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What is the ‘Doomsday Weapon’ – Annulment or Interpretation? A Critical Perspective on Constitutionally Conforming Interpretation in Israel

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I. Introduction

There is a general accepted method in constitutional review according to which every interpretive effort must be made to reconcile laws with protected constitutional rights and principles before such law is held unconstitutional. This is the German method of ‘interpretation in conformity with the Constitution’ (*Verfassungskonforme Auslegung*), that exists one way or another in different jurisdictions.¹ In the US, the famous *Ashwander* case provided various principles for a restraint judicial review, called the ‘Avoidance Doctrine’.² The relevant principles for our matter are those of:

4. The Court will not pass upon a constitutional question [...] if there is also present some other ground upon which the case may be disposed of [...] Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.³

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¹See Matthias Klatt (ed), *Constitutionally Conforming Interpretation – Comparative Perspectives, Volume 1: National Reports* (Oxford, Hart Publishing, 2023).

²*Ashwander v Tennessee Valley Authority*, 297 U.S. 288 (1936).

³*ibid* 347.

And:

7. 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 this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.⁴

Using such an interpretive method of ‘constitutional avoidance’,⁵ courts may choose the interpretation of a law that is compatible with the constitution rather than annulling the legislation under review. This is another ‘line of defence’ of the constitution, which avoids the remedy of annulment.⁶

However, we critically argue that often, interpretation in contrast with the explicit statutory text and/or legislative intent, even if conforming with the constitution, may be more violative of separation of powers. In other words, from the perspective of the principle of separation of powers, in certain cases it is preferable for the court to invalidate unconstitutional laws rather than to interpret them in accordance with the constitution, if such interpretation amounts to re-writing the law. Accordingly, interpretation is not always the more ‘conservative’ judicial method and may be more ‘activist’ than striking down legislation, as paradoxical as it may sound.

In order to support our claim, this chapter uses Israel as an example. Allegedly, constitutionally conforming interpretation (CCI) is an accepted doctrine in Israeli jurisprudence. Before the ‘constitutional revolution’, the court used the doctrine in the form of ‘rights conforming interpretation’ to justify the broadening of rights protection without constitutional supremacy. After the constitutional revolution, the court expanded the doctrine, using the form of ‘basic laws conforming interpretation’. Israeli courts have held that ‘constitutional review – the “doomsday weapon” shall be a last resort and used only when all other means have failed.’⁷ Even at the constitutional level, the interpretation of basic laws is subject to conforming interpretation, this time to the fundamental values of the state as a Jewish and Democratic state and seeking harmony between the various basic laws. However, as we shall argue, conforming interpretation is not always a symbol of judicial restraint but rather of judicial activism. In other words, sometimes invalidation of a statute is less intrusive than interpretation that is contrary to the explicit wording

⁴ *ibid* 348.

⁵ On the resemblance of this American ‘avoidance’ practice to the constitutional conforming principle, see Frederick Schauer, ‘United States. Constitutional Avoidance as Constitutional Conformation’ in Klatt (n 1) 267–81.

⁶ Ernst Livneh, ‘Basic Laws and Ordinary Legislation’ (1978) 13 *Israel Law Review* 251, 255.

⁷ HCJ 3267/97 *Rubinstein v Minister of Defence*, PD 52(2), 441, 524 (1988) (‘The Court circumvents possible delegation problems by making a narrow interpretation of statutory language, thus using the delegation doctrine as an Ashwander like principle. [...] The Courts in Germany adopted a similar approach. [...] We, too, have followed this approach, incorporating the law established in *Ashwander v Tennessee Valley Authority* (1936). Accordingly, all legitimate interpretative efforts must be made to avoid a law’s invalidation.’). The English translation is available at versa.cardozo.yu.edu/opinions/rubinstein-v-minister-defense. For a critical overview of the application of this doctrine in Israel, see also Gideon Sapir, ‘The Presumption of Conformity – Outlines of Its Character’ (unpublished manuscript, on file with authors, 2025) (Hebrew).

of the statute and the clear intent of the legislature. In this chapter we illustrate this argument by focusing on the Israeli case study.

This chapter proceeds as follows. Section II provides a brief history of Israeli constitutional law which is necessary to place the constitutionally conforming doctrine in context, and describes how the courts established and used the doctrine. Sections III and IV describe the development of the doctrine in Israeli case law before and after the 'constitutional revolution' of the 1990s. Section III describes how the Israeli Supreme Court used the principle of 'CCI' prior to the constitutional revolution, and section IV describes the more extensive use of doctrine as part of the constitutional revolution. Section V takes the doctrine to a specific Israeli expansion – using it at the constitutional level, in the context of unconstitutional constitutional amendment challenges. Recent Israeli case law had to consider that issue and whether the doctrine could be used to resolve it. In section VI we argue and demonstrate that often, using the doctrine with an interpretation of the laws in question that is completely contradictory to the legislature's intent or to the text, may be more intrusive in nature than invalidating the statute.

II. A Brief History of Israeli Constitutional Law

Israel's constitutional status is quite unique. For historical and political reasons, Israel does not have one document entitled 'Constitution' or 'Bill of Rights' as most countries do. Israel does have a series of so called 'basic laws' which regulate many (but not all) matters of a constitutional nature. The Israeli Supreme Court held that these basic laws are superior to ordinary laws and allow judicial review of The Knesset's (Israeli Parliament) ordinary legislation in case of conflict of such legislation with the basic laws. This section provides a brief summary of the structure of Israeli constitutional law, essential for a better understanding of the way the courts established and used the principle of CCI.

Israel was established in 1948, following United Nations General Assembly Resolution 181.⁸ That resolution held, with respect to the Jewish and the Arab states it aimed to form, that 'The Constituent Assembly of each State shall draft a democratic constitution for its State [...]'. The resolution further provided for the inclusion of specific provisions in the future constitution of the two states. These dictated provisions included those regarding the form of government,⁹ and a short list of civil rights to be guaranteed to all persons.¹⁰

⁸G.A. Res. 181 (II) (Nov. 29, 1947), available at www.gov.il/en/Departments/General/un-general-assembly-resolution-181.

⁹Establishing a legislative body elected by universal suffrage and by secret ballot on the basis of proportional representation, and an executive body responsible to the legislature.

¹⁰The resolution required 'Guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and

Israel's Declaration of Independence¹¹ followed Resolution 181 so as to rely on the international recognition. The Declaration thus anticipated a formal constitution-making process, and stated that a constituent assembly was to be elected shortly with the goal of adopting a constitution for the new state. The Declaration also established temporary authorities (legislative and executive) and regarding human rights, held that:

The State of Israel [...] will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

A Constituent Assembly was indeed elected.¹² But for political and historical reasons the 'original intent' of creating a constitution never fully materialised.¹³ Soon after its formation, on 16 February 1949, the Constituent Assembly – established to promulgate Israel's constitution – declared itself Israel's legislature by enacting the Transition Law, which provided that the legislative body shall be named 'the Knesset' and the Constituent Assembly shall be called 'the First Knesset'. That decision meant that the Constituent Assembly assumed dual capacity – being the legislative and constitutive body in one. That dual capacity has been held by the Israeli parliament until now.

In 1950, it became clear that because of disagreements over core values, the prospect of reaching a widely-acceptable constitution was not feasible in the near

association; Preserving freedom of transit and visit for all residents and citizens of the other State in Palestine and the City of Jerusalem, subject to considerations of national security, provided that each State shall control residence within its borders.'

¹¹ Formally entitled The Declaration of The Establishment of The State of Israel, available at www.gov.il/en/Departments/General/declaration-of-establishment-state-of-israel. On the history of the declaration, see Yoram Shachar, 'Jefferson Goes East: The American Origins of the Israeli Declaration of Independence' (2009) 10 *Theoretical Inquires in Law* 589.

¹² The Elections were held on 25 January 1959, even though the Declaration of Independence called for the elections to be no later than 1 October 1948. The elections were delayed because of the war of independence caused by the rejection by the Arab states surrounding Israel of the two-state solution envisioned by Resolution 181.

¹³ For a more detailed account, see Nir Kedar, *David Ben-Gurion and the Foundation of Israeli Democracy* (Bloomington, Indiana University Press, 2021); Daphne Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective' (1995) 26 *Columbia Human Right Law Review* 309, 312; Amos Shapira, 'Why Israel Has No Constitution, but Should, and Likely Will, Have One' (1993) 37 *St. Louis University Law Journal* 283, 285; Tamar Hostovsky Brandes, 'Israel's Legal System – Institutions, Principles and Challenges' in Guy Ben-Porat et al (eds), *Routledge Handbook on Contemporary Israel* (London, Routledge, 2022) and the Knesset's own account 'The Knesset as a constitutive authority: Constitution and basic laws', available at main.knesset.gov.il/EN/activity/pages/BasicLawsAndConstitution.aspx.

future.¹⁴ The Knesset subsequently adopted a resolution,¹⁵ which abandoned, at least temporarily, the effort to reach a single-document constitution. Instead, the Knesset decided to enact separate 'Basic Laws'. Each of these would arrange a different constitutional subject and be enacted as a separate act of Parliament in its capacity as the Constituent Authority. The Knesset decided that upon the future completion of the process, all Basic Laws would be combined into a single-document Constitution.¹⁶

Since 1950 the Knesset has enacted 13 Basic Laws,¹⁷ yet until 1992 all Basic Laws were structural in nature – regulating the branches of government and other State institutions.¹⁸ Basic Laws protecting civil rights were not enacted until 1992, primarily because it was hard to overcome the wide differences of opinions on human rights issues in the Israeli polity.

The absence of a written constitution or bill of rights did not prevent the young Israeli Supreme Court from protecting civil rights. The Court declared and strongly protected by way of case law most civil and human rights usually stated in written constitutions.¹⁹ The freedom of expression, freedom of movement, freedom of religion, equality and many other rights were recognised as fundamental rights, and enforced by the Israeli Court. In the absence of a written constitution and without any statutory authority to do so,²⁰ the Court found the legal basis for upholding these rights as arising from the 'nature of Israel as a freedom-seeking democratic state'.²¹ As one commentator notes, CCI is an important addition to

¹⁴ See Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (New Jersey, Princeton University Press, 1993) 3–18.

¹⁵ The 'Harari Resolution', adopted 13 June 1950: 'The First Knesset charges the Constitution, Legislative and Judicial Committee [of the Knesset] with the duty to prepare a draft Constitution for the State. The Constitution will be comprised of several Chapters, and each of the said Chapters shall in itself constitute a Basic Law. Each of the several chapters shall be brought before the Knesset as soon as the said Committee completes its work and all Chapters (already adopted) shall form the State's Constitution.' Cited in Eliahu Likhovski, 'Can the Knesset Adopt a Constitution that Will Be the Supreme Law of the Land?' (1969) *Israel Law Review* 61, 63.

¹⁶ See Suzie Navot, *Constitutional Law in Israel*, 2nd edn (Philadelphia, Wolters Kluwer, 2016) 21–23, 35–38. On the Israeli incremental constitution-making, see also Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge, Cambridge University Press, 2011) 51–108.

¹⁷ For a list of the Basic Laws, summaries and full text in English see main.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx.

¹⁸ The structural Basic Laws included Basic Law: The Knesset; Basic Law: Israel Lands; Basic Law: The President of the State; Basic Law: The Government; Basic Law: The State Economy; Basic Law: The Army; Basic Law: Jerusalem, the Capital of Israel; Basic Law: The Judiciary; and Basic Law: The State Comptroller. In 2014, the Knesset added another structural basic law – Basic Law: Referendum. In 2018 the Knesset passed Basic Law: Israel the Nation State of the Jewish People, discussed in s V below.

¹⁹ Amos Shapira, 'The Status of Fundamental Individual Rights in the Absence of a Written Constitution' (1974) 9 *Israel Law Review* 497; Asher Maoz, 'Defending Civil Liberties Without A Constitution – The Israeli Experience' (1987) 16 *Melbourne University Law Review* 815.

²⁰ Initially the Supreme Court held that the Declaration of Independence had no binding legal authority. For a critical assessment, see Michal Tamir, 'The Declaration of Independence as a Transitional Constitution: The Case of Israel' (2016) 8(1) *Middle East Law and Governance* 57.

²¹ H CJ 25/53, *Kol Ha'am Ltd. v Minister of the Interior*, 7(1) PD 165 (1953), English translation available at versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior; H CJ 243/62 *Film Studios Israel v Levi Geri*, 16 PD 2407 (1962).

the contribution of the Israeli Supreme Court to the creation of human rights in Israel, as the Supreme Court:

[N]ot only developed the norm that such basic values exist, but also developed the principle that statutes should be interpreted to avoid impairing these values. The Court reads statutes in such a way as not to violate the rights it has recognized. The Court also uses the values when reviewing the validity of administrative actions. Administrative actions that violate the basic values are held invalid.²²

In 1992 the Knesset started discussing several Basic Laws bills relating to civil rights. Two of these bills – Basic Law: Human Dignity and Liberty²³ and Basic Law: Freedom of Vocation²⁴ passed and became Basic Laws. Basic Law: Human Dignity and Liberty lists a series of enumerated constitutional rights, which include the protection of life, physical integrity and most important for our current discussion – human dignity (Articles 2 and 4), the protection of property (Article 3), personal liberty,²⁵ (Article 5) the external freedom of movement (Article 6) and the right of privacy (Article 7).

Article 8 of Basic Law: Human Dignity and Liberty, often referred to as the Limitation Clause, allows the violation of rights ‘under this Basic Law’ only 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.’²⁶ This section served the Supreme Court shortly thereafter in 1995, to hand down the Israeli equivalent of *Marbury v Madison*²⁷ – the *Bank Hamizrahi* case.²⁸ In *Bank Hamizrahi* the Court held that the two Basic Laws of 1992 are constitutional, in the sense that no ordinary legislation can contradict or limit the rights enumerated in them except to the extent permitted by them, most notably in the aforementioned Article 8. In this way the Court interpreted that it has the power of constitutional review, ie the power to strike

²² Marcia Gelpe, ‘Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space’ (1999) 13 *Emory International Law Review* 493, 508; see also Barak-Erez (n 13).

²³ Basic Law: Human Dignity and Liberty.

²⁴ Basic Law: Freedom of Vocation. This Basic Law is often referred to as Basic Law: Freedom of Occupation. Given the current political situation in the Middle-East, we prefer the name ‘Freedom of Vocation’.

²⁵ ‘Personal liberty’ is probably to be interpreted only in the physical sense, as the law reads: ‘There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.’ Basic Law: Human Dignity and Liberty.

²⁶ See Navot (n 16) 217–18. A similar provision is included in art 4 of Basic Law: Freedom of Vocation.

²⁷ *Marbury v Madison*, 5 U.S. 137 (1803). This is the classic American case announcing that the Supreme Court has the power of judicial-constitutional review. See Yoram Rabin and Arnon Gutfeld, ‘Marbury v. Madison and Its Impact on Israeli Constitutional Law’ (2007) 15(2) *University of Miami International Law and Comparative Law Review* 303.

²⁸ CA 6821/93, *United Bank Mizrahi v Migdal*, 49(4) PD 221 (1995). For a detailed description of the case, see Barak Cohen, ‘Empowering Constitutionalism with Text from an Israeli Perspective’ (2003) 18 *American University International Law Review* 585, 641–48; Suzie Navot, ‘Mizrahi Bank Case (Isr)’ in *Max Planck Encyclopedia of Comparative Constitutional Law*, available at oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e597?rskey=9d8OP8&result=32&prd=MPECCOL.

down a statute which infringes a right included in Basic Law: Human Dignity and Freedom if that statute does not hold to the standards of Article 8.²⁹

Since *Bank Hamizrahi*, in 30 years, the Israeli Supreme Court has declared 24 Knesset Statutes partially unconstitutional and thus invalid.³⁰ This drew sharp criticism from politicians, one result being that the Knesset has slowed down the enactment of additional Basic Laws.³¹ As a result, several very important rights have not yet been incorporated into Basic Laws. These include freedom of expression, the freedom of association, freedom of religion and from religion, and the principle of equal protection (the right to equality). The practical solution, once again, was court activism, resulting in still more controversy.

In a series of cases since 1994, the Supreme Court has used the protection of human dignity in Basic Law: Human Dignity and Liberty as a springboard for upholding other civil rights normally found in other bills of rights but not included in that basic law. A simplified explanation of the general form of these cases is this: one cannot have human dignity to its fullest without having freedom of expression/equal protection etc, hence the right to human dignity includes these non-enumerated rights.³² In this manner, the Supreme Court may invalidate a statute for unduly infringing a right which was not elevated to constitutional status in the slow piecemeal legislative process, simply by viewing this right as a part of human dignity. Thus, the right to dignity, a right with very little presence in the US legal system,³³ became the cornerstone of the Israeli partial bill of rights. Interpreted broadly, it became a major tool for Israeli judicial review of legislation and administrative actions.³⁴

²⁹ For further analysis, see generally Joshua Segev, 'Who Needs a Constitution – In Defense of the Non-Decision Constitution-Making Tactic in Israel' (2006–2007) 70 *Albany Law Review* 409; Aharon Barak, 'A Constitutional Revolution: Israel's Basic Laws' (1993) 4 *Constitutional Forum* 83; Gideon Sapir, *The Israeli Constitution: From Evolution to Revolution* (Oxford, Oxford University Press, 2018).

³⁰ See eg HCJ 1715/97 *Association of Investment Managers in Israel v Minister of Treasury* 41(4) PD 367 (1997); HCJ 6055/95 *Zemach v Minister of Defense* 43(5) PD 241 (1999); HCJ 1030/99 *Oron v Speaker of the Knesset* 56(3) PD 640 (2002). A Magistrates' (first tier) Court declared another statutory section unconstitutional, holding that any court in Israel has the power to do so. CrimC (TA) 4696/01 *State of Israel v Hendelman, PM* (unpublished, 2003). See also Guy Lurie and Yuval Shany, 'Invalidations of Laws in Israel in a Comparative Perspective' (2019) 49 *Israel Yearbook on Human Rights* 261.

³¹ In 2003, the Knesset's Law, Constitution, and Justice Commission launched an effort to complete the constitution 'by a wide consensus' that did not succeed. The only exceptions were the Basic Law: Referendum, which was passed in 2014 and Basic Law: Israel the Nation State of the Jewish People passed in 2018.

³² Gary J Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (New Haven, Yale University Press, 2020) 208–11. For a broader description and analysis, see Tamar Hostovsky Brandes, 'Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters' in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Oxford, Hart Publishing, 2013) 267, 269–83; and Izhak Englard, 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' (2000) 21 *Cardozo Law Review* 1903, 1925.

³³ On human dignity and US law, see eg Vicki C Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15; Rex D Glensy, 'The Right to Dignity' (2011) 43 *Columbia Human Rights Law Review* 65; and Maxine D Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2006) 84 *Nebraska Law Review* 740, 780.

³⁴ See Aharon Barak, *Human Dignity – The Constitutional Value and the Constitutional Right* (Cambridge, Cambridge University Press, 2015) 156–83.

III. Constitutionally Conforming Interpretation Prior to the Constitutional Revolution

This section describes the ways in which the Israeli Supreme Court used the principle of CCI prior to the Constitutional Revolution of the 1990s.

As described in the previous chapter, during this period human rights were not based on a constitution or even basic laws. It was the Supreme Court which advanced human rights upon appropriate cases. CCI was then used by choosing statutory interpretations that would broaden the scope of a human rights and limit the State's ability to infringe on them.

Aharon Barak, who was both an influential Justice (and then President) of the Israeli Supreme Court and a prolific academic writer, wrote in his monumental treatise on interpretation: 'The Presumption is that every piece of legislation seeks to advance human rights and does not seek to infringe on them [...] Out of two possible interpretations, the choice should be that interpretation that upholds human and civil rights.'³⁵ One application of the rule was to favour interpretations that reduce the infringement on civil rights. In one case the Supreme Court held: 'When the authority has a material violation of a basic right of a citizen in a free society, we will not hesitate to hold in favour of the interpretation that reduces the damage to civil rights, because the presumption is that the legislator respects these rights.'³⁶

A significant case in that respect is *Kol Ha'Am v Minister of the Interior*,³⁷ in which the Court held that freedom of speech could be derived (in the absence of a constitution or even legislation) from the very nature of the state as a democratic state, since freedom of speech is an inherent feature of democracy.³⁸ The Supreme Court went on to interpret a statute explicitly limiting freedom of speech in a very liberal interpretation that would protect the newly-declared right further.³⁹

In the *Kol Ha'Am* case, the Court reviewed an order by the Minister of the Interior suspending the publication of two newspapers associated with the opposition's communist party for 10 and 15 days, respectively. The Minister (which inherited the authority of the British Mandate High Commissioner) had exercised his authority derived from the Press Ordinance, according to which the High Commissioner may suspend the publication of a newspaper 'if any matter

³⁵ Aharon Barak, *Interpretation in Law, Vol. II Statutory Interpretation* (Jerusalem, Nevo Publishing, 1993) 553.

³⁶ HCJ 124/70 *Shemesh v the Registrar of Companies*, PD 25(1) 505, 513 (1971).

³⁷ HCJ 73/53 *Kol Ha'Am v Minister of the Interior*, PD 7 871 (1953) English translation available at versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior and at supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C53%5C730%5C000%5CZ01&fileName=53000730_Z01.txt&type=4.

³⁸ *ibid*; see Daniel J Rothstein, 'Adjudication of Freedom of Expression Cases under Israel's Unwritten Constitution' (1985) 18 *Cornell International Law Journal* 247, 261–72.

³⁹ HCJ 73/53 (n 37); see also Stephen Goldstein, 'Protection of Human Rights by Judges: The Israeli Experience' (1994) 38 *Saint Louis University Law Journal* 605, 611.

appearing in a newspaper is, in the opinion of the High Commissioner in Council, likely to endanger the public peace ...⁴⁰

The High Court of Justice was well aware of the precedential importance of the case.⁴¹

Accepting that the 'right to freedom of expression is not an absolute and unlimited right, but a relative right', the Court had to interpret what is the standard that would be 'likely to endanger the public peace', ie which degree of behaviour would justify the suspension of the newspapers.

The Court considered two possible approaches:

According to one approach it is sufficient, in order to satisfy the condition stated in the section in question that the publication reveals only a tendency – even a slight or remote tendency – in the direction of one of the consequences that we included in the notion, "endangers the public peace"; while according to the other approach, the Minister of Interior must be convinced beforehand that there has been created, having regard to the circumstances in which it takes place, a link between the publication and the possibility of one of the said consequences occurring, which must lead to the inference that the occurrence of that consequence is probable.

The Court proceeded to state that Israel 'is indeed a state founded on democracy' and 'a freedom-loving State.' Despite previous case law that held that Israel's Declaration of Independence 'does not consist of any constitutional law laying down in first any rule regarding the maintaining or repeal of any ordinances or laws',⁴² the Court held that insofar as it 'expresses the vision of the people and its credo [...] we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State'.

The Court then concluded that this analysis leads to the conclusion 'that we must interpret the term "likely", when we read it together with the other matters stated in section 19(2)(a), in the sense of "probability" rather than in the spirit of the view which favours the doctrine of the "bad tendency" and "indirect causation"'. Bottom line: The authority of the Minister of Interior was severely limited by CCI.

Another application of the CCI rule was established in the area of delegated (or secondary) legislation. In *Mitrani v Minister of Transportation*,⁴³ the Minister exercised his authority to regulate automobiles' annual inspection to hold that only the car's owner or a licensed carshop worker may bring the car for inspection. The purpose of the regulation was to eliminate the 'service' of middlemen specialising in getting the cars to pass inspection even if they should not have. The purpose

⁴⁰ Section 19(2)(a) of the Press Ordinance.

⁴¹ Simon Agranat J: 'From time to time, a case reaches this court which raises some fundamental problem, demanding the reconsideration of ancient and well-worn principles. The two cases in question here belong to that group.'

⁴² For a background on Israel's declaration of independence see Suzie Navot, *The Constitution of Israel – A Contextual Analysis* (Oxford, Hart Publishing, 2014) 4–6, 12–15; Tamir (n 20).

⁴³ HCJ 337/81 *Mitrani v Minister of Transport*, PD 37(3) 337 (1983).

was to increase car safety, since the middlemen were considered detrimental to the inspection's purpose.

The middlemen petitioned to the High Court of Justice since the new regulation practically put them out of work.

The Court held the regulation illegal despite its important purpose because the statute granting the Minister's authority to regulate the annual inspection did not explicitly authorise the Minister to violate the freedom of vocation. The Court held that 'as a rule, a law will not be construed as violating or as granting power to violate the freedom of vocation unless it is explicitly determined therein.' The Court added that 'authorization for this purpose, means express authorization, and for my part, I refer exclusively to a case in which the primary legislator states clearly and expressly that he authorizes the secondary legislator to enact regulations that establish prohibitions or restrictions on occupation in a particular profession.'

The Mitrani Court again applied CCI with no written constitution and with respect to human rights which were developed by the Supreme Court.

However, until the constitutional revolution of the 1990s, the court was clear that CCI has its limits: the principle will not be used to overcome a law which explicitly and unequivocally limits human rights. The Court stated that 'when there is an explicit legal instruction of the Knesset that leaves no room for doubt, it must be followed, even if it is incompatible with the principles of the Declaration of Independence.'⁴⁴

A special place was given to equality-conforming interpretations. Again, until the constitutional revolution of the 1990s the general right to equality was not founded in any basic law.⁴⁵ But given the Court's view on the importance of the right to equality, the Court used the conforming interpretation principle in many cases in varied fields. For example, in tax appeals the Court favoured interpretations that would increase equality between different taxpayers.⁴⁶ In a tort case, the Court held that immunity provisions need to be interpreted narrowly, again to favour equality.⁴⁷

So, without a constitution, and with the Court developing a judicial bill of rights, before the constitutional revolution, the Court's approach was 'rights conforming interpretation'. This was developed to ensure a better protection of rights not in order to avoid striking down laws – because the Court lacked the authority to invalidate Knesset's legislation. Following the constitutional revolution in the mid-1990s, this method became similar to the CCI method.

⁴⁴ CA 450/70, *Rogozinsky v The State of Israel*, PD 26(1) 129 (1971). See Gideon Sapir, 'Constitutional Revolutions: Israel as a Case-Study' (2009) 5(4) *International Journal of Law in Context* 355.

⁴⁵ At that time only specific areas of equality were enacted into ordinary legislation. These include a prohibition to discriminate in the area of labour law, and gender equality. Basic Law: the Knesset includes a provision that required equality in elections.

⁴⁶ CA 527/76 *Kuperberg v Tax Collector Haifa*, PD 31(2) 138 (1977).

⁴⁷ CA 437/65 *Maurer v Regional Council High Gallilee*, PD 20(3) 645 (1966).

IV. Interpretation in Accordance with the Basic Laws after the Constitutional Revolution

Already in the famous *Bank Hamizrahi* case, in which the Supreme Court recognised its judicial review power, President Shamgar referred to the abovementioned *Ashwander* rules that have been shaped to serve the courts when deciding upon the invalidity of legislation on constitutional grounds in order to 'examine claims of unconstitutionality with caution and restraint.' President Shamgar noted that '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.'⁴⁸ As we shall demonstrate, the Israeli Supreme Court has generally taken this approach, but not always.⁴⁹

In his book on constitutional interpretation, published in 1994, after the enactment of the two basic laws on human rights in 1992, Aharon Barak explained the aspiration for a normative harmony. Interpreting laws according to the constitution, he wrote, means the interpretation of laws in a manner that would be compatible with the constitution and not contradict it. So, between two possible interpretations, one has to choose the interpretation that results in an accordance between the law and the constitution and not the interpretation that results in a conflict resulting in an unconstitutional law. According to Barak, this conception is derived from the desire to ensure a normative harmony in the legal system. An interpretation that leads to a contrast between the constitution and laws creates an undesirable disharmony, hence the interpreter should aspire to make the laws conform with the constitution.⁵⁰

Elsewhere, Barak explained that this rule of interpretation is not a constitutional remedy but rather part of the ordinary rules for statutory interpretation. It applies to all laws and not only to laws that do not correspond with the limitations of the constitution. In other words, this interpretive rule does not necessitate a judicial ruling that the law violates a constitutional right not in accordance with the limitation clause and is thus unconstitutional; on the contrary, this interpretation in accordance with the basic laws is meant to avoid the unconstitutionality of the law and the need to declare it as unconstitutional and void.⁵¹

The use of this method by the Court may be exemplified by various important constitutional cases, for example, by the *Zandberg v Broadcasting Authority* case, shortly after the constitutional revolution.⁵² This case followed a series of court cases holding that the Broadcasting Authority charged citizens an excessive fee compared with the legal fee. Following this determination, the Knesset enacted

⁴⁸ CA 6821/93 (n 28), paras 88–90.

⁴⁹ Hillel Sommer, 'In Favor of Judicial Restraint in Constitutional Cases' (2012) 14 *IDC Law Review* (2012) 155, 178–80.

⁵⁰ Aharon Barak, *Constitutional Interpretation* (Jerusalem, Nevo Publishing, 1994) 116–17.

⁵¹ Aharon Barak, 'On the Theory of Constitutional Remedies' (2017) 10 *Law and Business* 301, 311.

⁵² HCJ 4562/92 *Zandberg v Broadcasting Authority* *IsrSc* 50(2) 793, 800 (1996).

a law that retroactively ratified the excessive fee as charged by the Broadcasting Authority. The petitioner accepted the payment of the fee itself (which was ratified by the retroactive law), but challenged the payments of fines for arrears and linkage differences, which he considered a violation of the right to property which is protected in Basic Law: Human Dignity and Liberty. In order to avoid the constitutional conflict and to avoid the need to invalidate a law for unconstitutionality, the Supreme Court chose to interpret the retroactive statute as not applicable to fines for arrears, even though arriving at this interpretation was not simple. In his ruling, President Barak wrote that the interpreter's ambition is to portray the law as consistent with the constitution:

it is preferable to limit the scope of a law by means of interpretation rather than be required to reach that same limitation by way of the declaration of part of that law as nullified since it contradicts the provision of a Basic Law [...] The reasonable interpretation of a law is preferable to a determination regarding its constitutionality.⁵³

Thus, from two possible interpretations, the constitutionally-harmonious one must be chosen, as was done in this case.

The case of *Segal v Knesset Speaker*,⁵⁴ delivered a year later, raised another interesting constitutional question relating to the broadcasting fee – this time a fee specific to vehicle owners who paid the fee as part of their annual car licence fee. The petitioners, owners of a private car, were required to pay the annual broadcasting fee even though their car did not have a radio receiver installed, since the law held that ‘the vehicle owner is obligated to pay the vehicle license fee in full regardless of the presence or absence of a radio receiver in the vehicle.’

The petitioners argued that imposing the fee on those who do not have a radio receiver installed in their car would violate their constitutional right to property and should be declared as unconstitutional. The majority rejected this argument. Justice Goldberg held that ‘when the language of the norm is not vague, and the purpose of the legislation can be upheld, there is no justification for deviating from the linguistic meaning, which is consistent with the purpose of the legislation, in the name of the fundamental principles. Otherwise, the fear arises that we are not interpreting a norm but creating a norm to replace it.’⁵⁵ We shall return to such criticism in section VI. In any event, the majority opinion was that the infringement on the right is proportionate and accordingly the law is constitutional.⁵⁶ But the dissenting opinion of Justice Cheshin is of relevance to our matter.

Cheshin begins the dissenting opinion by citing the relevant *Ashwander* rules, claiming that these ‘rules that we have brought are the sons of common sense, and it is appropriate that we adopt them. These rules have been applied to this day on secondary legislation – for example, the rule of *ut res magis valeat quam pereat*

⁵³ *ibid* 812.

⁵⁴ HCJ 5503/94 *Segal v Knesset Speaker*, IsrSC 51(4) 529 (1997).

⁵⁵ *ibid* 539.

⁵⁶ *ibid* 544.

(let the thing live and not perish) – and should apply, all the more so, on primary legislation.⁵⁷ Accordingly, before considering constitutionality, one must examine the possibility of deciding the case by interpretation of the law.⁵⁸ This leads Justice Cheshin to hold that as long as the law does not explicitly state that the radio fee applies to car owners without a radio receiver, it should be interpreted to impose the radio fee only on car owners who have a radio receiver in their car, and not on car owners without one. This interpretation rests on basic legal principles, principles of fairness and justice.⁵⁹

In the *Ganimat* case,⁶⁰ the principle of conforming interpretation of laws that were enacted prior to Basic Law: Human Dignity and Freedom arose. This was a challenging question because laws enacted prior to the enactment of Basic Law: Human Dignity and Freedom are protected from invalidation by a grandfathering clause holding that: 'This Basic Law shall not affect the validity of any law that existed prior to the inception of the Basic Law.'⁶¹ Do the words 'affect the validity' refer only to invalidation of the law, ie so that the Court cannot strike down a pre-1992 law or does the grandfathering also prevent the new CCI of a pre-1992 law? In *Ganimat*, that centred on the interpretation of the law of arrest in light of the elevation of the right to personal liberty to constitutional right under Basic Law: Human Dignity and Freedom: the majority of the Supreme Court held that although the old arrest legislation is protected from judicial review given the grandfathering clause, the Court may allow the new constitutional right to change the interpretation of pre-1992 laws.⁶² According to President Aharon Barak:

It is here that the Basic Law performs its interpretive deed. Under its influence, different weights are likely to be assigned to the protected values and interests. Consequently, there is liable to be a change in the point of balance between the interests and the values that constitute the objective purpose of the law [...] The piece of legislation is no different, but its meaning is different. The validity of the existing law is preserved, however there is a change in the scope of its deployment.⁶³

President Barak noted in his ruling that with the enactment of the basic laws the status of human rights has changed – human rights are given constitutional status. Rules of interpretation express the need to maintain a constitutional harmony that requires that the basic law also affects old legislation. And so, the interpretation in

⁵⁷ *ibid* 549–50.

⁵⁸ *ibid* 548–50.

⁵⁹ *ibid* 553–54, 560, 568–69. See also Aharon Barak, 'Statutory Interpretation: The Approach of Justice Mishael Cheshin' (2024) 26 *IDC Law Review* (forthcoming).

⁶⁰ CrimFH 2316/95 *Ganimat v State of Israel*, 49(4) PD 589, 654 (1995). An English translation is available in (1997) 15 *Israel Law Review* 754–63.

⁶¹ Section 10 of Basic Law: Human Dignity and Freedom. For a general discussion, see Rivka Weill, 'Bills of Rights with Strings Attached: Protecting Death Penalty, Slavery, Discriminatory Religious Practices and the Past from Judicial Review' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, Cambridge University Press, 2019) 308.

⁶² CrimFH 2316/95 (n 60).

⁶³ *Israel Law Review* (n 60) 762.

accordance with the basic laws applies not only to laws that are enacted after Basic Law: Human Dignity and Liberty but also to pre-1992 laws.

Thus, the Supreme Court's general approach, as pronounced in the *Hoffnung* case that dealt with the issue of equality in elections, is that: 'the court tends to interpret the law (and it does this even with regard to secondary legislation and even with regard to a contract) in a way that is compatible with the constitutional principles, and as a result it can be maintained and not annulled. In this way, the court can often cancel, or at least reduce, the possible infringement of a law on constitutional principles, such as human rights or equality in elections.'⁶⁴

The method of interpretation in accordance with the basic laws has been applied not only to the basic laws on human rights, but also to institutional basic laws.

One example is the *Herut* case which dealt with the disqualification of a television commercial for elections of the 16th Knesset. The commercial included a jingle composed from the tune of the national anthem, combined with words of praise and congratulations to Yasser Arafat and a call for the deportation of Jews from Jaffa and Ramla. The Israeli flag was shown above the Knesset building turning into the Palestinian flag within seconds. The chairman of the central elections committee decided to disqualify the commercial holding that it caused severe damage to the honour of the flag and humiliated the national anthem.⁶⁵ The State Attorney argued that this decision was final and that the High Court of Justice lacks the authority to review it. The argument was based on section 137 of the Knesset Elections Law (Consolidated Version) 1969: 'Any complaint as to an act or omission under this Law shall be within the exclusive jurisdiction of the Central Committee, and, save as otherwise provided by this Law, *no court shall resort to an application for relief relating to any such act or omission or to any decision or direction* of the Central Committee, the Chairman and Vice-Chairman of the Committee [...]' (emphasis added). Prior to the constitutional revolution, this provision was interpreted as granting 'procedural immunity' from judicial review, even by the High Court of Justice. The Court rejected the previous decisions and highlighted that the authority of the High Court of Justice was anchored in Basic Law: The Judiciary which is a superior law which an ordinary law cannot modify. Accordingly, President Aharon Barak noted in his majority opinion:

inasmuch as section 137 of the Elections Law – which states that 'no court' shall grant the remedies there stated – can be interpreted as negating the authority of the High Court of Justice, it is unconstitutional, and thus void regarding its application to the High Court of Justice. Of course, the law continues to apply to all other courts. This same conclusion may be reached – and I think more properly – by reinterpreting the phrase 'no court' as referring to all other courts besides the High Court of Justice. This

⁶⁴ HCJ 3434/96 *Hoffnung v The Speaker of the Knesset*, 50(3) PD 57, 68 (1996).

⁶⁵ HCJ 212/03 *Herut National Movement v Chairman of Central Elections Committee*, 57(1) PD 750 (2003). An English translation is available at supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/03/120/002/A04&fileName=03002120_a04.txt&type=4.

interpretation reflects the view that 'it is preferable to limit the scope of a law through interpretation, rather than achieve the same result by declaring a part of that law as being unconstitutional and void.' [...] As such, we find that we have the authority to consider the petition at hand.⁶⁶

And so, a narrow interpretation which is contrary to the explicit wording of the law was given in order to avoid a declaration of unconstitutionality and invalidation of the law.

A somewhat similar battle over statutory text appeared in the *Ganis* case.⁶⁷ Here, the Knesset passed Amendment No. 5 of the Housing Loans Law that gave certain persons an entitlement to financial grants for the purchase or expansion of an apartment in Jerusalem. After the elections, about six weeks later, the Knesset suspended the grants by section 20 of the Arrangements Law, and included an explicit provision to the effect that the suspension of the grants was retroactive, from the date on which the grants originally came into effect. The petitioners challenged this retroactive suspension of the grants, on the grounds that they had relied on the grants and undertook to buy or expand an apartment in Jerusalem during the interim period, and therefore the retroactive suspension of the grants violated their protected right to property in Basic Law: Human Dignity and Freedom and was thus unconstitutional.⁶⁸

The Supreme Court held unanimously that the Knesset had acted improperly when it retroactively suspended the grants, since it had not considered the possibility that some persons may have taken financial commitments upon themselves as a result of relying on the grants. However, the justices differed as to the proper approach that should be adopted to remedy the situation.

Albeit the explicit statutory text, the majority opinion opted for interpretation compatible with the constitution. It held that it was possible to construe the statute narrowly in such a way that the retroactive suspension would only apply to potentially entitled persons who had not relied on the statute during the interim period, but it would not apply to those entitled persons who did rely on the statute during the interim period. See, for example, Justice Cheshin, for the majority: 'for the purpose of determining the scope of the application of section 20, and relying on the basic presumption – which adopts the guise of a rule of interpretation – that tells us that the legislator will not act unjustly to an individual nor will he turn his back on persons who followed him and relied on promises and undertakings that he made, we will interpret section 20 as seeking to apply only to persons who did not rely on the legislator's promise and not to apply to persons who relied on the legislator's promise.'⁶⁹ In contrast, the minority opinion – to which we shall return

⁶⁶ *ibid* 755–56.

⁶⁷ HCJ 9098/01 *Ganis v Ministry of Building and Housing*, 59(4) PD 241 (2005). An English translation is available at versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ganis%20v.%20Ministry%20of%20Building%20and%20Housing.pdf.

⁶⁸ *ibid* 257–58.

⁶⁹ *ibid* s 23 to Mishaël Cheshin J's opinion.

in section VI – was that it was not possible to construe the statute narrowly as aforesaid, and therefore one cannot avoid the constitutionality examination according to which the retroactive suspension ought to be declared void.

In various other cases concerning constitutional protected rights, the Supreme Court has repeated the idea that statute should be interpreted in harmony with the constitutional system and with fundamental values in order to avoid annulling a law.⁷⁰

The method of interpretation according to the Constitution has been applied by the Israeli Supreme Court not only to protect against infringement of constitutional rights or violations of basic laws, but more broadly to correspond with general legal principles. A recent example is the case of personalised law in local authorities' elections.⁷¹ The petitions in this case challenged the validity of the Local Authorities Law (Elections) (Amendment No. 53), which amended section 7 of the 1965 Local Authorities Law (Elections). This amendment removed a limitation and allowed individuals who held caretaker mayor positions to run in subsequent local elections. The problem was that this law was designed to benefit a particular candidate in the local elections in Tiberius (a small city in Israel).

The judiciary's opinions on the law varied, yet there was a consensus that it should not influence the imminent local elections. Acting President of the Supreme Court Uzi Vogelman expressed reservations about the law, stating it undermined the neutrality and professionalism of caretaker appointed committees and unfairly altered the competitive landscape for local election candidates. He criticised the timing of the amendment's enactment, during an electoral period, and its being tailored to benefit one person's mayoral candidacy. Without reaching a clear conclusion on the right to vote and the right to be elected or the principle of equality in local elections, and avoiding these constitutional questions by citing the *Ashwander* rules, Justice Vogelman opted to interpret the timing of the law's implementation rather than assess its legality outright, in line with treating constitutional invalidation as a measure of last resort. He distinguished between the law's explicit, personal aim for quick application and its broader, objective purpose, advocating for the latter by highlighting the importance of stability in electoral rules and the general applicability of laws; thereby deciding that the amendment not be enforced in the upcoming electoral cycle: 'providing that the amendment shall not apply on the upcoming municipal electoral cycle is the interpretive alternative that its infringement upon the legal system's basic

⁷⁰ See eg CrimA 6659/06 *Doe v State of Israel*, 62(4) PD 329, 345 (2008); CrimApp 8823/07 *A v State of Israel*, 63(3) PD 500 (2009); HCJ 3809/08 *Association for Civil Rights in Israel v Israel Police*, pp 7, 27 (Nevo, 28 May 2012); HCJ 5113/12 *Friedman v The Knesset*, p 3, (Nevo, 7 August 2012); HCJ 7385/13 *Eitan – Israel's immigration policy v Government of Israel*, p 60, (Nevo, 22 September 2014); HCJ 5239/11 *Avnery v The Knesset*, p 17, (Nevo, 15 April 2015); HCJ 8665/14 *Desta v The Knesset*, 30, (Nevo, 11 August 2015); FHCJ 5026/16 *Gini v Chief Rabbinate of Israel*, p 4, (Nevo, 12 September 2017).

⁷¹ HCJ 5119/23 *Anti-Corruption Movement v The Knesset* (Nevo, 26 October 2023).

principles is the more limited. The opposite interpretive stance means that in the delicate area of election law, the law of elections, during elections, was amended to benefit one person.⁷²

The use of CCI in this case raises a theoretical difficulty. As aforementioned, this rule is intended to prefer the interpretation that recognises the constitutionality of the law (and its validity) over the interpretation that leads to its unconstitutionality (and its invalidation). But this was not the case here. The existing flaws in Amendment No. 53 – the personal motive, the impairment of the functioning of called committees and a real-time change of the 'rules of the game' – do not constitute sufficient anchors for striking down a law due to unconstitutionality according to existing law. There is no explicit constitutional rule prohibiting 'personal legislation' and there is no explicit constitutional rule providing for equality in municipal elections. As Elad Gil wondered, even if these flaws are undesirable from policy point of view, if repeal is not on the agenda, it is not CCI.⁷³ Yet this case demonstrates how far the Court has taken the idea of conforming interpretation.

V. Interpretation According to the Constitution at the Constitutional Level

Finally, Israel presents another interesting case. As we explained, Israel has no rigid constitution and *a fortiori* no explicit unamendable provisions ('eternity clauses').⁷⁴ There are numerous basic laws which function as constitutional documents, superior to ordinary legislation and enforced by strong judicial review but peculiarly, the basic laws are enacted through precisely the same process as ordinary legislation.⁷⁵ In other words, in Israel, there are generally no procedural, substantive or temporal explicit limits on the Knesset's constituent power, and, with some very minor exceptions, basic laws can be enacted and amended very quickly and through a simple majority.⁷⁶ Does that mean that in exercising its constituent power, the Knesset is omnipotent? Not necessarily.

For many years, the Israeli Supreme Court has stated, in various *obiter dicta*, that there are basic constitutional principles, mainly the character of the state as

⁷² *ibid*, para 62 Uzi Vogelmann J.

⁷³ See Elad Gil, 'Interpretation empowers democracy: its applicability is rejected as an interpretive remedy, following the cases of the Law of Tiberias and the Law of Incapacitation' (*ICON-S-IL Blog*, 24 September 2023), available at israeliconstitutionalism.wordpress.com/2023/09/24/240923/.

⁷⁴ On eternity clauses, see Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (Oxford, Oxford University Press, 2017); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford, Oxford University Press, 2021).

⁷⁵ See Rivka Weill, 'Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care' (2012) 30 *Berkeley Journal of International Law* 349.

⁷⁶ Suzie Navot, 'Israel' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change – A Comparative Study* (Oxford, Hart Publishing, 2011) 191.

Jewish and Democratic, that might limit even the Knesset's constituent power.⁷⁷ But such judicial statements were always voiced with due precaution and as non-binding *obiter dicta*. Until recently, there was no precedent regarding the limits to the Knesset's constituent authority, and *a fortiori* no basic law was ever invalidated for violating basic constitutional values.

The question received an interesting treatment in the dramatic judgment on Basic Law: Israel the Nation State of the Jewish People enacted on 19 July 2018. This Basic Law was meant to be another 'chapter' in the Israeli Constitution dealing with the Nation's identity. It established that Israel is the 'national home of the Jewish people', and dealt with state symbols like the flag and national anthem, the official language, national holidays, the Sabbath, Jerusalem as the capital, etc.⁷⁸

Supporters of the Basic Law state that it is mainly declaratory and does not change the existing legal state of affairs. Opponents claim that because it mentions neither the democratic nature of the state nor the principle of equality, it allows discrimination against the non-Jewish minorities in Israel and aims to have the 'Jewish' feature of the state prevail over the 'democratic' feature. Moreover, the provisions regarding the 'exclusive' right to self-determination for the Jewish People (Article 2), the lowered status of the Arabic language from an official language to 'special status' and the provision stating that 'The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation' (Article 7), are allegedly discriminatory towards non-Jews.

After the enactment of this Basic Law, multiple petitions were filed to the High Court of Justice asking that Basic Law: Israel as the Nation State of the Jewish People be declared null. The challenges against the 'constitutionality' of the Basic Law brought to the fore the question whether the HCJ possess the power to review basic laws, which have constitutional status.

On 8 July 2021, an eleven-judge panel rejected the petitions.⁷⁹ The 201-page decision has ten justices in the majority, each of whom wrote a separate opinion. It also includes the single minority opinion of Justice Kar'a, the only Arab judge in the Court, and the only justice who thought that several of the Basic Law's provisions should be invalidated for undermining the core democratic identity of the state and shaking the foundations of its constitutional structure.

⁷⁷ See, for elaboration, Sharon Weintal, 'The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory' (2011) 44(3) *Israel Law Review* 449; Mazen Masri, 'Unamendability in Israel – A Critical Perspective' in Richard Albert and Bertil Emrah Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Berlin, Springer, 2018) 169; Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) *European Journal of Law Reform* 403.

⁷⁸ For an English translation of the full text of the basic law, see main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf.

⁷⁹ HCJ 5555/18 *Hasson v the Knesset* (rendered 8 July 2021).

The main opinion of the majority was written by President Hayut. Consistent with her approach in earlier cases,⁸⁰ President Hayut held that it was not the time to adopt a comprehensive doctrine regarding the constitutionality of constitutional amendments, because the constitution-making process is still ongoing.⁸¹ Nevertheless, Hayut's ruling clearly stated that the Knesset's legislative power when enacting or amending Basic Laws is not unlimited: 'this does not necessarily mean that in the absence of such a comprehensive doctrine, the powers of the Constituent Assembly in Israel are unlimited.'⁸² The Court declared that the constituent power of the Knesset is limited in the sense that 'The Knesset cannot deny in a basic law the very existence of Israel as a Jewish and democratic state.'⁸³ And for this matter, it was irrelevant for President Hayut and the Court that the constitution-making process is still ongoing: 'Indeed, our constitutional structure is incomplete and it is quite possible that floors and branches will be added along the way, but these two pillars – the Jewish pillar and the democratic pillar – have long been placed in it. Denial of any of them leads to the collapse of the entire structure.'⁸⁴

Notwithstanding this decision, regarding the limited scope of the Knesset's constituent power, there was no clear statement as to whether the Court is empowered to repeal or invalidate a basic law that would undermine the core values of the state as Jewish and democratic. The majority ruled that there was no need to decide upon the power of the Court to invalidate basic laws, because, as President Hayut noted: 'Even if I assume for the purpose of this case that the Court is empowered to judicially review the content of basic laws, Basic Law: the Nation State does not negate the Jewish and democratic characteristics of the state in a manner that justifies interference with its content.'⁸⁵ In other words, instead of solving the constitutional difficulty through the doctrine of unconstitutional constitutional amendment, the Court solved them through interpretation.

The Court interpreted the 'problematic' provisions of the basic law narrowly, as compatible with the principles of democracy and equality. According to the Court, the basic law does not undermine the democratic nature of Israel because all the principles that are missing from the basic law (such as the principle of equality and the idea of a democratic state), exist anyway in the Israeli legal system, including in other basic laws. The Court stated, for example, that the impugned basic law does not negate the character of Israel as a democratic state, it does not give priority to the Jewish identity of Israel over the principle of democracy; it does not detract from or limit the status of equality in the legal system and it does not deny personal rights to members of minority groups. Those conclusions are reached following enabling or conforming interpretation, as well as a presumption of constitutional

⁸⁰ See eg HCJ 10214/16 *MK Yousef Jabareen v Knesset* (27 May 2018), para 25 of President Esther Hayut's opinion.

⁸¹ HCJ 5555/18 (n 79), para 15 of President Esther Hayut's opinion.

⁸² *ibid*, para 15 of President Esther Hayut's opinion.

⁸³ *ibid*, para 16 of President Esther Hayut's opinion.

⁸⁴ *ibid*, para 18 of President Esther Hayut's opinion.

⁸⁵ *ibid*, para 35 of President Esther Hayut's opinion.

harmony. As this basic law is only one chapter in the Israeli constitutional project, it ought to be read together with the other basic laws, and especially with Basic Law: Human Dignity and Liberty, which protects Israel's democratic identity and – due to the Court's decisions – also the right to equality as a non-enumerated right.

Accordingly, the Court assumes that the Knesset intended to protect equality among all citizens of the state and to preserve the democratic values of the state. It is this 'basic principles interpretation' that allows the Court to refrain from intervening in the provisions to reconcile Basic Law: The Nation State with Israel's democratic values, and to leave undecided the challenging question of its own authority to invalidate basic laws that violate the core values of the Jewish and democratic state.⁸⁶

According to Rivka Weill, this interpretive move has crucial consequences. This, she writes:

marked the first time that the Court applied this interpretation method to Basic Laws. Previously, it had only been applied to ordinary legislation, ensuring that it aligns with the Basic Laws, which are superior. However, now it has been applied to Basic Laws, where no hierarchy sets one Basic Law as superior to any other. [...] Thus, we can see that, despite the Justices' claims, applying the constitutional avoidance doctrine, by its very nature, asserts that the Justices indeed have the authority to repeal the Basic Law, if the doctrine is not exercised to *de facto* modify its problematic nature. With this understanding in mind, we can appreciate the true revolutionary nature of the *Hasson* decision. In many ways, it is more radical than voiding *Basic Law: Nation State*. The Court had officially rejected the petitions, including their request that the Court rewrite this Basic Law and read democracy and the right for equality into it. However, by exercising constitutional avoidance, the Court has in fact done just that. It didn't wait for the Knesset to react. Rather, the Court remedied *Basic Law: Nation State* on its own. Now, because of the *Hasson* ruling, *Basic Law: Nation State* doesn't need to just be read in tandem with other Basic Laws which uphold democracy and the right for equality. Rather, the principle of democracy and the right for equality are now an intrinsic part of *Basic Law: Nation State* itself. Any other approach would undermine the Basic Law's validity and would leave it vulnerable to challenges in Court on grounds of unconstitutionality.⁸⁷

The Court's approach corresponds with the general notion that before invalidation of amendments, 'every interpretive effort must be made to reconcile amendments with protected rights and basic constitutional principles',⁸⁸ yet this interpretative move, as Weill claims, may be no less 'activist' than striking down provisions of the basic law. We elaborate on this argument in the next section. But before that,

⁸⁶ See generally Rehan Abeyratne and Yaniv Roznai, 'Basic Structure Interpretation' in Catherine O'Regan, Carlos Bernal and Sujit Choudhry (eds), *Research Handbook on Constitutional Interpretation* (Cheltenham, Edward Elgar Publishing, forthcoming 2025).

⁸⁷ Rivka Weill, 'A Covert Constitutional Revolution? Is Basic Law: Israel – the Nation-State of the Jewish People Democratic?' *Balkinization* (19 December 2021), available at balkin.blogspot.com/2021/12/a-covert-constitutional-revolution-is.html.

⁸⁸ Roznai (n 74) 220.

two important constitutional cases which highlight the issue were delivered by the Supreme Court in early 2024.

The first case was the momentous judicial decision in *The Movement for Quality Government* case,⁸⁹ in which the High Court of Justice declared an unconstitutional part of the 'reform in the judicial system',⁹⁰ that removed the authority of all courts to review the 'reasonableness' of decisions of the Prime Minister, the Ministers or the Cabinet.⁹¹

The petition under consideration challenged Amendment No. 3 to Basic-Law: The Judiciary, focusing on the removal of courts authority to review the 'reasonableness' actions of the government and of ministers. It raised critical issues: the authority of the High Court of Justice to review basic laws and if the amendment constitutes an excessive overstep of the Knesset's constitutional boundaries, calling for its annulment. For the first time in its history, a full bench of all 15 justices heard the case.

On 1 January 2024, the High Court of Justice delivered its 738-page landmark judgment, which was the first case in the Court's history in which the Court invalidated a part of a basic law.

Lead by President Hayut, a majority of 12 to 3 asserted that the Court has the authority to review basic laws and strike them down when the Knesset appears to exceed its constitutional limits.⁹² Against the backdrop of the absence of a formalised procedure for creating constitutional norms in Israel's system and concerns over the political misuse of basic laws for expedient ends, the majority emphasised the Supreme Court's crucial role in maintaining the constitutional structure. On the merits of the case, in a split decision of 8 to 7, the Court deemed the amendment invalid for significantly restricting scrutiny over governmental actions, a move seen as severely damaging to Israel's democratic fabric and especially the rule of law and separation of power.⁹³

Notwithstanding the importance of this judgment, more relevant to our matter are the minority opinions. Justices Solberg and Mintz contested the Court's very authority to nullify a basic law, arguing against any perceived Knesset overreach in

⁸⁹ HCJ 5658/23 *The Movement for Quality Government in Israel v The Knesset* (Nevo, 1.1.2024). An English translation is available here [versa.cardoza.yu.edu/opinions/movement-quality-government-v-knesset](https://www.cardoza.yu.edu/opinions/movement-quality-government-v-knesset).

⁹⁰ Critics describe this reform as a 'judicial overhaul'. In this chapter we shall not expand on the judicial overhaul in Israel. For an overview, see the collection of arts in special symposiums of the (2024) 56 *Israel Law Review* 289–540; (2024) 39(1) *Israel Studies Review* 1–178 and (2023) 28(3) *Israel Studies* 1–49.

⁹¹ On 24 July 2023, the Knesset adopted Basic Law: The Judiciary (Amendment No. 3), according to which: 'Notwithstanding what is stated in this Basic Law, a holder of judicial authority under law, including the Supreme Court sitting as the High Court of Justice, shall not address the reasonableness of a decision by the Government, the Prime Minister or a Government Minister, and will not issue an order in such a matter; in this section, "decision" means any decision, including in matters of appointments, or a decision to refrain from exercising authority.'

⁹² See Yaniv Roznai and Shani Schnitzer, 'Navigating the Judicial Ship in Stormy Waters: President Esther Hayut and the Israeli Constitutional Crises, 2018–2023' (forthcoming) *International Journal of Constitutional Law*.

⁹³ HCJ 5658/23 (n 89).

this case, and Justice Elron argued for a cautious approach, suggesting it is premature to conclude the amendment's potential negative impact without a clear restrictive interpretation being applied. Relevant to our discussion, Justices Willner, Stein and Canfy-Steinitz called for a narrow interpretation of the amendment, thereby removing the need to invalidate it. For example, according to Justice Willner:

the amendment can be interpreted as a sustaining interpretation, and there is no place anyway to order its invalidation. This is because it is a fundamental understanding that a sustaining interpretation of a basic law – if it is linguistically possible and compatible with its purposes – according to which it does not deny the core Jewish or democratic identity of the State of Israel, in the face of an interpretation which could lead to the opposite conclusion and therefore to its invalidation. [...] I believe that the interpretation of the amendment in accordance with our customary rules of interpretation, leads to the conclusion that the term 'reasonableness' within the amendment, refers exclusively to the reasonableness grounds in the sense that was given to it following the High Court ruling 389/80 *Yellow Pages Ltd. v. The Broadcasting Authority* [ie balancing formula reasonableness and not extreme unreasonableness – Y.R and H.S] [...] In my view, given this interpretation, the amendment – although one should be sorry that it was enacted – does not deny the core of the democratic identity of the State of Israel. [...] there is no place to order invalidation of the amendment, and one must choose the possible interpretive route that upholds it.⁹⁴

But, as aforementioned, this interpretive approach, to which we return in the next section, was rejected by the majority who opted for invalidation of the amendment, for the first time in the Court's history, making this judgment probably the most important judgment in the Supreme Court's history.

The second case, which is another example for conforming interpretation at the constitutional level was the case concerning the incapacitation of the Prime Minister. Amendment No. 12 to Basic-Law: The Government altered the criteria for declaring a prime minister's incapacity to 'physical or mental incapacity' and introduced a detailed and challenging process for such a declaration, contending it was specifically crafted to favour the existing Prime Minister. This amendment was challenged in the High Court of Justice on claims of abuse of constituent power.⁹⁵

The High Court of Justice, with a majority of 6 out of 11 judges, decided to postpone the amendment's implementation until the next Knesset term, labelling it a clear personal amendment designed to protect the current Prime Minister from being deemed unfit due to legal proceedings against him. The majority highlighted the amendment's explicit purpose to advance the personal interests of the Prime Minister, noting its rapid introduction and passage in the Knesset following petitions for his impeachment and his direct comments post-approval as indicative of the amendment's personal intent. Concluding that the amendment's immediate enforcement would constitute a misuse of constitutional power, the majority opted for a constitutional remedy by postponing its effective date to the start of

⁹⁴ HCJ 5658/23 (n 89), para 8 to Yael Willner's opinion (our translation).

⁹⁵ HCJ 2412/23 *The Movement for Quality Government in Israel v The Knesset* (3 January 2024).

the next Knesset's term, addressing the issue without invalidating the amendment altogether.⁹⁶ This approach aimed to correct the legislation's personal bias, ensuring it would not impact the current Prime Minister's tenure. This is another instance of conforming interpretation aimed at correcting a constitutional flaw which might lead to invalidation.

VI. A Critical Perspective: Why Interpretation According to the Constitution may Often be More Intrusive than Invalidation

Traditionally, in Israeli jurisprudence, when considering constitutional remedies, invalidation of laws as unconstitutional is considered to be a means of last resort – the 'doomsday weapon'. This is understandable, because declaring a law (and all the more so a basic law) enacted by the legislature invalid is considered to be the ultimate intrusion at the will of the people and their elected representatives.

However, against the backdrop of the Israeli jurisprudence, we argue that often, an interpretation of laws that is completely opposite to the legislature's intent or the text, may be more intrusive – in terms of separation of powers – than invalidation.

Consider the *Ganis* case⁹⁷ and the *Herut* case⁹⁸ mentioned above. In the *Herut* case, when the Court interpreted the legislative text 'no court' to exclude the High Court of Justice thus preventing unconstitutionality and avoiding invalidation it actually rewrites the law in contrast with the clear wording of the legislative text and the legislative intent. Likewise, in the *Ganis* case, when the Court interprets an explicit retroactive law as to not apply to those who have relied upon it. Vice-President Mazza, in his dissenting opinion, was correct to argue that:

it is not possible to interpret the suspending law as applicable only to whoever did not rely on the entitling law. Such an interpretation does not have a minimal foothold in the text. It constitutes, in practice, a change in the language of the statute, and as such it departs from the legitimate boundaries of interpretation. [...] In such circumstances, we are obliged to examine the constitutionality of the retroactive application of the suspending law in accordance with the constitutional criteria set out in Basic Law: Human Dignity and Liberty. Indeed, I too accept that whenever it is possible to refrain from constitutional intervention in the validity of a statute by giving an interpretation – even a 'creative' interpretation – to a problematic statutory provision we are obliged to prefer this method. But even interpretation has its linguistic limits. We are not speaking of a choice between 'literal interpretation' and 'purposive interpretation', but of a choice between purposive interpretation that is based on the text and purposive interpretation that is detached from it.⁹⁹

⁹⁶ *ibid.*

⁹⁷ HCJ 9098/01 (n 67).

⁹⁸ HCJ 212/03 (n 65).

⁹⁹ HCJ 9098/01 (n 67) Vice-President Eliahu Mazza, para 1 to his opinion.

And similarly, Justice Rivlin accepted the fundamental position:

according to which we should turn to constitutional review – which can be described as a ‘doomsday weapon’ – only when we have exhausted all other avenues [...] But care must be taken so that excessive use is not made of this tool. [...] A provision should not be given an interpretation that is entirely in conflict with its language. The art of interpretation, although it is desirable and essential, has limits, beyond which the interpreter cannot pass; otherwise, he will find himself rewriting legislation. In the case before us, the interpretation proposed by the majority justices goes, in my opinion, beyond the confines of what is possible and what is permitted.¹⁰⁰

We accept this approach and argue that sometimes, certain interpretations of a statute, which completely depart from the explicit language of the statute and the legislative intent, are more intrusive to the legislative realm than striking down the law as unconstitutional.¹⁰¹ The results of an interpretation that differs significantly from the legislative intent, or is detached from the statute’s wording, could be more severe than the act of annulment. Otto Pfersmann describes provisions that were given a different meaning from what they actually mean – because otherwise they would be invalidated by the Court – as ‘norms without texts.’¹⁰² Such application of interpretation may conflict with principles of legal certainty and separation of powers.¹⁰³ One may compare this with the theory of ‘Falsification of the Constitution,’ which occurs when ‘constitutional norms are given an interpretation and a sense different from those that they really possess: this is in reality an informal modification of the Constitution itself.’¹⁰⁴

Returning to the Movement for Quality Government case,¹⁰⁵ this seems to be the rationale behind President’s Hayut objection to the minority opinions suggesting resolving the constitutional difficulty through a narrow interpretation to the ‘reasonableness’ being removed from Court’s authority. As she states:

the fundamental principle in our system states that we are obligated to seek out an interpretive solution that will avoid the need to decide upon the validity of a piece of legislation [...] However, at times, the Court is forced to decide that no such interpretation is possible. This is particularly the case when such an interpretation is artificial and leads to emptying the legal arrangement of all content or leads, in practice, to rewriting the law [...] Such is the case before us. In my opinion, an interpretation that would narrowly construe the application of the amendment that abolishes the reasonableness

¹⁰⁰ *ibid* Eliezer Rivlin J, paras 2–3.

¹⁰¹ Yaniv Roznai, ‘Retroactivity – Not Only a Matter of Time! Thoughts on Analyzing Retroactive Legislation Following *Genis*’ (2008) 9 *IDC Law Review* 395, 435 [Hebrew].

¹⁰² Otto Pfersmann, ‘Ontological and Epistemological Complexity in Comparative Constitutional Law’ in Antonina Bakardjieva Engelbrekt and Joakim Nergelius (eds), *New Directions in Comparative Law* (Cheltenham, Edward Elgar Publishing, 2009) 81, 88.

¹⁰³ See references in Kerstin Tobisch, ‘Public Procurement Law and Effective Legal Protection’ (2011) *Vienna Journal on International Constitutional Law* 424, 427.

¹⁰⁴ Allan R Brewer-Carias, ‘The Principle of Separation of Powers and Authoritarian Government in Venezuela’ (2009) 47(4) *Duquesne Law Review* (2009) 813, 835.

¹⁰⁵ HCJ 5658/23 (n 89).

standard in regard to the elected echelon only in its sense in Dapei Zahav would be a dubious interpretation that would effectively constitute a redrafting of the Amendment by the Court in a sense that would be completely different from that of the existing Amendment. This is all the more so because we are concerned with interpretation that touches upon the core of the constitutional arrangement and not its ancillary aspects, such as the time of its entry into force [...] For all the above reasons, I do not believe that we can adopt the distinction among the various meanings of the reasonableness standard proposed by the Knesset in regard to the application of the Amendment by means of interpretation. My conclusion is, therefore, that the Amendment should be interpreted in accordance with its plain meaning, i.e. as a provision that comprehensively abolishes judicial review on the basis of the reasonableness standard, in all its senses, as regards decisions by the Government, the Prime Minister, and the ministers.¹⁰⁶

In this case, President Hayut held that 'the comprehensive, unqualified language of the Amendment is, indeed, "explicit and unequivocal". It lacks any foothold for the suggested narrow interpretation, and leaves "no room for doubt" as to the application of the Amendment to the reasonableness standard in its entirety.'¹⁰⁷ Not just that the constitutional text was implicit and making no distinctions as for the different meanings of 'reasonableness' but also throughout the legislative process the amendment's initiators have repeated time and again that the amendment applies to any decision, including decisions that are extremely unreasonable and implausible. Accepting a contradictory interpretation instead of invalidation would be an exercise more intrusive than striking down the amendment. Paradoxically, the interpretation of the minority judges – who are considered conservative – can be regarded as an activist exercise, while the invalidation of the amendment by the majority judges – who are considered activists – is the more conservative option.¹⁰⁸

As Christine Landfried explains:

A clear-cut invalidation of a law can give the legislature more room for political manoeuvring, in that a new law can be enacted. However, the declaration that only one particular interpretation of a law is constitutional often entails precise prescriptions and can quite easily result in law-making by the Constitutional Court.¹⁰⁹

In the case of invalidation, the 'ball returns to the hands' of the political authority – the legislature, which can re-enact the law according to the Court's decision

¹⁰⁶ *ibid*, paras 135–36.

¹⁰⁷ *ibid*, para 125.

¹⁰⁸ See Yaniv Roznai, 'The Reasonableness Judgment – Not What You Thought! Conservatism, Activism and the Unconstitutional Constitutional Amendment' in Suzie Navot and Anat Thon-Ashkenazy (eds), *The Supreme Court Ruling on the Reasonableness Doctrine: Some Initial Analyses* (Jerusalem, Israeli Democracy Institute, 2024), available at www.idi.org.il/media/24415/reasonableness-verdict-first-studies.pdf.

¹⁰⁹ Christine Landfried, 'Constitutional Review and Legislation in the Federal Republic of Germany' in Christine Landfried (ed), *Constitutional Review and Legislation: An International Comparison* (Baden-Baden, Nomos, 1988) 154.

or otherwise. In the case of judicial interpretation, if the legislature is not satisfied with the new meaning of the statute, it would have to annul it through the same legislative process, only this time, the 'ball has left the hands' of the political authorities. Until the enactment of the new law, the legal norm is now in the public sphere shaped by the judiciary until its abolishment or replacement with a new law. Therefore, often an acrobatic interpretation that significantly departs from the language of the law and the legislative intent may be regarded as more intrusive than invalidation.

VII. Conclusion

CCI is an accepted doctrine in Israeli jurisprudence. Before the constitutional revolution, it was part of the HCJ's development of a judicial bill of rights. Without constitutional supremacy, the Court used the doctrine in the form of 'rights conforming interpretation' to justify the broadening of human rights. Following the constitutional revolution, the HCJ expanded the already existing doctrine further, and used it in the form of 'basic laws conforming interpretation'. Even at the constitutional level, the interpretation of basic laws is subject to conforming interpretation, this time to the fundamental values of the state as a Jewish and Democratic and seeking harmony between the various basic laws and the core state values.

In this chapter, we use the Israeli jurisprudence as a case study in order to critically argue that often, interpretation in contrast with the explicit statutory text and legislative intent, even if conforming with the constitution, is more violative of separation of powers. In other words, from the perspective of the principle of separation of powers, in certain cases it is preferable for the Court to invalidate unconstitutional laws rather than interpreting them in according to the constitution, if such interpretation amounts to re-writing the law. Interpretation, therefore, is not always the more conservative judicial method and may be more activist than striking down legislation, as paradoxical as it may sound.