

INTERVIEW

A Conversation with Aharon Barak

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(Received 22 November 2021; accepted 22 November 2021)

Keywords: Judges; Constitutions; International law; Fundamental rights; Constitutional courts

A. Before Joining the Supreme Court

A. Barak: I am not sure why I studied law; I doubt there was a good reason for it. In Lithuania, where my parents and I were born, Jews were allowed to study law. My father studied law, and after we came to Israel in 1947, he passed the bar exam. He never practiced, but he thought like a lawyer.

As a professor at Hebrew University [1961–1978], I taught private law and legal theory. I also served as the Dean of the law school, before being appointed Attorney General of Israel in 1975. As Attorney General I acted in important criminal cases because the Attorney General is also the country's chief prosecutor. But I also developed an interest in public law, as my office gave legal opinions to the executive branch and represented the state in litigation.

Question: As a professor, had you considered becoming a judge?

A. Barak: Never seriously. When I was Attorney General, I assumed that I would return to the university, which actually strengthened my own sense of independence. But then the President of the Israeli Supreme Court approached me and asked if I might consider the possibility of an appointment to the Court. I consulted with my main teacher and mentor, Guido Tedeschi [1907–1992]. He had refused the same offer in the 1950s. Tedeschi urged me to say yes, and I ended up accepting the appointment. It was “now or never,” I thought.

Question: Today, your scholarly works and many of your judicial opinions are regarded as foundational in the field of rights protection. Looking back, how important to these opinions was the fact that you were forced into a Jewish ghetto as a child, only to become a refugee in the midst of the Holocaust?

A. Barak: It was only much later that I began to ask myself this question, when I was asked to give a lecture at the holocaust memorial in Israel [2003]. Did my experience in the Holocaust influence my thinking? I slowly, very slowly, came to the realization that it had, and I eventually published something about the topic, so it's no secret.¹

I see this influence now in terms of three ideas. The first is the importance of the establishment of the State of Israel. I imagine that the fate of the Jews in World War II would have been different had Israel existed before the outbreak of the war. At any rate, its existence is crucial to preventing another Holocaust, for example through the annihilation of the State by a nuclear bomb. The

¹Aharon Barak, *The Holocaust from a Personal and National Perspective*, in JUSTICES OF THE SUPREME COURT WRITING ON THE (E. Rubinstein, I. Levin, & R. Stauber eds., forthcoming 2022) (Hebrew).

second is the importance of human dignity as a foundational component of all law. In the Holocaust, we lost our lives, but we safeguarded our dignity. Some 29,000 Jews were held in the Kovno Ghetto in Lithuania. But only few thousands survived the Holocaust. In the ghetto, we maintained our dignity. We even created an internal court that resolved disputes within our community, based on the Lithuanian law that existed between World War I and World War II. Third, there will always be tension between the State's existence and the individual's self-autonomy, which can only be resolved through the careful balancing between public interests and individual rights, under the proportionality principle.

Question: You were taught a very English idea of constitutionalism. Unlike English Judges, however, you embraced the idea that judges should fill gaps in Israel public law—such as the absence for a charter of rights—by looking to international law, general principles, and comparative law.

A. Barak: This is a complex topic. Israel was always a “mixed jurisdiction,” blending elements of common law and civil law. The professors who taught me at law school were not common law professors. Tedeschi taught me torts from a civil perspective.² An Austrian, Klinghoffer [Yitzhak Hans, 1905–1990] taught me administrative law, and he was influenced by Hans Kelsen [1881–1973]. In Israel at that time, we all studied law as if it were inherently a comparative subject. To learn comparative law was like learning the ABCs. We had to create our own law, but this meant drawing from other systems. As for my legal philosophy, I am a positivist. In this framework I believe that our rule of recognition in the H.L.A Hart sense,³ allows us to rely on general principles, whether to develop the Israeli common law, or for purposes of interpretation.

My professors were very much in favor of building the legal system on the basis of general principles. I mentioned Klinghoffer—a great proponent of general principles. Tedeschi, who taught a first-year course on legal methodology, always spoke about the importance of principles.

Question: Before migrating to Israel, Tedeschi taught in several Italian law schools, including in Rome, along with a leading philosopher of law, Giorgio Del Vecchio [1878–1970], who also worked on general principles of law.

A. Barak: Yes, Del Vecchio was a relative of Tedeschi, and all of them are part of the Finzi-Contini family. Del Vecchio was a Finzi-Contini, as is Guido Calabresi [born 1932, former Dean of the Yale Law School, and currently a senior judge on the U.S. Court of appeal for the Second Circuit].

The legal community in Israel understood the idea of relying on general principles, as a source of positive law. Further, we had, until 1980, a provision in one of the mandatory rules which stipulated that any gap was to be filled by principles to be found in English common law and equity. So, as Attorney General and judge on the Supreme Court, I considered myself under a duty to go to the general principles of law and determine myself how to apply these principles.

Generally, where there is a lacuna of law in the Israel legal system, the reference is to principles, not statutory law.

Question: To be clear, Israeli judges were under a positive obligation to apply English common law principles when filling gaps in Israeli law?

A. Barak: Yes, according to Art. 46 of the (King's) Palestinian Order in Council.⁴ When I became Attorney General—you will see how stupid I was—the Minister of Justice asked me: “Do you have any specific requests?” I said, “yes, please support legislation to annul Art. 46,” and it was abolished. Now, we have another provision.⁵ When one confronts a gap, one must fill it first by analogy to another rule; if there is no such analogy, then one fills it with “general

²Guido Tedeschi was involved in the elaboration of the Italian Civil Code, before leaving Italy in 1938: see Guido Calabresi, *Two Functions of Formalism: in Memory of Guido Tedeschi*, 67 U. CHI. L. REV. 479 (2000) (pointing out the relationship between Tedeschi and Barak).

³H.L.A. HART, *THE CONCEPT OF LAW* 97–120 (1994).

⁴The Kings Order in Council, § 46 (1922) (Isr.).

⁵Foundation of the Law Act, 5740-1980 (1980) (Isr.).

principles of Jewish law and Jewish heritage.” Thus, to fill gaps, we were expected to refer to Jewish principles, and to our heritage, as developed over the course of our long history. Fortunately, we now have the two Basic Laws of 1992, which refer to dignity, liberty, and other constitutional values, and these Basic Laws are paramount.

B. Member and Chief Justice of the Israeli Supreme Court

A. Barak: There are many things in common between Dieter Grimm, Sabino Cassese, and myself. We are three judges, of similar ages, and were professors before becoming judges. And we are all interested in comparative law and jurisprudence. But there are also major differences. I am a judge in a common law system, and they are judges in civil law systems. I was a judge on the Supreme Court, not a specialized constitutional court. Furthermore, in their legal systems, no one can deny that there is a constitution that authorizes judicial review of a statutes. In Israel, these questions remain are controversial. In Germany and Italy, the status of the constitutional court is guaranteed in a constitution that is difficult to change. In our case, the status of the Supreme Court and its authority are subject to constitutional change by a simple majority. Despite this, the Supreme Court ruled in the *United Mizrahi Bank* case that the Basic Law is part of a constitution since it is at a higher normative level than ordinary law. Taken together, the constitutional and administrative law cases are only about a third of what the Israeli Supreme Court does. The rest are appeals in criminal, civil, and administrative court cases that do not raise constitutional questions. Sabino and Dieter are appointed for limited terms [nine and twelve years respectively], whereas I was appointed until retirement, which meant a total of twenty-eight years on the Supreme Court, eleven as Chief Justice. My court dealt with some 6,000 cases per year, most of which should not have come to it at all. Of important constitutional cases, we had perhaps one-hundred per year. And I had other functions as well. As Chief Justice, it was my job to manage the whole court system and to represent the judiciary vis-a-vis the other branches of the State.

Question: Justices Grimm and Cassese were law students when the new German and Italian constitutional systems had just begun to operate. By the time they became constitutional judges, the most important legal problems confronting the German and Italian constitutional courts, and their place in the legal system, had been resolved. In contrast, when you became Attorney General and then went on to the Supreme Court, Israel had no written charter of right, judicial review of statute, or a complete, codified constitution—the three basic elements of modern constitutional law.

A. Barak: As Attorney General and then judge, I had no constitutional text or rights protecting precedents to follow. We in Israel have a tradition of English common law, that grants important rights at the sub-constitutional level. In this framework the Israeli Supreme Court developed, on the basis of the foundational principles of English common law, protections. And we evolved the concept that a statute may only limit a human right if done expressly, through language that is clear and unambiguous.

Israel did not enact a bill of rights—through the Basic Law of Human Dignity and Liberty [BLHDL] until 1992. But beforehand, I educated myself about the importance of constitutional law from a rights perspective. I read scholars on rights and I began citing to the jurisprudence of foreign courts. Gradually, I developed my own theory of law and my own methodology for enforcing rights as a judge. My book, *The Judge in a Democracy*,⁶ reflects these views.

Question: So even before 1992, you had begun constructing and applying what we now call a “structural” theory of rights and judicial review.

A. Barak: Yes, even before the BLHDL. It was my opinion that the rights contained in the common law and in customary international law formed part of Israel’s constitutional structure of rights. Further, according to my approach, Israeli common law that infringed upon a right would only be constitutional if it were proportional. Customary international law also forms part

⁶AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

of the Israeli common law, including international humanitarian norms that apply to belligerent occupation. In 1983,⁷ my Court held that every Israeli soldier should carry with him, in his kit, the rules of customary public international law concerned with the laws of war and “the fundamental rules of Israeli administrative law.” And in pre-1992 rulings, I had laid out a theory of why judicial review, and the possibility of the Supreme Court invalidating a statute, was part of Israeli law.⁸

Question: In your theory, rights—in the guise of general—permeate the legal system, implying that standing rules and the scope of judicial review must be conceived in expansive, not narrow, terms.

A. Barak: Even as Attorney General, I worked on the assumption that, with respect to all important questions concerning the rule of law, everyone has standing. Under this view, the Attorney General could take up the matter, with no standing issues blocking him. The Attorney General’s role is not to be an advocate of the executive branch, but to be the lawyer for the State. I represented the public good, not what the government wanted. And I was very careful to take account for rights and to give reasons for doing so. Of course, judges and the legislature could oppose me because I had no power over them. But the executive branch had to follow me.

Question: So as Attorney General you were already thinking as a constitutional judge. How did the other branches react?

A. Barak: I don’t think that my “constitutional” approach gave rise to any difficulties in terms of the legislature, since I did not have any particularly strong connection to it. The Attorney Generals that preceded me had made use of general legal principles frequently in order to develop Israeli administrative law. As a judge, I continued down this path. I developed a distinct version of the principle of reasonableness, and the idea of a “zone of reasonableness,” which had nothing to do with *Wednesbury* unreasonableness. Public officials are the trustees of the public; and administrative officials must act fairly, on the basis of general principles that are binding on the exercise of all public authority.

Question: Your approach, pre-1992, prepared the ground for the “constitutional revolution” to come. Indeed, one might say that revolution—understood as a long, historical process—had already begun before the BLHDL was adopted. After 1992, you had a major role in grounding the Israeli Constitution in that Basic Law, and in a more formal recognition of the Supreme Court’s authority to annul acts, including statutes, that violated rights.

A. Barak: One year before the enactment of the BLHDL, a case came to the Court asking us to invalidate a parliamentary statute as a violation of the right to equality. Could I do so, legitimately? Yes, and I gave reasons for this view. But I decided not to do so, on the grounds that that there existed a process for making the constitution, through the adoption of Basic Laws.⁹ This is what the constituent powers had already decided in 1951, and it also reflected the view of the Israeli public, then and now. The Court should wait until the Knesset enacted the BLHDL, I decided, before extending and formalizing its judicial review authority. If the process stalled, I could assert judicial review powers, at least in some types of cases. In the end, the revolution was not of the Court’s making, but the Knesset’s.

Question: Thus, if the Knesset had not adopted the BLHDL in 1992, the Supreme Court would likely have incorporated rights into the constitutional framework anyway, as general principles?

A. Barak: Yes. Let me give you an example involving a case that came to us before the BLHDL. It concerned a conflict between free speech and privacy: Could someone demonstrate in front of the private home of a public figure?¹⁰ The case was governed by the common law, since all of the relevant statutes were drafted in vague terms and gave little guidance. We had to rely on general principles. My ruling relied heavily on comparative law, not least, because the same question had been raised in the United States. I cited the U.S. Supreme Court, including to minority and

⁷Hcj 393/82, *Jami’at Ascan el-Malmun el-Mahdudeh el-Masauliyeh v. Commander of IDF Forces in the Judea and Samaria Area*, 37(4) PD 785, 810 (1983) (Isr.).

⁸Hcj 142/89, *La’or Movement v. Speaker of the Knesset*, 44(3) PD 529, 554 (1990) (Isr.).

⁹See *La’or Movement*, 44(3) PD 529 (1990).

¹⁰Hcj 2481/93, *Dayan v. Police Commander Yehuda Wilek*, 48 PD (2) 456 (1994) (Isr.).

dissenting opinions. Later, the *American Journal of Comparative Law* published an article suggesting that I should not have cited to a minority judgement that concerned the Fourteenth Amendment ([equal protection]), not the First Amendment (freedom of speech). I read it, and said to myself: “Who cares if the opinion carried the majority or not?” And “who cares if it’s a First or Fourteenth Amendment case, in the American context? I’m using general principles!” I ruled that free speech included protests in front of an official’s house, while recognizing that those living nearby also possessed their own rights—property, privacy, and so on. So, to resolve the case, we had to balance between rights whose source was the general principles of law. I balanced in this way throughout the Supreme Court’s “common law” period, the first fourteen years of my tenure on the Court, before the Knesset’s enactment of the BLHDL.

As to judicial review, there is a view that it’s the common law that says that Parliament is supreme, and judges are prohibited from exercising the review of statutes. Where does that principle come from? From English judges. Before English judges decided that the courts could not declare a statute unconstitutional, they had the power to do so. Typical common law move. The judges decide they have the power to declare a statute unconstitutional, until they decide they do not possess that authority. Now, these issues are being raised again in the UK courts.¹¹

Question: The 1992 Basic Laws, as you interpreted them, changed the framework for thinking about these issues.

A Barak: For as long as the constitutional process of enacting the Basic Laws continues, constitutional human rights, including the right to human dignity, will be entrenched within this framework. If this enterprise is interrupted and is left incomplete, then the Supreme Court can develop constitutional rights through its rulings, deriving them from the principle of human dignity and proportionality.

Question: So, under your theory, dignity and other important rights occupy constitutional rank in the hierarchy of norms, above statutes, at least under certain circumstances. If so, it becomes a very short step for the Court to assert that it has the power to annul statutes for violating rights under general principles related to rule of law. There is also a prior question, which may be reduced to the same issue, in the context of legislative sovereignty models. Do the most important principles—dignity and others linked directly to rule of law—take precedent over conflicting statutes, even when parliament has intended to override them in a statute?

A. Barak: The Knesset has decided that the constitution-making process would proceed through the adoption of Basic Laws. For as long as this process continues, I believe that it is inappropriate for a judge to give constitutional rank to general principles, if that means creating a conflict between these principles and the Basic Laws. However, in the event that the process fails or is abolished, the court could do so, in effect, constitutionalizing human dignity, and the rights that are derivable from dignity.¹²

Question: In Europe, historically, general principles emerged first in the field of administrative law and later migrated to constitutional law once new constitutional courts had appeared. Judges then constitutionalized the general principles or filled gaps in rights protection with them.

A. Barak: This is also the Israeli story. However, we have an additional factor, namely our Declaration of Independence (1948), which refers to rights to equality, freedom of religion, speech, conscience, and other principles that bind Israel’s constituent assembly—the Knesset. The Declaration of Independence also stipulated that elections would be held and that a constituent assembly would produce a written constitution. In my opinion, these statements comprise authoritative guidelines governing how all state legal authority in Israel is to be understood, including the authority of the constituent assembly. A Basic Law that violates these principles cannot be constitutional.

¹¹R (Jackson) v Attorney General [2005] UKHL 56.

¹²See La’or Movement, 44(3) PD at 554 (1990).

Question: This is essentially the South African story, with regard to the back and forth between the South African Constitutional Court and the constituent powers.¹³ A set of general constitutional principles establish positive requirements of constitutional validity and bind the constituent assembly from the beginning to the end of its work. Under this view, the constitution's legitimacy is dependent upon conformity with these fundamental principles, which lie outside and pre-exist, the final Constitutional document.

A. Barak: Yes. The South African Constitutional Court said it well in its ruling in that first round of proceedings leading up to the drafting of the Constitution. So please understand: When I talked about a constitutional revolution, I was not suggesting that judges could do everything, but only that the development of the Israeli constitution must respect the principles laid down by the Declaration of Independence. Further, judges are under an obligation to develop and enforce these principles, in particular when the Knesset's work as constituent assembly remains incomplete.

Question: It would seem that your theory gives substantive content to Kelsen's *Grundnorm*. Kelsen famously argued that the *Grundnorm* was devoid of content. It contained, at most, only the declaration: "Thou shalt enforce this Constitution as if it were a Constitution, that is, higher, valid law." Under your theory, the *Grundnorm* also stands outside of the Constitution, but it contains substantive norms, pertaining to democracy, dignity, rights, judicial review, and proportionality, for example.

A. Barak: Yes, but we are now talking from the standpoint of a high level of generality. Another approach is to stipulate that rights, review, and proportionality all inhere in dignity. The restriction on the constituent authority stems from the same place, a higher-law principle that governs even the constituent authority.

Question: After you left the Court, you wrote two influential books: One on proportionality,¹⁴ the other on dignity.¹⁵ Read together, they express a relatively comprehensive, general theory of modern Constitutional law. Do you think, as others do, that no modern Constitution is complete, or fully legitimate, if it does not comply with the dignity norm, proportionality, and so on?¹⁶

A. Barak: My view is that even the Israeli Constituent Assembly could not infringe a number of fundamental principles. In the absence of the Declaration of Independence, would the Constituent Assembly's powers have also been limited? It is an open question for me, although I have addressed some of the issues elsewhere.¹⁷ It is possible that, even in this situation, a new Constitution would also be subject to fundamental principles. What is the source of such principles? I would start with dignity, but many questions of this sort remain open.

Question: This conversation has begun to parallel, or reflect, certain German ideas about how dignity and proportionality penetrate into all areas of the law. Your view is that law is a unified field, from the point of view of dignity and rights. Mattias Kumm has described the situation as the "total constitution."¹⁸ In practice, judges have been the agents of this result, institutionalizing it in case law.

A. Barak: My opinion is similar to Kumm's. The BLHDL includes the human dignity norm. And I have interpreted dignity as a "mother right," including every aspect of the autonomy of one's private will. The "daughter rights" that can be derived from dignity need not be named (enumerated) to be recognized and given effect by judges.¹⁹

¹³Certification of the Constitution of the Republic of South Africa (First Hearing 1994) (CCT 23/96) ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (Sept. 6, 1996). See Heinz Klug, *South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid*, 3 J. COMPAR. L. 174 (2008).

¹⁴AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

¹⁵AHARON BARAK, *DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* (2015).

¹⁶JACOB WEINRIB, *DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL* (2016); Alec Stone Sweet, *Dignity and Constitutional Justice*, 11 JURISPRUDENCE 280 (2020).

¹⁷Aharon Barak, *The Declaration of Independence and the Knesset as a Constituent Authority*, 11 STATUTES 9 (2018)

¹⁸Mattias Kumm, *Who is Afraid of the Total Constitution? Rights as Principles and the Constitutionalisation of Private Law*, 7 GERMAN L.J. 341 (2006).

¹⁹BARAK, *supra* note 15.

The BLHDL lists only eight rights—that’s it. But one should not then say that the only way to create a “real” Bill of Rights is for the legislator, acting as constituent assembly, to add another two dozen to the eight we already have. It’s the dignity norm that implies the idea of the “total constitution.” In Israel, we don’t have Article 2(1) of the German Basic Law [the right to freely develop one’s personality, a general liberty norm], but we have dignity. The BLHDL does not mention due process, but we have dignity, and due process is part of dignity.

Question: You embrace proportionality, too, as both a general principles and part of the Israeli Constitution. How did you become interested in proportionality?

A. Barak: Proportionality—“Midatiut”—is a new word in Hebrew, which we use to adjudicate the limitation clause of the Basic Law.²⁰ Beforehand the BLHDL, we used the word—“reasonableness”—for similar purposes in administrative law. But in a number of my judgments, I defined reasonableness review as a process through which the relevant interests are taken into account, and a balance struck between them, reflecting their relative significance in a case at hand. I now consider proportionality to be a master principle that subsumes reasonableness.²¹

Question: You treat proportionality as a highly formalized standard of reasonableness. At the same time, proportionality is now recognized as an autonomous general principle of virtually every branch of law.

A. Barak: Correct. In my opinion, the use of proportionality is preferable to reasonableness, since it is more structured and transparent, and allows for a richer dialogue between the judiciary and the other authorities.

C. The Constitutional Revolution and its Effects

[Note: In the 1995 case—*United Mizrahi Bank v. Migdal Cooperative Village*²²—the Supreme Court refused to declare unconstitutional certain statutory provisions related to managing the debts of an agricultural cooperative, finding that the law’s infringement on the debt holder’s property rights was proportional. Far more important, the Supreme Court extensively debated a set of linked questions: The constitutional rank of the BLHDL, the scope of the Court’s powers of judicial review, and the state of the piecemeal process of constructing a constitution through the enactment of Basic Laws. Barak argued that the Knesset functioned as the constituent power when enacting the Basic Laws, rather than an ordinary legislature; that the BLHDL comprised the core of a judicially-enforceable bill of rights; and that the Supreme Court possessed the authority to annul any act of public authority, including statutes enacted later in time, that conflicted with these rights. The ruling is justly famous for its wide-ranging *dicta* on rights and proportionality, separation of powers and judicial power, and the rule of law. Barak used the phrase—“constitutional revolution”—to frame his main conclusions, while taking care to emphasize that this revolution was taking place around the world, not just in Israel, and that it involved the Knesset, acting as a constituent assembly.]

Question: Looking back, do you think there was another way of proceeding, perhaps with softer rhetoric, that might have made the *Bank Mizrahi* decision more palatable for those who have opposed the revolution?

A. Barak: There were other ways of doing it. One could have gone more slowly, for example. The Court had unanimously agreed that the statute was proportional, and thus constitutional. We could have merely implied strong powers of judicial review, leaving the details and rationale for future cases. I would not have had to announce a “constitutional revolution,” or lay out theories of the Knesset as a constituent power, or provide a long defense of judicial review, and so on. It could have been a judgment of a page and a half, rather than of 150 pages.

²⁰Basic Law: Human Dignity and Liberty, art. 8 (1992) (Isr.).

²¹BARAK, *supra* note 14.

²²CA 682/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* 49(4) PD 221 (1995) (Isr.).

In Israel, my students sometimes ask: “Don’t you regret the whole thing?” A good question, since now there are those who claim that the ruling made members of the Knesset fearful of enacting new Basic Laws dealing with rights and review, and other important constitutional questions. They say that the reasons we don’t have a complete constitution because *Bank Mizrahi* showed members of the Knesset how dangerous such a thing could be.

But look, because of this decision, politicians and the public now know what the constitutional project in Israel actually means. That is how it should be. We should not try to trick or defraud the country. Making a constitution is a serious business, and judicial review is very serious business. One does not build a constitution by convincing people that constitutions are unimportant, and that everything will be as it was before. Perhaps I could have used less provocative rhetoric. I announced a constitutional revolution, which created a misunderstanding. But I keep saying, it was the parliament acting as a constituent assembly that made this revolution, having been commanded to do so by the Declaration of Independence. And that is how it should be.

If we on the Supreme Court had said that Basic Laws were just regular statutes, then nothing would have happened. But saying that they had constitutional status made a difference, creating a new kind of partnership between the two branches. The Parliament and the Supreme Court are now engaged in dialogues about constitutional meaning. Maybe using the phrase, “constitutional revolution,” was a mistake. Nonetheless, I believe that the constitutional dialogue between the Knesset and the Supreme Court was not only necessary but remains positive.

Question: The rhetoric in the opinion matched the historical significance of the moment.

A, Barak: I’m a long-distance runner. I will be judged by history and not by the public in 1995 or today. I have written judgments on many important issues but, in the end, I have made one singular contribution. I recall asking myself at the time: what would have happened if, in *Brown vs. Board of Education*, the U.S. Supreme Court had held back, split the difference between the parties, worried about politics? In *Bank Mizrahi*, I knew that we had a task of historic importance, and that the ruling would be a historic event. I thought of the Hebrew expression, sailing on “the wing beats of history.”

Question: Let’s return to a prior question, this time, in the context of the constitutional revolution. Stripped to basics, a modern Constitution needs only a handful of elements: (1) The dignity norm and proportionality, which are both covered by the BLHDL of 1992, (2) a parliament that can legislate on virtually any matter, so long as it respects the proportionality principle, and (3) a court that possesses the authority to ensure respect for dignity and to review the proportionality of lawmaking and the enforcement of law.

A. Barak. In theory a constitution might say just one thing—dignity. The rest is derivable from dignity. But, in practice, it would be a very bad constitution. One needs much more than just dignity. To impose on the Court the burden of creating a full bill of rights just from dignity would be an inept way of drafting a Constitution.

Question: The Declaration of Independence stipulates that “The State of Israel . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex . . .” But the Knesset has stated that the Declaration does not have the force of law, such that it can be relied upon by courts. Could the Knesset abrogate the BLHDL, thereby erasing human dignity, equality, and proportionality from the Constitution?

A. Barak: In my view, the Declaration of Independence does not allow the Knesset to adopt a Basic Law that would, for example, prohibit Arabs from voting. The Supreme Court should—according to my theory—declare such a law unconstitutional.

In order to adopt a Basic Law that conflicts with the Declaration, the Knesset would have to produce a new Declaration of Independence. But then comes the question. Are they free to do whatever they want? Suppose they knock out every idea of equality? What is the role of the judge then? Can we have a new constitution that will limit equality, or even remove equality altogether? This is an open question for me.

Question: Perhaps the “constitutional revolution” is not a revolution after all? In this conversation, its main components appear as logical, legal consequence of a jurisprudence of human dignity and other general principles.

A. Barak: No. The BLHDL is a revolution, because it placed the principle of human dignity on constitutional level, formally, by our constituent assembly. Without the BLHDL, human dignity would exist, as part of the common law, a general principle of law, and as an interpretive principle for construing legislation. But in order to secure dignity as a constitutional norm, the Basic Laws were needed.

D. The Revolution: Parliament, the Judiciary, and the Academy

Question: No court can succeed in changing the deep structure of a constitution without elite support. Yet, prior to the *Bank of Mizrahi* ruling, there was good reason to believe that the revolution would be resisted—by political parties and parliament, lower court judges, and law professors, for example. Let’s start with the parties and parliament. Did the parties understand the full importance of the decision, and how did you assess the risk that they might oppose it?

A. Barak: When the BLHDL was enacted, it did not provoke much public criticism. Most Knesset members understood that the BLHDL meant that rights had been raised to a constitutional level, and that a statute judged to be a disproportionate violation of a constitutional right was subject to judicial invalidation. The ruling in *Bank Mizrahi* did not provoke much criticism either. Since then, the number of cases in which legislation has been invalidated has been small, about one statute per year since 1998, and then mostly only in part.

Question: Yet the “Constitutional revolution” is also a placeholder for populist attacks on “judicial activism,” and for claims that the Court gives preference to human rights over the “national interest.”

A. Barak: Criticism has intensified in recent years. Among some politicians, I am now considered a villain, the enemy. I still have demonstrations outside my house, against me, for judgements that I did not even write. I retired fourteen years ago. “Perhaps not,” they say, “but your ideas are behind these rulings.” I try to be as quiet as I can because it is a lose-lose proposition to respond. One side says: “You see, here Barak said X, Y, Z . . . that’s all him. This is what we’re fighting against.” Then the other side says, “he didn’t go far enough, because Barak always seeks a balance.” My great dream is that people will come to understand that judicial rulings express positive law, not ideology. I am currently writing a new book about the basic law of dignity and liberty where I will try to explain this once again.

Question: Opponents of the Constitutional revolution typically focus on the issue of judicial supremacy. Can Parliament override an interpretation of the BLHDL by the Supreme Court? There is no provision of any Basic Law that addresses this question.

A. Barak: Where there is a codified constitution, judicial review, and an entrenched procedure for revising the constitution, as in India, an amendment that permits legislative override of judicial interpretations of rights should be considered unconstitutional. In Israel, a special problem arises in light of the fact that our constitution is incomplete, and still in formation. Further, the general rules regarding enacting and amending the Basic Laws have not fully determined. In my opinion, the override question should be discussed only after the latter have been established.

Question: How difficult has it been for the political parties to accept that they now have to take rights seriously, that legislation is subject to proportionality review, and that the Supreme Court has rejected deference doctrines?

A. Barak: Judicial deference to legislatures or executives’ interpretation of the Constitution or of the statutes is *per se* unacceptable to me and is unconstitutional.²³ The Knesset has largely internalized the importance of constitutional rights, and of judicial review on the basis of

²³BARAK, *supra* note 14, at 384–99.

proportionality. Present controversies focus on questions of standing, legislative override of the Basic Laws, and the method of appointing judges to the Supreme Court.

Question: In the Knesset, most of those who oppose the revolution claim that it undermines separation of powers, conceived in terms of the classic Westminster model. In your theory, separation of powers, properly understood, means that the Court's job is to delineate a "zone of proportionality," within which Parliament legislates, in complete constitutional legitimacy.

A. Barak: I developed the concept of the "zone of proportionality," through a number of judgements.²⁴ Within this zone, the discretion to choose a proportionate legislative solution, in the context of a ruling that statutory provisions are unconstitutional, is entirely in the hands of the Knesset.

Dialogues between the Court and those authorities are important and should be encouraged, especially in the field of remedies. I see the constitutional remedy as part of the right, so the remedy too must be proportionate. In my judgments, I developed the concept of "relative nullity." Judges can "read-in" an interpretation that will render the statute proportional, or "read-out" interpretations that are unconstitutional. I recently published a comprehensive article in Hebrew on the doctrine of Constitutional remedies, based on this conception.²⁵

Question: The revolution also transformed the function of the judiciary: Judges are now under a duty to enforce the BLHDL, even against conflicting statutes. How did judges react to this decision? Did many resist under the banner of defending the old legislative sovereignty?

A. Barak: The revolution mainly affected the work of the Supreme Court which, as the High Court of Justice, possesses the authority to hear all petitions against state authorities. The impact of the Constitutional revolution on other judges was weaker at first.

After the *Bank of Mizrahi* ruling, I put together a Committee of Experts, which included: Me as an Israeli; Rick Pildes [New York University Law School; born 1957]; Jochen Frowein [born 1934] from Germany, who had been the President of the European Commission on Human Rights and later Georg Nolte [International Court of Justice, born 1959]; and a Canadian, Lorraine Weinrib [University of Toronto Faculty of Law, born 1948]. We ran seminars for judges all over the country, to teach them about the consequences of what had happened. These seminars are part of the reason the "constitutional revolution" was accepted by the courts.

But, of course, there is second, more important, answer. The Court is supreme in all judicial matters, for all the lower courts. Moreover, even when a judge of a lower court encounters a constitutional problem—such as in a dispute between two individuals that raises the question of the constitutionality of a law—the judge must rule according to the Supreme Court's precedents. The authority of precedent is stipulated in the Basic Law, and therefore has constitutional status.

Most civil and criminal judges do not deal with constitutional matters. However, they construe statutes, and according to *Bank Mizrahi*, all judges must interpret every provision of the criminal or civil law, according to the general principles found in the Basic Laws. If they fail to do so, their decisions are subject to appeal and can be overruled by the Supreme Court. In this way, the whole legal system is "constitutionalised."

Question: How did legal academy respond to the constitutional revolution? We know how stubborn law professors can be when it comes to teaching, scholarship, the mentoring of students, and so on.

A. Barak: It led to many fights. I tried to convince them by lecturing and writing articles. I went from topic to topic, from property to contracts, not just public law, and told them "you cannot teach as you did before." But since the BLHDL states that its provisions do not affect the validity of statutes enacted prior to it, my opponents replied that we teachers must still teach the old law. And I answered, "even so, one has to interpret the old law in light of the new principles." The validity of

²⁴See the chapter devoted to the "zone of discretion" in BARAK, *supra* note 14, at ch. 14.

²⁵Aharon Barak, *On the Theory of Constitutional Remedies*, 20 L. & BUS. 301 (2017) (Hebrew.)

the old legislation has not changed. Its language has not changed. Buts meaning has, since it must now reflect the new principles.

Slowly the new way of doing things have penetrated into the academic world, but it took a lot of time, and there is still resistance.

Question: It was much harder to convince scholars, compared to judges?

A. Barak: Absolutely. Some scholars simply refused to support us. Many of the private law professors thought that these changes did not concern them. Some of those who taught constitutional law thought and still think that the “revolution” was a mistake.

One important critic was the late Ruth Gavison [1945-2020], who taught both philosophy of law and public law. She thought *Bank Mizrahi* went too far, that the Court should have waited for the Knesset to move first.²⁶ In her view, *Bank Mizrahi* explains why we still don’t have a unified document called “the constitution.” I am blamed for that, too. Again, the idea is that introducing judicial review of statutes, with reference to the BLHDL, made the political parties even more afraid of accepting strong judicial review.

E. Global Law and Inter-Judicial Dialogues

Question: As Chief Justice you routinely engaged with foreign case law, especially rulings of important high courts, regional human rights courts, and the International Court of Justice. At the same time, your scholarly writings and decisions have had huge impact on the evolution of constitutional law, globally. To take just one example, domestic and international judges, when they adopt or perfect how they use proportionality, regularly cite to your *Proportionality* book in support of such moves.²⁷

A. Barak: I am always very happy to see judges on other courts rely on my general approach to questions of adjudication. This mutual influence is very important, but one must also be careful. Other courts and foreign scholars should be thought of as good friends that you consult. But, ultimately, if you’re a judge, you decide on your own, using your own methods, within the context of your own court. A foreign judgment may be persuasive and important, but it’s not binding, of course. The weight one gives to such advice must be considered alongside a many other considerations.

Question: You have given the impression that, in today’s world, there exists a common constitutional structure that important domestic and regional human rights courts enforce in tandem, through constructive dialogue. In other words, there has evolved a “global commons” for rights protection,²⁸ that has been gradually institutionalized at a global level.

A. Barak: Despite the differences in the wording of the various constitutions and international conventions, there are principles common to these constitutions. The importance of human rights, proportionality, access to justice, and judicial protection are at the core of all of these texts. Most judges who participate in these dialogues see their main role as protecting democracy and rights. Most advocate expansive interpretation, treating rights provisions as a “living constitution” that grow organically, like a tree, rather than being frozen in time.

Question: As both judge and scholar, you have given particular attention to the jurisprudence of the European Court of Human Rights (ECtHR), which has constructed its judicial identity on the “living” constitution metaphor, and hence on the principle of “evolutive interpretation.”²⁹ You seem quite comfortable with the notion that the Strasbourg Court is a type of transnational constitutional court, and as such, one of your friends and allies.

A. Barak: Yes, very much. I would like Israel to be a part of the ECtHR system.

²⁶Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy?*, 28 MISHAPTIM 21 (1997).

²⁷BARAK, *supra* note 14.

²⁸ ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY, BALANCING, AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 191–196 (2019).

²⁹JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN ch. 3 (2020).

Question: The development of the ECtHR, and the incorporation of the Convention as directly applicable domestic law has meant the demise of the old “dualist” orthodoxies that had been in place in many European states. As you have emphasized, the constitutional revolution had been foreshadowed by a series of decisions of the Israeli Supreme Court in administrative law. Those decisions rested on human rights, enforced as general principles, some of which coming from human rights and international humanitarian law. Is it fair to say that those rulings converted Israel, from a traditional “dualist” state, with respect to the relationship between international and domestic legal orders, into a monist system?

A. Barak: International treaties are binding in Israel only if Israeli legislation has adopted them—dualism. But customary international law is part of our common law and is directly applicable. The situation is a bit different with regard to general principles. Basic principles of law are incorporated into our common law as considerations that judges may rely upon in the development of common law. In the context of legislative interpretation, the courts must also take these principles into account, as part of inquiry into proper purpose, for example. The same is true of the interpretation of the constitution itself, especially when determining the scope of constitutional rights, or the proportionality of governmental acts. In my opinion, legal principles apply throughout the legal system, as far as the legal sources will allow.

Question: This seems a good place to discuss your *Security Fence* ruling (2004), with which most readers of this journal will be familiar. In its structure, the reasoning closely resembles a case involving domestic constitutional rights; indeed, you use the judgment to “teach” proportionality analysis to a broad audience, including the public. Yet it is an administrative law case, decided under international humanitarian law. The ruling is justly celebrated, not least, because the Supreme Court assumed the task of reviewing the lawfulness of military-decision making, in real time, during an ongoing belligerent occupation. Few if any domestic courts had ever done so before. Instead, faced with such situations, most courts would hide behind a deference doctrine, or a national security exception, precisely in order to refuse jurisdiction. It is also a shining example of what you call “relational balancing,” which resulted in an order demanding military commanders to reconsider the path of the fence, in order to reduce harm to inhabitants.³⁰

A. Barak: These issues have been among the most important that the Supreme Court has faced. Take the administration of the occupied territories, which has produced many cases in which the Court has applied international humanitarian law in the review of decisions taken by military commanders. In these rulings, I treated claims based on violations of international humanitarian law as *always* justiciable.

Question: As readers will also know, the International Court of Justice [ICJ] held, just months before your decision in the *Security Fence* case was issued, that the building of the fence was illegal in the first place. The two judgments were in conflict on this point, since your ruling, in effect, gave a degree of epistemic deference to the military on necessity, which then focused attention on your analysis in the balancing *stricto sensu* stage. How would you characterize this tension from the point of view of inter-judicial dialogue? After all, the ICJ is, presumptively, the authoritative interpreter of the law that you applied.

A. Barak: First, the ICJ did not address the same type of “case” that came to us. The ICJ’s holding was part of an advisory opinion, upon request of the Security Council; and Israel was not a party to the proceedings. When the ICJ received the referral, I advised our people to appear before the court to present Israel’s arguments. Regrettably, they refused, and it was a great mistake.

I received the ICJ’s judgment immediately, as it was brought to me by a petitioner in one of the cases pending before the Supreme Court.

Question: The ICJ’s opinion is largely an exercise in abstract interpretation, with important aspects of the concrete dispute on the ground missing entirely.

³⁰H CJ 2056/04 Beit Sourik Village Council v. The Government of Israel 57(1) PD 385 (2004) (Isr.).

A. Barak: Yes. It's an advisory opinion, addressed to the Security Court, without binding effect. Nonetheless, in my view, the Israeli Supreme Court was under an obligation to proceed on the assumption that the ICJ had given a correct interpretation of international humanitarian law. The ICJ was not convinced that the wall was justified by military necessity. In response, we took the question of necessity to be a factual question that required examination, on a case-by-case basis, along the entire route of the fence proposed by the military commanders on the ground.

The ICJ held that, under the Geneva Convention, Israel could not take inhabitant's property to build the wall. But the ICJ also noted—in a couple of sentences with no real factual analysis—that the commander could legislate in the occupied area, upon a showing of military necessity and while respecting the proportionality principle. Since the ICJ and I agreed on this latter point, I said, “fine, given that the ICJ is not convinced of military necessity, we must examine necessity and proportionality again, in detail.” So, at least some elements of a proper dialogue were there.

In the end, we had some thirty security fence claims, and we heard testimony on necessity and the proportionality of the fence's proposed route on everyone. In my chambers, there were maps of every part of the path of the fence, and maps of alternative routes. And we asked over and over: What is the military necessity of this proposed route? We can build this fence only under military necessity, the ICJ has stated, so where is the necessity of this path, if it goes through this village or olive grove? And if the commanders could not convince me that there was necessity, I ordered the wall to be destroyed. We didn't go straight to balancing. Only if they did demonstrate necessity—that only a fence, following this designated path, could maximize security—did I move to relational balancing, wherein we examined the relative harms of alternative routes. If we found that a proposed route to be disproportionate, we ordered the military to discuss changes to the route with affected groups on both sides, and then to come back with a revised proposal that would be proportionate, by reducing harms to inhabitants.

During this period, Justice Antonin Scalia [1936–2016] visited Israel from the U.S., and I invited him to visit the Court. When he arrived in my chambers, he saw all these maps. He asked: “Are you a lawyer or an architect?” “No,” I said, “I'm studying law, but I am also becoming an architect.” Then I tried to explain to him what was happening.

F. Challenges, Past, and Future

Question: If you had the power to change Israeli constitutional law, what would you do? One presumes that you are an advocate of a fully codified, entrenched constitution that provides a charter of rights enforced through strong judicial review.

A. Barak: Yes, I am in favor of a complete constitution, a complete Bill of Rights, and complete judicial review. An example of an “ideal” process of constitution-making is that of the Constitution of South Africa [1996–1997]. I have often stated that the provision in Israel's Declaration of Independence requiring the enactment of a constitution has not been fulfilled. I am in favor of completing the process, through the adoption of Basic Laws, and then the ratification of the Constitution through a vote of the people.

Ratifying through referendum can serve a major educational function, instructing people about the importance of human dignity as a constitutional value that people around the world share and why proportionality-based judicial review is necessary to the rule of law, even in the field of national security.

Question: Are you in favor of the creation of a constitutional court, one goal of which would be to build on the importance of rights and review?

A. Barak: The institution of a specialized constitutional court is foreign to common law [but see A. Barak's just-mentioned comments on the South African Constitutional Court]. Establishing such a court has been proposed in Israel. I objected, but not to the institution as such. I think a constitutional court in Israel would be a disaster, given the political context. The Knesset is

governed on the basis of political coalitions in which a large number of factions are members. Thus, appointments to the constitutional court would be part of coalition agreements, with each party insisting on its own candidates. In a divided society such as ours, I think we should exclude politicians as much as possible from the appointment of Supreme Court justices.

Question: It is commonplace today to argue that constitutional justice is in deep trouble, on the defensive in the face of mounting political backlash. What advice would you give to constitutional judges who are trying to enhance the effectiveness of rights and review while confronting political hostility to both?

A. Barak: Judges should not think about backlash. Our job is to take the right decision in law, not to make the other branches happy. There must be friction among the branches—it's a healthy thing. When the court comes under attack, it is prohibited to retreat into a bunker. The court must continuously renew its commitments and seek to render judgements that correspond to its usual practices, and with the usual legal tools at its disposal. At the center of this tool-box are human rights, proportionality, and the general principles.

The role of the court is not to defend itself, but to defend democracy. Its goal should be to construct a kind of legal "iron dome," that protects the state from the missiles deployed to destroy democracy. A judge must act in accordance with constitutional principles, otherwise it will be complicit in the death of the constitutional democracy it has pledged to uphold. Only if the judge is not sure about the proper course of action—only if he has an internal dilemma with himself about the solution to the problem—may he allow himself to let the missile reach its target.