidates conflicting legislation that does not meet the requirements of the Constitution, as follows:

> 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the clauses of the Constitution is, to the extent of the inconsistency, of no force or effect.'

Similar provisions are found in many modem constitutions, particularly those of European countries after the First World War. Such provisions proliferated in the constitutions of European countries after the Second World War and the victory over the Nazis. One of the lessons of the Second World War was that constitutional supremacy and judicial review of constitutionality are potent weapons against the enemies of democracy (see E. McWhinney, *Judicial Review* (1960); M. Cappelletti, *Judicial Review in the Contemporary World* (1971); M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989); A. Brewer-Carias, *Judicial Review in Comparative Law* (1983)).

But what is the rule when the constitution is silent in this matter? The answer to this question depends upon the culture and tradition of the legal system. It is determined by the adjudication rule of the particular legal system (see H.L.A. Hart, *The Concept of Law*, *ibid.*, at p. 96). Thus, for example, it may be recognized – as was the tradition in nineteenth century Europe – that the constitution binds the institutions of the government. However, noncompliance with a constitutional directive does not lead to invalidation of the law, and the Court is not empowered to impose the sanction of voiding such legislation. According to this view, the obligation to ensure compliance with the constitution rests with the government institutions themselves, and if they violate this obligation, the sanctions are in the hands of the public on election day (see Akzin, II *The Doctrine of Governments*, *ibid.*, at p. 9). But this is not the only view, nor is it the most widely held. Today this is the minority view. Indeed, a particular legal tradition and culture are likely to lead to the conclusion that constitutional silence in this matter should be interpreted as calling for the invalidation of conflicting legislation and to the concomitant conclusion that the determination of whether such a conflict exists rests not with the legislature but with the court. Under this view, constitutional silence requires judicial review and authorizes the court to declare unconstitutional legislation void. We will now examine this tradition.

b) The case of Marbury v. Madison

75. The American legal tradition – since the 1803 decision in *Marbury v. Madison* [94] – is that a statute that conflicts with the clauses of the constitution is void, and any court is empowered so to declare. The United States Supreme Court reached this conclusion despite the absence of an express provision to that effect in the Constitution of the United States. Justice Marshall wrote:

> 'The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.'

Indeed, the constitution is intended to limit the legislature. This limitation is meaningful only if a regular law cannot prevail over the constitution. There is no middle ground: either the constitution is supreme and may not be amended by regular means, or it has the same status as a regular law, which the legislature may change at its whim. Justice Marshall added:

> 'If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and Constitution apply to a particular case, so that the

> court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.'

Since that decision, it is beyond doubt in the United States that legislation conflicting with the Constitution is void, and it is the role of the court – in interpreting the Constitution and the law – to determine the existence of a conflict, as well as its consequences. Thus arises the doctrine of the judicial review of constitutionality. This doctrine is a cornerstone of the American constitutional system. Remove it and the entire structure collapses.

c) Judicial review of constitutionality – the modern experience

76. The American experience with judicial review of constitutionality has spread well beyond that country. That experience has influenced constitutional thinking throughout the entire world. It has dominated the various constitutional systems established since the Second World War. It has been accepted as the guideline in all of the Eastern Bloc states since the liberation from Soviet control (see Schwartz, "The New East European Constitutional Courts," 13 *Mich. J. Int. L.* (1992) 741). This may be the central contribution of American constitutional thought to constitutional thinking throughout the world.

As we have seen, express provisions in this regard appear in the constitutions that have been adopted by many states after the Second World War (see, e.g., the constitutions of Germany, Japan, Italy, Ireland, Austria, Cyprus, India, and Turkey). Even in states whose constitutions do not include express provisions in this regard – and that are part of the common law legal culture – the view has become accepted that an unconstitutional law is invalid, and the court is empowered so to decree (see, e.g., Cowen, "Legislature and Judiciary," 15 *Mod. L. Rev.* (1952) 282; 16 *Mod. L. Rev.* (1953) 273). An increasing number of states have recognized the judicial review of constitutionality. Justice Frankfurter justly noted that the conclusion reached by the American Supreme Court in the *Marbury* case [94]:

> '[H]as been deemed by great English speaking courts an indispensable, implied characteristic of a written Constitution' (F.

> Frankfurter, "John Marshall and the Judicial Function,"' 69 *Harv. L. Rev.* (1955) 217, 219).

Indeed, a long list of judicial decisions throughout the common-law world has recognized – in the absence of an express constitutional provision – judicial review of constitutionality (see, e.g., *Harris v. Minister of Interior* [111]; *Clayton v. Heffron* [82]; *Bribery Commissioner v. Ranasinghe* [104]; *Akar v. Attorney-General of Sierra Leone* [105]. See Rubinstein, *The Constitutional Law of the State of Israel* (annotated second edition, 1974), at p. 281).

d) Judicial review of constitutionality in Israel

77. Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty do not explicitly address the consequences of a law that infringes a constitutionally protected right and does not comply with the requirements of the Basic Laws. The proposed Basic Law: Legislation includes general provisions in this regard. That proposal, however, has not yet completed the legislative process in the Knesset. The two Basic Laws contain no 'supremacy clause.' What is the law in such a situation? It seems to me that our legal tradition requires us to conclude that the remedy for an unconstitutional law is its invalidation, and that the courts have been endowed with the authority to declare it invalid. Just as a regulation that conflicts with statute is void and may be declared as such by the court, so too should be the case when a regular law conflicts with a Basic Law; the law is void and the court is empowered to declare it so.

Important judicial developments have led to the recognition of this conclusion in Israel. The question arose first in the case of *Bergman v. Minister of Finance* [15]. The court noted that it would leave for future consideration the determination of whether or not the relationship between an entrenched Basic Law and a conflicting regular law that did not meet the entrenchment requirements was a justiciable question. Over the years a number of decisions were handed down, the majority of which effectively voided regular laws that did not meet the entrenchment provisions of a Basic Law. As time passed, this tradition became established (see *Derech Eretz Association v. Broadcasting Authority* [19]; *Rubinstein v. Knesset Speaker* [20]). In the *Rubinstein* case [20], Justice S. Levin noted:

> 'As the number of instances increases in which the court is asked to decide issues of constitutional significance of this nature, so does the likelihood decrease that the court will stay its hand from

> deciding them, particularly when the Attorney-General will in the future raise similar questions' (p. 148).

As I noted in a previous case:

> 'In seeking to amend an "entrenched" provision without having been adopted by the necessary majority of Members of Knesset, a law of the Knesset – whether a "regular" law or a Basic Law – contradicts the entrenchment provisions of the Basic Law. In view of its legal force the "entrenchment" provision will prevail. In a clash between the entrenchment provision and the clause that purports to amend it without meeting the necessary majority requirements, we do not apply the usual principles, according to which a later-enacted statute invalidates an earlier statute. In this conflict we apply the principle that grants normative supremacy to the entrenched Basic Law. We find that legislation that seeks to change an entrenched Basic Law without meeting the necessary majority is null and void. The court is empowered to declare such nullity. Indeed, the very inclusion of an entrenchment provision calls for the court, as an independent institution, to review the legal validity of legislation that purports to amend an entrenchment provision without meeting the special majority requirement… The existence of an entrenchment provision implies that there will be judicial review, and that the court is therefore empowered to determine that a statutory provision – whether set forth in a "regular" or a Basic Law – when enacted by a "regular" majority and not that set forth in the entrenchment provision, is null and void. The court has decided according to this view in the past' (*Laor Movement case* [21], at pp. 539-540).

This approach accords with our tradition. It is consistent with our general legal culture. It is accepted in the Israeli community (see Rubinstein, *ibid.*, at p. 461; see also Burt, 'Inventing Judicial Review: Israel and America,' 10 *Cardozo L. Rev.* (1989) 2013). It is required by the application clause included in both Basic Laws. Indeed, if the Knesset is 'required to respect the rights under this Basic Law' (as stated in s. 11 of Basic Law: Human Dignity and Liberty), then this is not merely a 'political' obligation of the Knesset but also a 'legal' obligation. If this is so, then it is necessary that some body other than the Knesset – i.e. the Court – determine whether in fact the rights set forth in the Basic Law have been honored.

e) The rationale for judicial review of constitutionality

(i) Judicial review and the rule of law

78. The doctrine of judicial review of constitutionality is based upon the 'rule of law,' or, more correctly, the rule of the constitution or the law (see L. Sheleff, "The Two Meanings of 'The Rule of Law'," 16 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1991) 559). The central role of the court in a democratic society is 'to protect the rule of law. This means, inter alia, that it must enforce the law in the institutions of the government, and it must ensure that the government acts according to the law' (*Ressler v. Chairman of Knesset Central Elections Committee* [14], at p. 462). When a given legal system includes a constitution, the "rule of law" requires that the sovereignty of the constitution be protected. Thus the Knesset, in using its constituent authority, endowed the State with Basic Laws. In the normative hierarchy, the Basic Laws are paramount. In order to fulfill the Knesset's directives, regular legislation that conflicts with a Basic Law must be invalidated, in the same way that a regulation that conflicts with law is invalidated. In presenting the proposed Basic Law: Legislation for a first reading, the Justice Minister, Mr Zadok, maintained as follows:

> 'I agree that the Knesset must be given broad latitude and room to maneuver in its legislative work, but this sovereignty should not be interpreted to permit arbitrariness as to basic principles. It seems to me that the doctrine of the rule of law, which we all espouse, means that everyone is subject to the law: the Government, governmental agencies, the President, the State Comptroller, and the Knesset as well. Just as the other state institutions operate within a limited framework of authority, such a framework, albeit broader, must be established for the Knesset's legislation' (*Knesset Proceedings*, vol. 76, at p. 1705).

Thus, in declaring invalid a law that does not meet the requirements of the Basic Law, the court fulfills the Basic Law. The constitution and the Basic Law themselves legitimize the judicial review of constitutionality. As MK Menahem Begin described it during the debate on the constitution in the First Knesset:

> 'One of the two: either it will be a constitution that is superior to all other law, or it will be a worthless piece of paper' (*Knesset Proceedings*, vol. 4, at p. 737).

Thus, judicial review of the constitutionality of the law is the soul of the constitution itself. Strip the constitution of judicial review and you have removed its very life. The primacy of the constitution therefore requires judicial review. As Professor Kelsen has noted:

> 'The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than the legislative body is entrusted with the task of testing whether a law is constitutional...' (H. Kelsen, *General Theory of Law and State*, Wedberg, trans. (1961), at p. 157).

(ii) Judicial review and the separation of powers

79. Judicial review of the constitutionality of the law derives from the principle of separation of powers. The legislature's authority is to enact laws. In order to do so it is authorized to interpret the constitution itself. When the resolution of a dispute between litigants requires interpretation of the constitution, such interpretation is in the hands of the Court. The Court's interpretation is binding. Within the framework of the separation of powers, interpretation of the constitution is the responsibility of the Court (see *Flatto-Sharon v. Knesset House Committee* [2], at p. 141). As I noted in a different case:

> 'In a democratic system, based upon the separation of powers, the authority to interpret all legislation – from Basic Laws to regulations and regulatory orders – is the province of the Court ... Any other approach violates the essence of judicial power and utterly distorts the principle of the separation of powers and the checks and balances between them' (See *Kach Faction v. Knesset Speaker* [49], at p. 152).

Thus, judicial review of constitutionality both derives from and gives expression to the principle of separation of powers. As Chief Justice Burger noted:

> 'In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution .... Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* ... That [it] is emphatically the province and duty of the judicial department to say what the law is ... Any other conclusion would be contrary to the basic concept of powers and the checks and balances that

> flow from the scheme of a tripartite government' (see *United States v. Nixon* [95], at pp. 703-704).

The Court's constitutionally mandated role of interpreting the constitution leads to the adjudication of disputes according to the constitution. Adjudication according to the constitution, rather than according to the law, can incidentally lead to the invalidation of a law. This invalidation is not a violation of the separation of powers, but rather its realization. Indeed 'separation of powers does not mean the absolutism of each power in its own area. Such absolutism violates freedom, the realization of which is the very basis for the separation of powers' (HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [50], at p. 790). The creation of the constitution in accordance with constituent authority requires a concurrent grant of interpretive authority to the judicial branch. To judge means to interpret. Constitutional interpretation must naturally and inevitably result in the determination that a law in conflict with the constitution is invalid. This is the role of the judicial branch in a tripartite system.

(iii) Judicial review and democracy

80. But is judicial review democratic? Is it democratic that the court – whose judges do not stand for election by the people and do not present a social and political platform – be empowered to invalidate a law enacted by elected officials? (For a discussion of this question in the American literature, see Lahav, "The American Doctrine of Judicial Review: Themes and Variations," 10 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1984) 491; Horowitz, "American Legal Thought After World War II – 1945-1960," 16 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1991) 445, 452). The formal answer is simple. The court, in its judicial review of the constitutionality of law, gives effect to the constitution and the Basic Law. Hamilton addressed this point over two hundred years ago (in *The Federalist* No. 78) in discussing the judicial review of constitutionality in relation to the constitution itself:

> 'Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by

> those which are not fundamental' (Hamilton and Madison et al., *The Federalist Papers* (1788; Mentor ed. 1961) 467-468).

In a similar spirit, Rawls stated the following:

> 'A supreme court fits into this idea of dualist constitutional democracy as one of the institutional devices to protect the higher law. By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straightforwardly antidemocratic. It is indeed anti-majoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not anti-majoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations' (J. Rawls, *Political Liberalism*, (1993), *supra*, at p. 233).

However, a formal answer alone is not sufficient. There is a substantive answer as well. The substantive answer is that the judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights as expressed in the constitution. Democracy strikes a delicate balance between majority rule and the basic values of society. Indeed democracy does not mean formal democracy alone, which is concerned with the electoral process in which the majority rules. Democracy also means substantive democracy, which is concerned with the defense of human rights in particular (see Y. Shapira, *Democracy in Israel* (1977), at p. 35). Professor A. Rubinstein has addressed this matter, noting:

> 'The true meaning of democracy includes not only the principle of the will of the majority but also the limitation of the will of the majority. The constant tension between these two poles – the power of the majority and its limitations – is the axis of the democratic process. It may prefer a minority or the individual, as such, to the majority in granting certain rights.(A. Rubinstein, "Israeli Law in the Seventies," 2 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1972) 271, 274).

In a similar vein, Professor Dworkin has noted:

> 'True democracy is not just statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy, in which majority decision is legitimate only if it is a majority within a community of equals. That means not only that everyone must be allowed to participate in politics as an equal, through the vote and through freedom of speech and protest, but that political decisions must treat everyone with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life' (R. Dworkin, *A Bill of Rights for Britain*, *supra*, at p. 35).

In fact when the majority strips the minority of its human rights, democracy is infringed (see J. Ely, *Democracy and Distrust, A Theory of Judicial Review*, (Cambridge 1980)). Judicial review of constitutionality therefore prevails over what is known as the 'counter-majoritarian dilemma.' One way to accomplish this is by emphasizing that when judges interpret the constitution and invalidate contradictory laws they give expression to the fundamental values of society that have developed over time. Thus the court safeguards constitutional democracy and maintains the delicate balance upon which it is based. Remove majority rule from constitutional democracy and its essence is harmed. Remove the sovereignty of fundamental values from constitutional democracy and its very existence is called into question. Judicial review of constitutionality enables a society to be true to itself and to honor its basic conceptions. This is the basis for the substantive legitimacy of judicial review. This is also the true basis for the principle of constitutionality itself. We are bound by the constitution that was enacted in the past because it expresses the fundamental outlook of modem society. It may therefore be said that each generation enacts the constitution anew. By means of judicial review we are loyal to the fundamental values that we took upon ourselves in the past, that reflect our essence in the present, and that will direct our national development as a society in the future.

It is therefore no wonder that judicial review has become more common. The majority of enlightened democratic states have judicial review. It is difficult to imagine the United States, Canada, Germany, Japan, Spain, Italy, and many other nations without judicial review of constitutionality. The

twentieth century is the century of judicial review. It imparts real meaning to the principle of constitutionality, to constitutional democracy and to the proper balance between majority rule and human rights, between the collective and the individual. It may be said that whoever argues that judicial review is undemocratic is in effect arguing that the constitution itself is undemocratic. To maintain that judicial review is undemocratic is to maintain that safeguarding human rights is undemocratic. To maintain that judicial review is undemocratic is to maintain that defending the rights of the individual against the majority is undemocratic. The democratic nature of the state is not determined by the representative nature of each of its branches but rather by the democratic nature of the government as a whole. In examining the democratic aspect of judicial review, it must be noted that every constitution provides for methods by which it may be amended. As long as these methods are not rigid they allow today's majority to realize its aspirations. The methods by which a constitution may be amended reflect the balance that the society wishes to maintain between past and present, between long-term values and short-term aspirations, between value and policy. These methods are set forth in the constitution itself and are shaped by political forces. To the extent that these methods are not unduly rigid, they allow today's majority to express its perceptions and thereby blunt the argument that bases itself on the formal conception of democracy.

This argument is further weakened – in effect to its very core – in those legal systems (such as Canada and to a limited extent Israel) that include an override clause. Indeed the override clause (s. 8 of Basic Law: Freedom of Occupation) provides a constitutional means by which today's political majority may lawfully infringe the constitution. This is not a constitutional amendment, for legislation that infringes the constitution does not change the latter's provisions. Nevertheless, a constitutional apparatus is created that allows today's majority to realize its aspirations in a constitutional manner even as it affects values and rights that the constitution wishes to protect (see L.E. Weinrib, "Learning to Live with the Override," 35 *McGill L. J.* (1990) 541). Through the override clause, the legal system may prevail over the democratic argument which enables formal democracy to prevail in certain conditions over substantive democracy. Excessive use of this method will, of course, ultimately result in the frustration of the constitutional enterprise itself.

(iv) Judicial review and judicial objectivity

81. Judicial review expresses the values of the constitution. By means of judicial review the judge makes manifest the ideals of the society in which he lives. He expresses the fundamental conceptions of society as it moves through the shifting sands of history. The judge in particular, who does not face election and who benefits from judicial independence, is worthy of this task. It is precisely because the judge is not elected by the people and does not present them with a social and political platform that qualifies him express society's profoundest perceptions without being influenced by the needs of the moment. For this purpose he must operate with judicial objectivity. He must express the outlook of society even if it is not his personal outlook. As I have noted in a previous decision:

> 'The judge must reflect the long-term beliefs of society. He must avoid imposing on society his private creed .... This requirement for objectivity places a heavy burden upon the judge. He must be able to distinguish between his personal view of the ideal and the present day reality of society. He must establish a clear division between his personal beliefs and his judicial perceptions. He must recognize that his personal beliefs may not be those of society at large. He must distinguish clearly between his personal credo and that of the nation. He must be self-critical and restrained in his views. He must respect the shackles that bind him as a judge' (*Efrat v. Director of Population Register, Ministry of Interior* [51], at pp. 781-782).

Declaring a law unconstitutional is a serious matter. Such a declaration would seem to undermine the will of today's majority. It may be justified by the supremacy of the constitution and its values. The justification applies when the judiciary gives expression to the values of society as they are understood by the culture and tradition of the people as it moves forward through history. This justification does not, however, operate when the judge expresses his subjective beliefs. Indeed, judicial objectivity is part and parcel of the basis of judicial review of constitutionality. In granting weight to different considerations, the judge aspires to the best of his ability to achieve judicial objectivity. He reflects neither his personal values nor his personal considerations. The judge reflects 'the values of the State of Israel as a Jewish and democratic state' (*Eisenberg v. Minister of Building and Housing* [52]). Indeed, this extremely difficult task can be achieved only by the professional judge, who has absorbed through years of experience the need to guarantee

judicial objectivity, and enjoys total independence. As I noted in a previous case:

> 'A professional judge is qualified to shoulder this burden. His education, his experience, and the judicial culture of his time internalize the values of independence and the ability to distinguish between personal views and the requirements of his position. None more than the professional judge is mindful of the limitations placed on him in a democratic society. "Do you imagine that I offer you rulership? It is servitude that I have offered you"' (Talmud Horayoth 10a-b (*Efrat*, supra, at p. 782)).

This charge may be undertaken only by a judge, whose outlook is that 'judging is not a task but a way of life' (HCJ 732/84 *Tzaban v. Minister of Religious Affairs* [53], at p. 148). It may be undertaken only by a judge, whose entire education brings him to abstract thought, which is based upon reason and not power, the weight of the claim and not the identity of the claimant. Only a judge, who daily experiences the tension between abstract principle and its operation in the mundane life of the litigant before him, may accomplish this difficult task. All of these require an independent judiciary, which develops from the people and reflects the basic social consensus, but does not stand for election every few years, as do Members of Knesset (see M. Perry, *Morality, Politics and Law*, (1988), at p. 147). In a similar vein, Professor Bickel has stated:

> 'When the pressure for immediate results is strong enough and emotions ride high enough [legislators] will ordinarily prefer to act on expediency rather than take the long view ... Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules – that is what our legislators have proven themselves ill equipped to give us. Judges have, or should have, the leisure, the training and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society ... [The court can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry' (A. Bickel, *The Least Dangerous Branch*, (1962), at pp. 24-26).

Indeed the judge neither wields a sword not controls the purse strings. All he has is his independence. His daily bread is none other than the basic values, which he balances objectively. He does not seek power, nor does he crave to

rule. He does not seek to impose his personal views on society. He wishes only to do justice in the case before him and to adjudicate each case justly.

Since the establishment of the State of Israel, the High Court of Justice has stood – and with it the entire community of Israel – as the bastion of Israeli democracy. The words of Justice Berinson are well known: 'the court is the most secure and objective refuge that the citizen has in his dispute with the establishment' (HCJ 287/69 *Miron v. Minister of Labour* [54], at p. 362). This role was enhanced with the enactment of the Basic Laws regarding human rights. Additional bulwarks have been erected to protect these human rights. The court has been entrusted with the constitutional task of guarding the basic tenets and fundamental values of Israeli society as they are expressed in the Basic Laws (see Wellington, "Standards: Some Common Law Rules and Constitutional Double Notes on Adjudication," 83 *Yale L. J.* (1973-74) 221). It must balance between the basic values of Israeli society (as they are expressed in the Basic Laws) and the short-term needs of day-to-day life (as they are expressed in regular legislation). It is entrusted with the task of 'exposing the basic values while rejecting the temporary and transient' (*Efrat*, *supra*, at p. 780).

f) Judicial review of constitutionality – Summary

82. Neither Basic Law: Freedom of Occupation nor Basic Law: Human Dignity includes an express provision – in the guise of a supremacy clause – addressing the fate of a law that infringes a protected human right without fulfilling the requirements of the Basic Law. This silence – against the background of the recognition, limitation and override clauses – calls into play the basic principles of Israeli law as to the relationship between superior and subordinate norms. These principles include the tenet that the superior norm reigns (*lex superior derogat inferior*). The court is competent to declare the contradicting norm void. In this manner the court gives expression to the ideals of democracy and the separation of powers. Indeed if the constitution itself is democratic, then judicial review is democratic.

On this basis we can now proceed to Basic Law: Human Dignity and Liberty, which serves as a superior norm, in light of which we will examine the provisions of the Family Agricultural Sector (Arrangements) (Amendment) Law, 5753-1993.

C. Basic Law: Human Digntiy and Liberty

1) The Basic Law and the constitutional test derived therefrom

a) Stages of the constitutional analysis

83. Basic Law: Human Dignity and Liberty defines human rights and sets out the limitations imposed upon them. The rights are defined in absolute terms ('There shall be no violation of the life, body or dignity of any person'; 'There shall be no violation of the property of a person'; 'There shall be no deprivation or restriction of the liberty of a person'). The limitations imposed do not attach to the rights themselves, but rather are derived from the limitation clause. When a judge encounters a claim that legislation contravenes the directives of the Basic Law, he must conduct a three-phase examination: first, he must determine whether the law indeed infringes a protected human right. In order to do so, the judge must interpret the basic right on the one hand (constitutional interpretation), and the legislation on the other hand (statutory interpretation). The level of proof required is that required in a civil trial, i.e. a preponderance of the evidence or the balance of probability. If the judge concludes that the regular law indeed infringes the basic right, he must move on to the second stage of the examination. He must determine whether infringement of the basic right is lawful, i.e. whether the statute meets the requirements of the limitation clause. Here as well, the level of proof required is that required in a civil trial, i.e. a preponderance of the evidence or the balance of probability (see *R. v. Oakes* [114], at p. 137). In order to meet this burden it is sometimes necessary to present a factual basis supporting constitutionality of the law. In some cases, common sense and life experience are sufficient in order to persuade the Court that the infringing law meets the requirements of the limitation clause. If the judge concludes that the infringing law does not meet the requirements of the limitation clause, he must then proceed to the third stage of the examination. In this phase the court examines the constitutional remedy. It goes without saying that human rights not safeguarded by Basic Law enjoy the same status accorded them before enactment of the Basic Laws. That certain human rights are anchored in a Basic Law does not detract from the force of the other human rights.

b) Burden of proof

84. Who bears the burden of proof in the three phases of the constitutional examination? There is no dispute that in the first phase – on which infringement of the constitutional human right is based – the burden of proof is borne by the party claiming injury to a constitutional right. A law is presumed to be constitutional (see HCJ 98/69 *Bergman v Minister of Finance*, *supra*, at p. 699), and the party who seeks to rebut this presumption bears the burden of proof. The question arises as to the second phase, which examines the constitutionality of the injury to the constitutional human right. It is

commonly accepted that in this phase the burden of proof rests upon the party claiming that the injury was constitutional. This is the rule in Canada (see Hogg, *Constitutional Law of Canada* (3rd ed., 1992)) and New Zealand (see P. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at p. 861). The first decision of the constitutional court of South Africa adopted this view as to the infringement of human rights safeguarded in the new constitution of South Africa (see *S. v. Mekwanyana* [112]). This approach was adopted in the opinion of Justice D. Levin in the *Clal* case (HCJ 726/94, *Clal Insurance Co. Ltd v. Minister of Finance* [37], *supra*). On its face, this approach seems to me to be correct. It shifts the burden to the party that should and can bear it – the government. At the same time, this question does not arise in this appeal, and I am therefore prepared to reserve it for further consideration.

c) Constitutional examination and the old rule

85. The three phases of constitutional examination apply only to legislation enacted after the adoption of Basic Law: Human Dignity and Liberty. The old law is protected under the validity of laws clause, according to which:

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

Although the effect of the old law has been preserved, it must be interpreted in the spirit of the provisions of the Basic Law (cf. Section 10 of Basic Law: Freedom of Occupation; see also CrimApp 537/95 *Ganimat v. State of Israel* [38], *supra*). The validity of laws clause does not preclude the violation of any constitutional right. Neither does it provide that infringement of the Basic Law fulfills the requirements of the limitation clause. The clause does provide a constitutional umbrella for legislation that infringes the Basic Law without fulfilling the requirements of the limitation clause. This clause raises difficult questions. One of them is whether the clause applies to a new law (enacted after the Basic Law came into force) that amends an old law (in effect when the Basic Law came into force). This issue has been discussed extensively by my colleague President Shamgar and I agree with his analysis.

(II). The first phase: the scope of the right and its infringement

a) The scope of the right

86. The scope of a right is determined by its interpretation. This is constitutional interpretation. It is sensitive to the unique character of the document under examination: indeed 'it is a Constitution we are expounding' (see *McCulloch v. Maryland* [96], at p. 407). 'The interpretation of a regular

provision is not the same as the interpretation of a basic constitutional provision' (EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [8], at p. 306). The constitution is interpreted in accordance with the constitutional purpose. The constitutional interpretation must be made 'from a "broad perspective"' (President Agranat in FH 13/60 *Attorney-General v. Matana* [25], at p. 442). The constitutional purpose may be discerned from language, history, culture and basic principles. A constitutional provision is not enacted in a vacuum and it does not develop in a constitutional incubator. It constitutes part of life itself. Justice Dickson noted as follows:

> 'The purpose of the right of freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and, where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous, rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for the individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts' (*R. v. Big M Drug Mart Ltd* [115], at p. 344).

Interpretation from a broad perspective is flexible rather than technical; it is substantive and to the point, rather than legalistic or pedantic (see *Australian National Airways Pty Ltd v. The Commonwealth* [83], at p. 81; *Minister of Home Affairs v. Fisher* [106], at p. 329). In the following case I discussed interpretation of a human right when it is given constitutional protection in a Basic Law:

> 'Now that this has been given a constitutionally enacted basis, it must be interpreted from a "broad perspective" ... "and with the understanding that we are dealing with a directive that dictates a way of life ... we are dealing with human experience, which must suit itself to a changing reality... Therefore the constitutional directive must be interpreted "from a broad perspective" and not in a technical manner ... Hence arises the approach – accepted in enlightened democratic states – that constitutional directives must

> be interpreted "generously" ... from a "substantive" rather than a "legalistic" approach ... through an approach that treats of the specific issue rather than by a "technical" or "pedantic" approach…' (HCJ 2481/93 *Dayan v. Wilk* [55], at p. 470).

In a similar spirit, Justice Strasberg-Cohen noted as follows:

> 'The interpretation of a constitutional text must be undertaken from a "broad perspective" and "generously." The approach should not be technical, "legalistic" or "pedantic"' (HCJ 1255/94 *"Bezeq" – The Israeli Telecommunication Company Ltd v. Minister of Communications* [45], *supra*).

Indeed, constitutional interpretation must be based upon constitutional unity, and not upon constitutional disharmony. It reflects the role of the constitutional text in the structure of government and society. It endows it with the meaning that enables it to fulfill its role in the present and future in the most suitable manner' (see HCJ 428/86 *Barzilai v. Government of Israel* [9], at p. 595**)**

b) The right to property

87. It is in light of this view of interpretation that we must approach the analysis of the constitutional right to property. This right is set forth in s. 3 of the Basic Law: Human Dignity and Liberty, which provides '[t]here shall be no violation of the property of a person.'

The right to property is thereby given constitutional status. This is an important right. 'The right to property is the cornerstone of the liberal system. It occupies a central place in liberal ideology, as security for the existence of other rights' (Lahav, "The Power and the Dominion: The Supreme Court in the First Decade of its Existence," 14 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1989) 479, 498).

Nonetheless, the right to property – like the other rights set forth in the Basic Law – is not absolute. It may be infringed, so long as the infringing law fulfills the requirements of the limitation clause. Indeed, property has a "role" in both the private and public spheres. The Basic Law does not define 'property.' It is incumbent upon the Court to interpret this right according to its purpose (see Weisman, "Constitutional Protection for Property," (1995), 42 *HaPraklit* 8). The word "property" has different meanings, depending upon the context in which it appears. It seems that in the constitutional realm, the basis of the right is the protection of possessions. Property is every interest that has a financial value. Thus property refers not only to "property rights" (in

the sense accorded to them under private law – for example, ownership, leasing and easements) but also obligations and rights with property values acquired by public law. 'The property referred to in the Basic Law is interpreted to include rights that are not property rights in the classic sense' (Justice M. Cheshin in HCJ 7112/93 *Tzudler v. Yosef* [30]). Indeed, the right to property guarantees the individual financial freedom. It enables interpersonal cooperation. It enables a person to exercise the autonomy of his personal will. Hence the connection between the protection of property and the protection of human dignity (see J. Rawls, *Political Liberalism*, (1993), at p. 298). It follows that, in general, expropriation infringes property rights. Just compensation does not remove the infringement but it is likely to be constitutional if it fulfills the conditions of the limitation clause. And I note: the constitutional prohibition applies to the infringement of property. Every infringement violates the prohibition, and shifts the constitutional review to the limitation clause. At the same time, when the infringement of property is incidental or minor – if it can be classified as *de minimis* – then it will not be regarded as an infringement and there is no need to embark upon the constitutional review of the second phase (cf. *Jones v. The Queen* [116]). Theoretically it can be said that the right to property is infringed when the property value of an interest is less than its value before the legislation. At the same time, the regular day-to-day activities of the government may influence the value of an individual's property. Should such activities be viewed as an infringement of property rights, calling for constitutional review under the limitation clause, or should their categorization as an infringement be precluded? We will deal with these questions in the future. I would therefore like to leave for further consideration the "siting" of the discussion that my colleague President Shamgar conducts regarding the enactment of the tax, and whether it ought to be included in the definition of the term "infringement."

88. Determining the scope of the freedom of property is an important task imposed upon the judicial authority. In fulfilling this task it is, of course, appropriate to turn to comparative law. In this matter, a threefold "warning notice" is required. *First*, the constitutional structures of the various countries differ from one another. The structure of a constitution influences its interpretation. Thus, for example, the constitution of the United States does not protect property in the same way as does our Basic Law. The constitutional structure of the right to property in the American constitution arises from the prohibition against taking without just compensation, and applies to various arrangements that are not related to taking. Similarly the American system lacks an express limitation clause. This makes development

of full protection of property difficult in the United States and complicates the constitutional law (B. Ackerman, *Private Property and the Constitution*, (1977), at pp. 3, 113, 189; Sax, "Takings and the Police Power," 74 *Yale L.J.* (1964) 36). *Second*, the scope of the constitutional right is derived from society's understanding of its importance. Thus, for example, in the United States – for a variety of historical reasons – constitutional protection of property has been given a relatively low status. Justice Frankfurter discussed this as follows:

> 'Those Liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' (*Kovacs v. Cooper* [97], at p. 95).

In contrast, the German system endows this right with primary status. It is viewed as a central right (see D.P. Currie, *The Constitution of the Republic of Germany*, (1944), at p. 290). In France, the constitutional right to property is safeguarded in the Declaration on the Rights of Man and Citizen of 1789 (s. 17). French constitutional rhetoric endows this right with great social value. In practice, however, significant infringements are permitted (see J. Bell, *French Constitutional Law*, (1992), at p. 176). *Third*, the status of the right, and the balance between the right and the general good is determined, *inter alia*, by society's attitude toward the national interest and by the status of the State and the government. The American approach in this regard is unlike the French approach. And both the American and the French approaches differ from that of Israeli society. We see in the State the fulfillment of the dream of generations. Our attitude towards the State is not negative. We do not fear the State. Yet we must ensure that the State does not harm the individual. The balance between individual and community therefore reflects the unique outlook of Israeli society. Great caution is therefore required in considering comparative law in this particular area. However, comparative law is of great importance. It reveals the possibilities concealed in the text. It sheds light upon the arrangements accepted in constitutional democracies. It gives the judge confidence that his interpretation is accepted and functions well in other places. Nonetheless, we must be careful not to transform the servant into a master. We must not enslave ourselves to comparative law. Its strength is in its ability to inspire, and this power is limited. Indeed, we must bear in mind the social and cultural differences between the various communities. We must

consider the unique history of the legal system and the different emphases given to particular issues. The words of Justice Holmes in this regard are apt: 'A page of history is worth a volume of logic' (*New York Trust Co. v. Fisher* [98], at p. 349). This is especially so when discussing protection of property, an issue that in most legal systems is immersed in history and social change. Thus, the uniqueness of the right of property in the Israeli constitutional fabric must be determined according to its place in the system of human rights in Israel.

III. The second phase: the limitation clause

a) The importance of the clause and the relativity of the human right

89. The limitation clause (s. 8) of the Basic Law: Human Dignity and Liberty is a key ingredient in the protection of human rights. It delineates the limits of the right and the limitations upon the legislature. The role of the limitation is twofold. It protects human rights and licenses their infringement, at one and the same time. It expresses the notion of the relativity of human rights. It reflects the basic outlook that human rights exist in a social context that maintains them. It mirrors the underlying view that human rights do not view the individual as an island, but as part of a society with national goals. It is the product of the recognition that while basic human rights must be realized, the national framework must be protected as well. It is intended to permit infringement of human rights in order to maintain the social framework that itself protects human rights. Indeed, the constitutional right and its lawful infringement emanate from the same source (*R. v. Oakes* [114], at p. 135). Both the constitutional right and its limitation are subject to the same basic principle underlying Basic Law: Human Dignity and Freedom (s. 1) and its purposes (ss. 1A and 2). The limitation clause provides the foundation for the constitutional balance between private and public, individual and community. It reflects the viewpoint that alongside human rights there are human obligations; that the normative world is not only one of rights but also of obligations; that alongside each right of a human being stands his duty to the community.

b) The elements of the limitation clause

90. The limitation clause provides four cumulative tests that determine the constitutionality of a law that violates a constitutional human right. The four tests are as follows:

(a) the infringement is made by law or in accordance with law and by means of an express authorization;

(b) the infringing law must be consistent with the values of the State of Israel;

(c) the infringing law must be intended for a proper purpose;

(d) the law may infringe the human right to an extent no greater than is required.

In the future, the Supreme Court will be required to define each of these tests. Thus, for example, the requirement that the violation be by law or according to law reflects the principle of legality (see Garibaldi, "General Limitations on Human Rights: The Principle of Legality," 17 *Harv. Int. L. J.* (1976) 503. This principle is not merely formal in nature (see *Sunday Times v. United Kingdom* [107], at pp. 245, 270). The second test refers to the values of Israel as a Jewish state (in the context of both Jewish tradition and Zionism) and as a democratic state. Indeed, we are different from other nations. We are not only a democratic state but also a Jewish state. The Basic Law comes to 'establish in a Basic Law the values of the State of Israel as a Jewish and democratic state' (s. 1A) (see Elon, "The Way of Law in the Constitution: The Values of the Jewish and Democratic State in Light of the Basic Law: Human Dignity and Liberty," 17 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1993) 659). One of the important innovations of the Basic Law is its provision that '[t]he purpose of the Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state' (s. 1). Those values were thereby given constitutional supra-legislative status. The meaning of the values of the State as a Jewish and democratic state, and a solution to the clash between those values, will certainly occupy us greatly in the future.

'A proper purpose'

91. The third element of the limitation clause requires that the purpose be fitting. This element, too, raises significant difficulties, which we may reserve for future consideration. In essence, a purpose is fitting if it serves an important social objective regarding human rights. Thus, legislation intended to protect human rights is certainly intended for a proper purpose. Legislation intended to serve general social goals, such as welfare policies or protection of the public interest is fitting as well. In American constitutional law, distinctions are drawn among the various human rights in determining whether a purpose is worthy. The courts there have created different levels of constitutional scrutiny. Thus, for example, when the injury is to freedom of movement, freedom of expression or racial equality, the highest level of

scrutiny applies. In such cases, a purpose will be deemed fitting if it is intended to fulfill a compelling state interest or a pressing public necessity or a substantial state interest. When the harm is gender or age-based discrimination, an intermediate level of scrutiny applies. In such cases the purpose will be deemed fitting if it serves an important governmental objective. The third and lowest level of scrutiny applies when the injury is to economic rights. Here the true test is whether the objective is reasonable.

In contrast to the three levels of American law, Canada has developed a unified test. The purpose of the law is fitting if it is directed towards social needs of fundamental importance. It is premature to determine what the Israeli rule will be as to the limitation clause and whether our test should comprise a single level (as in Canada) or multiple levels (as in the United States). It seems to me that for the purposes of the matter before us it is sufficient to determine that the purpose is fitting if it is intended to fulfill important social goals for the establishment of a social framework that recognizes the constitutional importance of human rights and the need to protect them. The normative scope of this importance will be determined with time, in the decisions of the Supreme Court.

92. In analyzing the nature of the "proper purpose" my colleague President Shamgar notes that this purpose includes that which was apparent to the legislature ('the Court examines the purpose that guided the legislature') as well as that determined by the Court at the time of its opinion ('it may also become apparent at the time of examination of the final draft of the law and its ramifications'). My colleague notes furthermore that as to determining the purpose that was apparent to the legislature 'there is a presumption that the legislature acted in good faith, and in any event we must not search for the concealed motives of individuals making up the legislative branch, in contrast to the purpose considered by the legislature as a collective legislative organ'.' Finally, my colleague notes that the purpose of the law is weighed 'against the violation and its significance.' This position raises a significant number of problems, which, in my opinion, may and should be reserved for further consideration. My colleague suggests that two 'purposes' be examined – that which was apparent to the legislature and that which is revealed to the Court. There are different positions as to this approach in the comparative literature. There are those who believe that, in determining the constitutionality of a law – as in determining the constitutionality of a regulation (when it is claimed that the regulation was adopted out of improper motives) – we must consider only the historic purpose that was before the legislature. Others believe that

we must consider both the historic and the modem purposes. Furthermore, if we consider the subjective purpose, we are faced with the problem of examining the legislature's motive. My colleague the President states that 'we must not search for the concealed motives of individuals making up the legislative branch, in contrast to the purpose considered by the legislature as a collective legislative organ.' We must, of course, agree with this. Should we, however, consider the expressed motives of the Members of Knesset? There are differences of opinion as to this issue in the comparative constitutional literature. How can it be proven that legislation was impelled by improper motives (such as discriminatory motives) if we do not permit examination of the motives? Of course, more difficult questions arise as to the means of proof. Finally, my colleague emphasizes the purpose and adds, *obiter dictum*, that the purpose is balanced 'against the violation and its significance.' Here as well, serious problems arise. Some believe that only the purpose is significant and the harm itself should not be considered. An invalid motive invalidates the legislation even if the result is positive. Others believe that the determinant is the effect of the legislation and not its purpose (With regard to all these issues, see Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 *Yale L.J.* (1970) 1205; Brest, "*Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive," *Sup. Ct. Rev.* (1971) 95; Alexander, "Introduction: Motivation and Constitutionality," 15 *San Diego L. Rev.* (1978) 925). As noted, these questions are difficult – some of the most difficult in constitutional law. We have no experience in dealing with them and I therefore suggest that they be reserved for further consideration.

'To an extent no greater than is required'

93. The final element of the limitation clause is that the injury to the human right must be to an extent no greater than is required. If the previous factor examines the motives of the infringing legislation, this factor examines the means chosen by the legislature. This is a proportionality test. This test examines whether the means chosen by the legislature are appropriate for achieving its objectives (the proper purpose). In the past we have made use of the doctrine of proportionality in the field of administrative law (see HCJ 5510/92 *Turkeman v. Minister of Defense* [56], at p. 217; HCJ 987/94 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [57]; HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture & Sport* [58]; HCJ 1255/94 *"Bezeq" – The Israeli Telecommunication Company Ltd v. Minister of Communications* [45], *supra*; see also Segal, "The Claim of Lack of Relativity in Administrative Law," 39 *HaPraklit* (1991) 507). It has now been given

constitutional status. The constitutionality of a statute will now be examined in light of the doctrine. In comparative law too, this test began its development as a test used in administrative law. It is most accepted in European administrative law (see J. Schwarze, *European Administrative Law* (1992), at p. 677). The doctrine developed particularly in German administrative law (see Zamir, "Israeli Administrative Law in Comparison to German Administrative Law," 2 *Mishpat uMimshal* (1994) 109, 130; and Sing, *German Administrative Law* (1985), at p. 88; Nolte, *General Principles of German and European Administrative Law – A Comparison in Historical Perspective*, 57 *Mod. L. Rev.* (1994) 191). From there it moved to the constitutional law of most of the countries of Europe, and elsewhere as well. It is the central test in Canada (see Hogg, *Constitutional Law of Canada*, (3rd ed., 1992), at p. 875, as well as in South Africa under its new constitution (see *S. v. Mekwanyana* [112], at p. 665)).

94. A law infringes a protected human right. The law accords with the values of the State of Israel. It is intended for a proper purpose. How must we decide whether the law infringes human rights 'to an extent no greater than is required?' When does a law that infringes a constitutional human right achieve the required proportionality? In comparative law an attempt was made to concretize the principle of proportionality. It seems to me that we should learn from this attempt, which is common to Canada, Germany, the European Community and the European Court for Human Rights in Strasbourg, for the principle of proportionality does not reflect a unique social history or particular constitutional position. Rather, it is a general analytical position according to which we may examine a law infringing constitutional human rights.

95. Comparative law indicates that the examination of the "extent necessary" is divided into three sub-tests. The first sub-test determines that a legislative means that infringes a constitutional human right is fitting if it is appropriate to achieving the purpose. This is the fitness test (*geeignt*), or the "rational relationship" test. There must be a suitable connection between the goal and the means. The means must be tailored to achieve the objective. The means must lead, in a rational manner, to fulfillment of the goal. The second sub-test establishes that the legislative means that infringe the constitutional human right are fitting only if the goal cannot be achieved by other means that would result in a lesser injury to the human right. This is the middle test of "minimal harm" It is sometimes described as the "principle of need." The third sub-test requires a balancing of the public good against the private harm

arising from the means. There must therefore be a suitable relationship between the means and the purpose ("proportionality in the strict sense"). These three sub-tests were nicely summarized in the leading Canadian case, as follows:

> 'There are, in my view, three important components of a proportionality test; first the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should infringe "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures, which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance"' (*R. v. Oakes* [114], at p. 138).

It must be noted that the second sub-test is the most important of the sub-tests for proportionality. That the protected right be infringed as little as possible is the very essence of the requirement that the means be to an extent no greater than is required. This requirement is also textually connected. Indeed, in many cases the purpose is fitting and there is a rational relationship between the purpose and the means chosen. The determining question centers upon the question of whether the legislature chose the means that would result in the most minimal injury. In this regard, the image of rungs on a ladder is commonly employed. The Court determines whether the legislature chose the lowest rung of the ladder. This is the "step theory" (*stufentheorie*) (see D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (1989), at p. 290). In the *Pharmacy* case [110] – dealing with a limitation of the freedom of occupation – the German constitutional court adopted the theory of steps or rungs. The court determined that infringement of the freedom of occupation can be permitted:

> '[O]nly to the extent that the protection cannot be accomplished by a lesser restriction of freedom of choice. In the event that an encroachment on freedom of occupational choice is unavoidable, lawmakers must always employ the regulative means least restrictive of the basic right' (translation by Kommers, *ibid.*, at p. 288).

Constitutional latitude

96. The limitation clause imposes upon the Court a difficult task. It requires sensitivity to the necessity of balancing between the rights of the individual and the public interest. It requires the judge to understand his constitutional role. The directives of the limitation clause may be fulfilled in various ways. A type of 'limitation margin' is created (similar to the margin of reasonableness) or 'margin of harm.' The Court must protect the boundaries of that margin. It must refrain from crossing the margin. The choice between the various possibilities that lie within the bounds of the margin rests in the hands of the legislature. The principle of the separation of powers places the task of choosing – the task of lawmaking within the margin – upon the legislative authority. The legislature is endowed with the power to choose between the various policy options that fulfill the directives of the limitation clause. The question that the judge must ask himself is not what law would he have enacted, had he been a member of the legislature, in order to properly balance private and public needs. The question that the judge must ask himself is whether or not the balance chosen falls within the limitation margin. The Court must determine the constitutionality of the law, not its wisdom. The question is not whether the law is good, efficient, or just. The question is whether the law is constitutional. A "socialist" lawmaker and a "capitalist" lawmaker may enact different and contradictory laws, all of which fulfill the requirements of the limitation clause. The legislature must be accorded a "margin of appreciation" or "latitude for discretion" along the boundaries of the limitation zone. There must be reasonable room to maneuver, enabling the legislature to use its discretion in choosing between (a proper) purpose and means (that infringe to an extent no greater than is required). Every lawmaker has reasonable room to maneuver (see Hogg, *ibid.*, at p. 882; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (1984), at p. 585). I discussed this in the matter of the administrative authority, as follows:

> 'In applying the principle of proportionality – particularly in examining the means causing the least harm – we must recognize the latitude given to the governmental authority. There are a number of ways in which the proportionality requirement may be fulfilled. Often the matter is borderline. In such cases, the authority's margin of appreciation must be recognized. This margin is similar to the executive authority's margin of reasonableness.... This recognition of the governmental margin of

> discretion is based upon the institutional advantage that the governmental authority enjoys in examining the possible alternatives, and in fulfilling its national responsibility – a responsibility imposed by the principle of separation of powers – to implement the proper purpose' (*Ben-Atiya v. Minister of Education, Culture and Sport* [58], *supra*).

These words apply with even greater force when the applicable governmental authority is the legislature. Indeed, the determination of social policy – on economic and other matters – is in the hands of the legislature, and the legislature must be given broad legislative latitude. The Court does not determine social policy. That is a matter for the legislature. But if the policy is not constitutional, that is a matter for the Court. Indeed, if the lawmaker deviates from the boundaries of the limitation, there is no recourse but to take a clear judicial stance. In criticizing the American approach to economic rights – which leaves it to the legislature, as the expert in this area, to determine the content of the law without the Court's constitutional intervention – Tribe writes:

> 'But such a belief would hardly justify wholesale abdication to the political process since there exists no type of legislation that can be guaranteed in advance to leave important constitutional principles unimpaired, and there is simply no way for courts to review legislation in terms of the constitutional without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions. Nor can it suffice to dismiss constitutional review of socioeconomic regulation as uniquely 'political'; all significant constitutional judgments ... are inescapably political' (L.H. Tribe, *American Constitutional Law* (Mineola, second edition, 1988), at pp. 583-584).

97. My colleague the President has cited Professor Hogg's approach, according to which the various rights should be given a narrow interpretation in order to ensure a careful examination of the legislation in the context of the limitation clause. Professor Hogg reached this conclusion after the experience of some ten years in the interpretation of the Canadian Charter of Rights and Freedoms. On its face, it seems to me that this approach is unsuitable. It will ultimately lead to constriction of the right as well as to laxity in guarding against its infringement. At the same time, it seems to me too early at this point to reach any conclusion in the matter of our Basic Law. The case law

should be allowed to develop without *a priori* declarations that certain provisions must be given a broad interpretation while other provisions must be interpreted narrowly. Each provision should be given the interpretation that will fulfill the objective upon which it is based.

98. In addressing the question of whether a piece of legislation violates a protected human right to an extent no greater than is required, it is sometimes necessary to examine alternative means. Thus, just as the proportionality test requires that the Court examine the various alternatives that present themselves to the administrative authority, so the Court must examine the various alternatives that were available to the legislature. This is not a task that is beyond the Court's ability. Constitutional examinations of this nature are undertaken in many countries around the world. 'Social facts' and "legislative facts" are brought before the competent court as evidence of the various alternatives. In describing these facts, Hogg notes as follows:

> 'Legislative facts are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts are rarely in issue in most kinds of litigation, but they are often in issue in constitutional litigation, where the constitutionality of a law may depend upon such diverse facts as the existence of an emergency, the effect of segregated schooling on minority children, the relationship between alcohol consumption and road accidents, the susceptibility to advertising of young children, or the effect of pornography on behavior' (Hogg, *op cit.*, at p. 1292).

Evidentiary foundations of this type are presented every day around the world to courts dealing with constitutional problems. Upon this foundation the Court decides, always cognizant that it is not the lawmaker, and that policy is determined by the lawmaker and that the lawmaker is given a wide latitude in which to maneuver. Anyone who reviews the opinions of courts treating of constitutional determinations has studied the wealth of evidentiary material brought before the courts, as well as the courts' ability to grapple with such problems. In the United States, this practice has been recognized since the beginning of the century. It is known as the "Brandeis Brief," after the author of the first systematic and scientific document to be submitted to the Court in reliance upon research tools from the field of social sciences. The Court expects the parties – particularly the party bearing the burden of proof – to present an evidentiary foundation that will enable the Court to decide whether the requirement that the legislation be only "to the extent necessary" has been

fulfilled. There is substantial literature on this subject throughout the world (see Karst, "Legislative Facts in Constitutional Legislation," *Sup. Ct. Rev.* (1960) 75; Baade, 'Social Science Evidence and the Federal Constitutional Court of West Germany,' *J. Politics* (1961) 421-423). Justice La Forest has discussed this, noting as follows:

> 'I must underline as strongly as I can the importance of producing evidence ... One of the major challenges in a s. 1 analysis is to identify and weigh the rights or interests served by a provision impugned as violating a guaranteed right. Particularly in areas outside the ordinary ken of lawyers, evidence will be required to enable courts to deal with the issue at all (La Forest, "The Balancing of Interests Under the Charter,"' II *N.J.C.L.* 133, 143).

In order to fulfill its obligation, the Court and the lawyers appearing before it must develop additional skills, which will enable them to grapple with the "social facts." Antonio Lamer, Chief Justice of the Supreme Court of Canada, discussed this, noting that the constitutional revolution in Canada in the field of human rights requires the Court and the lawyer to grapple with a new sort of evidentiary foundation:

> 'These developments require lawyers and judges to have a whole new range of skills. We need to be able to look intelligently to questions of social policy, to identify the sorts of expertise that the particular problem requires, to deal with material from a wide range of disciplines and to interact effectively with persons who possess many sorts of expertise. In addition to the traditional technical skills of the lawyer, we need a deep understanding of the most fundamental principles of the law, an understanding which is broad enough to relate to a wide variety of other disciplines (Lamer, "Canada's Legal Revolution: Judging in the Age of the Charter of Rights,"' 28 *Isr. L. Rev.* (1994) 579, 581).

Chief Justice Lamer further notes that the courts of Canada developed judicial techniques in order to deal with social facts:

> 'Courts now are routinely receiving a good deal of what can be referred to as social fact evidence. This sort of evidence is often directed to questions of what is the impact of legislation on society and what would be the impact of alternative ways of confronting the social problem. This kind of evidence is like that which is

> relevant in proceedings before a Parliamentary Committee when proposed legislation is being considered. Particularly where the question is whether certain laws are justified in a free and democratic society, debate in the Courts sometimes resembles proceedings before a House Committee in that the benefits and burdens of the legislation and its alternatives have to be weighed in light of the best available information about the needs of society and the nature of the problem addressed' (*ibid.*, at p. 582).

Just as the courts and lawyers in Canada can undertake such an investigation, so can we. Of course we must always remember that the legislature is endowed with legislative room to maneuver; that the question is not what is the ideal legislative arrangement, but what is the legislative arrangement that can be expected in the context of the Israeli constitutional regime as a whole; that the Court does not determine the constitutional paradigm that it deems best but examines the constitutionality of the legislative formula established by the legislature; that in marginal cases, the legislature must be given reasonable latitude in its legislative choice. The court must be convinced that among the available legislative options, the legislature chose that which least infringed the constitutional right. What is demanded is not an ideal choice.

D. The Family Agricultural Sector (Arrangements) (Amendment) Law 5753-1993

I) Application of the Basic Law: Human Dignity and Liberty

99. The Family Agricultural Sector (Arrangements) (Amendment) Law 5753-1993 (hereinafter, the "Amended Sector Law") was enacted after the Basic Law: Human Dignity and Liberty came into effect. Accordingly, the validity of laws clause does not apply to this law. In this matter I agree with President Shamgar's position. Of course, the original law – which was enacted before the adoption of Basic Law: Human Dignity and Liberty – is not subject to constitutional review. It enjoys the normative protection accorded to established law by s. 10 of the Basic Law.

II) The first phase: does the Amended Sector Law infringe a constitutional right?

The first constitutional question that arises is whether the Amended Sector Law infringes the right of property. In my opinion there can be no doubt that the answer to this question is affirmative. The Amended Sector Law infringes the ownership rights of creditors. It permits cancellation of unpaid debt,

thereby infringing the property rights of the creditors. The infringement is not trivial – whether the debt is significant or insignificant, the creditor's right is infringed. We must therefore determine whether the infringement of the property right is lawful, i.e. whether it fulfills the requirements of the limitation clause.

III) The second phase: whether the Amended Sector Law fulfills the requirements of the limitation clause

a) 'The law'; 'the values of the state of Israel'

101. Does the Amended Sector Law fulfill the conditions of the limitation clause? It has not been contended that infringement of the property right is not 'by law.' This condition has therefore been fulfilled. Is the Amended Sector Law consistent with the values of the State of Israel as a Jewish and democratic state? The question is whether the new law, which provides for cancellation of debt – essentially, an extensive bankruptcy arrangement – in order to liberate the agricultural sector from potential ruin by imposing the burden upon the creditors, is consistent with the values of the State of Israel. My colleague answers this question affirmatively. I share his opinion, and for the same reasons.

102. My colleague the President criticizes the lower court (in LCA 1908/94 and 3363/94) for not having properly considered the court's role in determining whether legislation is consistent with the values of the State of Israel. My colleague writes as follows:

> 'The court does not sit in judgment in order to administer the State economy. It does not rewrite the law. It does not transform secondary into primary in order to determine that legislation that it deems defective or otherwise wanting is inconsistent with the values of the State of Israel. The court is not called upon to declare what, in its opinion, would be a more fitting or enlightened legislative solution. The court is called upon to determine, in the context of s. 8, whether the subject statute, according to its general purpose, is *grosso modo* consistent with a Jewish and democratic state.'

It is certainly true that the court does not administer the State economy. But the court is required to determine whether the legislation by which the State economy is administered is consistent with the values of the State of Israel as a Jewish and democratic state. Consider legislation controlling administration of the media, which, it is claimed, infringes freedom of expression. The court

does not administer the media, but must determine whether legislation infringing freedom of expression is consistent with the values of the State of Israel as a Jewish and democratic state. Or consider legislation providing for the manner of execution of judgments, which, it is claimed, infringes the debtor's freedom or the creditor's property rights. The court must examine such claims. In these cases, there is, of course, no call for the court to rewrite the law, or to transform the primary into the secondary or vice versa. Nor is the court asked to give its opinion on the wisdom or justice of the legislative solution. Nonetheless, the court is required – and cannot be freed of this requirement – to determine whether the legislation is consistent with the values of the State of Israel. My colleague President Shamgar quotes the opinion of Justice Black in the case of *Ferguson v. Skrupa* [88]. This opinion must be understood in the context of the historical development of Supreme Court's approach to substantive due process and the case of *Lochner v. New York* [99] (see J. E. Nowak and R. D. Rotunda, *Constitutional Law* (4th ed. 1991), at p. 362). This history is foreign to us. The American distinction between basic rights (regarding which constitutional scrutiny is strictest) and the economic freedom of the state (regarding which constitutional scrutiny is most lenient) does not accord with our constitutional structure, in which freedom of occupation, one of the basic human rights, enjoys the same constitutional status as other human rights. The trauma experienced in America as a result of the *Lochner* case [99] must not bring Israeli law to a standstill. We must, over the course of the years to come, adopt a comprehensive constitutional philosophy, based upon the values of the State of Israel as a Jewish and democratic state. We must determine whether in the context of the limitation clause, different levels of scrutiny should be developed (as to the nature of the appropriate purpose and means) for the different rights, or whether we should adopt a uniform level of scrutiny.

103. My colleague President Shamgar criticizes the determination of one District Court that the Amended Sector Law is not consistent with the values of the State of Israel because it applies only to moshavim (and not to kibbutzim). In the President's opinion, this determination is 'an example of a misguided basic approach, according to which only if the scope of the general application of the law meets the court's satisfaction, can it be concluded that it is consistent with the values of the State of Israel.' My colleague notes further that 'economic legislation resulting from economic policy determines the scope of its application in light of the legislature's discretion and in light of various economic factors that are not within the court's knowledge or expertise. This is not why the court was given the power of constitutional

review.' My colleague cites in this context 'the decision of the Canadian legislature not to include in the constitution the subject of infringement of property.' In my opinion, this criticism is too general and too sweeping. The key point is that in Israel, unlike Canada, the right to property is a constitutional right. The court is charged with protecting the right to property, just as it is charged with protecting other constitutional rights. We have not yet been presented with the question of whether all rights enjoy constitutional protection of the same magnitude or whether the level of protection varies according to the nature of the right. It is too early to take a stand on this important question. In principle, the District Courts acted properly in taking into consideration the principle of equality as one of the values of the State of Israel as a Jewish and democratic state, and in examining the legislation before us in light of that principle. At the same time, I agree with my colleague the President that in the case before us – after extensive consideration – it cannot be said that the arrangements in one sector inherently discriminate against other sectors.

b) A proper purpose

104. A law infringing a constitutional human right protected by the Basic Law: Human Dignity and Liberty is constitutional only if it is intended for a proper purpose. My colleague the President has deemed as fitting the purpose for which the Amended Sector Law was enacted. I agree with this conclusion. Whether we take a subjective approach to this analysis (legislative intent) or whether our approach is objective (legislative purpose), the purpose is fitting according to both criteria. The purpose is to ensure the rehabilitation of certain debtors and to prevent the collapse of their life's work. This is a sort of emergency legislation intended to protect the existence of the moshav members. This purpose was intended to fulfill an important social goal. It is similar to the legislation in regard to cancellation of debt in bankruptcy. It expresses the policy of the welfare state. It recognizes the constitutional importance of the protection of human rights, and the need to protect them (debtors and creditors). It seems to me that this proposition is sufficient for the appeals before us.

c) To the extent necessary

105. As we have seen, an examination as to whether the legislation infringes the constitutional right "to an extent no greater than is required" includes three sub-tests. The first test is of "fitness" or "rational relationship." It is met in our case. The second sub-test is the test of "the least intrusive means" or the "needs" test. The law infringes the basic right to an extent no

greater than is required if the legislature chose – from the array of means available – the means that infringed the protected human right to the least extent possible. The legislature must begin at the "rung" that does the least harm, and slowly ascend, until it reaches the rung at which the proper purpose can be achieved without infringing the human right more than necessary. In determining the appropriate level we must bear in mind that the legislature has been accorded reasonable legislative latitude. The court must demonstrate flexibility and must recognize the difficult choices faced by the legislature, the effect of its choice on the various sectors of society and the institutional advantage enjoyed by the legislature in examining these factors.

106. Does the Amended Sector Law infringe creditors' rights more than to the extent necessary? Or does this law fall within the bounds of the wide latitude given to the lawmaker? The Attorney-General has described the dilemma that faced the legislature. This dilemma is expressed in the Explanatory Note to the proposed Family Agricultural Sector (Arrangements) Law (*Hatzaot Hok (Draft Laws)*, 1992, at p. 92):

'The proposed law is intended to create a new framework in order to solve the crisis that has loomed over the agricultural sector for quite some years. Its general purpose is to facilitate rehabilitation of the agricultural sector by favoring rehabilitation over dissolution, while at the same time stemming the outflow of money from public coffers. It now seems that circumstances require legislative intervention in presenting a settlement arrangement to the agricultural sector since the various other settlements did not prove to be effective, left the agricultural sector in deep crisis and, at times, exacerbated the situation.'

In this context, the 1987 settlement (the "Ravid Settlement") has been cited, according to which an administration was established which was to determine an arrangement for settling the bank debt of each moshav. Participation was voluntary for debtors and those non-bank creditors who signed the agreement, which included "'veto rights" for each party as to the administration's determinations. We have been told that because of the voluntary participation clause and the veto rights, the Ravid Settlement did not succeed, and by its terms only some 30% of the debts of the agricultural sector were settled (approximately one and a half billion shekels). Against this background, there was no alternative to the legislative solution. This solution is based upon 'radical treatment of the crisis facing the Israeli agricultural system' (Attorney-General's Response, at p. 13). Under this "radical treatment" a "receiver" was appointed in order to analyze the debt of the

moshav and its members, and to formulate a rehabilitation plan taking into account the debtors' repayment ability and the magnitude of remaining debt. Against this background – and in light of the experience of the original law – a number of legal questions arose, which the Amended Sector Law attempted to solve, and which my colleague President Shamgar noted in the introduction to his opinion. The Attorney-General contends that these amendments do not exceed the extent necessary, and that they fall within the bounds of legislative latitude. In this regard, the Attorney-General notes that 'it is clear that the crisis continues' and demands an expeditious solution. The Attorney-General notes, as well, that the harm does not exceed the extent necessary 'when, in effect, we are dealing with a creditor arrangement that comes to replace other acceptable arrangements such as bankruptcy, liquidation and dissolution under which creditors' rights can be infringed' (*ibid.*, at p. 61). Against this background the Attorney-General contends that 'the infringement does not exceed the extent necessary, when the infringement itself is unclear, i.e. to what extent can the creditor collect its claim if it is not included within the scope of the law and, on the other hand, infringement of the legislative purpose without the Amending Law is certain' (*ibid.*, at p. 62). The Attorney-General emphasized that:

> 'The legislature's efforts to save the agricultural-moshav sector by permitting certain damage to creditors come after attempts to solve the crisis in various ways, both by means of assistance from State and Jewish Agency funding sources and by means of voluntary settlement arrangements. After all of these attempts failed, the legislature enacted the main law, the motive of which was finally to settle the debts of the agricultural sector. The main law is not before the Court today, nor are the clauses of section 15 as to automatic reduction, which is the primary infringement of the main law. Before the Court are the relevant provisions of the Amending Law, which do not cancel the creditors' right to collect or sue for collection of the debt, but rather propose a different settlement, which may infringe the possibility of collecting part of the debt. In this situation, when the lawmaker's intention and purpose are to rescue the agricultural sector and assist in its rehabilitation, the legislature's choice was made in the context of its "broad legislative latitude."'

Alternatively, the Attorney-General requested that – if we are unconvinced that the means chosen do not exceed the extent necessary –

> '[T]he Court allow submission of a factual and legal foundation in order to prove that the conditions of the limiting clause have been proven, in light of the fact that we are dealing with the invalidation of legislation. The lower court's decision should not be left in effect merely because the Court was not presented with enough evidence' (*ibid.*, at p. 66).

107. Against this background, the question before us is whether or not we are convinced that the legislature enacted measures that do not exceed the extent necessary, and, whether or not this instance falls within the bounds of the broad legislative discretion given to the legislature. I have given considerable thought to this question and contemplated the possibility of granting the Attorney-General's alternative request to return the case to the District Court for renewed consideration. In the end, I am convinced that this is a borderline case that falls within that area permitting the lawmaker to design a legislative arrangement at its discretion, and that further analysis of the "social facts" is not justified. In light of the proper purpose which deals with solving the deep crisis into which the agricultural sector has fallen – it seems to me that the means chosen by the legislature in the Amended Sector Law does do harm to creditors, but that this harm does not exceed the extent necessary and, in any event, falls on the lawful side of the fence. In reaching this conclusion I considered the possibility of voluntary settlement and concluded that it is not a viable alternative (in light of the failed attempt). Similarly, I considered other legislative arrangements proposed by the parties, which must be rejected in the absence of any relevant supporting analysis. In the end, we are left with the legislative arrangement chosen by the Knesset after consideration and examination, and I have not found – after taking the relevant considerations into account – that it goes beyond the domain to be left within the discretion of the legislature in a democratic society. In this regard I have also given weight to the fact that we are dealing with the first instances to come before the courts, and that, in the absence of constitutional experience, the existing evidentiary potential was not realized, nor were all the social data in the hands of the State presented in order to prove its contentions.

For these reasons I concur with the conclusion of my colleague the President that the appeals in HCJ 1908/94 and HCJ 3363/94 should be granted and that the cases should be returned to the lower court for continued review as to the matter itself. Similarly, for these reasons I concur in denying the appeal in HCJ 6821/93. In light of my position, I propose that there be no order of costs.

Summary

108. I have therefore reached the following three conclusions: *First*, that Basic Law: Human Dignity and Liberty is accorded constitutional supra-legislative status; that this conclusion may be reached in a number of ways and that choosing among them is not necessary for this appeal, although the position that seems to me most fitting is that which recognizes the Knesset's power to enact a constitution for Israel at the highest normative level (constituent authority); that this Basic Law constitutes a superior norm, in light of which we must examine the constitutionality of 'regular' legislation that infringes a constitutional human right protected by the Basic Law, and that the Basic Law may be amended only by Basic Law. *Second*, that a "regular" law adopted by the Knesset (by whatever majority) cannot infringe a human right protected by the Basic Law unless it fulfill the requirements of the limitation clause. If a "regular" law does not fulfill those requirements it is unconstitutional, whether it explicitly states its intention to infringe a human right protected by the Basic Law, or whether the infringement be implicit. T*hird*, that the Court in Israel is endowed with the power of judicial review of the constitutionality of a law. It must examine (in the first stage) whether the "regular" law (adopted after the enactment of the Basic Law) infringes a protected human right. The Court must determine (at the second stage) whether the infringement fulfills the requirements set out in the limitation clause. If the Court reaches the conclusion that a basic right has been infringed, without the requirements of the limitation clause having been met, it is empowered to prescribe constitutional remedies, among them declaring the law (or part thereof) void. *Fourth*, that the provision of Basic Law: Human Dignity and Liberty according to which 'property rights shall not be infringed' is to be interpreted to include obligatory rights, and therefore legislation that diminishes the right of a creditor to claim his debt violates his right to property. *Fifth*, that the limitation clause – in requiring that the law infringe a human right to an extent no greater than is required – imposes a test of proportionality, composed of three ancillary tests: rational relationship, need and proportionality (in its narrow meaning), while recognizing the legislature's broad legislative discretion. *Finally*, that in the appeals before us, we are convinced that the infringement of the creditors' property rights fulfills the requirements of the limitation clause.

Conclusion

109. The enactment of Basic Law: Human Dignity and Liberty brought about a constitutional revolution in the status of human rights in Israel. A

number of rights were transformed into constitutional supra-legislative rights. The Israeli politic became, with regard to human rights, a constitutional politic. Israeli law was constitutionalized. Constitutional human rights affect all branches of the law (public and private) and influence their nature and substance. If in the past human rights were derived from the various branches of the law, from now on the various branches of law will be derived from human rights. Moreover, there has been a change in the constitutional discourse. If in the past the legal discourse focused on the question of jurisdiction, power and discretion (legislative, administrative and judicial), from now on the discourse will be one of rights and liberties. No longer will it be the administrative power that determines human rights, but rather human rights, in their correct balance, will determine the power of the administration. This constitutional change was effected by the Knesset, which imposed limitations upon itself as well as upon the other governmental authorities. All of these impose a heavy responsibility upon the governmental bodies, which are obligated to protect human rights. We are now in a difficult transitional period in which we must adapt to a new constitutional framework. There is much uncertainty and doubt. There are dangers, some of which have been pointed out by my colleague President Shamgar. Certainly, the judicial authority must exercise great restraint. It must properly understand its role in a democratic state. This role does not involve determining the social policy of the State. The judicial authority does not determine the national priorities. The judge's role is to oversee the constitutionality of the policies set by the political bodies. The judge's role is to zealously protect the delicate balance between majority rule and basic human rights and values. The judge's role is to defend the constitution and safeguard human rights. It is true that a constitutional determination has political ramifications. Nonetheless, it is not made of political considerations. The judge's considerations are legal-constitutional in nature. I am convinced that in time we will formulate for ourselves judicial criteria for exercising of our constitutional discretion. Uncertainty will diminish. Doubts will lessen. In consolidating our judicial experience we will act with objectivity, with humility and with the requisite judicial courage. We are not the first to face tests of this sort. Just as other countries have succeeded, it can be assumed that we too will face challenges and that in the end, Israeli democracy will emerge strengthened. Indeed, there is now the possibility that the constitutional change will be internalized; that human rights will become the 'daily bread' of every girl and boy; that the awareness of rights – rights of children, the disabled, the elderly, the ill, employees, minorities and women – will increase; and that we will become

more sensitive to the rights of human beings as such. The prospect is that rule will be based on law, and not law on rule. The prospect is of increased awareness in the Knesset of its constitutional role, and reinforced recognition by the nation of its central status in framing Israel's constitution. The prospect is of recognition of the Court's role as guardian of the constitution, balancing the constitutional values established in the constitution and supervising the constitutionality of administrative activity. The prospect is of the ascent of the glory of human rights, and enhanced goodwill and fellowship among human beings, each born in the image of the Creator.

Justice D. Levin

1. It was with great interest and attention that I reviewed the learned, profound, extensive and edifying opinions of President Shamgar and of President Barak, which deal thoroughly with all the important matters of principle before the Court in the present proceedings. It would appear that if I were to attempt a broad review of the factual background and the legal basis of the questions at hand, I would be 'bringing coals to Newcastle,' which would be pointless.

2. In the *Clal* case [37], I set forth a clear and detailed statement of my own established view of the supra-legislative status of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty and their supra-legislative constitutional status as a central part of the Israeli constitution that is being drafted chapter by chapter. My colleagues, Justice Strasberg-Cohen and Justice Tal, concurred with my opinion on all the fundamental and value-related issues and my analysis of the constitutional aspect of the Basic Laws. They disagreed only with my conclusion with regard to the proportionality of the legislation in the circumstances of the said case.

I will now briefly address what was stated in my aforementioned opinion, in so far as is relevant to presenting my views on the issues before the Court.

3. I believe that it is both appropriate and necessary to address, at some length, a number of issues that are at the heart of the case before us, and to express my opinion regarding them. The following are the issues to which I will refer:

(a) The source of the Knesset's authority to enact Basic Laws on a supra-legislative constitutional level.

(b) The constitutional status of the aforementioned Basic Laws, the relationship between them, and the source of the values and principles that are realized by these laws, either expressly or implicitly.

(c) How should the basic human rights that are protected by these Laws be addressed, and what protection is given to the citizen against infringement of these rights?

(d) What infringement of these basic rights is permitted, and how may the legality of such an infringement be tested under the principles of the limitation clauses set out in each of those two Laws?

(e) How should the Court fulfill its role and exercise its authority in safeguarding the basic rights and values in the aforementioned Laws? What is their appropriate interpretation, and how and to what extent should the Court extend its protection to those enjoying protection under the law, so that their rights not be infringed beyond what is permissible and necessary?

(f) What is the purpose of the Principal Law, and what is the intention of the later, Amending Law? In this context it is necessary that we address the question of the extent to which these laws infringe Basic Law: Human Dignity and Liberty, s. 3 of which states:

> 'There shall be no violation of the property of a person.'

And if there is such an infringement, to what extent may it be tolerated under the principles and criteria of the limitation clause (s. 8) in the aforementioned law?

(g) In light of all that we shall say, what determination is required in the matter at hand?

4. My two colleagues, former President Shamgar and the current President, reach in their opinions the identical conclusion that the Knesset enacted the two aforesaid Basic Laws at the supra-legislative constitutional normative level and established primary basic rights at the constitutional level, which may not easily be infringed. Let me simply and clearly state that my opinion is identical to theirs.

Alongside this essential agreement, there is a difference in their approaches in regard to the important question of the source of the Knesset's authority to promulgate and grant the people legislation on the said normative level. President Shamgar prefers to define the Knesset's authority in terms of what he defines as "the theory of Knesset sovereignty," which, as he explains in his opinion and conclusion, is that the Knesset, as a legislative body in every

sense, is empowered to establish different levels of legislation. President Barak prefers to determine that the authority lies in what President Shamgar defines as "the theory of constituent authority." According to this theory, the Israeli Knesset, acting in its capacity as legislature, carries out its work wearing two hats: one, insofar as ordinary legislation is concerned, represents and signifies the source of its authority in its designated role as the legislative body that is responsible for ongoing legislation; while the other hat, insofar as constitutional or supra-constitutional legislation is concerned, represents its authority and status as a constituent authority that stands in the stead of the Constituent Assembly that was elected to establish a constitution for the state, yet passed from the world without realizing its goal.

Justice Cheshin completely disagrees with both of my aforesaid colleagues, for reasons of his own, which have received a full exposition. I do not agree with his opinion, nor do my colleagues, who disagreed with him for reasons that also express my opinion.

At first glance, one might ask what difference does it make which theory is chosen if both positions ultimately lead to the same conclusion that the Israeli Knesset is empowered to enact legislation on a constitutional level? But this is not the case. This is not a hypothetical debate. This is no mere academic disagreement. My colleagues are not arguing over a semantic question, but rather over a substantive, significant principle concerning values, which is of consequence now and in the future for the framing of a constitution.

5. In my opinion in the *Clal* case [37], I sided with the proponents of the view that the aforementioned Basic Laws, and all other legislation of a constitutional nature that emanates from the Knesset, are rooted in the Knesset's status as a constituent authority. It may therefore be said that my opinion in this matter is that of President Barak. In his opinion, President Barak explains why he is of the opinion that the Knesset acts as a constituent authority with regard to constitutional legislation. His opinion relies upon a broad historical and factual foundation and upon the legal logic that derives from and is implied by this foundation. This legal conclusion is strengthened by viewing the issues through the comparative prism of the constitutions of other enlightened democracies.

I adopt his explanation and concur in it, but I am not content with that. I would like to clarify my aforestated position from another angle as well, one which I consider to be of fundamental importance, and worthy of emphasis.

6. The Basic Laws that have been enacted over the years, and which have been granted constitutional status, constitute chapters and blocks in the constitutional temple that will be established upon the foundations and cornerstone of the Declaration of Independence. Every decision in matters of principle and values handed down by this Court over the years that has established binding precedent in relation to protected fundamental rights, and that has aggressively extended their protection, originated in and was inspired by the Declaration of Independence.

Since gaining independence, it has always been our view that the Declaration of Independence provides the clearest expression of the national credo. It identifies Israel as a free nation and an enlightened democracy, founded upon the values that characterize a democratic regime, and upon the essential values of Judaism and its ethical heritage.

7. Indeed, the Declaration of Independence, with all of its ethical content, was never juridically recognized as being of constitutional force, nor ever regarded as binding law. Nonetheless, the Declaration of Independence has always been perceived in our consciousness as accurately reflecting and permanently establishing the fundamental principles and values that, in our view, serve as our guiding light, our Urim and Thummim, when we set out to establish a constitution.

Therefore, from the very start, this Court saw fit to look to the Declaration of Independence as a principal source in interpreting the law and, above and beyond this function, as a spotlight that lights our way in shaping the basic civil rights and their actual implementation in communal life (see in this regard the decision of Justice Agranat in HCJ 73/53, at p. 87 [4]; the opinion of Justice Landau in HCJ 243/62 [39]; and also EA 2/84, at p. 3 [8] and EA 2/88 *Ben Shalom* v. *Central Elections Committee for Twelfth Knesset* [59]).

8. What values, principles, foundations and ideas were explicitly incorporated into the Declaration of Independence or implied by the spirit of the Declaration? I will note only those that I believe to be important in the present context, and not necessarily in the order of their substantive importance:

(a) A constitution shall be established, under which the elected officials and the institutions of the state shall be established and shall function;

(b) The State shall be properly established, in accordance with its constitution and on the basis of its national credo, on the foundations of 'freedom, justice and peace as envisaged by the prophets of Israel';

(c) The State of Israel shall be established on the basis of those democratic principles that shall properly be expressed in the constitution; it shall establish basic civil rights on an ethical footing and shall implement '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… and it will be faithful to the principles of the Charter of the United Nations';

(d) The constitution shall be established by means of an elected Constituent Assembly on or before October 1, 1948, and in the meantime the regular legislation required shall be enacted by the People's Council as a Provisional Council of State until the regular, elected institutions of the state are established in accordance with the constitution, including, appropriately, the legislative assembly which shall be responsible for the ongoing task of legislation.

It may be concluded from the foregoing that the architects of the Declaration of Independence intended that the task of legislation was to be carried out at two levels and along two parallel paths: a constitution by the constituent authority (the elected Constituent Assembly), in which fundamental human rights as envisaged by the prophets of Israel would receive their expression; while on the other hand the day-to-day legislation would be carried out by a legislature properly so-called (initially by the authority of the Provisional Council of State, and later on under the authority of the legislative body that would be established under the constitution). This is the intention that, in my opinion, arises from the Declaration [of Independence] regarding the matter at hand.

9. As shown in the surveys laid out in the opinions of my colleagues, this original intent was not realized: that is, that the Constituent Assembly, elected by the people, would succeed in establishing a constitution by October 1, 1948. In order to ensure continuity and the orderly functioning of the state institutions in the spirit of the Declaration of Independence, the Constituent Assembly became, with the agreement of its members, the First Knesset and, by virtue of the Transition Law, it – and subsequent Knessets under similar legislative provisions – was invested at that time with the powers granted to the legislature, the aim of which was to ensure that, alongside the legislation necessary for day-to-day life, the Knesset would also deal with the framing of the constitution, chapter by chapter, in the form of Basic Laws (see the Harrari Decision, to which my colleagues refer). It may be stated that in fact the Knesset was equipped with two staffs. One was that of constituent authority,

which came in place of the Constituent Assembly for the purpose of framing the constitution; and the other was that of the regular legislature, for the enactment of the regular laws, for which purpose the Knesset replaced the Provisional Council of State.

In my view, the actions of the Knesset as a legislature, in the two aforementioned separate paths and at different levels, has existed in the past, exists in the present, and should continue to exist, not only on the basis of the authority granted it in the Transition Laws. Even following the enactment of Basic Law: The Knesset, which states nothing explicit in this regard, the authority of the Knesset as regards constitutional legislation derived from its status as a constituent authority. We have seen that the foundations of that view lie in the principles and in the approach that were set out in the Declaration of Independence. That Declaration, as stated, constitutes a principal source for interpretation of the law, including the Basic Laws.

Similarly, in respect to the explanation for the source of the Knesset's authority to enact constitutional legislation, we are permitted and even required to be guided by the letter and spirit of the Declaration of Independence. There would appear to be no doubt that the Declaration of Independence attributed the utmost importance to the establishment of a constitution, since it was to be established by a constituent authority that was to dedicate itself seriously to drafting this creation and which was particularly endowed with the authority to enrich us with constitutional legislation.

It is right and proper that legislation at this level should be elevated above the work of ordinary legislation and those charged with its enactment.

10. The establishing of supra-legislative constitutional norms, the creation of fundamental human rights and the crafting of a constitution which grounds the institutions of government and establishes their roles upon a foundation of democratic values are different from enacting everyday legislation on routine matters. The framing of a constitution (and the Basic Laws are none other than chapters in the future constitution) and conferring upon the people is cause for celebration in every enlightened, democratic regime. It is assumed that the task of establishing a constitution is the responsibility of a legislature that approaches its task with humility, trepidation, dedication, and seriousness, holding a staff engraved with the values and principles granted to it in its capacity as a constituent authority. This differs from the task of everyday and ongoing legislation, which should also be carried out faithfully and with the

requisite level of care, but the staff of everyday legislation is smooth and normally free of constitutional principles and values.

It is customary, as stated above, to portray the Knesset as a legislative authority that wears two "hats," one for constitutional matters and the other for ordinary legislation, and I maintain that it is more appropriate to symbolize the duality of the role of the legislature and its members by having them don the cloak of the constitutional legislator as against the ready-made suit of the regular legislator. This graphic description emphasizes the legislative hierarchy that was anticipated in the Declaration of Independence, which accords the constitutional enterprise a different, more radiant appearance, prestige and luster, than that accorded to legislation at the regular normative level. As stated, we are not dealing here with semantics, but with an important, clear distinction between the grayness of the regular law and the power, stability and authority that radiate from constitutional legislation – a distinction between the status of the legislative creator of the regular gray law and that of the legislator who creates eternal constitutional values for the nation.

11. It appears to me that this problematic nature, which was examined in detail by my colleagues, is a function of the extended period of time that has passed from the time that the Constituent Assembly was elected to establish a permanent constitution for the country, and the present. The statement in the Declaration of Independence that the constitution would be established no later than October 1, 1948 (in other words, within the space of a few months) was a worthy aspiration but not a realistic one, since the drafting of a constitution requires in-depth consultation, careful deliberation and profound seriousness regarding every subject and issue that is appropriate to a constitution; adaptation of principles and values to the national political entity just created and renewed; and above all the formation of a broad national consensus and general backing for the constitution. Such a weighty, distinguished legislative task cannot and should not seriously be undertaken in such a short space of time.

The Constituent Assembly reached this same conclusion, and as a result it was decided that the constitution would be adopted in stages, chapter by chapter, so that it would ultimately be combined into a comprehensive constitution. It was assumed that within a number of years the constitutional edifice would stand in all its glory, but unfortunately that was not the case. The delay in the process has ostensibly created a lack of clarity regarding constitutional questions of the highest order and a decline in the values and

principles that have guided us since the earliest days of the State, in accordance with the content of the Declaration of Independence. It is therefore fitting to welcome the dramatic, important, albeit overdue, change brought by the enactment of the aforementioned Basic Laws. We can hope that the task of framing the constitution may be completed in the foreseeable future.

Yet the very fact that the completion of the chapters of the constitution has been delayed does not and should not alter or influence the source of authority of the legislature as it promulgates legislation at a constitutional level. As I have already stated, my opinion is that this task was given over to a constituent authority, and that this source exists and shall continue to exist until such time as the task of framing the constitution is completed as anticipated.

As they enacted these aforementioned laws and earlier Basic Laws, Members of Knesset saw themselves acting as a constituent authority; and they had a basis for so believing, as much as the appropriate interpretation of the source of their authority is derived from and inspired by the Declaration of Independence. As I have described, the Declaration envisioned that a constitution would be established by a specific constituent authority. The source of the authority should be interpreted in that spirit. This is what has been done, and this is how we ought to act.

12. The aforementioned Basic Laws stem back to March 1992, when they first came into force. Their enactment brought a substantive change in the status of human rights in Israel, which became basic "supra-legislative" constitutional rights, as President Barak justly noted at the beginning of his opinion. Indeed, there was an important change in Israel.

Yet this change, which was powerful and of immense value from the outset, had a significant follow up with the amendment of the two Basic Laws (primarily Basic Law: Freedom of Occupation). These laws, in their updated, amended form, came into force on March 9, 1994; and introduced fundamental principles that were not previously included in these laws.

In s. 1 of each of the two laws, we now find this addition:

> '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 preamble, which is typical and even mandatory in a constitution that defines the citizen's human rights, indeed faithfully expresses the most basic values that are implemented through these laws and realize what was declared in the Declaration of Independence. These basic principles are the motto that sheds its light on these Laws that establish the basic fundamental rights and protect them. Thus the legislature set these laws in a place of honor, power and prestige in the evolving constitution.

This declaration was not enacted as mere window dressing, but rather it expresses – not merely as a hope or abstract credo – binding fundamental constitutional principles and values. If in the past and in the early days the courts looked to the principles and values of the Declaration of Independence as a principal source for interpreting the law, and for support in anchoring basic rights protected by the case law, these Basic Laws brought about a dramatic change in the status of the Declaration of Independence and in the bright light that emanates from it. Now it can no longer be perceived merely as a faithful and appropriate source for the interpretation of the law, but rather its authority has been increased and it can now appropriately be deemed an independent source of human rights. We must assume that the Israeli legislature did not waste words or try to pull the wool over our eyes in adding the said declaration of principles to the Basic Laws, but rather intended to inform Israel's citizens of the rights to which they are entitled, while emphasizing that the source of these rights lies in the Declaration of Independence which constitutes a normative source for legislation at the elevated constitutional level.

The governmental establishment, as well as the legal community, and equally the general public, must accustom themselves to this revolution that has taken place not only in our ways of thinking, but also in the structure of law in Israel, since:

> 'Respect for basic human rights in the spirit of the principles embodied in the Declaration of the Establishment of the State of Israel has become a constitutional mandate. It is now the case that not only do the principles of the Declaration of Independence have legal force, but the requirement to honor basic rights in the spirit of the principles of the Declaration of Independence has become a constitutional requirement that a "regular" law cannot oppose. We are thus faced with a substantive change in the legal status of the Declaration of Independence' (from Professor Barak's above cited book, *Legal Interpretation,* vol. 3, at p. 305).

13. We may rightly assume and conclude that the Knesset, as a constituent authority, inserted this amendment into the Basic Laws because it believed that the time was ripe to give meaning and force to the principles and values of the Declaration of Independence. This is how I understand the Basic Laws in their present formulation. One may wonder – and the skeptic might ask – was this indeed the case? Did the Members of Knesset really intend such dramatic and far-reaching legislation? One might also hear reservations and murmurings as to whether the Knesset Members whose votes enacted these laws really appreciated and understood the far-reaching implications of the said Basic Laws. Such people may be answered in the following two ways:

(a) It may be assumed that the legislature, acting as a constituent authority, acts with the appropriate seriousness and responsibility while deliberating constitutional issues, which always exert far-reaching influence over the institutions of the state and its citizens. And if we may speak in symbols, we may say that the legislature does this whilst supported by the staff of the values and principles of the Declaration of Independence. Thus, it is not appropriate to relate to the task of legislation as if it were carried out in a haphazard and inappropriate manner.

True, the legislature is not all-powerful and is not a model of perfection. It is liable, even in its capacity as a constituent authority, to produce legislation that is imperfect or controversial. Yet this does not reduce the force or effect of the legislation. It is always possible to initiate a change and to amend the law, after careful and thorough examination, on the basis of cumulative experience in enforcing the law over time. In principle, it is also possible to amend a constitution and provisions of supra-legislative constitutional laws, as long as this is done in an appropriate manner and with the required majority. Yet amendments to the constitution must not be undertaken as a matter of course, lest the constitution and the constitutional values contained in it be altered and changed with every passing breeze. The stability of the law and, to an even greater degree, the stability of the constitution represent values in and of themselves. The legislature should reflect upon this prior to promulgating a law, and even more so, a constitution, since they establish norms and principles that are meant to guide the citizen over the course of the days and years to come.

(b) Once the task of enactment by the legislative branch has been completed, and the law has taken shape and been enacted with the proper majority, the law is severed from the legislature's umbilical cord and becomes an independent creation, a living and dynamic entity that stands on its own

two feet and develops independently, and becomes the property of the people and of society. The law serves the latter, and it will be interpreted over time not necessarily in accordance with the literal meaning of the words; and not necessarily in accordance with what may be gleaned regarding the thoughts of any particular Member of Knesset while he was dealing with the task of legislation; but rather in accordance with the social purpose that the law was meant to implement in conformity with the time, the place, and the needs of the community.

The Court, when it is asked to interpret such a law, does not ignore the law's literal text. It will find in the legislative process helpful tools for understanding the significance and meaning of the law. But, first and foremost, the judge will examine the law from an objective and realistic standpoint, with the aim of realizing its normative purpose and values within existing reality. This will be undertaken not in accordance with the judge's personal world view, but rather through a careful and thorough examination of those protected values expressed by the law – values intended to promote and realize the vision of the Declaration of Independence, according to its spirit and in view of its stated aims.

14. Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation are part of the family of the basic rights of the citizen, not all of which have as yet been incorporated into law, although it can be assumed and hoped that they will be expanded over time. Yet since they derive from the same principles and values, they supplement one another and are inter-dependent, and it is thus possible to extrapolate from one to the other, and to use one to complete the principles and values of the other. Both of them together should be read alongside the values and the human rights that were set out in the Declaration of Independence.

In my opinion in the *Clal* judgment [37], I expanded upon this point and also referred to the words of Prof. Y. H. Klinghoffer in his article "Freedom of Occupation and the Licensing of Businesses" (3 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1983) 582, 605), in which he expressed his view in the following manner:

> 'All basic human rights unite into a body of norms that ensure human freedom. They influence one another, and if we make light of one of them, it is liable to be the first step in the elimination other basic rights and may potentially undermine the delicate, complex structure of freedom as a whole.'

It follows that when we review the Basic Laws and seek the values and principles expressed in the protected right, we should be guided by the meaning that can be inferred from the two Basic Laws taken together, and also by the interpretation that has already been given, if any, to the provisions of these laws.

15. In my opinion in the *Clal* judgment [37], I emphasized the commonality of the two laws with respect to the limitation clause that is included in each of them and what can be learned from them. In order to elucidate my point, I shall cite what I wrote there:

> 'Both Basic Laws have in common an aspect that demonstrates that we are concerned with a single subject, and a single family of basic rights; that is, the section defined as the "limitation clause," which is found in each of the two laws, and is worded as follows: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required" (s. 8 of Basic Law: Human Dignity and Freedom; s. 4 of Basic Law: Freedom of Occupation)…
>
> One should learn from this limitation clause that the Basic Laws that define, safeguard and protect the basic rights of the citizen are not absolute, since it is indeed possible that one basic right may clash with another basic right that is no less important. Thus the right is, in fact, relative and it may need to retreat in the face of other civil liberties. A basic right such as the freedom of occupation may clash with another civil right, just as it may clash with a clear public interest of importance for the entire citizenry. Thus, in such cases the golden mean must be found that balances the competing rights, where in one case the scale will lean towards one basic right and in another case a prudent balance will tilt the scale towards a different one.
>
> This balance should be carried out seriously and with great discretion, in accordance with the rules and criteria that have been provided by the legislature itself in the limitation clauses of the Basic Laws' (*ibid*, at pp. 466-467).

16. The new approach in Israeli law, conceived in the aforementioned Basic Laws, explicitly or implicitly accords binding, supra-legislative constitutional status to the primary fundamental human rights, as every

governmental authority is obligated to respect these rights in accordance with these Basic Laws (s. 5 of Basic Law: Freedom of Occupation and s. 11 of Basic Law: Human Dignity and Freedom, viz. the relevant application clauses). I am completely in agreement with the words of our colleague Professor Barak in his aforementioned book *Interpretation in Law* (vol. 3, at p. 447) regarding the meaning of the "application clauses." He writes:

> 'The application clause imposes upon the legislature the duty to respect human rights. "Regular" laws are subject to human rights. The "regular" legislature is no longer "all-powerful." The legislative authority granted to the legislature is contingent upon its duty to respect human rights. From this we derive the principle of the supremacy of the Basic Laws. This supremacy – which is supported by other provisions in the Basic Laws, as well – can also be inferred from the application clause.'

Nonetheless, as we have stated, although the basic right is formulated in unambiguous, declarative language, a degree of infringement of this right will be permitted when the need arises to balance between conflicting Basic Laws and between the declared human rights and the needs of the public. Even then, when the task of balancing is carried out, it must fulfill what is required by virtue of the basic right itself and from the "permission" granted in the Basic Law to "infringe" this right according to the conditions and the restrictions of the limitation clauses. If this balance has not been struck, the legislation is unlawful and may be struck down unless some other escape route can be found, whether by amendment of the Basic Law itself, with the required majority, or whether, in the case of Basic Law: Freedom of Occupation, in accordance with the provisions of s. 8 thereof (the override clause), which permits an exceptional infringement of the Basic Law by a regular law.

Therefore, when the Court is required to examine whether and to what extent a regular law that has been enacted contradicts the provisions of a constitutional law, and whether it may in fact be appropriate to declare a law that has been duly legislated in the Israeli Knesset void on account of such an infringement, the Court must examine, first and foremost, the substance of the said constitutional law: the particular basic right that it is intended to protect, the scope of the said right, and its practical expression.

17. Anyone who claims that a basic right has been infringed and who seeks to undermine the force of a regular law for the sake of such an infringement must shoulder the burden of persuading the Court that a protected, constitutional basic right has indeed been infringed. The Court will then

examine this claim in the light of the facts of the case as laid out before it, and in accordance with the values that are contained within the protected basic right. If the Court finds that indeed a regular law that has been passed does infringe a safeguarded basic right, the burden of persuading the Court that in this specific case the justifications in the limitation clause exist for such an infringement passes over to the entity defending the validity of the law – usually a representative of the state.

By saying that the burden of persuading the Court passes from the person opposing the infringement of the basic right to the person arguing that the infringement is justified under the limitation clause, I do not mean that the latter must persuade the Court that the legal conclusion required in relation to a theoretical confrontation between a regular law and a constitutional law should fall one way or the other. This task is imposed upon the judge. Nevertheless, before the judge is required to formulate his legal position, the appropriate factual foundation should be laid out before him on the basis of which, the judicial decision will be made applying the law in this specific case according to its circumstances.

It follows that the burden of persuasion with which we are dealing is the burden regarding the required factual foundation, and it is the latter that ought to be laid before the Court.

Once the facts have been laid out, the task of comparing and evaluating the legality of the regular law in the light of the constitutional law requires a sustained intellectual process, step by step: at the first stage, with regard to the issue of the actual infringement of the safeguarded basic right; and at the second stage, with regard to the justification for the infringement according to the various elements of the limitation clause.

18. If at the initial stage no real infringement of a basic right anchored in a supra-legislative constitutional law is proven to have taken place, or if it becomes clear that the infringement is marginal, trivial or insignificant, then the examination is concluded and the petition to invalidate the allegedly infringing law will be rejected. On the other hand, if a real infringement of a basic right anchored in such a law is proven, the existence of the elements of justification in the limitation clause will then be examined on four levels. The party claiming that the infringement is permissible must bring before the Court a persuasive factual basis to show that all of the following exist:

1. The infringement of the basic right is anchored in law or has been established 'in accordance with the law by a specific authorization made therein';

2. The infringing legislation is 'befitting the values of the State of Israel';

3. The infringing legislation is intended for 'a proper purpose';

4. The legislation infringing a basic right does so 'to an extent no greater than is required.'

The examination and analysis proceed step by step, one stage after another.

First of all, it must be shown that the infringement occurs in or by law. If it becomes clear that the infringement is not so anchored in law, but rather, for example, only in administrative directives or in secondary legislation that does not rely upon a specific authorization in law, then there is no need to continue the examination process, as the infringement is completely unlawful, whatever its underlying motives may have been.

If the infringement is found to be anchored in law, the next question will be whether the infringing provision befits the values of the State of Israel, because if the infringing provision does not befit the principles and the values of the State of Israel as a Jewish and democratic state, it should not remain in force. For instance, an infringement that promotes arbitrary goals of the government as against its citizens (discrimination, denial of rights, deprivation of property, etc.), even if under a color of a regular law, will not be recognized at the constitutional level, since it is those values expressed in the Basic Law that establish the appropriate behavioral norms of government and citizenry, and they may not be weakened or eroded by ordinary legislation.

Should it be found that the infringing provision does not conflict with the values of the State of Israel, and that it may even serve these values, only then may we proceed to the next level of analysis. That is to say, was the infringing legislation enacted for a proper purpose? If it becomes clear that the infringing legislation does not serve a worthy purpose, in that it does not promote national social objectives that benefit the public, or does not strike an appropriate balance between basic rights of equal value, then the infringement cannot be tolerated and is unacceptable.

If we find that the infringing legislation intends to do good, and that it has the potential to promote or preserve appropriate social values, inasmuch as it

reflects an appropriate balance between conflicting basic rights, then we may conclude that, in principle, the infringing provision serves a proper purpose.

If that is the conclusion, then we can move on to an additional stage in the examination process. Indeed, a proper purpose is an important element, without which the infringing legislation cannot be tolerated. However, the existence of a proper purpose cannot redress the wrong if, in achieving that purpose, the infringing law permits a violation of the basic right that is severe or greater than required. Not all means are legitimate in the pursuit of a proper purpose. This element in the limitation clause is the final barrier – and perhaps the sturdiest – facing the waves of a law that seeks to erode and even infringe a basic civil right. Even if the infringing provision satisfies all of the other elements of the limitation clause, the legislature would still have to devote significant care and restraint to determining the extent, necessity, scope and depth of the infringing provision in the means adopted. A sweeping infringement of a protected basic right cannot be permitted, and the aim should be to restrict the infringement so that it be as moderate as possible; and in any event that it not go beyond what is necessary in order to achieve the proper purpose.

If the facts initially examined by the legislature in the course of the legislative process, and later examined by the Court, show that the same proper purpose is attainable in a number of alternative ways, some of which infringe a protected basic right to a greater extent and some to a lesser extent, then the legislature must choose the alternative that is best for the citizen and which least harms the protected right. If the legislature does not do so, or if the Court discovers that the legislature did not consider all of the alternatives, or chose an alternative that severely infringes the right when a less harmful alternative was available, the Court will find that the infringement is greater than required, and will not extend the protection of the limitation clause to that law. It follows that the Court will not be satisfied with an abstract description or a technical examination of the legislative process, but rather the entire factual basis that was examined or that should have been examined must be laid before the Court, so that it can state its opinion.

Some, myself included, view this element of the limitation clause as the core of the entire section.

One may assume that in the overwhelming majority of cases the infringement of the basic right will be approved or rejected on the basis of the degree of the infringement and its scope.

I would like to believe that in the foreseeable future, the Israeli legislature, founded upon and operating in accordance with enlightened, democratic values and principles, will not enact any legislation that is not anchored in the values of the State of Israel, or that serves the sole purpose of inflicting harm to citizens and denying their protected basic rights without proper cause. Nonetheless, the legislature may unwittingly err unawares, and thus it is appropriate that, in any event, all of the elements of the limitation clause be examined with the requisite thoroughness.

However, with regard to the degree of the infringement, its scope and its necessity, the legislature may certainly err, both in the process and in the conclusion. In cases of such careless and ill-considered legislation, precedence will be given to the basic rights that we are enjoined to protect.

19. I have presented a detailed explanation of my position regarding the burden of proof in regard to the factual basis that must be presented before the Court, whether with respect to the actual infringement of a basic right protected by a Basic Law, or whether with respect to the issue of whether the infringement is tolerable insofar as it conforms to the principles of the limitation clause. I presented this at length because, in my opinion, if we do not act in this manner, but rather presume that the legislature always acts, *prima facie*, within the bounds of the constitutional law, then we will serve neither the interests of the law nor of the legislature. In our desire to enforce the protected basic rights found in the evolving constitution, we must make sure that, in drafting regular legislation, the legislature always keep the protected basic rights in mind; refrain, insofar as possible and insofar as is required, from any infringement of those rights, and if necessary, make the appropriate effort to ensure that the infringement meet the requirements of the limitation clause, *inter alia*, that its scope not exceed what is required. Such legislation requires, by its very nature, a careful examination of the various possible alternatives for achieving the purpose that must be proper. Thus, before the legislature has its say, it must examine the relevant factual basis provided by expert research and examination. On that basis, it can formulate a position consistent with the constitutional provision, and draft the law appropriately.

We make no such assumption regarding the actions of the legislature, nor do we assume that its preferences are always appropriate. It is the Court that will have to decide, on the basis of the relevant factual basis that was before the legislature, that – in terms of its strength, premises, and reasonableness – it complies with the conditions of the limitation clause.

If a conflicting set of facts is presented in opposition to those factual grounds by some person whose protected basic right has been infringed – and which indicates that the proper purpose, if any, could have been obtained in a less harmful way – then the burden of proof falls upon the legislature that infringed the right, through its representatives. Of course, the Court does not, nor does it intend to place itself in lieu of the legislature. But it is the Court's task and obligation to conduct a judicial review of whether the legislature did in fact satisfy the conditions of the limitation clause, whether it has not adopted the easy path, gone too far, or infringed the citizen's protected basic right more than necessary. The Court, of course, respects the other branch of government operating within the scope of its authority, and will carefully consider, with due respect, any legislation enacted by the primary legislature. However, the Court is also required to ensure the citizen's basic constitutional rights. Therefore, the citizen bears the burden of proving that his right has been infringed, while the legislature, through the offices of the State's attorneys, bears the burden of proving that the infringement is tolerable, and that it satisfies all of the elements of the limitation clause. This burden should not be borne by the citizen who has been harmed.

I fear that if, in constitutional matters, we were to adopt the rule of administrative law that assumes that the governmental authority duly acts within the scope of its jurisdiction unless that assumption be proven wrong, we would become lax in regard to protected basic rights, and we would, God forbid, cause the blessing of the aforementioned Basic Laws to fade away. For these reasons, I cannot agree with the opinion of my esteemed colleague Justice Goldberg regarding the burden of proof and regarding the intensity of the infringement required in order to determine that a regular law does not meet the conditions of the limitation clause.

20. In accordance with which criteria will the Court examine the matter of infringement of a basic right and interpret the various elements of the limitation clause? The grounds for a court's intervention in the administrative decisions of governmental authorities are well known, but should judicial review be carried out in accordance with the same criteria, or must we adopt special rules? It would seem that the rule that should guide us in such a case is that, when examining whether there has been an infringement of a citizen's basic right, the protected right should be afforded its full ethical and fundamental significance, in the express spirit of the Declaration of Independence and in accordance with the principles of democratic government, while the scope of possible infringement or erosion of such rights

should be limited as much as possible. Once an infringement has been established, then, as I stated above, the party that seeks to justify the infringement must show that the infringement is permissible in terms of the principles of the limitation clause. This examination may be carried out in accordance with criteria similar to those employed for the review of the lawfulness of administrative provisions, viz. does the provision reflect actual discrimination, denial of rights, or (Heaven forefend) arbitrariness. But also beyond this, was the provision infringing the basic right promulgated dishonestly or in an irrelevant or unreasonable manner? With due respect for the legislative branch, it is appropriate that we assume that the legislative branch deemed its considerations and reasons for the infringing legislation to be material and honest, yet it is nevertheless incumbent upon the Court to review and examine whether a mistake has been made by the legislature that might endanger rights.

I would say that review of the infringement of the basic right needs to be thorough and firm; and yet when examining the justification of the infringement in accordance with the elements of the limitation clause, the Court can adopt an open, liberal approach toward the legislative process, taking into account the necessary balances regarding each of the elements of the limitation clause. Legislation that is discriminatory, denies rights, or is arbitrary will be rejected absolutely. But in other respects, the interpretation will be flexible with regard to the appropriateness of its purpose, its reasonableness, its integrity, the proportionality of its means, and its necessity. These criteria will guide me in my consideration of the Primary Law and the Amending Law.

21. Over the years, the family agricultural sector fell into an economic crisis of the most extreme proportions. The debts of agriculturalists skyrocketed, and many entered a state of insolvency; and in the absence of assistance, there was a very real danger that the branch would fail and Israel's agricultural sector would collapse. The State requested, and the legislature agreed, to establish legal arrangements that would prevent, or at least mitigate the catastrophe, so that it would be possible to continue to maintain farms while imposing a legal arrangement for the farmers' debts. The Primary Law, which came into force on March 12, 1992, restricted itself to arrangements that would resolve primarily the problem of debts due to be repaid on December 31, 1987. Of the many complex provisions of the law, the two that are most important to the matter before us are the following:

(a) Rehabilitators will be appointed in accordance with the Law, who will be granted the legal authority and power to dispose of the agriculturalists' debts, and discretionary authority to arrange for the repayment of the debts, in accordance with the nature and scope of their authority as determined by the Law.

(b) Regarding those debts to which the Law applies, the jurisdiction of the courts and of the execution offices to consider the debt or execute judgments is revoked. Pending legal proceedings will be halted, and the entire matter will be transferred to be heard and decided by a rehabilitator.

The rehabilitator shall determine the size of the debt, the ability to repay it, the amount of the debt that shall be repaid and the payment schedule, the realization of assets as payment for the debt, cancellation of debts and other similar provisions that erode the right of the creditor to collect the entire sum of debt owed to him.

22. In reading the law, it is absolutely clear that there is a real infringement of the basic rights of the creditors in their property in two primary aspects: First, they are barred from of the gates of the courts and the execution offices, where they have a right to claim what is owed them by these debtors, as from any other debtor. Secondly, an arrangement has been imposed upon them that may deprive them of rights, in the sense that part of the debt is liable to be cancelled, and part of the debt may be repaid in installments spread out over many years, so that when whatever part of the debt is paid will represent only very partial repayment hardly in accordance with their expectations, needs and rights, and this without any of the recourse to the enforcement authorities that they enjoyed prior to the law.

Thus, we may conclude that the provisions of this law constitute a real infringement of the creditors' property.

23. Until the enactment of the Basic Law: Human Dignity and Liberty on March 25, 1992, a person's property was not recognized as a protected basic right. The protection of this right at the constitutional level was recognized in s. 3 of Basic Law: Human Dignity and Liberty which states: 'There shall be no violation of the property of a person.' This protection is not available to a citizen in the context of the aforementioned law, due to the section on validity of laws in the Basic Law, which states (s. 10): 'This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.'

Nevertheless, and bearing in mind the general principles of the Basic Laws as a whole, it is appropriate that in treating of matters concerning basic human

rights in a law that was in force prior to the Basic Law, the Court construe the law in a manner consistent with the spirit of the Basic Laws. This rule is established under s. 10 of Basic Law: Freedom of Occupation, and there is nothing similar to it in Basic Law: Human Dignity and Liberty. Yet, in my opinion, this approach is also appropriate in our case. In terms of values, as earlier stated, the two laws should be treated equally – especially as from the very outset we have adopted the values and the principles of the Declaration of Independence as our guide, and they also shed light upon the present matter – in construing the law that applies to the citizens of this country. We have done this in the past in establishing and defending basic civil rights, and we should do so in this context.

24. The situation is different regarding the Amending Law, which was passed in the Knesset on August 4, 1993. This law was enacted after Basic Law: Human Dignity and Liberty, and it is therefore subject to the provision that prohibits infringement of a person's property rights. The Amending Law not only infringes the creditors' rights to the extent that they are infringed by the original law, as explained above, but it is even more extreme. First of all, the Amending Law also imposes the arrangement upon debts that accumulated up until December 31, 1991. In addition, the Amending Law extends the power and authority of the rehabilitator to cancel and reschedule debts. Moreover, according to the Amending Law, a tax debt that is defined as 'any amount that a person owes according to legislation regarding the imposition of a tax or a mandatory payment that the Minister of Finance is charged with imposing or collecting' is not included among the debts subject to the aforementioned law.

In other words, while an ordinary citizen is bound by the law's provisions, and thus his ability to collect the debt is harmed, the State as a creditor is not bound by the law, and is free to continue to collect the debts owed to it. Therefore, I concur with the view of my colleagues, President Shamgar and President Barak, that the Amending Law infringes the right to property of creditors in the proceedings that are the subject of this case.

25. The State argues that the amendment to the law is nothing more than a clarification of the provisions in the Primary Law, and therefore the Amending Law should be treated in the same way as the Primary Law, which is not subject to the Basic Law. This argument was rejected by the President, and I concur in his opinion and his reasoning. I will however add this: Every law, even an amending law, is subject to the rules of the aforementioned Basic Law according to the date of its enactment.

Provisions regarding the maintenance of the status quo were intended to serve only one purpose: to prevent severe harm to the stability of the existing law and radical disruption of the system in force before the Basic Laws came into force. This does not lead to the conclusion that if we find clear that a pre-existing law infringes a basic human right, that law is worthy of continuing for posterity. As stated, even in the case of such a law, it should, as far as possible, be interpreted in the spirit of the principles of the Basic Law. In my opinion, the arrangement in Basic Law: Freedom of Occupation that sets limits on the continued application of infringing laws that preceded the Basic Law is preferable. But this is the legislature's problem, and we cannot, by virtue of our authority, change what the law has expressly established. The conceptual basis for preserving the status quo is absent when we are faced with new legislation.

When the legislature amends an existing law, it must consider the principles and values enunciated in the Basic Laws, and abstain from their unlawful infringement.

26. Having established that the Amending Law infringes the provisions of section 3 of Basic Law: Human Dignity and Liberty, we must consider whether this infringement is tolerable and permissible under the aegis of the limitation clause.

27. The instant case presents no problem with regard to the first stage of the examination as to whether the infringement was carried out in accordance with the law, inasmuch as the Amending Law was enacted by the Knesset, and the infringing provisions are a part of that law. As for the second stage of the examination – whether the law is consistent with the values of the State of Israel – we can say without hesitation that enlightened democratic states, as well as in Jewish tradition, value the idea of mutual assistance, support of the weak who require assistance by those with means, shouldering the burden of the needs of the state in a progressive manner in accordance with one's capacity to do so, and imposing tasks upon one part of society in order to relieve another sector of the public, so that we may achieve an enlightened, just society that provides for the needs of society as a whole and for the quality of communal life (I have addressed the subject of nature of value-based democracy, in general and in Jewish tradition, in the different, but relevant context of the *Clal* case [37], on pp. 474-477. I believe that it is appropriate to refer to the detailed opinion and the sources quoted in detail in that decision).

This is not the first time that the public or some part of the public of a democratic society has been called to the rescue of an economic sector facing collapse. Jewish tradition provides examples of edicts, rules and customs that share the characteristic of extending help to the stranger, the orphan, the widow, the sojourner, the poor, the unfortunate and the despondent. The President has addressed this at length in his opinion and I can only concur in all that he has stated.

Does the infringing law serve a proper purpose? The explanatory note to the draft bill of the Primary Law state, on p. 92, that the bill 'is intended to create a new framework for resolution of the most difficult crisis to have struck the entire agricultural sector over several years.' The note also states:

> 'The overall aim [of the bill – D.L.] is to facilitate the rehabilitation of the agricultural sector, by giving preference to rehabilitation over liquidation, on the one hand, and the need to prevent a flow of funds from the public purse on the other. The involvement of the legislature in providing arrangements for the agricultural sector appears a necessity at this time, after other arrangements proved ineffective, and left the agricultural sector in deep crisis and sometimes even made things worse.'

Indeed, the appropriate policy for dealing with commercial enterprises or businessmen in serious economic crisis is not necessarily liquidation of the company or a declaration of bankruptcy, but rather the rehabilitation of the business to the extent possible. In CA 673/87 *Y. Salah et al v. Liquidator for Peretz and Issar Construction and Investments Co. Ltd. (in liquidation)* [60] at p. 68, I stated as follows:

> 'In my opinion, there is no need for haste (in regard to the liquidation of a business or bankruptcy – D.L.). As long as it is possible to save a business from collapse, we should carefully and responsibly try to do so with daring and resourcefulness. To the extent that the liquidator, trustee or receiver acts under the supervision and guidance of the court to effect the necessary liquidation of a business as an active, vibrant concern, so much the better for the creditors, for the parties to the company, and for the bankrupt as an individual.
>
> Through such action, the purpose of the law is realized. By such an approach, insofar as it is applicable to the circumstances of the case, we promote a just result.'

Both the Companies Ordinance [New Version], 5743-1983, and the Bankruptcy Ordinance [New Version], 5740-1980, encourage and promote resolution by an arrangement by which creditors waive part of their claims in order to save the company or the business proprietor from total collapse. One will benefit a little, while the other will give up a little, yet at the end of the day both will be saved.

By way of analogy, we proceed to the matter before us. The collapse of the agricultural sector could have caused untold damage to the national economy, and could have brought many good citizens – who had invested all of their resources, strength and energy in the construction of Israel's magnificent agricultural sector – to their last crust of bread. They must not be abandoned in their hour of need. Those who, first and foremost, can contribute to recovery and the prevention of collapse are the creditors who have carried out business with the agriculturalists and enjoyed no small profit over the years.

The duty of rescue should not be imposed upon all citizens, but rather on those who have some connection to the matter. The law is intended to promote a proper purpose – to address the social needs of a meritorious community, to achieve social justice, and to enable the state to overcome a dangerous situation that, if not resolved, will seriously harm the national economy.

In this instance, the importance of the aforementioned purpose should not be underestimated because it is not applied equitably across different sectors of the economy. The values of the State of Israel do not require such equality in a case such as this, and such inequality, insofar as it exists, in extending assistance to sectors in distress, or in imposing a burden on a part of the public, is not sufficient to taint that purpose.

28. The question that remains to be answered in the final stage of examination is whether the proffered solution infringes the basic rights of citizens beyond what is absolutely necessary in the circumstances of the case. I harbored some hesitations and second thoughts regarding the proportionality of the infringement.

First of all, I asked myself whether it was appropriate that the Amending Law removes the State from the general group of creditors that will have to bear the burden, considering that the State also enjoyed income from the agricultural sector, and should perhaps contribute from its own resources to rescue the agriculturalists in their time of need.

Should we not regard the imposition of the burden on the other creditors alone as a severe alternative for the creditors as a whole, when a less injurious

alternative could have been presented? I have refrained from drawing a conclusion regarding this infringement, since this issue was not addressed in any meaningful way by the parties to the case, and it would be inappropriate for the Court, on its own initiative, to draw far-reaching conclusions, and even question the constitutionality of a law, where the parties had not presented factual and legal arguments before the trial court.

I also asked myself whether the legislature examined different alternatives for resolving the crisis of the agricultural sector and concluded that the aforementioned alternative was the least harmful and the most just.

Such examination and analysis are necessary, in my view, and if these are not undertaken by the legislature in the legislative process, then it is appropriate that they be undertaken by the Court when it is asked to invalidate the infringing law. However, when all is said and done, it seems to me that, in this matter as well, the infringement does not appear to go beyond what is necessary in the this case. Examination of the original draft bill to which I referred above, examination of the draft bill of the Amending Law and its provisions, and weighing the arguments and explanations advanced by the parties in this regard, especially those of the Attorney-General's representative, satisfy me that before formulating its infringing provisions the legislature did consider various alternatives.

The Primary Law only came into being after other alternatives, which did not so severely infringe basic rights of citizens, were tried and failed. The Primary Law attempted a solution similar to existing solutions in the field of private law field (viz. liquidation of companies and bankruptcy, as explained above). The experience accumulated in the application of the original law shows that the arrangements established by the Primary Law, *inter alia* those establishing that the debt be handled in the manner prescribed by the law as the basic debt that existed on December 31, 1987, do not achieve the desired results, and the powers that were granted to the rehabilitator were insufficient. Thus, the Amending Law arrived only at a later stage, and introduced a more severe infringement of basic rights that apparently became necessary in order to achieve the purpose. Thus, the overall picture supports the conclusion that the infringement, while significant, is nonetheless required in the face of a sad reality, and thus is not excessive.

29. I therefore concur with the opinion of my colleagues that the appeals in LCA 1908/94 and LCA 3363/94 should be allowed, and the appeal in CA 6821/93 should be denied. Inasmuch as disagreements arose among the members of the bench regarding a number of the important issues, and in light

of the opinions and positions that I expressed above, I stand in this case behind the conclusion of President Barak in paragraph 108 of his opinion.

Justice I. Zamir

1. The constitutional revolution did not begin now, with the enactment of the Basic Laws on human rights. It began a generation ago, with the *Bergman* decision [15]. As is well known, the *Bergman* decision first established that the Knesset can bind itself by means of an entrenched provision in a Basic Law, and that the Court is authorized to annul an ordinary law that is repugnant to such a provision. Justice Landau's opinion in that decision began a revolution, because it came to the legal community as a complete surprise and introduced a fundamental change: it reversed what had until then constituted the axiomatic view of the status of the Knesset, the status of the Court, and the relationship between them. The Court did not resort to theory in order to bring about thisrevolution. On the contrary, it intentionally refrained from addressing 'very weighty preliminary constitutional questions regarding the status of the Basic Laws and the justiciability before this Court of the question of whether the Knesset did in fact comply with a limitation that it imposed upon itself...' (*ibid.* at p. 696). Nevertheless, the revolution succeeded. It succeeded, as revolutions do, because it occurred at the right time, under the pressure of the eve of elections; because it was implemented through wise tactics that left the government with the means for achieving its ends despite the annulment of the law), either by amending the law or by re-enacting it with a special majority; and perhaps also because it refrained from a debate upon the weighty constitutional questions. In these respects, it is reminiscent of the successful revolution that took place in the United States approximately 200 years ago, also in the area of the relationship between the judiciary and the legislature, in the *Marbury* case [94]. Indeed, the *Bergman* decision [15] provides additional proof of the famous statement of Justice Holmes that a page of history is worth a volume of logic.

2. The constitutional revolution of the *Bergman* decision [15] was, like all successful revolutions, only the first stage in a long, complex process. It paved the way for the second stage of the revolution, which commenced approximately three years ago, with Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Although the practical importance of this stage inestimably surpasses the importance of the first stage, it does not

represent a theoretical breakthrough. The new Basic Laws do not create human rights, inasmuch as they have long been recognized by the case law. They do not even create a new rule of interpretation, inasmuch as the case law has already established that all laws must be construed in the light of human rights. So what do they accomplish? The laws expand the principle that was established in the *Bergman* decision [15], and that has since become generally accepted, that the Knesset can limit itself through a Basic Law. Indeed, in the *Bergman* decision [15] the Court only established the principle of formal self-limitation, that is, self-limitation requiring a special majority of Members of the Knesset. In the case at hand, we are dealing with substantive self-limitation, that is to say, limitation that requires the conformity of an ordinary law to the values and principles that have been established in the new Basic Laws.

At this stage, the transition, within the framework of that principle, from formal self-limitation to substantive self-limitation, is simple and straightforward. It is a natural development. Indeed, the idea that the Knesset can substantively bind itself by means of a Basic Law has achieved nearly universal acceptance. This approach finds expression in scholarly literature and in *obiter dicta* of this Court. Now, in the instant case, it achieves the status of established law. In the words of President Shamgar (*supra*, at paragraph 35), 'Logically, there can be no ground for distinguishing between the powers to fetter future parliaments *substantively* and *procedurally*.' That is the whole law *stans pede in uno*, to be elaborated in future decisions as may be required.

3. Nonetheless, the theoretical basis for this approach is contested. What is the source of the Knesset's power to limit itself? The controversy, which was left unresolved in the *Bergman* decision [15], has been simmering beneath the surface for many years. It would seem both possible and appropriate to allow it to continue to develop in academic debate until such time as the Court will be required to decide, inasmuch as no determination is necessary to decide the instant case. The fact remains that at the conclusion of the present discussion, the issue remains unresolved.

This is true regarding the aforementioned issue, as well as in regard to other important, complex issues that have been addressed at length in this case. In matters of constitutional law, the Court must tread with extreme care lest it stumble. In this area, more than in other areas of law, the Court is establishing societal norms. Often its decisions are not merely guideposts, but pave new roads. This process requires a thorough examination of the terrain

and a long-term perspective. Progress should be made inch by inch. A sudden leap may undermine the stability that is essential to progress.

The uniqueness of the field of constitutional law also requires that the Court adopt a unique approach. Hence the clearly great importance of the rules proposed by President Shamgar, following Justice Brandeis, when discussing constitutional questions. President Shamgar states (in paragraph 89), *inter alia*, that 'The Court will not customarily decide questions of a constitutional nature unless *absolutely necessary* to a decision of the case,' and 'The Court will not formulate a rule of constitutional law broader than is required by *the concrete facts before it* to which it is to be applied.' I concur. In this spirit, I prefer to leave open various questions that have been discussed in this case, including seminal questions of constitutional law, until the time is ripe.

4. Nonetheless, I cannot ignore the fact that the controversy has indeed surfaced, and this decision presents various opinions on basic questions of constitutional law. These opinions, even those that are only *obiter dicta*, are likely to influence the development of the law. In such a situation, importance is attributed to the relative support expressed for one position or another. Therefore, I think it appropriate that I very briefly express my views regarding two issues.

First of all, regarding the question of the source of the Knesset's power to limit itself, both from the formal and the substantive points of view, I believe that this power emanates from the Knesset's status as a constituent assembly. The theory regarding constituent assemblies is accepted in many countries and is widely held in Israel. It proposes a theoretical explanation and supplies a practical tool, both for the Knesset and the Court, for the appropriate treatment of constitutional issues. It is, in my view, the preferable approach.

Secondly, regarding the issue of proportionality, which was established as the test by the limitation clause in the Basic Law, I believe that it is appropriate to adopt a three-pronged test: conformity, need, and proportionality. This test is accepted in various countries and in international law, as well. It has also penetrated Israeli law, and has become settled law in administrative law. See HCJ 987/94 [57]; HCJ 3477/95 [58]. It is neither reasonable nor desirable to establish a different rule in the field of constitutional law. This is the case because, first of all, there is no sharp boundary dividing constitutional law and administrative law. It is also the case because this Court crossed the line in stating that the requirement of proportionality established in the Basic Law also applies to administrative

authorities. See HCJ 987/94 [57]. In other words, the legal rule in this regard is identical in both constitutional and administrative law. Moreover, the law that grounds proportionality on the aforementioned three elements represents, in my opinion, the proper approach. It provides the Court with a sophisticated, efficient tool, based on the experience of other countries and of international tribunals, for the judicial review of laws, secondary legislation and the various types of administrative decisions.

Thus, regarding these two issues, I concur with President Barak.

However, I would advise great caution against establishing any hard and fast rules regarding the definition of property and what constitutes an infringement of property rights. Does the Basic Law provide a defense against any new law that may, even indirectly, affect the value of property or pecuniary income? For example, does the protection of property extend to limitations that the law imposes upon labor contracts, such as a provision regarding minimum wage, or requirements concerning property relations between spouses, such as a provision requiring maintenance?

If every infringement of the value of a person's property, including infringements of various financial obligations, were deemed an infringement of property rights, then we will discover innumerable laws infringing property. The Court would likely find itself up to its neck in reviewing the legality of every such law, for fear, *inter alia*, that it infringes property rights beyond what is necessary, and it would be difficult for the legislature to fulfill its role adequately. The broader the scope of the right to property as a constitutional right, the weaker its protection. In this regard, a bird in the hand is worth two in the bush. Therefore, in the matter at hand, it is sufficient that I assume that the Amending Law infringes property rights. Even on the basis of this assumption, I see no need to annul the Amending Law, since the facts and the arguments presented to this Court do not provide a basis for a determination that the Law does not meet the requirements of the limitation clause.

5. President Barak sums up the law, insofar as is relevant for a determination in the present case, in paragraph 108 of his opinion. I concur with that summary. I therefore also concur with the result reached by President Shamgar, President Barak and my other colleagues on this bench.

Justice M. Cheshin

1. I concur with my colleagues President Shamgar and President Barak. Indeed, the Amending Law succeeded in overcoming the hurdles erected by Basic Law: Human Dignity and Liberty, and there is no need to further address the legality or constitutionality of that law.

2. My colleagues, President Shamgar and President Barak, wielded scythe and the sickle in the field of the Basic Laws, not laying them down until nightfall. But they left a few stalks standing, and I resolved to gather a few ears myself, which I will grind and bake into a loaf of my own bread.

One of the fundamental issues that my colleagues addressed at length – and upon which they disagreed – concerns the Knesset's authority to frame a (rigid) constitution for the State. If you like: the question of the Knesset's power to "limit" its future authority to legislate in the future by way of the "entrenchment" of laws (formal or substantive entrenchment). Both of my colleagues reached the conclusion that the Knesset has the authority to entrench the laws that it enacts, i.e. to limit its authority to legislate in the future. However, they follow different paths to that conclusion, and to the extent that their paths differ, my colleagues do not even agree on the question of the scope of the Knesset's power to entrench laws.

3. I will begin by stating that in my opinion the Knesset lacks the constituent power to frame a constitution, in the sense that the concept of "constituent power" and the concept of "constitution" appear in the opinions of my colleagues. Moreover, I have grave doubts as to whether a theory that accords the Knesset authority to frame a constitution is appropriate for us, here and now. Indeed, I believe that the Knesset has the authority to impose on itself limitations upon future legislation – within limits and bounds that I shall specify and explain – and in this sense, I concur with my colleagues' views. However because my starting point differs from that of my colleagues, I find myself arriving at a different destination.

4. The differences of opinion among us in relation to the issue of the constituent authority of the Knesset and the question of Knesset "sovereignty" all constitute *obiter dicta*. In the matter before the Court, we are of one mind. What was it then that compelled me to burden the public by adding my own (lengthy) *obiter dictum* to those of my colleagues? I will, therefore, begin with an explanation.

5. First of all, in my view the question of the Knesset's authority to limit itself (by constitution or law) is the most important question arising before the Court in the present case, and its importance far exceeds that of the other matters confronting us. In comparing them, I would say that say this is one of the giants while those are Lilliputians.

Furthermore, I dare say that since Israel has had a Supreme Court – from its inception to this very day – no greater or more important question has come before it than the question of the Knesset's constituent authority to frame a constitution for Israel, the question of whether Israel has a constitution, even if adopted incrementally In fact, the present case does not require that we decide this question on its merits, and we all concur that Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation were enacted lawfully and with the requisite authority.

Yet this one question towers over all the other questions before us, and even if only incidental, it is a colossus. The question of the constitution and the question of who possesses the authority to frame a constitution are questions that come exceedingly close to the *grundnorm* of the Israeli legal system. Thus, our concern is with a question lying at the bedrock of the Israeli legal system. And, facing such a preeminent question, we would be hard put not to make some remarks.

6. Secondly, and this goes to the heart of the matter: One day the Knesset will pass a law or a Basic Law on a constitutional matter, and that law or Basic Law will provide that it can only be changed by a majority of seventy or eighty Knesset members (or ninety or a hundred). What legal standing would such a provision have? Would it be valid and binding to the extent that the Knesset could not amend the law (or Basic Law) except by the special majority stipulated in the law? Or might we say that such a provision, which curtails the Knesset's legislative power, indefinitely is like a broken potsherd, lifeless by reason of its presumption to limit the Knesset's legislative power for all time? According to my colleague President Barak, the limitation would be fully and unreservedly effective (valid?) provided that it bore the form of a Basic Law, for that legislative act would be within the Knesset's constituent authority. Such a law (or constitution) is a "Basic Law," and its contents comprise all of the constitutional subjects (fundamental principles of the state, governmental structure, the relations among the branches of government, and individual rights). This is also the view of my colleague President Shamgar, although his opinion also hints at a certain limitation of the Knesset's authority (see

par. 35 of his judgment). My view is that a provision for a special majority (the kind of majority provisions we mentioned above) purporting to limit the Knesset's power to change a law would be invalid *ab initio,* because the Knesset lacks the authority to pass it. In my view this kind of statutory provision would be absolutely *anti-democratic*; this statutory provision places the minority in control of the majority, and as such is a law that the nation never authorized its representatives to enact. In my view, in the absence of a true constitution, this kind of provision presents a clear and present danger to Israeli democracy, both in law and in practice, and I oppose it with every means at my disposal.

7. We will further discuss all of these matters below, whereas in this context we wish only to explain why we view the issue of the Knesset's authority to enact a (rigid) constitution, in other words the Knesset's authority to legislate entrenched laws – as an issue that overshadows the other subjects being adjudicated before us. These are the few ears that I have chosen to grind.

8. Our discussion takes the following path: Firstly, we will examine the question of the Knesset's constituent authority, i.e. the subject of the Knesset's authority to enact a constitution. In this chapter we explain why, in our view, the Knesset lacks constituent authority, and why it is powerless to enact a (rigid) constitution for the State of Israel. In that context we will further dwell on the inherent dangers of giving legal approbation to the Knesset's constituent authority or its unlimited sovereignty without the issue having been placed before the people for its decision and a consideration of the opinions regarding the advantages and disadvantages attendant to the authority to establish a constitution. Having reached this conclusion, we further ask ourselves: In the absence of constituent authority, does the Knesset have, as a matter of law, the authority to enact "entrenched" laws? At this junction we will set out our approach, and explain why, in our view, the Knesset does indeed possess that authority and we will delineate its limitations. We thus begin with the subject of the Knesset's constituent authority

The Constituent Authority – Was it you or was I dreaming?

9. How does one identify the authority to adopt a constitution? How should we know whether constituent authority was conferred, and if the authority was conferred, who possesses the authority? How shall we know if a constitution was established, and whether a particular norm is a constitutional norm? The question of identifying the body with the

authority to frame a constitution, and the question of whether a certain norm is a constitutional norm are intertwined, inseparably linked, and are, in fact, one and the same. The body authorized to frame a constitution frames the constitution, and a norm enacted by the authorized body with the intention of it being a constitutional norm, is a constitutional norm.

Since we know that the constitution comprises the supreme norms of the State, before which even the legislature bows its head in deference, the ineluctable conclusion must be that with respect to the existence of the authority to frame a constitution, and the identity of the body authorized to frame the constitution, there can be no doubt regarding the existence of the authority or the identity of the authorized body. Both are self-evident and any explanation is superfluous.

Thus the Jewish people became obligated to its first constitution. The people were first commanded to purify themselves in anticipation of receiving the constitution:

> 'And the LORD said unto Moses, Go unto the people, and sanctify them today and tomorrow, and let them wash their clothes. And be prepared for the third day. For in the third day the LORD shall descend upon Mount Sinai for all the people to see. And Moses went down from the mount unto the people, and sanctified the people; and they washed their clothes. And he said unto the people, Be ready against the third day: come not at your wives' (Exod. 19:10-11;14 [120]).

For three days (no more and no less) the people waited to receive the constitution, and on the third day the ceremony began in awesome grandeur:

> 'And it came to pass on the third day in the morning, that there was thunder and lightning, and a thick cloud upon the mount, and the voice of the trumpet exceeding loud; so that all the people that were in the camp trembled. And Moses brought forth the people out of the camp to meet with God; and they stood at the nether part of the mount. And Mount Sinai was altogether on a smoke, because the LORD descended upon it in fire: and the smoke thereof ascended as the smoke of a furnace, and the whole mount quaked greatly. And when the voice of the trumpet sounded long, and waxed louder and louder, Moses spoke, and God answered him by a voice. And the LORD came down upon mount Sinai, on the top of the mount: and the LORD

> called Moses up to the top of the mount; and Moses went up' (Exod. 19:15-20 [120]).

Thunder and lightning and thick clouds; the mighty sound of the trumpet. The Almighty descends on the mountain in fire and Mount Sinai is engulfed in smoke, smoke like the smoke of a kiln, and the sound of the trumpet grows louder and louder: "Moses spoke, and God answered him in thunder." And after all that comes the constitution: "I am the Lord your God." This is the Sinaitic theophany, the awesome grandeur of receiving the Law; the ceremony of bestowing a constitution upon Israel. There is no doubt as to who grants the constitution; there is no doubt as to the authority of the giver of the constitution; there is no doubt as to the language of the constitution, and there is no doubt that a constitution has been given. The authority is not disputed, its language is not disputed, and the giving of the Torah is not disputed.

The same idea has also been presented in different terms:

> 'R. Abahu said in the name of R. Yohanan: When the Holy One Blessed be He gave the Torah no bird chirped, no fowl took wing, no ox lowed, the wheels [of the celestial chariot] did not rise, the seraphim did not say Holy, the sea did not rock, no creature spoke, but the world was quiet and silent, and there was a voice: "I am the Lord your God"' (*Shemot Rabba* 29 [121]).

This is the Torah of thunder and lightning, of thick cloud and the mighty sound of the trumpet, and this is the Torah of the still small voice.

Indeed, this is the hallmark of a constitution, and to the best of my knowledge it has been the hallmark of constitutions throughout human history. As the Bible states regarding the first tablets: (Exod. 32:16) [119]):

> 'The tablets were the work of God, and the writing was the writing of God, engraved upon the tablets.'

In the past, it was God's finger that engraved the constitution in stone. In our day it is man's hand that writes, and the text is in blood and fire and columns of smoke, and if not so, then in fire and columns of smoke, and if not that, then in columns of smoke.

10. The day of giving a constitution is a day of pomp and circumstance. Everyone knows that the authorized body is about to enact

a constitution, for behold a constitution is about to be given, and behold a constitution is now given. "A constitution is given with full awareness," with the nation willing to assume the yoke of the constitution, even if by way of "holding the mountain over their heads" [Babylonian Talmud, *Shabbat* (Sabbath) 88a – ed.].

Today we may require a referendum, a constituent assembly specifically designated for that purpose and charged with the task of framing a constitution, or perhaps some other approach. Most importantly, we must have a clear knowledge of what lies ahead. The question of the authority to grant a constitution is not "just another legal question" demanding a solution. It is the ultimate question, for in relation to bestowing a constitution it is said: "this day you have become a people" (Deut. 27:9 [119]). More prosaically we might say: today you have been privileged to receive a norm that is elevated above all other norms, a norm so majestic that only the *grundnorm* stands above it. Is it conceivable that a legal requirement would arise to cite historical and legal circumstances to prove that a particular body had acquired the authority to bestow a constitution upon a nation or had so bestowed a constitution? We are familiar with the issue of constitutional interpretation; and with the issue of the court's authority, or lack thereof, to invalidate statutes that contradict the constitution. Perhaps our perspective is limited, but to date we have yet to hear of a dispute over whether a particular body has the (historical and legal) authority to grant a constitution to the nation. And we certainly have not heard of this question arising as a legal issue given to judicial resolution. We have enough – more than enough – questions pertaining to the interpretation of the law and the interpretation of the constitution. We would at least have expected there to be no dispute over the actual authority to enact a constitution. The very existence of disputes on this question indicates the tenuousness of the conclusion that the current Knesset possesses constituent authority.

11. My colleague President Shamgar, and my colleague President Barak, each in his own way, recognize the Knesset's authority to frame a constitution. President Shamgar premises the Knesset's authority on the principle he refers to as the unlimited sovereignty of the Knesset. President Barak, on the other hand, builds the Knesset's constituent authority on three pillars (models). The first is constitutional continuity from the Constituent Assembly of the First Knesset. The second is the rule of recognition and the fundamental conceptions of the Israeli legal community. The third is the

model of the "best interpretation of the entirety of the social and legal history of the Israeli legal system." President Shamgar's approach differs from that of President Barak, and Barak's approach is divided into three secondary models, each different from the others with its own unique contours. However, close examination of both approaches indicates unequivocally that in each of their individual odysseys my colleagues rely on the doctrine of constitutional continuity from the Constituent Assembly of the First Knesset, which is the foundation of their conclusions. In other words, both of the edifices constructed by my colleagues, upon which they base the current Knesset's constituent authority, originate in the First Knesset's constituent authority and a constitutional continuity from the Constituent Assembly of the First Knesset until the current Knesset. Accordingly, if this is the basic principle – and it is – it is quite natural for our own journey to begin from there.

We will therefore pose the following questions: Firstly, did the Constituent Assembly of the first Knesset have the authority to frame a constitution for Israel, and secondly, assuming that it had such power, was this power transferred to all subsequent Knessets?

Regarding the establishment of the "Constituent Assembly"

12. The establishment of a Jewish state in the Land of Israel - the State of Israel - was declared on the fifth of Iyar 5708, May 14, .1948. The operative part of the declaration is in the middle, and it comprises two sub-sections, the first of which reads as follows:

> 'Accordingly we, members of the People's Council, representatives of the Jewish community of Eretz-Israel and of the Zionist movement, are here assembled on the day of the termination of the British mandate over Eretz-Israel and, by virtue of our natural and historic right and on the basis of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel.'

In this subsection we find the *grundnorm* of the State: recognition of the right of the "members of the People's Council, representatives of the Jewish community of Eretz-Israel and the Zionist Movement" to declare the establishment of the State and to determine binding norms for the people of Israel. The second subsection, which relates directly to the matter currently before us, provides as follows:

> 'WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the elected Constituent Assembly no later than the 1st of October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel."'

This portion of the declaration informs us of a number of matters pertaining to the central institutions of the State, all of them at the pinnacle of the State's norms. Our current concern is with the "elected constituent assembly," mentioned in the Declaration. Taking a closer look, we discern that this was an interim, short lived entity, with a single purpose of framing a constitution that would include (among other things, apparently) instructions for the election and establishment of "elected, regular authorities of the State." The Provisional Council of State, and the Provisional Government (previously called: the People's Council and the People's Administration") were to continue functioning as the central institutions of the State, and the Constituent Assembly was supposed to function parallel to them in the fulfillment of its one and only task: the establishment of a constitution, within a short period of time, measured in terms of just a few months. The constitution would be written (and the Constituent Assembly would disperse); elections for the "elected regular authorities" would be conducted thereunder, and the elected regular authorities would be established. Only then were the Council of State and the Provisional Government to stop functioning, and all powers would be vested in those elected regular authorities.

For our purposes, the following two issues are of primary significance: First, the exclusive devotion of the Constituent Assembly to its task, and second, the termination of the activities of the Constituent Assembly within the short, prescribed period. We shall now briefly comment on these two subjects.

13. As for the exclusive devotion of the Constituent Assembly to its task, the intention of the Declaration of the Establishment of the State is self evident: The Constituent Assembly – as such – was not intended to be a permanent organ of the State, or one of its regular authorities. On the

contrary, the Constituent Assembly was intended to function separately and distinctly from the other State authorities, and in parallel to them. The State authorities and councils and the Provisional Government were supposed to pursue their own paths, and carry out their respective functions, while concurrently, the Constituent Assembly was supposed to pursue its path and work towards the fulfillment of its own objective. The purpose of the Constituent Assembly – its one and only mission – was the framing of the State's constitution.

This, in fact, is how the matter was viewed at the time. Elections to the Constituent Assembly were held on January 25, 1949. On January 24, 1949, the day before the elections, the head of the legislation department in the Ministry of Justice, Uri Yadin, delivered a lecture on the subject of the elections to be held on the following day. In his lecture, Yadin said the following (*Uri Yadin Volume,* at p. 82):

> 'Tomorrow elections will be held for the Constituent Assembly of the State of Israel, the first elections since the establishment of the State, and the most important ones for a long time. For we are not going to elect a regular parliament, one of many that will come one after another to enact laws in various areas of our day-to-day lives, but rather, a unique parliament, of singular importance, charged with the task of endowing the State with one preeminent law, to endure for posterity, as the bedrock of its existence as a democracy– its basic law – the Constitution.
>
> Future parliaments will be elected in accordance with this basic constitution adopted by the Constituent Assembly. The constitution will determine, once and for all, the foundations of the elections, including the active and passive right to vote, the electoral system, the calculation of their results, and the number of delegates, and it will establish a prearranged format for elections to be conducted from time to time, for as long as the constitution remains in force.'

These brief comments are the essence of our comments above, and we have no need to add to them.

A number of additional conclusions can be derived from the above. For example, inasmuch as the Constituent Assembly was intended exclusively for the framing of the constitution, and nothing else – to draft and then to disappear – it follows that it was supposed to be free of any personal interest

in the content of the constitution (cf. Karp, in her aforementioned article, at p. 328). Furthermore, having been limited for its particular task, the Constituent Assembly was supposed to have/acquire an appropriate perspective regarding/ the foundations that were to construct the constitution: independent, as it were, from the burden of everyday concerns, and equipped with a panoramic view, looking far ahead, and taking into consideration the long term interests of the State and the individual.

As for the short period designated for the Constituent Assembly to draft the constitution, a constitution, by definition, should be written over a relatively short time. While it need not be measured in days, weeks or months, by the same token we have never heard of a constitution being written over a period of fifty years.

I imagine that had the members of the People's Council been told that after forty-seven years the constitutional enterprise would still be awaiting completion, they would have waived their hands in denial, as if to say, 'How can that be? That was definitely not our intention'. They might even have added: 'We allocated four and a half months for writing the constitution (from May 14, 1948 until October 1, 1948). Under the circumstances as they transpired, another few months might be added, perhaps even a few years, but forty seven years definitely exceeds the limits of imagination'. Presumably, this would have been the response of the founders of the state, and this is also common practice when drafting a constitution. We must remember that a constitution is and should be written at a propitious hour, when the heavens open to hear our petitions, at a momentous turning point in the life of the nation. In the words of David Ben-Gurion in the Knesset (in the debate on the Constitution):

> 'The events of Sinai do not occur every day. We had a grand, historical occasion, twenty-two months ago. In our history of four thousand years there have not been many other such occasions.
>
> I don't think that it is our last historical event. I believe that we can expect another grand event. It might lack the grandeur of Mount Sinai, or of the establishment of the State. This I cannot know. But I sense the possibility of another grand occasion; perhaps we may even hear the voice speaking out of the fire – 'by prodigious acts, by signs and portents, by war, by a mighty and outstretched arm and awesome power,' and again a new and glorious chapter of our history will begin.

> Until then, we will toil from day to day in faith and in humility, persistently and without hesitation. We will see to security, immigration and settlement, and to all of the major and minor laws they require' (*Knesset Proceedings*, (1950) at p. 820).

Indeed, a constitution is bestowed at the crossroads of a nation's life. A crossroad that spreads over fifty years is no crossroad. The chasm that emerged between the initial intention and the actual implementation might lead us to say: inaction constitutes a deviation from authority that renders an act outside the scope of permissible activity. But we are getting ahead of ourselves.

14. Let us pause for a moment and survey our surroundings. Parallel to the Constituent Assembly, a Provisional Council of State was also supposed to operate in the newly established state. This was the People's Council before it changed its name. The functions of the Provisional Council of State were not defined by the Declaration of Independence, but rather in the Proclamation, issued concurrently with the Declaration on May 14, 1948, and in the Law and Administration Ordinance, which was published on May 21, 1948, but was given retroactive effect from May, 15, 1948. Section 1 of the Proclamation stated that 'The Provisional Council of State is the legislative authority,' and the very same words were repeated in s. 7(a) of the Law and Administration Ordinance

Thus, (normatively) two bodies were created: the Provisional Council of State as the legislative authority, and along with it, the Constituent Assembly, which had yet to be established – as the body meant to draft the State's constitution. In the words of Professor Uri Yadin (in the *Uri Yadin Volume*, at pp. 80-81)

> 'According to the Declaration of Independence, the Provisional Council of State and the Provisional Government were supposed to continue to function not only until the election of the Constituent Assembly, but also until the establishment of the new sovereign authorities in accordance with the new constitution. The role of the Constituent Assembly would be limited to the formulation and ratification of the constitution, and the tasks of ongoing legislation would remain in the hands of the Provisional Council of State until after the completion of the term of the Constituent Assembly. Until that time, the two institutions were supposed to exist side by side, and the Provisional Government

would serve its present composition until after the elections to the permanent parliament under the new constitution.'

15. We will now continue briefly recounting the events that occurred and the various legislative acts that were adopted, after which we will attempt to explain and interpret them. As noted, the Constituent Assembly, within its meaning in the Declaration, was intended as a collegial body charged with the sole task of writing a constitution. However, a constituent assembly as per the instructions and the definition of the Declaration of the Establishment of the State never actually materialized. On January 14, 1949, eleven days before the elections to the Constituent Assembly, the Provisional Council of State published the Constituent Assembly (Transition) Ordinance, and in s. 3 of the Ordinance it enacted the following powers of the Constituent Assembly:

'Powers of the Constituent Assembly	The Constituent Assembly shall, so long as it does not itself otherwise decide, have all the powers vested by law in the Provisional Council of State.'

As noted, the original intention of members of the People's Council was that the Constituent Assembly would write a constitution, that the regular authorities of the State would be elected under that constitution, and that until the convening of the regular authorities, the Council of State would continue in office, fulfilling the legislative role. However, the Constituent Assembly (Transition) Ordinance introduced a change: The Constituent Assembly was no longer intended exclusively to frame the State constitution. From now on, it was also to hold the powers of the Provisional Council of State, i.e. it was to fulfill the legislative role. The Constituent Assembly was charged with two tasks: the task of writing a constitution for the State and the task of enacting laws – one body wearing two crowns.

16. In this context we further note that upon the convening of the Constituent authority, the Provisional Council was supposed to disperse and disappear, as provided in s. 1 of the Constituent Assembly (Transition) Ordinance:

'The Continuance in Office of the Provisional Council of State	The Provisional Council of State shall continue in office until the convening of the Constituent Assembly of the State of Israel; upon the convening of the Constituent Assembly, the Provisional Council of State shall dissolve and cease to exist.'

Yet, once the Constituent Assembly had acquired the legislative authority of the Provisional Council of State, in addition to its authorities as a "Constituent Assembly," what need could there be for an additional body with parallel legislative powers? Hence the provision regarding the discontinuation of the Provisional Council of State.

17. The Provisional Council of State enacted the Constituent Assembly (Elections) Ordinance, and elections were accordingly held, but the Constituent Assembly, at least under that name, was short-lived. On February 24, 1949 the Constituent Assembly convened for the first time, and two days later – on February 16, 1949 –the Transition Law was enacted. Section 1 of that Law spelt the end of the name "Constituent Assembly":

'Designation of the legislative body and of the members of the legislative body	The legislative body of the State of Israel shall be called the Knesset. The Constituent Assembly shall be called "The First Knesset." A delegate to the Constituent Assembly shall be called "a member of Knesset."'

And so it was that the Constituent Assembly disappeared, to be replaced by "The First Knesset."

18. The First Knesset – i.e. the "Constituent Assembly" as it was originally called – did not write a constitution for Israel. Lively debates erupted over the questions of whether and what kind of constitution it would actually enact. Finally, a decision was adopted that was

subsequently known as "the Harrari Resolution," named after its proponent, Knesset Member Yizhar Harrari. We will comment further on this decision below, but for present purposes it will suffice to say that the Harrari Resolution deferred the adoption of a constitution to an unspecified date. The Harrari Resolution no longer speaks of a "constitution" but rather of "basic laws" as distinct from a constitution. And so it was until the termination of the First Knesset. Nor did anything change thereafter – not in the Second Knesset nor in the Third Knesset, nor in any of the subsequent Knessets – until this very day.

19. This completes our survey of certain legislative milestones. We now proceed to their interpretation and analysis.

The Knesset as Possessor of Constituent Authority; the Entrenchment of Statutes

20. The issue currently concerning us is whether the current Knesset possesses constituent authority, i.e. the authority to frame a formal constitution for Israel. To that end, a distinction must be drawn between the question of the Knesset's authority to exercise the powers of a constituent assembly, i.e. the power to enact a constitution, and the question of the Knesset's authority to enact entrenched laws. These powers are not identical, and one power cannot necessarily be inferred from the other. In fact, constituent authority to enact a constitution may, in principle, include the power to enact entrenched constitutional laws, and quite possibly this is its essence. However, the same inference cannot be made in the other direction.. In other words, authority to enact entrenched laws does not per se indicate the Knesset's authority as a constituent authority. The Knesset may acquire the authority to enact entrenched laws, but still be lacking in constituent authority. As we will explain below in detail, this in fact is our view. The Knesset is empowered to enact entrenched laws – within certain limits – but it lacks the power of a constituent authority.

Thus we must differentiate between the two, and we will maintain this distinction throughout. As mentioned, our current concern is not with the authority of the Knesset to enact entrenched laws. Our current concern is solely with the question of whether the Knesset was vested with constituent authority to enact a constitution.

Has a Continuity of the Authority of the "Constituent Assembly" been maintained from the First Knesset to the Knessets That Followed

21. The central question concerning us is, as stated, whether the current Knesset possesses constituent authority – the authority vested in the original Constituent Assembly – together with its regular legislative authority. In my view, the Knesset's authority as a constituent assembly lapsed long ago. We will now clarify this matter.

22. It was the Declaration of Independence that provided for the establishment of an "elected Constituent Assembly" to frame a constitution for Israel. As we saw, shortly before the election of the Constituent Assembly, the Provisional Council of State decided that all its statutory powers would be exercised by the Constituent Assembly, as long as the latter did not decide otherwise (s. 3 of the Constituent Assembly (Transition) Ordinance). The Constituent Assembly thus acquired regular legislative powers – its legacy from the Provisional Council of State – while retaining its original power to frame a constitution for Israel, which remained unchanged. The Constituent Assembly came and went, and no one would disagree that from the outset it possessed both constituent power, i.e. the power to enact a formal constitution, and legislative power, side by side. The constituent power vested in the Constituent Assembly – here, too, we concur – was not diminished in the least by the fact that, immediately upon its convocation, it renamed itself "the First Knesset."

Had the same Constituent Assembly-First Knesset framed a formal Constitution for Israel, I would concede that the deed was done and that its constitution was the Constitution. However this was not the case. The First Knesset dispersed without framing a formal constitution. The Second Knesset, too, failed to write a (formal) constitution, and so, too, all the subsequent Knessets from then until today. The question that inevitably arises is: does the current Knesset possess the original authority of the Constituent Assembly to draft a formal constitution? On this question opinions were divided, and this is the question before us.

23. As noted, the theories of the current Knesset's constituent authority rely on the following two factors: first, the Constituent Assembly's authority to draft a constitution, and second, the continuity of that authority to frame a constitution from the Constituent Assembly — that changed its name to the First Knesset — to all the subsequent Knessets. It is undisputed that the Constituent Assembly (First Knesset) possessed the authority of a "constituent assembly," namely, authority to frame a constitution. The

question is whether it transferred that authority to the Second Knesset. Supporters of the theory of the (current) Knesset's dual authority cite legislation that purportedly preserves that authority and transfers it, in its entirety and as it was, from one generation to the next: from the Constituent Assembly (First Knesset) to the Second Knesset, from the Second Knesset to the Third Knesset, and so forth, until today (see Rubinstein in his book, *ibid,* (4th ed) at p. 447ff; Klein, *ibid*., 2 *Mishpatim*; Klein, *ibid*., 1 *Hamishpat;* Barak, *ibid*., *Interpretation in Law,* vol. 3, at p. 43

These are the legislative provisions. Initially there was the Constituent Assembly (Transition) Ordinance, s. 3 of which provided as follows:

Constituent Assembly (Transition) Ordinance

'The Powers of the Constituent Assembly	3. The Constituent Assembly shall, so long as it does not itself otherwise decide, have all the powers vested by law in the Provisional Council of State'

The Constituent Assembly thus acquired the legislative powers of the Provisional Council of State alongside its power to draft a constitution for Israel.

The "Constituent Assembly" changed its name to the First Knesset (as per s. 1 of the Transition Law, and towards the end of its term it enacted the Second Knesset (Transition) Law. Section 5 of the latter provided as follows:

'The Powers etc. of the Second Knesset and its Members	5. The Second Knesset and its members shall have all the powers, rights and duties which the First Knesset and its members had.'

Section 9 of the law further provided as follows:

'Adaptation of Laws	9. Wherever in any law reference is made to the constituent assembly or the First Knesset, such reference shall,

> from the day of the convening of the Second Knesset, unless the context otherwise requires, be read as a reference to the Second Knesset.'

And whereas the provisions of this law referred exclusively to the transfer of authority from the First Knesset to the Second Knesset, s. 10 of the same law established a general norm with respect to transfer of powers:

> 'Application 10. This Law shall also apply *mutatis mutandis* to the transition to the Third and any subsequent Knesset, so long as the Knesset does not pass any other Law concerning the matters dealt with by this Law.'

Supporters of the two-crown doctrine claim as follows: The Constituent Assembly was vested with authority to frame a formal constitution for Israel, and that is not disputed. Following that, these statutory provisions were adopted, each at its own time and place, which transferred that authority from one Knesset to the next, until the current Knesset. The legislative crown, and with it the constituent crown, were passed down, as if from father to son, so that today's Knesset wears the legislative crown together with the crown worn by the constituent authority about 50 years ago. Is that indeed the case?

24. This argument suffers from perplexing doubts. The question of whether authority passed from person to person or from body to body – by the will of the transferors of the authority – is divided into two separate questions. The first question is whether the person or the body that transferred the authority *intended* to transfer that authority to another, and the second question is whether that authority could, by its nature, be transferred. In other words, was the transferor *permitted and authorized* to transfer that authority to another. Only if both of these conditions are met may we say that authority was transferred from one to another. In our case, we must answer the following two separate questions: first, did the First Knesset *intend* to transfer its authority to enact a constitution to the Knesset following it, and second, was the First Knesset *permitted and authorized* to transfer that authority to the Knesset that followed it, that is to say, did the First Knesset possess the power to transfer its authority? Was its constituent authority

transferable, in principle? A closer look at these issues reveals that it is doubtful that these two elements of transfer of authority were present in the case of the Constituent Assembly. However, our concern for now is with the second element, that of the power of the Constituent Assembly to transfer constituent authority to the Knessets following it.

25. Even if we say that, *prima facie*, the statutory provisions sought to transfer certain powers – as they were – from Knesset to Knesset, the question remains: *Which powers* could the Constituent Assembly and all the past and future Knessets transfer to one another? After all, we all agree that a person can transfer only such authority that he is *permitted and authorized* to transfer; and if the "transferor" is not permitted and authorized to transfer, then his intention to transfer is simply of no consequence.

Indeed, in my view, when the Constituent Assembly – which was the First Knesset – dispersed without having framed a constitution for Israel, the Knesset's right to draft a constitution as established by the Declaration of the Establishment of the State, expired. The continuity that was maintained by the transition provisions quoted above relates solely to matters of legislation, and not to constitutional issues.

26. Today, the 13th Knesset is serving. Israeli Knessets follow one after the other, each one the image of its predecessor. The Constituent Assembly – the First Knesset – was singular and unique. Today's Knesset, the Thirteenth Knesset, derives its authority from yesterday's Knesset, the Twelfth Knesset. The authority of yesterday's Knesset derived from the authority of the Knesset of the day before, and so our journey goes back until the first Knesset. Here we pause. We draw the veil from the First Knesset and behold we are confronted with the "Constituent Assembly." As we further retrace our steps we no longer maintain our pace, because unlike the other Knessets, the Constituent Assembly was a demigod, born not of its predecessors, but rather in the minds of the founders of the State. The People's Council declared the establishment of the State, it decided upon the institutions to be created, and it conceived the Constituent Assembly and assigned it its first task, namely: to frame a constitution for the State of Israel. Recognition of the authority of the People's Council to establish all of these goes beyond the scope of the Israeli legal system. It constitutes the grundnorm of our (legal) existence as a state.

27. We should recall that the same Constituent Assembly – as established by the People's Council in the Declaration of Independence – was meant to complete its task of writing the constitution within a few months. It was to

write it and then disperse. Hence, the Constituent Assembly was singular, exceptional and unique. Knowing this, we also know that the task of the Constituent Assembly to write a constitution was a specific, one-time mission. The authority of the Constituent Assembly to write a constitution could not be viewed as a property right, transferable at its owner's will. It was a kind of trust that the People's Council entrusted to the hands of the Constituent Authority, and a trust – as is known – is not transferable from person to person at the trustee's behest. Indeed, in going to the polls to elect a "Constituent Assembly" – as dictated by the Constituent Assembly (Elections) Ordinance – the nation was meant to have elected a Constituent Assembly whose function it was to frame a constitution for Israel. Concededly, the Constituent Assembly was also supposed to possess regular legislative powers. However these powers existed independently, while its primary function remained as it was, in accordance with the decision of one whose very existence embodies the basic norm. On the face of it, it would seem therefore that the Constituent Assembly was not empowered to transfer its constituent authority to another (see and cf: Nimmer, *supra* at p 1239-1240). I agree with Professor Nimmer, and would like to add the following comments.

28. A basic legal principle, rooted in common sense, is that agency cannot be transferred. An agent cannot appoint another agent. *Delegatus non potest delegare* (see e.g. CrimApp 74/58 *Attorney General v. Hornstein,* [61]). When I repose my trust in someone, such trust by its very essence, is not transferable. In the absence of the principal's authorization, an agent is not permitted to appoint another person to perform the agency (see s. 16 of the Agency Law, 5725-1965: "An agent shall not appoint an agent for the object of his agency, unless he has been expressly or implicitly authorized to do so …"). The performance of certain actions is specifically personal, and no person has the power or the authority to transfer them to another (cf: CA 549/75 *A v. Attorney General*, [64], at p. 465-466). The "Constituent Assembly" was established by the People's Council, and *by law* it was supposed to be the nation's agent for *the writing of a constitution*. Concededly, the people then designated the Constituent Assembly – by force of a law enacted by the Provisional Council of State – as its explicit agent for the writing of the Constitution. This was what the People's Council legislated and this was what the people chose. However, *neither the People's Council nor the people authorized the Constituent Assembly to transfer its authority to another body*. When a king bestows a title of nobility upon a particular person, that person will indeed become a peer, but the title cannot be

transferred to another living person, nor be transferred by inheritance unless it was bestowed as a hereditary title. A noble cannot transfer his title to another, because the title adheres to him and him only. So it is with the nobility and so it was with the Constituent Assembly that could not transfer to the Second Knesset the authority that originated in the personal trust reposed in it by the electorate. All of these matters are quite simple

29. It is undisputed that in its capacity as a constituent authority the First Knesset was authorized only to enact a constitution, and nothing else. The Constituent Assembly was a lofty institution that was supposed to occupy itself with lofty legislation, but this authority was conferred solely for the purpose of enacting a constitution. The Constituent Assembly may have been all-powerful, but it was all-powerful as a constituent assembly, and could wield its power only within the defined realm of enacting a constitution. Its omnipotence did not extend to other areas, including the area of transferring its authority to another. It was not granted the authority to transfer its authority, nor did it possess a "natural authority" to do so, nor was it authorized to "regulate itself" for purposes of transferring its authority. That which is born unique remains unique. The Constituent Assembly is like a queen bee who sits on her in a place of honor, her life task and purpose being to lay eggs and to thus sustain the next generation of bees. Survival by procreation is the natural objective of living things, and it is the destiny of the queen. Her task is singularly important, incomparably more important than the task of a worker bee, but this task is exclusively hers and she cannot transfer it to others.

As a constituent authority, the First Knesset had one and only one purpose – the writing of a constitution. That authority did not include the authority to extend its term, or to transfer its authority. The Constituent Assembly (The First Knesset) was like the queen bee, but this title was exclusively its own, and it was not authorized to transfer it to any other body.

I ascribe tremendous importance to the election for the Constituent Assembly. When the voters went to the polls to elect the Constituent Assembly, their purpose was to elect, *by law*, a body that would grant Israel its constitution. Even were we to say that the issue of a constitution was raised by political parties in various Knesset elections, nevertheless, the election for the Constituent Assembly was different from all of the later elections for the Knesset, because only in that election was the constitutional question put to the voters by force of law. The Constituent Assembly was created for the express purpose of writing the Constitution, and voters therefore "knew"

that they were electing a body that would be drafting a constitution. This feature distinguishes the Constituent Assembly, setting it aside from all subsequent Knessets. *Indeed, only the election for the Constituent Assembly, as opposed to any future Knesset elections, were held for the election of a body that would draft a constitution* Thus, when the Constituent Assembly failed to discharge its task, the opposition was infuriated and harshly criticized the government. Members of the opposition who expressed themselves on the matter stressed the Declaration of Independence, the nature of the "constituent assembly," and above all, the fact that the elections had been for a constituent assembly. They were elections for the purpose of writing a constitution. For example, Knesset Member Menachem Begin had the following to say (all emphases are our own):

> 'I need not rely on the Declaration of Independence. I *rely upon the will of the people as it was expressed in the general elections*. What did we elect? A house of representatives? A regular parliament? A regular legislative body? *We all went to elections for a Constituent Assembly, and the concept of a "constituent assembly" is a clearly defined, universally accepted juridical concept.*
>
> …
>
> We may continue to debate this point. We went to the *Asefa Mechonenet.* This is the (perhaps inadequate) Hebrew rendition of the English term "constituent assembly." There have been constituent assemblies in all of the countries that have fought wars of independence. In all of them it was understood that the constituent assemblies would adopt basic laws and then disperse. The legislature, the executive and the judiciary were established on the basis of that fundamental constitution, and orderly political life began. *Therefore, you were under a single obligation: to enact a constitution, and then to disperse and hold new elections.*
>
> …
>
> *The question of whether enacting the constitution will take a year or two years is not decisive, being simply a question of what constitutes a reasonable period.* But you? What have you done? You promised the people to discharge the mandate that you received from it, and without asking the people, by force of

> an automatic majority of the members of the Constituent Assembly, you decided not to enact a constitution and to maintain a situation in which the ministers are free to run rampant.
>
> …
>
> *Should you choose to alter this situation – you may do so, but on one condition, that you ask the people*. The people elected a Constituent Assembly, in other words, it charged all of us with framing a constitution for the State of Israel. You are unwilling to frame a constitution, perhaps on an impulse, or perhaps for some calculated consideration. Let us stand before the people and tell them: We do not require a constitution, we lack the inspiration, we don't want to bind the coming generations, and so on, and let the people decide…. All of you, without exception, went to the election for the constituent assembly, and none of you informed the people that there will be no constitution.
>
> We therefore demand that you do one of the following: Either fulfill the duty that the nation imposed upon you to enact a constitution, or conduct a referendum in which all of the Israeli voters will participate, and they will decide again upon the question of the constitution, *because your first obligation is to enact a constitution, and that is your duty. You are not entitled to alter your mandate*' (*Knesset Proceedings*, vol. 4, pp. 739-740).

Similar statements were made by Knesset Member Joseph Serlin:

> 'We were elected as the Constituent Assembly, and the same house that changed its name from the Constituent Assembly to the Knesset was promised that the change of name was merely an expression of respect due the Hebrew language. As a Constituent Assembly, we were charged with the single, fundamental task of adopting and granting the people a constitution. *At the very moment when, by force of the majority of the parties that are members of the coalition, this Constituent Assembly, which calls itself "the Knesset" abandoned and evaded its duty to give the people a constitution, its term expired and its authority ended.*

> It is impossible to come back two years later and to propose that the very same Constituent Assembly serve as the Knesset for another two years. *At the moment at which the Constituent Assembly that became the Knesset failed to fulfill its mission and chose not to grant the people a constitution*, it has betrayed the people's trust. It is inconceivable that it should now be given a license to sit for another two years as the Knesset' (*Knesset Proceedings*, vol. 7, p. 214).

In a similar vein, Knesset Member Meir Wilner stated:

> 'This defiance of the people's will is unacceptable. During the elections for this Knesset, we all promised to prepare a constitution. *This Knesset was elected by the people as a constituent assembly* – as the assembly that was to establish the State, its foundations, and its constitution. Concurrently, it sees to the ongoing affairs of State. We are not a regular parliament; we are a constituent assembly. You will recall that when we gave our assembly a name – calling it the "Knesset" – we immediately adopted a unanimous amendment that this would be the First Knesset. *The aim was to stress the unique charter of this Knesset – the framing of the Constitution* – and that its term would be shorter than that of a regular parliament. We accepted this obligation prior to the elections. This is the concept of a constituent assembly. It was dictated by the change in the political situation and the change in the composition of the population. The adoption of a constitution within one year, and the conducting of new elections are a critical necessity for the State' (*Knesset Proceedings*, vol. 4, p. 804).

And Knesset Member Jacob Kalibnov:

> 'Let us recall just how many times in the space of an entire year declarations were made regarding the Constituent Assembly and the Constitution: [It was referred] to by the People's Council, by the Provisional Council of State, and by the Provisional Government. It began with the Declaration of Independence, and the establishment of a committee to prepare a Constitution in the Provisional Council of State; it was followed by the Elections to the Constituent Assembly Law, the official notification of the results of the election, and then followed by the adoption of the Transition (Constituent Assembly)

> Ordinance. *Can there be any doubt that all of these declarations and actions specifically referred to a constituent assembly and not a regular house of representatives, and that they viewed the Constituent Assembly's principal task as being the preparation of the Constitution*? It is also true that this House was established a year ago and it changed its name, ostensibly expressing its desire to redefine its purpose and role and to transform itself from being a constituent assembly into a regular parliament. Unfortunately we have no higher instance that is authorized to annul the decision of this House' (*ibid.*, p. 826).

We cited all of the above – and other examples abound – in order to stress that the Constituent Assembly was intended for a particular purpose. It, and only it, was established to frame a constitution, whether by virtue of the Declaration of the Establishment of the State, or the election for the Constituent Assembly. This trust placed by the people in the Constituent Assembly was not transferable to anyone else, inasmuch as the people did not authorize it to transfer its authority to anyone else.

31. Professor Amnon Rubinstein was one of the first people to write about the Knesset's authority as a constituent authority (see Rubinstein, 16 *Scripta Hierosolymitana*, *supra*, at p. 201). Professor Rubinstein addressed the unique character of the Constituent Assembly in his aforementioned book (4th ed.) at p. 449:

> 'Another argument relies on the constituent authority not being a right of the house of representatives, but rather a right of the people that is entrusted to the constituent assembly. When it dispersed without adopting a constitution, its authority lapsed. In order to draft a constitution, an election must be held for a new constituent body, or the constitution must be submitted for approval by referendum. This is a weighty argument. We also believe that a matter as serious as the adoption of a constitution should be confirmed by the voting public in a referendum, or by presenting the proposed constitution as an issue in the general election to the Knesset. However, from a binding legal perspective it is difficult to see a difference between the First Knesset (the Constituent Assembly) and the subsequent Knessets. All of them were characterized by the same functional duality. In enacting the Basic Laws, the Knesset officially confirmed its inheritance of the constituent authority.'

This response must be read very closely. Personally, I am unable to find an answer to the claim that the Constituent Assembly – First Knesset was not authorized to transfer its constituent authority to the subsequent Knessets, this authority having been exclusively its own

32. Furthermore, the theory that places two crowns upon the Knesset (today) leads to a trap from which I see no escape. The two-crown theory views the Knesset as possessing two kinds of authority: "constituent" authority – to draft a constitution; and legislative authority – to draft laws. Depending on the matter at hand, the Knesset – as necessary and as it deems fit – acts as a constituent authority to enact laws of a constitutional nature, or acts in its legislative capacity to enact laws. According to this doctrine, constituent authority transcends legislative authority, and when the Knesset convenes as a constituent authority it is superior to the Knesset sitting as a legislative authority.

We will not concern ourselves now with the generally artificial nature of this formulation, we will just mention that it was via *regular legislation* – transition laws – that the Knesset purported to transfer its authority from one Knesset to the next. Laws *qua* laws are the product of the Knesset as a *legislative authority*, that is to say as an authority inferior to the constituent authority. Thus the question arises: How can an "inferior" legislative authority transfer the powers of a superior authority – the constituent authority – from one superior authority to another superior authority? How can the "mundane" legislature bestow "sacred" constituent authority? Do we recognize the legislature's power to deal with the powers of a constituent authority? Shall the saw magnify itself against him who wields it [Isaiah 10:15 – ed.]? Indeed, a mundane Knesset cannot establish a constituent assembly. It cannot enact a law that creates an authority higher than the Knesset itself. The saw cannot magnify itself against him who wields it. Just as a person cannot save himself from drowning by pulling himself up by his own hair, the Knesset cannot empower another body to establish a constitution to which the Knesset would be subordinate. And if the Knesset lacks the authority to establish a constituent assembly, does it not follow that it is similarly powerless to transfer the powers of a constituent assembly to itself or to any other body? After all, transferring the authority is tantamount to bestowing the authority to the body to which it is supposed to be transferred. We therefore know that the Knesset in its legislative capacity was not empowered to transfer its constituent authority from one Knesset to the next.

We should also bear in mind that the Second Knesset (Transition) Law was enacted only after the Harrari Resolution, i.e. after the Knesset elected to enact "Basic Laws" instead of a single constitution. The Harrari Resolution was adopted on June 13, 1950, and the Second Knesset (Transition) Law was published on April 12, 1951. As such, why didn't the Knesset see fit to transfer the authority of one Knesset-Constituent-Assembly to the next Knesset-Constituent-Assembly by way of a Basic Law, if only to signify that it was acting as a constituent authority? I cannot accept the answer that the Knesset was not sufficiently aware of the difference between the two kinds of legislation, and that it should not be called on a mere technicality. Indeed, the Knesset was not aware of this point because there was no need to be aware of something that did not exist. The Knesset was not authorized to transfer constituent authority, and it clearly did not intend to transfer its non-transferable authority. Needless to say, the intention to transfer as such – had it existed – would not have sufficed.

We therefore agree with Minister of Justice Dr Dov Yosef, who made the following statement from the Knesset podium:

> 'Nor do I believe that there is any law that stands "above the regular legislature." We do not have two legislatures. We have only the Knesset, and in my opinion, a law of the Knesset cannot limit the Knesset's legislative power, and if there is such a provision in any law, then, I believe that a regular majority of the Knesset can repeal the provision that purports to limit its rights.
>
> …
>
> And a constituent assembly enjoys an exceptional and extraordinary status.
>
> However, after our legislature was established in the way it was established, and we did not establish such a constitution at the outset, I do not think that it is possible to deny the Knesset's ability to decide upon any law as it sees fit. When we elected the First Knesset, we called it a "Constituent Assembly" in accordance with the resolutions of the United Nations, but those resolutions were not implemented, and in fact, the first Knesset did not function as a Constituent Assembly at all. On the contrary, we functioned as a regular Knesset, and we dealt with all of the subjects that concern a regular Knesset . We did not

> function as a Constituent Assembly charged with framing a Constitution' (*Knesset Proceedings*, vol. 38, at p. 789).

33. Our comments above are consistent with the conception of a legal system – any legal system – as a collection of norms, all of them collectively justified by a single "*grundnorm*," in accordance with the doctrine of the great Kelsen. A constituent authority cannot establish itself. Its establishment requires a foundation point that is external to the positive legal system: that is the *grundnorm*. Insofar as the constituent authority cannot constitute itself, neither can it transfer its authority to any other body. Only the body that established it – for example, a referendum – has the authority to authorize the transfer of constituent authority to another body. This is proof, if further proof is required, of why the Constituent Assembly was neither permitted nor competent to transfer its constituent authority. Hence, with the dispersal of the First Knesset, which was elected as the constituent assembly, the constituent authority lapsed.

34. As mentioned above, the Constituent Assembly-First Knesset was distinguished from all the subsequent Knessets, being the sole body with an express legal mandate (in the Declaration of Independence) to frame a constitution for Israel. The people had chosen the constituent assembly *ex lege* to compose its constitution, and the Constituent Assembly thus had its roots in the people, from which it directly derived its authority. From this we learn that it was the real constituent assembly, the one and only one that had the authority to give the people a constitution for which purpose it had been chosen by the people. This could not be said of the other Knessets that followed the First Knesset (which had been named at birth "The Constituent Assembly").

The issue of the constitution may indeed have arisen in the elections to the Second and Third Knessets, but then it was only one of a number of questions, and parties drafted their platforms in order to win the hearts of the voters, as has always been the practice, both in our country and all over the world.

We all know that in the elections to the Second Knesset and to all the subsequent Knessets, the universally discussed issues were peace and security, adopting an aggressive or moderate policy, the social gap and integration, social welfare and the standard of living. The issue of the constitution assumed modest and unassuming proportions, hovering on the peripheries of the operative programs, even if it featured prominently in the party platforms, and it is doubtful whether the voters seriously considered the

issue. As such, nothing can be inferred from the mandate ostensibly given by the people to the Second Knesset and to those following it to enact a constitution. While that is true in general, it is even more so the case considering that certain parties totally omitted the constitutional issue from their platforms, and others expressed their opposition to a constitution for Israel. The division of opinions was so great that it is almost impossible to draw a conclusion that the Knesset elections following the First Knesset were for the purpose of framing a constitution – quite the contrary. Building a constitution upon party platforms, to the extent that they existed, would be quite a leap.

35. Our comments above indicate that the Constituent Assembly-First Knesset did not transfer its power to the Second Knesset and to the following Knessets. The Constituent Assembly was not authorized to transfer its authority to others, and the Knesset, as a legislative authority inferior to the constituent authority, was not empowered to transfer its superior constituent authority. With the dispersal of the Constituent Assembly-First Knesset, the original authority to frame a constitution for Israel lapsed and ceased to exist.

This account of the lapsing of constituent authority is strongly reflected in the comments of Knesset members. For example, one member of the Provisional Council of State, Z Warhaftig (Chairman of the Constitutional Committee) asserted that the Constituent Assembly (which at that time had yet to be elected), was unique, and that it would draw its authority directly from the nation. From his statements we learn that the Constituent Assembly would not be able to transfer its authority to another body. This is what he said (the emphases are all our own):

> 'The source of the sovereignty of the Constituent Assembly is the people, the people's will. Its sovereignty does not issue from the Council of State. The Council of State can only transfer to the Constituent Assembly what it has, and no more. *It is an accepted legal norm that one institution cannot transfer to another institution more rights than it already has*, meaning that we can only transfer rights that we have, and we are unable to grant the Constituent Assembly authority that we do not possess. *Any other rights will be derived by the Constituent Assembly from the people in elections, in accordance with our decision and notification regarding elections to the Constituent Assembly, by which we placed everything in the hands of the public*, and the Constituent Assembly derives its sovereignty

> from the public. We must remember: "Any addition detracts"' (*Proceedings of the Provisional Council of State*, January 13, 1949, p. 10).

MK Joseph Serlin was of the opinion that the Second Knesset and its successors did not and would not have constituent authority. He stated:

> 'We were elected as the Constituent Assembly, and the same house that changed its name from the Constituent Assembly to the Knesset was promised that the change of name was merely an expression of the respect due to the Hebrew language. As a Constituent Assembly, we were charged with the single, fundamental task of adopting and granting the people a constitution. *At the very moment when, by force of the majority of the parties that are members of the coalition, this Constituent Assembly, which calls itself "the Knesset" abandoned and evaded its duty to give the people a constitution, its term expired and its authority lapsed*.
>
> It is impossible to come back two years later and to propose that the very same Constituent Assembly serve as the Knesset for another two years. *At the moment at which the Constituent Assembly that became the Knesset failed to fulfill its mission and chose not to grant the people a constitution, it has betrayed the people's trust*. It is inconceivable that it should now be given a license to sit for another two years as the Knesset' (*Knesset Proceedings*, vol. 7, p. 214).

The opinion of Knesset Member Menachem Begin, is indicated in the following:

> 'I am convinced – and in concluding my comments I wish to express my belief – that the day will come when the people will vote for a government that will fulfill the first promise made to the people upon the establishment of the State, to elect a Constituent Assembly whose central task in any nation that has come into being, is to give the people a constitution, and to adopt the legislative guarantees that ensure the freedom of its citizens and the entire nation' (*Knesset Proceedings*, vol. 20, at p. 2220.

MK Osnia also maintained that the Knesset did not have constituent authority, and stated as follows (on behalf of the majority in the Constitution Committee):

> 'Let us assume that the Knesset now decides upon such a section, that we will call s. 43A or 44, and then someone – not by chance – follows the same long or short procedure to table a motion suggesting that we revoke the provision that requires a two-thirds majority of 80 votes. *Now we are not a "constituent body," and if we were, in fact, a constituent assembly, we would have to adopt that decision by a majority of two thirds*. And so, do you really think that there is any kind of *ratio legis* whereby through a vote of 54 against 52, or 54 versus 40, we can decide something that in the future would require a decision by a majority of 80? 54 against 40 cannot dictate that only a majority of 80 can change the section. *The members of Knesset could subsequently convene and revoke the section by a regular majority. This is not a constitutional law in the sense that any of its sections cannot lawfully be changed by another law'* (*Knesset Proceedings*, vol. 23 at p. 926).

Minister of Justice Dov Yosef, took a similar view:

> 'Nor do I believe that there is any law that stands "above the regular legislature." We do not have two legislatures. We have only the Knesset, and *in my opinion, a law of the Knesset cannot limit the Knesset's legislative power, and if there is such a provision in any law, then, I believe that a regular majority of the Knesset can repeal the provision that purports to limit its rights*.
>
> Jurists conversant in constitutional law claim that the legislature can be limited by a constitution adopted by a constituent assembly prior to the establishment of the legislature. The constituent assembly establishes the rules that determine how the state will be established and manage its affairs, and the essential content of its laws. The decision of such a body can be viewed as being binding upon the legislature because that is the intention of the people in establishing such a constituent assembly.
>
> …

> And a constituent assembly enjoys an exceptional and extraordinary status.
>
> *However, after our legislature was established in the way it was established, and we did not establish such a constitution at the outset, I do not think that it is possible to deny the Knesset's ability to decide upon any law at it sees fit*. When we elected the First Knesset, we called it a "Constituent Assembly" in accordance with the resolutions of the United Nations, but those resolutions were not implemented, and in fact, the first Knesset did not function as a constituent assembly at all. On the contrary, we functioned as a regular Knesset, and we dealt with all of the subjects that concern a regular Knesset. We did not function as a constituent assembly charged with framing a Constitution' (*Knesset Proceedings*, vol. 38, at p. 789).

This was also the view of MK Benjamin Halevi:

> 'It as though we are adding to all of the Basic Laws – Basic Law: The Knesset; Basic Law: President of the State; Basic Law: Israel Lands; and Basic Law: The State Economy, etc. – an additional provision that states that this Basic Law that was adopted in the past cannot be amended or contravened or changed except by a majority of 61 Knesset members. How are we making that addition? Not by a 61 member majority but by a smaller majority. The contradiction here is patent, perhaps not in the legal-technical sense, but certainly in the moral sense. Who gave it legitimacy? *We are not a constituent assembly, and we are not composing a constitution*. At this point in time there are less than two dozen members sitting in the Knesset. In the presence of two dozen or fewer Knesset members we presume to curtail the Ninth Knesset, the Tenth Knesset and any other subsequent Knesset so that they can only make changes by virtue of a special majority. *I do not think that this is legitimate*. It is not practical. This is not the time to do it. There are serious legal doubts as to whether any Knesset is empowered to act in this fashion' (*Knesset Proceedings*, vol. 78, p. 955).

The comments of MK Amnon Rubinstein, one of the outstanding proponents of the two-crown theory, are particularly interesting. This is what MK Rubinstein said in the Knesset:

> '…There was debate in previous Knessets as to whether the Knesset can entrench laws against their amendment by force of a regular majority, *and the view that more or less prevailed, though still disputed, was that where it concerns the Knesset's role as a constituent assembly*, that is, when it acts as the drafter of a constitution, when it enacts a chapter of the constitution, *it is empowered to establish the superior status of a particular law*' (*Knesset Proceedings*, vol. 99, p. 2790)

MK Rubinstein admits quite candidly: When sitting as a constituent authority, the Knesset can, in my view, enact a supra-legal statute, but this view, is "still being disputed." Now if this was the view of MK Rubinstein – who is none other than Professor Rubinstein – is this not sufficient proof for all that the Knesset is not unanimous in regard to the two-crown doctrine, that the Knesset's opinion wavers on this point and certainly is not firmly anchored?

We have not said, nor will we say that the unanimous view is and has always been that the constituent authority was not transferred from the Constituent Assembly to the ensuing Knessets. There were those who supported this view, and others who rejected it, and others who were silent on the matter. The overall picture is, however, that we are a long way from the conclusion that the members of the Knesset have consistently held that the constituent authority of the Constituent Assembly passed down by inheritance to all of the subsequent Knessets, until the current Knesset.

36. The question of the constitutional continuity of the constituent authority is in fact part of a much larger question: Does today's Knesset – and in fact any of the Knessets after the First Knesset – have the authority to frame a constitution? In presenting this question – which is the heart of our discussion – and in reviewing the comments of the Knesset members, it clearly emerges that the position adopted by Knesset members over the generations was far from unequivocal on the question of whether the Knesset possesses constituent authority, whether as the heir and successor of the Constituent Assembly, or otherwise, and on the question of the Knesset's status as a constituent authority with regard to the adoption of a constitution, with regard to the Knesset's power to limit itself by way of the entrenchment of laws, and with regard to the ancillary and derivative questions flowing from these questions. Regarding each proposition on these matters there are a number of opinions – East, West, North and South – that do not all lead to the same valley. The necessary conclusion from our survey of the material is

that the Knesset never took a single, exclusive view of its authority as a constituent assembly. Anyone seeking the "Knesset's" opinion will receive a number of responses, as is the Jewish way. So it was in the First Knesset, and so it continues to be.

Furthermore, in reading the speeches of the Knesset members we do not know whether their views are "legal" interpretation or whether they are the views of statesmen and politicians (though presumably the political factor is the decisive one). Against this background, we can understand why Government supporters expressed one view, whereas opposition members expressed another view, and the religiously observant Knesset members had their own view. Indeed, a number of Knesset members who were jurists based their views on legal rationales, but they were few, and we should remember that they too sat in the Knesset as representatives of parties and not as men of law.

Lastly, from reading statements made by Knesset members we learn that the question of the Knesset's constituent authority is inseparably linked to the question of the Knesset's authority to limit itself by way of entrenchment of laws. In other words, Knesset members alternately refer to the Knesset's constituent authority and to its power to entrench laws treating of rights, as if the two were identical. Needless to say, this confusion of two dissimilar terms weakens the assertion that the Knesset members themselves supported the notion of the Knesset's constituent power, when in fact they were referring to the Knesset's power of self-limitation.

37. We will cite some of the statements made by Knesset members on point (emphases are our own):

The following statements were made by MK Haim Zadok, a brilliant jurist and later the Minister of Justice:

> 'As to the concluding part of s. 4, stating that "this section shall not be varied save by a majority of the members of the Knesset," i.e. not by a regular majority of those voting but a special majority, we reject this provision, not just because we reject the existing electoral system, but also for a fundamental, constitutionally based reason, namely *that any attempt to limit the Knesset's authority to change the laws of the state by way of regular legislation is not consistent with the constitutional structure of the State of Israel and the Knesset's sovereignty*.

> *We live in a regime in which the Knesset is sovereign, in other words with a legislature which despite its physical, political, public and moral limitations, is nonetheless all-powerful and unlimited in the constitutional-legal dimension. Arguably, there is only one constitutional limitation to the omnipotence of the sovereign Knesset, deriving from its basic nature as a sovereign parliament – that it is unable to limit the power of subsequent sovereign parliaments*.
>
> For this reason we utterly reject the provision pertaining to a special majority in s. 4, and for the same reason we reject the provision in s. 45, which stipulates that s. 4 and s. 45 can only be varied by a majority of 80 Knesset members.
>
> In addition to the constitutional consideration, I must further add that the qualification appearing in s. 44 requiring a majority of 61 was adopted at the time by a majority of 56 votes versus 54, and the qualification of s. 45, mandating a majority of 80 Knesset members, was adopted by a majority of 43 versus 40. *Our opinion was and remains that a regular Knesset majority has no public or moral right to erect a protective wall of a special or weighted majority with respect to a statutory provision adopted by a regular majority*.
>
> …*We reject the law in its entirety, and our principled position is that one Knesset cannot tie the hands of the Knesset that follows it, and this position naturally applies to the new provision appearing in the Articles*' (*Knesset Proceedings*, vol. 27, p. 2961).

This was also the opinion of Knesset Member Akiva Guvrin:

> 'Honored Speaker and Knesset. The party faction of Poalei Eretz Yisrael disputed and continues to dispute, both from a public and a moral perspective, the provision adopted by the Knesset with respect to a special majority, that was adopted by a regular, non-special majority. …
>
> It is our opinion that the Third Knesset adopted this law – this faulty arrangement – in reliance on its claim – which it correctly makes in this regard – that it was continuing the work of the First and Second Knesset.

> *As such, the Fourth Knesset will have the statutory, moral and public right to repeal by regular majority, at the nation's behest, a provision that in our view was neither moral nor publicly justified - the provision concerning a special majority and the existing electoral system.*
>
> The various factions, which adopted the provision regarding a special majority by force of a regular majority, are apparently aware of what the public sentiment is, how many members, even within their own factions, recognize the seriousness of the harm inherent in the current electoral system, and so they attempted and continue to attempt to employ another law in order to prevent any examination of the matter' (*ibid*, at p. 2962).

The following statement was made by Knesset Member Bar Rav-Hai:

> 'If they introduced this limitation... *there is no power in the State of Israel that will succeed in limiting the will of this House. There is no power in the world that can dictate to this house the position of the majority views of the Sixth and Seventh Knesset… I categorically reject this authority.* We live at a time in which things change far faster than we imagine, and it is impossible to determine today a format for living in the next generation, and to compel it to live in accordance with that format established by the wise men of this generation, myself included' (*Knesset Proceedings*, vol. 36, p. 1044).

Knesset Member Osnia, for example, contended that the Knesset lacked the authority to entrench laws and, in that manner curtail its own discretion, and he had the following to say regarding Basic Law: President of the State:

> 'I would now like to address some of the questions arising in regard to the proposed law.
>
> Permit me to say, without going into details of the matter, that the proposal made here to entrench certain sections by requiring a special majority in order to change them is meaningless in the absence of a constitution that, by force of its adoption by a special majority, establishes the principle of a special majority without which it cannot be changed. It is meaningless in respect of any law. *I think that when a law – even a Basic Law – states that there is a requirement for a special majority, another law*

> *can propose changing that requirement by way of amendment, and I see no basis for inferring that the adoption of such an amendment would require a special majority*. In other words, my intention is that one cannot obtain rigidity of Basic Laws via the window without first going through the door of attaining a rigid constitution. Absent such rigidity, according to the constitutional conception prevailing in the State of Israel, no attempt to entrench any law will be of any avail' (*ibid*, at p. 970)

Knesset Member Yisrael Yeshayahu-Sharabi took a similar view:

> 'We are a state under the rule of law. Israeli law is fully operative, and of that there can be no doubt.
>
> *But it is doubtful whether anybody authorized us to shackle the hands and the will of the nation's chosen representatives by a rigid, entrenched and privileged constitution, which would deny them the benefit of the same right that we ourselves enjoy, to decide what appears to them as right and just by a simple majority*… What makes us more special than them and why should their rights be inferior to ours?
>
> In other words, it is not only that we lack the time, and cannot say to the Knesset "Sun, stand thou still at Gibeon" to accommodate a one-time effort to formulate a consolidated and privileged constitution, as proposed by Knesset Member Klinghoffer; *we also cannot arrogate to ourselves such far reaching authority. Anyone seeking such authority, must request it from the source of the authority–the people itself*' (*ibid.,* p. 1037).

And Knesset Member Bar Rav Hai stated:

> *'What I absolutely reject is the possibility of a particular law chaining the hands of the next generation*… '(*ibid*, p. 1043)

Minister of Justice Dr Dov Yosef adamantly insisted that the Knesset lacked the power to limit itself, and on one occasion made the following statement:

> 'Nor am I clear as to the basis for Knesset Member Klinghoffer's assumption that he can propose that this draft proposal be adopted only if voted for by two thirds of all the Knesset members. *The Knesset articles, as of today at least,*

> *recognize no limitation on the Knesset's power to decide by a majority of those participating in the vote. Knesset Member Klinghoffer cannot change this by including a provision for that purpose in his draft proposal*. In any event, for as long as the proposal has not been adopted, it certainly is not the law, and its contents are not binding upon the Knesset. In other words, even were a regular majority of voters to support his proposal, it would have the force of law. *Where is the justice in enabling twenty out of thirty members voting for his proposal to shackle the hands of the Knesset that may sit and deliberate over the same law in another fifteen years? . The result would be that even a majority of the Knesset at that time, which would be three times more than twenty, would be powerless to change what was determined in his draft proposal.* Legislation can be adopted, and as I mentioned, many of our laws have been adopted, by the votes of 15, 18, 20, and 22 Knesset members. *What possible logic and moral foundation can there be for coming to the Knesset and saying: limit yourselves? Something that was done by 15 Knesset members when legislating that law, will be eternally valid, and even 61 Knesset members will be unable to repeal it. According to what kind of justice? What kind of morality?*' (*Knesset Proceedings*, vol. 38, at p. 789).

The Head of the Constitution, Law and Justice Committee, Knesset Member Moshe Unna, expressed an original view, taking the same path:

> 'Honored speaker and Knesset: The question of the rigidity of constitutional provisions raised by Knesset Members Klinghoffer and Kushnir may possibly be of importance with respect to particular statutes, and *I will not deny that I favor rigidity for certain laws.* But in what context? When there is a special, substantive reason in the particular provision, such as Basic Law: The Knesset, in which we establish the electoral system and wish to ensure that it not easily be amended. *It must, however, be clear that even in that case the effectiveness of such a provision is inevitably quite limited, because even that kind of provision can be changed by a regular Knesset vote*. Nonetheless, it gives expression to the fact that the Knesset deemed this particular provision to be of special importance' (*Knesset Proceedings*, vol. 40, at p. 2025)

Justice Minister Dov Yosef responded by saying:

> '*Until today, and apart from one case, the rule in the Knesset has been that the Knesset always decides by a majority of votes. In my humble opinion, this rule is vital and must be maintained. Even regarding the particular instance in which the Knesset decided otherwise, as already noted by the Committee chairman, the validity of that particular statutory provision is highly questionable'* (*ibid*. p 2025).

In another place Knesset Member Ari Ankorin stated as follows:

> 'Honorable Speaker, *I consider the British system preferable, under which all laws are of equal value and a regular majority is sufficient to change any law, even a law referred to as constitutional…*
>
> …At the very most – in our debate over the nature of the preference to be given to this Basic Law or any other Basic Law – I would demand that in considering a change in a Basic Law, the Knesset should be required to take note of that fact. In other words, when passing a law that is liable to violate a particular provision of this Basic Law, it should expressly state, "notwithstanding the provisions of the Basic Law, it will be so and so." That is to say that the Knesset should do whatever it does with the knowledge that it is changing something in the existing Basic Law. But I would not in any other sense limit the right of this Knesset or of any Knesset to legislate. In other words, I support flexibility as opposed to rigidity.
>
> …
>
> I have already stated and I accept that it would be good to have a bill of rights, but it should be exactly the same as with the English. Whatever is written in the Magna Carta, in the charter of rights, can be amended by any parliament. It is a separate question whether or not it actually makes any changes, *but it is capable of doing so, and any other option is inconceivable.*
>
> *I think that we ought to follow this example and avoid casting doubt upon the work of a parliament – of any parliament or of any Knesset*' *(Knesset Proceedings*, vol. 71, p. 2494-2495).

This was also the view adopted by Knesset Member Binyamin Halevi:

> 'I have found two statements in Jewish law that are germane to this subject. The first is "A prisoner does not release himself from prison." If we limit ourselves we place ourselves in the category of incarcerated prisoners, and we will be incapable of freeing ourselves unless the court comes along and says that the limitations are not valid. Another principle in Jewish law is "the mouth that prohibits is the mouth that permits." *If the Knesset by a regular majority prohibited itself from amending a Basic Law, the same Knesset can release itself from those bonds by force of a regular law. This draft law apparently contradicts these principles, and it would be injudicious to enclose ourselves in these shackles'* (*Knesset Proceedings*, vol. 78, p. 956)

This was also the view adopted by Knesset Member David-Zvi Pinkas:

> 'Some think that the constitution should be a privileged law, one that cannot be changed or - can be changed only with difficulty. We received explanations regarding the accepted practice among other nations regarding rigid and flexible constitutions. I cannot imagine that we will be able to accept any of these concepts. Regarding a rigid constitution and a constitution enjoying privileged status, I need only something we all know about a constitution that was adopted by a stupid king – King Ahasuerus, who ruled over one hundred and twenty seven provinces, from India to Ethiopia. His constitution stated "an edict written in the name of the king and sealed with the king's ring cannot be revoked." Shall we adopt a "successful" constitution such as that?
>
> *Is it conceivable that this House would prevent itself, or subsequent Houses, from deciding and doing whatever may be required at the proper time?*' (*Knesset Proceedings*, vol.5 p. 1263).

We have cited the comments of Knesset members at length if only to show clearly that the members of successive Knessets have never shared a single view. There have indeed been many who asserted that the Knesset lacked constituent authority, and we cannot ignore this view when deciding on the question of whether the current Knesset has constituent authority.

The Harrari Resolution

38. My colleagues view the "Harrari Resolution" as one of the important links in what they view as an unbroken chain that began with the authority of the Constituent Assembly to enact a constitution, and ends (for the time being) with the authority of the current Knesset to enact a constitution. I cannot accept their view. Firstly, it should be remembered that the "Harrari Resolution" was only a resolution, and we find it difficult to anchor the authority to frame a constitution in nothing more than a Knesset resolution. Secondly, reading the Knesset Proceedings teaches us that the Harrari Resolution is open to a variety of interpretations, and that each Knesset member relied on it to prove the argument that he found most politically convenient. The situation was aptly described by Knesset Member Nahum Nir-Refalkes:

> 'Honored Speaker and Knesset. Knesset Member Yeshayahu found it necessary to return to the debate conducted in the First Knesset over a period of four months, from the beginning of February 1950 until June 13th of that year. If our intention is to renew the debate over whether or not the State of Israel requires a constitution, then I think that after such a long hiatus, we should at least adduce new reasons, such as were not heard thirteen years ago. The only reason we have now heard from Knesset Member Yeshayahu is the same one that was suggested ten or twenty times by the Prime Minister at the time, to the effect that it is wrong to bind the coming generations by the enactment of a constitution. Meanwhile one generation has passed and a second generation is also passing, and it will never be possible to limit the coming generations, and so we will never have a constitution.
>
> *Our concern at the time, as it is today, is that nothing compels us to adopt a rigid constitution in the first place. Different states have adopted different paths, such as the possibility of revision of the constitution with every new generation, or every twenty years, so as not to bind the coming generation. The debate terminated with the adoption of that miserable resolution on the 13th of June (the Harrari Resolution – M.C.), which was a compromise decision.*

> The story is told of a wife who consulted with her husband over what kind of shoes to buy – high heels or low heels. The husband told her to buy shoes with high heels, to which she responded: If I buy high heeled shoes I could fall and break a leg. The husband then said: Buy low heels, to which she replied, they're not stylish. Then he suggested that she buy a pair of shoes, one with a high heel and the other a low heel. She answered: "Then I'll limp." Her husband then explained that nothing could be done about that. It is a compromise, and every compromise limps.
>
> …
>
> This was the compromise of Knesset Member Harrari, who, like his colleague Knesset Member Rosen – then serving as Minister of Justice – favored a constitution, and felt that the best decision was one low heel and one high heel' (*Knesset Proceedings*, vol. 36 p. 1039).

Thus, for example, Knesset Member Yeshayahu Forder made the following statement:

> 'The debate ended in a compromise. The Constitution, Law and Justice Committee was charged with the preparation of proposals for the Basic Laws that would be submitted to the Knesset one by one. *The clear intention was to fill the empty framework, and instead of a rigid constitution, to at least grant Basic Laws with all possible speed'* (*Knesset Proceedings*, vol.15, p. 73).

In other words, the "Harrari Resolution" put the last nail in the Constitution's coffin, and replaced it with Basic Laws, in other words, with laws that are not a constitution.

This, indeed, was the view taken by Knesset Member Hanan Rubin:

> 'Honored Knesset, when dealing with the first of the Basic Laws, I cannot begin my comments without mentioning the fact that we do not have a constitution, and I fear that there is no chance of a constitution being adopted in the near future. As for the entire artificial structure of laws that at the end of days will be "combined" or "incorporated" into a constitution – *it goes without saying that this totally contrived theory only serves to camouflage the grave reality that there is no constitution nor is*

> *there any desire for a constitution.* Three reasons underlie the unwillingness to have a constitution.
>
> The first reason is that it suits any incidental majority in the Government and the Knesset for there not to be any law bearing the title of constitution, a law which fundamentally regulates the workings of the State institutions, and which defines its social regime. It is convenient for it to be able to occasionally change these matters by a simple majority in accordance with its momentary needs' (*ibid.* at p. 119).

Knesset Member Harrari himself contended that the "Harrari Resolution" did not purport to decide whether Israel would have a material constitution or whether it would have a formal (entrenched) constitution. In his own words:

> 'In the momentous debate conducted during the first Knesset whether the enactment of a constitution was necessary or not, *it was decided that the State of Israel would have a constitution but no decision was made regarding the nature of that constitution, and regarding its priority over any other law. Accordingly, it seems to me somewhat premature to speak today as if it has already been decided that there will be no relative majority.*
>
> …
>
> *Admittedly, I am opposed to a special majority and from that perspective I accept all the reasons cited by the Prime Minister against a special majority, but this does not mean that if we fail to decide on a special majority we are abandoning the concept of constitutional supremacy.* Conceivably, a regular majority is compatible with the requirement that the law be passed twice or three times within a particular period. A regular majority can be subjected to certain restrictions in terms of duration, and the like, or similar to our decision regarding the President of the State, that at the same session no other matter may be discussed, or that notice must be given as to when the discussion of that issue will begin etc.' (*ibid,* at p. 130).

Knesset Member Osnia made the following statement:

> 'I will sum up as follows: We should expedite the enactment of the Basic Laws. This legislation should rest on three principles: (a) *The constitution must be flexible with no requirement of a special majority in order to change it; [it should be] sensitive to*

> *the organic development of our democracy, in a manner that accommodates the inclusion of new developments in the constitutional reality without obstacles stemming from a special majority*; (b) the constitution must include the accepted principles pertaining to law and administration in Israel, while conferring decisions on controversial issues for discussion within the ambit of laws dealing with the disputed matters. Thirdly, Basic Laws must be drafted so that eventually they will make up a single legislative unit' (*Knesset Proceedings*, vol. 21 at p. 9).

And Knesset Member Benjamin Ha-Levi said the following:

> 'In conclusion, I suggest that that *our generation is not yet ready to confer supreme status to Basic Laws. I would advise waiting until the consolidation of all of the Basic Laws into a complete State Constitution, at which time the State Constitution would be adopted by a large, special majority, presumably of more than 61 votes* but taking a gradual approach, which as I understand it, is the path taken by the Minister of Justice with the aim of reaching a complete legislative arrangement – in my view this path is strewn with difficulty and liable to lead to failure. It is preferable to continue as we have been since the Harrari committee and until today, until the work is completed: *all the Basic Laws should be examined, winnowed, amended, and then the full constitution would be adopted. Only then would they be conferred with status*' (*Knesset Proceedings*, vol. 78, at p. 958).

Similar comments were made by Knesset Member Nir-Rafalkes (Chairman of the Constitution, Law and Justice Committee):

> '*This resolution was a sort of compromise between the supporters of the constitution and its opponents*, and like any compromise, it satisfied no one, and the result of this decision was that each party explains the decision as if it were adopted to its full satisfaction' (*Knesset Proceedings*, vol. 20 at p. 2216).

And in another context:

> '*…all of this is the result of the "Original Sin," the resolution adopted in accordance with the proposal of Knesset Member Harrari, a resolution supported simultaneously by supporters of the constitution and supporters of no-constitution.* The former group relies on the first part, which states that a constitution must be given to the State of Israel, and the others rely on the part that states that it should be given chapter by chapter. And chapter by chapter means that it will take generations' (*Knesset Proceedings*, vol.21, at p. 29).

Knesset Member Nir-Rafalkes also stated the following on behalf of the Constitution, Law and Justice Committee:

> 'Honored Speaker and Knesset. *In general, all over the world there are rigid constitutions and flexible ones. There is no fixed rule that a constitution must be rigid. There are reasons favoring each position.*
>
> *First of all, we are not adopting a constitution. We are only adopting one Basic Law, which will constitute one chapter of the constitution…* We cannot, therefore, statutorily entrench all of the provisions of the law by a two thirds majority. There are general arguments against a rigid constitution, and claims that the adoption of a rigid constitution effectively confers a privilege upon the minority. If we say that it can only be changed by 80 votes, presuming that 78 Knesset members wish to change and 42 do not, then we are giving a certain degree of privilege to the minority. For this reason there is opposition to a rigid constitution' (*Knesset Proceedings*, vol.23 at p. 89).

This was also the opinion of Justice Minister Pinhas Rosen:

> 'I have not despaired of the possibility that during the term of this Knesset we may arrive at those Basic Laws that will ultimately be incorporated into a constitution, pursuant to the 1950 resolution.
>
> Obviously, even when we undertake this task and *even when we arrive at the stage of combining the chapters into one constitution, we will still have to decide the crucial question, over which this house is perhaps divided: whether the constitution will be rigid or flexible. As I am now speaking on*

> *behalf of the government, I will not express a personal view, though my personal view is more or less known*' (*Knesset Proceedings*, vol. 38, p. 586)

We will conclude with statements made by then Prime Minister David Ben-Gurion: (in the debate concerning the Constitution that ended in the Harari Resolution)

> 'Our debate is over whether to have a constitution or laws, a fundamental, supreme and comprehensive constitution, *or basic laws that, like other laws, establish the character and practices of the regime, and define the rights and obligations of the citizens*' (*Knesset Proceedings*, vol. 4, p. 812).

In short, we absolutely cannot say that the Harrari Resolution was but a link in the uninterrupted chain of constituent authority, passed on from the Constituent Assembly to the current Knesset. Quite the opposite is the case. The Harrari Resolution was a type of compromise, and like all compromises, each party saw in it that they wanted to see. The most that can be inferred from the Harrari Resolution is that in place of one integrated constitution, the Knesset would be enacting basic laws, and that when the time comes, all of the basic laws would be consolidated under one roof. As to when and how this would be done, or what the formal status of the basic laws would be, these and other related questions were left in limbo, unanswered, and not surprisingly so. The main thrust of the Harrari Resolution was to halt the race towards a formal rigid constitution. It was not intended to lay down the procedures for adopting a constitution. It should come as no surprise that it did not resolve the question of the formal status of the Basic Laws**.** The failure to resolve this question was intentional (and see Karp, *ibid*., at p. 237).

Interpretation of the Declaration of the Establishment of the State: What are a Constituent Assembly and a "Constitution"?

Formal Constitutions and Material Constitutions: *Does Israel have a Constitution?*

39. In addition to the arguments and evidence presented above, there is additional support for our contention that today's Knesset does not possess constituent authority. We will now briefly examine some of the arguments made in this context.

40. Firstly, we will mention the question of interpreting the Declaration of the Establishment of the State. The Declaration instructed us regarding the "elected constituent assembly" that would enact a "constitution" for the State.

Thus far we have assumed that the term "elected constituent assembly," when linked to the term "constitution," should be understood as referring to an elected body charged with the establishing of the organs of the state in a uniform, formally rigid "constitution." It is no secret that, to date, such a constitution has not been adopted, and the question before us is merely whether the current Knesset possesses the authority to adopt the kind of constitution that was envisaged.

41. There are grounds for contending that the Declaration's original intention was to establish a formal, rigid constitution. Under the Declaration of the Establishment of the State, the People's Council presumed to base itself not only on "our natural and historic right," but also upon the "resolution of the United Nations General Assembly." An examination of that resolution indicates (according to some scholars) that the United Nations had a rigid and formal constitution in mind (see, e.g., Rubinstein, *ibid*. (4th ed.) at p. 44). While that may have been the original intention, it was not long before the high road had divided into numerous and varied secondary roads. It seems that every possible thesis has its supporters and its opponents. The proliferation of opinions is extensive to the point of confusion. Perforce we should stop and wonder aloud whether we can rule with any certainty, and without a quivering hand, that the Knesset is authorized by force of documents formulated some fifty years ago, to enact a rigid constitution - a constitution under which laws can be invalidated as if they were regulations adopted ultra vires. It appears to me that we must agree that only an unequivocal legal provision would have the power to confer upon the Knesset authority to enact a constitution to which regular laws would bow down. A Knesset statute is not comparable to an order issued by local authority on the subject of cleaning yards (our concern here is with the Knesset exceeding its authority, and not with a court's authority to invalidate laws enacted in deviation from authority. The latter derives inexorably from the role of the judicial branch and the principal of separation of powers). Given the diversity of views, can we so rule? We highly doubt it. In this context we will further examine the citations of statements of Knesset members. Those who examine them closely will know and understand.

42. Regarding the "Constitution" itself, it may reasonably be presumed that the Declaration of the Establishment of the State envisaged the enactment of a formal, rigid constitution. However, it was not long before other opinions were voiced. Hence, it was asserted that a state's constitution primarily means a compilation of laws concerning the central institutions of

the State and the relations between them. The term "Constitution" should not be interpreted in accordance with the meaning given to it today, i.e. a formal, rigid constitution, but rather a collection of laws treating of a particular subject. Thus, it may be recalled that "The Constitution of Military Jurisdiction" was none other than emergency regulations, the validity of which was extended, but which was nonetheless referred to as a "constitution" (see: Emergency Regulations (Jurisdiction Constitution 1948). These regulations were extended from time to time by order of the Provisional Council of State, and by Knesset legislation. Even the very first law enacted by the Constituent Assembly-First Knesset, namely the Transition Law, was referred to as the Transition Constitution.

Thus, for example, after the Transition Law passed its first reading, the Speaker of the Knesset, Knesset Member Sprinzak made the following statements to the Knesset:

> '… I hereby determine that we have discharged the duty of conducting a first reading of the Transition Constitution' (*Knesset Proceedings*, vol.1, p. 16).

Even Prime Minister David Ben-Gurion, referred to the Transition Law as the "Transition Constitution" (see below). The Chairman of the Elections Committee, Knesset Member Bar Rav Hai likewise referred to The Elections Ordinance to the Constituent Assembly as "The Elections Constitution for the Constituent Assembly," and so did the Minister of the Interior, Knesset Member Greenbaum (see *Proceedings of the Temporary Council of State*, October 28, 1948, p. 22). The Minister of the Interior further added:

> 'I believe that I am entitled to say that this constitution is not inferior to election constitutions in other States. This constitution ensures orderly elections…'

There are countless citations, and we will make do with the examples already mentioned. Thus, at the time, a constitution did not mean only a formal constitution, but was also a term for a collection of laws concerning a particular subject, and primarily, laws of a constitutional nature. (Here we should point out, particularly for contemporary purposes, that in speaking of a "constituent assembly," it would seem that the Declaration was only referring to the establishment of the central institutions of state and their mutual relations. These subjects were the central focus of the Knesset debates. This point is particularly salient because the focus today has shifted,

and when speaking of a "constitution" today, we are primarily concerned with the protection of the rights and freedoms of the individual).

43. Of course, that is important is neither nomenclature, nor terminology. The main point is that the blurring of the distinction between a formal rigid constitution and a flexible, material constitution led Knesset Members to claim that the term "constitution" referred to in the declaration of the establishment of the State also applies to an unentrenched constitution. In fact, an examination of the comments of the Knesset members clearly shows that many of the Knesset members felt that the word "constitution" also carries the connotation of a material constitution, which is not entrenched. The citations showing this are too many to count, and we will not take the trouble to cite them.

In the same context, the Knesset members, among them the Prime Minister, David Ben-Gurion, declared that not only does the word "constitution" in the Declaration of the Establishment of the State mean a material constitution, *but also that the Knesset did in fact discharge its duty of providing the nation with a constitution*. Having fulfilled its duty, the Constituent Assembly had no legacy to bequeath to the subsequent Knessets. In the words of Prime Minister David Ben-Gurion:

> 'As for the Declaration of Independence, the Declaration provides that the People's Council will operate as the Provisional Council of State, and the People's Administration as the Provisional Government, until the establishment of the elected, regular institutions of State in accordance with the constitution enacted by the elected Constituent Assembly, no later than the first of October 1948. *The elections for the Constituent Assembly were conducted on the 25th of January 1949.On the 16th of February, the Transition Constitution was adopted, and in accordance with that constitution, which was, however, adopted somewhat after the first of October, the elected and regular institutions of the State were established. On the10th of March 1949, the first regular government was approved by the Knesset in accordance with the constitution*' (*Knesset Proceedings*, vol.4, p. 813.

See further: H. Zadok, "The Structure of Government in Israel in Light of Constitutional Law," *Law and Government in Israel* (Government Press, Z. Zilbiger, ed., 1954), at 39, 46; Likhovski, *supra*, 4 *Is.L.Rev.* at pp. 64-65).

Knesset Member Warhaftig spoke in a similar vein:

> 'Forgive me if I cite the response of Shalom Aleichem: First of all, we never obligated ourselves [to enact a constitution – M.C.], and secondly, if we did assume such an obligation, then we have already discharged it; and furthermore, if we gave an undertaking in the framework of this Declaration (of the Establishment of the State – M.C.) to grant a constitution – then we rescinded our undertaking by virtue of subsequent decisions…
>
> …
>
> As to the second question – *do we already have a constitution? I think that we have a constitution in accordance with the undertaking given in the Declaration of Independence.* That undertaking was not given to the United Nations. We assumed such a responsibility without any relation to the resolution of the General Assembly of the United Nations, and we are under no obligation to ensure conditions that are not subject to change by a regular majority, or that cannot be changed at all. *We already have such a constitution, by virtue of our adoption of the Law and Administration Ordinance, the Transition Law, and the Knesset Elections Ordinance, in accordance with which the election was held. A constitution is a system of laws that regulates matters of law and administration in the State. We have a system of laws that answers that definition. Hence we have a constitution.*
>
> For those who understand the distinction between a written constitution and an unwritten constitution, it might be argued that we do not have a written constitution. But when speaking of a "constitution" in the generic sense, it includes both a written and an unwritten constitution. Constitutional theory differentiates between a number of categories of constitutions, among them, between a "written constitution" and an "unwritten constitution," although both of them are referred to by the term "constitution." If the Declaration of Independence states that we must adopt a constitution, it means that we must make the arrangements required to enable regular and orderly government in the State. This we have done. Concededly, we did not do it by the 1st of October, because the elections to the Knesset were

> only held in January, but the State does have a regular government, even if it can and should be improved. But it cannot be said that we do not have a constitution' (*ibid*, at p. 729-730).

44. We elaborated somewhat in adducing the statements made by the Knesset Members. We have not said - nor will we say - that we concur with their statements. Just as we have not said – nor will we say – that we disagree with their statements. Our sole intention is to assert that there is a multiplicity of views in the Knesset. With respect to what was said in the Knesset, we could say "Turn it and turn it again for everything is in it." The Knesset is not of one mind, and it will not rescue us in our attempt to interpret the law. Looking into the mirror, the Knesset sees the reflection of a myriad of faces. How can we know which of those many faces to choose?

Interim Summary

45. Summing up we can say that from the State's inception, the Constituent Assembly acquired "personal" authority to frame a constitution for the state, and had it fulfilled its mandate we would have a constitution. However, the Constituent Assembly did not frame a constitution, and after it ceased to exist – with the dispersal of the First Knesset – so too the authority to frame a constitution lapsed and disappeared. The Knessets that followed the First Knesset did not inherit the authority of the Constituent Assembly. Even the Harari Resolution did not and does not substantiate the Knesset's authority to frame a constitution. We also saw that over the years, many Knesset members have expressed the view that the Knesset lacks the authority to frame a constitution.

Does the Knesset have the Authority to Frame a Constitution other than as the Legacy of the Constituent Assembly?

46. As I observed at the beginning of my comments, my colleagues have premised the Knesset's authority to frame a state constitution on a number of pillars. I further noted that careful examination reveals that each one of these pillars relies to a great or very great extent upon the constituent authority of the Constituent Assembly, and upon the continuity of that authority from the Constituent Assembly to the present Knesset. Now, having concluded that the authority that was vested in the Constituent Assembly did not pass to the Knessets following the First Knesset, the ineluctable conclusion is that the Knesset lacks the authority to frame a constitution.

47. There is however another possibility. My colleagues speak of the unlimited sovereignty of the Knesset, the rule of recognition of the system, and the best explanation of Israel's constitutional history in its entirety. Personally, I have difficulty in relying on general, abstract and vague theories to establish the operative authority of the Knesset to enact a constitution for the State of Israel. In my view, the proofs adduced by my colleagues are inadequate and lack the requisite power to vest the Knesset with such far-reaching authority as that of the enactment of a constitution. I do not know where the Knesset acquired its unlimited sovereignty. I have found no conclusive, or even sufficient proof that our societal conceptions and social consensus confer upon the Knesset the power to frame a constitution. On the contrary, I have searched but have not found any evidence of a contract between the people and the Knesset in which the people intended to bestow upon the Knesset the authority to adopt a rigid constitution. Moreover, as I shall explain below, I do not think that the best explanation of the Knesset's acts to date necessarily leads to a recognition of the Knesset's authority to adopt a constitution.

Incidentally, the fact is that in the past the Knesset *has* changed Basic Laws by means of regular legislation. In other words, the Knesset did not see the Basic Laws as possessing unique status as constitutional laws, changeable only by force of other constitutional laws. The same applies to the rulings of the Supreme Court, which have not, in this regard, distinguished between Basic Laws and regular laws (see references in paragraph 131 below). Does not this fact alone indicate that under the rules of recognition of state law there is no conclusive legal distinction between Basic Laws and regular laws? And this is because the best explanation of Israel's legal history is that Basic Laws and regular laws are all located on the same normative level.

In addition to all this, to the extent that my colleagues purport to premise the Knesset's constituent power on a basis other than the constitutional continuity extending from the Constituent Assembly, they divorce themselves from all of the writers and scholars, from the fundamental conceptions of the Knesset members, and from all the other sources upon which constituent authority might potentially be based. All of the writers and scholars, and all of the Knesset members who spoke of the Knesset possessing constituent authority, based themselves on constitutional continuity from the – one and only – Constituent Assembly until the currently serving Knesset. My colleagues on the other hand, have divorced themselves from that constitutional continuum, and if this is the case, then

my colleagues can no longer rely on the writers and scholars, or on the comments of Knesset members, or on any other legal or jurisprudential source.

48. My colleague, President Barak purports to buttress the doctrine conferring constituent authority upon the Knesset by relying on the writings of writers and scholars, and by asserting that the vast majority of the Israeli legal community shares this view. I do not think that this claim substantiates the doctrine of constituent authority.

49. First of all, not all of the writers and scholars are of the same view. Not all of them concur with the two-crown theory. In addition to Professor Nimmer and Dr Likhovski, we should also mention the names of other important authors, judges, and writers who reject the two-crown theory. By way of example, we cite the view of Prof. I. Englard, who wrote the following in his abovementioned book, at pp. 108-110.

> 'The Supreme Court recognized …the Knesset's power to limit itself. What is the theoretical basis of this self-limitation? *According to one theory, self-limitation is rooted in the Knesset's authority to serve not only as a legislature, but also as a Constituent Assembly*.
>
> *Although this explanation was recently relied upon by Justice Barak, in our view it is contrived and does not stand up to critical examination* (emphasis added - M.C.). Creation of a higher normative plane by adopting the presumption that Basic Laws have constitutional status does not actually solve the problem of the entrenchment of Basic Laws. If the Knesset also fulfills the role of a Constituent Assembly, then why can't it change an entrenched Basic Law by a regular majority at any time, simply by declaring that it is functioning in its capacity as a Constituent Assembly? After all, when acting as a constituent assembly the Knesset's legislation is enacted on the constitutional plane. The answer given is that with the enactment of the first Basic Law concerning the Knesset – the one that established entrenchment provisions – the Knesset exhausted its constituent capacity. It follows, therefore, that the Knesset is no longer entitled to function as a Constituent Assembly, rather, its task is that of a regular legislature on a lower normative plane. This answer, however, is not adequate, because it, too, assumes that a supreme body can limit itself. In

> other words, the notion of a constituent body exhausting its capacity by force of a particular act of legislation means nothing other than acceptance of the principle of self-limitation, this time in absolute form.'

As it turns out this was also the view of the learned professors Shapira and Bracha in their aforementioned articles. It was similarly the opinion of Sheftler in his article, and of Hornstein in his. It would appear that President Landau adopted this view in his article, as well. Secondly, in examining academic writings, one clearly finds that most were content to repeat what had been stated by their predecessors, with no further explanation or reasoning, as if it were revealed law granted to us for safekeeping. Has the Supreme Court ever decided a constitutional or any other matter in this way?

In view of all this, let us discuss the reasons adduced by the scholars and writers rather than their names, the merits of the reasons rather than the merits of their reputations, and the weight of the arguments rather than the weight of their numbers.

So I have done. I carefully examined the works of all the scholars, reading them through and through, and I can genuinely say that none of them provide answers to my questions. Some of the scholars – the majority – fail even to address the questions that I have raised. There are others whose answers are unsatisfactory. At any event, all of them premise their views on what they perceive as the constitutional continuity existing from the Constituent Assembly to the current Knesset. Given our conclusion that such continuity does not exist, the opinions of those scholars are of little help.

50. Furthermore, it is hard to avoid the impression that supporters of the two-crown doctrine, or at least some of them, have confused matters of legal agenda with matters of law, and the ideal law with the real law. And so, in their desire for an Israeli constitution that will protect the individual against governmental power, they seek ways of anchoring such a constitution in the existing law. My heart is with them. I too would like to see an Israeli constitution that treats of the rights of the individual, and the sooner the better. But I think that first and foremost it is necessary to find a true, certain anchor for such a constitution in the existing law. We must remember that a constitution means the invalidation of Knesset statutes that violate from the constitution. Before I can agree to nullify Knesset legislation by reason of its deviation from fundamental principles that are also established in Knesset legislation, I require firm grounds for such far-reaching authority.

Finally, it is no trifling matter for us to rule today, at the stroke of a pen, that fifty years after the establishment of the State the Knesset is empowered to enact a constitution, and that as a result, the Court is authorized to invalidate Knesset statutes that violate the basic rights entrenched by the Constitution. Actually, I view the Court's authority to invalidate Knesset legislation to be part and parcel with the authority to enact supra-legislation. The question is only whether the Knesset possesses the authority to enact a constitution.

51. Among the other references, Professor Benjamin Akzin is cited as authority for the two-crown doctrine. I read Professor Akzin's article, and I found that it supported both the two-crown doctrine and the doctrine of the Knesset's unlimited sovereignty. Professor Akzin does not regard the two doctrines as contradictory, but rather treats both respectfully. Can we rely on Professor Akzin's view in favor of both doctrines? But this is not the issue.

52. We would all agree that the question of the Knesset's authority to frame a constitution for Israel, i.e. the Knesset's authority to limit itself by force of entrenched laws, whether as a constituent assembly or otherwise, is one of the most momentous questions. Indeed, as I have pointed out, this is the most important question to have confronted an Israeli Court since its inception. It is so important that any teacher of constitutional law, or of government, should devote one of his first lectures to it. I was Professor Akzin's student for two years. In the 1954 term I took his course titled "Theories of Government," and in 1955 I studied constitutional law with him. In neither of these courses did Professor Akzin teach us anything at all about the Knesset's authority to adopt a constitution, whether as a constituent assembly or otherwise. Does this not show that, at that time, Professor Akzin did not regard the Knesset as possessing constituent authority to adopt a constitution?

53. The same applies to comments made by Knesset Member Hans Klinghoffer. Professor Klinghoffer, too, was my teacher, and in 1958 and 1959 I was his teaching assistant in Constitutional Law. Professor Klinghoffer also taught nothing that related to the Knesset's constituent authority to frame a formal constitution (this was also the case in his class on Administrative Law, in which he similarly made no mention of the Knesset's constituent authority). Those years – the fifties – were closer to the time of the Constituent Assembly and the First Knesset, and the historical memory of the events was fresher and better. Nonetheless, the teachers of theories of government and of constitutional law – teachers with a capital "T" – did not

imagine that the Knesset held constituent authority. They also had not heard of the two-crown doctrine, nor did we hear of it from them.

54. I am not trying to say that a person is not entitled to change his mind. I have not, and would not say that. Nor would I say that a person is not continually learning new things and broadening his horizons. If Professors Akzin and Klinghoffer changed their opinions, or broadened their views, that would certainly be praiseworthy. However, the fact that so many years elapsed between the First Knesset and the introduction of the two-crowns doctrine attests to its being a hypothesis and nothing more. We have demonstrated the internal contradictions inherent in this hypothesis, and we stated that in our view it should not be adopted. Personally, I find it difficult to understand how this hypothesis can, in and of itself, provide the authority to enact a constitution, and to invalidate laws enacted by the Knesset that violate the constitution. This is not how one builds a constitution. This is not the way a court acquires the power to invalidate laws. Aside from a general remark of Mr Sternberg in his aforementioned article in 1958 (in the *Molad* journal), the two-crown doctrine did not appear until the sixties (in the aforementioned article of Dr Rubinstein), and in the seventies, in the aforementioned article of Dr Klein, and in other places. And it is only during the last few yeas that the doctrine has attained currency among scholars. We should further recall that even in the Knesset itself, different opinions were voiced regarding the Knesset's authority as a constituent assembly.

55. It emerges, therefore, that about twenty years after the establishment of the State, the authority for enacting a constitution was suddenly "discovered." Once revealed, there were those who pounced upon it as if it were a vast treasure. But is this how one enacts a constitution? Isn't the very doubt sufficient to dissuade us from endorsing the two-crown doctrine? Is it conceivable that having slept for twenty years a person can wake one bright morning to discover that the Israeli Knesset possesses the authority to enact a constitution? This was no forgotten Ottoman Law that we discovered in Young [George Young, *Corps de droit Ottoman* (1905) – ed.], we discovered the Israeli Constitution! Is that possible?

56. Moreover, a law professor is free to come up with whatever legal theories he desires, and teach his students as he sees fit. Academic freedom is the air that academics breathe, and no one would tell them what to do. This is how a teacher speaks to his students: I am presenting you with a theory-hypothesis that I regard as appropriate. In my view, this is the interpretation of the law, and the law should be understood accordingly. The Supreme

Court has yet to address the issue, and hence it has not considered the matter. I hope that one day the Supreme Court will adopt this hypothesis as the law of the land, because it is appropriate for the State and for us. However, for the meantime, this is my opinion. This is how a university instructor presents a legal theory to his students, and if he does so, his students will know their path. And I honor those who honor me.

57. Neither have I found any basis for the Knesset's constituent authority in the case law of the Supreme Court. In fact, the Court acknowledged the Knesset's authority to entrench laws against change, as well as the Court's authority to invalidate laws that violate the provisions of an entrenched law. That was the case in *Bergman* [15], *Agudat Derech Eretz* [19], *Rubinstein* [20], and *Laor*¸[21]. Initially, in *Bergman*[15], the acknowledgment was made without questioning, in the form of "We will do and we will obey" [Exodus 24:7 – ed.]., however, over time we came to realize that this was indeed the rule, and today no one would contest either the Knesset's authority to entrench a law by the requirement of a special majority of 61 Knesset members for its change, or the court's authority to declare the invalidity of a law which substantively contradicts the provisions of an entrenched law, and which was not adopted by 61 Knesset members (cf. *Rubinstein*, [20] at pp. 147-148, per Justice Levine). I too will not separate myself from the consensus. . I wholeheartedly concur with the Court's ruling, and in the second part of my judgment I have attempted to provide it with a legal foundation.

However, needless to say, nothing in this case law compels recognition of the Knesset's constituent authority. On the contrary, apart from an *obiter dictum* of my colleague Justice Barak (*Laor*, [21]; and cf. HCJ 761/86 *Miari v. Knesset Speaker* [63] at p. 873 opposite the letter "g"), the Supreme Court did not even hint at constituent authority as the basis for its decisions in any of those cases.

As for the decision in the *Clal* [37] case, our colleague Justice D. Levine did indeed refer to the Knesset as a "constituent authority," but this statement was made without any explanation, and was not in dispute. The other two justices on the bench expressed no opinion on the two-crown doctrine. This is true *a fortiori* in regard to the other decisions cited by my colleague President Barak.

It is, therefore, difficult to maintain that the Supreme Court recognized the existence of constituent power: The question has remained open, and will continue to remain open even after this decision.

We should bear in mind further that a clear distinction must be drawn between the Knesset's constituent authority to adopt a constitution for the State, and its authority to entrench laws. They are not one and the same. We, too, believe that the Knesset possesses the power to entrench laws (subject to certain limitations), but concurrently, we think that the Knesset lacks constituent authority. The two issues should not be confused, and a constitution cannot be inferred from entrenchment.

58. Lastly, I do not find that the Basic Laws already enacted by the Knesset provide any support for the doctrines of constituent authority or of unlimited sovereignty. The Basic Laws were, of course, products of the Harrari Resolution, the primary purpose of which was *to avoid* the enactment of a constitution. Moreover, the Knesset members themselves were divided in regard to the effect of the Harrari Resolution. As noted, many of them felt that the decision did not contemplate the enactment of a formal constitution. Thus, I cannot see how this resolution can be regarded as the basis for adopting a rigid constitution. The Harrari Resolution, and all that followed it are nothing more than a "broken reed of a staff" for the establishment of the authority to enact a constitution, and this is certainly the case after the dissolution of the Constituent Assembly.

As for the exiguous number of entrenchment provisions in some of the Basic Laws (such as Basic Law: The Knesset), these can hardly serve as the basis for specifically inferring the existence of constituent authority. On the contrary, the fact is that the overwhelming majority of provisions in the Basic Laws were not entrenched at all, and this fact *per se* invites the conclusion that successive Knessets *did not view* the Harrari Resolution as the basis for the immediate enactment of a rigid constitution (as distinct from a rigid constitution that may or may not be enacted upon the termination of the Basic Law project). As for the few entrenched provisions that were actually enacted, I have not found that they necessarily originate in the authority to adopt a constitution. Moreover, while this Court actually recognized the Knesset's authority to entrench s. 4 of Basic Law: The Knesset (in *Bergman* [15], *Agudat Derech Eretz* [19], *Rubinstein* [20], *Laor* [21]), I have not found that its rulings were premised specifically on the Knesset's constituent power. The Knesset, and likewise the Supreme Court, presumably felt that in its current capacity it had the authority to entrench laws, but this view was not premised upon constituent authority.

Either way, I have difficulty understanding an argument whereby the very existence of Basic Laws or of entrenchment provisions in Basic Laws, is

proof *per se* of the Knesset's authority to enact Basic Laws (i.e. to enact a constitution that is supposedly the equivalent of Basic Laws), or for the establishment of entrenchment provisions in the Basic Laws. This kind of proof involves a circular argument, because the proof assumes that which it attempts to prove. In our view, as we will elaborate below, there are firm legal grounds for asserting that the Knesset is permitted to limit its authority within certain boundaries, but this is unrelated to the issue of constituent authority. We will continue to address the Basic Laws below.

Additional Questions on the Two-Crown Doctrine (and on the Unlimited Sovereignty Doctrine, as well)

59. The two-crown doctrine inherently raises a number of (additional) questions that defy simple solution. These questions would not have arisen had the Constituent Assembly enacted a constitution for the State of Israel, as envisioned by the of the State. However, in view of the protracted nature of the process, which has continued up until these very days, the questions are pressing and we have found no unequivocal solution.

60. For example, my colleague President Barak asserts that the Knesset is authorized to enact a formal, entrenched constitution, and that until the enactment of an integrated constitution, the Knesset is authorized to enact entrenched *constitutional laws* (as Basic Laws). Simultaneously, my colleague acknowledges the difficulty pertaining to the Knesset's authority to enact entrenched laws that are not Basic Laws, as with the Knesset's authority to enact Basic Laws dealing with subjects that are not "constitutional." An example of this is the Investments by Public in Financial Assets in Israel (Protection) Law, 5744-1984, and its provision that it can be only amended by a majority of the Knesset members. We discussed this subject elsewhere, and for now we will just address the distinction between a "constitutional subject" and non-constitutional subjects and the theory that the former may be the subject of Basic Laws, whereas regarding the latter, it is claimed, that there is no authority for enactment of Basic Laws.

Had the Constituent Assembly endowed Israel with a constitution, our examination of the document itself would enable us to know what the constitution is. In its absence, however, how are we to know which subjects are "appropriate" for inclusion in the constitution and which subjects are inappropriate to a constitution (such that their inclusion in a constitution or basic law would amount to an "abuse" of authority)? This question's resolution is of primary importance, because if the Knesset purports to entrench a law that is not a constitutional law, or chooses to append the title

"Basic Law" to a law that is not "appropriate" thereof, then according to the argument above, such an act might exceed the bounds of its authority, and the court would be entitled to declare the invalidity, *ab initio*, of that act. On the other hand, is it conceivable that the court itself should define the parameters of "an appropriate constitution," and according to those contours rule on the lawfulness of an act of entrenchment?

Let us take the example of the Investments by Public in Financial Assets in Israel (Protection) Law, 5744-1984. In terms of its substance, it would not generally be included in a constitution. However, is it for the *court* to determine what is or is not appropriate for inclusion in the constitutions, and to the extent that the Protection of Investments by the Israeli Public in Financial Assets, Law 5744 -1984 is inappropriate, is it the court's role to rule that its entrenchment is unlawful and exceeds the Knesset's authority for that reason alone? The prohibition on drinking alcohol ("Prohibition") was included in an amendment to the United States Constitution. That was what the "framer of the Constitution" desired, and that is what it did. No one would dispute that this is not a law that belongs to the family of constitutional laws. But does this mean that the amenders of the constitution exceeded the bounds of their authority? Can it be said, at this time and place, that the protection of public assets belongs outside the constitution? In any case, should the court be the body to determine the boundaries of the constitution? Indeed, it is asserted that for purposes of enacting a constitution, the Knesset's authority is limited to "constitutional subjects," and therefore, the court will determine which laws may enter the constitutional garden, which laws will knock but find the gates locked, and which will be expelled should they enter. This assertion itself attests not to the limited authority of the Knesset, but rather to the weakness of the two-crown doctrine.

Another example: The two-crown doctrine teaches us that the Knesset possesses two forms of authority, and that the Knesset's legislative authority may not deviate from the norms established by the Knesset as a constituent authority. A statutory norm and a constitutional norm are located on different levels, and the "inferior" norm cannot exceed the boundaries of the "superior" norm. The question thus arises: Let us assume that in its constituent capacity the Knesset enacts a Basic Law dealing with a constitutional subject, and then goes a step further and formally entrenches the law. In other words, it determines that the law cannot be amended other than by a majority of 61 members of Knesset. Let us further assume that a

later law (also a Basic Law) purports to vary that same entrenched law, but without having been adopted by 61 members of Knesset. Is the later law valid or not? Proponents of the two-crown doctrine would tell us that the later law is invalid for the simple reason that the later law deviated from the boundaries laid down by the former law (cf. Barak, *Interpretation in Law*, vol.1, *The General Doctrine of Interpretation*, (Nevo, 1999) 568; *idem*, vol. 3, at p. 282). We would ask: How can this be? The Knesset established the second law in its capacity as a constituent authority. When acting in that capacity, it is not bound by the Knesset that enacted the first law in its capacity as a constituent authority. The fundamental rule in this context is that the hand that gives is the hand hath taken away. The entrenchment of a law is intended, by its very essence, *to protect it against the actions of the Knesset as a legislative authority*. Now that we know that when enacting the second law the Knesset was acting in its *constituent capacity*, we also know that it acted with the requisite authority. This being the case, aren't we just playing with words and with abstract legal constructs? (See further on this point, and cf: Nimer, in his aforementioned article; and see Englard, in his aforementioned book (par. 49 above); Likhovski, *supra*, 3 *Is.L.Rev.* at p. 358).

Professors Klein and Rubinstein would respond that having enacted the first law, the Constituent Assembly "exhausted" its authority on that subject, and that from that time onwards it, too, became subject to the entrenchment provision (see e.g. Klein, in the aforementioned article, 2 *Mishpatim*; Rubinstein, in aforementioned book (4th ed.) at p. 450 fn. 13). From where did Professors Klein and Rubinstein take this doctrine (the doctrine of "derivative authority")? Doesn't it assume the answer? This entire doctrine is nothing more than scholarly conjecture. The question that insistently pounds at our door without let up is whether this is the doctrine by which the Knesset acquired the authority to frame a constitution? My answer is a resounding no. My colleague President Barak also addressed this question, and wrote the following:

> 'In exercising its constituent authority the Knesset may limit the future use of its constituent power. This derives from the very essence of the constituent function. This function aims to create a document that entrenches norms that may be altered only in a special way. The constituent function is intended by its very nature to create a formal constitution, the inherent meaning of which is the establishment of provisions as to the manner by

> which the constitution may be amended themselves be amended in accordance with these provisions, failing which the amendment is unconstitutional (the 'unconstitutional constitutional amendment'). Indeed, the power of the Knesset – when it exercises its constituent authority – to limit itself, and thereby 'entrench' its provisions, derives from the authorization to enact a formal constitution itself.'

All of these are *ex cathedra* statements presented as incontrovertible axioms. Furthermore, closer examination demonstrates that all of them are circular arguments that assume that which must be proved, and in their present form they define *idem per idem*. Indeed, we acknowledge that a constituent authority has the power to limit the legislative authority, but what is the basis for the claim that a constituent authority has the power to limit a constituent authority? This is, and remains a question.

In fact, built into the two-crown doctrine is the requirement that the Knesset, in its constituent authority, be able and authorized to limit its constituent authority. This built-in requirement is a result of the anomaly that gave rise to the two-crown doctrine. The anomaly lies in the fact that the constituent authority has continued to exist for some 50 years, and no one knows the date of its demise. The term of a normal constituent authority is fixed. During that period it drafts the constitution, and then the constitution is presented for ratification in the prescribed manner. This is the case regarding a constitution written as one document, and the same applies to a constitution comprising a collection of written documents. The question of self-limitation either does not arise at all, because of the nature of the constitutional structure created for the drafting of a constitution, or it arises only for the short, restricted period during which the constituent authority exists and operates (assuming that the constituent assembly and the legislative authority are one and the same). The anomaly of the two-crown doctrine originates in the reality of there being one king wearing two crowns, but is primarily the result of the unfixed and unlimited reign of that king.

The anomaly did not descend from Heaven. The two-crown doctrine, along with the unlimited sovereignty doctrine, have created and maintained it. Had the original intentions of those who declared the establishment of the State been realized, the problem of self-limitation would never have arisen, at least not for such a protracted period. Initially, the Constituent Assembly existed alone. Its sole purpose was to frame a constitution, and self-limitation was not on the national agenda. This was also the case in regard to the

establishment of the First Knesset-Constituent Assembly, the term of which was, by definition, intended to be fixed and measured. The anomaly emerged together with the unlimited "extension" of the life of the Constituent Assembly. This anomaly inevitably generated the need to establish a rule concerning self-limitation, and hence the doctrine of derivative authority which recognizes the power of the constituent authority to limit its power in the future. However, as stated, these doctrines are all *ex cathedra*, to be taken at face value, and instead of seeing the very existence of an anomaly as sufficient reason for rejecting the two-crown doctrine and the unlimited authority doctrine, we see a need to invent another rule, which we deem to be the offspring of the basic norm.

62. In the same context: What prevented the First Knesset from enacting a constitution, the result of which is that until this very day Israel lacks a constitution? Perusal of the Knesset Proceedings teaches us that the *real* reason for the failure to adopt the constitution was the refusal of the coalition parties to adopt a constitution, each for its own reasons. This happened with the Constituent Assembly, with the First Knesset and with all the subsequent Knessets. The obvious question is, therefore, whether the Knesset's failure to enact a constitution, or perhaps we should say its stubborn refusal to enact a constitution, is instructive for our purposes?

63. Like my colleagues, I too believe that we deserve a constitution and that a constitution would befit us. But there are many, eminent people who think otherwise, and in my view their reasons warrant serious consideration, especially since the enactment of a constitution, in certain respects, means taking the path of no return. Indeed, even those supporting the adoption a constitution should tread carefully lets they fall into traps, be wary of obstacles, lest they be plagued by pitfalls, conspicuous and concealed. On the contrary! Let the act be done and let a constitution be adopted. But it should be performed in the way of all the nations. Let a constitution be drafted and submitted for a referendum. Let the constitution be adopted in a process of six readings spread out over the two Knessets. Let any act be done, provided that it involves a substantial deviation from regular legislative proceedings, and provided that the people are involved in the enactment of the constitution. All of these are legitimate acts, and we will acquiesce to them and cherish them. But with all my might I will oppose our recognition of the Knesset's authority to enact a constitution *by force of a judicial ruling*, via a legal analysis of a document dating back forty seven years, in reliance on disputed conceptions which have no firm roots in Israeli society. And where

is the people? Should we not ask its opinion? On the contrary, let us call the people and consult them. Our matriarch Rebecca was not given to Isaac until she had been asked for her opinion and consent: "We will call the maiden and ask her" (Genesis 24:57) [118]. If this was the case with Rebecca, should we not do the same for the entire nation of Israel? If the people and its leaders desire a constitution, the means will be found for adopting one. And, if they don't want one, then the constitution will not be enacted. But I cannot agree to enacting a constitution *without consulting the people.* In fact, what basis is there for asserting that the fundamental conceptions of Israeli society point to recognition of the Knesset's authority to enact a constitution? How do we know that the Israeli consensus is that the Knesset possesses constituent authority? *Has today's nation* conferred upon its Knesset representatives the power to limit the tomorrow's, even if only on constitutional matters? And if they tell me: Yes indeed, forty-seven years ago, then I too will respond that our concern is with the *people of today.* Did it grant its delegates in the Knesset today the power to frame a constitution? When did the people give a mandate to its Knesset delegates to enact a rigid constitution for Israel?

64. In volume two of his aforementioned book, Professor Akzin treats of the subject of "The Adoption and the Changing of a Constitution" (p. 28 ff.) and the subject of "The Social Significance of Constitutions" (p. 50 ff.). Anyone reading these texts will discover that a proper constitution should be enacted *by those charged* with drafting the constitution, and "whose authority exceeds that of the authorities charged with the establishment of other legal directives" (*ibid,* at p. 28), or "an authority elevated above the realm of governance and law, done with a measure of pomp that emphasizes the unique status of the constitution" (*ibid*). This was the case of the Constituent Assembly established in 1949. Professor Akzin also taught us another possibility for adopting a constitution, namely with the cooperation of the people, in a referendum or otherwise. In his own words (at p. 34):

> '…There are many states in which the referendum procedure was maintained or reinstated as a mandatory procedure or as an elective one under certain circumstances pertaining to the establishment of particular norms. More than anything else, the tendency was to require a referendum for purposes of the framing and amending of a constitution. This tendency flows from the conception that the constitution, as a set of norms commanding the highest authority in the state, is more suited

> than any other set of norms to be established directly by the specific body that a state purporting to be democratic views as its sovereign, i.e. by way of the entire adult population. When serving as the constituent body, the sovereign people assist in vesting the constitution with the status of a norm that is superior to all other norms, which were only created by the people's representatives. Similarly, the relatively widespread use of the referendum in adopting a constitution bespeaks the hope that the people's participation in its enactment will be a clear sign of the fundamental difference between it and all other norms, and will ensure that the rulers and public office holders will treat it with special respect. From the perspective of the masses, universal participation in the constitutional process will induce a sense of identification with the constitution that they themselves authored, a special affinity to it, and the readiness to enlist in its protection when the need arises. On the basis of these considerations, a number of constitutions were approved by referendum following their preparation by the appropriate body.'

And further on (*ibid*, at p. 35):

> 'In the democratic system, even when the constitution is to be presented for ratification by a referendum, the draft constitution is prepared by the constituent assembly. The latter is elected in accordance with the same basic electoral system used in that state for electing representatives to the legislature, or in the case of a far-reaching revolution, in accordance with the method deemed appropriate by those at the helm of the provisional government.
>
> Under these circumstances, the constituent assembly serves both as the institution that prepares the constitution and – presuming that the state is run as a parliamentary system – as a legislative institution that supervises the government. In the latter case, all the supreme sovereign powers are concentrated in the hands of the constituent assembly, with the exception that it does not see fit to *finally adopt* the constitution, but leaves that task in the hands of the nation.'

Indeed, there are other ways of enacting a constitution, such as where the same authority is both the legislative and the constituent authority, but these

formats are of an inferior level, and in the words of Professor Akzin (*ibid*, at p. 37):

> 'Experience shows that these alternatives should be viewed with a certain skepticism.'

And he adds:

> 'And it is precisely here that the question arises: Why should one norm established by the legislative body have priority over other norms of precisely the same body? Or, as this problem was formulated at the time: How can the legislature bind itself or the other legislatures following it? This formulation of the question obviously casts doubt on the very existence of a formal constitution as a distinct normative plane, suggesting that a constitution does not differ substantially from regular legislation. To the extent that the State of Israel is progressing towards the enactment of a constitution as part of the customary duties of the Knesset – the legislative institution of the State – then it also confronts this problem.'

This is what we have been saying: From any perspective – legal, public, moral – in order to adopt a constitution today, forty seven years after the State's establishment, we require far more than just a legal construction relating to the current Knesset's authority to enact a constitution.

65. My colleague President Barak gives a somewhat dramatic description of the Knesset debates over the new Basic Laws, and he says (at para. 57 of his opinion) that the Knesset debates were of a unique character:

> 'The Knesset debates on the Basic Laws were of a singular nature. The Knesset knew that it was preparing an additional chapter of the State constitution. The Knesset members knew that they were not enacting regular legislation, but constitutional legislation, with far-reaching, long-term consequences as to the law and the character of the State. The debate was ceremonial. When the Basic Laws were enacted all were aware of the importance of the moment.'

There is no denying that some Knesset members indeed felt a sense of mission. These were primarily the Knesset members who were involved in the drafting of the Basic Laws, and as such they were imbued with a sense of elation.

However there were no more than a few – a child could count them. Most of the Knesset members felt that they were engaged in their day-to -day routine. For them, the day of adopting the Basic Laws was just another day. Accordingly, Basic Law: Human Dignity and Liberty, a law of immeasurably greater importance than any other law concerning human rights, including Basic Law: Freedom of Occupation, was adopted in the Knesset by a majority of 32 against 21 with one abstention. In other words, only 54 Knesset members bothered to be present in the Knesset during the vote, whereas 66 Knesset members didn't bother to attend the vote. I think that it is somewhat exaggerated to claim that the Knesset proceedings "were of a singular nature," and that "all were aware of the importance of the moment," and that "the "debate was festive" . I would be surprised if the 66 absent Knesset members shared those feelings. And, we should remember that 66 Knesset members constitute more than an absolute majority of the Knesset (see further, Karp, in her aforementioned article, at pp. 326-328).

Knesset Member Shevach Weiss said the following at the first reading of the draft law of Basic Law: Freedom of Occupation.

> '…If Knesset member Amnon Rubinstein succeeds, particle by particle, nucleus by nucleus, progressing to atoms, and from the atoms onto a more comprehensive system, and if it doesn't create chaos and confusion, and there is a semblance of order, *by semi-clandestine, semi-legitimate means to smuggle the Constitution into the agenda of the State of Israel*, we will praise him for it' (*Knesset Proceedings*, vol. 124, at p. 2596) (emphasis added - M.C).
>
> Knesset Member Shevach Weiss felt that we are worthy of a constitution, and that a constitution is appropriate for us, but we can hardly believe that he viewed the Knesset debate as a festive, historical and momentous debate, like the day of giving the Torah.

66. If the two-crown doctrine or the unlimited sovereignty doctrine were a living doctrine, we could expect it to appear before us in all its glory, as if to say, "here I am, for you called me," and all those who would see it would know and be enthralled. When confronted by a lion, do we need to gather evidence and construct doctrines to prove that it is a lion? If that is the case with a lion, should it not be the case with regard to the very existence of authority to frame a constitution? It should be self-evident. It is an inherent constitutional requirement that the authority acquired by a body to frame a

constitution be uncontested, that the authority should present itself before us in all its splendor so that all who see it may know before whom they stand, without the need for explanations, interpretations, and doctrines, why, whence and wherefore the view that the Knesset possessed the authority to frame a constitution provides none of these.

Constituent Authority and our Democratic Journey

67. It appears that the two-crown doctrine, like the unlimited sovereignty doctrine, establishes a structure in Israeli constitutional law unknown in other countries. For almost fifty years, and for an unknown period into the future, the same body purports to operate both as a regular legislature and as the framer of the constitution, without the need for any proceeding or body external to itself. *And the people was not consulted*. Is this how we propose to build a constitution? Is this how we vest the court with the authority to invalidate the Knesset's laws? I can hardly imagine that these doctrines will be our crowning glory, that through them the Knesset will acquire the authority to limit its authority, and the court will be authorized to tumble the Knesset's laws. Indeed, if the Knesset is to possess the authority to enact a constitution, we would expect that such authority be conferred upon it expressly, clearly, and unequivocally. The construction of a constitution today based on the authority acquired by the Constituent Assembly forty-seven years ago, and in the absence of constitutional continuity from beginning to end, is unacceptable, not least when dealing with the very same body – the same Knesset – that is supposed both to enact laws and to enact a constitution.

68. I believe that I would not be mistaken if I said that those attempting to recognize the current Knesset's authority to enact a constitution amendable only by a special majority of over 61 members (and similarly for those who recognize the Knesset's authority to limit future legislation by the requirement of a special, weighted majority) contemplate legislation that entrenches individual rights and freedoms: freedom of movement, freedom of expression, freedom from arrest. As we survey all of these, our hearts abound with joy; how good and how pleasant. I rejoice at the promise of fortifying human rights. We will broaden individual liberties and curtail the powers of government. We will benefit the individual and the public and we will all profit. Happy is the man who trusts in the court, and whose hope is the court. The court may be relied upon to find the "balances" between individuals, between the private and public, and between the individual and society. Better to trust in the court than to trust in rulers.

Even if all of the above is correct, and we agree that they are all correct, we should bear in mind that a constitution is not only concerned with individual rights and human dignity. The constitution is substantially/significantly, perhaps even primarily concerned with the governmental institutions, the branches of government, and the powers and authorities allotted to each of the branches, which may even extend to relations of religion and state, and even to the delineation of state borders. For example, let us assume that a Basic Law established separate elections for the legislature and the executive; that the elections would be conducted in a certain manner; that the allocation of powers among the organs of the executive – the prime minister and the government – would take a particular form; that the state borders would be such and such, and that this Basic Law could only be changed by a majority of eighty Knesset members. With the distribution of power in the State of Israel, it might be impossible to change this law for many years, notwithstanding a desire for change on the part of a majority, perhaps even a substantial majority of the nation and of the Knesset. Would we accept this?

69. Since our independence we have known no rest, neither as a nation nor as a State. We are frequently confronted by difficult and painful decisions, the effects of which are evident in every day life, and only the future knows what is in store for us. We are constantly beset by fateful questions concerning the individual and the community, and the nation harbors a multiplicity of opinions and views. Let us imagine a certain question that both troubles/ and divides the nation, and further assume that the government or the opposition succeeds in causing the Knesset to adopt a Basic Law concerning that subject, over the strident protests of its opponents, the protests of the Knesset, and protests of the street. The subject is a constitutional one, and the Knesset further decides that the basic law can only be changed by a majority of eighty Knesset members. Naturally, the law is passed by a regular majority, as is customary in the Knesset, for example by the majority by which Basic Law: Human Dignity and Liberty was adopted, a majority of 32 against 21 with one abstention, or the majority which adopted Basic Law: The Government (55 votes for, and 22 votes against).

And then the day comes – the day after the adoption of the law, perhaps a fortnight later, perhaps months, and maybe even a year or two. And the government or the opposition (as the case may be) desires to change the law, but is unable to do so, having the support of only 70 Knesset members, maybe even 75, or only 61. According to my colleagues, this law would

stand because it is a constitutional law, part of the Israeli constitution.

And I say: Absolutely not! It is inconceivable that the representatives of a majority of the nation should adopt a position, but be prevented from realizing their goal of amending a Basic Law due to our establishment of a legal construction of two crowns or of unlimited sovereignty. Is this a way of preventing the majority of the nation – even a massive majority – from changing the nation's fate? I believe that frustrating the majority is a patently anti-democratic procedure. I have stated this on a number of occasions, and will not tire of repeating the point: This is not how one enacts a constitution. If we desire to present the nation with a *fait accompli* without having asked its opinion this would, indeed, be the way. But if we aspire to act with the nation's approval, we should turn to it and consult it, as we did with the real Constituent Assembly of forty-seven years ago. Another kind of act could also be performed – an act which from a constitutional perspective is a radical departure from routine legislation – and we would love it, too. But please, let us not now establish, for the first time, a legal ruling based upon a law from 1951, and with our own hands establish the Knesset as a constituent authority for the enactment of a rigid state constitution.

70. The matter however is graver still. In the example cited above, the current Knesset not only purported to limit the discretion of the Knessets – the current one and its successors – but of the nation as well. Accordingly, the current electorate was not asked whether it empowered the Knesset to entrench a Basic Law to the extent of precluding its amendment other than by a majority of eighty. And now, confronted with a *fait accompli*, we tell the people: If you wish to *change* the law – the very same law that you never empowered the Knesset to enact (with respect to the requirement of a special majority) – you must know that *you bear the onus* of acting. In the coming elections make sure that you direct your vote properly, and after the convening of the Knesset, assemble eighty Knesset members and go to battle. However, good advice to the voter is simplistic because even in the coming elections, the nation's ability to change the law is limited.

Assume that a voter is a staunch opponent of the law, but when weighing all of the considerations he decides to vote for a particular party that actually supports the law. Considerations of this kind are not unusual, because voters are not likely to vote for a particular party solely because of its intention to change that particular Basic Law. The nation has thus been confronted with a *fait accompli*, and the onus for changing it is unbearably heavy, with respect to the need to assemble eighty Knesset members sharing the same view, and

with respect to the elections to the Knesset. If a system as complex as this is not a blow to democracy, then I don't know what a blow to democracy is.

71. Irrespective of the situation in countries that lie across the sea (and even those that are not across the sea), this scenario is a grave one, and I regard it as patently anti-democratic. I will loudly declare: When we go to the ballot box to vote for the Knesset, we request that the elected Knesset be the one to determine the norms by which we live., it periodically enact the norms that regulate the life of the nation as well as the individual. When we go to the ballot box we do not authorize the Knesset to divest itself of the powers that we gave it, that it divest itself of its legislative powers and bind its hands with respect to future legislation. Ask the voter and he will tell you – if he has even heard – of the Knesset's authority to adopt a rigid state constitution, i.e. a constitution which requires more that 61 Knesset members to amend it. Enquire as to whether apart from a few jurists and a few other men of letters – "two or three berries at the top of the highest bough" [Isaiah 17:6 – ed.] – the man on Dizengoff Street was aware that fifty years ago the Knesset acquired the authority to enact a constitution, and that that authority persisted until this very day, and that now the Knesset desires to adopt a constitution. Did I know this? Did you know this? Did any of you know this? Is this how the authority to frame a constitution *is* created, as if *ex nihilo*?

I deem the fundamental democratic principle of majority rule – for our purposes 61 Knesset members – too important to be disregarded as though it were not there. We may deviate from the principle consciously, intentionally, assuming responsibility, and acting with due deliberation, and by a procedure appropriate for adopting a constitution. And even if there had been six hundred thousand who requested the constitution, - had we lived in 1948 – can we today realize that intention and desire, when we number five million. "Will the axe boast itself against the one that hews therewith? Will the saw magnify itself against he that moves it" (Isaiah, 10:15 [122]). The axe will not boast and the saw will not magnify itself. The same applies to the Knesset: Being nothing more than the agent of its voters, it is prohibited from deviating from the authority conferred upon it by us, the voters, and it has no permission to restrict its legislative authority without having received a special and explicit license to do so. *Such license has never been given*.

Here we can add what should be self evident, that our concern is only with the issue of the majority required in a democratic system. We are all aware that majority rule as such does not guarantee a functioning democracy. The content and the nature of the regime, genuine elections conducted

periodically, separation of powers and protection of individual rights: all of these and others like them are essential limbs in the body of a proper democratic regime. All that we are saying here is that the principle of the majority is a *condition sine-qua-non* for the basic existence of a democratic regime (in the absence of a constitution).

72. We speak of "national consensus," of "basic conceptions" of Israeli society, and of the "social contract." In my view, no national Israeli consensus exists for recognition of the Knesset's authority to limit its discretion in the form of entrenchment requiring over 61 Knesset members. The isolated cases in which this kind of entrenchment was enacted concern undisputed issues that represent the fundamental conceptions of Israeli democracy. No inference can be drawn from them, neither with respect to the Knesset's authority as a constituent authority, nor with respect to other cases that may be the source of grave, acrimonious dispute. *A fortiori*, this applies when dealing with questions that have yet to be examined, either legally or from any other perspective.

And I further ask: How are we to know the current views of Israeli society? Did we conduct a referendum? Did we ask the man on the street? Will we decide that no referendum will be conducted, and that we ourselves will determine that the Knesset is authorized to enact a constitution? Is this possible? Isn't this a case of a self-fulfilling dream (albeit a worthy one) (worthy) wishes forcing their self-fulfillment?

Now they may say to us, as they indeed have: Why do you require the "nation's" permission to enact a constitution? Since when is the "nation" engaged in questions of law and justice, and with the question of whether or not the Knesset acquired constituent authority? The real argument between the sectors of the public is about the content of the constitution, not other specific legal questions. National consensus is only required with respect to the content of the constitution, not the actual authority to enact it. Do not speak of the Knesset's authority, but rather of the content of the constitution itself. This criticism is unacceptable for a simple reason. If we accept the doctrine of constituent authority or unlimited sovereignty, a minority of the nation would be able to adopt a law with "entrenchment by 80" in the absence of any "national consensus" on the content of that law. In this sense, it makes no difference whether we are treating of constituent authority or of the content of the constitution. They are essentially the same, and Basic Laws adopted by a minority of the nation, as is the case with the overwhelming

majority of the Basic Laws, cannot be said to reflect national consensus (certainly not in advance).

73. It is difficult to escape the impression that the supporters of the two-crown theory and of the unlimited-sovereignty doctrine make the following claim: The Knesset is authorized to enact a constitution because it is appropriate that it should have such authority (social consensus, etc). In other words, these doctrines are largely sustained by the powerful desire to introduce ideal law into existing law, to inject a doctrine (commendable in its own right) into the veins of the existing system of law. The longing and yearning for a formal, rigid constitution is so deep and powerful that a hypothesis originating in the heart's desire has magically become existing law. Our desire transforms itself into a reality without strict supervision of the central powers and authorities of the State and the allocation of powers to each particular authority. Needless to say, an aspiration for a constitution, albeit a genuine one, is insufficient to establish the actual authority to adopt a constitution. And where shall we find the social consensus? I do not know.

I fully concur with what Shapira and Bracha wrote in 1972 in their aforementioned article, at pp. 21-22:

> 'Even assuming that those who maintain that the Knesset has constituent authority are correct, it is doubtful whether it is desirable today to base the normative supremacy of a possible constitution on the continuing constituent authority of the Knesset, today, twenty-two years after the elections to the original Constituent Assembly. As mentioned, the social-moral basis for the supremacy of the constitution is grounded in the general public's sense that the constitution is its own creation, being the direct outgrowth of its will. Is it even feasible today to persuade the public of the reasonableness of giving special normative force to a constitution adopted by the Seventh Knesset – a body elected as a regular legislature – solely because the power of the Constituent Assembly, a body elected a generation earlier, passed to the current Knesset by some formality or another? We must also remember that there are legal doubts as to whether the current Knesset was vested with constituent authority, something that potentially blurs the distinction between the two capacities of the same Knesset (i.e. between its role as a legislative authority and its standing as a constituent authority). It appears to me that today, the

> Knesset's act of accepting a constitution is not sufficient. an act of adoption of a constitution by the Knesset itself would not be sufficient'

These statements were made in 1972. In the twenty-three years that have passed since then, their validity has only increased.

74. We began with the question: The Constituent Assembly – Was it you or was I dreaming? We respond: Forty seven years ago, it was you, but today you are but a sweet dream.

The Knesset's Authority to Enact Entrenched Laws

75. Our view is that the Knesset lacks constituent authority to enact a formal, rigid constitution. Neither the two-crown theory nor the unlimited-sovereignty doctrine is rooted in the law of the land. The Knesset is simply the Knesset, with the authority to enact laws as in the past. And this invites the question: It is an undeniable fact that over the years the Knesset enacted a number of Basic Laws (and non-basic laws) that were "entrenched" or "protected" against a regular majority. The question therefore arises whether in doing so it did not exceed the bounds of its authority (making a clear distinction between the authority to enact a constitution and the entrenchment of laws).

The Knesset lacks "constituent" authority. Does it have the authority to legislate entrenched laws? A law stating expressly that it can be neither varied nor violated except by a majority of the members of Knesset. Is such entrenchment valid? Is the Knesset really incapable of varying or violating the law unless it enlists a majority of the members of the Knesset in support of the variation or violation? And if the law provides that it can only be changed by a majority of 70 or 80 Knesset members, is such entrenchment valid? We will now proceed to examine this question.

76. For convenience, we begin our discussion with the accepted presumption (accepted, but in my view incorrect, as I will presently explain) that the Israeli Knesset, similar to the British Parliament, is omnipotent and is empowered to pass any legislation, irrespective of its contents (see CA 450/70 *Rogozinsky v. State of Israel* [1972] [64] at p. 136; HCJ 120/73 [41], at p. 759; the *Kaniel* case [13], at p. 798; HCJ 889/86 *Cohen v. Minister of Trade and Welfare*, at p. 546; the *Laor* case [21]; Rubinstein, in his book *supra* (fourth vol.) at p. 135 ff., 461 ff.). This all-inclusive authority is occasionally referred to as Knesset Sovereignty (or Parliamentary Supremacy). In this context, it has been said jokingly, that the parliament in

Westminster is authorized to enact any law but to make a woman a man, and a man a woman:

> 'It is a fundamental principle with English Lawyers, "that Parliament can do everything but make a woman a man and a man a woman"' (Dicey, *supra* at 41).

This statement is imprecise. Obviously, if the intention is only that Parliament is incapable of literally turning a man into a woman, and a woman into a man, it is certainly correct. However, such a reading empties the paragraph of meaning, because by the same token, Parliament is unable to move a pencil from one side of the table to the other because the Parliament as such does not occupy itself in any physical action, and is unable to generate any change in the surrounding physical world. Parliament occupies itself solely with norms and normative actions, and its power and authority lie in this field. If, therefore, the intention is that Parliament is "unable" – in the normative sense – to turn a man into a woman and a woman into a man, then it is quite simply incorrect. In the wonderful world of norms that is not perceived by our five senses, but which controls our lives, the Knesset is certainly "able" and authorized to transform a man into a woman and a woman into a man. A separate question is whether or not those to whom the norms are to apply will submit to them. Needless to say, that question is beyond our scope.

77. The Knesset is therefore omnipotent and authorized to enact laws, regardless of their content and their scope. We therefore return to our first question. If indeed the Knesset is "all-authorized" (all-powerful), does that power and authority empower it to enact entrenched laws, i.e. to limit its legislative power and authority? The question we ask as adults is the question we asked as children. If God is omnipotent, can He create a rock that He is unable to lift? If he is able to create such a rock, then necessarily he is not omnipotent, because after the creation of such a rock, he will not be able to lift it. And if he is unable to create it, then he cannot, by definition, be said to be omnipotent. Either way, it turns out that the God we perceived as being omnipotent, is not, actually, omnipotent. Resolution of this paradox requires that we abandon one of the two alternatives: the lifting of the rock or the creation of the rock. Our argument would proceed as follows: Either God has continuing omnipotence (in the language of Hart) except with respect to His own power, which He cannot limit; or that ultimately He is omnipotent and also has the ability to limit His own power ("self embracing omnipotence"), but having curtailed His power, He is no longer omnipotent (See and

compare: Hart, "Uncertainty in the Rule of Recognition," *supra* at p. 147-154; Englard, *ibid*. at pp. 107-111).

78. Going from the metaphor to its simple meaning: If the Knesset is "all-authorized," which is our point of departure, is it authorized to limit (or negate) its authority to change the law? If authorized to limit (or negate) its authority, the conclusion must be that having exercised its authority of self-limitation, it is no longer all-authorized. If, on the other hand, it is not authorized to limit (or not to limit) its authority, then it was not all-authorized in the first place. Either way, we began with the assumption of the Knesset's unlimited authority, but it turns out in the end that its authority is not unlimited. We therefore face a paradox, and the question is whether it can be resolved.

79. First of all, let us avoid speaking of the omnipotent God (or of any other "omnipotent" entity). God does what He does, and we do what we do. His acts are not ours. His power is not our power; His time is not our time. His affairs are not our affairs. The matter is quite simple. Insofar as God is omnipotent, as per our opening assumption, He is by definition not governed by the rules of logic that apply to us. The concept of "omnipotence" is a metaphysical one, because if God's "omnipotence" is understood in the literal sense, then He can also exist and not exist; He can exist today, and simultaneously exist yesterday and tomorrow, and also not to exist at those times. He can be white and not white. He can have a body and image and be incorporeal. And in addition to all these, the "omnipotent" can also cause another to be and not to be at the same time. And if indeed He can do all these, then why should He not be able to limit Himself and not limit Himself? Accordingly, we cannot speak of God as being "omnipotent," and in the same breath proceed to subject Him to human law, to the laws of nature with which we are familiar, the laws of logic and the laws of democracy. As stated in the hymn *Adon Olam* ("Eternal Lord"):

> '"He was, He is, and He shall be; Without beginning, without end." And in "*Yigdal*" ("Exalt"): "Transcending time and here eternally…A mystery of Oneness, measureless…Before Creation's dawn He was the same; the first to be, though He never began."
>
> "High up in the North in the land called Svithjod, there stands a rock. It is a thousand miles high and a thousand miles wide. Once every thousand years a little bird comes to this rock to sharpen its beak. When the rock has thus been worn away, then

> a single day of eternity will have gone by"' (H.W. van Loon, The Story of Mankind (1921)).

Can we presume to apply human laws and logic to that single day of eternity?

The heavens belong to the Lord, but the Knesset He has given to mortals

80. The difficulty remains. Is the Knesset able to restrict (or limit) its future legislative authority? This would mean that in the wake of such a law limiting (or denying) authority, the Knesset would no longer have the unlimited authority that it had prior to its enactment. To facilitate our discussion we will not apply the rock parable to the Knesset, in other words we will not use the example of a law that proscribes any possibility of its being amended, because that scenario is irrelevant (and in our view such a negation would not be valid). We will restrict our comments to a law that limits the Knesset's authority in the future, or in Hart's terminology, a "self-embracing" law, and to the two methods with which we are familiar: *procedural entrenchment* by force of a special majority (such as restricting the amendment of a Basic Law to the vote of a majority of the Knesset members, as in Basic Law: Freedom of Occupation, or an even larger majority), and *substantive entrenchment*, as is imposed by Basic Law: Human Dignity and Liberty, which obligates the Knesset by force of the content of the legislation, even without formal entrenchment. In our comments below, we will distinguish between these two limitations, discussing each one separately. We will begin with the Knesset's authority to restrict its legislative activities by the declaration that a particular law can only be varied by force of a special majority (a majority of the Knesset members, or some other kind of special majority).

Regarding Formal Entrenchment

81. Let us examine the issue from the beginning. The first and foremost task of the Knesset (as with any other legislature) is the establishment of behavioral norms for people and bodies living and operating in Israeli society (along with its other tasks, such as the overseeing of the Government's activities). Those who contend that the Knesset is all-powerful refer primarily to its (ostensibly) unlimited power – from a legal perspective – to establish a normative regime in Israel as it deems fit (within "acceptable" boundaries). As stated above, this is the point of departure for our discussion, from which we will proceed.

The Knesset's "Preparation" for its Activity

82. When establishing norms for Israeli society the Knesset "speaks" through its legislation, and its laws are the binding norms. But how does the Knesset exercise its authority in "legislating laws"? In its capacity as a collegial body of one-hundred-and-twenty members, how shall it "legislate"? How shall the legislators assemble for a legislative session? On which days and at what time? What proceedings must be conducted for a draft proposal to become a "law"? And once legislated, how is it brought to the public's attention? A "Knesset" is not merely one-hundred-and-twenty people elected as Knesset members. While the one-hundred-and-twenty elected representatives are, naturally, its principal component, they are surrounded by norms and rules that are designed to organize the Knesset's work. These rules create and ground its work procedures, from the tabling of draft proposals before the one-hundred-and-twenty members, to bringing the "law" to the knowledge of the general public. From this we learn that before it legislates laws for people and bodies outside the Knesset, the Knesset must first organize its own internal work procedures.

The Knesset's internal organization is a practical imperative and a necessary condition for its activities. "First adorn yourself, and then adorn others" (*Bava Metzia* 107b [123]). An echo of this rule appears in the provisions of s. 17 of the Interpretation Law, 5741-1981, concerning "Auxiliary powers": "Any empowerment to do something or to deal with or decide a particular matter implies empowerment to prescribe work procedure and the order of deliberations insofar as these are not prescribed by legislation."

Our comments here apply to any collegial body (and similarly to an individual authority, in a society in which the rule of law prevails, even if only in the formal sense). For example, this is the law that applies to courts, and is also the reason for the application of *lex fori* in regard to court procedure, even where the substantive matters are decided in accordance with rules deriving from foreign legal systems (see, e.g., A.V. Dicey and J.H.C. Morris, *The Conflict of Laws* (London, 12th Ed., L. Collins, 1993) Ch. 8, p. 169; and see Dr A Levontin, On Marriage and Divorce Conducted Abroad, (Mif'al HaShichpul, 1957) 68-69; and in the words of Professor Avigdor Levontin: "Any organism must be internally organized before it can organize its surroundings," ("Draft proposal for Conflict of Laws: The Procedural Aspects," *Uri Yadin Volume*, at p. 100). Professor Levontin expressed himself in a similar vein regarding the activities of the court (*ibid)*:

> '…without the laws of procedure that apply to it and in it, no court is a court, and it cannot function in that capacity…when a court is requested to handle any matter, the court must be regarded as a living, functioning entity. Every organism must be internally organized before it is able to organize its environment. This is also true of the judicial mechanism. Without its customary work procedures, the court cannot even be i*dentified*. The rules of panels and appointment inform us as to the identity of the judges in a particular court, and which judges will compose a particular panel. Other similarly "non-substantive" rules direct us as to *where* and *when* the court functions. There are other rules that tell us how to apply to the court, such as that an application to the court must be made in writing, the prescribed number of copies, that it must be filed in a particular office in a particular format, during particular hours, and that a conversation with a judge does not constitute the filing of an action.
>
> These methods of acting and of activating, and certainly the panel rules of the court, are thus not something separate from the court "itself"; if they are not followed, no application is made.'

These comments regarding the court – which for this purpose resembles any other body intended to dictate legal norms for others – also apply to the Knesset and to Knesset legislation, mutatis mutandis. The Knesset's role is to "organize" Israeli society, and in accordance with the rule "first adorn yourself," the Knesset must first "organize" itself. Only that kind of organization can change a static body into a dynamic one. A collection of representatives can become a group of people operating in accordance with predetermined rules and programs, and the amorphous collective attains the capability of performing the roles and tasks imposed upon it. The "organization" of the body – the procedures it will adopt, the paths that it shall tread, and all that surrounds this – are all secondary and ancillary to the body's principal role, but calling the body by the name "Knesset" necessarily comprises both the house of representatives and its prescribed procedures and organization. The "legislating Knesset" cannot exist independently of legislative procedures, from beginning to end. Without clear, predetermined procedures, the Knesset cannot discharge its duties.

83. The Knesset's "organization" for purposes of legislation can be - and is in fact – fixed in different legislative acts. For example, s. 19 of Basic Law: The Knesset provides that "The Knesset shall itself prescribe its *procedure*" (emphasis added – M.C.) and continues: "insofar as such procedure has not been prescribed by law the Knesset shall prescribe it by the articles." (This bears an interesting comparison to s. 108 of the Courts Law [Consolidated Version], by which the Minister of Justice acquired the power "by rules of procedure to regulate the *procedure and practice* before courts, registrars and execution offices insofar as they have not been prescribed by law…" (emphasis mine – M.C.). Procedures (as in rules of procedure and custom) appear partly in the primary legislation and partly in secondary legislation (in the Knesset Articles or in Civil Procedure Regulation), in accordance with their importance and weight. Hence, procedures of distinct importance will appear in the law, while those of (relatively) inferior status will be included in the articles.

The Knesset's organization for the fulfillment of its tasks does not only include technical "procedures," such as the procedural regulations by which the courts operate. There are also arrangements that are at the heart of the substantive law, and which are nonetheless classified as part of the Knesset's organization for the discharging of its functions. For example, the immunity of Knesset members' and the immunity of the Knesset buildings, or the example of the publication of laws and the rule that the effective date of a law is the date of publication unless another effective date is determined by the law itself (as per s. 10 (a) of the Law and Administration Ordinance). And so, festively attired, and light on its feet, the Knesset sets out on its mission of "organizing" its surrounding world, establishing legal norms for people and bodies meant to defer to the Knesset's word

We will further state the obvious. Procedural restrictions within the scope of the Knesset's "organization" for the discharging of its principal functions cannot be regarded as "self limitation." First of all, if the legislature proceeds on its intended path, there is no limitation of legislative authority in any realm in which it chooses to legislate. Secondly, at any event, the legislature can at all times amend its prescribed procedures, and this releases it from any self-limitation, which was not self-limitation in the first place (see and compare, Hart, *supra* at pp. 68-70).

Finally, we do not, nor will we claim that we will always be able to easily distinguish between procedure in the sense of "organization" for discharging of duties, and "substance." The distinction between procedure and substance

stands independently, and the problems it poses, as with any type of legal classification, will not be discussed in the present context (and see, for example, Hart *ibid*. at p. 71-72; R. Eliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values," 29 *Osgood Hall L.J*. (1991) 215; Hogg, *supra*, Ch.12).

84. Incidentally, in English law, and in other national legal systems of states that originated in the British Empire, these legislative procedures are referred to as the "Manner and Form." The expression originates in a British law known as the Colonial Laws Validity Act, 1865, a law that, as its name indicates, deals with the Empire's colonies. According to s. 5 of that law, the legislative authorities of the colonies were granted the authority to enact their own constitutions, but the regulatory authority was subjected to one qualification, namely that the amendment be done:

> 'In such *manner and form* as may from time to time be required by any Act of Parliament, letters patent, order in council or colonial law for the time being in force in the said colony.'

This paragraph in the British law, and the "manner and form" expression in particular, was a primary focus both of the case law of those states, and the writings of scholars, and even Israeli academics have addressed it. Personally, I think it inappropriate for me to resort to expressions rooted in the legislation and law of other states, and certainly not in the mechanical sense. The purpose and the scope of the provision in British law do not necessarily conform to the purpose and scope of the "organization" of our Knesset, and for fear of error, we will do our best to stick to our own nomenclature, without availing ourselves of the expression "manner and form," which in and of itself may be subject to qualifications that do not concern us. Our concern is with the "organization" of the Knesset, and the need for "organization" which, along with the fundamental tenets of our system, dictates the parameters of our discussion, as we will observe and elaborate below (for example, and merely hinting at the matter, it could be argued that the immunity granted by the Knesset members to themselves exceeds the Knesset's "organizational" needs and violates fundamental principles of the legal system. Naturally, we will not draw any conclusions at this time).

Nonetheless, we can seek assistance from ideas raised by others, and which are germane to our discussion: See and compare, e.g., R.F.V. Heuston, Essays in Constitutional Law (London, 1961) p. 1 ff ("Sovereignty"); Hart,

supra, at 67-69, 149-151; A.W. Bradley, "The Sovereignty of Parliament – In Perpetuity?" in The Changing Constitution, ed. J. Jowell and D. Oliver, 3rd ed. (Oxford: 1994) 35 ff. ("Legislative Power" and "Sovereignty"); R. Elliot, *supra*; Hogg, *supra*, chap. 12, ("Parliamentary Sovereignty") at 310 ff., esp. para. 12.3 (b) ("Manner and Form of Future Laws"); Nimmer, supra, 1217.

85. Having established its legislative procedures, including those for the publication of laws, the Knesset must proceed along its chosen path, unless it explicitly revokes those procedures and adopts new ones in their stead. It should be stressed that all of this – namely the revocation of old procedures and the adoption of new ones – is performed by the Knesset *in accordance with its permanent work procedures, in other words, in accordance with the procedures that it intends to revoke*. In other words, the Knesset is "bound" by its previously established legislative procedures. It is able and entitled to change those procedures, provided that such changes are effected in accordance with the predetermined method. None of the above is new. For example, s. 15 of the Interpretation Law provides as follows:

> 'Any authorization to make regulations or to issue an administrative directive also implies authorization to amend, vary, suspend, or revoke them *in the manner in which they were made or issued*' (emphasis added – M.C.)

An additional example of this is the publication of laws. The legal position today is that a law must be published in the Official Gazette, and that if not published it will not come into force (s. 10 of the Law and Administration Ordinance; s. 2(d) of the Transition Law). Let us now assume that the Knesset wishes to enact a law that will take effect even without being published in the Official Gazette. The Knesset cannot enact this kind of law unless it first publishes a law that empowers it to enact laws without publication. If it does not first enact and publish a law (allowing the enactment of laws without publication), the Knesset lacks the power to legislate without publication. A norm adopted by the Knesset by the usual procedures (three readings, etc.) that states that it will come into force even though it has not been published in the Official Gazette will not have legal force, and will not be deemed a law. The reason is simple: The Knesset (according to the assumption) is all-powerful regarding the contents of any "law" and regarding the procedures for enacting a "law," but that hypothetical norm is not a law according to the Knesset's own definition of what constitutes a law. This conclusion is dictated by common sense, good order, and the internal logic of the matter. While other alternatives are

"possible," the conclusion we presented is practically self-evident (see and compare, Professor Rubinstein, *supra* (4th ed), p. 472).

Imagine some principality governed by the rule of law (even if only formally). The prince's bellman, astride his horse, appears in the city square every Monday and Thursday, at five o'clock in the afternoon, unrolls a parchment, and proclaims the new laws to the assembled citizens of the principality. Should he choose to change the day, time, or place of publication, he must give advance notice to that effect, and will do so at the regular place of publication, on the usual days of publication, and at the predetermined times. If, without prior notice, the bellman appears in the city square on Sunday at eleven o'clock in the morning, his proclamation will not be a proclamation, the square may be vacant, and the law will not be a law. The Knesset's mode of expression is by the "law," and a law is only a law if it is published. A norm purporting to have the validity of law despite its non-publication will not be considered a law according to the Knesset's own definition of what constitutes a law. Any statement to the contrary would undermine the basic organizational principles of the society, resulting in chaos and confusion, scorn and provocation.

Another example: The Knesset Rules of Procedure provide that a law is not valid unless passed by the Knesset in three (or four) readings. A draft bill that passes only two readings remains a draft bill, and does not become a law, even if the draft bill states that it will become law after only two readings. Only an *explicit prior amendment* (in the Rules of Procedure or in the law, as required) permitting the adoption of a law after only two readings is capable of turning a draft bill into a "law" after only two readings. The reasons stated regarding publication are similarly applicable here, and do not require repetition.

86. The Knesset and its legislative procedures are comparable to a machine with an internal operating mechanism: A machine that dispenses soft drink bottles will not be able to issue parking tickets unless its internal mechanism is replaced. Needless to say, the transformation must be carried out in a special way in order to make the machine suitable to its new task. The most talented magician cannot open a drawer locked with the key inside, and even the swiftest of men cannot lock a drawer and simultaneously place the key inside it. A drawer cannot be opened with a key that does not match the lock, but any child can open the same drawer if he has the right key, or if the lock is replaced to match the key. These changes must be performed first, and only afterwards can the drawer be opened. So it is with drawers and

machines, and so it is with the Knesset and legislative procedures (and see, for example, Hogg, *ibid.*, at p. 300ff; P.A. Joseph, "Constitutional Entrenchment and the MMP Referendum," 16 *N.Z.U. L. Rev* (1994) at p. 67).

Knesset Voting; Special Majority

87. Let us now take a closer look at the subject of Knesset voting, which is the core of our concerns. We will begin with the issue of the quorum, and proceed to the subject of voting. Firstly, it bears mention that the issues of quorum and voting both concern the "organizational" procedures that the Knesset establishes in order to enable it to function, and the procedure by which it adorns itself before it adorns others.

88. The quorum rule is an optional one. In some cases, a quorum is mandatory in one of a variety of forms, and in other cases, there is no quorum requirement at all. Section 20 of the Interpretation Law (formerly s. 37 of the Interpretation Ordinance (New Version)) states that "an act required to be done by a number of persons shall be valid if performed by the majority of them." This is the point of departure for assessing the actions of a collegial body (which is not a judicial or quasi-judicial body) (see, e.g., HC 7/55 *Yanowitz v. Ohr*, [66], at p. 1255ff.).

Arguably, the Interpretation Law does not apply, by force of its own provisions, to Basic Law: The Knesset. Nonetheless, in the absence of a specific provision otherwise, the Knesset would presumably be subject to the rule laid down in the Interpretation Law, by force of the law's internal logic and because it reflects the fundamental democratic principle of majority rule. In any case, we need not resolve this question, inasmuch as s. 24 of Basic Law: The Knesset specifically provides that "The Knesset shall hold debates and pass decisions whatever the number of members present." The rule stipulating the lack of a quorum requirement is binding as long as it is not changed. Should the Knesset Speaker refuse to submit a certain matter for a vote purely because of a "deficient quorum," he would exceed his authority, and his decision would be invalid. Were a quorum requirement to be imposed, the Knesset would not be able to enact a "law" unless the quorum conditions were met (provided that the rule had not been changed in a separate, prior proceeding). Accordingly, the draft bill would not become a "law" even if it stipulated that it was not subject to the quorum requirement. That very same "law" would not be deemed a law, inasmuch as it was not passed by the required quorum. Baron Munchausen cannot lift himself up by his bootstraps, or save himself from drowning by pulling his own hair, and

the Knesset (according to the hypothetical quorum rule) cannot pass a law without a quorum.

89. Proceeding from the quorum to Knesset voting, the basic rule established in s. 25 of Basic Law: The Knesset provides that:

> 'Save as otherwise provided by Law, the Knesset shall pass its decisions by a majority of those participating in the voting – those abstaining not being reckoned as participating – and the voting procedure shall be prescribed by the articles.'

These are the voting rules followed in the Knesset by force of Basic Law: The Knesset. Knesset decisions are adopted on the basis of the democratic principle of majority rule, and Knesset members who were absent or abstained from voting are not included in the counting of the votes. Only those present at the vote, who voted for or against the law, will be included in the tally which is governed by the regular rules of majority. These rules have applied in the Knesset from the start. We would only add that this kind of provision stipulating that absentees or abstainers are not counted is common in Israeli legislation, and in other legal systems, as well.

However, nothing compels us to adopt this specific provision. For example, with respect to abstainers, the law could have included abstainers among those participating in the vote, and such a provision would ipso facto have meant counting the abstainers among the opponents of the law. And, needless to say, whichever approach the law adopted would decisively affect the manner of voting, both with respect to abstainers and with respect to absentees. The methods of obtaining a majority depend upon three variables: the requirement for a quorum; the treatment of both absentees and abstainers (in our comments below we address the specific issue of the special majority, which is the focus of our discussion). Thus the exclusion of absentees and abstainers in the tally of votes tends to strengthen the Government (assuming that it is the Government that initiates Knesset decisions). The opposite is also true: The inclusion of absentees and abstainers among those whose votes count, has the effect of strengthening the opposition (insofar as they did not vote "in favor," they will be counted among the opponents) (see further, "Majority Rule," in the *Encyclopedia of Social Sciences* (New York: 1953), vol. 9 at p. 55; 59 *Am.Jur*.2d (Rochester and San Francisco) paras. 8, 9; and see CA 219/80 *Beit Hilkiya, Workers' Village for Cooperative Settlement Ltd v. Efrati*, at p. 521-522).

In the absence of a constitution providing otherwise, the Knesset is free to

choose any combination of these variables - quorum, absentees and abstainers - and any combination will be deemed legitimate (from a legal perspective). However, the Knesset's authority is subject to one significant limit, namely the democratic principle. Regardless of the particular path adopted regarding quorum, absentees and abstainers, the principle of a democratic "majority" must be ensured, admitting of no deviation, right or left. In other words, the "majority" is the axis, the grounding principle around which all other rules and directives orbit. The majority – to paraphrase Hillel – is the "the entire Torah" and all the rest of the rules are "commentary" (we are not now addressing questions of individual rights).

90. Knowing that the majority principle forms the central axis – the beginning, the middle and end – facilitates the construction of various models for arriving at a majority decision within the permitted parameters. We can move among a range of models until we encounter the outer borders of democracy, which are inviolable. For example, the rule that abstainers will be considered among the participants in the vote (and therefore included amongst those voting "against") would, in principle, be burdensome for the government, and require it to muster a larger number of supporters for its proposal. The same method could be applied to absentees. The higher up the ladder we go – in terms of including abstainers and absentees in the vote – the more difficult it becomes for the government, and the easier for the opposition. We climb the rungs of the ladder until we reach the top, where we would say that the Knesset will decide by force of majority, with both abstainers and absentees being counted among the participants in the vote. Such a provision is tantamount to proclaiming that the absentees and the abstainers are considered as having voted against the proposal (by force of not having voted for it). If we remove the veil from this construction, we see a provision stating that a proposal can only be accepted if it receives 61 votes, i.e. an absolute majority of the Knesset members. We further stress that this kind of statutory provision is almost self-evident, being a provision that does not deviate from the boundaries of regular Knesset activities. This would be the position irrespective of whether the 61 votes were implicitly required, as in our example, or explicitly, as contemplated by s. 4 of Basic Law: The Knesset.

In comparison with the majority provision appearing in s. 25 of Basic Law: The Knesset, the requirement of a 61 vote majority for the passage of a decision may be classified as a requirement for a "special," or "privileged" majority. We certainly have no quarrel with the adjective "special" or

"privileged," and in everyday parlance the term "special" majority appropriately connotes a majority of 61. But at the same time we should know that even when the passage of a law requires a special majority, it is nonetheless a law that the Knesset is authorized and permitted to enact as part of its regular activity. This statutory provision falls within the accepted, legitimate constraints of democracy, and does not cross the boundaries of legitimate, routine Knesset activities. We simply view the Knesset session as a meeting with the participation of all the Knesset members, in which all of the participants vote either for or against. In that situation, a majority of 61 would be required in order to enact a law, and this would also be the rule in the other cases. Needless to say, a stringent statutory provision of this nature could take the form of a general statutory provision in place of the provision in s. 25 of Basic Law: The Knesset, or could be restricted to a particular matter, in accordance with the concluding phrase of s. 25 ("Save as otherwise provided by Law").

91. We could go even further and assert that not only is the majority requirement of 61 neither unusual nor unique – it actually represents the *starting point* of the entire democratic process. A requirement of a majority of 61 (i.e., an absolute majority) is not only consistent with the fundamental democratic principle of majority, it constitutes the embodiment of the democratic principle. In the world of democracy, an absolute majority is neither a "special majority," nor a "privileged" majority; it is the "authentic" majority, deriving from the essence of the democratic principle of majority. When the Knesset passes a law, it binds the entire nation, and since we do not live in a utopia in which the entire nation assents as one to the adoption of laws, it is appropriate that, at the very least, the *majority* of the people, i.e. an *absolute majority*, should assent to them. The people expresses its opinion through its representatives, and we will therefore require that an absolute majority of the people's representatives agree to imposing obligations on the people. Those in agreement will presumably make the effort to vote in favor, while those who fail to make the effort to vote – by abstaining or by absenting themselves from the vote – may be assumed to oppose the proposal. This accords with the rabbinic dicta: the "majority carries the same weight as the entirety"; "a majority is equivalent to the totality"; "a majority is like the totality." But this only applies when the majority is taken from the totality, and the principal meaning of a majority from the totality is an absolute majority (and see: *Encyclopedia of Social Sciences*, *supra*, at p. 55).

92. This was the thrust of statements made in the Knesset by Knesset

Members Raphael and Rosenberg (in the debate on Basic Law: The Knesset), and I think it appropriate to cite them. Knesset member Raphael made the following statement regarding the majority:

> '…just as I would not want an incidental majority to change our decision, which was a majority decision, I similarly would not want there to be a need for a privileged majority to change a decision. This also would be somewhat arbitrary and would be tantamount to a distortion of the majority position, in view of there being a substantial portion that is pushing for a change.
>
> I do not agree with the proponents of a two-thirds majority or any other kind of privileged majority; my proposal is that it be a majority from the whole, which according to the Rashba [Rabbi Solomon ben Abraham Aderet – ed.] and other authorities of Jewish law is the true definition of a majority. This means a majority of all the Knesset members, and accordingly only sixty-one can change it
>
> (Interjection: That is also a privileged majority).
>
> No, it is not a privileged majority. It is a real majority, rather than an accidental majority.
>
> I propose that the Knesset add a stipulation stating that this section can be changed only by a majority of all the Knesset members' (*Knesset Proceedings*, vol. 23 at p. 898)

And Knesset Member Rosenberg stated the following:

> 'Madam Speaker, Knesset Members. I would like to further elaborate on the difference between my proposal, whereby this section can only be changed by a majority of Knesset members, and a proposal stating that the section can be changed only by force of a two-thirds majority. The problem is not that a two-thirds majority requires a larger majority, while a majority of Knesset members requires a smaller majority. It is a matter of principle. The Knesset adopted this law by force of a majority, a majority of the Knesset members, and it is both reasonable and just that what is adopted by force of a majority may only be changed by force of a majority. The Knesset did not adopt this law by a two-thirds majority, and I see no justification for a requirement of a two-thirds majority in order to change it.

> I do not accept the approach whereby a constitutional law requires a two-thirds majority. There are states with constitutions containing special clauses prescribing how to amend it, and not necessarily by two thirds, but by all sorts of other means. In England, as in Israel, there is no constitution, but there are still constitutional laws which do not require a privileged majority if there is a desire to change them
>
> …
>
> I do however concur with what was said here, and this indeed is our approach, that it is forbidden for a matter of principle to be altered by force of an incidental majority. As a result, we are opposed in principle to the notion of a special majority, save with respect to one eventuality, which will be addressed at the end of the law, concerning emergency legislation. Here however, it is clear that we must ensure a Knesset majority, which means a majority of the state. In this context, I adhere to the accepted approach, namely, that in a system of proportional elections, a Knesset majority represents a majority of the people. Accordingly, if sixty-one Knesset members, i.e. a majority in the Knesset that represents the majority of the nation, wish to make a change, they can do so. If less than half of the people, i.e. less than sixty-one Knesset members, then should they wish to make a change, they will be unable to so. Since they do not represent a majority of the nation, they cannot make a change. Accordingly, we recommend the acceptance of our reservations' (*ibid.*, at p. 898).

Knesset Member Amnon Rubinstein made similar comments at the first reading of the draft bill of Basic Law: Human Dignity and Liberty:

> '…61 Knesset members do not constitute entrenchment, but rather are a tool utilized in many parliaments to prevent votes of chance. However, without s. 10, this law would be meaningless, and as such the section also represents a minimum. As opposed to the draft bill submitted by the Minister of Justice, it does not require a two-thirds majority, but only a majority of 61. This is a minimum requirement beyond which no compromise is possible, because a majority of 61 is intended to prevent any possibility of a legislative hijacking and amendments by a chance majority' (*Knesset Proceedings*, vol. 123, at p. 1236).

This is what Knesset Member. Rubinstein said in the Knesset session for the first reading of the draft bill of Basic Law: Freedom of Occupation:

> 'We propose that this law may only be changed by a majority of the Knesset members. It is not an entrenched majority… There is no entrenchment here….the requirement for an absolute majority, which is not an entrenched majority, tells the Knesset one thing: This law cannot be adopted by a chance majority. You must adopt it by an absolute majority of all the members. I would like to emphasize that under the provisions that apply to many bodies, this is the basic quorum rule. A quorum means an absolute majority. This type of provision does not apply to the Knesset, and rightly so because otherwise it would encounter daily difficulties. But this requirement is absolutely modest, and minimal, not requiring entrenchment but rather an absolute majority' (*Knesset Proceedings*, vol. 124 at p. 2596).

And Knesset Member Rubinstein made the following statement in the meeting of the Constitution, Law and Justice Committee**:**

> 'In all of the Parliaments of the world there is a difference between a special majority, which is a majority of two thirds, as proposed by the Minister of Justice, and an absolute majority. This provision is known as a quorum provision, and is not regarded as a special majority provision' (meeting on 9.3.92, at p. 53).

This is "real" democracy, in all its glory and grandeur – the democracy of festivals and holydays. *It is the starting point*: A majority is an absolute majority of the members of the House. But since we all are aware that incidental demands, constraints and matters of convenience lead to the loss of that glory and grandeur, we inevitably find ourselves in the mundane, workaday democracy.

Should an example be necessary, Basic Law: Human Dignity and Liberty was adopted by a majority of 32 for and 21 against. Its twin, Basic Law: Freedom of Occupation (the first one) was adopted by a majority of 23 Knesset members, with no opponents or abstainers. This is weekday, routine democracy, and it would surprise me if even the Knesset members themselves regarded the Basic Laws as a "constitutional revolution," or any other kind of revolution (see and compare Bendor, *supra*).

93. Every day constraints, the convenience of the members of the legislature, and other factors, too, have generated a reality of compromise, of derogation from the absolute majority – the majority that derives from the democratic principle. This was the background of the absentees and abstainers rule in s. 25 of Basic Law: The Knesset. However, our diminution of the "pure" democratic principle should not blind us to the fact that the rule and the principle is that of the absolute majority – *the absolute majority that is the beginning of all beginnings*. All of this teaches us that the rule of a majority of 61 is the self-evident dictate of the democratic principle of the majority, and as such *does not involve the imposition of any element of "self limitation" by the Knesset*. When the Knesset prescribes that a particular statute can be repealed, changed or infringed only by a majority of 61 Knesset members, it does not limit its authority, nor does it "curtail" its legislative power. All that it does is give direct expression to the majority rule dictated by the democratic principle. The principle of the majority, quite simply, means 50% + 1 (n/2 +1). In a body comprising 120 members, a "majority" means 61 members (and cf. Hart, *supra*, p. 68).

Requiring a special majority of 61 obviously restricts the Knesset members' ability to abstain or to mutually set off votes, in that abstention or mutual set off would be regarded as voting against. However, since I do not find that the ability to abstain or set off a vote is a basic right of a *public representative*, nor is it a right at all even if not a basic right, I do not think that the "rule of 61" violates or infringes any important democratic principle.

I would further add, incidentally, that the establishment of a special majority must be specifically anchored in law, primarily because of the statutory provision regarding the formation of a majority in s. 25 of Basic Law: The Knesset. For this reason, I cannot concur with my colleague President Barak, who writes: "It seems to me that the Knesset may – by way of changing the articles – determine that the adoption of a law be by special majority" (Barak, *Interpretation in Law*, vol.1, at p. 569).

94. We have learnt thus far that the requirement of a majority of Knesset members for the annulment, change or infringement of any law may occur at any stage of the Knesset's routine activities, and bears no *legal* uniqueness. Indeed, a majority of 61 is "special" when compared to the majority of 23 that voted for the adoption of Basic Law: Freedom of Occupation (the first version), however, this "distinction" does not involve any innovation from the perspective of the law's constitutional standing. We are unaware of any

legal obstacle to the Knesset's adoption of any law with "entrenchment by 61," and we see nothing *legally* unique in that kind of law.

This is the case, for example, in s. 3 of the Protection of Investments by the Israeli Public in Financial Assets Law, which provides that "this law may not be amended nor may the appendix be revised except by a majority of the Members of Knesset." This statutory provision is legitimate in my opinion, and the Knesset was entitled to "limit" its authority by establishing this kind of entrenchment for the law (see and compare, Karp, *supra*).

This view is not unanimous. For example, my colleague President Barak is skeptical regarding the entrenchment of that law. In his view, apparently, entrenchment is valid only when done by means of a Basic Law, whereas the law for Protection of Investments by the Israeli Public in Financial Assets is not a Basic Law (see, e.g. Barak, *Interpretation in Law*, vol.1, pp. 568-569; vol. 3, pp. 274-276). I am highly skeptical regarding my colleague's view for two doctrinal reasons. Firstly, I do not know what my colleague regards as a "Basic Law" that could justify entrenchment such as in the Protection of Investments by the Israeli Public in Financial Assets Law. Had the title of the Protection of Investments by the Israeli Public in Financial Assets Law included the two words "Basic Law," would it have validated the entrenchment? Irrespective of whether the answer is positive or negative, neither of the answers would be satisfactory. (We might argue that the title "Basic Law" is sufficient, but we would then be accused of semantics. On the other hand, we might claim that the title "Basic Law" is insufficient, and that the entrenchment is invalid, having been enacted in excess of authority. But I think that would be going too far in conferring authority upon the court, in the absence of any explicit statutory authorization).

Regarding the content of the law, if Prohibition could find its way into a constitution, then it would seem that public investments could also represent a legitimate constitutional interest (and had such a protection been included in the Constitution in the first place, would we disqualify it?). In any case, where does the Court derive the authority to decide what should be included in a constitution, and furthermore, in order to overrule statutory provisions of the Knesset? Moreover, in my view, the Knesset may, in the regular course of its work, entrench a statute by means of an absolute majority of 61 members, and consequently, I am unable to find any fault in the entrenchment of the Protection of Investments by the Israeli Public in Financial Assets Law.

95. Incidentally, I will add that for the same reasons I cannot concur with the view of my colleague Justice Zamir that the *Bergman* ruling represents a "revolution" in Israeli law. Naturally, I agree that the *Bergman* ruling was a milestone in the Supreme Court's rulings. This was the first time that the Court struck down Knesset legislation, and in so doing the Court recognized the justiciability of the procedure and the Court's authority to nullify Knesset legislation. However, in terms of overall constitutional doctrine, I think that the ruling can be understood as being required by the "internal" authority of the Knesset, in other words, it is derived from the Knesset's authority to limit its authority, and to entrench a law against a majority of less than 61 Knesset members.

96. Is a majority of 61 Knesset members the upper limit to the entrenchment of a law in a democratic proceeding? For example, is the Knesset authorized to determine that a Basic Law can only be repealed, varied or violated by force of a majority of 70 or 80 Knesset members (and if 70 or 80 Knesset members, then why not 90 or 100?)? Is the Knesset authorized to limit its authority by enacting that kind of entrenchment? My colleagues President Shamgar and President Barak maintain that the Knesset is entitled to pass such legislation. In my opinion the Knesset does not have that kind of authority to entrench legislation, and were it to do so it would be exceeding the boundaries of its authority. No lengthy explanation is needed, as this derives from the same reasoning that brought us to the conclusion that the Knesset is entitled to establish a requirement of a majority of Knesset members in order to change a particular law. Establishing a requirement for a majority of Knesset members as a condition for changing a law is permitted as a matter of routine, but it also signifies the upper limit. The democratic process mandates this rule unconditionally, and it is a rule that cannot be violated. A requirement that the Knesset must achieve a majority of 62 to change a law would exceed the boundaries of what is permitted. The Knesset does not have the authority to exceed the limit of 61.

Incidentally, what is the status of a law that the Knesset determines can be changed only by a majority of 80 votes? For example, under the provisions of s. 9A of Basic Law: The Knesset (a provision that was added in Basic Law: The Government in 1992), the Knesset can extend its incumbency only by force of a law adopted by a majority of eighty Knesset members, and the same applies to ss. 45 and 45A of Basic Law: The Knesset regarding the power of emergency regulations to change or temporarily suspend Basic Law: The Knesset, and regarding a change in the provisions of s. 9A of Basic

Law: The Knesset. Arguably, the "rule of 61" vitiates these entrenchment provisions, because they all require a majority of more than 61. But this is not the case. We have not vitiated these statutory provisions and they should not be regarded as null and void. In my view (*prima facie)*, the law should be regarded as being entrenched under a "61 entrenchment" even if only by force of the rule of *ut res magis valeat quam pereat.* In other words, we have not annulled those provisions but only diminished their force. I would further say that to date, "80 entrenchment" provisions have been established for matters that are entirely undisputed, and as such it may reasonably be presumed that they will never be subjected to judicial review. We hope that the day never comes. In any case, these provisions do not constitute proof of the Knesset's constituent authority, if only because one cannot corroborate one's own testimony.

97. In Israel's current constitutional regime, and in the absence of the living, breathing authority to adopt a "constitution," a determination that a statute cannot be cancelled, varied or infringed other than by a majority of more than 61 (>61) votes is patently anti-democratic. A functioning governmental organ in a democratic regime – and the Knesset fits that description – cannot have the *legal* authority to establish such an anti-democratic rule regarding its own activity. For as long as our regime is a democratic one, we are governed by the principle of majority rule (together with civil rights). As such, a requirement for the consent of 62 Knesset members (or more) to change a law essentially means minority rule and abrogation of the majority rule principle. The Knesset does not have that authority, and it is absolutely forbidden for us to recognize it as possessing that kind of authority. If we say that the Knesset is authorized to limit its ability to change a law – regardless of whether it refers to itself as a "constituent assembly" or otherwise; regardless of whether it refers to its authority as constituent authority or otherwise; and regardless of whether the law is titled "Basic Law" or any other name – we thereby acknowledge the Knesset's authority to enact a law that it will be unable to repeal (as a practical matter). An examination of Israeli parliamentary history shows that very few laws were actually adopted by a majority of 70 or 80 Knesset members. If the Knesset were to entrench laws in that manner, what chance would there be of changing the law? The majority of the nation would stand agape, powerless to change the law. The apologists will explain to the people: you are helpless, and there is nothing you can do.

We should further note that according to those who disagree with us, the Knesset is authorized to curtail its legislative authority by determining that a particular law can only be changed by a majority, for example, of 80 Knesset members, even if the law establishing that rule is adopted by a negligible majority of Knesset members – see the examples of Basic Law: Freedom of Occupation (the first one), and Basic Law: Human Dignity and Liberty. Can this be so? Section 9A of Basic Law: The Knesset – the statutory provision enjoying "80 entrenchment" – was added to Basic Law: The Knesset in Basic Law: The Government of 1992 (the Basic Law intended to replace the current version of Basic Law: The Government). That Basic Law itself was passed in the Knesset by a majority of 55 votes in favor and 32 against (*Knesset Proceedings*, vol. 125, at p. 3863). This inevitably raises the legal, moral and public question of whether we should recognize the authority of a majority of 55 Knesset members to enact an "80 entrenchment," especially given our knowledge – in view of the Knesset's composition since the establishment of the State – that very few laws could be adopted by a majority of 80. We have elaborated on this point, and there is no need to add to it.

Indeed, in my view no importance attaches to the number of members that may seek to limit the Knesset's authority in the future. A regular majority has the authority to entrench a law so that it can be changed only by a majority of 61 Knesset members ("a majority carries the same weight as the entirety"). However, even a hefty majority cannot entrench a law to preclude its amendment other than by a majority of 62 (or more) Knesset members. In the latter case, even if the entire Knesset voted in favor of such a limitation, I would still maintain that the Knesset had exceeded its authority. Indeed, recognizing the Knesset's authority to revoke its own power to change a law by a democratic majority (= a majority of 61 Knesset members) presents a dire picture.

98. The basic principle of majority rule can teach us the following: First, that inherent in the Knesset's authority to enact laws is the natural power to legislatively establish that a particular law cannot be repealed, varied or violated unless the proposal receives the support of a majority of the Knesset members i.e. 61 Knesset members. There is no need for a source of law external to the Knesset itself in order to endow it with that power. It is inherent in the very nature of the Knesset as a supreme legislative authority, and is derived from Israel's democratic character. The second conclusion is that the same principle of majority rule – and no

other – further dictates that inherent in the Knesset's legislative authority is the lack of power to establish in legislation that the repeal, the variation, or the violation of the scope of a particular law requires the support of more than 61 Knesset members. A majority of 61 is the upper limit, beyond which the Knesset exceeds its authority.

99. This is but one example of the Knesset's limited power to legislate in regard to *itself*, to define *its own power* and to establish *its own authority*. There is no shortage of additional examples. Here is one:

A particular Knesset enacts a Basic Law that stipulates that its term will be extended for an additional four years beyond the four years prescribed in s. 8 of Basic Law: The Knesset ("The term of office of the Knesset shall be four years from the day on which it is elected"). In other words, a particular Knesset was elected for a period of 4 years and it now proposes to serve for eight full years. In my view, such a law would be manifestly *illegal*, even were it adopted by all one-hundred-and-twenty Knesset members who thus purported to extend their term of office. The people elected the Knesset for only four years. It did not grant the Knesset a power of attorney to extend its own term of office for an additional four years (obviously, we are not dealing with states of emergency and the extension of a term during a state of emergency) (see and compare s. 9A of Basic Law: The Knesset, which was added in Basic Law: The Government in1992. That provision will enter into force on the day that a Prime Minister elected by virtue of that Basic Law assumes office). In the words of David Ben-Gurion in the Knesset, prior to the elections to the Second Knesset:

> 'The Knesset must stipulate the term of the Second Knesset's office, and if we decide that the term will be for four years, the next Knesset will not be able to serve for more than four years, because the people elected it, from the outset, for four years' (*Knesset Proceedings*, vol. 8, at p. 1581).

Another example: A particular Knesset wishes to enact a law that reduces the number of members of the House to ninety members. The law is due to go into effect immediately, and accordingly thirty members are to be removed, pro rata in accordance with their party affiliation. (In other words, there is no "discrimination" among the parties, and the minority does not control the majority. The situation is, therefore, one in which the people elected one hundred and twenty members, whoever they may be, and along comes the Knesset and rejects the mandate it received from the people. Were such a law to be enacted, it would exceed the power of the Knesset, and it

would be as worthless as a broken potsherd. It would not be valid from a *legal perspective*.

The examples cited, and others like them, indicate the operation of "hidden" forces, embedded in the very existence of the Knesset, which restrict its purportedly unlimited power to enact legislation. It bears consideration that our concern is the Knesset's *legislating for itself*, and not its legislating for others, which is its central role. We are not referring here to restrictions deriving from "natural law" that pertains to the Knesset's authority to enact legislation for others (such as "every boy that is born to the Hebrews you shall throw into the Nile but you shall let every girl live" (Exodus 1:22 [120])), as this authority is not under discussion.

100. Our views here are not universally accepted. For example, in his aforementioned book, at pp. 110-111, Prof. Englard writes as follows:

> '… "Can the primary legislature limit itself?" In our view the answer is affirmative, and no logical contradiction is involved. Nothing prevents a legal norm from addressing not only a specific kind of conduct of others but also its own validity and the methods for changing it. Just as the legislature can establish the scope of application of a particular norm in terms of time and place, it can likewise provide that a norm can be changed only by force of a particular procedure or by a particular body. Similarly, it can dictate that a particular norm may not be repealed or changed at all, neither by itself, nor by any other body. Such a norm is valid…. '

Professor Englard sees no difference between the Knesset's authority to establish norms for the world outside the Knesset and its authority to establish norms for itself, and hence his conclusion that the primary legislature – being what it is – is authorized to limit itself. My view is different. In my understanding, the role of the primary legislature is to "organize" its surrounding world. Its authority to "organize" itself is only ancillary and secondary, and as such its goals are limited to those required for "organizing itself." Even if we were to contend that in its "organization" of the world, the primary legislature could never be limited, this would not be the case regarding its authority to "organize" itself, because it was not created for that purpose. The primary legislature's authority to organize itself extends exclusively to the specific area that enables it to establish norms for others, and nothing else. Needless to say, all of the above is subject to the provisions of a constitution that spreads its canopy over everything.

101. The basic rule is this: By the very nature of the matter, when it legislates for itself – and in respect of itself – the Knesset does not wield unlimited power and authority. Meta-principles – or, if you prefer, foundational principles – are etched into the Knesset's very existence. Certain character traits inhere in the genes of the Knesset, being what it is, and the Knesset is unable to free itself from those principles and features. Those characteristics are the Knesset. One of those principles is the majority principle. This principle teaches us that the Knesset's authority to limit its power to change laws extends to the requirement of 61 Knesset members, and no more. Hence the majority principle, both upwards and downwards, is a basic foundation in the rule of law and the existence of a democratic regime. Without it the people cast off restraint, and in its absence no kingdom can be established. Each of you to your tents, O Israel! [2 Chronicles 10:16 – ed.]. To uproot majority rule from the body of a regime is to remove the very soul of democracy. The majority principle governs the Knesset in the form of "the high official is watched by a higher" [Ecclesiastes 5:8 – ed.]. The rule of law also governs the legislature. A law enacted by the Knesset becomes part of Israeli law provided that it does not pierce the heart of democracy – the majority principle. All of this, naturally, subject to the provisions of a legally enacted constitution.

102. Incidentally, we spoke of the inherent restriction in the Knesset's authority that prevents it from enacting a law that cannot be changed other than by a majority of more than 61 Knesset members. We did not address the possibilities of other limitations, such as a law that requires a referendum in order to be changed, or other limitations that derive from the very nature of democracy and the basic values of Israeli society. These "limitations" raise independent problems. In the case of a referendum, for example, the Knesset turns to the people, the source of its own authority. But we will not treat these matters.

103. In conclusion, the Supreme Court has thus far invalidated a number of Knesset statutes that deviated from previously entrenched provisions, but each and every one of those cases concerned a statutory provision that could be changed only by force of a majority (61) of Knesset members, namely a "61 majority." I fully concur with all of those judgments, because they all conform with the restrictions of a democratic regime. The same applies to the restrictions now established in the new Basic Laws. My quarrel is only with statutory provisions that purport to condition any variation or violation of its provisions on the support of 62 or more Knesset members. Statutory provi-

sions of this nature, regardless of their content, undermine the foundations of Israeli democracy, and cannot be taken at face value.

Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation

104. So far we have addressed the fundamental principles pertaining to the Knesset's authority to frame a constitution and impose formal limitations upon its legislative activity. We will now take a closer look at the two Basic Laws concerning us here, and attempt to gain a deeper understanding.

105. First, we must distinguish between a "variation" of a Basic Law and a "violation" of a Basic Law, if only because Basic Law: Freedom of Occupation distinguishes between "variation" and "violation" (and Basic Law: Human Dignity and Liberty borrowed therefrom). A variation of a law means a change in the *fundamental* scope of the law. The law is subjected to "genetic engineering," and when the law's genetic code is changed, it is no longer the law that it was. On the other hand, a violation of a law or of a basic right does not fundamentally alter the law or the right. "Violating" the law is like bending a tree and within defined boundaries its power subsequent to the violation is not quite the same as its power prior to the violation. But this is as far as it goes. Nonetheless, it appears that when distinguishing between a variation and a violation, one must consider the degree of the "violation." As a violation becomes more extensive, it increasingly bears the character of a variation. A variation can masquerade as a violation, hence while referred to as a violation in essence it is a variation. As mentioned, the Basic Laws themselves dictate the distinction between "variation" and "violation," but the distinction does not appear in s. 4 of Basic Law: The Knesset (from which it follows that the "variation" referred to in that section also includes a violation). In any case, we will take the path already paved by the legislature.

106. Along with the distinction between "variation" and "violation," we must also distinguish between a statutory provision in which the Knesset purports to restrict its ability to legislate by the *formal entrenchment* of the law, i.e. by determining that the law can only be varied or violated if certain formal conditions are satisfied (such as a special majority, referendum, etc., and a statutory provision in which the Knesset attempts to restrict its legislative powers by establishing certain *substantive criteria*, but without formally entrenching those substantive provisions. Formal entrenchment must be treated separately from substantive limitation, and hence we will discuss each of them separately.

These two classifications, "variation" and "violation" on the one hand, and "formal entrenchment" and "substantive limitation" on the other hand, generate four different possibilities. We will discuss them in our comments below, distinguishing between the two Basic Laws. We will begin with Basic Law: Freedom of Occupation, and then proceed to Basic Law: Human Dignity and Liberty.

Basic Law: Freedom of Occupation

107. Basic Law: Freedom of Occupation refers both to procedures for "variation" of the law and procedures for a "violation" thereof. Its provisions include both substantive and formal limitation. We will begin with the issue of variation, after which we will discuss the subject of violation.

Variation of a Basic Law: Formal Entrenchment and Substantive Limitation

108. Basic Law: Freedom of Occupation establishes formal entrenchment of its provisions. According to s. 7:

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

The section bears the title "entrenchment," and prescribes two conditions for the variation of Basic Law: Freedom of Occupation. The first is that a variation can only be made in a Basic Law, and the second is that it must be adopted by a majority of the Knesset members. A statute enacted by the Knesset that does not fulfill either one of the conditions cannot vary the Basic Law. Neither a Basic Law adopted by less than 61 Knesset members, nor a law adopted by 61 members that is not titled "Basic Law" can vary the Basic Law. A separate question is whether the law would be recognized as valid for all other matters that do not vary the Basic Law, but this question does not presently concern us.

Did the Knesset succeed in limiting its authority to vary Basic Law: Freedom of Occupation? In my view it was successful, and the limitation is valid. Regarding the majority requirement, we have already elaborated, perhaps excessively, on the issue of the majority, and for fear of being tedious, we make no further comment. Regarding the explicit provision that it can only be varied by another Basic Law, this too is a procedural condition, similar to the requirement of a majority. The Knesset's authority to require a majority of 61 as a condition for varying a law belongs to the appropriate procedures governing the enactment of a law, which do not constitute an illegitimate restriction of the Knesset's power. The same rule is true for the

explicit requirement that a Basic Law can only be varied by force of a Basic Law. This precondition for the enactment of an amending Basic Law is no different from the requirement of three readings for the adoption of a law. Just as a "law" that only passed two readings is not a law at all, and cannot change an existing law, confer or deny rights, or impose obligations, so too a law purporting to vary a Basic Law, that is not itself a Basic Law (or did not receive a majority of 61 Knesset members). Unless s. 7 of Basic Law: Freedom of Occupation is changed, by the method prescribed for changing it, only a norm that satisfies both requirements of s. 7 can vary the Basic Law according to the procedure imposed by the Knesset upon itself. It is understood that a variation of s. 7 of the Basic Law, in the manner prescribed, i.e. by a majority of the Knesset members and in a Basic Law, would hence cause a variation in the method prescribed for changing the basic right of freedom of occupation.

109. Up to this point we have addressed the formal entrenchment of Basic Law: Freedom of Occupation against variation. How does substantive limitation affect variation? It would appear that s. 5 of the Basic Law establishes a substantive limitation. The provision states "All governmental authorities are bound to respect the freedom of occupation of all nationals and residents." Given that the Knesset is "one of the governmental authorities," it follows that the Knesset – like other governmental authorities – must respect freedom of occupation. This obligation constitutes a substantive limitation. However, the provision of s. 5 reflects the binding law for as long as the Basic Law has not been varied (subject to fulfillment of the two requirements for a variation). From this it follows that the statute relates only indirectly to the issue of a variation. The substantive limitation is in fact concealed in the folds of formal entrenchment. The cloak of formal entrenchment conceals substantive limitation, and substantive limitation is in fact derived from the formal entrenchment, in which it hides.

Violation of a Basic Law: Freedom of Occupation – Formal Entrenchment and Substantive Limitation

110. As far as the violation of the basic right of freedom of occupation, our concern here is with ss. 4 and 8 of the Basic Law, which provide as follows:

'Violation of freedom of	There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a

occupation	proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.'
'Effect of non-conforming law	A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.'

Section 4 of the Basic Law established various substantive conditions for the possible violation of freedom of occupation (substantive limitation). Section 8 adds to it by establishing *procedures* for the enactment of a law that violates the freedom of occupation and which does not comply with the provisions of s. 4, and establishes that the duration of such a law may not exceed four years. Two conditions must be fulfilled for the Knesset to acquire the authority to "violate" Basic Law: Freedom of Occupation, in the event that it fails to comply with the conditions of section 4. The first is the enactment of a "regular law" by a majority of the Knesset members. The second is that it "expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law: Freedom of Occupation." Should one of these conditions not be satisfied, the law cannot violate freedom of occupation. These conditions are prescribed for the enactment of a law that purports to violate the freedom of occupation (a law that does not satisfy the conditions prescribed in s. 4 of the Basic Law), and until such time that the Knesset amends that procedure, this is the only way of enacting a law which is capable of impairing the freedom of occupation (if it does not satisfy the conditions enumerated in s. 4 of Basic Law: Freedom of Occupation). Regarding the argument that the later law should nonetheless be valid and be capable of violating freedom of occupation, even if it fails to satisfy one of the two conditions (for example, a law enacted by a majority of the Knesset, but which does not explicitly provide that it will be valid despite the provisions of Basic Law: Freedom of Occupation in accordance with the rule of *lex posterior derogat legi priori*. Our response would be that the later law is not even a "*lex*" in the first place, because it was not adopted in

compliance with the procedures specified in advance by the Knesset for its adoption (like a law "adopted" after only two readings).

111. Concerning the subject of a violation of freedom of occupation, the format of Basic Law: Freedom of Occupation is the same as the format for the subject of variation. Regarding violation, s. 4 of the Basic Law explicitly establishes a substantive limitation, by prohibiting any violation of freedom of occupation unless particular conditions are satisfied. But here, too, we find that the substantive limitation is in fact concealed within the folds of the formal entrenchment of s. 8 of the Basic Law. A law that violates the freedom of occupation and which satisfies the conditions of s. 4 will be valid, as per s. 4. A law that violates the freedom of occupation and does not satisfy the conditions of s. 4 will only be valid if it satisfies the entrenchment provisions enumerated in s. 8 of the Basic Law. The legislature took pains to establish explicit provisions in the body of the law for different situations.. The issue of entrenchment will, in any case, revolve around the procedural question and the formal entrenchment provision. Any issues of substantive entrenchment that may be raised by Basic Law: Freedom of Occupation will be addressed in our discussion of Basic Law: Human Dignity and Liberty.

Basic Law: Freedom of Occupation – Concerning the Conditions for Entrenchment

112. The issue under discussion concerns the conditions set forth in ss. 7 and 8 of Basic Law: Freedom of Occupation regarding a variation or violation of the law. Notably, these conditions are exclusively *procedural*, and contain no substantive content at all: a special majority, the name of the law (regarding a variation), an explicit "notwithstanding" provision (regarding a violation). We have discussed the issue of majority at length, and need not add. The other two conditions may be viewed as procedural "incantations" for legislation, like the magic words that open a secret cave. The words have no intrinsic substance, but by legislative fiat they pave the way to legislation. Even if the magic formulae have no intrinsic substance, the very need to insert "Basic Law" (at the beginning of the variation) and the "notwithstanding" formula (in the middle of the violating law) is meant to trigger the legislature's awareness of the importance of its actions, and the responsibility that it assumes when varying or violating the freedom of occupation. Let no Knesset member come along a day or two later, shouting: I didn't know, I didn't understand, it never occurred to me to vary or to violate the freedom of occupation. The adoption of a Basic Law (that violates freedom of occupation) is no routine matter, and the specific use of "Basic

law" or "notwithstanding" makes it apparent to any one who bothers to look. *This kind* of law can only be adopted by virtue of the prescribed procedures. In other words, this kind of "law," which has the power to vary or to violate the freedom of occupation, can only be produced by way of fixed procedures, and the meeting of various, specific conditions.

Basic Law: Human Dignity and Liberty – Violation of Human Rights and Variation of Human Rights

113. We thus far have addressed Basic Law: Freedom of Occupation in accordance with its various formulations. By contrast, Basic Law: Human Dignity and Liberty presents us with a different method of limiting the Knesset in its legislation. Here, the Knesset is substantively limited without the accompanying formal entrenchment. In our comments below, we will address the two subjects of variation and violation of the Basic Law together.

114. After establishing its basic principles and purpose, Basic Law: Human Dignity and Liberty enumerates various human rights (for some reason, some of the basic rights are not defined as substantive rights). After listing them, s. 8 of the Basic Law imposes the prohibition upon violating the enumerated rights, as follows:

> 'Violation of Rights
>
> 8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law'

Section 11 of the Basic Law adds:

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

We would all agree that the Knesset is one of the "governmental authorities" referred to in s. 11. In fact, it would seem that the section was drafted primarily in honor of the Knesset. Nonetheless, it goes without saying that the other "governmental authorities," such as the courts, the government, and any other state agency also fall within the ambit of "governmental authorities." Even in the absence of s. 11, they would be bound to uphold Basic Law: Human Dignity and Liberty, simply by force of being bound by the rule of law, which is an intrinsic part of what we are. The provisions of s.

11 are thus intended to inform us in a formal and binding manner, that Basic Law: Human Dignity and Freedom explicitly applies to the legislative authority, as well, giving expression to the legislature's subordination to the rule of law. Actually, once s. 8 of the Basic Law provided that basic rights under the law could only be violated by a *law* that complies with prescribed conditions, the provisions of s. 11 became necessary to *supplement* the substantive determination of s. 8.

115. The Knesset is thus bound to respect the basic rights enumerated in Basic Law: Human Dignity and Liberty including, and we should add – perhaps primarily – in its legislative activities. Taking this path, we are confronted by the question of the nature and the scope of the Knesset's act of self-limitation – its undertaking not to violate basic rights except if in compliance with the conditions enumerated in s. 8, referred to as "the limitation clause." When the limitation clause is fortified by a formal entrenchment provision, as in the case of Basic Law: Freedom of Occupation, we know the answer. The entrenchment provision is determinative: it paves our way, and we will decide accordingly. However, in the absence of the aegis of entrenchment, as is the case with Basic Law: Human Dignity and Liberty, what is it that protects the "limitation clause" from variation or violation?

Let us assume that after the passage of Basic Law: Human Dignity and Liberty, the Knesset adopted a regular law, by regular majority, that – in practice – violates basic rights specifically established by the Basic Law, but does not satisfy the conditions established by s. 8 for recognition as a "legal" law. For example, it violates a right under the Basic Law to an extent greater than is required. Should we acknowledge the legal validity of such a law? Should we view it as being a "legal" law for all intents and purposes – as a law passed with requisite authority, and that successfully derogates from a basic right? Or perhaps we might say that such a law is not "legal," and that *ab initio* it is not binding, insofar as it fails to comply with the Knesset's provisions in s. 8 of Basic Law: Human Dignity and Liberty? In other words, when the Knesset subjects itself to a substantive limitation with respect to future legislation, what significance attaches to the limitation in the absence of a wall of protective entrenchment surrounding it (as is the case with Basic Law: Freedom of Occupation)? How should we construe the provision of the Basic Law, and what is the legal function of the Knesset's purported self-limitation?

The following four possible solutions present themselves: the provisions

of s. 8 are absolute, and no deviation is possible; s. 8 is no more than a guideline for legislation, and hence a deviation from its provisions has no effect on legislation; the provisions of s. 8 can be deviated from in a later law, whether implicitly or explicitly; and, deviation from s. 8 is possible only by way of an explicit law (and perhaps only in the form of a Basic Law). We will now proceed to examine each of these solutions individually, one-by-one, both in terms of the legislative purpose (the level of intention), and in terms of the Knesset's ability to achieve that purpose (the level of authority) (and see and compare: Karp, *supra*; Barak, *Interpretation in Law*, vol. 3 at p. 266ff.).

116. *One* way of interpreting s. 8 is that the legislative pronouncement is resolute and absolute, admitting of no deviation. Having become a law, no governmental authority is permitted to violate any of the human rights stipulated in the Basic Law, unless it satisfies a number of conditions, all of them stipulated in s. 8: It can do so by law, or by force of an express authorization therein; such a law must be consistent with the values of the State of Israel; it must be for an appropriate purpose; its violation of human rights must be to an extent no greater than is necessary. This provision of s. 8 is immutable. Though apparently attempting to create an immovable rock, this interpretation – *prima facie* – is soundly based, and in substantive terms it is consistent with the nature of a democratic-liberal regime, one that is appropriate for us and that we deserve. For example, every person in Israel has a basic right not to have his life or dignity violated, as per s. 2 of the Basic Law. The law further provides, according to this understanding, that having come into force, the law forbids the violation of a person's life or dignity unless by force of a law intended for a proper purpose, etc. This prohibition is a rock, and our prohibitions are prohibitions, as written and as intended, as is right and proper.

If that is the law in terms of its content and purpose – as per the presumed legislative "intent" – then we look in vain for a source for the Knesset's authority to limit its future legislative capacity. We have shown that the Knesset cannot shackle itself in its legislative capacity other than by the requirement of a majority of 61 Knesset members, and as we have seen, this particular procedure is in fact required for all legislation (as opposed to a limitation of authority, which in our opinion is forbidden). If the Knesset lacks the authority to limit itself in its legislative activities by positing a requirement for a majority of 62 or more votes, then *a fortiori* it is incapable of permanently limiting its legislative abilities according to this (possible)

interpretation of the law. The nation did not authorize the Knesset to divest itself of its authority and release itself from the yoke of legislating, and this necessarily dictates the rejection of this interpretation of s. 8 of the law. The Knesset cannot create a rock that it cannot lift.

117. A *second* interpretation, which substantively is the polar opposite of the first, is that the provisions of s. 8 (along with s. 11) of the Basic Law were intended exclusively for purposes of guidance, having no binding authority. Their purpose was to *guide* the legislature in the act of legislation, meaning that s. 8 is an instructive directive, as opposed to an imperative, mandatory directive (on the distinction between these two kinds of provisions, see CA 87/50 *Liebman v. Lipshitz*, [68]. According to this interpretation, the provisions of s. 8 are no more than good advice that the legislature has whispered in its own ear. It says: if you choose to take this path – well and good, but if you fail to take it, your acts are valid, and the law that you enact will be a law. This interpretation, while possible, in terms of the legislative intention, is nonetheless unreasonable. There are cases in which the legislative instruction is interpreted as being a guideline, but it is unheard of for the legislature to lay down statutory guidelines for its own legislation. We are unaware of any such proposition, and we do not consider it to be reasonable. That is true in general, and *a fortiori* it would appear to be the case with respect to the provision in s. 8, which clearly and unequivocally states that there can be no violation of the Basic Law other than by force of law (or by specific authorization therein). The wording of s. 8 is not that of a guideline, but rather that of an obligation, and I see no good reason for not interpreting the law in terms of its plain meaning.

118. Having rejected the two extreme interpretations of Basic Law: Human Dignity and Liberty, we are left with the two intermediary interpretations. One interpretation is based upon the concept of implied repeal, while the other is based on that of express repeal. We will now address these two interpretative options, beginning with the subject of implicit repeal.

119. The basic rule is that a new law overrides the law that preceded it. And you shall take out the old from before the new (Leviticus, 26:10) [1]. Where a later law contradicts or is inconsistent with an earlier law, the later law has the upper hand, and the earlier law is repealed to the extent of the contradiction or inconsistency. (*lex posterior derogat priori: (pro tanto)*). The substantive rationale of this rule derives from the fundamental principle that an authorized agency – in our case, the people's representatives in the

House of Representatives – periodically establishes behavioral norms that are appropriate for the general population and the individual. If the legislature established a particular behavioral norm, obviously it intended that norm to be binding, and no other. If today's norm contradicts yesterday's norm, then quite obviously, today's norm should override yesterday's norm to the extent of the with scope of the new norm. In a democratic regime such as ours, this rule supplements the rule deriving from the very nature of the regime – that the opinion of the majority is decisive.

Indeed, when today's norm explicitly repeals yesterday's norm, no question arises (provided that the two norms are on the same normative plane, i.e. a law versus a law, a regulation versus a regulation, etc.). The question is what happens when the later norm does not expressly repeal the earlier norm. In this context we have two comments: Firstly, we would do our best to reconcile the two norms, making every effort, even if somewhat contrived, to harmonize them, and enable them to coexist under the same roof. We would push our limits to make peace between the apparent rivals. We would tell ourselves that had today's legislature desired to repeal yesterday's norm, it could have informed us of that intention with a stroke of the pen. Not having done so, it is presumed to have intended that both norms apply concurrently. If this, *prima facie*, was its intention, we will do our best to give effect to that intention by way of interpretation, even if in a contrived manner. However, when all possibilities have been exhausted, and even convoluted, tortuous solutions are of no avail, then we may say to ourselves, apparently the legislature overlooked the contradiction between the norms, and because we regard ourselves as bound by its current command, which is today's norm, we may conclude by implication that its intention was to repeal yesterday's norm (to the extent of the contradiction). Our comments here were worded in a subjective form, and we can also give them an objective formulation in terms of the relationship between one law and another and the manner in which they are integrated into an overall legislative context. So we have express repeal, implicit repeal and the relationship between them. (see further and compare: Barak, *Interpretation in Law*, vol. 1 at p. 566ff. and citations there).

120. We will repeat these comments in another form, and then proceed on our journey. The rule that a later law overrides an earlier law applies, first and foremost, to an explicit provision of repeal included in the later law. The legislature expressed its view and we will abide by it, for it is the legislature that is given the power to legislate. The same logic that applies to a specific

repeal provision in the later law, would, *prima facie*, also apply in the absence of a formal repeal provision. In the later law the legislature established a particular regime, and where that regime is incompatible with the previous regime we can infer the legislature's implicit intention (the legislative arrangement) for the later regime to replace the former. However, the express repeal of a previous law is binding by force of its content, deriving expressly from the nature of sovereignty; and in a democratic regime it derives expressly from the nature of the democracy. On the other hand, with respect to implied repeal we must rely on the *presumed* legislative intent (or if you prefer – the intention that we impute to the legislature), because it did not explicitly express that intent. It follows that while our duty to respect the express repeal provision derives (in this country) from the democratic social contract, the interpretation leading to implicit repeal requires an interpretative construction that attempts to reflect the legislative intention (i.e. the purpose of the law). From this we learn that implicit repeal differs from express repeal. As such, in my view, explicit and implicit repeal must each be treated differently.

121. Therefore, if a law were to establish – for example – that an explicit provision of repeal in a later law (where both laws are on the same normative level), will not be valid and will be incapable of repealing the previous law, that provision of the earlier law would be invalid *ab initio*, inasmuch as it contradicts the rule concerning the effect of a later law, or if you wish, the very essence of the democratic regime. This is the only possible conclusion. But we cannot say this with the same degree of certainty in regard to an implicit repeal, as for example, where the law states that only an explicit provision in a later law can invalidate (or narrow the scope) of the earlier law. In other words, a provision in a particular law stating that a later law would not be regarded as repealing all or part of that law, unless there was a specific provision to that effect in the later law. It is entirely unclear that such a provision in the earlier law would be void *ab initio* or would not be of legal effect. On the contrary, inasmuch as when we are concerned with the issue of implicit repeal we rely on the presumed legislative intention (or the intention imputed to the legislature), or if you prefer – the structure of the law and of the legal system in its entirety – the two provisions stand opposite one another, taunting one another. On one side there is a provision that entrenches itself against change, and on the other a regime which purports (implicitly) to repeal by implication. In this case it cannot be said, in general terms, that a later law repeals an earlier law. The reason is that the legislature "was aware" of the earlier law, and when planting the new law in the

legislative garden, in which the earlier, entrenched law was already planted, the intention in the later law was, as in the earlier law, that the earlier law should prevail. This is proved by the fact that the legislature did not explicitly revoke the previous regime, despite having established the procedure for repeal of the earlier law. At all events, the legislator's "intention" for today's regime to replace yesterday's arrangement, despite the entrenchment of yesterday's arrangement, cannot be inferred as self-evident, as with other implicit repeals. The entrenchment provision has the effect of shaking the foundations of the principle of implied repeal.

It might be compared to a person who promises not to do a particular act. Time passes, and the man forgets his promise, and despite his promise, he goes ahead and does that act. Upon being reminded of his promise, he slaps his forehead and says: Blessed is He who keeps his promise. I made a mistake. I certainly intend to keep the promises I make. Please disregard what I did. I hereby retract that action, and restore the situation to what it was initially. This is the case regarding a person's personal promise, and the same applies to the legislature – this is the parable and this is its lesson. Hence, the rule regarding implicit repeal, as opposed to the rule of express repeal, may be agreed upon and may be changed. The only question is how we regard the subject of the implied repeal.

Incidentally, a hint that implied repeal is not a self-evident principle can be found, also by way of implication, in the explicit statutory provisions of s. 2(a) of the Law and Administration Ordinance (Further Provisions), 5708-1948:

> 'Construction of Laws
>
> 2. For the removal of doubts it is hereby declared:
>
> (a) Where any law enacted by or on behalf of the Provisional Council of State is repugnant to any law which was in force in Palestine on the 5th Iyar, 5708 (14th May, 1948), the earlier law shall be deemed to be repealed or amended even if the new law contains no express repeal or amendment of the earlier law.'

This statutory provision is intended to clarify and reinforce the provision of s. 11 of the Law and Administration Ordinance, regarding the relationship

between laws enacted after the establishment of the State and pre-State legislation. (Pre-state legislation "retains its validity to the extent that it does not contradict the provisions of this Ordinance and other laws that may be enacted…"). We can all agree that the provisions of this law establish the obvious. This indeed is the way we see it today, but apparently they thought otherwise at the time. The very fact that our original legislators deemed it proper to enact this kind of legislation, in that formulation, is tantamount to the testimony of 100 witnesses that implied repeal is not the same as express repeal. Now that we know this, we also know that there is no a priori necessity for the rules applying to express repeal to apply to implied repeal.

122. This brings us to the matter at hand. Let us assume that following the enactment of Basic Law: Human Dignity and Liberty, the Knesset adopted a regular law that, by implication, varied or violated a right or rights included in the Basic Law, without meeting the conditions specified in s. 8 of the Basic Law (a law which is consistent with the values of the State of Israel, etc.). Would the "later-law" rule apply? In other words, would we regard the new law as being valid and the Basic Law as having been repealed to the extent of the contradiction or inconsistency? Or would we say that the Basic law was intended for a special purpose, and a later law would be powerless to implicitly vitiate the Basic Law? *Prima facie*, the "later-law" rule – which applies to implied repeal – would also apply here. But this is only *prima facie*, as we shall now explain.

123. As noted, s. 11 of the Basic Law provides that all governmental authorities, including the Knesset, are bound to respect the provisions of Basic Law: Human Dignity and Liberty. The duty of respecting the law also applies to s. 8 of the Basic Law, the provision that prohibits the violation or variation of any right recognized by the Basic Law, except by way of a law that satisfies certain conditions. Furthermore, the *first and foremost* addressee of s. 11 is the Knesset itself, as though it stated "the Knesset is bound to respect the rights under this Basic Law." Now, if we assume that a later law can *impliedly* repeal this duty of the Knesset, then what is the particular import of s. 11 of the Basic Law (conjoined with s. 8 of the law)? The other governmental authorities are in any case obligated to respect all of the rights prescribed by the Basic Law by virtue of the principle of the rule of law. If the Knesset can repeal that self-imposed obligation even by implication, then what is the point of the pre-established *obligation* [of s. 11]? Why did the law *specifically* obligate the Knesset to respect the provisions of the Basic Law if the Knesset is simultaneously entitled (according to the proposed

interpretation) to repeal that obligation even by implication? After all, the Knesset could have taken the same path even if the law hadn't imposed an explicit obligation upon it?

In other words, an interpretation permitting an implied repeal of the specific obligation that the Knesset imposed on itself, effectively renders the express obligation superfluous. It is as though the legislature spoke in vain. Its words are like the whistling wind. Can we say that s. 11 of the Basic Law is nothing more than good advice? We have already rejected this interpretation, and we now reject it again. The same reasoning also applies to the interpretation of s. 8 of the Basic Law, which similarly imposes a burden on the Knesset.

An attempt to infuse s. 11 (and by the same token, s. 8 of the Basic Law) with wisdom and logic leads inevitably to the conclusion that a law enacted after the Basic Law cannot repeal the provisions of the Basic Law by implication. Evidently, this was the original intention of the arrangement and I find nothing that precludes conferring legal status to that intention, neither in terms of the basic principles of democracy nor from any other perspective. Indeed, the "principle of the later law" regarding an implied repeal cannot be reasonably said to apply to the instant case. While application of the principle may be "possible," it is neither reasonable nor logical. Where the law explicitly and specifically imposes an extraordinary obligation upon the Knesset, it is neither reasonable nor appropriate, in terms of the rule of law or by any other parameter, to be able to brush it aside incidentally. The principles of statutory interpretation dictate that such an explicit obligation can only be limited or revoked by express repeal.

This is the possible alternative explanation for the provisions of Basic Law: Human Dignity and Liberty. The Knesset, in accordance with its own statement, may violate or vary any of the provisions of a Basic Law only if it does so expressly, and in no other way. The later law can utilize the formula of "notwithstanding" or any other equivalent formula. In other words, the wording must indicate that the Knesset is unequivocally and unreservedly aware that it is about to vary or violate basic rights, even if that (later) law does not satisfy the conditions imposed by the Knesset itself in s. 8. Inasmuch as Basic Law: Human Dignity and Liberty obligates the Knesset to respect the basic rights enumerated therein in accordance with the scope specified therein, including in accordance with s. 8, we would expect that a later law will specifically state that although the Knesset was originally obligated to respect certain basic rights, in accordance with a particular

scope, and although the Knesset is only allowed to violate those rights if certain conditions are satisfied, namely the ones stipulated in s. 8, nevertheless it wishes to violate (or vary) those basic rights, even though the fundamental conditions originally established were not met. Indeed, a government representative should mount the Knesset podium and declare: I was obligated to respect it, but in my opinion it is not appropriate for me to respect it. That is knowledge and awareness, the assumption of responsibility. That is express repeal. I believe, and we all believe, that under such an interpretation of the Basic Law, ill-considered violations of basic rights will decrease, and perhaps will not occur at all.

As noted, s. 8 of Basic Law: Freedom of Occupation explicitly proscribes any violation of the freedom of occupation unless the violation is included in a law that states that it shall be of effect "notwithstanding the provisions of this Basic Law." Basic Law: Human Dignity and Liberty does not, concededly, include a parallel provision, but the existence of such a requirement may be inferred from the law itself, even without a specific provision to that effect (see further and compare, Elon, in his aforementioned article, at p. 662; Barak, *Interpretation in Law*, vol. 1, pp. 562-563).

125. Our opinion is therefore that Basic Law: Human Dignity and Liberty can only be violated or varied by force of an explicit provision to that effect in a later law; an implicit variation or implicit violation in the later law will not suffice. In the event of classic rules of interpretation being inadequate for reconciling a provision in the Basic Law with a later provision i.e. we find that the two provisions are indeed contradictory, and assuming that the later provision does not expressly repeal the provision of the Basic Law, we may conclude that despite it being the earlier provision, the Basic Law's provision nonetheless shall prevail.

We think that this is the necessary interpretation of the law, and that it is self evident from the law itself. Although it is subject to certain objections, in our view it draws support from all directions. We will now discuss certain issues in this context.

126. For our purposes an analogy can be drawn from the rule that a later, general law does not derogate from an earlier, specific law: *lex posterior generalis non derogat legi priori speciali*. We know that a later law overrides an earlier law, but the aforementioned rule teaches us that a later law of broad scope, even if contradicting a law of narrow scope, will not be construed as implicitly repealing the earlier law. In our effort to reconcile the provisions of the two laws and to understand the rationale of the laws and the presumed

legislative intent, we would say that in all likelihood the later law did not intend to repeal the earlier (specific) law. Had it intended to do so, we would expect the legislature to do so explicitly. Since the legislature did not do so, we would say that the specific law, which was earlier in time, would remain in force with respect to its (limited) area, whereas the later, broader law would apply to all areas that do not fall within the (limited) scope of the earlier law. We presume that the legislature did not intend to violate the earlier law, for had this been its (presumed) intention it would have expressly repealed it. This is the rule regarding a contradiction between a later, general law and an earlier, specific law (on the rules of interpretation in cases of a contradiction between a later law and a general law, see: Barak, *Interpretation in Law*, vol.1, at p. 551ff, and p. 569 ff).

We will employ the same criterion in regard to the relationship between an earlier law that substantively entrenches itself against implied repeal and a subsequent law that allegedly repeals the prior law. Let us assume that a certain law includes a provision stating that its provisions remain in force unless a later law *expressly* repeals them, partially or completely. Along comes a law that, upon examination, contradicts the provisions of the earlier law, but does not expressly repeal them. In such a case, we would say that the legislature (in the later law) did not "intend" to violate the earlier law, because had it intended to so, it would have repealed it expressly. By analogy, the earlier law is like the specific law, and the rule that applies to a specific law would also apply to a law entrenched against implied repeal. In a sense, the entrenched law is more powerful than the specific law, because when we are concerned with a specific law we need only ascertain the intention of the later law in order to reach our conclusion. However, in the case of an earlier law that entrenches itself, we learn the legislative intent both from what is explicitly stated in the earlier law, and from what is implied in the later law. The "legislative intent" extends directly from the earlier law to the later law without encountering anything in the way. We concede that the analogy is not perfect. With respect to the specific law, the later law retains its scope in areas *not covered* by the earlier law, whereas for our purposes, the later law would be considered a nullity in its entirety. The inescapable conclusion is, therefore, that for our purposes we would seek to limit the scope of the implied repeal, and the analogy is imperfect.

127. In distinguishing between express repeal and implied repeal, we do not reject any fundamental principle of the democratic system or any basic principle of the legal system. Nor do we in any way contradict basic

principles of our jurisprudence. For example, if a particular provision of a law explicitly provides that where it contradicts any other provision of the same law, it will supersede that provision, we would, no doubt, honor in full that legislative provision. The same rule would apply to the concurrent adoption and publication of two laws, one of which includes the statutory provision mentioned above. Our case, however, appears to be different in that our assumption was that the Basic Law was adopted first, whereas the later law that purports to repeal parts of the Basic Law by implication was adopted later. However, this is only how it appears.

Basic Law: Human Dignity and Liberty is a unique law. Whereas the Knesset adopts "regular laws" to "organize" its surroundings, to establish behavioral norms for people and bodies external to the Knesset, in Basic Law: Human Dignity and Liberty, the Knesset purports (inter alia) to "organize" itself. Being what it is, the Basic Law is a law that guides the Knesset and its legislation constantly, every day, and every hour. By its very nature, the Basic Law is implicit in every law, or if you like, it is appended to every law, (or is a preamble to every law). More precisely, we could say that each and every individual law is regarded as being planted in the soil of the Basic Law; its roots reach down to the Basic Law, which is the source of its nourishment and sustenance. By analogy, it resembles human rights, which are regarded as being an integral part of every law.

Basic Laws are comparable to rules of interpretation that accompany each and every law: they are everywhere, all the time. Basic Law: Human Dignity and Liberty functions as a "legal escort" that provides the infrastructure and foundation for each and every law. It is as if it is legislated every day anew with each new law, as He "who in his goodness renews the creation every day continually." A person wakes up every morning (thanking God for returning his soul), and so it is with the Basic Law, which, in effect, is legislated anew each day. This is indicated by the fact that the title of a Basic Law does not include the year of its adoption. All other laws cite the year of their enactment, according to Gregorian and Hebrew calendar. A Basic Law does not cite the year of its adoption. It stands, as it were, above time. It tells us that it is timeless, having neither date nor hour. It is always with us, and its validity is timeless. These being the features of the Basic Law, it is easy to understand how they can be viewed as being enacted anew, in conjunction with the enactment of every specific law, including that rebellious law that purports to repeal it by implication.

An analogy, and perhaps even more than an analogy, may be drawn from the rule whereby changing times may lead to changes in the law's scope in accordance with current conditions of place and time (this applies *a fortiori* with respect to "framework concepts"). In the words of President Smoira in HCJ 65/51 *Jabotinsky v. President of the State of Israel* [69], at p. 811:

> 'This is the power of statutory law that speaks normatively rather than casuistically, and by doing so creates vessels that are able to hold content that did not exist when the law was given.'

Similar comments were made by Justice S.Z. Cheshin in HCJ 180/52 *Dor Heirs v. Minister of Finance* [70], at p. 911:

> '… This is the power of the law, that it is not designed for its time alone, or for the limited, immediate purpose that concerns the legislature at the time of its enactment. And as long as the executive branch can achieve its intended purpose within the framework of the existing law – albeit an old law originally intended for other purposes – it cannot be criticized for applying the law to the conditions of a new reality.'

(See further, Barak, *Interpretation in Law*, vol.2 at pp. 220-221, 267-270; vol. 3 at p. 528-530).

This is the basis for the obvious analogy to that special statutory provision that attests to its precedence over all of the other provisions in that law, as well as the analogy to the case of two laws enacted and published on the same day, one of which includes a provision that elevates it above all the other provisions. Just as "there is no earlier or later in the Torah" – as indicated by the essence of the Basic Law – the implied rule of repeal inevitably withers. In the absence of any other indication, and I have not found any, I see no good reason why we should not honor a specific limitation clause which requires express repeal, like the explicit limitation clause in Basic Law: Freedom of Occupation, and the entrenchment provision in Basic Law: Human Dignity and Liberty.

128. Having arrived at this point, we should further note that the limitation clause in Basic Law: Human Dignity and Liberty, like the entrenchment of Basic Law: Freedom of Occupation, is derived from procedure. The limitation applies to the procedure, and the law can be varied or violated irrespective of its contents. Our concern here – as in Basic Law: Freedom of Occupation – is with the rules for "organizing" the Knesset prior to organizing the world outside the Knesset. In order to vary or violate Basic

Law: Human Dignity and Liberty, a special procedure must be followed – a "magic formula" like "notwithstanding" must be invoked – that informs us that the Knesset (in the later law) *explicitly and deliberately* sought to vary or violate the provisions of the Basic Law.

In Basic Law: Freedom of Occupation a rigid formula is established for any violation of the freedom of occupation, like a series of tones that must be uttered for the stone to roll away from the entrance to the secret cave ("which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law"). As opposed to this, Basic Law: Human Dignity and Liberty employs the concept of express repeal without recourse to a specific formula. Nonetheless, the ideational framework is the same and rests upon the same foundations. The analogy from Basic Law: Freedom of Occupation to our subject here carries with it all the same rationales cited to legitimize the Knesset's actions in limiting itself in legislation. Indeed, just as only three readings can make a "law," the same will apply to an express repeal. It is as though the Knesset declares in advance that a particular law – for our purposes, the two Basic Laws, each in its own particular way, can neither be varied nor violated by a later law, unless done so explicitly. Establishing a requirement to state matters *explicitly* is a procedural requirement, just as is the requirement of three readings. It would seem that this was also the view of Karp in her aforementioned article, at pp 324, 379-80.

129. An interesting comparison can be made to the rule established by Jewish law for a similar, if not identical subject. The principle in Jewish law is that "the law is in accordance with the views of the later authorities" (*hilkhata ke-batrai*). Needless to say, this is the rule of *lex posterior*. Jewish law preferred the words of the later authorities to those of the earlier authorities, even if the stature and authority of the earlier authorities exceeded the stature and authority of the later authorities. The reason for this rule should be self- evident. This is how Jewish law adapted to the changing conditions of life. However, the rule was subject to an exception, which is that: (in the words of M. Elon, *Jewish Law, History, Sources, Principles,* 3rd ed. (Magnes, 1988), p. 238a:

> 'The principle "the law is in accordance with the views of the later authorities" does not apply if the later authority reached his decision *per incuriam* (inadvertently) i.e. without being aware of the views of his predecessors. For this reason it became authoritatively established that the principle applies only if the later authority refers to and discusses the earlier opinion and

> shows by proof acceptable to his contemporaries that, although contrary to the position of the earlier authority, his own view is sound.'

And further on:

> 'Thus was established and accepted the fundamental principle of decision-making in Jewish law – "the law is in accordance with the views of the later authorities." It should not be thought that this principle in any way diminished the respect that later generations accorded to the earlier generations. It was precisely this respect that induced the later authority responsible for declaring the law to consider r his own decision gravely, fearfully and humbly, because he was aware that he was dealing with a question already considered by earlier authorities. Nevertheless, when he finally reached his conclusion, his view, and not the view of the earlier authority, became the law.'

Basic Law: Human Dignity and Liberty resembles the "earlier authorities" (*rishonim),* while the later law is like the "later authorities" (*aharonim*). The rulings of the earlier authorities will not recede before those of the later authorities unless the later ones examined the words of the earlier ones, and expressly stated their reasons. The provisions of a Basic Law will not retreat before a later law unless it is clearly and expressly repealed. The same rules apply everywhere.

Variation or Violation – Only in a Basic Law?

130. We have said that a law enacted after Basic Law: Human Dignity and Liberty is powerless to vary or violate rights under the Basic Law unless it specifically states, in one form or another, that its provisions are binding notwithstanding the provisions of the Basic Law, and that its express intention is to vary or violate those rights. This condition is established explicitly in s. 8 of Basic Law: Freedom of Occupation. In regard to Basic Law: Human Dignity and Liberty, on the other hand, we have deduced the need for such an explicit statement from within the law and its content. If a law subsequent to Basic Law: Human Dignity and Liberty explicitly states that its provisions are intended to vary or violate the provisions of rights established under the Basic Law, must that later law be a *Basic Law*, or could we say that any law has the power to deviate from the provisions of a Basic Law?

131. The text of the Basic Law contains no provision regarding the method of its varying or violation – whether by a regular law or a Basic Law. The twin of Basic Law: Human Dignity and Liberty, Basic Law: Freedom of Occupation, stipulates in s. 7 that any variation thereof must be made by way of a Basic Law. The question is whether one rule can be inferred from its opposite, i.e. would a regular law suffice in regard to Basic Law: Human Dignity and Liberty? Would such a conclusion gain support from the settled rule that any law can infringe another law (even if it is a Basic Law)? (see *Kaniel* [13], at p. 796; *Ressler* [14], at p. 560; *Negev* [12] at p. 642; Prof. Rubinstein, *supra*, 4th ed., at pp. 456-458; Prof. Englard, *supra*, at p. 111).

My colleagues President Shamgar and President Barak maintain – each in his own way and for his own reasons – that a Basic Law can neither be varied nor changed other than by way of another Basic Law, or by force of a Basic Law, and that this rule applies to Basic Law: Human Dignity and Liberty despite its silence on this point. On the other hand, it may be argued that there is no inherent necessity for the variation or violation of a Basic Law to be effected specifically by force of a Basic Law – unless the legislature ordered otherwise, as indeed is the case in s. 7 of Basic Law: Freedom of Occupation. The legislature did not instruct us that any variation or violation of Basic Law: Human Dignity and Liberty must be effected specifically in the form of a Basic Law, and one may therefore assert that we are not bound in that regard. Either way, the most important thing is the Knesset's *awareness* of the change or violation that it is about to initiate in the rights established in Basic Law: Human Dignity and Liberty, and hence the need for an *explicit* "notwithstanding" statement, in one form or another. Where it is clear that the Knesset was explicitly aware of its act, there is no systemic need that the variation or the violation be made by Basic Law.

Incidentally, the requirement dictated by my colleagues' decision that any violation of Basic Law: Human Dignity and Liberty be effected exclusively by means of a Basic Law, meaning that a regular law violating the provisions of a Basic Law is invalid even if it states "notwithstanding," and even if adopted by an extra-special majority, leads to a rather anomalous conclusion: When attempting to formally entrench Basic Law: Freedom of Occupation against violation, the legislature took the trouble of including an explicit provision by which the provisions of the Basic Law could be violated only if certain conditions were fulfilled, as per s. 8 of the Basic Law. Basic Law: Human Dignity and Liberty, does not contain this kind of provision. A person comparing both Basic Laws might thus conclude that the

entrenchment of Basic Law: Human Dignity and Liberty *is less* than that of Basic Law: Freedom of Occupation. We are now being told that a Basic Law cannot be violated other than in a Basic Law (and subject to specific provisions in the Basic Law itself). The surprising result therefore is that Basic Law: Human Dignity and Liberty is actually more powerful than Basic Law: Freedom of Occupation. In regard to the latter, which the legislature sought to entrench against violation, the legislature provided that a regular law can also violate it, provided that it satisfies the conditions of s. 8. On the other hand, Basic Law: Human Dignity and Liberty, though not meriting any entrenchment to protect it from violation, can nonetheless only be violated by force of a Basic Law. This conclusion is propounded despite the lack of any basis in the language of the law, being exclusively a product of legal interpretation. The doctrine derived from the law thus prevails over explicit statutory provisions – a strange result.

132. In my view, there is no doctrinal necessity that a variation or violation of a Basic Law be effected specifically by another Basic Law. Quite the opposite: Let us take the case of the Knesset adopting a law in accordance with the rules of procedure, and taking the trouble to specifically indicate that its intention is to vary or to "violate" a provision of Basic Law: Human Dignity and Liberty (whether by the "notwithstanding" formula, or any other formula), all in an orderly fashion and according to standard practice. However, the said law is a normal law and not a Basic Law. Knowing that the Knesset is the same Knesset, with the same members, can we say that the law never existed and that the Knesset did not succeed in changing Basic Law: Human Liberty and Liberty? Were this a matter concerning Basic Law: Freedom of Occupation the answer would be clear: Everyone knows and the Knesset was forewarned that the Basic Law could be changed only by another Basic Law adopted by a majority of the members of Knesset (s. 7 of the Basic Law). Having failed to comply with that statutory provision that the later law be dubbed a Basic Law, it is obvious that the change would be of no effect, just as a "law" only adopted in two readings would not be considered a "law."

The question however concerns Basic Law: Human Dignity and Liberty, which does not specify that its variation or violation requires a Basic Law. Can we, the judiciary, import conditions from afar and plant them in the Basic Law? Indeed, holding that a Basic Law can be varied or violated only by another Basic Law has a persuasive ring. But I nevertheless ask myself

whether we can add a requirement to the statute that was not expressly established by the statute itself.

However, I do not regard this as a cardinal question.

The "Constitutional Revolution"

133. In his decision, my colleague President Barak speaks of a "constitutional revolution" that took place in the Knesset in March 1992, when the Knesset granted the State of Israel a "Bill of Constitutional Human Rights," i.e., human rights in Israel "were transformed into constitutional rights." Israel joined "the community of democratic nations ... that possess a constitutional bill of rights"; "we have become part of the human rights revolution, that characterizes the second half of the twentieth century." These words, and others, reflect exaltation and elation. However, no two prophets prophesy in the same manner, and personally, I would not describe the Basic Laws of 1992 thus.

134. In regard to the Basic Laws of 1992, I have grave doubts whether the Knesset members themselves were aware of the "revolution" they were instigating. The fact is that Basic Law: Freedom of Occupation was passed by a majority of 23 members of Knesset (with no opposition or abstentions), whereas Basic Law: Human Dignity and Liberty was passed by a majority of 32 for, 21 against, and one abstention (see above, par. 65).

Furthermore, the term "revolution" connotes a traumatic upheaval in the life of a person, and in the life of a nation, a change from one extreme to another, such as the revolution of Jeroboam the son of Nebat, the French Revolution, and the Bolshevik Revolution. When one claims that in March 1992 there was a "constitutional revolution" in the realm of human rights, one is in effect saying that in that month a profound, radical change occurred in the field of human rights in Israel, as though human rights first saw the light of day, as though the Knesset had created something *ab initio.* "The human rights revolution that characterized the second half of the twentieth century" had reached us. And so, happy are we that now have merited constitutional human rights.

I take a different view because, as is well known, human rights existed in Israel before 1992, and I addressed this subject elsewhere as follows (CrimApp 2316/95 *Ganimat v. State of Israel*, at pp. 399-401):

> 'The doctrine developed by my colleague the Deputy President centers on Basic Law: Human Dignity and Liberty, in its function as a Basic Law, the provisions of which are engraved

in our statute book. Prior to the advent of Basic Laws according to my colleague, basic rights were nothing other than the product of case law, and now, not only have the basic rights found a home in the body of a statute but the legislature itself went even further, elevating them to the throne of monarchy and they now have the status of super rights… I would like to add what I see as the main point in this context of the existing law, Basic Law and basic rights. Personally, I view the main power and strength of the basic rights as inhering in their essence, in their being "nature's children" – "natural" rights – self-evident rights that require no explanation or commentary: One saw them, heard about them, read about them, and knew they were with us. Disputes may arise regarding the periphery of these rights, the outer margins that are remote from the center, but there are no disputes among us in regard to their core. In the society in which we live, at this place and time, all those who encounter the rights recognize, understand and agree…

… the basic rights radiate warmth and power and they conceal an inner light. That is why we are willingly captivated by those expressions that attempt to elevate those rights to sublime heights.

When we speak now – and in the future – of Basic Laws and basic rights, it is important that we remember all of these matters. Humility and modesty are worthy virtues for a person, and a judge is a person. We must guard ourselves against hubris, lest we say to one another that our own power, our own wisdom and our own intelligence achieved this. The history of human rights did not begin with the Basic Laws. Generations of Israeli judges strode hand in hand with these rights, and they have been with us since our independence. They gave rise to the rulings in HCJ 1/49 *Bijerno v. Minister of Police* [3]; HCJ 144/50 *Sheib v. Minister of Defense*, 5 *IsrSC* 399; HCJ 87 79/53 *Kol HaAm Co. Ltd v. Minister of Interior* [4]; HCJ 7/48 *Al-Carbotelli v. Minister of Defense* [42]; HCJ 337/81 *Miterani v. Minister of Transport* [7]; EA2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [8], and many other fine rulings that accompany us along our path…and those same rulings were accorded the status of law. That is how they were

> seen by all, and this is how they were interpreted. Inasmuch as a Basic Law did not create basic rights, I think that it behooves us to conduct ourselves with humility and modesty in our treatment of the previous law, which is fully immersed in those rights.
>
> Indeed, in the future we will mention this Basic Law and rely upon it as a document that embodies basic rights. But we must always bear in mind, firstly, that these rights did not originate in the Basic Law, and that in essence, the Basic Law intended only to give statutory expression to the "natural" rights that already existed. Secondly, that basic rights do not draw their moral and social power from the Basic Law as such, but from within themselves, from their inherent light, intensity, and heat, for they are like the Burning Bush that continues to burn but is not consumed. The bush has been with us from antiquity. Others will say that basic rights are the product of our moral and societal worldviews, and that is the source of their power. Either way, the basic rights already had strength and power before the Basic Law, and even then, there was nothing that "compelled" the courts to rule as they ruled, or that prevented them from ruling otherwise. Essentially, nothing has changed in the wake of the Basic Law.'

That was my view then, and it is my view this very day, but with greater conviction.

135. I find the label "revolution" to be problematic. Is it not enough to say that there has been a "change" in the legal system? And I say this because labels – in themselves – may sometimes blind us and make for self-fulfilling aspirations. Moreover, even if we have said that the Basic Laws could generate very important changes in the Israeli legal system – and this has been said – the concept of "constitutional revolution" embraces much more than the concept of change. Not only is it likely to lead to excessive enthusiasm, but by adding force and energy to one side of the equation, it simultaneously derogates from the power and energy of the other side, and vice versa. Is this how a constitution ought to be framed?

The law says what it says. I agree, of course, that following the adoption of the Basic Laws, the Court acquired the authority to review Knesset laws and to declare them invalid – completely or partially – in cases where they unlawfully violate fundamental rights or modify fundamental rights specified in the Basic Laws. However to what extent a "revolution" has transpired,

only time will tell. The concept of the Industrial Revolution was devised many years after the revolution had taken place, and the Christian calendar did not begin the count on the day that Jesus died but a few hundred years later, counting backwards to the estimated day of his birth (which was erroneously determined).

136. Finally, the path of law is not the path of revolution, but is a "changing story" (as Professor Dworkin has described it). It is a marathon. Life is perpetually changing and with it the law. A law that fails to adapt itself to life is a law in retreat. The relationship between a legal system and life is like an actor on a moving, revolving stage. If the actor does not move he will disappear from the audience's view, behind the stage. He must move at least as fast as the stage just to remain in the same place, *a fortiori* if he wishes to move forward. If the revolving stage suddenly speeds up, and the actor fails to increase his own speed, he may well loose his balance. If he moves too fast he is liable to disappear behind the stage. Our wisdom – the wisdom of the law – lies in knowing how to adjust our speed to that of the surrounding world. Indeed, as I said in the *Ganimat* case [38], at p. 401, "slowly we proceed, heal after toe, toe after heal, treading carefully, in returning and rest" as in the words of the prophet "In returning and rest you shall be saved, in quietness and trust shall be your strength" (Isaiah 30:15).

Two Additional Questions that we will briefly discuss

137. At the beginning of our comments we said that we would only discuss some of the questions that may arise in the matter confronting us. We will now address two additional questions, but only briefly.

The Issue of the Authority of the Courts to Invalidate Laws of the Knesset

138. My colleagues have laid a theoretical foundation for the authority of the court to invalidate laws of the Knesset, and I have added to them somewhat. But the question of who possesses this authority still disturbs us: will it be all the courts of Israel in all instances, or will this be authority be exclusively for the Supreme Court sitting in the capacity of the High Court of Justice? My colleagues did not raise the question, and we may deduce from their words, if implicitly, that all the courts of Israel – from the smallest to the largest – are competent to invalidate laws of the Knesset, and hence the action of the District Court in the present case. As the question was not raised before us, I will not state my opinion on it. I will merely say that there is a strong basis for the view that the competence to invalidate Knesset laws ought to be reserved solely to the High Court of Justice, and to it alone,

excluding all other courts. Indeed, the legal tradition that we follow – the Common Law tradition – recognizes the authority of all courts to declare legislation void *ab initio*. However, heretofore this rule concerned secondary legislation (purportedly) adopted in accordance with a Knesset law.

Having now recognized for the first time – *as a matter of law* – the competence of the courts to invalidate a law of the Knesset, it would appear that we are also entitled to establish which court will possess the authority of review and invalidation. Indeed, the vessel provided to us by the Common Law tradition – the granting of competence of review to every court, in every instance – is too small to contain the authority to invalidate Knesset laws, as well. In any event, the doctrine that applies to the invalidation of secondary legislation ought not be applied to our case mechanically. It seems to me that significant arguments support singling out this authority for the High Court of Justice alone (while establishing appropriate procedural rules for the transfer of constitutional issues from other courts to the High Court of Justice). In this way even the High Court of Justice will be able to select the questions that it deems suitable for immediate discussion, while deferring other topics for the future. No doubt, many such occasions await us.

The Burden of Proof for the Invalidation of a Law

139. Who bears the burden of proving that a particular law is invalid solely because it (allegedly) violates a basic right recognized by a Basic Law? My colleagues President Shamgar and President Barak shared the same view, and our colleague Justice D. Levin concurs. My colleagues distinguish between the following two stages: the first stage concerns the question of whether there was a violation of a basic right as defined in the Basic Law. For example, whether there was a violation of the right of property as defined in Basic Law: Human Dignity and Liberty. At this stage of the proceedings, the party alleging the violation bears the burden of proving it. President Barak adds that at this stage of the proceedings there is a presumption of constitutionality, as held in the *Bergman* case [15] at p. 699. Once the violation of the basic right has been proven, we proceed to the next stage, which examines whether the law remains valid despite the violation of a basic right, because the violation satisfies the requirements of the limitation clause. The burden at this stage is transferred to the other party, which must now prove the validity of the law. In this respect my colleagues apparently endorse the Canadian approach (see: Hogg, *supra*, ch. 35, p. 851ff ("Limitation of Rights") [114]).

140. In our view, the issue of the burden of persuasion does not require a decision, because all are agreed that the Amending Law skips over the hurdles erected by s. 8 of Basic Law: Human Dignity and Liberty. When the time comes, the question of the burden of proof will require our decision, and our decision will be what it will be. My comments here relate exclusively to raising the considerations that should be considered when making that decision.

141. My colleagues' opinions regarding the burden of persuasion at the first and second stages of proceedings, being the same as the rule in Canadian law, appear to be based on the following two principles. Firstly, an analysis of the formal structure of the law and the particular manner in which the basic rights are defined. On the other hand, there is the permission granted by the legislature, subject to certain conditions, to violate those rights. The second principle is the substance of the basic right, qua basic right, and the nature of the violation of the basic right – in other words, the principle of form and alongside it the principle of substance.

We should note that our concern here is exclusively with the burden of persuasion, and not with interpretation of the Basic Law, the scope of the basic rights, nor the interpretation of the limitation clause and the conditions established therein for the validation of a law that violates a basic right. These matters may be self-evident, but we felt it necessary to mention them because all of these topics are discussed in the case law and legal literature as a single issue. Hence to the extent that each one of them is governed by a different set of rules, it seems proper in our view to distinguish between the issues that are mistakenly combined.

142. Regarding the rules prescribed by my colleagues for the burden of persuasion, I must confess, that I gave the matter much thought and that I have reached the conclusion, that at this time these rules are proper both in their own right and in terms of their incorporation in the system of the laws of evidence, including the Basic Laws (see and compare: R. Cross, On Evidence, ed. C. Tapper, 7th ed., (London, Dublin, Edinburgh, 1990) 120 ff. ("Allocation of the Burden")). However, in my view we should give consideration to the establishment of a caveat regarding the burden of persuasion at the second stage of the proceedings, in the context of the "Presumption of Regularity" and the "Presumption of Constitutionality."

For current purposes, we accept that once the violation of the Basic Law is proved, and upon progressing to the second stage of proceedings, regarding the requirements of the limitation clause, the party claiming the

constitutionality of the law bears the burden of proof. In other words, it must prove that the law satisfies the conditions of the limitation clause. The caveat that we think should be considered is to rule that, at the second stage of proceedings, in considering the limitation clause, the law should be provided with a presumption of constitutionality. The import of this would be that *prima facie*, any law enacted by the Knesset is presumed to be constitutional. This presumption would naturally be operative in the framework of determining the burden of adducing proof (burden no.2) as distinct from the burden of persuasion (which falls on the sovereign authority). In this sense, my comments resemble those of my colleague President Shamgar, even if not totally identical (see the comments of my colleague President Shamgar, at par. 85 of his judgment). My colleague President Barak limits the presumption of constitutionality to the first stage only. I have two comments on this: firstly, at the first stage of the proceedings, the presumption of constitutionality is only of secondary importance, because the regular rules of evidence – that the claimant bears the burden of proof – would in any case impose the onus on the party claiming the violation of his right (compare to Hogg, *ibid.*, at p. 857). Secondly, I see no reason for not applying the presumption of constitutionality at the second stage of proceedings. Indeed, in Canadian law the opinion was voiced that the presumption of constitutionality would not apply at the second stage of proceedings in cases pertaining to basic rights (see and compare, for example, *ibid*, at pp. 859, 860). However, before adopting this opinion, we should examine it on its merits. Perhaps the rule in Israel is different, and the presumption of constitutionality should, *prima facie*, apply at the second stage of proceedings, and in the words of Justice Landau in the *Bergman* case [15], at p. 699:

> 'In our present consideration of the Financing Law, …we should say by way of introduction …. first of all, Knesset legislation should enjoy the presumption of validity, in the manner it was enacted. The initial tendency of the court should be towards upholding the law and not towards its disqualification, even when it allegedly violates an "entrenched" statutory provision.'

Actually, the question of whether this rule has direct, unqualified application in our case is far from simple: the claims go both ways, and we will not elaborate. We will only say that prior to our removal of the presumption of constitutionality from the second stage of proceedings, it is

appropriate for us to give the matter deep consideration. I think that this was also the view of our colleague Justice Goldberg.

143. Furthermore, secondary legislation also benefits from the presumption of validity, and *a fortiori,* secondary legislation enacted by a Knesset committee or that was confirmed by a Knesset committee (see e.g. HCJ 6290/93 *Zilka v. Manager General of Ministry of Health,* [71], at pp. 637-639, and references there; HCJ 889/86 [65] at pp. 543-544; HCJ 491/86 *Tel-Aviv Jaffa Municipality v. Minister of the Interior,* [72] at pp. 495-496; HCJ 356/83 *Lidor v. Association for Protection of Houseowners v. Minister of Building and Housing,* [73] at p. 607; HCJ 108/70 *Manor v. Minister of Finance,* [74] at p. 445.

If this is the case with secondary legislation, it should certainly apply to the Knesset legislation, for in essence, we choose our Knesset representatives so that they can both inform us of and determine the appropriate norms by which we should conduct our lives (*vox populi vox dei)*, and the nation's representatives are like the nation (see further, A Levontin, "Judaism and Democracy – Personal Observations," *Tel-Aviv Law Studies,* 19 (1995) at p. 521). We will not adopt an extreme position that would say that since the voice of the Knesset is tantamount to the voice of the people, therefore the Court has no authority to annul Knesset legislation where it deviates from basic rights. Were we to say so, we would be holding an empty pitcher because we had ourselves poured out its contents. However, in performing the delicate task of balancing, which is our art and craft, I believe it possible to maintain the presumption of constitutionality at the second stage of proceedings as well. And we will act as our wisdom dictates.

Furthermore, having consideration for the absolute and unqualified wording of the basic rights in the Basic Laws, it is easier for the person claiming a violation of a basic right to skip over the hurdle the obstacle at the first stage of proceedings. This phenomenon will repeat itself with respect to almost every law of the Knesset, because at this place and time almost every law, or at least many laws, likely violates one or another of the basic rights in some way. It thus turns out that in almost every proceeding we will go directly to the second stage, i.e. imposing the burden on those claiming that the law complies with the provisions of the limitation clause. Against this background, it may be appropriate for us to establish that every law should be seen as enjoying a presumption of constitutionality at the second stage too. And if the constitutionality presumption does not apply to the same degree in every case would it be appropriate to apply it selectively to a lesser degree?

All of these questions are worthy of examination, and their resolution will come in the due course of time.

Final Word

The conclusion of the matter is as stated at the outset: I concur with the decisions of my colleagues the Presidents: President Shamgar and President Barak, along with Justices D. Levin, Eliezer Golberg, and Zamir. And I will say the following: Basic Law: Human Dignity and Liberty is elevated above other laws, and a law that violates it without having satisfied the prescribed preliminary conditions will be considered not to have been enacted. The Supreme Court has the authority to rule that a particular law contravenes Basic Law: Human Dignity and Liberty, and to declare that such a law is null and void for that reason. Finally, the Amending Law entered the field of the limitation clause of Basic Law: Human Dignity and Liberty and emerged unscathed.

Justice E. Goldberg:

A Basic Law that anchors human rights is by its nature and substance no ordinary law. A Basic Law that proclaims human rights touches the very soul of the social experience of a democracy. A Basic Law that declares that 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state' (s. 1A of Basic Law: Human Dignity and Liberty), brings dignity not only to people, but also to the state. Therefore, 'the ordinary citizen' who cherishes human rights naturally perceives such a law as a constitutional law in the most basic sense. From a legal perspective, the two Basic Laws – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation –changed the norm that granted recognition to the human rights that they establish. These rights are no longer 'natural' rights; they are no longer the product only of judicial recognition; and the citizen

no longer needs to fight in order to obtain legal recognition for any one of these rights. The legal source that now anchors these rights, their status as supra-legislative constitutional rights; their entrenchment (one way or another); and as a result – the power of judicial review that has been granted to the Court in the matter of legislation, and the constitutional remedies that the Court may grant, culminating in the annulment of a law – all of the above undoubtedly provide a basis for declaring that a major change occurred in Israel in March 1992. The question regarding the source of the norm and its status is, in the present case, a theoretical one that does not require determination. I will therefore state only this: I am prepared to proceed on the assumption that none of the views expressed on this point lack solid theoretical, historical and interpretive basis. Yet it is precisely for this reason, precisely because each view represents a 'legitimate' legal option, that it is best to prefer the one that enhances the status of human rights, as is required by the values inherent to this subject. Any possible approach that weakens the status of this norm must of necessity lessen the status of the rights themselves, at a time when precisely the opposite tendency should guide us.

As a result, it is necessary that the rights that were granted by the Knesset in Basic Law: Human Dignity and Liberty be given the status of constitutional rights – a status that is the ultimate normative status.

2. When we speak of the protection afforded to a person's property by section 3 of the Basic Law, we must first clarify whether the right that we seek to protect is indeed 'property' within the meaning of section 3. If so, then the second question arises, viz. whether there was an 'infringement' of the property right as defined under section 3. A positive answer to the second question as well, raises the third question, which is whether the infringement fulfills the requirements of the limitation clause in section 8 of the Basic Law (see Prof. Weisman, in his above-mentioned article, *HaPraklit* 42, at p. 261).

3. Regarding the case before us, which is expressed in a law that infringes the contractual rights of creditors, I am also of the opinion that property rights include contractual rights within their scope. This does not indicate a blurring of the accepted distinction between contractual rights (*in personam*) and property rights (*in rem*), inasmuch as even obligatory rights are objects of ownership, since they have an economic value:

> 'The assets that are the subject of proprietary rights may be of different types… thus, for example, one may create a property right… in an asset that is itself a personal right…*in personam.* We must thus therefore carefully distinguish between the nature

> of the asset that is the subject of the right (and there is nothing to prevent a personal right constituting the asset regarding which a property right exists…) and the nature of the right in the asset…' (Weisman, in his above-mentioned book, at p. 50).

In CA 511/88 *Mandelbaum v. Local Planning and Building Committee, Rishon LeTzion, et al.* [75], at p. 527, President Shamgar states:

> 'The interest of the protected tenant in the asset is worthy of protection like the interest of the renter or the leaseholder, because in this context it is not the purity of the proprietary nature of the right that is the determining factor, but rather the economic value that is damaged as a result of the plan' (in The Planning and Building Law, 1965 – E.G.).

And see also Professor Weisman, in his aforementioned article, at p. 267.

Moreover, because the civil law recognizes the need to protect a person's ownership of contractual rights against intentional infringement by a third party, such as in the tortious inducing of breach of contract, there is no reason to diminish the protection given to these assets in the framework of section 3 of the Basic Law (for similar results see: *Minister of State for the Army v. Dalziel* [84], at p. 295; *Rio Rico Properties v. Santa Cruz County* [100], at p. 174; L. Kreynin, 'Breach of Contract as a Due Process Violation: Can the Constitution Be a Form of Contract Law?' 90 *Colum. L. Rev.* (1990)). It is also clear that in the matter before us an infringement of property rights has occurred, and that 'infringement' should be interpreted as a detraction form the economic property right that the property owner possessed.

4. In addition, I would like to address subjects that touch upon the application of section 8 of the Basic Law. In HCJ 428/86, HCJ 320/86 *Barzilai v. Government of Israel* [9], at p. 595, Justice Barak stated that:

> '… Constitutional legislation must be interpreted in light of the structure of the entire system…each constitutional law is nothing but a single brick in the whole building, placed on a given foundation of regime and law. Thus, the task of the judicial interpreter, when construing a constitutional law, is to bring it "into harmony with the foundations of the country's existing constitutional regime"'(M. Landau, 'Law and Discretion in the Making of Law, 1 *Hebrew Univ. L. Rev. (Mishpatim)* 306).'

Thus must we be guided when we interpret s. 8 of the Basic Law, and its three sub-tests. In interpreting this section, the Court must bear in mind the constitutional structure of our system, which is based upon a separation of powers that ensures mutual checks and balances among the branches of government. As President Shamgar wrote in the *Ressler* case [14], at p. 518:

> '…Only in this manner, that is to say by avoiding overly concentrating power exclusively in the hands of one branch of government, is democracy guaranteed and the freedom of the individual and of the public safeguarded. In other words, the consistent and conceptual spreading of powers among the branches of government, through the imposition of constitutional principles regarding mutual supervision and control, and the establishment for this purpose of connections and bridges among the various branches of government, will create a basis comprising the combined elements that embrace all branches of government. This creates the parallelogram of forces that establishes and stabilizes the balance that is a condition for the existence of freedom and for the proper functioning of all the branches of government.'

5. The harmony between branches of government therefore requires drawing a 'red line' between the exercise of the power of review over an act of legislation granted to the Court, and involvement in the legislative process. The Court must be careful not to blur the boundaries and cross into domains that are not its own. It must bear in mind that it has been entrusted only with the power of judicial review over whether or not the law is constitutional, and in exercising that authority the Court does not replace the legislature. The Court may not substitute its discretion for that of the legislature. The freedom to choose between alternative measures intended to balance the proper purpose and the infringement of a right is granted to the legislature and not to the Court. It is the legislature that is authorized to choose from among the possible means the one that it deems most appropriate for realizing the proper purpose of the law, and there is a presumption that it has indeed considered all of the relevant possibilities.

As a result, the constitutional legitimacy of the law under scrutiny is presumed. This approach is accepted, *mutatis mutandis*, for administrative review, and applies *a fortiori* to constitutional review. Only a conclusion that the legislature has not met the limitations upon infringement set out in s. 8 of the Basic Law requires that the Court declare a law to be unconstitutional, as

if the legislator had acted *ultra vires*. Any other intervention by the Court would undermine those boundaries required by the separation of powers.

6. This is the manner in which we must also relate to the final test in the limitation clause of the Basic Law, viz. that the infringement of the offending law upon human rights be 'to an extent no greater than is required.' This test is the 'degree test.' The degree of the infringement must be such that it is no greater than required.

In order to arrive at the proper degree, there must be a process of winnowing through possible alternatives and of choosing the best. This process, by its nature, reflects the use of discretion in calculating the degree appropriate to realizing the (proper) purpose, while the point of departure is that for every alternative there is a 'price' that is expressed one way or another. We would also note that, when s. 8 speaks of 'an extent no greater than is required,' there are two meanings to the word 'required.' When two values collide, what is 'required' is the substantive criterion. When the collision is between two measurable concepts in a concrete system of data, what is 'required' is the quantitative criterion. The test referred to is relative and not absolute. The absolute size of the infringement is not what is being examined, but rather its size relative to what is required in order to achieve the proper purpose. While the language of s. 8 of the Basic Law implies that any infringement in excess of that required for the achievement of the proper purpose is forbidden, nevertheless, for reasons which we have examined, it is necessary, in my view, that the Court declare that a law has not met the 'degree' test only if it has reached the conclusion that the means chosen in the winnowing infringes to a degree that represents and exceptionally severe deviation from the range of reasonable infringement (in comparison with extreme unreasonableness). Otherwise, the Court will be replacing the legislature's discretion with its own.

The risk is that, in the process of constitutional review, the tasks of the Court and the legislature will be reversed, and the need to fix the borders of intervention, as suggested above, are particularly clear in regard to tax laws and laws that set economic policy (to which the second meaning of 'required' that we discussed applies). If a test of legality of degree is carried out in this regard, by means of a careful examination of the possible alternatives, it will be difficult to find economic legislation that will stand up to the test of proportionality. In the words of Justice Blackmun:

> 'A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less

> "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.' (*Illinois Elections BD. v. Socialist Workers Party* [101], at pp. 188-189)

In tax laws and in economic laws there is the additional fact that the Court is not equipped with the tools to delve into the intricacies and the distinctions in the proportionality among the various alternatives (see HCJ 311/60 *Y. Miller, Engineer (Agency and Import) Ltd v. Minister of Transport* [76], at p. 1996). We must also not forget that an erroneous intervention in laws that deal with the subjects mentioned above may induce shock waves in the national economy. All of these things taken together only strengthen the view that the Court should declare a law unconstitutional for deviation from the test of degree, only if the means that the legislature chose reflects an exceptionally severe deviation from the range of reasonable infringement for the fulfillment of the proper purpose.

7. The necessary conclusion from the above is not that we require a different formula for judicial review of tax laws and economic laws, but rather that the 'threshold' of possible degree should be higher for them. This is similar to the approach of United States constitutional law that economic legislation is subjected to 'minimal scrutiny', and that it is sufficient that there be merely a rational basis for the infringing means employed by the law.

A broader framing of the allowable degree of infringement is required by the nature of the subject matter before us, inasmuch as the infringement of property rights of the individual by means of economic legislation in fact comprises three elements: At the first stage, the overall amount of means required for achieving the proper purpose is established. Establishing this overall amount is no more than an expression of priorities among the proper national objectives that the legislature has established. In general, the Court will refrain from intervening in legislation that sets or is based upon such general goals, As it merely expresses a balance between private property and the needs of the general public, and the Court will not intervene unless there is clearly an exceptional departure from the proper degree, such that private property rights will be deprived of appropriate room to exist . The second stage identifies those from whom the necessary means will be recruited in order to achieve the proper purpose. This determination is also subject to the review of the Court (such as in regard to discrimination), subject to the freedom to choose between alternative measures all of which attempt to balance between the proper purpose and the infringement of a right. This

balancing, too, as already stated, is the role of the legislature rather than the Court. The third stage constitutes an arithmetical calculation of the degree of infringement.

As we see, this is a complex process that is based on both policy and upon the intricacies of complicated actuarial calculations, which are often the subject of disagreement among economists. It is thus understandable that the High Court of Justice tends not to intervene in the determination of economic policy (see, for example, HCJ 49/83 *Consolidated Dairies Ltd v. Israel Dairy Board* [77], at p. 523). It should be clear that the above is not intended to lead to a conclusion that economic legislation is exempt from judicial review, but rather in order to emphasize that the material under review requires that the Court widen the scope of the possible degrees of infringement so that the Court will not appear to be ruling upon the wisdom of legislative policy.

8. This brings us to the question of the burden of proof when a claim is brought that a law infringes one of the rights listed in the Basic Law, and that it does not serve a proper purpose or does not meet the requirement of proportionality. The burden of proof is of importance when the Court is asked to draw factual conclusions. In such a case, it is the burden of proof that determines between two contradictory and equally weighted arguments. When the Court is asked to make a value-based determination (e.g., striking a balance between conflicting values), there is no practical significance to the burden of proof. The Court must apply the tool of logical analysis, with which it is fully equipped. Thus, there is for the most part no significance to the burden of proof in determining whether an infringement of a protected right serves a proper purpose, and the determination is fundamentally one of values. The burden of proof is of significance in determining the proportionality of the infringement, where proportionality itself is not the result of a balancing of values. The material nature of property (i.e. the ability to quantify the value of a property right) is what requires the Court to make recourse to the facts in order to determine whether legislation that infringes a proprietary right meets the criterion of proportionality. If so, the burden of proof will have practical significance in such circumstances, in which the Court must decide between two sets of facts.

The task of the burden of proof is to make a determination in conditions of uncertainty when the scales are balanced. Several considerations apply to the division of this burden between the parties to a case. One consideration is that the existence of a fact or of a situation is more reasonable. In such a case, the tendency is to impose upon the person claiming the opposite of such a

situation the burden of showing that the situation is different in the case under discussion. An additional consideration springs from the recognition that in conditions of uncertainty the burden of proof will be imposed in a manner that will narrow the risk that the decision will be erroneous. Thus for example, in criminal proceedings, in which a person's freedom is at stake, the burden is imposed upon the state by means of the presumption of innocence set out in the criminal law. In civil proceedings the burden of proof is placed on the person who is making a claim against another, as he is arguing for a change in the *status quo* (see D. Bein in this regard, 'The Burden of Proof and the Evidentiary Requirement in Tax Law' (1995) III *Mishpat uMimshal*, at p. 285). In proceedings in which the legality of a law is being examined, the point of departure is that the law is assumed to be constitutional. Thus, any doubt must operate in favor of the law's legitimacy, and not against its validity. We thus conclude that a party who argues against the validity of a law must bear the burden of proof, even regarding the issue of whether the infringement constitutes an extreme deviation from the realm of a reasonable infringement for the sake of achieving a proper purpose. The evidentiary burden is auxiliary to the burden of proof. The party defending the law need not show that there are other alternatives that more severely infringe the right and that the less-infringing alternative was chosen, but rather the party arguing against the validity of a law must show that there exists a specific, clear alternative that fulfills the proper purpose, while infringing the protected right in a manner that is significantly less than the infringement of the law.9. In the case before us, those assailing the constitutional validity of the law have not presented any alternatives of degree to the one chosen by the legislature for the fulfillment of the proper purpose (and I agree that the purpose is in fact proper).

Thus, I too concur with the opinions of my colleagues as to the results of this proceeding.

Justice E. Mazza:

I concur with the opinion of my colleague President Barak. I accept his rationale in general; and I also concur with the summary of his conclusions, which appears in paragraph 108 of his opinion. Given this situation, I will suffice in briefly addressing three of the important issues regarding which some of my esteemed colleagues have presented different positions and approaches. I will begin by emphasizing that the appeals before us do not require a decisive determination of any of these three issues. My brief

comments are meant to emphasize my support for one of the possible approaches regarding each issue.

The first matter is the question of the source of the Knesset's power to bind itself – whether by a formal entrenchment provision or by a substantive limitation – which is required in order to establish a constitutional norm that will be protected from the Knesset's own power. Like my colleague, President Barak, I share the view that this power has been granted to the Knesset on the basis of its constituent authority. That the Knesset possesses constituent as well as legislative authority is strongly anchored in our constitutional history. Moreover, the approach that attributes the Knesset's constitutional activity to its constituent authority appears substantively preferable to me to other possible approaches. Its main advantage is that it attributes the Knesset's authority to establish a constitution to a source that is conceptually 'external' and distinct from the source of its sovereignty as a legislative authority. In so doing, it establishes a theoretical basis for a normative ladder that enables a practical distinction between the Knesset's special activity in establishing a constitution and its ongoing activity in the legislative field.

The second matter I would like to address is the scope of the definition of 'property' and 'infringement of property.' I accept the view that, with regard to the effect of s. 3 of the Basic Law: Human Dignity and Liberty, 'property' may include obligatory rights. Yet my colleague Justice Zamir rightly points out that 'The broader the scope of the right to property as a constitutional right, the weaker its protection..' I believe, as he does, that in order to make a decisive determination regarding the appeals before us, it is enough to assume that the Amending Law does in fact infringe property; and so long as we are not required to do so, we must be careful not to establish fixed conclusions as to the scope of the protected property right. It may be that, in the spirit of the approach of President Shamgar (in para. 69 of his opinion), the practical test for determining whether there is cause for examining the constitutionality of an infringement of property ought to be based not on the internal substance of this right, but rather on the seriousness of the infringement of the right and its identification, by some objective criterion, such as an infringement that substantially affects the position of the right-holder. It would appear that even President Barak, who, in principle, leans toward a broad definition of property and of infringement thereof, would agree that marginal damage to property may not give rise to a cause for

constitutional review of the infringement. In any case, he left these questions open for further review, and I am satisfied with that.

My third comment relates to the burden of proof in the second stage of the constitutional analysis. There is a consensus that at the first stage of the review, a person claiming infringement of a basic right must assume the burden of proving the infringement. The question is, upon whom does this burden fall in the second stage, in which the question is whether the infringement of the right is constitutional, in the sense that it fulfills the conditions of the limitation clause.

My esteemed colleagues expressed several views regarding this issue. My colleague President Barak notes the accepted view of comparative constitutional law, according to which the burden of proving the constitutionality of the infringement falls upon the state. The President states that he deems this approach to be appropriate, yet since the issue does not arise in the case before us, he suggests leaving the issue of the burden of proof for further review. My colleague Justice D. Levin decisively expresses his opinion that the law does indeed require that the burden of proof be transferred to the shoulders of the state. The views of my colleagues Justices Bach and Goldberg are diametrically opposed to that. In their opinion, every law enjoys the presumption of its constitutionality, and even when it is proven that a law infringes upon a basic right, the presumption of constitutionality requires that we assume that the infringement satisfies the conditions of the limitation clause. Therefore the burden of contradicting that assumption falls upon the claimant. My colleague Justice Cheshin, who admits to having hesitations in this regard, tends to an intermediate position: the burden of proof that a law that infringes a basic right fulfills the conditions of the limitation clause does indeed fall upon the state. However, even a law that has been proven to be an infringing law, enjoys a *prima facie* assumption that it does not contradict the Basic Law; and one who claims otherwise must bring contradictory proof. This presumption that the state enjoys in meeting its burden of proof, transfers the evidentiary burden onto the claimant. If the claimant does not bring sufficient evidence to contradict this presumption, the state will be found to have borne the burden of proof, whereas, if the claimant manages to adduce contradictory evidence, the state will be required to show the Court that the infringing law does indeed meet the conditions of the limitation clause. Having stated in which direction his opinion leans, and in view of the difficulty of the questions posed in the

matter of burden of proof, Justice Cheshin proposes leaving a decisive determination in this matter for the future.

I, too, do not have a clear opinion on this difficult matter. My tendency, *prima facie*, is that there is good reason for splitting the burden between the parties, so that the state will have to convince the Court that the infringement serves a proper purpose and that the means chosen are appropriate for achieving that purpose. The burden of convincing the Court that the government should choose a less harmful, alternative method, should be imposed upon the person alleging the unconstitutionality of the infringement. My colleague President Shamgar explained the appropriateness of his distinction (in para. 85 of his opinion) and, on the face of it, I concur with his approach. Nonetheless, I am not absolutely certain that it is fitting to act in this manner in every instance. It may be that such an approach is appropriate only for infringements of an economic nature, and that a different type of harm to basic rights justifies imposing the burden of proof on the state in regard to all of the conditions of the limitation clause. Subject to these comments, which were meant to indicate a possible direction without setting things in stone, and in the spirit of the proposals of my colleagues President Barak and Justice Cheshin, I would leave for further review the issue of determining the various aspects and levels of the burden of proof.

Justice G. Bach:

1. I concur with the view that the appeals in LCA 1908/94 and LCA 3363/94 should be allowed, and that the relevant files should be returned to the court of first instance for continued deliberation. I also concur with the rejection of the appeal in CA 6821/93. I am also of the opinion that there should be no order for costs regarding these appeals.

2. It appears that due to the sense of the great importance of this event – from the point of view of the legal, constitutional and judicial history of the State of Israel, when this Court is asked for the first time to rule on the question of the validity of a law enacted by the Knesset, on the grounds that the law infringes upon Basic Law: Human Dignity and Liberty and is thus unconstitutional – some of my colleagues have analyzed in great detail matters regarding which a decision is not necessary for deciding these appeals. Several of my colleagues have noted in their opinions that no binding decision is called for regarding these matters, and thus they are prepared to leave the matters for 'further review.' However, since they nonetheless clarified their positions in these matters, other colleagues expressed their opposing views in this regard. This aroused the natural desire

of those judges who left the decisions for 'further review' to further clarify their principled positions.

Truth be told, we are dealing with fascinating topics, that appeal to the heart and the mind at the legal level generally, and at the constitutional level in particular; as well as at the national, public, general and philosophical levels. The temptation to analyze these topics in detail is accordingly great. Nonetheless, I have decided, for myself, to resist the temptation, and to limit my remarks to those topics that appear to me to be necessary for rendering our specific opinion in the matter of these appeals.

3. I concur with the commonly held proposition of my esteemed colleagues Presidents Barak and Shamgar, with which most of the other judges on this bench have concurred. According to this proposition, the Knesset is empowered to enact both ordinary legislation and special Basic Laws that constitute the constitution of Israel, and that in the latter type of laws, the Knesset may even limit its own authority and that of future Knessets to amend or infringe these same constitutional Basic Laws. This self-limitation can be procedural, viz. by means of a special majority for the annulment or amendment of these laws, and it can be material, by means of the setting of substantive conditions for amending those Basic Laws.

I see no need, for the purpose of these appeals, to take a stand on the inherently interesting and important question of constitutional history of whether, in enacting Basic Laws of a constitutional character, the Knesset wields inherent authority in its capacity as the state's supreme legislative body, as President Shamgar believes; or whether the Knesset enacts Basic Laws by means of special, separate authority, under the 'hat' of constituent authority, as President Barak believes.

4. My position regarding this issue would be different, had the claim been raised before us that the aforementioned Basic Laws could only have been enacted by the Knesset in its capacity as a constituent assembly, but that a special procedure for so doing was required, such as a proclamation in the Knesset and of its committees that dealt with these laws, to the effect that the debate and the voting related to the enactment of constitutional laws, and that the Knesset was acting under its constituent authority, and that this fact had to require clear and definitive expression in the wording of the Basic Laws themselves. Such an argument would have implied that without having undertaken such a special procedure, and without a statement in the Basic Laws themselves that they were enacted on the basis of the Knesset's constituent authority, there is in fact no constitutional effect to the two Basic

Laws that we are addressing in these appeals, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.

However, since no one supports this extreme line of thinking, and since it is clear from the opinion of my esteemed colleague President Barak that the Knesset's constituent authority is not contingent upon a procedure different from that used in enacting ordinary laws, and the fact of the constituent assembly's special 'hat' need not be specifically noted in the wording of the aforesaid laws, I do not find any practical difference between the two approaches in the case before us. This situation may change should the Knesset adopt a Basic Law, whether entrenched in a procedural or material-substantive manner, regarding which it be claimed that the Knesset abused its constituent authority, and that the law did not justify the use of the said special authority of Knesset, by virtue of its contents or its national importance.

However, this cannot be said, and has not been argued in regard to the two laws before the Court. These two laws address the most basic of human rights. Both the content and the wording of these laws manifestly indicate the legislature's intent to establish constitutional supra-norms for the protection of human rights. There can be no doubt that the provisions included in these Basic Laws could serve as a central pillar in any constitution worthy of its name in an enlightened democratic regime.

5. In his interesting, comprehensive opinion, my esteemed colleague Justice Cheshin raises the question of whether we ought to be convinced that the legislature intended to create part of a constitution when it enacted these Basic Laws. He recalls in this context the theophany at Mount Sinai, in stating, *inter alia*, as follows:

> 'This was the manner in which the Jewish people became obligated by its first constitution... For three days the people waited to receive the constitution … and on the third day the grand and awesome ceremony began… thunder and lightning, and a thick cloud upon the mount, and the voice of the trumpet exceeding loud …'

The implication is clear: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty were not enacted with such festive displays. It is certainly true that these Basic Laws were not enacted with thunder and lightning and the sounding of trumpets. Such phenomena apparently no longer occur in our era. Yet in my opinion the festiveness and

the constitutional character of these Basic Laws, and the desire to establish supra-constitutional norms, emerge from the text itself. To illustrate this point it is sufficient to take the main law with which we are dealing, Basic Law: Human Dignity and Liberty. Sections 1 and 1A of the Basic Law state:

> '1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.
>
> 1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.'

The sections following these establish provisions regarding the protection and preservation of life, physical integrity and the dignity of the person. Section 8, the limitation clause, then states:

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

Do not these words unequivocally express the legislative intent to establish constitutional norms for the people of Israel, and in a manner that is, in effect, no less than that of thunder, lightening and trumpets?

6. This sums up the matter of the Knesset's intention to establish a constitution. Regarding the question of its authority to establish a constitution, I have already indicated above, that I concur with the positive views of President Shamgar and President Barak in this regard (and I clarified that I understand their position to be a shared one on this point). I reached this conclusion after reviewing the voluminous amount of material that was cited by my colleagues and the learned representatives of the parties, including the constitutional history of the State of Israel from the first day of its establishment, including the 'Harrari Decision,' the opinions expressed by members of the Knesset during the debates on the various Basic Laws as recorded in the Knesset Proceedings, and the opinions expressed by learned experts of constitutional law, the content of the Basic Laws that have been legislated by the Knesset prior to 1992, when Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty were enacted, and the manner in which these laws were passed, and finally the relevant case

law on the subject that has been decided by this Court and the courts of other countries with a constitutional regime.

I carefully examined the doubts, reservations and misgivings expressed in this matter by my esteemed colleague Justice Cheshin. In my opinion, one cannot deny the weight of at least some of those points, which also draw support from the opinions of various scholars, as well as several of the Knesset members who took part in the debates upon the said Basic Laws and earlier Basic Laws. Yet, at the end of the day, I concur with the view that the Knesset was endowed with central and supreme legislative authority that includes the authority to enact a constitution for Israel. It seems to me that this view is accepted today, and was accepted in the past by the Israeli public. Were we to ask the supporters of a written constitution and those who oppose it for either practical or ideological reasons, we may reasonably assume that the overwhelming majority of the public would have no doubts as to the Knesset's authority *per se* to enact Basic Laws that form a constitution. The public acceptance of the Basic Laws that have been enacted since the establishment of the state proves this.

7. I would raise an additional point in this context: Even my colleague Justice Cheshin, does not disagree that the Knesset is empowered to enact a law that comprises a provision that binds future Knessets, in the sense that it requires a majority of Knesset members, that is to say, a minimum majority of 61 Knesset members, in order to revoke or amend the law. My colleague agrees that such a provision does not contradict the fundamental conception of democracy.

It appears to me that there is no difference, in principle, between a limiting provision that requires a majority of 61 Knesset members for the law's amendment or revocation, and a more far-reaching, constitutional limitation provision. A law is passed in the Knesset with a regular majority of those participating in the vote. Absence or abstention is the right of every Knesset member. Therefore, if my colleague is correct in his opinion that the Knesset is not empowered to enact a constitutional law because the next Knesset can revoke any law by ordinary means, then it is difficult to understand why a limiting law that requires a majority vote of 61 Knesset members would constitute an exception to that rule.

It would appear that in order to be consistent my colleague needed to point out the invalidity of any law that prevents the future enactment of a law by ordinary means. Emphasizing that requiring a majority of 61 Knesset members is 'kosher' because it accords with our democratic sense may sound

good, but I am not convinced that there is a difference of principle regarding the matter before us, between requiring a majority of 61 and requiring a majority of 62 Knesset members, or a greater majority.

8. In his opinion, Justice Cheshin raises concerns, *inter alia*, regarding the negative phenomena that are liable to result in the future if indeed we recognize the unrestricted authority of the Knesset to limit in a Basic Law the authority of future Knessets to revoke such a law or to amend it. Thus my colleague asks what will happen if a Basic Law enacted in the future would require a vote of 90 or 100 or even more Members of Knesset in order to amend it? Indeed, such a thought raises concerns regarding our future democratic life, but it seems that this concern is more theoretical than practical. Israel is not the only country that has enacted laws of a constitutional nature that include entrenchment and limitation provisions regarding future legislation. Such laws require a majority of members of parliament for the amendment of a constitutional law, or even a majority of two-thirds of parliament or of those participating in the vote. We have never heard of a requirement of a 100% majority, i.e. unanimity, or even of a requirement of 90% or of 80% of the members of parliament.

The concern that has been expressed reminds me of the following questions that I have asked myself on more than one occasion: What would happen, if, when the commander of the Independence Day ceremony requests the permission of the Speaker of the Knesset to begin the ceremony, the request would be denied by the Speaker?! What would happen if the President, or the Prime Minister, or the relevant minister would refuse to sign a law enacted by the Knesset? And what if the President refuses to sign the appointment of a judge who has been selected by the Judicial Appointment Committee, when there is no defect in the appointment? The simple answer to questions such as these is that there are certain things that we may assume will simply never happen in a proper democratic regime. And if, heaven forbid, such unreasonable events were to occur, then a democratic regime will find judicial or other governmental solutions. This concern and other problems related to the enactment of future Basic Laws and their amendment, which will be solved in the course of time, cannot outweigh the considerations that lead to the conclusion that the Knesset, as the supreme legislative body, is indeed authorized both to enact ordinary laws and to legislate Basic Laws that provide Israel with a constitution.

9. Accordingly, I concur with the opinion of my colleagues, that the above-mentioned Basic Laws do in fact endow the Court with the authority

to nullify laws that contradict these Basic Laws and do not meet the legality tests that they establish.

10. I agree that the Amending Law that is the subject of these appeals 'infringes property rights' within the meaning of s. 3 of Basic Law: Human Dignity and Liberty. I concur with the conclusion and the reasoning of my esteemed colleague President Shamgar on this point, and I see no need to add anything.

It remains for us, therefore, to consider the central issue of the appeals before us, and that is whether the Amending Law meets the requirements of the 'limitation clause.' In other words, does the Amending Law fall within the scope of s. 8 of the Basic Law, which determines that the new law is not nullified in spite of its infringement of a basic right, because it meets the requirements stipulated in that section?

11. Several of my colleagues expressed their opinions upon the issue of which party ought to bear the burden of evidence or proof regarding the question of whether the law at hand meets the limitation requirements in s. 8 of Basic Law: Human Dignity and Liberty (and to the same extent, of course, the parallel section to the aforementioned s. 8 in Basic Law: Freedom of Occupation, viz. s. 4).

Some of my colleagues noted that there is no need to decide this question in the appeals before us, and it may thus be left for future consideration. As opposed to my position regarding several other questions that were addressed by my colleagues, I believe that this topic is indeed very relevant to the present matter, and that it is appropriate that we consider it. The moment that we reached a determination that the Amending Law does in fact infringe a property right, that is to say, a fundamental right protected by the Basic Law, we must then answer the question of whether the Amending Law meets all of the criteria in s. 8 of the Basic Law. It is only natural, and necessary, that we ask ourselves which party must convince us regarding these points. What if doubts arise regarding any or all of those? What happens if the scales remain evenly balanced in regard to any or all of those points?

Various opinions have been expressed regarding this question. According to one of them, to which my esteemed colleague Justice D. Levin gave most specific and decisive expression, the question of the burden of proof regarding the issues before us must be divided into two: the burden of proof regarding the very existence of an infringement of the basic right in the new law under examination; and, if an infringement of the basic right is indeed

proven, then the question arises as to the burden of proof regarding the fulfillment of the requirements in the limitation clause, that is to say s. 8 of the Law, regarding which different rules apply, according to this same opinion.

Thus states Justice D. Levin, *inter alia*:

> 'Anyone who claims that a basic right has been infringed and who seeks to undermine the force of a regular law for the sake of such an infringement, must shoulder the burden of persuading the Court that a protected, constitutional basic right has indeed been infringed. The Court then examines this claim in the light of the facts of the case as laid out before it and in accordance with the values that are contained in the protected basic right. If the Court finds that indeed a regular law that has been passed does infringe a safeguarded basic right, the burden of persuading the Court that in this specific case the justifications for such an infringement exist in the limitation clause passes over to the entity protecting the validity of the law – usually a representative of the state.'

This proposition is accepted by some scholars and judges in Israel and elsewhere, and even the state's representative did not disagree with it during the proceedings before us.

12. I, however, cannot agree with this view regarding the second part of the proposition, for the following reasons. There are indeed areas of law in which the burden of proving a defense in the face of an accusation or a certain claim falls upon the person who raises the defense. We encounter this phenomenon mainly in criminal law. When it is proven that a defendant, who has been accused of murder or assault, has indeed killed or assaulted another person, and the accused wishes to defend himself on the grounds of self-defense and to therefore claim that he ought not to be convicted, the burden of proof falls upon him to show the existence of a situation of self-defense.

The same is true regarding a defense of drunkenness or insanity. In tort law, as well, the burden of proof is sometimes transferred to the shoulders of the respondent. Under certain circumstances, noted in s. 41 of the Civil Wrongs Ordinance [New Version] and which arouse a *prima facie* suspicion against the respondent for having been negligent towards the claimant, the conclusion of that same section determines:

> '…and it appears to the court that the happening of the occurrence that caused the damage is more consistent with the conclusion that the defendant did not exercise reasonable care than with the conclusion that he did exercise reasonable care – then the onus shall be upon the defendant to prove that there was no carelessness for which he is liable in connection with the occurrence which led to the damage.'

In other words, in certain cases, in which the evidence indicates *prima facie* that a crime or a tort has occurred, and the defendant or the respondent wishes to raise certain defenses based upon facts that are a matter of their special knowledge, the burden of proof will transfer to them regarding these points.

Does a similar situation obtain in regard to the topic before us? I think not. In listing the fundamental human rights, Basic Law: Human Dignity and Liberty makes a general, normative declaration. The legislature was well aware of the fact that very many situations would arise in which the law would permit infringements of these 'rights,' meaning that undoubtedly laws would be legislated that would meet the requirements of the limitation clause, s. 8 of the Basic Law. When s. 5 of the Basic Law states that 'There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.' We can hardly imagine that the legislature was unaware of the probability that laws will be passed that will conflict with this 'right.' Is it not clear that every country requires the enactment of criminal laws that permit the arrest and incarceration of suspects and of convicted criminals? Is it not perfectly obvious that laws will be proposed and enacted to permit the extradition of criminals to other countries? We are also all aware that a person's liberty may be 'otherwise' restricted, as for example, by means of conscription into the army. Should we assume that the legislature takes a negative view of all of these possibilities for the restriction of liberty?

It also seems to me that various tax laws are also laws that 'infringe a person's property,' and that s. 3 of the Basic Law ostensibly applies to them. There are differences of opinion among experts regarding this point, but I am of the view that in tandem with the prohibition on arrests and detainments, where it is clear that the state must apply the criminal law, the term 'infringement of property' must also be interpreted broadly, with an understanding on the part of all those concerned that many laws, in this context as well, will be found wanting in terms of s. 8 of the Basic Law.

In other words, a law that *prima facie* infringes a basic right is not automatically absolutely and thoroughly suspect of being morally or democratically invalid. Each law will be objectively examined in light of the elements prescribed in the limitation clause. In my opinion, this analysis leads to the conclusion that there is no assumption or presumption that every law that infringes human liberty, property, or any other basic right enumerated in the Basic Law is invalid until proven otherwise. On the contrary, in my opinion, the assumption should be that a law was lawfully enacted, unless the Court is convinced that it is void for infringing a basic right and not meeting the requirements of s. 8 of the Basic Law.

There is an assumption and a presumption that every civil servant who performs a task in the framework of his job acts in good faith and in accordance with the law, until the opposite is proven. This well-known rule, *omnia praesumuntor rite esse acta*, applies to every official act. The same holds for a policeman making an arrest, who is assumed to be acting legally and properly, until proven otherwise. Are we to act in accordance with the opposite assumption, in the case of the legislature, in the case of the members of the Knesset elected by the public? When the people's elected representatives, following debates in the Knesset committees and plenum, enact a law, is there no assumption that the law was passed for a worthy end and that it conforms to the values of the State of Israel? Is there any justification whatsoever for the opposite assumption? This is precisely the meaning of imposing the burden of proof on the party that claims that the conditions of s. 8 have been fulfilled. If we so determine, it is as if we are saying to the legislators: 'Since your law contains some infringement of liberty or property, our assumption is that you have acted in a manner that is inappropriate and does not befit the values of the State of Israel; or you have done something that is not intended for a proper purpose, unless you convince us of the opposite.'

In my view, such a conclusion is unacceptable, and the burden of proof at all stages must be imposed upon the party that argues that the law is void for contradicting a Basic Law. In other words, the person who argues against the validity of a law must convince the Court both as to the law's infringement of a right protected by the Basic Law, as well as that the law does not meet the requirements of the limitation clause, s. 8 of the Basic Law (see also, in the same vein, para. 8 of the opinion of my esteemed colleague Justice Goldberg).

I would also add that we should not forget that the legislature – that is to say the Knesset members, the elected representatives of the people – is not generally represented as a party in this Court. It is said that the state's representative, the representative of the Attorney General, will in general represent the position of the legislature. Yet this is not necessarily so. There may be situations in which an enacted law does not enjoy the support of the government or the Attorney General. This is another reason for concluding that the Court should not annul a law on the above-mentioned grounds, unless it is convinced by the evidence and the arguments brought before it that the law that infringes a basic right does not in fact meet the criteria of s. 8 of the Basic Law.

13. In the above explanation I mentioned the first two requirements of s. 8 of the Basic Law, viz. that the law must be 'befitting [of] the values of the state of Israel' and that the law must be 'enacted for a proper purpose.' But my approach is identical in regard to the third criterion of s. 8, which requires that the infringement of the basic right must be 'to an extent no greater than is required.' Here, too, the assumption must, in my opinion, tend to the direction of the legitimacy of the law, unless the opposite is clearly proven. If we impose upon the legislature, or upon whoever is attempting to defend the law, the burden of showing that there exists no alternative to the law as legislated by the Knesset that poses a lesser infringement of the basic right, we are liable to find ourselves in intolerable situations.

Let us return once again to the criminal law. There are those who are of the opinion that imprisonment does not deter and is not effective, and that we should employ other sanctions that do not infringe human freedom to the same extent. Others take the view that shorter terms of imprisonment achieve the same punitive result, and may even have better results. Still others believe that for specific offences, such as drug-related crimes or sex crimes, emphasis should be placed on medical treatment rather than on punishment. It is possible that even the judge presiding over the proceedings may hold such views. Additionally, there is extensive professional literature treating of these issues. The same is true regarding fiscal laws or commercial laws, such as the Amending Law that is currently before this Court. There can be no doubt that it is possible to propose alternative laws that, in the eyes of the proposer, appear preferable, more efficient, more just, and less injurious to the property right of the person seeking the annulment of the law.

Let us just imagine where we would end up if the Court were required to delve into such arguments, and if the party arguing in favor of the validity of

the law would have to prove that there exists no alternative that infringes a given right to a lesser extent.

In conclusion, in this matter as well, the burden of proof must rest upon the person arguing that the law should be voided. We should also not accept an overly broad construction of the requirement itself. Only if the evidence and arguments make it clear to the Court that the law infringes the petitioner's basic right in a manner that is disproportionate to the fulfillment of its desired aim, and that there is a real need for an alternative solution less injurious to the basic right, may the Court decide to void the law for the above-mentioned reason.

14. The outcome of all of the above is that only in rare and exceptional cases will the Court find justification for declaring a law void on the grounds that it contradicts the above-mentioned Basic Laws on human rights of 1992.

15. If we now apply these rules to the cases before us, the unavoidable conclusion is that there is no justification for voiding the Amending Law that is the subject of these appeals. As my esteemed colleague President Shamgar stated, the purpose of the Amending Law, like that of the Main Law, is an attempt to resolve the crisis in the agricultural sector. This is a proper purpose, and the law conforms to the values of the State of Israel. Moreover, the possible infringement of the property rights of the creditors under the provisions of the Amending Law is not disproportionate to the intended legislative purpose. This is especially so, after taking into consideration the alternatives that were available to those creditors in accordance with the existing laws of execution and bankruptcy.

I would probably have reached this same conclusion even if I were of the opinion that the burden of proof regarding the conformity of the law to the requirements of the limitation clause was to be borne by the person arguing for the law's legality. This is so *a fortiori* given that my view, as explained above, is that the burden of proof rests with the party arguing that the law should be voided.

16. I would also like to note that I concur with the concluding remarks in para. 108 of the opinion of my esteemed colleague President Barak, and I refer to paras. 3 and 4 above, in which I clarified the reason for not taking a position regarding the question of whether the Knesset wields its inherent authority or its constituent authority in legislating a constitutional law. My colleague's statements in those concluding remarks are, in fact, in agreement

with my opinion, and they also do not conflict with my position regarding the burden of proof in this matter, which I set out in detail in paras. 11-14 above.

17. In light of all the above, I have reached the conclusion set out at the beginning of my opinion.

Justice Tz. E. Tal

There is a difference of opinion between President Shamgar and President Barak, and between the two of them and Justice Cheshin, regarding fundamental questions of the authority and status of the legislative branch. This difference of opinion is extremely important in terms of constitutional law.

Nonetheless, I do not believe that these questions need be decided in order to resolve the matter before us. I will therefore refrain from entering into the debate between these eminent jurists, and leave these questions to be decided at the appropriate time.

In HCJ 878, 726/94, [37], I concurred with the opinion of my colleague Justice D. Levin (although not with his conclusions) in the matter of the superior normative status of the Basic Laws, in the light of which the Knesset's ordinary legislation should be reviewed, and with that I rest content.

My colleagues were divided on the question of who should bear the onus of proving that the infringement of a right protected in a Basic Law did not exceed what was proper. In this matter, I agree with the approach of my colleague Justice Mazza.

I concur with the result that the appeal in CA 6821/93 should be denied, and that the appeals in LCA 1908/94 and LCA 3363/94 should be allowed, and that the matters should be remanded to the lower court for further proceedings.

Decided as stated in the opinion of President Shamgar.

Handed down this day, 16 Heshvan 5755 (**November 9, 1995**)