ARTICLES

CONSTITUTIONAL UPGRADING OF HUMAN RIGHTS IN ISRAEL: THE IMPACT ON ADMINISTRATIVE LAW

Baruch Bracha

---

*Translations of Hebrew-language sources have been generously provided by the author. For the benefit of the reader, the author has also provided parallel citations to English language journals for cases written in Hebrew (e.g., where the Israeli Law Review has excerpted case material from the Piskei Din reporting Israeli case law).

Professor of Law, Faculty of Law, Tel Aviv University, Israel. I wish to express my gratitude to the Minerva Center for Human Rights, Tel Aviv University, for providing me with a research grant for this article. I would also like to thank Dr. Daphne Barak-Erez and Dr. Ariel L. Bendor for their helpful comments. I am also grateful to Oren Gazar, my former teaching and research assistant in the Faculty of Law, Haifa University, and to Dan Sharot, my present research assistant in the Faculty of Law, Tel Aviv University, for their help.
# Table of Contents

## I. Introduction ........................................................................................................... 583

## II. The Application of the Basic Laws to the Administrative Authorities ...................... 589
A. The Application (Respect) Clause ................................................................. 589
B. The Significance of the Application of the Basic Laws to the Administrative Authorities ................................................................. 591
   1. Negative Protection of Rights—The Principle of the Legality of the Administration ................................................................. 591
   2. Positive Protection of Rights—The General Duty of the Administrative Authority to Exercise Powers ................................................................. 593
   3. Positive Protection of Rights—The Constitutional Duty of the Administrative Authority to Exercise Powers ................................................................. 594

## III. The Influence of the Basic Laws on Administrative Powers, Process and Discretion ....... 606
A. Administrative Power ................................................................................................. 607
   1. Administrative Power to Violate Human Rights Prior to the Era of the Basic Laws ................................................................. 607
   3. Administrative Power to Violate Human Rights—The Limitation Clause ................................................................................................. 613
B. Administrative Process ................................................................................................. 622
   1. Shaping the Administrative Process—Efficiency and Fairness ................................................................. 622
   2. The Influence of the Basic Laws ................................................................................................. 623
C. Administrative Discretion ................................................................................................. 631
   1. Administrative Discretion—Its Nature and Scope ................................................................. 631
   2. The Rights Protected in the Basic Laws—A Relevant Consideration ................................................................. 633
   3. Reasonableness ................................................................................................. 634
   4. Proportionality ................................................................................................. 637
   5. Equality ......................................................................................................... 639

## IV. Conclusion ............................................................................................................. 642
I. INTRODUCTION

In 1995, the Supreme Court of Israel held that Basic Laws enjoy normative supremacy over “regular” laws. A substantial portion of the lengthy judgment is devoted to providing theoretical substantiation for the superior status of the Basic Laws, particularly in view of the fact that both the Basic Laws and the regular laws are enacted by the Knesset (the Israeli Parliament) itself. This fascinating analysis is outside the scope of our discussion. At the heart of the judgment is the conviction that the Basic Laws should be regarded as the written constitution of Israel. A law which contradicts the provisions of a Basic Law may be invalidated as unconstitutional. The power of invalidation is within the competence of the courts and is the outcome of the normative superiority of a Basic Law over a regular law. Naturally, as permitted by some constitutions of other countries, a Basic Law may afford a statute scope for infringing the provisions of the former. Subject to this, an amendment to a Basic Law may be ac-

---

2 It suffices for us to point out that eight of the nine justices hearing the case reached the conclusion that the Knesset possesses jurisdiction both to adopt constitutional acts (Basic Laws) and ordinary statutes (regular laws), where the latter are positioned on a lower normative rung than the former. See primarily the remarks of Justice Shamgar, 49(4) P.D. at 283-88, 31 Isr. L. Rev. at 770-72, and Justice Barak, 49(4) P.D. at 355-59, 31 Isr. L. Rev. at 780-84. It appears that the reasoning of Justice Barak, to the effect that the Knesset has a dual competency as a constituent authority (in adopting Basic Laws) and as a legislative authority (in enacting laws)—prevails, as some of the other judges acceded to it. 49(4) P.D. at 450-54 (Levin, J.); 49(4) P.D. at 470, 31 Isr. L. Rev. at 794 (Zamir, J.); 49(4) P.D. at 577 (Mazza, J.). Justice Cheshin expressed a minority view in this connection, which does not recognize the power of the Knesset to generate constitutional acts which supersede regular laws. 49(4) P.D. at 473-526, 31 Isr. L. Rev. at 796-800. For an analysis of the opinions of Justices Shamgar, Barak, and Cheshin, see Claude Klein, Basic Laws, Constituent Power and Judicial Review of Statutes in Israel: Bank Hamizrachi United v. Kfar Chitufi Migdal and Others, 2 Eur. PUB. L. 225 (1996).
3 31 Isr. L. Rev. at 783 (Barak, J.) (“Each of the Basic Laws constitutes a chapter in the constitution of the State of Israel. Each chapter stands as the pinnacle of the normative pyramid... Indeed, the State of Israel has a constitution—the Basic Laws.”).
4 49(4) P.D. at 272-76, 296-99, 319-24, 351-52 (Shamgar, J.); id. at 406-09, 418-19, 447 (Barak, J.). It should be noted that Justice Barak leaves “open” the question of whether it is possible to “infringe” (as distinct from “amend”) the provisions of a Basic Law by means of a regular law. id. at 409. See also his comments, id. at 409-10, from which it is perhaps possible to conclude that the infringement is indeed possible. However, it seems that the normative superiority of a Basic Law over a regular law—which Justice Barak has asserted—must lead to the conclusion that a deviation from a Basic Law is not possible even by way of “infringement.” See also infra note 17.
5 49(4) P.D. at 316-17, 352, 31 Isr. L. Rev. at 777 (Shamgar, J.); 49(4) P.D. at 418-27, 447, 31 Isr. L. Rev. at 785 (Barak, J.); 49(4) P.D. at 513-14, 567, 568, 571, 31 Isr. L. Rev. at 801-02 (Cheshin, J.). All the judges were in agreement with regard to the existence of the Court’s power to invalidate a statute in consequence of the normative superiority of Basic Laws.
The trigger for the judgment of the Supreme Court was the enactment of two Basic Laws in the sphere of human rights: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom. These Basic Laws reflected a partial victory in the protracted struggle to adopt a full Bill of Rights for Israel by way of a Basic Law. This success, which the President of the Supreme Court termed a “constitutional revolution,” opened the way to numerous difficult constitutional questions, *inter alia*, in relation to the constitutional status of Basic Law: Human Dignity and Freedom, which does not contain a provision regarding formal entrenchment.

This issue stood at the center of the hearing in the United Mizrachi Bank case, in which the appellants attacked the Family Agricultural Sector Adjustment (Amendment) Law, 1993, on the grounds that it infringed their property rights which were guaranteed by Section 3 of the Basic Law. As noted, the Supreme Court held that this Basic Law, together with the other Basic Laws, enjoy normative superiority over regular laws and, in that case, the 1995 Law. Accordingly, the Court examined whether this law indeed infringed upon the property rights guaranteed by Section 3. Upon determining that it did, the Court considered the law in the light of the limitation clause and concluded that the law did in fact meet the tests provided therein. The infringing statute was therefore found to be constitutional notwithstanding that it impaired the property right.

---

7 49(4) P.D. at 319-21 (Shamgar, J.); *id.* at 406-07 (Barak, J).
12 *Cf.* Section 7 of Basic Law: Freedom of Occupation, which contains such a provision. “This Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knnesset.” *Id.*
15 Section 8 of the Basic Law states:

The rights conferred by this Basic Law shall not be infringed save where provided by a law which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or under an aforesaid law by virtue of an explicit authorization therein.

The same limitation clause appears in connection with infringement of freedom of occupation in Section 4 of Basic Law: Freedom of Occupation.
Since the United Mizrahi Bank case, a number of statutes enacted by the Knesset have been attacked on the ground of unconstitutionality. In one of the cases, the Supreme Court invalidated a statutory provision (by way of suspension) on the grounds that it infringed the right to freedom of occupation guaranteed by Basic Law: Freedom of Occupation and did not meet the requirements of the limitation clause contained in the Basic Law. In another case, the Court invalidated a statutory provision (again by way of suspension) which infringed the freedom of a person which is guaranteed by Basic Law: Human Dignity and Freedom, where that infringement failed to meet the requirements of the limitation clause contained in that Basic Law.

---


17 H.C. 1715/97, Chamber of Inv. Managers in Isr. v. Minister of Fin., 51(4) P.D. 367.

18 H.C. 6055, 7083/95, Zemach v. Minister of Defense (forthcoming). As pointed out in supra note 12, Basic Law: Freedom of Occupation is entrenched against deviations from its provisions subject to the scope which it itself leaves to the Knesset in relation to legislative infringement of freedom of occupation. In this context it should be said that before the judgment in the matter of Chamber of Investment Managers in Israel, 51(4) P.D. 367—and even before the case of G.A. 6821/93, United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) P.D. 221, the Court examined the constitutionality of statutes which it was asserted contradicted an entrenched provision of a Basic Law. In certain cases, the Supreme Court has even invalidated provisions of such statutes. RUBINSTEIN & MEDINA, supra note 10, at 383-98. The uniqueness of the judgment in the United Mizrahi Bank case lies in it providing the most in-depth theoretical endeavour undertaken to date in the case law, to resolve questions which revolve around the most fundamental aspects of the constitutional system. In consequence of this endeavour, the Court held, contrary to earlier case law, see id. at 398-99, that even Basic Laws which are not entrenched—and therefore all the Basic Laws—enjoy a constitutional status which is superior to that of regular statutes. In addition, the Court decisively affirmed the existence of judicial supervisory power, a power which had been exercised in the past without any real theoretical deliberations as to the power of its existence, principally by reason of the fact that the respondents had not raised the issue of its absence. Id. at 396-97.

It should also be pointed out that in relation to Basic Law: Human Dignity and Freedom, there also were, prior to this judgment, obiter dicta in the case law regarding its supra-legislative status, and regarding the power of the Court to supervise this status. See, e.g., Miscellaneous Applications—Criminal [M.A.Cr.] 6654/93, Binkin v. State, 48(1) P.D. 290, 293. There, Justice Barak refers to the right to leave Israel provided in Section 6(a) of the Basic Law:

This right enjoys a constitutional status which is supra-legislative. A regular law which is enacted after the date of entry into force of the Basic Law, which infringes the basic right and which does not meet the requirements of the “limitation clause” (Section 8 of the Basic Law), is an unconstitutional law. The Court is entitled to confer remedies in respect of it. One of those remedies is a declaration of invalidity, while concurrently setting the date of invalidity (retroactive, active, prospective).

Id. However, it must be reiterated, that these statements were not accompanied by the same incisive analysis found in United Mizrahi Bank Ltd., which has repercussions for the status of all the Basic Laws and for the judicial supervision derived therefrom. This analysis was implemented in the Zemach judgment in which, as noted, a statutory provision was invalidated because it infringed the provisions of Basic Law: Human Dignity and Freedom. See also Chamber of Inv. Managers in Isr., 51(4) P.D. at 418. In H.C. 102/99, Misgav v. Knesset (forthcoming) (Zamir, J.), the Supreme Court noted, at paragraph 7, that:

[I]t has already been held that the Court is competent to invalidate a law which is contrary to Basic Law: Human Dignity and Freedom or to Basic Law: Freedom of Occupa-
The substantive importance of the new Basic Laws and the recognition of their supra-legislative normative status, enjoyed by the other Basic Laws as well, caused the subordination of the various legal branches to the constitutional provisions contained in the Basic Laws. In the words of Justice Barak, this amounts to the “constitutionalization of the Israeli legal system.” This constitutionalization is primarily expressed in the new normative status of protected human rights, which are now positioned at the apex of the pyramid, and by their impact on the various branches of the law. This impact has a profound effect on the relations between the individual and the administrative authority which exercises powers capable of infringing his freedoms. A significant change has now been introduced in these relations. Generally, it should be remembered that a firm, reciprocal...

In my opinion, once it was determined that Basic Laws enjoy normative superiority over regular laws, and that the Court possesses jurisdiction to exercise judicial review in accordance therewith, the same extends to all the cases in which it is asserted that a statute is contrary to a Basic Law. See also H.C. 1384/98, Avni v. Prime Minister, 52(5) P.D. 206, 209, 214 (stating that with regard to the provisions of Section 39(b) of Basic Law: the Government, 1991-1992 S.H. 214, "[t]his provision exists on a constitutional supra-legislative level" and that "[a] Basic Law is not a 'regular' law. A Basic Law is a normative provision, at a constitutional supra-legislative level."); United Mizrahi Bank Ltd., 49(4) P.D at 468 (Zamir, J.). At the same time, one should not ignore the fact that in the light of the final result reached by the justices in the United Mizrahi Bank Ltd. case, i.e., that the statute under attack was not void—the analysis made there in relation to the question of the status of the Basic Laws and the power of judicial review is also in the nature of obiter dictum. In this connection, for example, see the remarks of Justice Cheshin at the beginning of his judgment: "The differences of opinion among us that were revealed in relation to the issue of the constituent authority of the Knesset and the question of the 'sovereignty' of the Knesset, all constitute obiter dictum"; 49(4) P.D. at 471-72, 31 ISR. L. REV. at 796. This fact, according to Justice Cheshin, did not diminish the importance of dealing with the aforesaid questions:

[1] It seems to me that since the date of the Supreme Court of Israel—since the date of its establishment up to the present—no greater or more important question has been raised before the Court than the question of the constituent power of the Knesset to enact a constitution for Israel, than the question whether a constitution has been given to Israel, even if only a few bills at a time . . . However, substantively, the question overshadows all other questions brought before us, even if obiter; indeed it is a giant among giants . . . We are dealing with a question which lies at the foundation of the legal system in Israel, no less. And standing before such a sublime question we would find it difficult not to make some comments concerning it.

49(4) P.D. at 472. For criticism of the judgment on the grounds that it is in the nature of obiter dictum, see Eli M. Salzberger, The Constituent Assembly in Israel, 3 LAW & GOV'T ISR. 679, 680-86 (1995-1996) (Hebrew).


20 See United Mizrahi Bank Ltd., 49(4) P.D. at 447, 31 ISR. L. REV. at 792 (Barak, J.).

21 See M.A.Cr. 537/95, Genimat v. State, 49(3) P.D. 355, 414-15 (Barak, J.):

Upon the enactment of the Basic Laws, a conceptual change took place. Human rights are no longer derived from interpretation of legislation. Interpretation of legislation and its very validity are required to respect the human rights in the Basic Laws, and the balance inter se as well as between them and the public interest. This change also has an impact on legal rhetoric. In the past we used the rhetoric of authority, power and gov-
connection exists between the two branches of public law—the constitutional and the administrative—as, to a large extent, administrative law leads to the concretization of the constitutional principles in the sphere of the relations between the individual and governmental authority. In giving rise to this concretization, administrative law draws a balance between two fundamental elements of the welfare state, which on occasion pull in conflicting directions. The elements are, on the one hand, the need to grant expansive powers to the governmental authorities—particularly those operating under the umbrella of the executive branch (i.e., public administration bodies)—and, on the other hand, the need to restrict those same powers in order to prevent inappropriate infringements of human rights. Obviously, a supra-legislative constitutional arrangement in the sphere of human rights stamps its mark on the aforesaid balance, thus influencing the rules of administrative law.

The greater the influence of the constitutional arrangements on administrative law, the more relevant it is to speak of "constitutional administrative law." On occasion, the constitution is also the direct and immediate source of the administrative law rule under consideration. Thus, in terms of the matter under discussion here, namely, the Bill of Rights in a constitution, it may be instructive to point out that various aspects of the administrative process in the United States are based on the provisions of the Fifth and Fourteenth Amendments of the Constitution concerning "due process." These provisions guarantee, constitutionally, fair process when it is intended to infringe the rights referred to in the United States Constitution's Bill of Rights. The same holds true regarding Canada by virtue of Section 22.

---

See also United Mizrachi Bank Ltd., 49(4) P.D. at 447-87, 31 ISR. L. REV. at 792-93 (Barak, J.).

Cf. THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 374 (13th ed. 1924): The various organs of the sovereign power are described by constitutional law as at rest; but it is also necessary that they should be considered as in motion, and that the manner of their activity should be prescribed in detail. The branch of law which does this is called administrative law. . . .


See ROBERT STUART LorCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 61 (rev. ed. 1989).


7 of the Charter of Rights and Freedoms 1982, which forms part of the Canadian Constitution and which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." This also applies to the proposed Bills of Rights in Israel.

As will be seen below, the direct and explicit reference to rules of administrative law is not given prominence in Basic Law: Freedom of Occupation or Basic Law: Human Dignity and Freedom. Nevertheless, analysis of the provisions of the Basic Laws reveals their extensive influence on administrative law, and consequently, the "upgrading" of some administrative rules to a constitutional level. This influence will be discussed in this article, but without purporting, of course, to examine the entirety of the rules of administrative law from the constitutional angle. Moreover, the discussion on this influence will primarily be conducted on the level of principle, without entering into the details of the concrete rules and the full extent of their application.

The massive constitutional contribution by the Knesset in 1992 was also reflected in the replacement of Basic Law: the Government of 1968, with Basic Law: the Government of 1992. The new Basic Law introduced significant changes to the system of parliamentary government in Israel. At its center the new Basic Law provided for the direct election of the Prime Minister (PM), the strengthening of the PM's governing status, and the creation of various new arrangements in the relations between the executive branch (the government) and the Knesset. This Basic Law contains a variety of provisions—some of which also appeared in its predecessor—dealing directly with rules of administrative law and their application in the governmental arena. These provisions deal with the delegation.
transfer\textsuperscript{54} and arrogation of powers,\textsuperscript{55} the power to promulgate subordinate legislation,\textsuperscript{56} parliamentary supervision of such legislation,\textsuperscript{57} and more. Similarly, the constitutional principles anchored in those provisions exert an influence on other aspects of administrative law.\textsuperscript{58}

These arrangements justify separate examination.\textsuperscript{59} As already noted, in this article we shall deal with the influence that the Basic Laws operating in the sphere of human rights exert on rules of administrative law.

II. THE APPLICATION OF THE BASIC LAWS TO THE ADMINISTRATIVE AUTHORITIES

A. The Application (Respect) Clause

Bills of Rights are first and foremost directed towards government authorities, obliging them to respect the protected rights.\textsuperscript{60} This is also the case in the Basic Laws under consideration here. Section 11 of Basic Law: Human Dignity and Freedom provides that: All governmental authorities are bound to respect the rights under this Basic Law.

A parallel provision may be found in Section 5 of Basic Law: Freedom of Occupation. The application of the Basic Laws to the governmental authorities—from the point of view of their duty to respect the rights contained therein—is, therefore, immediate and direct.\textsuperscript{61}

\textsuperscript{54} Section 39(b).
\textsuperscript{55} Section 42.
\textsuperscript{56} Section 47.
\textsuperscript{57} Section 48.
\textsuperscript{58} For example, they influence that which concerns the question of the independence of a competent authority's discretion, within the hierarchical system, and in our case—that which stands at the top of the pyramid—the government. \textit{See} 2 BARUCH BRACHA, ADMINISTRATIVE LAW 64-65, 84-86 (1996) (Hebrew).

On March 2001 the Knesset passed Basic Law: the Government, which will replace the 1992 Basic Law by returning—generally speaking—to the system of parliamentary government. The 2001 Basic Law will enter into force in the coming elections to the Knesset (Section 47) which are scheduled for 2003. Reference hereinafter to “Basic Law: the Government” is to the 1992 version unless the 2001 version is explicitly mentioned.

\textsuperscript{59} This is also the case with respect to the impact of other Basic Laws which have gained a constitutional dimension since the \textit{United Mizrahi Bank Ltd. Case}, on administrative law, and the potential impact of proposed Basic Laws, such as Basic Law: Legislation Bill, 1992-93 Hatzaot Chok 91.

\textsuperscript{60} “Historically, bills of rights, of which that of the United States is the great exemplar, have been directed at government.” McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, 262 (La Forest, J.) (Supreme Court of Canada).

The position is different with regard to the duty of respect to be shown by private bodies. The Basic Laws do not contain any specific application provisions regarding the duty of respect, and the way to make them subject to the duty of respect is more complicated. \textit{See} BARAK, supra note 10, at 647-97; \textit{see also} C.A. 239/92, Egged Coop. Ass'n for Transp. in Isr. v. Mashiah, 48(2) P.D. 66, 70-73.
The term "governmental authorities" refers to the three branches of government in the classic division: legislature, judiciary, and executive. The public administration authorities are undoubtedly incorporated within the aforesaid category. These authorities are numerous and richly diverse, and include, inter alia, the government with its various branches, local government authorities and public corporations. A question may arise as to the position of corporations incorporated under private law, but which are under the control of governmental authorities, such as government companies or municipal companies. It seems that to the extent that these corporations exercise statutory powers and operate primarily within the public sphere—there is no difficulty in regarding them as governmental authorities, as—by virtue of the rule of "normative duality"—they are subject not only to private law but also to public law, including the Basic Laws under consideration here. Other corporations which are similarly controlled, but which do not fulfill governmental functions, apparently are not subject to normative duality and are accordingly outside the purview of public law. Nevertheless, Justice

---

42 See the comments of Justice Shamgar with regard to the provision under discussion, in C.A. 6821/93, United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) P.D. 221, 307 ("The 'governmental authorities' are three—the legislative authority, the executive authority and the judicial authority."), and the comments of Justice Barak, id. at 412. See also H.C. 1000/92, Bavli v. Great Rabbinical Court, 48(3) P.D. 221, 248. A "respect" clause which refers directly to governmental authorities is fairly well-accepted in bills of rights. See, e.g., Can. Const. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms), §32(1); Grundgesetz [Constitution] (Basic Law for the Federal Republic of Germany, 1949), §1 (3); N.Z. Bill of Rights Act, §3; S. Afr. Const., §§; U.K. Human Rights Act, 1998, §6.


44 For an extensive look at this rich diversity of authorities, see ITZHAK ZAMIR, ADMINISTRATIVE POWER 271-508 (1996).

45 For a discussion of these bodies and their relationship to the public administration, see AVRAHAM VEINROTH, GOVERNMENT COMPANIES (1995) (Hebrew), Daphne Barak-Erez, Civil Rights in the Privatization State: A Comparative View, 28 ANGLO-AM. L. REV. 503 (1999), and ZAMIR, supra note 44, at 427-88.

46 Thus, in H.C. 731/86, Micro-Page v. Electric Company of Israel, 41(2) P.D. 449, Justice Barak did not see fit to decide the issue of the normative system applicable to all the governmental corporations. Id. at 461. However, he held that the Electric Company is subject to normative duality, and therefore to the rules of administrative law:

Indeed, whatever the fate of the governmental companies—and we have no need to decide that in the present petition—the status of the Electric Company is different from the status of an ordinary governmental company. What makes the Electric Company unique is that it has accumulated a number of qualities which make it comparable, for the purpose of the law applicable to its activities, to the statutory corporations. These qualities are primarily: the existence of governmental powers, the conferment of an exclusive franchise by the state and the control over an essential means of production (electricity) ....

Id. at 462.

47 Indeed, against the background of the comments quoted in supra note 46, Justice Barak further held, "In my view, the Electric Company is just like a public authority." 41(2) P.D. at 462.

48 In C.A. 3414/93, On v. Diamond Exch. Plants (1965) Ltd., 49(3) P.D. 196, 204-05, Justice Zamir refers to the rule set out in the Micro-Page Case with regard to the Electric Company, add-
Barak has expressed his firm view that they are subordinate to the direct application of the Basic Laws.49

The public administration authorities enjoy a wide range of powers in the spheres of legislation, adjudication and execution.50 All these powers are subject to the duty of respect provided for in the Basic Laws, which draw no distinction, for this purpose, between the respective powers. Moreover, even when the authority acts within the sphere of private law, it is subject to the rules of public law—again, as part of the principle of normative duality51—and in our case, it is directly subject to the application of the Basic Laws.52

B. The Significance of the Application of the Basic Laws to the Administrative Authorities

1. Negative Protection of Rights—The Principle of the Legality of the Administration

The application (duty of respect) clauses, therefore, oblige the governmental authorities—in our case, the public administration authorities—to respect the human rights protected in the Basic Laws under consideration. This duty of respect has, first and foremost, a negative significance: those authorities are prohibited from infringing upon the rights beyond the limits of what is permitted by the Basic Laws (i.e. the limitation clauses found therein).54

---

49 However it is clear that not all the governmental companies are made of the same fabric. Many are the companies which, excluding public ownership, show almost no characteristics of a public body. Thus, for example, the Dead Sea Plants Ltd. Accordingly, it has been held that normative duality does not apply to that company: it is not subject to the rules of administrative law. See supra note 44, at 473-74.

50 BARAK, supra note 10, at 454 ("The application of human rights to the private corporation is not contingent upon that private corporation carrying out state functions. The application of human rights is derived from the control and supervision of the state, whatever the functions being carried out.").

51 See BRACHA, supra note 23, at 53-75.

52 See BARAK, supra note 10, at 452-53. This is also the position in Canada with regard to the application of the Charter of Rights and Freedoms to actions of a governmental authority in the sphere of private law. See JONES & DE VILLARS, supra note 27, at 46-47.

53 In so far as reference is to freedom of occupation, it is also possible to infringe upon it by making use of the "notwithstanding" clause contained in Section 8 of Basic Law: Freedom of Occupation, which provides:

(a) A provision of law which infringes [upon the] freedom of occupation shall be valid notwithstanding that it does not accord with Section 4 [the limitation clause], if it is incorporated in a law enacted by a majority of Knesset members and it expressly declares that it is valid notwithstanding the provisions of this Basic Law; a law as aforesaid will expire at the end of four years from its date of commencement, save where an earlier ter-
Thus, for example, Section 3 of Basic Law: Human Dignity and Freedom, which protects property rights, states that: "[n]o injury may be caused to the property of a person." A law which purports to infringe this right will be invalid, unless it meets the requirements of the limitation clause set out in Section 8.55

Thus is the immediate impact on the principle of the legality of the administration, which is the foremost principle of administrative law.56 This principle makes the power of the administrative authority contingent upon the existence of a legally valid empowering provision.57 Without such empowerment, its activities will be unlawful and therefore without legal effect. This is the position with respect to the activities of the authority in general and, a fortiori, with respect to its infringing activities in the sphere of human rights.58 In the absence of constitutional protection of these rights, it was sufficient in the past for the executive authority to point to a Knesset law which acted as the source of its powers. Today, the position of protected rights is different. A statute can act as the source of the power of the authority, on condition, however, that the statute itself is valid—i.e., that it meets the requirements of the limitation clause, both from the point of view of its infringing-right contents, and from the point of view of

54 This prohibition is the conventional protection of "classic" human rights, according to the liberal model. See Shapira & Bracha, supra note 6, at 216. An example of such negative protection is found in the American Bill of Rights. As Justice Rehnquist noted in Deshaney v. Winnabago Social Services: 

[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.


55 See, e.g., C.A. 6821/93, United Mizrachi Bank Ltd. v. Migdal Coop. Vill., 49(4) P.D. 221; supra text accompanying notes 13-14. For additional rights which enjoy negative protection in the Basic Laws under discussion, see Barak, supra note 10, at 361-62.

56 See Bracha, supra note 23, at 35; Zamir, supra note 44, at 49.


The central principle of administrative law is the principle of the legality of the administration. The authorities of the public administration are established by virtue of statute and statute confers powers upon them and determines their mode of operation. It follows that no administrative authority, set up by virtue of statute, is entitled to do anything save what it has been authorized to do by statute . . . .

58 See Bracha, supra note 23, at 99-40.
the empowerment of the administrative authority to infringe that right. As a result, the principle of the legality of the administration attains a constitutional status.

2. Positive Protection of Rights—The General Duty of the Administrative Authority to Exercise Powers

Alongside the principle of the legality of the administration, which prohibits the authority to act in the absence of a legal authorization—and in our case, to infringe a right—another important principle of administrative law obligates the authority to act. These two principles are complementary, together reflecting the fundamental principle of the rule of law. Indeed, in the same way as the absence of empowerment reveals the unwillingness of the legislature to enable the authority to act, conferral of a power manifests the will of the legislature to compel exercise of the power on the part of the authority.

The duty to act is often intended to protect one of the human rights, including those originating from the liberal model, which, as noted, on the conceptual level, require "negative" protection. Thus, for example, "it is the right of the citizen ... to enjoy his property and to procure the services of the police against anyone interfering..."

---

59 As to the constitutionality of the statutory authorization in this regard, see the final portion of the limitation clauses ("or under an aforesaid law by virtue of an explicit authorization therein") and infra text accompanying notes 156-57, 200. In Canada too, the "legality of bureaucratic conduct is now decided not only in accordance with fidelity to legislation, but also by the normative concepts contained in the Charter." See Andrew J. Roman, The Possible Impact of the Canadian Charter of Rights and Freedoms on Administrative Law, 26 LES CAHIERS DE DROIT 339, 341 (1985). This is not the case, however, in Australia where there is no constitutional Bill of Rights. See Kim Rubinstein, Towards 2001: An Assessment of the Possible Impact of a Bill of Rights on Administrative Law in Australia, 1 AUSTL. J. ADMIN. L. 13, 22 (1993-94).

60 In this way, constitutional support is given to the philosophical idea underlying Bills of Rights, i.e. that the individual is entitled to do whatever he pleases unless his freedom is limited by a valid piece of legislation. Thus, the Universal Declaration of Human Rights states in Art. 29(2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law ..." The Ninth Amendment to the United States Constitution clarifies the eight preceding it, noting that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

61 See BRACHA, supra note 38, at 23-41.

Similarly, the police must guarantee the implementation of freedom of artistic speech against any person attempting to hamper it by way of a disturbance. They must also protect the freedom of demonstration and worship by providing protection to demonstrators and worshippers from a hostile crowd attempting to undermine the right. On a broader level, “public authorities” must share with the public information stored in their files and data bases, inter alia, as part of freedom of information and the right of the public to know. The right to equality often means the imposition of an obligation on the authority to grant A the same care that it grants B, when there is no relevant difference between them.

3. Positive Protection of Rights—The Constitutional Duty of the Administrative Authority to Exercise Powers

This approach, which obligates the authority to act in order to protect a right, is reflected in the Basic Laws insofar as they compel the governmental authorities to respect the protected rights: the respect may, in certain circumstances, impose a prohibition on the infringement of a right, and in other circumstances impose a duty to act in order to protect the right against infringement. In this way, the purpose clauses in both Basic Laws are also implemented. Thus, Section 1A of Basic Law: Human Dignity and Freedom states that “[t]he purpose of this Basic Law is to protect human dignity and freedom . . . .” “Protection” may well require the performance of an act

---

64 H.C. 222/68, Nationalist Groups Ass’n. v. Minister of Police, 24(2) P.D. 141, 167 (Witkon, J.).
65 H.C. 549/75, Noah Films Co. v. Cinematic Films Supervisory Bd., 30(1) P.D. 757, 764 (Witkon, J.) (“If there is a fear of rowdiness, it is for the police to preserve the public peace and the maintenance of law and order. This is not a consideration which should influence a council member to prohibit a film, which, in his initial view, should not have been prohibited.”).
68 Freedom of Information Law, 1998, S.H. 226, §1 (“Every Israeli citizen or resident has the right to obtain information from a public authority in accordance with the provisions of this Law.”).
69 Even prior to the enactment of the Freedom of Information Law, the case law recognized “the right to obtain information,” while emphasizing “the duty of holders of public office to provide information to members of the public.” H.C. 1601-1604/90, Shalit v. Peres, 44(3) P.D. 353, 365 (Barak, J.); see also C.A. 6926/93, Israel Shipyards Ltd. v. Israel Elec. Co., 48(3) P.D. 749, 794-96; see also infra text accompanying notes 245-47.
70 As to this right, see infra text accompanying notes 288-300.
71 See, e.g., H.C. 721/94, El-Al Isr. Airlines Ltd. v. Danilowitz, 48(5) P.D. 749; see also infra text accompanying note 299.
72 See BARAK, supra note 10, at 313, 365.
73 A parallel provision is found in Section 2 of Basic Law: Freedom of Occupation (“The object of this Basic Law is to protect freedom of occupation.”).
on the part of the appropriate authority. Indeed, as Justice Barak explains in his book:

[E]very constitutional norm which requires the government to refrain from an act, may in appropriate circumstances compel the government to act. Ultimately, the distinction between an act and an omission is fine and indistinct, and it is difficult to assume that on such a narrow basis it is possible to construct a constitutional theory according to which the Basic Law requires that an authority refrain from a governmental act but does not compel governmental action. It seems, therefore, that the government may breach its obligation not only by an act but also by an omission.

An outstanding example of both aspects of the duty of respect may be found in the provisions of Sections 2 and 4 of Basic Law: Human Dignity and Freedom:

2. No injury may be caused to the life, person or dignity of a human being as a human being.

4. Every person has the right to protection of his life, his person and his dignity.

Against the background of Section 4, it would seem that Section 2 is concerned with negative protection; and against the background of Section 2, it would seem that Section 4 is concerned with positive protection. Thus, Justice Cheshin, referring to the right to dignity, stated:

[A]longside this right arises the obligation of the state to assist a person to obtain what is properly his. The right which subsists in the Basic Law is addressed to us: by its nature it affords relief to the holder of the right to dignity, and by its nature it imposes a duty on other persons. This is so in general, and a fortiori because the Basic Law expressly instructs us—in Section 4—that every person is entitled to protection of his dignity. 

---

74 See BARAK, supra note 10, at 312-13.

75 BARAK, supra note 10, at 313. Cf. H.C. 297/82, Berger v. Minister of Interior, 37(3) P.D. 29, 34-36. See also MATHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS—A PERSPECTIVE ON ITS DEVELOPMENT 15 (1999) (“[I]t would be wrong to suggest that civil and political rights themselves are entirely negative . . . the protection of civil and political rights at an inter-individual level necessitates the operation of a police force and a penal system.” (citation omitted)); Currie, supra note 54, at 867.

76 C.A. 3077/90, Anonymous v. Anonymous, 49(2) P.D. 578, 593.

77 Id. See Further Hearing—Civil [F.H.C.] 7325/95, Yedioth Achronot Ltd. v. Kraus, 52(3) P.D. 1, 61 (Cheshin, J.). See also the comments of Justice Cheshin in H.C. 6126/94, Smesh v. Broadcasting Authority, 53(3) P.D. 817, in connection with Basic Law: Human Dignity and Freedom which states:

Section 2 establishes a prohibition according to which "no injury may be caused to the life, person or dignity of a human being as a human being" . . . Section 4 of the Law provides us with a duty according to which: "every person has the right to protection of his life, his person and his dignity."

Id. at 865.

For the duty imposed on governmental authorities to protect human dignity, see also C.A. 5942/92, Anonymous v. Anonymous, 48(3) P.D. 837, 842, and paragraph 2 of Justice Barak’s opinion in the 1999 decision in H.C. 5936/97, Lam v. Director General of the Ministry of Education, Culture & Sport (forthcoming).
In cases where there is a positive duty to act to protect the right under consideration, breach of that duty will actually constitute infringement of the right, and it seems that its legality will be examined—by way of analogy—through the perspective of the limitation clause. Complaince with the positive duty to act entails activation of the powers held by the authority to protect the right. Thus, "the dignity of the petitioner as a person requires a guarantee of his minimal existence as a human being," and it is for the welfare authorities to exercise the powers to assist possessed by them in such a way as to guarantee this right. This is also the case in relation to the authority.

For the duties to act which are the product of the right to dignity, see, for example, H.C. 161/94, Atarri v. State (unreported); M.A.Cr. 3045/94, Issawi v. State (unreported). See also infra text accompanying notes 79-81.


80 See infra text accompanying note 80. In the instant case, the authorities fulfilled their duty.

See Atarri (unreported) (Barak, J.). In the instant case, the authorities fulfilled their duty. In H.C. 1554, 7715/953, Association of Shocharei Gilat v. Minister of Education, Culture & Sport, 50(3) P.D. 2, the petitioners asserted the existence of a constitutional right to education anchored in Basic Law: Human Dignity and Freedom within the framework of the right to dig-
charged with maintenance of detention centers: "if indeed the image of the detainee as a human being is violated, then he is entitled not only that the state not infringe his dignity as a human being but that it actually protect his dignity." 801

It may be that the duty to act will require the authority to promulgate regulations that are within its competence, 82 and if it fails to do so, the courts may order it to do so, 83 just as they may order it to for-
mulate rules concerning the policy and criteria guiding the implementation of its powers so as to guarantee the right to equality or any other protected right.\textsuperscript{85}

The duties to act found in the Basic Laws under consideration here, may also give content to the residual power of the government set out in Section 40 of Basic Law: the Government.\textsuperscript{86} Thus, for example, the government is empowered, by virtue of this section, to decide property rights in connection with the holy places to which the Palestine (Holy Places) Order in Council, 1924,\textsuperscript{87} applies.\textsuperscript{88} The government is obliged to exercise this power, the significance of which is to protect the rights under consideration,\textsuperscript{89} again, if the government refrain from doing so, this could lead to judicial intervention.\textsuperscript{90} Section 40 states: "The government is authorized to perform in the name of the state, subject to any law, any action which is not imposed by law on another authority." See generally, BRACHA, supra note 23, at 43-44, 52, 79-80; ZAMIR, supra note 44, at 334-44; RUBINSTEIN & MEDINA, supra note 10, at 781-85. The same provision appears in Section 32 of Basic Law: the Government of 2001. See supra note 38.

\textsuperscript{85} See H.C. 188/77, Coptic Muthran v. Israel, 33(1) P.D. 225, 228, 229, 234, 236, 241, 251; H.C. 109/70, Coptic Muthran v. Minister of Police, 25(1) P.D. 225, 234, 244, 252; H.C. 222/68, Nationalist Groups Ass'n. v. Minister of Police, 24(2) P.D. 141, 178, 211, 220. As Justice Landau clarifies in his dissenting opinion in the \textit{Coptic Muthran} case, 33(1) P.D. at 238: 'Reference here is to rights which deserve legal protection, and it is the case law ruling that when a governmental body is given the power to act (such as in Section 29 of Basic Law: the Government [of 1968; this Section was replaced by Section 40 of the Basic Law of 1992]) it is obliged to exercise that power, if exercise of the power is necessary to afford protection to an existing right.' Actually, there was no dispute between the judges in respect of this general principle. See infra note 90.

\textsuperscript{86} In the \textit{Coptic Muthran} case, 39(1) P.D. at 225, the High Court of Justice was asked to order the government to exercise its power under the said Section and to decide a dispute between two churches regarding the sharing of certain sites adjacent to the Church of the Holy Sepulchre in Jerusalem. The government had reached a decision the practical effect of which was not to decide. See id. at 232. Justice Landau, in a dissenting opinion, regarded this as a refusal to exercise its power, id. at 236, and, accordingly, held that the government was obliged to conclude the hearing of the dispute and come to a decision with reasonable speed. Id. at 247. The second minority judge, Justice Witkon, also thought that reference here was to the refusal of the government to exercise its power to decide the dispute. \textit{Id.} at 247. It must be said that even
tion 40 is also the basis for the government’s power—from the point of view of internal law—in the occupied territories. In the same way that the allocation of financial benefits by the government within the area of the State of Israel requires the formulation of “clear, relevant and equal criteria” in order to guarantee the right to equality, the award by the government of grants in the territories, in reliance on Section 40, also requires such criteria.

In the context of employing Section 40 of Basic Law: the Government for the purpose of implementing the duty to act, within the area of the protection of human rights in general, and in relation to the rights contained in the Basic Laws in particular, it is necessary to sound a note of caution. Section 40 provides for residual power, i.e.

though the three majority judges—Asher, Bechor and Levin—were of the opinion that the petition had to be dismissed, they did not disagree with Justice Landau regarding the principle that the government may not refuse to decide the dispute. Thus, Justice Levin explained that:

[H]ad the government given notice that it was washing its hands completely of the handling of the dispute between the litigants, or had it violated their right to be heard before it on the basis of equality, or had it been proved that it refused and refuses to hold any hearing on the matter, then I would not have hesitated to hold that there is a basis for our intervention enforcing upon it fulfillment of the duties imposed upon it ....

Id. at 243. However, the judge did not see the government’s decision in this way:

[B]earing in mind the nature of the powers of the executive authority, in the instant case, one must see the decision not to consider the petitional rights of the litigants, for the time being, until the conditions are right for the same, as a decision which the government was competent to make and that we have no cause to intervene in it.

Id. at 243-44. Justice Bechor agreed with this view, id. at 245-46, as did Justice Asher, who agreed with the two other majority judges. Id. at 249. Cf. H.C. 257/89, 2410/90, Hoffman v. Official Responsible for Western Wall, 48(2) P.D. 265, 339-40, 355-56, 357-58. In this connection it should also be added that the courts tend to refrain from intervening in decisions of the government concerning the holy places. H.C. 8666/99, Temple Mount Faithful v. Attorney Gen., 54(1) P.D. 199. As the Court has noted:

This does not mean, of course, that if a difference of opinion or violation of the law in matters concerning the Temple Mount are revealed, the executive authority—the government and the Prime Minister—will react by doing nothing. On the contrary: it is because the courts refrain from dealing with matters concerning the Temple Mount, that there is a doubly strong duty on the executive authority to enter deeply into all the differences of opinion and violations of the law, and do everything possible—as speedily as possible—in order to preserve order, public peace and the appropriate balance between the various sectors of the public.

Id. at 210 (Cheshin,J.).

In the case at bar, the competent bodies did not refuse to deal with the matter, and did not disregard their functions and responsibilities, rather, they considered a variety of factors relating to the matter ... the competent bodies, including the Prime Minister, having deliberated and weighed the situation on the merits, without taking into account extraneous factors or an improper purpose, there is no room, in the light of the case law applicable in this connection, for the court to intervene and order them to take this or that step.

Id. at 207 (Zamir,J.).

91 See H.C. 302, 304/72, Khilo v. Government of Isr., 27(2) P.D. 169, 176.
92 See supra note 84.
93 See H.C. 287/91, Kargal Ltd. v. Investment Ctr. Admin., 46(2) 852, 862.
94 Id. at 864 (Goldberg, J.) ("Reference is to large sums of public money, which are granted on the basis of administrative decisions made on an annual footing, and there is no need to say that respondent must have before it clear criteria, detailed guidelines and objective standards for the allocation of the moneys.").
power which should be exercised by the government in the absence of another competent authority.95 The arena of activity is that of the executive authority, and it is customary to regard it as the answer to the need for general governmental powers in this area.96 Because the extent of the power contained in Section 40 is unclear, there is a great danger that reliance upon it may lead to unnecessary expansion of the powers of the executive branch, as well as enable its invasion into areas of competence of the other branches—the legislative and the judicial.97 Indeed, the Supreme Court has clarified that:

[T]here are activities which are not within the competence and power of the government, as performing them without legal authorization is contrary to fundamental normative concepts which ensue from the nature of our regime. This is the case in relation to basic rights which are part of our positive law, whether they were incorporated in a Basic Law or not. Thus, for example, the government would not have power to close a newspaper on the basis of an administrative decision if there is no express provision regulating a matter such as this, and even if a Basic Law has not yet been enacted which defines freedom of expression; such an act would be contrary to our fundamental perceptions regarding human freedoms that are inherent in our system, which may only be limited by statutory law.98

Likewise, it cannot be regarded as the source for subordinate legislative powers, where these were not provided for by statute.99 Basic normative perceptions of the Israeli constitutional system provide that primary arrangements are within the competence of the primary legislator.100—this is so in general and a fortiori in the arena of human

---

96 See Federman, 48(5) P.D. at 651-54.
97 See Kiryat Gat Municipality, 47(5) P.D. at 841-42; RUBINSTEIN & MEDINA, supra note 10, at 784-85.
100 H.C. 2740/96, Shancey v. Supervisor of Diamonds, 51(4) P.D. 481, 504 (Cheshin, J.): The principle of the rule of law in its substantive sense, teaches us that ‘primary arrangements’ must be placed within a law of the Knesset, and that regulations were not designed, in principle, to do other than implement statutes. This is the Pillar of Fire, this is the Pillar of Cloud, which show us the way, night and day—and we shall follow
In other words, according to these fundamental perceptions, there is no room for the government and its branches, on the basis of Section 40, to give content, in the sense of a primary arrangement, to the duties to act set out in the Basic Laws under discussion, for the purpose of protecting human rights. This complex issue, which requires an intricate and sensitive network of balances—on occasion involving the recognition of the violation of one right in order to protect another—is within the competence of the legislature, and where necessary will confer powers on the administrative authorities. These powers, as we have seen, may be subject to the duties to act in the Basic Laws.

Section 40 of Basic Law: the Government will therefore furnish a source of power in the area under consideration in those rare cases which may appropriately be dealt with by the government as the executive authority of the state, and which do not have the effect of determining primary arrangements. A fortiori, the duties to act in the Basic Laws should not be regarded as a direct source of power of an administrative authority—in the absence of statutory provisions conferring upon it the necessary power.

See in the same spirit Justice Barak in H.C. 3257/97, 715/98, Rubinstein v. Minister of Defense, 52(5) P.D. 481, 502:

A basic rule of public law in Israel states that where a governmental act is anchored in a regulation or an administrative directive, it is proper that the general policy and the fundamental standards which underlie the act be anchored in primary legislation by virtue of which the regulation was promulgated or the administrative directive issued. In more "technical" language, the basic rule provides that "primary arrangements" which set the general policy and the guiding principles—must be determined in a Knesset law, whereas the regulations or administrative directives must determine "secondary arrangements" only.

See also H.C. 6971, 6972/98, Paritzki v. Israel, 53(1) P.D. 763, 777-78 (Barak, J.); id. at 790 (Cheshin, J.).

See Rubinstein, 53(5) P.D. at 513 (Barak, J.):

[T]he violation of human rights, even if it advances the values of the state, even if it is for a proper purpose, and even if it does not exceed the extent necessary—must be determined in a law establishing the primary arrangements and it is not sufficient that the executive authority obtains formal authorization for a legislative act. Thus, the requirement that the primary legislation determine the primary arrangements and that the secondary legislation or administrative directives deal only with implementation arrangements is anchored in the need to protect the freedom of the individual. It is true that in a democratic regime, it is sometimes necessary—for the purpose of satisfying the interests of the public—to violate the rights of the individual. Nonetheless, this violation, even if justified, must be determined in primary legislation, and not be put in the hands of the executive authority itself....

It must be said that even prior to the enactment of Section 29 of Basic Law: the Government of 1968, which preceded Section 40 of the present Basic Law of 1992, the Supreme Court recognized the existence of powers held by the administrative authorities, even though it was not possible to anchor them in an express or implied statutory provision. See Bracha, supra note 23, at 42-43. In Coptic Municipality, Justice Landau pointed out that the power to decide conflicts concerning rights in the holy places is within the province of the government "whether on
It will be recalled that implementation of the duties to act in the Basic Laws is expressed by the exercise of powers by the authority under consideration, against the background of the fundamental tenets of our constitutional system. In the absence of primary legislation regarding that implementation, whether directly in a law or by authorizing an administrative authority also by law, and subject to what has been said so far regarding the application of Section 40 of Basic Law: the Government, the duty to act is shifted to the “governmental authority” which possesses the power to act. This governmental authority, namely, the legislature, is obliged to exercise its power, i.e. the power of legislation. As the Basic Laws possess a supra-legislative constitutional status, they are capable of compelling the legislative organ to legislate. Indeed, breach of the duty actually the basis of the general governing powers of the government... or on the basis of the express provisions of Section 29 of Basic Law: the Government.” H.C. 188/77, Coptic Muthran v. Israel, 33(1) P.D. 225, 228. In other words, concurrently with the source provided by Section 29 (today, Section 40) of the Basic Law, the government and its branches enjoy general governing powers by virtue of the previous sources. This view seems to me to be misplaced: Section 29, once enacted, covered the issue of general (residual) governing powers and there is no room to seek additional sources, the results of which are unknowable, and which are inconsistent with the principle of the legality of the administration. Accordingly, as noted, today, reliance should only be placed on Section 40 in this context. See BRACHA, supra note 23, at 52; Itzhak Zamir, Administrative Power, 1 LAW & GOV’T ISR. 81, 118 n.95 (1992-1993) (Hebrew). Indeed, in the Federman case, Justice Shamgar considered the theory of general or inherent powers and its sources and added:

In any event, whatever the issue of the roots of the inherent power, the Israeli legislature did not see fit to leave this matter within the framework of an oral tradition, but included an express provision within Basic Law: the Government, namely, that which is found in Section 29 of Basic Law: the Government....

This sensitive issue of general/implied/inherent/prerogative/residual powers also occupies other legal systems, which in practice recognize such powers, despite the principle of the legality of the administration, which in those systems also enjoys priority status. Under United States law, there is uncertainty concerning the issue of “inherent executive powers”—uncertainty which has not been resolved even after the well-known decision in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which dealt with this question. Another case on this matter that also failed to resolve this sensitive question is Dames & Moore v. Regan, 453 U.S. 654 (1981). See also 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 679-77 (3d ed. 2000); Jules Lobel, Emergency Power and the Decline of Liberalism, 98 YALE L.J. 1385, 1407-11 (1989); Symposium, Dames & Moore v. Regan, 29 UCLA L. REV. 977 (1982).

In England, despite the great importance attributed to the principle of the legality of the administration, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188, 202 (by E.C.S. Wade, 10th ed. 1959) and the citation in infra text accompanying notes 257-58, the crown, that is the government, enjoys prerogative powers in a variety of fields. See ANTHONY BRADLEY & KEITH EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 271-85 (12th ed. 1998). In Australia, see MARGARET ALLARS, INTRODUCTION TO AUSTRALIAN ADMINISTRATIVE LAW 46-48 (1990), Canada, see DAVID J. MULLAN, ADMINISTRATIVE LAW 170 (2d ed. 1979); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 15-19, 776 (4th ed. 1997), and France, see L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 221-22 (5th ed. 1998), as well, some non-statutory powers are recognized.

104 See supra text accompanying notes 95-100.

105 On occasion, a Basic Law sets out an express provision which compels the Knesset to legislate. See, e.g., Section 5A of Basic Law: The Knesset ("A list of candidates to the Knesset shall be
amounts to infringement of the protected right. While the limitation clause does not directly apply to this "infringement," it would seem that it is possible to apply it by way of analogy and accordingly the infringement caused by the lack of legislation must satisfy the relevant elements of the limitation clause. Failure to meet these requirements might well lead the courts to determine that the legislative authority is under a duty to legislate.  

It should be pointed out that the courts have on occasion—including in the period preceding the "constitutional revolution"—affirmed the existence of the duty to act imposed on the Knesset within the context of their review of its decisions (not statutes). Moreover, in the case law concerning the constitutional right to vote in Knesset elections, the courts have made clear—in initially with great caution—the existence of the Knesset's duty to guarantee the implementation of this right by legislation, and in the light of the categorical comments made by the judges in this respect, it seems that, had the legislature not acted as required of it, there would have been no choice but, at a later stage, to grant judicial relief against the legis-

102 The limitation clause deals with a situation where the violation of a protected right is by a law, and here the violation takes place by virtue of the absence of law. However, as both are violations, see supra text accompanying notes 64-68, the rationale behind the limitation clause also applies to a statutory omission. Accordingly, absence of legislation will be justified if it befits the values of the State of Israel, if it is for a proper purpose and if it meets the requirement of proportionality. *Cf.* H.C. 2481/93, Dayan v. Commander of Jerusalem Dist., 48(2) P.D. 456, 489; C.A. 506/88, Shefer v. State, 48(1) P.D. 87, 105, 169-70; Barak, supra, note 10, at 383-84. An administrative authority is also subject to the limitation clause. See infra text accompanying notes 201-04. By analogy, the limitation clause will also apply to omissions on the part of the administrative authority, when a duty to act has been imposed on it in relation to its powers. See supra text accompanying note 74.  


108 Sections 4 and 5 of Basic Law: The Knesset, 12 L.S.I. 85 provide:  

4. The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset.  

5. Every Israel national of or over the age of eighteen years shall have the right to vote in elections to the Knesset unless a court has deprived him of that right by virtue of any Law. . . .  


lature in order to force it to perform its duty. Now, having entered the constitutional era, at least since the United Mizrachi Bank Ltd. case, it may be argued more forcefully that where the Knesset breaches its duty to legislate, the duty to grant relief shifts to the governmental authority competent to do so; namely, the judicial authority. As Justice Cheshin put it, "the substantive right of a person to dignity gives rise to a subsidiary right to obtain relief from the court, whenever that dignity is violated."

Needless to say, we are treading on extremely sensitive ground touching the nature of the relations between the judiciary and the legislature, and it is to be presumed that the courts will exercise the necessary caution, anchored in constitutional considerations, which

---

111 See the adamant comments voiced by the five judges in the Hokma case, 38(2) P.D. 826, with regard to the right to vote of prisoners and detainees, whose constitutional right could not be implemented by reason of their being imprisoned. As Justice S. Levin stated:

As the right of prisoners and detainees to vote in elections to the Knesset has been recognized, the legislature cannot decline responsibility and refrain from regulating the method of implementation of the aforesaid right. Not only is a moral duty imposed on the Knesset to do so, but also a statutory duty, and the legislature is not entitled, by omitting to act, to remove from the holders of the right that which has been granted to them by an entrenched provision in a Basic Law; indeed, if the Knesset is of the opinion that there is no justification for granting prisoners and detainees, or some of them, the right to vote, it should state the same with a "special" majority. The phenomenon by which a person is granted the right to vote, but the possibility of implementing it is negated, is undesirable, and the sooner the Knesset acts to prevent it, the better.

Id. at 838. In the same spirit, see the comments of Justices Shamgar, id. at 830, Ben Porat, id. at 835, Elon, id. at 835, and Bejski, id. at 837. The Knesset met the duties imposed on it and enacted a law which regulated the implementation of the right to vote of prisoners and detainees: Knesset Elections (Amendment No. 17) Law, 1986, 40 L.S.I. 249.

A similar argument concerning the violation of the right to vote—by reason of difficulties in its implementation—and the principle of equality in voting, was raised by disabled petitioners in H.C. 1759/99, Storm v. Minister of Interior (unreported). The Court stated:

At the start of the hearing—and before we considered the constitutional question—we asked the respondents to examine the possibility of amending the law in relation to the subject-matter of the petition. Today, we have been informed that the amendment has indeed been carried out, and that yesterday the Knesset passed the Elections to the Fifteenth Knesset and the Prime Minister (Amendment) Law, 1999. Counsel for the petitioners indicated that the petition has been satisfactorily resolved.

Id. The statute was published in 1998-1999 S.H. 143.

112 C.A. 6821/93, United Mizrachi Bank Ltd. v. Migdal Coop. Vill., 49(4) P.D. 221.

113 The judicial authority, i.e. the courts, is one of the governmental authorities to which the application clauses in the Basic Laws are directed. See supra text accompanying note 42. For the possible nexus between judicial review of Knesset resolutions and judicial review of Knesset legislation, see the comments of Justice Elon in H.C. 620/85, Miari v. Speaker of Knesset, 41(4) P.D. 169, 264.

114 C.A. 3077/90, Anonymous v. Anonymous, 49(2) P.D. 578, 593; see also C.A. 5942/92, Anonymous v. Anonymous, 48(3) P.D. 837, 842; BARAK, supra note 10, at 704. Precedents for judicial intervention in the implementation of the duty by the legislature, may be found on the comparative level, for example, in the constitutional case law in Germany. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 310-14 (1994); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 335-56 (2d ed. 1997); SABINA MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW—THE PROTECTION OF CIVIL LIBERTIES 136-46 (1999); Currie, supra note 54, at 869-71.
in a particular case may lead the court to refuse to grant the relief essential to enforce the duty.\footnote{The general rule within the area of administrative law in relation to the grant of relief, states that:

[O]ne should draw a sharp distinction between the rule binding the administrative authority and the relief granted by the court for breach of the rule. The rule is located on one plane, and the relief on another. The court may consider, after the act, factors which are different from the factors binding the authority prior to the act....

H.C. 2911, 3486/94, Backi v. Director Gen. of Ministry of Interior, 48(5) P.D. 291, 304 (Zamir, J.); see also Application for Criminal Appeal [A.Cr.A.] 2060/97, Vilenchik v. Tel-Aviv Dist. Psychiatrist, 52(1) P.D. 697, 719-20; H.C. 7053/96, Aencor Ltd. v. Minister of Interior, 53(1) P.D. 193, 202-04. This rule achieves a special status when a resolution of the Knesset concerning its working procedures is being attacked. Despite the existence of a flaw, the court may well desist from intervening. As Justice Shamgar put it:

[I]n practice, the court will not hurry to exercise its judicial review, in accordance with its powers, in so far as relates to those portions of the working procedures of the Knesset which are not in the form of a quasi-judicial resolution.... The proper balance between the need to guarantee the existence of the law and the need to respect the uniqueness of the Knesset in its resolutions concerning its internal affairs, is based on the activation of a standard which examines the substance and the weight of the violation ensuing in a concrete case.

H.C. 1179, 1180, 1181/90, Ratz Faction v. Deputy Speaker of Knesset, 44(2) P.D. 31, 33. This "proper balance" precluded the intervention of the Court in the case at bar, despite the fact that the respondent had not met the duty imposed on him by the Knesset regulations regarding the date on which a vote of no-confidence in the government would be held. Id. at 36. It is evident that this caution will guide the judiciary in connection with its judicial review over the Knesset as the legislature, in general. See, e.g., H.C. 8238/96, 4513/97, Abu Arar v. Minister of Interior, 52(4) P.D. 26, 42-43; United Mizrahi Bank Ltd., 49(4) P.D. at 331-32, 349-50; infra note 118; infra text accompanying note 134, as well as in the sphere of the Knesset's duty to act, i.e. its duty to legislate. If we use terminology relating to the Basic Laws, we can say that this caution accords with the values of the State of Israel, it is exercised for a fitting purpose and to the proper extent. In other words, in relation to the judicial authority as well, the relevant components of the limitation clause are applied by way of analogy, see supra text accompanying notes 78, 106, so that, if they apply, the courts will be entitled to desist from fulfilling their duties regarding the grant of relief in respect of a violation of a protected right. For a discussion of the serious difficulties regarding the judicial determination concerning the statutory duty, see BARAK, supra note 10, at 314, 365. For the appropriate judicial remedy to implement the duty to act, see Emanuel Gross, Constitutional Remedies, 4 LAW & GOV'T INST. 433, 456-58 (1997-1999) (Hebrew).\footnote{H.C. 134/76, Sharabi v. National Council of Bar Ass'n, 30(3) P.D. 493, 498 (Landau, J.).}

This is because the only decision attacked is the decision not to promulgate regulations in breach of the duty to do so. Dictating the contents of the regulations would entail stepping into the shoes of the regulatory authority and transforming the court into the body promulgating regulations—a function outside the framework of judicial supervision.\footnote{H.C. 134/76, Sharabi v. National Council of Bar Ass'n, 30(3) P.D. 493, 498 (Landau, J.).}}
III. THE INFLUENCE OF THE BASIC LAWS ON ADMINISTRATIVE POWERS, PROCESS, AND DISCRETION

I have already pointed out that the significant developments in the constitutional arena in connection with human rights have immediate implications for administrative law, as the latter implements the principles of the constitutional system while drawing a balance between the needs of the community (the public interest) and the good of the individual (human rights). This balance is expressed in every aspect of the activities of the administrative authority, starting with a determination of the extent of the authority's powers, via the administrative process, and ending with the decision of the authority, which is usually the outcome of discretion conferred on the authority by statute. All these factors are influenced by the constitutional developments under discussion here. Administrative authorities are now supposed to wend their way through the new constitutional order both from the point of view of the normative status of the protected rights and from the point of view of their great weight within the complex of interests touching upon the exercise of a particular power. We shall now examine the impact of the Basic Laws on administrative powers, processes and discretion.

118 Cf. 1715/97, Chamber of Inv. Managers in Isr. v. Minister of Fin., 51 (4) P.D. 367, 387 (Barak, J.):

Indeed, a declaration of the invalidity of a law, or part of it, is a serious matter. A judge will not do so lightly. A declaration of invalidity of subordinate legislation as being contrary to the provisions of a law, is not the same as a declaration of invalidity of primary legislation as being contrary to a Basic Law. By invalidating subordinate legislation, the judge gives expression to the will of the legislature. By invalidating primary legislation, the judge frustrates the will of the legislature.

119 See supra text accompanying notes 21-23.

120 Against this background we can understand the immediate, direct and broad application of the Basic Laws to the governmental authorities in general, see supra text accompanying notes 41-43, and, for our purpose, to the public administration authorities in particular, see supra text accompanying notes 50-52.

121 In this context, one should mention the comments of Justice Elon when he referred to Basic Law: Human Dignity and Freedom: "In view of the constitutional status and importance of Basic Law: Human Dignity and Freedom, the provisions of this Law are not only in the nature of basic values of the legal system in Israel, but also comprise the basic infrastructure of the legal system in Israel...." CA. 506/88, Shefer v. State, 48(1) P.D. 87, 105. These comments were cited with approval by Justice Barak, applying them to the two Basic Laws concerning human rights, in M.A.Cr. 537/95, Genimat v. State, 49(3) P.D. 355, 410.
A. Administrative Power

1. Administrative Power to Violate Human Rights Prior to the Era of the Basic Laws

According to the principle of the legality of the administration, the source of power of an administrative authority is statutory. Even prior to the enactment of the two Basic Laws, the Supreme Court held in a long line of cases that the empowering law would be interpreted in such a way so that the violation of human rights caused by the power granted to the authority would be minimal. There was a presumption that the legislature, operating within a democratic state, aspired to protect these rights (a presumption which continues to prevail). As noted by Justice Etzioni when annulling the refusal of the Registrar of Companies to register a company under a name selected by its founders:

"When reference is to a power which entails a real violation of a basic right of a citizen in a free society, we shall not hesitate to decide in favour of the interpretation which limits the violation of the civil rights, as there is a presumption that the legislature respects these rights and if it sees fit to infringe one of them—it will do so by means of express words which leave no shadow of a doubt in respect of that intention."

On occasion, the Supreme Court has reached even further in implementing this interpretive approach, in order to prevent or limit the violation of a right. Justice Cohn expressed this as follows:

"If sometimes the court is brave enough to interpret the words of the legislature in a manner contrary to its assumed intent—if its language justifies or demands such an interpretation—this will only be at a time and place when that interpretation is needed to increase remedies and to strengthen justice and protect human rights so that they will not be curtailed. This is not the position when that interpretation is required to broaden the powers of the authority and to diminish an individual's rights."

---

122 See supra text accompanying notes 56-58.

[I]f the legislature wishes to deny a person's freedom of independent occupation, or to empower a subordinate legislator to do so, it must state this in explicit and unambiguous language. If the legislator used language which is open to a reasonable interpretation according to which a person's basic right to choose his own occupation will not be curtailed or denied, then the court will presume that the legislator did not intend to restrict this right and to curtail fundamental freedoms.
125 See Bracha, supra note 10, at 120-21.
freedoms: in such a case the court will barricade itself behind the legislature’s intent and turn it into a buttress for the protection of the individual.\(^{127}\)

Concurrent with the protection of human rights, the courts have created balancing systems in relation to conflicts between protected rights and other public interest values, which must be protected in a democratic state and which on occasion are expressed in a statute conferring power on the administrative authority.\(^{128}\) This system of balances is what guides the activities of the authority, and what underpins the judicial review of these activities.\(^{129}\)

This multi-faceted complex of protected rights and the various ancillary balancing formulæ\(^{130}\) has provided the Israeli legal system with a "form of judicial Bill of Rights, resembling Bills written in constitutions of other states, however, in contrast to some (not all) of them, our Bill of Rights is subject to the sovereign will of the Knesset as the legislature."\(^{131}\) The intent to infringe human rights—directly by statute or by delegating powers to an administrative authority, must be expressed by the Knesset in a clear and unequivocal manner.\(^{132}\)

\(^{127}\) Id. Cf. C.A. 1915, 2084, 3208/91, Jacobi v. Jacobi, 49(3) P.D. 529, 626-27 (Strasberg-Cohen, J.)


\(^{130}\) See, e.g., Election Appeal [E.A.] 2, 3/84, Neiman v. Chairman of Cent. Election Comm. for Eleventh Knesset, 39(2) P.D. 225, 311, translated in 8 SELECTED JUDGMENTS SUP. CT. ISR. 83, 161 (Barak, J.) ("Indeed, when adopting the standard of probability one should not follow a general, universal criterion, since it depends on the force of the different values that come into conflict within a given legal context.").


\(^{132}\) See, e.g., H.C. 200/57, Bernstein v. Bet Shemesh Dist. Council, 12 P.D. 264, 268; H.C. 124/58, Bigon v. Lod Municipality, 13 P.D. 339, 343, 346. Generally, the demand regarding the expression of this will by the legislature is even stricter. In other words, in order that the violating statutory provision—and in our case the provision in the empowering statute—be recognized by the courts as such, it must be explicit. Thus, in H.C. 337/81, Miterani v. Minister of Transp., 37(3) P.D. 337, extracted in PUBLIC LAW IN ISRAEL 125 (Itzhak Zamir & Allen Zysblat eds., 1996), Justice Shamgar considered the question of whether an implicit authorization in a statute is sufficient to allow violation of individual freedoms. The question arose in the concrete context of violation of freedom of occupation by subordinate legislation—in the absence of explicit statutory authorization. Justice Shamgar noted:

Examination of the subordinate legislation, according to the limits marked out for it by the primary legislation, is, of course, especially strict when the limitation of a basic right is involved: the subordinate legislator needs . . . in all cases explicit authorization by the primary legislature; accordingly, we return to the issue of the interpretation of the written word . . . a basic right cannot be denied or limited save by explicit legislation on the part of the primary legislator, and, provided there is no Basic Law directing otherwise, by a subordinate legislator authorized to do the same by the primary legislator . . . . In my view, authorization for this purpose means "express authorization," and for my part reference here is exclusively to a situation where the primary legislator clearly and expressly states that it empowers the subordinate legislator to promulgate regulations establishing
2. Administrative Power to Violate Human Rights
in the Era of the Basic Laws—General

As we have seen, the status of the principle of the legality of the administration underwent transformation in the context of rights protected by the Basic Laws. It now enjoys constitutional status. The legislature is under a duty to respect these rights and does not have the power to violate them except within the confines of the limitation clause. A law which is found to be unconstitutional may be invalidated.\(^{133}\)

However, the Court will not arrive at such a far-reaching conclusion regarding the invalidity of a law except where every avenue has been exhausted and there is no possibility of interpreting the law in such a way as to make it conform with the provisions of the Basic Laws. In other words, the Court will do everything possible in order to find, by way of interpretation, "conformity" between the statute—including the sections conferring power on the administrative authority—and the Basic Laws.\(^{134}\)

In this way, the Court implements, in Israeli law, the principle of conformity to the constitution\(^{135}\) which is accepted in various systems where judicial supervision is exercised over the constitutionality of the law.\(^{136}\)

prohibitions or restrictions on occupation in a particular profession.

37(3) P.D. at 358. Indeed, according to the legal situation which preceded the new Basic Laws, the right to freedom of occupation did not have an effect on the validity of a law, and the legislature could have limited or impaired freedom of occupation, provided this was done in an express, clear and unequivocal manner. H.C. 726, 878/94, Clal Ins. Co. v. Minister of Fin., 48(3) P.D. 441, 459 (Levin, J.). See also 1715/97, Chamber of Inv. Managers in Isr. v. Minister of Fin., 51(4) P.D. 367, 383; H.C. 5936/97, Lam v. Director General of the Ministry of Education, Culture & Sport (forthcoming) (paragraph 10 of Justice Dorner's opinion and at paragraph 1 of Justice Barak's opinion). This principle is valid in respect of all human rights, see 2 AHAMON BARAK, INTERPRETATION IN LAW 558-61 (1993) (Hebrew) (discussing statutory interpretation).

\(^{133}\) See supra text accompanying notes 53-60.

\(^{134}\) See Clal, 48(5) P.D. at 474 (Levin, J.):

A question arises... what standards should guide us, when we seek to interpret the components of the limitation clause and examine the considerations of the legislature, in terms of reviewing legislation in the light of the principles and the values and the rights conferred by a Basic Law. It seems to me that the rule which should guide us in such a case is, on one hand, that the interpretation must be limiting, that the basic rights declared in the constitution (currently, in the Basic Laws) must be given their full substantive and fundamental significance, and that in any event, the possibilities of violating these rights should not be expanded.

Yet, it is appropriate to accord proper respect to the legislature and to impute to it a presumption that its considerations and reasons, when enacting provisions violating basic rights, were relevant and sincere. See also C.A. 2405/91, 2912/93, State v. Estate of Rabbi Pinhas David Horowitz, 51(5) P.D. 23, 64-65; H.C. 5503/94, Segal v. Speaker of Knesset, 51(4) P.D. 529, 548-50; Chamber of Inv. Managers in Isr., 51(4) P.D. at 387-88, 418; H.C. 7111, 8195/95, Local Gov't Ct. v. Knesset, 50(3) P.D. 485, 490; H.C. 5434/96, Hofnung v. Speaker of Knesset, 50(3) P.D. 57, 67-70; H.C. 4562/92, Zandberg v. Broadcasting Auth., 50(2) P.D. 793, 815; supra text accompanying notes 115-18.

\(^{135}\) See Zandberg, 50(2) P.D. at 810; M.A.Cr. 537/95, Geninat v. State, 49(3) P.D. 355, 412.

\(^{136}\) In the United States for example, see Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring):
The presumption regarding the aspiration of the legislature to respect the protected rights is not weakened, but strengthened: legislation is interpreted against the background of the fundamental values of the system. These values are reflected in the protected rights which serve as the basis of the system and now attract a supra-legislative constitutional status of which the legislature is aware. As a result of this, interpretation of statutes will be carried out while “attributing greater weight to the rights” under discussion. In other words, “in the balance between the interests embodied in these rights and other interests, which are not embodied in constitutional rights, the status of the former rights are strengthened.” This shift in the fulcrum of balance—that is, an interpretation favouring protected rights and limiting the infringing powers of the administrative authority—is strengthened even more by the fact that the alternative may be the invalidation of the law, which, as already noted, is a result the court strives to avoid.

The new value and normative status of the protected rights also affects the old law which preceded the Basic Laws. The validity of this law has been preserved, even if it infringes the protected rights and

The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. 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. See also Blair v. United States, 250 U.S. 273, 279 (1919). Regarding Germany, see Rob Bakker, Verfassungskonforme Auslegung, in JUDICIAL CONTROL—COMPARATIVE ESSAYS ON JUDICIAL REVIEW 9 (Rob Bakker et al. eds., 1995):

Verfassungskonforme Auslegung is an essentially German concept . . . . According to this principle a statutory provision is not considered unconstitutional if there is a possibility of interpreting the provision in a way which is in conformity with the Basic Law, provided the statutory provision remains meaningful when interpreted in such a way. See also CURRIE, supra note 114, at 28 (“[T]he German [Constitutional] Court often goes out of its way to construe a questionable statute so as to assure its conformity with the constitution (‘Verfassungskonforme Auslegung’”).

This interpretive principle is also used where the Bill of Rights does not possess a supra-legislative constitutional status. See, e.g., N.Z. Bill of Rights Act, § 6 (“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.”); U.K. Human Rights Act, § 3(1) (“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”). Regarding Section 3 of the Human Rights Act, see, for example, K.D. Ewing, The Human Rights Act and Parliamentary Democracy, 62 MOD. L. REV. 79, 86-88 (1999); KEIR STARNEZ, EUROPEAN HUMAN RIGHTS THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14-16 (1999).


See supra note 121.

H.C. 5934/92, Hophert v. Yad Vashem Mem'l Auth., 48(3) P.D. 353, 363 (Or, J.).

Id. For a far-reaching example of a law being made "compatible" by way of interpretation, with the provisions of Basic Law: Human Dignity and Freedom, in order to prevent doubts as to its validity, see Zandberg, 50(2) P.D. at 810-15.
does not conform with the provisions of the limitation clause. However, interpretation of it will be conducted in the spirit of the Basic Laws. Basic Law: Freedom of Occupation contains an explicit provision in this regard. Basic Law: Human Dignity and Freedom does not contain such a provision. However, even in its absence, it should be remembered that the two Basic Laws have made their mark on the basic values in accordance with which these “old” laws are interpreted. That is, even in connection with an old law there may be a “shift” of the point of interpretive balance leading to a change in its meaning, in the direction of further strengthening protected rights and limiting the infringing power of the authority which has been conferred on it by the empowering statute. Accordingly, when considering a particular power, by virtue of which it is possible to infringe a protected right, it is necessary to examine the old case law in the context of that power. The result of that examination may be the restriction of power and the limitation of the infringement made by virtue of it, so that it conforms to the provisions of the limitation clause. In this way, the gap, in relation to the protected rights, between the old and new law is diminished, and the “duality of the status” of the respective rights is reduced.

---


\[142\] Section 10 of the Basic Law stipulates that provisions of any “old” enactment “shall be construed in the spirit of the Basic Law.”

\[143\] See M.A.Cr. 537/95, Genimat v. State, 49(3) P.D. 355, 375-76, 379, 410-21 (Dorner, J., Barak, J.). This approach did not find favor with Justice Cheshin who, in a minority judgment, argued that it was not compatible with the provisions of Section 10 of Basic Law: Human Dignity and Freedom, which preserves existing law:

In my opinion, Basic Law: Human Dignity and Freedom did not intend, in principle, to make changes to the law preceding it, and indeed the same law we had then is with us now. Why did I say “in principle”?—because it is possible that on the margins some change may take place—even if only minor—and we must not commit ourselves in advance. That is the way of the law, developing itself, step after step, little by little, and this path which has been paved, I too will follow.

Id. at 389; see also id. at 389-401. In a further hearing in relation to this case, the position of Justices Dorner and Barak was accepted in relation to the issue under discussion here: F.H. Cr. 2516/95, Genimat v. State, 49(4) P.D. 589, 609-10, 614 (Mazza, J.); id. at 630-31 (Goldberg, J.); id. at 632-34 (Strasberg-Cohen, J.). See also id. at 644, 648 (Dorner, J.); id. at 652-55 (Barak, J.).

Justice Cheshin retained his minority opinion. Id. at 639-43.

\[144\] See F.H.H.C. 4466/94, Nusseiba v. Minister of Fin., 49(4) P.D. 68, 85; H.C. 4541/94, Miller v. Minister of Defense, 49(4) P.D. 94, 139. Naturally, this renewed examination of the old case law need not necessarily lead to a “shift” in the interpretive point of balance with which we are concerned. It is possible that in the past—prior to the enactment of the Basic Laws—the case law steered the possible interpretation in the direction of “favoring” the protected rights, making it compatible with the provisions of the Basic Laws, and this interpretation will remain valid now as well. In the same way, it is possible that the old law does not leave room for interpretation in the spirit of the Basic Laws and in such a case its meaning will remain as it was. See Genimat, 49(3) P.D. at 414-15.

For the application of the limitation clause to an administrative authoriti, see infra text accompanying notes 199-204.

\[145\] See Baruch Bracha, Aharon Barak: Constitutional Interpretation, 3 LAW & GOVT ISR. 339, 349-
ates an anomaly in the Israeli constitutional system in that there are rights which are protected in a constitutional manner, while concurrently there are enactments which are not subject to that protection and which violate those rights. This anomaly must be eliminated, and the approach of the Supreme Court contributes to this result. Such a contribution will be encouraged by the effect Basic Laws have on the interpretation of “old” and “new” enactments which violate rights that are not protected by those Basic Laws. It would seem that this is the path now being pursued by the courts. Indeed, it would seem that even in the constitutional age, the primary application of the Basic Laws will be in the area of interpretation and not in the area of invalidating statutes.

Indeed, since the Knesset adopted the Basic Laws relating to human rights, we have been using the standards set out therein for the purpose of interpreting the governmental powers which were conferred by legislation (primary or subordinate), whether in relation to legislation which was enacted prior to these Basic Laws, or legislation enacted thereafter; whether in relation to the violation of rights “covered” in the two Basic Laws concerning human rights, or in relation to the violation of human rights which are not “covered” by these Basic Laws. This connection between the constitutional limitation clause and the complex of laws within the field of public law—including human rights which are not “covered” by the Basic Laws—is natural.

The important questions in this context are, of course: to what extent the court implements the rule which it has established, especially in relation to the influence of the Basic Laws on the laws preceding them; to what extent the judicial decisions have been modified; and to what extent the violating impact of old laws has been limited by the Basic Laws. It would seem that at present it is still too early to point to drastic changes regarding the application of the old law. See, e.g., Eyal M. Gross, The Politics of Rights in Israeli Constitutional Law, 3 ISR. STUD. 80, 101-06 (1998); David Kretzmer, Fifty Years of Supreme Court Jurisprudence on Human Rights, 5 LAW & GOV’T ISR. 297, 334-37 (1999) (Hebrew). In any event, the infrastructure for these changes exists and their materialization depends on the extent of the court’s resolve to make real use of it in order to achieve uniformity with the values (the rights) contained in the Basic Laws. Examination of the implementation of the rule in the direction of a real change in the meaning accorded to “old” concrete provisions in the context of concrete rights justifies an article of its own and is beyond the scope of the discussion in this article.

The Basic Laws have led to the constitutionalization of Israeli law. This phenomenon influences both the validity of legislation and its meaning. For myself, I believe that the influence on the interpretation of legislation will be more extensive than the influence on the validity of the legislation, as every statute requires interpretation, and only few statutes will be examined as to their validity.

See also supra text accompanying notes 134-40.
3. Administrative Power to Violate Human Rights—
The Limitation Clause

This discussion returns us to the principle of the legality of the administration in the constitutional sense. The permissible violation of a protected right is "by a law"—namely, by primary legislation—which meets the requirements specified in the limitation clause, or under an aforesaid law by virtue of an explicit authorization therein. For our purposes, the latter provision is of particular importance, as the administrative authorities act by virtue of authorization "under a law," and the term "under a law" enables violation of a right by regulations made under a law.

Similarly, the legislature may authorize the administrative authority to violate rights by way of an administrative act which is not a regulation. In other words, it is an act which does not possess a legislative character. Naturally, the empowering law, together with its authorizing provisions, must meet the requirements of the limitation clause. In this context it should be emphasized that reference is to "explicit authorization." In this way the Basic Laws reiterate the law developed prior to their enactment by the courts and even sharpen it in the direction of protection of rights.

---

134 Analysis of the requirements which refer to the values of the State of Israel and to the proper purpose, is outside the scope of this article save for the occasional reference herein. See infra text accompanying notes 225-29, 238-40, 248-50, 266-67, 275, 392-300.
136 See Interpretation Law, §9, 35 L.S.I. 370 ("The expression 'under,' or a similar expression in relation to any enactment shall be construed as relating also to regulations made by virtue of such enactment."); see also H.C. 6055, 7083/95, Zemach v. Minister of Defense (forthcoming) (at paragraph 30 of Justice Zamir's opinion); Cr.A. 725/97, Kalkuda v. Authority for Agric. Supervision, 52(2) P.D. 721, 762; H.C. 2740/96, Shancey v. Supervisor of Diamonds, 51(4) P.D. 481, 491; H.C. 6500/93, Cohen v. Minister for Religious Affairs, 48(2) P.D. 837, 841-42; H.C. 5771, 5807/93, Zitrin v. Minister of Justice, 48(1) P.D. 661, 668.
138 Unless the empowering statute and the relevant case law give rise to a duty to promulgate regulations. See supra text accompanying notes 82-83.
139 See the definition of "regulation" in Section 3 of the Interpretation Law: "Regulation" means a direction issued by virtue of Law and having legislative effect.
140 See ZAMIR, supra note 44, at 135-36. See also infra text accompanying notes 186-88.
141 See supra text accompanying note 132.
142 This is accomplished in the express requirement that the authorization be "explicit." Cf. supra note 132. Of course, the requirement that the authorization be "explicit" now possesses a constitutional status—that is, an authorizing statute cannot deviate from it—and not only the status of an "interpretive presumption" as in the past. See H.C. 5936/97, Lam v. Director General of the Ministry of Education, Culture & Sport (forthcoming) at paragraph 10 of Justice Dorner's opinion.
The demand for "explicit authorization" should be interpreted against the background of the basic values of the system at the center of which, for our purpose, is the strengthening of the protected rights and deployment of the primary arrangements, especially those which have implications for human rights, in the hands of the primary legislator. Thus, the empowering law must state, in its own provisions, the contents of the violating arrangement as well as the criteria for its implementation and leave the administrative authority to handle the implementation of that arrangement—whether by way of subordinate legislation or in other ways—in accordance with those criteria.

The Supreme Court has recently made vigorous use of this constitutional approach in the Rubinstein case, invalidating an arrangement made by the Minister of Defence exempting a large number of Yeshiva [religious academy] students from the duty to perform military service. The Minister relied on Section 36 of the Defence Service Law (Consolidated Version) 1986, which empowers him to exempt a person from military service:

The Minister of Defence may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces of the Israel Defence Forces or for reasons connected with the requirements of education, security, settlement or the national economy or for family or other reasons

(1) exempt a person of military age from the duty of regular service or reduce the period of his service . . . .

Earlier attempts to challenge this arrangement in the High Court of Justice had failed. Since the last of those attempts, the number

---

158 See supra text accompanying notes 137-39.
159 See supra text accompanying notes 99-100.
160 See BARAK, supra note 10, at 489-507; ZAMIR, supra note 44, at 116-17, 180-81; RUBINSTEIN & MEDINA, supra note 10, at 982. For a different opinion, see Gazal, supra note 192, at 401-03, 414-21. It should be noted that Justice Barak reached the conclusion that the duty to set out in the violating law those criteria which will guide the administrative authority, need not necessarily be on the basis of the requirement of explicit authorization, but rather on the basis of the requirement that the violation be "by a law . . . or under an aforesaid law." BARAK, supra note 10, at 489-507. Considering the purpose of the provision (namely, to ensure "the principle of the rule of law from the formal point of view and from the narrow, substantive point of view," id. at 489, and following a comparative analysis, Justice Barak set out additional requirements in relation to the violating law—for our purpose, the authorizing law—including that:

161 H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, translated in 10 SELECTED JUDGMENTS SUP. CT. ISR. 1.
of persons receiving an exemption has increased significantly. Similarly, a shift took place in the status of the "basic rule," which states that primary arrangements are determined by the primary legislator—and not by its delegates among the administrative authorities, especially when reference is to a violation of human rights. This shift is the outcome of the enactment of Basic Laws concerning human rights which tend to "strengthen the basic rule. This strengthening is expressed by the fact that the interpretive presumption, to the effect that there is an assumption that the purpose of the law was not to grant to the executive authority power to establish primary arrangements, obtains added force." In Rubinstein, reference was made to a law which preceded the Basic Laws which therefore,

are incapable of impairing the validity of the old empowerment. Nevertheless, in the absence of an express provision to controvert—an interpretive effort must be made—where possible—to give this empowerment a restrictive interpretation, so that it will be implemented, in so far as possible, in the spirit of the basic rule regarding primary arrangements. In this spirit, there are cases where the executive authority must refrain from fundamental decisions on basic social issues, which are the subject of intense public dispute, and leave the decision to the legislative authority.

Rubinstein raised extremely difficult questions concerning the clash between rights (such as the right to equality of those serving in the army versus the freedom of religion of the Yeshiva students), as well as ideological social and security questions. All of these require a determination by the legislature. Application of the basic rule to the power of the Minister of Defence under of Section 36 of the Defence Service Law (Consolidated Version) leads to the conclusion that the Minister does not have the power to grant a general exemption to Yeshiva students. The eleven judges who heard the case held that the arrangement was void (by way of suspension) and passed the matter to the Knesset for it to deal with.

The Basic Laws concerning human rights therefore bolstered the interpretive approach of the courts which is intended to guarantee that the primary arrangements—and for our purpose, those within the field of human rights—will be determined by the legislature. With regard to "new" authorizing statutes, this approach may lead to the invalidation of a statutory provision which purports to grant un-

---

165 The term "basic rule of public law in Israel" is used by Justice Barak to describe the constitutional interpretive presumption under consideration here. See the remarks of Justice Barak in supra note 100.
166 Rubinstein, 52(5) P.D. at 523 (Barak, J.). Cf. H.C. 5016, 5025, 5090, 5434/96, Horev v. Minister of Transp., 51(4) P.D. 1, 75-76.
167 Id. at 524-29.
168 Id. at 529.
169 Id. at 530.
170 Id. at 530-31.
guided power and discretion by virtue of which it is possible to violate a protected right. For example, if a statute enacted by the Knesset in consequence of the judgment repeats the provisions of the current Section 36, it does not meet the requirement of explicit authorization (and in the concrete context considered by the judgment, the statute may be invalidated if the Court reaches the conclusion that the statute purports to grant primary power to violate a protected right).

At the same time, care should be taken not to reach hasty and far-reaching conclusions that a statutory provision is void by reason of the grant of primary power to the administrative authority. In the Israeli system there is no provision possessing constitutional status that concentrates legislative power in the hands of the primary legislator, and which constitutionally limits its power to delegate its powers. Unfortunately, the "basic rule" concerning the non-transfer of primary powers to the public administration, fails to genuinely reflect the legislative reality. The reality is that the legislature engages in an intensive conferral of primary powers on the administration, powers which may be exercised either by means of subordinate legislation or by means of other administrative acts. This is also the case in sensitive areas such as human rights. Even, Basic Law: the Government clarifies that it is within the power of the legislature to grant broad rule-making powers to a Minister. Section 47 of the Basic Law provides as follows:

(a) The Prime Minister or the Minister charged with the implementation of a Law is empowered to make regulations for its implementation.

(b) A Law may empower the Prime Minister or Minister to make regulations on a matter specified in the authorization.

Subsection (a) deals with the power to issue regulations of a secondary character. Subsection (b) deals with regulations which are not necessarily implementation regulations—that is, possessing a secondary character—and therefore it would seem that regulations of a


\[173\] A possible protected right is a right to equality. See infra text accompanying notes 288-300. Justice Barak did not state his position with regard to the constitutionality of a possible future statutory arrangement passed by the Knesset. See H.C. 3267/97, 715/98, Rubinstein v. Minister of Defense, 52(5) P.D. 481, 528-29; see also id. at 541 (Cheshin, J.).

In 2001 the Knesset passed legislation granting semi-ministerial powers to the Minister of Defense regarding the exemption of Yeshiva students from military service. Petitions attempting to challenge the validity of this legislation are now pending in the Supreme Court.

\[174\] See Bracha, supra note 23, at 83; see also H.C. 6971, 6972/98, Paritzki v. Israel, 53(1) P.D. 763, 790-91.

\[175\] See Bracha, supra note 23, at 84-86; Rubinstein & Medina, supra note 10, at 806-07.

\[176\] See Zamir, supra note 44, at 134, 232-38.

\[177\] See Bracha, Blanket Rule-Making Power, supra note 99, at 247; Zamir, supra note 44, at 134.

primary nature would also enter this framework. This provision imprints a "constitutional seal" on the existing reality. This reality, whereby broad rule-making powers is granted, exists in other legal systems, including those which constitutionally assign the power of legislation to the legislature.

The "basic rule," insofar as it reflects constitutional values of the utmost importance to a democratic regime, is supposed to "moderate" the phenomenon whereby far-reaching powers are conferred on the public administration. We have seen that it is of special importance, and attains greater force, when power is granted to violate human rights. Today, it has secured a constitutional status by means of the appropriate interpretation of the limitation clause, and accordingly, at least in the area of protected rights, the basic rule also applies to the provisions of Section 47(b) of Basic Law: the Government. That is to say: empowering statutes which fall within the confines of the Section will also be subject to the aforementioned rule and will certainly be interpreted in the light of that rule. This should not ignore the reality "on the ground" and the constraints.

---


180 With regard to England, see Paul P. Craig, Administrative Law 366 (4th ed. 1999): [T]he use of skeleton legislation . . . is cause for special concern. The passage of such legislation is now common, with power being given to the executive not merely to fill the technical details, but also to decide broad issues of policy, thereby leading to a consequential shift in the balance of power between Parliament and the executive.

See also Carleton K. Allen, Law and Orders 93-94, 154-57, 170-72 (3d ed. 1965). Regarding the United States, see Lorch, supra note 24, at 18; Tribe, supra note 103, at 978 ("The Court has broadly construed this power to delegate with the result that the Court has not invalidated a single delegation of congressional power on nondelegation doctrine grounds since 1936."). Regarding Australia, see Roger Douglas & Melina Jones, Administrative Law—Commentary and Materials 272-82 (3d ed. 1999); S.D. Hogg, Principles of Australian Administrative Law 115-16 (6th ed. 1985). Regarding Canada, see Jones & de Villars, supra note 27, at 85, 87-88; Hogg, supra note 103, at 349-52. On the other hand, the German Constitutional Court is more strict in complying with the limitations provided by Section 80(1) of the Basic Law regarding the delegation of legislative power. See Currie, supra note 114, at 125-34.

In this context it is interesting to mention the Constitution of the Fifth Republic of France, which confers limited legislative powers upon the legislative branch in areas defined in the Constitution, whereas the upper ranks of the executive branch are granted primary and residual legislative powers. Cf. Article 34 of the Constitution, which addresses the legislative powers of the Parliament in relation to the matters set out therein, to Article 37, which deals with the residual legislative powers of the government. In the light of this constitutional division of legislative powers in France, one cannot speak of regulations, which are promulgated in the residual sphere assigned to the government, as "subordinate legislation." See Brown & Bell, supra note 103, at 11.

181 See the broad discussion of these values in, H.C. 2740/96, Shemy v. Supervisor of Diamonds, 51(4) P.D. 481, in the opinions of Justice Cheshin, 51(4) P.D. at 504-19, and Justice Barak's id. at 520-21, and in Justice Barak's opinion in, H.C. 3267/97, 715/98; Rubenstein v. Minister of Defense, 82(5) P.D. 481, 502-15. See also H.C. 5936/97, Lam v. Director General of the Ministry of Education, Culture & Sport (forthcoming) at paragraph 9 of Justice Dorner's opinion; Public Committee Against Torture in Israel (forthcoming) paragraph 37 of Justice Barak's opinion; Bracha, supra note 23, at 99-95.
which cause the legislature to grant broad powers to the administrative authorities.\footnote{See Rubinstein, 52(5) P.D. at 515-17.}

The significance of this is that the difficult issue\footnote{See id.} of the delimitation of the boundaries between primary and secondary arrangements in this connection,\footnote{See Klinghoffer, supra note 178, at 224, where he discusses the distinction occupying us in the context of subordinate legislation: The power to make implementation regulations only enables subordinate legislation with regard to subordinate arrangements, which "implement" primary arrangements determined by law. The conceptual borderline separating primary and subordinate arrangements cannot be given a general definition, by way of abstract thinking. It depends on the nature and specific substance of the subject-matter which is to be arranged, and therefore, the decision whether a certain set-up is of a primary or secondary nature, cannot be made otherwise than by an inductive way in accordance with reason and logic. See also Bracha, Blanket Rule-Making Power, supra note 99, at 241-46. Without attempting to establish a precise border line between the two types of arrangements, Justice Barak clarifies in Rubinstein, 52(5) P.D. at 515: [A] primary arrangement exists where from the law itself—according to its construction by way of the usual methods of interpretation—it is possible to delineate the area within the borders of which the executive branch operates, and the direction, the principles or the purpose which are supposed to guide the executive branch in its actions. To the extent that regulation of a particular area necessitates fundamental decisions, which are capable of establishing structures that are significant for the life of a person or society, it would be proper for the decisions to be taken through the primary legislation itself. Indeed, a primary arrangement exists, where a law itself establishes principles or standards at a high level, which must be implemented at a lower level.\footnote{See id. (Barak, J.); see also id. at 515-17; BARAK supra note 10, at 503-04; RUBINSTEIN & MEDINA, supra note 10, at 982.} A high level of abstractness exists, for example, in the United States in the context of the requirement, which has been established in the case law, that the delegation of legislative powers by Congress be accompanied by standards, that is, by criteria according to which the subordinate legislator is supposed to exercise its powers. See SCHWARTZ, supra note 26, at 44-59, "Since 1935, the court has upheld statutes containing only vague standards and statements of policy and delegating very broad discretion." Id. at 51.\footnote{See Rubinstein, 52(5) P.D. at 517, 521-24; see also supra text accompanying notes 134-39.}
sion that it is unconstitutional\(^{187}\)—might not be annulled by the Court but rather be made “compatible” with the rationale of the basic rule so as to enable the operation of a specific, limited and secondary-type power under it.\(^{168}\) In this context, other factors may also possess significance, such as subordinating the arrangement established by the administrative authority to parliamentary supervision or to other measures which reflect the various constitutional values underlying the basic rule.\(^{189}\) In any event, in considering statutory empowerment provisions by virtue of which it is possible to violate protected rights, the court today must give added weight to its own pronouncements on this sensitive topic and do what it can to prevent the dangers which it itself has pointed out: \(^{190}\) “Subordinate legislation concerning a fundamental and highly important matter, made under an empowering statute, may bring on us a purely formal democratic regime. A genuine parliamentary democratic regime requires that legislation be enacted by the legislature.”

Is an authority which has lawfully been granted the power to violate a protected right entitled to delegate that power? The delegated power is a power “under a law,” as required by the limitation clause, since it originates in a statute.\(^{192}\) However, it seems that it is not “under a law by virtue of an explicit authorization therein.” In other words, if the legislature wishes to enable an authority to delegate a power which has been granted, it must explicitly empower that authority to do so. This interpretation conforms with the purpose of the Basic Laws in connection with the protection of the rights contained therein and in connection with the aspiration to confine, inso-

\(^{187}\) See supra text accompanying note 155.

\(^{168}\) Thus, with regard to the exemption given to the Yeshiva students in *Rubinstein*, 52(5) P.D. 481, we have seen that one of the reasons for the different result reached by the Court—compared to its earlier judgments—was the significant growth in the number of persons enjoying the benefit of the exemption. *Supra* text accompanying note 164. See *Rubinstein*, 52(5) P.D. at 499-501, 529-30. Does it therefore follow that in the absence of such growth, the Court would not have invalidated the arrangement in relation to the exemption? See the opinion of Justice Cheshin, *id.* at 538, where he emphasizes that by virtue of the powers granted to him, the Minister of Defense is entitled to issue individual exemptions, and that a general exemption is not within his ministerial competence but within that of the Knesset.


\(^{191}\) See BRACHA, supra note 38, at 111; supra text accompanying notes 149-55.
far as possible, the capacity to violate rights to the legislature itself, or, at least, to the authority which it expressly contemplated and empowered. This interpretation also conforms with the law regarding delegation, the starting point of which is that “delegatus non potest delegare.” This rule is in the nature of a presumption, which may be expressly, and, on occasion, even implicitly, rebutted. The presumption has great force when one is considering the delegation of a power to violate human rights. The force stems from the necessity to prevent that power from being “disseminated” and placed at the disposal of a body not contemplated by the legislature with the attendant increased danger that rights will be violated.

Applying this “strict” presumption to the provisions of the limitation clause, apparently makes it necessary to identify an explicit statutory provision conferring power to delegate the violating power. In a situation where it is possible to delegate this power, and on the assumption that the criteria for its implementation have not been set out or not specified in a sufficient manner in the empowering law (for example, when reference is to a law which preceded the Basic Laws and which clearly confers upon an authority the power to determine primary arrangements), the authority will be obliged to determine those arrangements itself and it will not be entitled to delegate the power to determine them to another body.

Beyond the issue of the determination of primary arrangements, a number of questions arise concerning the requirement of “explicit authorization” in the limitation clause. These questions will not be

---

195 A delegate cannot delegate. In other words, the delegate of the legislature—namely, the authority which has been granted the power—is not entitled to delegate that power to another. See Bracha, supra note 38, at 152-56; De Smith et al., Principles of Judicial Review 224 (Harry Woolf, Jeffrey Jowell, & Andrew Le Seur eds., 1999).

194 See Bracha, supra note 38, at 156-58.

196 See id. at 168. The presumption is supposed to be even more powerful if reference is to the delegation of a power having a legislative nature. See id. at 160-66; De Smith et al., supra note 193, at 227-28.

197 This need also exists in relation to competent authorities in respect of which there is a general power of delegation. Thus, Section 41 of Basic Law: the Government empowers the government to delegate powers to ministers, Section 41(a), and ministers are empowered to delegate the powers granted to them—either directly under a law, Section 41(b), or delegated to them by the government (in which case the government must authorize the continuation of the delegation—Section 41(c)—to a public servant. According to Section 41(e), the provisions of Section 41 shall apply “if no other intention may be inferred from the law which confers the power or imposes the duty.” Since the law which confers the power on the government or on a minister is subject to the provisions of the Basic Laws relating to human rights (or, in relation to old legislation, the empowering law must be interpreted in the spirit of the Basic Laws), it seems that “another intention” is being inferred from that law in terms of delegation of powers, at least in so far as concerns a delegation of powers from a minister to a public servant.

198 This is the situation which was considered in H.C. 2740/96, Shancey v. Supervisor of Diamonds, 51(4) P.D. 481. With regard to the discussion in the text, see primarily the opinions of Justice Cheshin, id. at 504-19, and Justice Barak, id. at 519-21.
discussed in this article. In any event, just as the empowering (violating) statute is subject to the limitation clause, so too, and a fortiori, is an administrative decision exercising the violating power subject to that clause. The limitation clause also applies to the exercise of power conferred by laws which preceded the Basic Laws, both by reason of the “application (respect) clause,” and by reason of the duty to interpret existing law in the spirit of the Basic Laws. Additionally, this interpretation will consider the fact that, from the point of view of the power of an administrative authority, the limitation clause does not present any novel requirements, as these requirements applied to the authority by virtue of the rules of administrative law even prior to the enactment of the Basic Laws. In the light of the “valid-
ity of laws clause, however, in those cases of old laws which cannot be made compatible with the Basic Laws, and where the application of the limitation clause to an administrative power conferred by them will lead to the undermining of the laws, the administrative authority will be able to act without being subject to those requirements. This would also hold true where such application is incompatible with a statutory provision conferring a power which does not conform with the provisions of the limitation clause.

B. Administrative Process

1. Shaping the Administrative Process—Efficiency and Fairness

The administrative process is intended to enable the administrative authority to exercise its power efficiently in accomplishing the purpose for which it was granted the power. However, efficiency is not the only consideration which shapes the administrative process. Operating alongside is the consideration of fairness, which expresses the duty of an authority in a democratic regime to respect the basic rights of the individual. These two considerations clash in a variety

Dorner regarding the validity of an order of administrative detention:
The Court must examine whether evidence on the basis of which the order is issued is sufficiently persuasive so as to provide a basis for the violation of a person's freedom, and whether the violation befits the values of the state, if it is for a proper purpose and whether it does not exceed what is required; all as ensuing from Basic Law: Human Dignity and Freedom.

Administrative Detention Appeal [A.D.A.] 4/96, Ginzbourg v. Minister of Defense, 50(3) P.D. 221, 223. Cf. H.C. 4806/94, D.S.A. Env't Ltd. v. Minister of Fin., 52(2) P.D. 193, 205 (Zamir, J.) (rejecting petitioner's claims that orders issued by the Minister of Finance violated her rights which were protected by Basic Law: Human Dignity and Freedom and adding that, "as it has been found that these orders do not violate rights under the Basic Law . . . there is actually no need to examine whether they meet the conditions of the limitation clause").


See H.C. 6026/94, Nazal v. Commander of I.D.F. in Judea & Samaria, 48(5) P.D. 338, 350; BARAK, supra note 10, at 563-64; Ewing, supra note 136, at 87-89; see also Section 6(1)-(2) of the United Kingdom Human Rights Act:

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

See GARY C. BRYNER, BUREAUCRATIC DISCRETION—LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 34 (1987); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY—THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 129-30 (1978). See also the comments of Justice Barak in H.C. 685/78, Mahmoud v. Minister of Educ. & Culture, 33(1) P.D. 767, 777 ("[T]he principles of fairness which bind the administration are some of the primary tools . . . for the preservation of civil rights.");), and Justice Dorner's comments at paragraph 9 of H.C. 5936/97, Lam v. Director General of the Ministry of Education, Culture & Sport (forthcoming) ("[E]fficiency is not necessarily an advantage where under consideration is a violation of hu-
of contexts, and in such cases, the administrative process is the outcome of the balance drawn between them.295 This point of balance—namely, the process under consideration here—is tightly intertwined with the basic constitutional tenets of the legal system, and is of immense importance in terms of the protection of basic rights:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.297

Indeed, it is an open secret that procedural arrangements, in a broad sense, have captured a central role in the defence of human rights: “The history of liberty has largely been the history of the observance of procedural safeguards.”

2. The Influence of the Basic Laws

Against this background, one may understand the influence which the Basic Laws concerning human rights exert over the administrative process. Since the weight attached to the protected rights has mounted, the consideration of fairness has also—as a matter of principle—been strengthened in shaping the administrative process relating to the exercise of power by virtue of which these rights may be violated.298 In terms of our issue too—as with regard to the scope of the administrative power299—the Basic Laws exert their influence on the shaping of the process touching the old laws which violate protected rights.

Increased concern for the protection of human rights in the ad-

---

295 See 1 KENETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 57 (2d ed. 1978) (“The two main interests in fairness and effectiveness must be accommodated to each other so as to maximize the protection of both interests...”).

296 Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J.). See also H.C. 297/82, Berger v. Minister of Interior, 37(3) P.D. 29, 49-50 (referring to the issue in the wider context of the protection of the substantive rule of law).

297 McNab v. United States, 318 U.S. 392, 347 (1943) (Frankfurter, J.); see also Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J.); Burdeau v. McDowell, 256 U.S. 456, 477 (1921) (Brandeis, J.); Lord Chancellor Viscount Kilmuir, The State, the Citizen and the Law, 73 LAW Q. REV. 172, 178 (1957); H.C. 3914/92, Lev v. Regional Rabbinical Court of Tel Aviv-Jaffa, 48(2) P.D. 491, 502-03 (Barak, J.).

298 In Lev, 48(2) P.D. 491, after Justice Barak discussed “the entirety of the general considerations in the framework of which one must exercise a procedural power (legislative or inherent),” id. at 503, he referred to a situation where those same considerations clash, and where a balance must accordingly be drawn between them: “Within the framework of this balance great weight must be given to considerations relating to human rights. This is particularly manifest now, following the legislation of Basic Law: Human Dignity and Freedom.” Id.

299 See supra text accompanying notes 141-48.

300 See supra text accompanying notes 147. Possibly, this influence will also be expressed in relation to new and old law which violates rights that are not protected by the Basic Laws. See supra text accompanying note 147.
The administrative process will, for example, require a more solid than “usual” evidentiary foundation before a decision will be reached which violates a protected right. It is clear that establishing the facts is of cardinal importance to the exercise of a particular power. The general test applying to the quantum of evidence needed for the purpose of arriving at an administrative decision, is the test of the reasonable person (or more precisely, the test of the reasonable administrative authority). With regard to the implementation of the test it may be said that “the perception of the reasonable person is influenced, in the natural course, by the relative importance of the values, which the factual elements intended to regulate.” Indeed, “[t]he reasonableness of the decision is a function of the values involved in the decision,” and when reference is made to the basic rights of the individual, the test of reasonableness becomes even more strict—namely, “the evidence required to persuade a statutory authority of a justification for denying a fundamental right must be clear, unequivocal and convincing.” As the importance of the right and the significance of the injury increase, the courts require more persuasive evidence to justify the authority’s decision.

See the well-known remarks of Chief Justice Hughes of the United States Supreme Court, in his 1931 appearance before the Federal Bar Association, as quoted by Judge Frank in United States v. Forness, 125 F.2d 928, 942 (2nd Cir. 1942): “An unscrupulous administrator might be tempted to say let me find the facts for the people of my country, and I care little who lays down the general principles.” See also Berger, 37(3) P.D. at 36 (Barak, J.) (citing the above remarks); N.L.R.B. v. Curtin Matthe-son Scientific, Inc., 494 U.S. 775, 819 (1990) (Scalia, J.) (same).

The question of the weight and credibility of the evidence is a matter for the administrative authority to determine. Rules should not be laid down in advance as to how it should act in that respect, apart from the rule that the evidence should be such that—taking into account the subject, the contents of the evidence and the person who gave it—any reasonable person would regard it as being of probative value and would rely on it in one way or another. See also Berger, 37(3) P.D. at 37. The Israeli test in this regard actually resembles the American “substantial evidence” rule. See Schwartz, supra note 26, at 640. English law “also has some affinity with the substantial evidence rule of American law.” William Wade & Christopher Forsyth, Administrative Law 279 (8th ed. 2000); see also de Smith et al., supra note 193, at 143-44.


Election Appeal [E.A.] 2, 3/84, Neiman v. Chairman of Cent. Election Comm. for Eleventh Knesset, 39(2) P.D. 225, translated in 8 SELECTED JUDGMENTS SUP. CT. ISR. 83, 100 (Shamgar, J.) (relying on the United States Supreme Court case of Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966)). See also H.C. 1227/98, Malevski v. Minister of Interior, 52(4) P.D. 690, 713-15. For the application of this test to emergency powers in Israel, by the exercise of which fundamental freedoms may be infringed, see Bracha, supra note 129, at 63-66.

See Neiman, 8 SELECTED JUDGMENTS SUP. CT. ISR. at 100 (Shamgar, J.) (“The more important the right, the greater the required weight and force of the evidence that is to serve as a basis for a decision in a diminution right.”). See also H.C. 802/89, Nassman v. Commander of I.D.F. in Gaza Strip, 44(2) P.D. 601, 606; H.C. 4146/95, Estate of the Late Lily Danker v. Director of Antiquities Auth., 52(4) P.D. 774, 800-01.
requirement will be particularly strict, therefore, in connection with a violation of rights protected by the Basic Laws.  

Granting additional weight to the consideration of fairness in shaping the administrative process, must also spur the courts to re-examine their position regarding the right of persons—who may be injured by certain regulations—to be heard during the rule-making process. It seems that thus far, the case law has not recognized this right.219 The main reason is efficiency.220 In my opinion, there was no room for this position even prior to the Basic Laws, and it would be proper to apply the right to be heard to legislative acts, just as they are applied to judicial and administrative acts.221 Recently, judicial statements

---

218 See H.C. 2394/95, Mochnik v. Minister of Interior, 49(3) P.D. 274, 281. In this context, it must be pointed out that the courts have not always applied the more severe evidentiary test regarding violations of basic rights. Thus, for example, refusal to grant a business license falls within the framework of a violation of freedom of occupation. Nevertheless, in the past, the courts have not applied the more severe test, in contrast to the case where a license is cancelled, where this test is applied. See Bracha, supra note 38, at 301-02. It would seem that now, after freedom of occupation has attained a new status—following its entrenchment in Basic Law: Freedom of Occupation—the more severe test will apply even to an "original" application for a business license. This will be the case in relation to "new" legislation (following the Basic Law) and in relation to old legislation. Cf. H.C. 987/94, Euronet Golden Lines (1999) Ltd. v. Minister of Communications, 48(5) P.D. 419, 425 (Zamir, J.) (holding that "a particularly grave violation of a basic right must be based on particularly credible and persuasive factors... no substantial violation may be made to freedom of occupation... save where this is supported by a real factual basis"). See also H.C. 635, 7216/95, Hadarim Taxis, Sherut Rehovot, Kiryat Ekron, Mazkeret Batya Ltd. v. Minister of Transp., 51(5) P.D. 723, 748-49.

219 See H.C. 3, 9/58, Berman v. Minister of Interior, 12 P.D. 1493, 1509, translated in 3 SELECTED JUDGMENTS SUP. CT. ISR. 29, 48; Cr.A. 3490/90, Galilee Wine Presses v. State, 48(1) P.D 11, 16; Baruch Bracha, The Right to be Heard in Rule Making Proceedings in England and in Israel: Judicial Policy Reconsidered, 10 FORDHAM INT'L LJ. 613, 615-20 (1987). Broadly speaking, this is also the law in England; see Bates v. Lord Hailsham, [1972] 1 W.L.R. 1373 (Ch.); de Smith et al., supra note 193, at 399-95; Craig, supra note 180, at 408. Regarding Australia, see Heat, supra note 180, at 120-22, 211-12; Edward I Sykes, David J. Lanham, & Richard R.S. Tracey, GENERAL PRINCIPLES OF ADMINISTRATIVE LAW 178 (3d ed. 1959). Regarding Canada, see Jones & de Villars, supra note 27, at 90-92, 208-10; Sara Blak, ADMINISTRATIVE LAW IN CANADA 120-26 (1997). The legal literature in Canada is engaged in a debate whether the Charter of Rights and Freedoms requires that the public participate in certain regulatory processes. See Jones & de Villars, supra note 27, at 92 n.55. In the United States, there is a general arrangement in the Administrative Procedure Act, 1946, allowing interested parties the right to be heard in rule making proceedings. Administrative Procedure Act, 5 U.S.C. § 553 (1994). See also Richard J. Pierce Jr. et al., ADMINISTRATIVE LAW AND PROCESS 320-26 (3d ed. 1999); Schwartz, supra note 26, at 193-99. Similar arrangements exist, generally speaking, at the state level as well. See Schwartz, supra note 26, at 205-07. For a comparison in this regard between American and Israeli law, see Colin S. Diver, Israeli Administrative Law from an American Perspective, 4 LAW & GOVT'5 ISR. at I, XII-XIV (1997-1998). In Australia too, important statutory developments have taken place in this area at the state level in order to bring about greater participation on the part of the public in the rule-making process. See Douglas & Jones, supra note 180, at 288-90. A proposal for reform in this direction also exists on the level of the Commonwealth. Id. at 316-17.

220 See Bracha, supra note 219, at 636-37 ("It appears that considerations of efficiency occupy a major place in the judicial policy of non-recognition of the right to a hearing with respect to legislative acts.").

221 See id. at 626. Of course, the application of the right to a hearing on rule-making proceedings should be adjusted so as not to reject the consideration of efficiency. See id. at 639-45.
have been made which recognize the need for a shift in this direction. Strengthening the status of protected rights requires the implementation of this shift, at least in relation to the protected rights.

We have seen that there are constitutional systems which have incorporated certain aspects of the administrative process into the provisions of their constitutions in order to provide constitutional protection to the fairness component underlying those processes. Is there also a basis for such incorporation in our Basic Laws on human rights? It seems to me that, if reference is made to rights protected by the Basic Laws, the answer should be in the affirmative. Procedural fairness is part of the general duty of fairness—and it is also connected, of course, to the consideration of the protection of human rights—which applies to the governmental authorities in their relations with the individual. This duty is one of the basic values of the legal system, and it derives from the duty of trust owed by the governmental authority in a democratic regime to each member of the public. In the matter at hand, legislation which violates a protected right must meet the requirements of the limitation clause and, inter alia, must befit “the values of the State of Israel.” Accordingly, a violating statute must satisfy the requirement of fairness, and the conferral of power on an administrative authority to violate a protected right is also subject to the duty to act fairly, which includes guaranteeing a fair process. Against this background it is possible to understand the remarks of the Supreme Court that “Basic Law: Human Dignity and Freedom protects the right of every person to due process prior to violation of his rights.” Further, it may be said that the right to due process—that is, fair process—is also guaranteed within the framework of the requirement of proportionality, which is established by the limitation clause and which requires that the violation of the protected right be “to an extent no greater than required.”

---


223 See supra text accompanying notes 24-38.

224 See BARAK, supra note 222, at 478-91; BARAK, supra note 132, at 456-57, 548-49.

225 See, e.g., Further Hearing—Civil [F.H.C.] 7325/95, Yedioth Achronot Ltd. v. Kraus, 52(3) P.D. 1, 72-73. See also BARAK, supra note 222, at 478, 484; BARAK, supra note 132, at 456, 548.

226 See, e.g., H.C. 840/79, Center of Contractors & Builders in Isr. v. Israel, 34(3) P.D. 729, 745-46. For the duty of the governmental authority to act fairly towards the individual, and for the question whether there is a parallel duty on the individual towards the authority, see, generally, Contram, 52(1) P.D. 289.


229 H.C. 4914/94, Turner v. State Comptroller, 49(3) P.D. 771, 790; Attorney-Gen. v. Achar,
From the foregoing, it follows that the Basic Laws impose limitations on the legislative power of the Knesset within the area of the administrative process. Thus, for example, it will not be within the competence of a law to permit the violation of a protected right while concurrently creating an exemption from the duty to satisfy the rules of natural justice—the right to be heard and the rule against bias and conflict of interests—save in highly exceptional circumstances where the exemption conforms with the values of the state. It is possible that the courts will even anchor these rules as protected rights. Indeed, one may find hints in the case law to the effect that the right to be heard is shielded by the umbrella of the right to dignity or the right to freedom. If this approach is accepted, the aforementioned rules will achieve “independent” constitutional protection even in cases where the violation is of a right which is not protected by the Basic Laws. In other words, the rules of natural justice—or at least the right to be heard—will join the list of protected rights.

51(4) P.D. at 861. For the requirement of proportionality, see infra text accompanying notes 281-87.

Thus, the right to be heard may be suspended if its exercise would frustrate the objects of the legislation involved—which is acceptable under the limitation clause in the Basic Law—or if urgent action is needed to avoid serious consequences. See H.C. 598/77, De'eri v. Parole Comm'r, 32(3) P.D. 161; see also Zamir, supra note 44, at 802-09; see generally H.C. 531/79, Likud Faction in Petach Tikvah Municipality v. Petach Tikvah Municipality, 34(2) P.D. 566, 576 (Barak, J.), extracted in PUBLIC LAW IN ISRAEL 169 (Itzhak Zamir & Allen Zysblat eds., 1996) (“[T]he principles of necessity or ‘the exigencies of the hour’ may on occasion postpone the application of rules of natural justice and conflict of interests . . . .”); Cr.A. 768/80, Shapiro v. State, 36(1) P.D. 337, 366 (Barak, J.) (“At the same time, the application of the doctrine of necessity must be limited to what is vital only, and not be turned into an opening for usurping the rules of natural justice.”). Cf. De Smith et al., supra note 193, at 365-72, 439-41.


See Section 5 of Basic Law: Human Dignity and Freedom; Mochnik, 49(3) at 281; H.C. 5504/92, Perach 1992 Assistance to Persons Injured by Laws & Regulations for Another Israel, an Ass'n v. Minister of Justice, 47(4) P.D. 715, 759; F.H.Cr. 4390/91, State v. Haj Yichyi, 47(3) P.D. 661, 694.

The test for the application of the rules of natural justice is the test of the violation of a right. See H.C. 3, 9/58, Berman v. Minister of Interior, 12 P.D. 1493, translated in 3 SELECTED JUDGMENTS Sup. Ct. Isr. 29, 46.

This approach may be regarded as far-reaching, as it elevates the process to a higher constitutional status than the substantive right which is violated (on the assumption that this right is not a protected right). The Basic Law: Trial Rights Bill, 1993-1994 Hatazot Hok 335, takes the same approach. Section 8(b) of the Bill provides that “a legal power concerning the rights of a person shall not be exercised save in a fair process, without bias and without irrelevant considerations.” See also the Basic Law Bills referred to in supra note 28. Another question, of course, is whether the list of rights set out in Basic Law: Human Dignity and Freedom, is a closed list or whether it also includes rights which are not set out in that list. See infra note 297. Recognition of the rules of natural justice as protected rights will prevent the subordinate legislator from empowering an administrative authority to violate them without express statutory authorization. See supra text accompanying notes 151-60. According to the prevailing law, it
An additional process which should be mentioned in this context is the duty to publish regulations. This duty is set out in Section 17 of the Interpretation Ordinance (New Version): "[a]ll regulations having legislative effect shall be published in Reshumot [the Official Gazette] and, unless it be otherwise provided, shall come into operation on the date of such publication."

The Supreme Court has stated:

Of course, a new piece of legislation which is enacted after the entry into force of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom, may create an exemption from the duty of publication only if it satisfies the requirements of the "limitation clause" (Section 1 [currently: Section 4] of Basic Law: Freedom of Occupation and Section 8 of Basic Law: Human Dignity and Freedom).

What is the basis for this determination? If the reference is to a law which expressly empowers the subordinate legislator to violate one of the protected rights and concurrently exempts the regulations from the duty of publication, then, according to the construction given to the constitutional anchorage of fair process, we would have to say that here too the violating statute—whether directly or through its empowering provisions—must satisfy the requirements of the limitation clause. The latter refers to the values of the State of Israel which guarantee the principle of publicity as one of the aspects of the public interest. It seems that such a violation is possible even in the absence of express authorization as aforesaid. This arises from the position taken by the majority justices (Cheshin and Berenson) in Legal Council Appeal [L.C.A.] 9/55, Anonymous v. Chairman of Legal Council, 10 P.D. 1720, 1728, 1733. Countering this view, Justice Silberg emphasized, in a minority opinion, "that every regulation which violates the principles of natural justice lacks legal validity, as we must assume that the legislature, in transferring to some body the power to promulgate regulations, did not authorize the latter to issue regulations which violate natural justice." Id. at 1733. See also the position expressed by Justice Cohn in H.C. 74/74, Ezra v. Minister of Transportation, 29(2) P.D. 729, 731, where, in a lone opinion and obiter dictum (the other judges did not express an opinion on the matter, id. at 732), he agreed with the view taken by Justice Silberg. The position of the majority judges in Anonymous v. Chairman of Legal Council seems wrong, as it is incompatible with the status of the rules as basic rights and fundamental principles. See, e.g., H.C. 7279/98, Sarid v. Israel at para. 18 (forthcoming); Shapira, 36(1) P.D. at 364-65; H.C. 654/78, Gingold v. National Labor Court, 35(2) P.D. 649, 654; supra note 132. See also BARAK, supra note 193, at 510-13. Express authorization in this connection is also required in England. See DE SMITH ET AL., supra note 193, at 561-69.

Even if one does not accept the position that the Basic Laws now directly protect the rules of natural justice, strengthening of the status of the consideration of fairness within the decision-making process must lead to the conclusion that there is a need for express authorization, both in relation to the new law and in relation to the old law. Cf. H.C. 5304/92, Persch 1992 Assistance to Persons Injured by Laws & Regulations for Another Israel, an Ass'n v. Minister of Justice, 47(4) P.D. 715, 759-65.

---

225 See generally BRACHA, supra note 23, at 249-69; ZAMIR, supra note 44, at 925-37, 945-51.
228 See supra text accompanying notes 223-28, 230 (explaining fair process).
rule of law. Accordingly, the empowering statute cannot exempt the regulations from the obligation of publication, save in those rare cases where the values of the State of Israel permit it. This result may also be reached by way of interpretation to the effect that a violation of a protected right by a concealed law or regulation will not satisfy the requirement of the limitation clause that such violation be "by a law . . . or under an aforesaid law."

It should be noted that the comments quoted from Parnass, making a statute which exempts regulations from the duty of publication subordinate to the provisions of the Basic Laws, are not limited, from the point of view of their language, solely to regulations violating the protected rights. Are these comments intended to have more far-reaching effect than that argued for so far, namely, that in every case the duty to publish regulations is protected by the Basic Laws? Again, if one accepts the view that the list of rights protected by Basic Law: Human Dignity and Freedom is not a closed list, it may be possible to also include within it freedom of speech as part of human dignity. Further, as is well-known:

the right of the public to know is one of the central and important derivatives of freedom of speech . . . and just as preservation of freedom of speech is a primary guarantee of the democratic process and a guarantee of other fundamental rights . . . so too respect for the right of the public to know is a condition for the implementation of freedom of speech.

---

259 See Parnass, 47(3) P.D. at 42 (Barak, J.):
[I]n a democratic state faithful to the rule of law, all legislation must be published. Publication of legislation is an essential principle of the rule of law. One cannot demand that a person obey the law if the law is hidden . . . [i]n the foundations of the rule of law and the essence of democracy.

See also A.Cr.A. 1127/93, State v. Klein, 48(3) P.D. 485, 515 (Cheshin, J.):

The principle of the publication of legislation is found at the very foundations of the rule of law. This is the case in respect of the rule of law in its formal and primary sense, if you will: the rule of law in the sense of the principle of legality. However, it would seem that this principle of publication of legislation also permeates the realm of the rule of law in its substantive sense—which has to do with contents and values—namely, the rule of law immersed in the basic values of society and the individual.

260 See, e.g., Parnass, 47(3) P.D. at 42-43 (giving an example based on the grounds of national security).

261 This interpretation is proposed by Barak. See supra note 160; Barak, supra note 10, at 491 ("Concealed legislation is incompatible with a limitation 'by law' of a human right.").

262 See supra text accompanying note 257.

263 See infra note 297.

264 See, e.g., C.A. 105/92, Re'em Eng'g Contractors Ltd. v. Municipality of Upper Nazareth, 47(5) P.D. 189, 201 (Barak, J.) ("Today, it is possible to derive freedom of expression from the protection given to human dignity and freedom in Basic Law: Human Dignity and Freedom."). See also the opinion of Justice Cheshin in H.C. 7225/95, Yediot Achronot Ltd. v. Kraus, 52(3) P.D. 1.78-85, where he refers to legal literature dealing with this question which has not yet been decided in the case law of the Supreme Court. The justice saw no need to express his position in this regard.

265 See H.C. 5771, 5807/93, Zitrin v. Minister of Justice, 48(1) P.D. 661, 673 (Mazia, J.). See also Further Hearing—Civil [F.H.C.] 7225/95, Yediot Achronot Ltd. v. Kraus, 52(3) P.D. 1.78-85. This right is now also guaranteed in the Freedom of Information Law. See also supra text accompanying notes 68-69.
The right to know embraces, of course, knowledge of the law, including subordinate legislation. Therefore, according to this line of thought, the duty to bring the regulations to the knowledge of the public—that is, the duty of publication—is in every case anchored in Basic Law: Human Dignity and Freedom. It seems that this route, if adopted, will also allow a determination to be made as to the constitutional duty to bring internal administrative guidelines, which are not in the nature of regulations, to the knowledge of the relevant public.

Returning to the regulations which violate one of the protected rights by virtue of an express empowering provision, it seems that it will not be possible to confer upon such regulations any retroactive effect, except to the extent that this conforms with the values of the State of Israel. The limitation applies to the power of the primary legislature, and a fortiori, to the power of its secondary delegate.

---

246 The Basic Laws have the effect of strengthening the duty to publish regulations under the "old" law as well. See C.A. 4275, 6230/94, Securities Stock Exch. in Tel Aviv Ltd. v. A.T. Mgmt. of Torah Library Archive Ltd., 50(5) P.D. 485, 525. It should be pointed out that even before the Basic Laws, the courts were strict with the subordinate legislators regarding the fulfillment of the duty of publication. In cases where the legislature exempted the subordinate legislator from the duty to publish in Reshumot, the courts held that there still existed a duty of publication in some other manner. See H.C. 4950/90, Parnass v. Minister of Defense, 47(3) P.D. 36, 42; C.A. 421/61, State v. Haz, 15 P.D. 2193, 2204-05.

247 See BRACHA, supra note 38, at 268 n.231. This duty is now also guaranteed in Section 6 of the Freedom of Information Law.

248 The case law contains statements from which it appears that giving retroactive effect to legislation violates the values of the State of Israel. See, e.g., H.C. 2933/94, Airports Auth. v. National Labor Court, 50(3) P.D. 837, 854 (Mazza, J.) ("[R]etroactive legislation is contrary to fundamental principles of the legal system, violates vested rights and legitimate expectations, undermines social stability and causes injustice ... "). However, this is not an all-embracing principle which applies in each and every case. Thus, for example, "retroactive civil legislation, per se, is not contrary to the values of the State of Israel. It all depends on the content of the legislation." H.C. 4562/92, Zandberg v. Broadcasting Auth., 50(2) P.D. 793, 817-18 (Barak, J.); see also H.C. 4806/94, D.S.A. Env't Ltd. v. Minister of Fin., 52(2) P.D. 193, 209; see generally, BARAK, supra note 132, at 270-71; ZAMIR, supra note 44, at 964-65; RUBINSTEIN & MEDINA, supra note 10, at 248-55. In any event there is a presumption that "the purpose of a law is not to bring about retroactive or retrospective application. It is presumed that all laws look to the future and not to the past ... " P.P.A. 1613/91, Arbiv v. State, 46(2) P.D. 765, 776 (Barak, J.). This presumption may be expressly or impliedly rebutted by the legislature. Id. at 775; Airports Auth., 50(3) P.D. at 853, 859-60; BRACHA, supra note 23, at 270-71; ZAMIR, supra note 44, at 964-65; RUBINSTEIN & MEDINA, supra note 10, at 251-52. See also infra note 254.

249 Section 17 of the Interpretation Ordinance (New Version), cited in supra text accompanying note 236, provides that the date of publication in Reshumot is the date on which the regulations become effective, "unless it be otherwise provided." In the past, the courts held that there was a presumption that the secondary legislator possessed the power to confer retroactive effect upon the regulations, except if the same was expressly or impliedly prohibited by the empowering statute. See, for example, Justice Mazza's opinion in Airports Authority, 50(3) P.D. at 853-54, which still espouses this view. However, such a view is incompatible with the presumption applying to the primary legislator regarding the denial of retroactive effect to a law the empowering provisions of which form part of it. Indeed, it seems that recently, the courts have deviated from their previous rulings and have "drawn a parallel" between the primary legislator and the secondary legislator, so that the latter's power to promulgate retroactive regulations is contingent upon an express or implied authorization in the empowering statute. See id. at 858-67.
Against this background it is possible to understand the comments of the Supreme Court on this matter:

A legal norm, in a statute or in a regulation, is generally prospective—one that looks to the future—however, the primary legislator (within the limits of the Basic Laws) and a secondary legislator (within the limits of a primary law and the Basic Laws) can even provide for retroactive application.

C. Administrative Discretion

1. Administrative Discretion—Its Nature and Scope

The most sensitive aspect of any given power is that which relates to the exercise of discretion. This is the very heart of the power.\textsuperscript{251}

\begin{itemize}
  \item (Zamir, J.); H.C. 5290/97, Ezranal Orthodox Youth Movement in Eretz Israel v. Minister of Religious Affairs, 51(5) P.D. 410; D.S.A., 52(2) P.D. at 209; H.C. 7691/95, 2878/96, Sagun v. Israel, 52(5) P.D. 577, 597-99; H.C. 1149/95, Erko Elec. Indus. Ltd. v. Mayor of Rison Le'Zion, 54(5) P.D. 547, 564, 570-72. In any event, the power of the rule-maker is conditional upon the retroactive application not violating the values of the State of Israel. See \textit{supra} note 248.
  \item Cr.A. 4912, 5434, 5513/91, Talmi v. State, 48(1) P.D. 581, 620. Retroactive legislation—primary and secondary—that violates protected rights may also be invalidated for being non-proportional. See \textit{Zandberg}, 50(2) P.D. at 810, 819. See also Itzhak Zamir, \textit{Israeli Administrative Law Compared to German Administrative Law}, 2 LAW & Gov'T IsR. 109, 121 n.26 (1994) (Hebrew). So far I have referred to legislation—primary or secondary—that violates retroactively protected rights, however, it is possible that the court will regard the retroactive legislation \textit{per se}—for example, if it imposes a criminal prohibition or makes sanctions more severe—as a violation of human dignity and freedom and therefore will invalidate the legislation. See \textit{Barak}, \textit{supra} note 10, at 452; \textit{Rubinstein & Medina}, \textit{supra} note 10, at 249.
  \item The sensitivity of the Israeli legislature to the prohibition on retroactive legislation, which creates an offence or imposes overly heavy sanctions, may be seen in the provisions of Sections 3-6 of the Penal Law, 1977, 1976-1977 S.H. 226 (amended 1994). Thus, Section 3 of the Law, captioned “No Retroactive Punishment,” provides:
    \begin{enumerate}
      \item An enactment which creates an offence shall not apply to an act committed prior to the date of its lawful publication or the date of its entry into force, which ever is later.
      \item An enactment which prescribes a sanction for an offence which is harsher than that prescribed at the time of commission of the offence, will not apply to an act committed prior to its lawful publication or prior to its coming into effect, whichever is later; however, adjustment of the rate of a fine shall not be deemed to be a harsher sanction.
    \end{enumerate}
  \item The term “enactment” incorporates law and regulation: Interpretation Ordinance (New Version), Section 1; Interpretation Law, Section 3. See also \textit{supra} note 201. For the question of the retroactive application of a penal law, see H.C. 1618/97, Satchi v. Municipality of Tel Aviv-Jaffa, 52(3) P.D. 542.
  \item In the area of emergency regulations too—even though Basic Law: the Government confers upon the rule-makers far-reaching powers, by means of which it is possible to deviate from the provisions of a law of the Knesset, including a Basic Law, which are not entrenched, Section 50(c) of the Basic Law (Section 39(c) of the 2001 version). “Emergency Regulations cannot prevent applications to the courts, prescribe penalties retroactively or permit violation of human dignity” Section 50(d) (Section 39(d) of the 2001 version). This sensitivity on the part of the Knesset will undoubtedly have an impact on the question whether retroactive subordinate legislation, which, by virtue of an express authorization, violates one of the protected rights, indeed infringes the basic values of the state. See also \textit{supra} notes 248-50.
\end{itemize}
Through the discretion, the legislature expects the authority to stamp its mark on the arrangement under consideration in order to achieve the statutory purpose, while adapting the power to the different factors of each and every case. Indeed, conferring discretion on the authority entails granting it the power to select the solution which seems most appropriate out of all possible alternative solutions. This power is conferred on the authority; the discretion falls within its province, and therefore, as a starting point, other bodies, including the courts, are not to intervene in its application. Bearing in mind that numerous statutes confer extremely broad discretion—without establishing criteria for its implementation—it is possible to understand the great danger this poses to the rule of law and to the basic rights of the individual. Indeed, Professor Dicey saw the grant of discretion to an administrative authority as a violation of the principle of the rule of law. Thus, he clarifies the first conception (of three) of the rule of law:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary, powers of constraint.

And he adds later: "wherever there is discretion there is room for arbitrariness, and ... discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects."

---

252 See F.H. 16/61, Registrar of Co. v. Kardosh, 16 P.D. 1209, 1215, translated in 4 SELECTED JUDGMENTS SUP. CT. ISR. 32, 35 (Sussman, J.) ("A discretion is given to an administrative organ ... in order that, in fulfilling its many-sided functions, which circumstances may vary and change periodically and which cannot be precisely determined in advance, it may have freedom of action."); see also H.C. 3094, 4519, 4478/93, Movement for Quality in Gov't v. Israel, 47(5) P.D. 404, translated in 10 SELECTED JUDGMENTS SUP. CT. ISR. 258, 278; JONES & DEVILLARS, supra note 27, at 168; GARNER, ADMINISTRATIVE LAW 195-96 (Brian Jones & Katherine Thompson eds., 8th ed. 1996).

253 See Registrar of Co., 16 P.D. at 1215, translated in 4 SELECTED JUDGMENTS SUP. CT. ISR. at 35 (Sussman, J.) ("[D]iscretion means freedom of choice from among different possible solutions, or an option granted to the administrative authority ... "); Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. REV. 925, 926 (1960) ("Discretion is an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience.").

254 Registrar of Co., 16 P.D. at 1215, translated in 4 SELECTED JUDGMENTS SUP. CT. ISR. at 35 (Sussman, J.) ("[B]ecause that authority is empowered to choose and select the solution appropriate to its mind, the court will not interfere for the reason alone that it would itself have picked upon a different solution.").

255 See supra text accompanying notes 175-80.

256 DICEY, supra note 103, at 188.

257 Id.

258 Id. This is Dicey's approach to the legality of the administration. See also supra note 103.

In a similar spirit see the comments of the Israeli Supreme Court in an old case:

According to the principle of the "rule of law," there is a duty on the legislature to establish in a law and specify there the situations in which licenses must be granted or refused,
In the reality of the administrative state—that is, the modern welfare state—it is difficult to accept these far-reaching comments, and they certainly cannot be implemented. At the same time, in order to prevent improper use of administrative discretion, one must aspire to achieve the situation whereby the legislature will circumscribe the discretion by means of determining the goals and criteria for its implementation. The reason for this is that "[a]bsolute discretion, like corruption, marks the beginning of the end of liberty."269 Similarly, it is necessary to confine the discretion by means of the rules of administrative law concerning its exercise. Indeed, "there is no need to emphasize that 'discretion' does not mean 'caprice.'"270 Accordingly, it also follows that every discretionary power granted—however wide or absolute—is subject to judicial review which implements the rules to which the administrative discretion is subject.272

2. The Rights Protected in the Basic Laws—A Relevant Consideration

The Basic Laws have a significant impact on administrative discretion insofar as it concerns a power which may be used to violate protected rights.273 First and foremost, the Basic Laws limit the power of the legislature to grant expansive discretion in this regard, without establishing accompanying criteria for its implementation.274 Beyond...
this, in exercising its power the authority must take into account all the considerations relevant to that power. Among these considerations are the basic values of the legal system, and, in the matter at hand, the protected rights. In other words, despite the existence of the violating power, the authority must consider exercising it in such a manner so as not to violate the right or, alternatively, to cause minimal damage. Where the authority has "transgressed" by ignoring this consideration, its decision will be invalidated.

3. Reasonableness

As reference is made to a power by virtue of which it is possible to violate a protected right, considerations relating to the protection of the right confront relevant considerations concerning its violation. As noted, the authority must take all of these into account. This clash of considerations requires the authority to strike a balance between them by giving appropriate weight to each factor. Again, the weight given to the consideration of protecting the right is strengthened in light of the constitutional status of the basic rights involved. This is the case in relation to "new" legislation and "old" legislation. An
improper balance between the conflicting considerations will lead to the invalidation of the decision on the ground of unreasonableness.\(^{273}\)

Concurrently with the added weight given to human rights in connection with the duty of the administrative authority to exercise its discretion reasonably, it seems that the latter duty may also attain a constitutional status which will restrict the power of the legislature to violate it by ordinary legislation. Prior to the adoption of the Basic Laws being discussed here, the case law held that even if the Court regarded the decision of an authority in a particular case as unrea-

accompanying note 147. Indeed, even before the enactment of the Basic Laws, significant weight was given to basic rights in drawing the proper balance between them and other considerations relevant to the exercise of the discretion of the competent administrative authority. See, e.g., H.C. 680/88, Schnitzer v. Shani, 42(4) P.D. 617, translated in 9 SELECTED JUDGMENTS SUP. CT. ISR. 77, 101. See also Bracha, supra note 129, at 83-85. On the other hand, even in the era of the Basic Laws, one cannot assume, of course, that the increased significance accorded to human rights in the exercise of the administrative discretion will inevitably lead to a balanced result which prevents their infringement. See, e.g., H.C. 2740/96, Shancey v. Supervisor of Diamonds, 51(4) P.D. 481, 495-96.\(^{273}\) See generally H.C. 935, 940, 943/89, Ganor v. Attorney Gen., 44(2) P.D. 485, 513-14, extracted in PUBLIC LAW IN ISRAEL 334 (Itzhak Zamir & Allen Zysblat eds., 1996); H.C. 389/80, Golden Pages Ltd. v. Executive Bd. of Broad. Auth., 35(1) P.D. 421, 444-47. The test of reasonableness enables the court to determine the proper weight to be given to each of the relevant considerations and determine the "zone of reasonableness," in which are located all the solutions from which "a reasonable administrative authority" is entitled to choose the one it sees fit, without the court intervening in its decision; Golden Pages, 35(1) P.D at 440-42 (Barak, J.). Indeed:

This administrative authority is not a screen and cover for the views of the court, as the question is not what the court would have done in the concrete circumstances, but whether a reasonable administrative authority would have acted in the way in which the public servant actually acted.

Id. at 440-41. However:

At the same time, it cannot be denied that the final decision is in the hands of the court, as the court and none other, determines what the reasonable administrative authority might decide. This is what gives rise to the heavy responsibility imposed on the court, which must distinguish between the solution which it regards as desirable and the solution which a reasonable authority might accept. On occasion, the two overlap, as the solution which appears desirable to the court is also the only solution which a reasonable authority might accept. However, frequently, the two are not identical, as the solution which appears desirable to the court is only one of the solutions which a reasonable authority might accept. In such a case, the court must restrain itself, and it must enable the administrative authority to choose the option which it regards as proper . . .

Id. at 441.

The fineness of the line between the "evaluation" of the "reasonable administrative authority" and the "evaluation" of the judge before whom the administrative decision is being challenged, may be seen in additional cases. See, e.g., H.C. 14/86, Laor v. Film & Theatre Supervisory Bd., 41(1) P.D. 421, 438-39; H.C. 806/88, Universal City Studios Inc. v. Film & Theatre Supervisory Board, 45(2) P.D. 22, 36, translated in 10 SELECTED JUDGMENTS SUP. CT. ISR. 229, 246-47; Ganor, 44(2) P.D. at 513; Schnitzer, translated in 9 SELECTED JUDGMENTS SUP. CT. ISR. at 101-02, 115; see also State Service Appeal [S.S.A.] 4129/95, Or v. State, 49(5) P.D. 184, 192. The Basic Laws—and the protected human rights therein—will therefore have great weight when the courts are required to determine the scope of the zone of reasonableness.

sonable, so long as the authority attracted statutory support—that is, the authority adopted the policy of the primary legislature—the decision would be left in place and the Court would not intervene. Where reference is made to rights protected by the Basic Laws, it seems that it may be argued that the legal position has now changed. As Justice Barak has commented:

[A]fter the enactment of Basic Law: Human Dignity and Freedom, the requirement of reasonableness is derived from the provision of the [Section 8 of Basic Law: Human Dignity and Freedom] that “the rights conferred by this Basic Law shall not be infringed save where provided by a law which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required.” The requirement of reasonableness may be found within the ambit of the phrase “proper purpose” or within the ambit of the phrase “to an extent no greater than required.”

These remarks also apply, of course, to the power of an administrative authority “under an aforesaid law,” by virtue of which it is possible to violate protected rights. It is also possible to base the demand for reasonableness upon the duty provided for in the limitation clause by virtue of which the violating law—or the administrative decision made under it—will befit “the values of the State of Israel.”

According to Justice Barak, reasonableness is “one of the basic values of our legal system.” The conclusion derived from this analysis is that an unreasonable decision by an administrative authority may be invalidated even if it is anchored in the empowering statute and the decision adopts and implements the statute’s policy. In

---

574 See H.C. 120/73, Tobis v. Israel, 27(1) P.D. 757, 759; C.A. 780/70, Municipality of Tel Aviv-Jaffa v. Sapir, 25(2) P.D. 486, 491, 497; H.C. 580/77, General Ass’n of Merchants in Isr. v. Municipality of Tel Aviv-Jaffa, 32(2) P.D. 780, 782 (Cohn, J.).

575 BARAK, supra note 132, at 543. The contents of the quoted passage are equally true of freedom of occupation protected in Basic Law: Freedom of Occupation.

576 Section 8 of Basic Law: Human Dignity and Freedom, and Section 4 of Basic Law: Freedom of Occupation. For this provision in the limitation clause, see supra text accompanying notes 149-204.

577 See BARAK, supra note 132, at 545.

578 Id. at 456.
other words, the requirement of reasonableness attains a constitutional dimension and will be used to examine the balances in the empowering statute which violates a protected right and which must meet the provisions of the limitation clause. Against this background one may understand the comments of Justice Cheshin in connection with the collection of a radio fee for the Broadcasting Authority:

All would agree, it seems to me, that empowering the Broadcasting Authority to collect radio fees from those who have no radio set installed in their car, is, at the least, an unusual requirement. Indeed, subject to the provisions of a constitution, to fundamental principles of natural law and to basic principles of democracy, the legislature is entitled to provide for any norm which it sees fit, even if, in our eyes, the norm seems to be unreasonable and inappropriate. However, at the least, we require from the legislature that it take courage and state its position expressly... if its ensuing statement will appear or sound somewhat faltering—fundamental principles of the system: justice, logic and reasonableness will themselves supply what is lacking.

4. Proportionality

The upgrading of the requirement of reasonableness to a constitutional level by making it part of the limitation clause also seems appropriate if one bears in mind that the requirement of proportionality, which is proximate to reasonableness, was expressly adopted by the limitation clause, and makes the validity of the provision violating the protected right contingent upon it being "to an extent no greater than required."

The test of proportionality, as one of the criteria which must be applied by the authority in exercising its discretion, was known to Israeli administrative law even prior to being adopted by the Basic Laws concerning human rights. The test is primarily used in the area of human rights, when these are violated by a decision of an administrative authority which is intended to achieve a legitimate purpose for

---

281 See generally Bracha, supra note 129, at 83-91; Zeev Segal, Disproportionality in Administrative Law, 39 HAPRAKILIT 507 (1990) (Hebrew); Zamir, supra note 274, at 135-36.
282 However, use has also been made of the test in other fields such as when examining the question whether it is justified to promulgate emergency regulations instead of making use of the ordinary legislative power of the Knesset. See H.C. 2994/90, Poraz v. Israel, 44(3) P.D. 317. The principle of proportionality in this context has now been adopted constitutionally, in Section 50(e) of Basic Law: the Government: "No emergency regulations shall be promulgated and no arrangements, measures and powers shall be implemented thereunder, save to the extent that the emergency situation requires." The same provision appears in Section 39(e) of the 2001 version of the Basic Law. See also H.C. 6971, 6972/98, Paritzki v. Israel, 53(1) P.D. 763.
which the power has been granted. Inspired by comparative law, the courts in Israel have given it meaning through three subsidiary tests focusing on the relations between the means and the purpose. These subsidiary tests are also applicable to constitutional proportionality, which as noted, has been incorporated into the Basic Laws as part of the limitation clause. Accordingly, today it is a constitu-

235 See, e.g., H.C. 987/94, Euronet Golden Lines (1992) Ltd. v. Minister of Communications, 48(5) P.D. 412, 435-38; H.C. 1255/94, Bezeq, Isr. Communications Co. v. Minister of Communications, 49(3) P.D. 661, 687-88; H.C. 3477/95, Ben-Atiya v. Minister of Educ., Culture & Sport, 49(5) P.D. 1, 9-16. In the latter case, Justice Barak also considered the nexus between the ground of proportionality and the ground of reasonableness. See id. at 14-15. For this latter point, see also H.C. 8016/96, Stamka v. Minister of Interior, 52(2) P.D. 728, 776.


236 See Ben-Atiya, 49(5) P.D. at 12-15 (Barak, J.):

In the majority of legal systems, in which the principle of proportionality is accepted, it has been held that it comprises three elements, or subsidiary tests. The first element of the proportionality test states that there must be compatibility between the purpose and the means. The means which the administration applies must be shaped to achieve the purpose which the administration wishes to achieve. The means must lead in a rational manner to the realization of the purpose. This is the test of the suitable means or the rational means . . . .

The second element which makes up the proportionality, holds that the means which the administration selects must injure the individual to the least possible extent. The administrative tailor must sew the administrative suit in such a manner that it is tailored to the purpose guiding him, while choosing the means least injurious to the person. This is the test of the means of least injury . . . .

The third element of the proportionality test states that the means which the administration chooses is not proper, if the injury to the individual is disproportionate to the benefit which it achieves in implementing the purpose. This is the test of the proportional means (or the proportionality in the "narrow sense").

The origin of the principle of proportionality is found in German administrative law, where, over the years, it has been perfected into a sophisticated ground for judicial supervision over administrative decisions. See NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW—A COMPARATIVE STUDY 2 (1996); SCHWARZE, supra note 25, at 685, 692; MAHENDRA P.S. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 88 (1985). Indeed, in the Ben-Atiya case, in setting out the three subsidiary tests for proportionality, Justice Barak quoted the summary in Zamir, supra note 250, at 131, which refers to the subsidiary tests in German law. See also id. at 436 (Barak, J.); Ben-Atiya, 49(5) P.D. at 10-11; Horev, 51(4) P.D. at 53; Chamber of Inv. Managers in Isr., 51(4) P.D. at 421-22.

The German Constitutional Court adjudicated in the same way, in locating the principle of proportionality, which had already been recognized in administrative law, on the constitutional level. The case law concerns legislation which injures freedoms protected in the German Basic Law, although the latter does not expressly refer to the said principle of proportionality. See EMILIOU, supra note 285, at 53-59; KOMMERS, supra note 114, at 46; SCHWARZE, supra note 25, at 686-90; SINGH, supra note 285, at 88-89. The constitutional adoption led to further strengthening of the principle in administrative law. See Georg Nolte, General Principles of German and European Administrative Law—A Comparison in Historical Perspective, 57 MOD. L. REV. 191, 202 (1994). For the need for a constitutional dimension to be given to the principle of proportionality in
tional requirement that a law violating a protected right and the exercise of administrative powers under it, meet the test of proportionality.

5. Equality

An additional ground for examining administrative discretion—which, as we shall see, has also achieved constitutional upgrading—concerns the prohibition against discrimination. An administrative authority must act on the basis of equality. The principle of equality is one of the basic values of the Israeli legal system. It is one of the most prominent values: "this unwritten principle is the soul of our entire constitutional regime." Accordingly, there is a presumption that the legislature did not empower the administrative authority...

---

257. The test of proportionality leaves the governmental authority discretion in respect of its implementation:

In implementing the principle of proportionality—and primarily in examining the means which causes the least infringement—one must recognize the zone of maneuverability of the governmental authority. Often, there are a number of ways in which one may meet the duty of proportionality. Sometimes the situation is border line. In these and other cases one must recognize the existence of zone of maneuverability of the governmental authority. This zone is similar to the zone of reasonableness of the executive authority. This recognition of the scope of governmental discretion is based on the institutional advantage of the governmental authority in examining possible alternatives, and its national responsibility—a responsibility imposed on it within the framework of the principle of the separation of powers—to implement the proper purpose ....

Ben-Atia, 49(5) P.D. at 13-14 (Barak, J.). H.C. 450/97, Tnufa Manpower & Maintenance Service Ltd. v. Minister of Labor & Welfare, 52(2) P.D. 433, 452 (Dorner, J.) ("At the same time, reason dictates that the 'zone of proportionality' which is conferred on the executive authority may be narrower than that conferred on the legislative authority.").

On the constitutional zone of maneuverability (margin of appreciation or reasonable room to manoeuvre) given to the discretion of the legislature in connection with the ground of proportionality, see Tnufa Manpower & Maintenance Serv., 52(2) P.D. at 452-53; Chamber of Inv. Managers in Isr., 51(4) P.D. at 386-89, 419-23; United Mizrahi Bank Ltd., 49(4) P.D. at 437-41, 574-75. See generally supra text accompanying notes 115-18.

258. Reference is to equality among equals, or, more precisely, among those where the difference between them is not relevant for the purpose of the particular power. See, e.g., F.H. 10/69, Borovovsky v. Chief Rabbis of Isr., 25(1) P.D. 7, 35. This is the Aristotelian perspective, which is primarily expressed in Israeli case law in connection with the significance of the concept of equality. Of course, there are other perspectives, and recently the latter have been reflected more and more in the case law. This is not the place to discuss this topic. See generally Itzhak Zamir & Moshe Sobel, Equality Before the Law, 5 LAW & GOV'T ISR. 165, 170-74 (1999). Cf. H.C. 1703/92, C.A.L. Cargo Air Lines v. Prime Minister, 52(4) P.D. 193, 235-37; Ruth Ben-Israel, EQUALITY OF OPPORTUNITIES AND PROHIBITION OF DISCRIMINATION IN EMPLOYMENT 19-32 (1998); see infra note 298.

259. H.C. 637/89, Constitution for the State of Israel v. Minister of Finance, 46(1) P.D. 191, 294 (Barak, J.) ("[T]he principle of equality is basic to our system, and one of the corner stones of our constitutional system.").

to act in violation of the principle of equality.\textsuperscript{291} Over the years the value under discussion has been transformed from being a mere ground for examining administrative discretion to becoming a basic right—namely, the right to equality.\textsuperscript{292} Nevertheless, in the absence of constitutional anchorage of the right, the Knesset may violate a right as well as empower an administrative authority to do the same.\textsuperscript{293} As reference is to a basic right, it is subject to the rule developed in the case law concerning the need for clear, unequivocal (and apparently also express) authorization in relation to the aforesaid infringement.\textsuperscript{294}

And what is the effect of the Basic Laws? The right to equality is not referred to therein as a protected right.\textsuperscript{295} Similarly, there are numerous statements in the case law from which it appears that it is guaranteed as part of the right to dignity.\textsuperscript{296} If this view is accepted, the right to equality will be transformed into a protected right, and violation thereof will be permitted only in accordance with the tests of the limitation clause. However, despite these statements, no judicial determination has yet been made on this matter.\textsuperscript{297} Even if the

\textsuperscript{291} See, BEN-ISRAEL, supra note 288, at 244-47, 251-52; RUBINSTEIN & MEDINA, supra note 10, at 273-74; ZAMIR, supra note 44, at 103-04; BARAK, supra note 132, at 457-59, 567.

\textsuperscript{292} See, e.g., Constitution for the State of Israel, 46(1) P.D. at 202; C.A.L., 52(4) P.D. at 230 (Barak, J.) ("Equality is a right from which the individual draws his vitality."); see also ZAMIR & SOBEL, supra note 288, at 205-08.

\textsuperscript{293} H.C. 889/86, Cohn v. Minister of Labor & Welfare, 41(2) P.D. 540, 546 (Ben-Porath, J.) ("In the absence of a constitution the Knesset has the jurisdiction and the power to enact a law which is discriminatory, and having done so, there is no choice but to act in accordance with it."); See also Cr.A. 621/88, Feiler v. State, 47(3) P.D. 112, 121-22; H.C. 120/73, Tobis v. Israel, 27(1) P.D. 757, 759. Cf. H.C. 5263/94, Hirshensohn v. Minister of Fin., 49(5) P.D. 837.

\textsuperscript{294} See supra text accompanying notes 122-32; see also H.C. 4541/94, Miller v. Minister of Defense, 49(4) P.D. 94, 139 (Dorner, J.) ("The assumption is... that the authority must exercise its powers while respecting the basic rights of the person, including the prohibition against discriminating against women—unless it has been given express power not to do so.").


\textsuperscript{296} For the legislative history explaining the background for the non-inclusion of the right in Basic Law: Human Dignity and Freedom, see RUBINSTEIN & MEDINA, supra note 10, at 956; Karp, supra note 10, at 338-40, 345-47.

One of the aspects of the right to equality—in connection with elections to the Knesset—is expressly guaranteed constitutionally in Section 4 of Basic Law: the Knesset (cited in supra note 108). See supra text accompanying notes 108-11.

\textsuperscript{297} See the references to cases in which these statements appear and the references to the legal literature on this issue in ZAMIR & SOBEL, supra note 288, at 210.

The judicial determination is largely dependent on the question whether the list of rights set out in Basic Law: Human Dignity and Freedom, is a "closed" list, or whether the protected rights concerning human dignity (Sections 2 and 4) and freedom (Section 5) include under their umbrella additional rights which have not been specified in the Basic Laws, such as the right to equality. For a discussion of this question, see Daphne Barak-Erez, From an Unwritten to a Written Constitution: the Israeli Challenge in American Perspective, 26 COLUM. HUM. RTS. L. REV. 309, 342-44 (1995); Judith Karp, Questions on Human Dignity According to the Basic Law: Human Dignity and Freedom, 25 MISHPATIM 129 (1995) (Hebrew); Hillel Sommer, Non-Enumerated Rights: on the Scope of the Constitutional Revolution, 28 MISHPATIM 257 (1997) (Hebrew).

In this context, one should also note an approach which is more "moderate" than the one which recognizes the full scope of the right to equality as a protected constitutional right, ac-
aforesaid view is rejected, it is clear that at least with regard to protected rights, the prohibition against discrimination has been upgraded to a constitutional level in the sense that it expresses the values of the State of Israel and accordingly a statute—or an administrative decision taken under it—which discriminates between equals, with regard to a protected right, will not meet the requirements of the limitation clause and may be invalidated.\footnote{299} In the same way, the courts may obligate the appropriate authority—the legislature or the administrative authority—to prevent the violation by requiring them to positively guarantee the right to equality with regard to a protected right—namely, to grant to B the same (protected) right which was granted to A—where there is no difference between them in terms of the factors relevant to the right under consideration.\footnote{299} The constitutional upgrading of the right to equality will also

cording to which “the Basic Law protects against violation of the principle of equality when the violation causes insult, that is a violation of the dignity of a person as a person.” Miller, 49(4) P.D. at 133 (Dorner, J.).

\footnote{298} See C.A.L. Cargo Air Lines v. Prime Minister, 52(4) P.D. 193, 234-35; Zamir, supra note 44, at 114-15. Indeed, in referring to a regulation “which includes a discriminatory provision, which breaches equality and infringes human dignity,” Justice Mazza held, in connection with the limitation clause, that “needless to say, a regulation which incorporates a provision which adopts a blatant discriminatory standard between holders of an equal right, does not befit the values of the State of Israel.” H.C. 205/94, No4. Minister of Defense, 50(5) P.D. 449, 462.

The fact that the principle of equality is included in the values of the State of Israel for the purpose of the limitation clause is strengthened by the “basic principles” clauses located in the Basic Laws (Section 1 of Basic Law: Freedom of Occupation and Section 1 of Basic Law: Human Dignity and Freedom) which provide that human rights “will be honoured in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel.” One of the principles which is emphasized by the Declaration is that the State of Israel “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.” Cf. Barak, supra note 10, at 405.

Of course, the principle of equality does not operate alone and it may clash with other values, with the ensuing need to draw a balance between them within the context of the examination whether the requirements of the limitation clause have been met by the statute and the administrative decision made thereunder.

The principle of equality may also be anchored in the requirement of proportionality in the limitation clause. See Miller, 49(4) P.D. at 144; H.C. 2313/95, Contact Linsen (Israel) Ltd. v. Minister of Health, 50(4) P.D. 397, 409 (Goldberg, J.):

[I]n order that the discrimination be permitted, it is not sufficient that the difference be relevant, it must also meet the test of proportionality. In other words, a suitable proportionality must exist between the factual difference between the bodies under discussion, and the difference in attitude of the authority towards them. The factual differences may indeed justify a certain difference in the attitude of the authority towards each of the bodies, however, not more than this. A situation where the difference in attitude exceeds what is necessary, will also be deemed to be unlawful discrimination . . . .

\footnote{299} See supra text accompanying notes 70-71. In the area of administrative law, the courts have indeed occasionally preferred to ensure “positive” equality (by granting a right to B, who has been discriminated against) rather than its “negative” counterpart (negating the right of A, who has been shown preference). See, e.g., H.C. 678, 803/88, Kfar Vradim v. Minister of Fin., 43(2) P.D. 501; H.C. 696/89, R.M.I. Jerusalem Medical Ctr. Ltd. v. Minister of Health, 44(3) P.D. 113; see generally H.C. 697/89, Constitution for the State of Israel v. Minister of Finance, 46(1) P.D. 191, 205. In H.C. 721/94, El-Al Isr. Airlines Ltd. v. Danilowitz, 48(5) P.D. 749, the Supreme Court applied this approach within the area of labor law in relation to collective agreements and arrangements. Justice Barak adopted the remedy of extension or reading in, recognized in
strengthen its status in relation to laws which preceded the Basic Laws.

IV. CONCLUSION

Israel's general administrative law is essentially judge-made law. It is in the nature of "common law—Israel style." Through their judgments, the courts have supplemented omissions of the legislature. In recent years, a number of statutes have been enacted which contain framework arrangements within the area of administrative law, however, the general picture has not changed. Thus, for example, in the area of the administrative process, no general law has yet been enacted regarding administrative procedure, as is common, inter alia, in a number of European countries and in the United States.

This issue—despite its conceptual and practical importance in guiding daily administrative work—is still primarily regulated by the rulings of the Supreme Court.

In their judgments in the area of administrative law, the courts have given expression to the basic values of the legal system, even though, for many years, the majority of these values did not enjoy constitutional regulation or, indeed, even statutory regulation. Thus, the basic values attained a normative dimension as part of the unwrit-

---

500 See H.C. 5263/94, Hirshensohn v. Minister of Fin., 49(5) P.D. 837; see generally supra text accompanying notes 141-146.

501 For the distinction between "general" and "particular" administrative law, see H. KLINGHOFFER, ADMINISTRATIVE LAW 44-45 (1957) (Hebrew). See also BRADLEY & EWING, supra note 103, at 697; DAVID FOUKES, ADMINISTRATIVE LAW 1-2 (8th ed. 1995).


505 See Itzhak Zamir, Preparing a Law of Administrative Procedure—The Need and Situation in Israel and Other Countries, 12 MISHPATIM 334 (1982) (Hebrew); BRACHA, supra note 38, at 18-21.

506 See supra text accompanying notes 205-11.
ten constitution of the State of Israel.\textsuperscript{507}

This jurisprudence to a large extent determined the rules of the game in the relations between the governmental authority, which possesses powers, and the individual, who enjoys basic rights.\textsuperscript{508} The rules of the game operated subject to the legislative sovereignty of the Knesset and to a large extent they relied on its assumed intention, while making use of interpretive presumptions which reflected the basic values.\textsuperscript{509} Over the years, the rules of administrative law developed as substantive rules.\textsuperscript{510} However, they were always subject to legislative provisions which could reject them,\textsuperscript{511} for example, in the context of powers under a specific law.\textsuperscript{512}

The constitutional development of the administrative law did not sprout, therefore, on barren land but rather on fertile and well-ploughed soil,\textsuperscript{513} which gave birth to the common law—Israel style.\textsuperscript{514} However, the crops which grew on this land in the past, needed strengthening against the legislature. Indeed the combination of the Basic Laws of 1992 concerning human rights and the judgment in the

\textsuperscript{507} See, for example, in the context of protection of human rights, supra text accompanying notes 122-32.

\textsuperscript{508} See, e.g., the references in supra note 123.

\textsuperscript{509} See, for example, regarding natural justice, supra note 234; and regarding equality, supra text accompanying notes 291-94.

\textsuperscript{510} See ITZHAK ZAMIR, ADMINISTRATIVE PROCEDURE IN ISRAEL AND ARTICLE 46 OF THE ORDER IN COUNCIL 71 (1973).

\textsuperscript{511} See, for example, with regard to the rejection of the requirement of reasonableness, supra text accompanying note 274; and with regard to the rejection of the principle of equality, supra text accompanying note 293.

\textsuperscript{512} See generally BRACHA, supra note 23, at 14; and specifically regarding the delegation of power, see BRACHA, supra note 38, at 216-17.

The specific reference to a particular rule of administrative law in a specific statute, does not necessarily entail the denial of the general law on the matter, as held in the case law. Thus, for example, reference to certain aspects of the rules of natural justice in a statute and disregard of other aspects, does not necessarily mean rejection of the latter. See H.C. 531/79, Likud Faction in Petach Tikvah Municipality v. Petach Tikvah Municipality, 34(2) P.D. 566, 574-75.

Thus, the question which must be answered is whether, in the light of the purpose of the legislature and the background of the issue, the provisions of the statute must be interpreted as exhaustive provisions, which deny the principles of natural justice outside them, or whether the provisions of the statute must be interpreted as crystallizing the principles of natural justice which are included in them, and which permit the application of the rules which are not included in them—statutory arrangements and case law arrangements, living in harmony, one alongside the other.

\textit{Id.} at 575 (Barak, J.). In cases of doubt with regard to the proper interpretation of the statute: [T]he interpretive trend should be that the rules of natural justice—in so far as they have not been expressly modified—continue to apply alongside the statute, and a statutory provision which deals with the rules of natural justice, but which does not encompass them, must be regarded, in these circumstances, as a supplementary and emphasizing provision, but not as an exhaustive provision.

\textit{Id.}

\textsuperscript{513} See supra text accompanying notes 122-32.

\textsuperscript{514} Regarding proportionality, see, for example, supra text accompanying notes 281-87. See also H.C. 5986/97, Lamm v. Director General of the Ministry of Education, Culture & Sport (forthcoming) at para. 1 (Barak, J.).
United Mizrachi Bank Ltd. case,315 created a new constitutional-normative reality in Israeli law,316 which stamped its mark on all the branches of the law317 and in a clear, prominent and immediate manner on the game rules of administrative law which are anchored in the basic constitutional principles of the legal system.316 A large portion of the rules were upgraded by being accorded protection under the umbrella of the Basic Laws—sometimes as independent rules and other times only within the area of protected rights—and by being subjected to the legislator’s capacity to maneuver, only within the boundaries allotted to it by the Basic Laws themselves, and in particular by the limitation clause.319 This is the case, first and foremost, with regard to the basic rule of administrative law which reflects the principle of the legality of the administration,320 as well as with regard to the derivatives of that principle in the complex of activities of the authority321—i.e., the power,322 the process,323 and the administrative discretion.324

Administrative law primarily expresses the proper balance between human rights and the public interest.325 With the elevation of some of these rights to a constitutional level, the points of balance also change—again in the complex of activities of the authority.326 Generalizing, one may say, therefore, that the authority must give greater weight to protected rights—as well as to those which are not protected327—at every stage of its daily work, including activities anchored in the “old” law,328 which impact on the interests of the individual. The courts, for their part, must ensure, within the framework of judicial review, that the administrative authorities indeed conduct

---

315 C.A. 6821/93, United Mizrachi Bank Ltd. v. Migdal Coop. Vill., 49(4) P.D. 221.
316 See supra text accompanying notes 1-18.
317 See supra text accompanying notes 19-20.
318 See supra text accompanying notes 21-23, 40-52.
320 See supra text accompanying notes 53-60.
321 See supra text accompanying notes 120-21.
322 See supra text accompanying notes 122-204.
323 See supra text accompanying notes 205-50.
324 See supra text accompanying notes 251-300.
325 See supra text accompanying note 119.
326 “[W]ith the enactment of the Basic Laws concerning human rights, new reciprocal relations were established between the individual and other individuals, and between the individual and the public. A new balance was created between the individual and the government.” M.A.Cr. 537/95, Genimat v. State, 49(3) P.D. 355, 412 (Barak, J.). Moreover:

[T]he novelty in the Basic Laws lies not in the fact of the existence of the balance. The novelty lies in the location of the point of balance. Elevating the status of human rights on one hand, and limiting the scope of the considerations which may infringe them, on the other hand, create by their very nature new reciprocal relations and new points of balance between human rights and the infringement thereof.

Id. at 414. See also supra text accompanying notes 139-47, 209-11, 271-72.
327 See supra text accompanying note 147.
328 See supra text accompanying notes 141-46.
themselves accordingly. That is, that they give practical expression to the change in the respective strength of the relevant interests. In so doing, the courts should not hesitate to impose duties on the administrative authorities, which are imperative in light of the new obligations, even if in the past the courts did not show any willingness to do so. Such an approach would reinforce the constitutional nature of administrative law in Israel.

---

329 The question to what extent the courts in practice implement the rules which they themselves establish in connection with a given power merits examination in a separate article. See supra note 147.

330 As an example, one may mention the unwillingness of the courts to subordinate the process of promulgating regulations to the right to a hearing. See supra text accompanying notes 219-20. Against the background of the Basic Laws one may expect the courts to change their approach. See supra text accompanying note 222.