Chapter 7

Creative Judiciary:

Equitable and Constitutional safeguards to Property

*"Locally-made equitable rights in property must be allowed to develop as independent Israeli law…”* Aharon Barak[[1]](#footnote-1)

*“In the balance between the property right…and the public necessities… is expressed in our new understanding of the purpose of the Expropriation Ordinance,”* Aharon Barak[[2]](#footnote-2)

One of the most prominent identifying characteristics of the State of Israel is the existence of a strong and independent judicial authority.[[3]](#footnote-3) One of the more obvious and controversial aspects of this independence is the phenomenon of judicial activism, that is, the tendency of the judiciary to not merely implement the law, but also to create it. This chapter focuses on two different central channels in which Israel’s judicial creativity has developed: civil law and constitutional law. We present the general background to the development of these channels and demonstrate how they are reflected in two important areas of land law: the protection of rights stemming from equity in real-estate and the constitutional protection of immovable property rights.

**Background to the development of judicial activism in Israel**

The creativity of the Israeli judiciary is an expression of the growing power and independence of the judicial system in Israel. This independence developed gradually, along two different paths. The first and earlier of the two, is the judiciary's process of disengagement from the legacy of English law left in Israel by the British Mandate government. Article 46 of the Royal Order of 1922, which was constitution of sorts introduced in Palestine by the British prior to the establishment of the State of Israel, stipulated that local courts should interpret laws or supplement them with lacunae “in conformity with the substance of the common law, and the doctrines of equity in force in England."[[4]](#footnote-4) The State of Israel did not repeal this provision upon its establishment and, therefore, during Israel’s early years, the precedents developed by English courts were legally binding, subject to the process of their "absorption" by the local courts. [[5]](#footnote-5) Starting from its second decade, the State of Israel began a process of disengagement from English law. In contemporary terms, the severance of this connection was a sort of an ‘exit’ of the Israeli legal system from the influence of the English legal system, similar to the ‘Brexit’ of the British legal system from European Union law. [[6]](#footnote-6)This process of legal ‘exit,’ initiated by the Israeli legislature with the goal of demonstrating the State of Israel’s political independence, unfolded gradually. It began in the 1960s and 1970s with the enactment of a series of laws that attempted to shape an independent Israeli private civil law. In some of those laws included an explicit provision regarding the "independence of the law," stipulating that English law would no longer have any binding force in the areas dealt with by each of those laws. [[7]](#footnote-7) The transformation was completed with the enactment of the Law of the Foundations of Law, 5740-1980, which finally and definitively voided the authority of references to English law, and ruled that from thereon after the court would fill lacunae in the law “in the light of the principles of freedom, justice, equity and peace of Israel's heritage.” [[8]](#footnote-8) Nonetheless, the gradual abolition of the requirement to rely on English case law did not eliminate the natural tendency of some judges to rely on foreign sources as comparative sources of inspiration. Reliance on American sources, in particular, increased. The Israeli Supreme Court, likewise, did not rush to implement the principles of Jewish/Hebrew law and Jewish heritage in its rulings. All the same, the judicial process gradually became more independent and the tendency to rely on the foreign sources declined significantly. The local courts began to develop an autonomous normative law, independent of foreign legal systems.[[9]](#footnote-9) Israel land laws hold a place of honor in this process.

The second channel through which the Israeli judicial system has accumulated a great deal if power is at the level of internal relations vis-à-vis the other two branches of government in Israel: the legislative and the executive branches. Israel is a democratic state in which the principle of separation of powers applies, and the relationship between government branches is based on a system of checks and balances. As the American Supreme Court Justice Felix Frankfurter once wrote, the court’s authority is based on “neither the purse nor the sword,” but rather on “sustained public confidence in its moral sanction” and on “the Court's complete detachment… from political entanglements…"[[10]](#footnote-10) In this spirit, the rulings of the courts during the first decades of Israel’s existence tended to be conservative and were not often characterized by judicial activism and legal creativity; they were also careful not to become involved in controversial political issues. In the more recent decades, however, this situation has changed. [[11]](#footnote-11) Three parallel processes have increased the power of the Supreme Court in relation to the other two/three branches of government during these decades.

First, the Supreme Court gradually abandoned the conservative approach that had characterized its rulings in the past. The Supreme Court increasingly tended toward expanding the scope of its judicial discretion by means of very broad and creative interpretations of various legislative concepts, such as good faith, negligence or reasonableness. It became more and more inclined to base its rulings on ethical considerations, rather than solely on formalist interpretations of the legislation. The Court's creative approach commonly veered away from adherence to the letter of laws and contracts and became more like “judicial legislation” of a judge's independent creation, than the outcome of the legislator’s intent. Since the 1980s, such "judicial legislation" has characterized the Supreme Court's rulings in almost all branches of law, including private law, administrative law and constitutional law. [[12]](#footnote-12)

Second, in 1992, the Knesset enacted the Basic Law: Human Dignity and Liberty (hereafter in this chapter: the Basic Law).[[13]](#footnote-13) The Basic Law, which is envisioned as part of the future constitution of the State of Israel, prohibits the violation of various human rights, including life, body, dignity (Article 2) and property (Article 3). Article 8 of the Law, which over the years has come to be referred to as the “limitations clause,” established conditions under which violation of these rights is permitted, including legislation or explicit authorization in legislation, appropriate purpose, harm that is not excessive ("proportionality") and suitability to the values ​​of the State of Israel as a "Jewish and democratic state." In a precedential judgement, the Supreme Court ruled that this, and other, Basic Laws have constitutional status and that the Court is empowered to invalidate laws or decisions made in accordance with those laws if, according to its interpretation, they do not meet the provisions of the Basic Law.[[14]](#footnote-14) Israel’s Supreme Court has, through this ruling, executed a move similar to the one made by the USA Supreme Court in the Marbury v. Madison case.[[15]](#footnote-15) It granted to a Basic Law a constitutional status that superseded Knesset legislation and granted itself the ultimate authority to exercise the supremacy of constitutional law by disqualifying ordinary laws it believed contradict the Basic Law, or through an activist interpretation of laws in the spirit of the Basic Law.[[16]](#footnote-16) The enactment of the Basic Law and the higher constitutional status granted to it by the Court have been viewed in Israel as a "constitutional revolution."[[17]](#footnote-17) The move greatly strengthened the status of the judiciary and made it, in addition to its traditional roles, a kind of constitutional court, similar to the US Supreme Court or to constitutional courts in Europe.[[18]](#footnote-18)

The third factor that has increased the power of the Supreme Court of Justice, as well as its activism, is the weakening of other governmental systems. The fracturing of the Israeli political system into small parties beginning in the 1980s greatly weakened the power of the executive and legislative branches, leading to what many experts call a “problem of governmentality.” The Supreme Court viewed itself, and often was also thus perceived by the public and by politicians, as an island of stability and as a last resort (perhaps even preferred) where other authorities were unable to help.[[19]](#footnote-19)

One of the leading instigators of this change was the Justice, and later the Chief Justice, of the Supreme Court, Prof. Aharon Barak. The judicial activism of his rulings reflected his academic background as a law professor, his professional background as a former attorney general, his favorable impression of the US legal system, and also his background as a child survivor of the Holocaust who recognized the importance of an independent judiciary as a guarantee for the existence of democracy.[[20]](#footnote-20) Upon his retirement, he lay forth his worldview in a special issue of the esteemed *Harvard Law Review.*[[21]](#footnote-21)Barak was a mentor to many Israeli jurists; indeed, Prof. Oz Almog likened him to the Hassidic rabbi of secular society.[[22]](#footnote-22) Barak became the symbol of the judicial activist transformation, and as a result was also the target of harsh criticism by its opponents.

The three processes outlined above have increased the relative power of the Supreme Court vis-a-vis the other authorities to such an extent that it has provoked exacting criticism of the Court, both from academia and in the public and political spheres. Prof. Mautner has defined the transformation in the Court's approach as a shift from formalism to values, and attributed this change, among other things, to an attempt by the social stratum to which the Supreme Court justices belong to maintain its power and liberal values.[[23]](#footnote-23) Other critics have argued that the Supreme Court has assumed powers that exceed the accepted and proper role of the courts and might ultimately even damage the Court itself.[[24]](#footnote-24) Certainly, the increasing number of rulings on politically controversial issues has led to growing criticism of the Court on the part of politicians.[[25]](#footnote-25) In recent years, the status of the Supreme Court has been the focus of constant political pressure aimed at reducing the Court's activism. Two of Israel's minsters of justice in recent decades have been fervent critics of judicial activism: Prof. Daniel Friedmann, who served as Minister of Justice in 2007-2009, summarized his critical approach in his book "The Purse and the Sword."[[26]](#footnote-26) The current Minister of Justice, Ayelet Shaked, who has been in office since 2015, has taken concrete steps to weaken judicial activism, including substantial and successful support for the appointment of "conservative" justices[[27]](#footnote-27) and the introduction of a Basic Law that will allow the Knesset to pass laws that override Supreme Court rulings by means of a "cessation clause."[[28]](#footnote-28) The increase in judicial activism also led to a certain gradual decline in public confidence in the Supreme Court; however, public opinion polls since 2009 indicate a consistent moderate trend towards a return to the level of public trust it had prior to the constitutional revolution.[[29]](#footnote-29)

Judicial creativity, then, is one of the central characteristics of Israel’s judiciary system. Like other identifying characteristics of the State of Israel, it is clearly reflected in Israeli land laws. The following paragraphs are devoted to analyzing two areas of land law that reflect the increasing power of the judiciary in Israel: First, the independent development indigenous equitable rights in Israel; and second, the evolution of the Court's rulings in the field of constitutional protection of private property in Israel.

**The independent development of equitable property rights**

English equity laws and common law had binding legal status in Mandatory Palestine. As already noted, this was rooted in the Mandatory constitution, which remained in effect even after the establishment of the State of Israel. During that period, English law served as the normative source for various doctrines in the field of land law, and particularly rights developed in the courts of equity.[[30]](#footnote-30) Thus, for example, Israeli courts recognized property rights "stemming from equity." They ruled, in accordance with laws imported from English law, that a person holding a contract to acquire rights in land has an equitable right of ownership in the property, even though the transferor remains the property owner by law. The main significance of this rule is that the equitable right to property supersedes the rights of any of the transferor’s creditors, with the exception of creditors who have completed the purchase of the asset in value and without notice. This ruling was based on the assumption by the courts of equity that a relationship of constructivist trust exists between the legal owner and the equitable owner and, therefore, the creditors of the trustee (the transferor) cannot go down the assets that he holds in trust for the beneficiary (the transferee).[[31]](#footnote-31) Yet another doctrine adopted in Israel was the doctrine of equitable interests by virtue of estoppel. Israeli courts have ruled in accordance with this doctrine that the legal owner of an estopped property cannot claim his rights from someone who mistakenly held, used and invested in the property over time without the permission, but with the knowledge and the absence of any objection, on the part of that legal owner.[[32]](#footnote-32)

The Land Law, 5729-1969, which to date constitutes the primary legislation defining real-estate law in Israel, came into effect in 1970.[[33]](#footnote-33) One of the aims of the Law was to ground Israeli land law in independent Israeli legislation and to eliminate the complex old and foreign historical layers of land law left over from Ottoman and English legislation. Article 161 of the Land Law, entitled "No rights stemming from equity," gave prominent expression to this purpose: "From the coming into force of this Law, there shall be no rights in immovable property save under an enacted Law." Israeli jurists all agreed that the aim of this article was to discontinue, from that point onward, the conventional obligatory reference to English rulings in order to adopt equitable doctrines. All the same, Article 161 elicited a fierce legal debate over the question of whether it was meant to annul doctrines that had already been introduced and thus bring about a substantive change in law, or alternately, that it merely sought to change the normative way of establishing them. In 1971, shortly after the enactment of the Land Law, the Supreme Court decided in the Boker ruling that the intention of Article 161 was not only declaratory but also substantive, meaning that rights stemming from equity would no longer be recognized, and only rights by law would be recognized. This meant that, from hereon after, anyone who had rights in land under a contract and had not yet register them in the land registry, no longer has any advantage over other creditors of the registered owner, even if they have received possession of the property and paid for it in full. The purpose of this ruling was to encourage completing the registration of transactions.[[34]](#footnote-34) The main opinion in this precedent-setting ruling was composed by the former head of the committee that drafted the Land Law, Supreme Court Justice Moshe Landau. His ruling reflected the legislative intent in real terms, since he was a member of the committee that drafted the law.[[35]](#footnote-35) It also expressed the conservative and non-activist approach of Justice Landau regarding the role of a judge. Many years later, when he retired, Judge Landau became one of the most public critics of the judicial activism developed by the Supreme Court after his departure.[[36]](#footnote-36) The first signs of this position were evident in his ruling that revoked rights stemming from equity.

All the same, Landau's conservative approach in the Boker case was rigorously criticized in academia. The critique was led by Prof. Joshua Weissman, one of Israel's preeminent experts in property law. Weissman argued that the severance of Israeli law from its sources in English law of equity did not require a change in the substantive law that was based upon them, but rather, only a change of its normative source. The equity rights imported from England should and could be transformed into indigenous Israeli rights stemming from equity, hereinafter based on Israeli legislation.[[37]](#footnote-37) The difficulty in implementing this approach was that it was not always possible to find an original and explicit Israeli legal provision upon which to base laws similar to those established by English equity laws. For thirty years after the Boker case, the Supreme Court was unwilling to undertake this task of creating original Israeli rights of equity in land laws. This was the same period during which the courts gradually became more powerful and only towards its end, in 1999, did the Supreme Court feel strong enough to dare and develop local "made in Israel" rights stemming from equity.

A secondary partner in the new Supreme Court project was Mrs. Mazal Aharonov. Ms. Aharonov was divorced from her husband in 1990. In their divorce agreement, her husband had undertaken to transfer to her ownership in a plot of land. Yet, before Mazal was able to register the transaction in the land registry, the husband’s creditors foreclosed on his registered rights to the land. In accordance with the Boker ruling, which eliminated rights stemming from equity, she could not surmount the creditors. Her representatives did not surrender, however, and tried to convince the courts that their client had acquired equity rights in the plot of land. This argument certainly obliged the courts not only to deviate from precedents that determined that there were no rights stemming from equity, but also to create, from nothing, indigenous “made in Israel” rights from equity. In contrast to numerous previous failed attempts, Mazal Aharonov succeeded in to persuading the court to cross the Rubicon. The Supreme Court ruled in the Aharonov case[[38]](#footnote-38) that a person holding a contract to acquire rights in a real estate property has equitable rights that trump those of the transferor's creditors, with the exception of a third party who purchased the property in consideration and without notice.[[39]](#footnote-39) The Court did not base this right on the English equity laws, but rather, on a creative and activist interpretation of Israeli legal provisions. Although there is no explicit Israeli statutory provision that grants priority to the purchaser of immovable property over the transferor’s creditors, the court concluded that such priority exists by analogy from another legal provision. While this provision does not deal directly with the issue, it grants priority to an agreement for the purchase of real estate property over a later conflicting transaction made in the same asset.[[40]](#footnote-40) The Court concluded that the preference for the first agreement in one case attests to the privileged status of that right in other cases as well. Thirty years earlier, the Supreme Court had rejected this analogy on the grounds that this legal provision indicated a preference in an unusual case that constitutes an exception to the rule, rather than a specific case of preference that attests to a preferential rule covering other cases as well.[[41]](#footnote-41) But, by now the climate had changed, conservatism was replaced by activism, and Chief Justice Barak and his colleagues were willing to take that step forward and establish “made in Israel” rights stemming from equity based on a creative interpretation of the same article that their predecessors did not dare adopt.[[42]](#footnote-42) The Court did not limit itself to interpreting that particular article of the law, but also gave a moral justification for preferring equitable rights to the rights of a competing creditor. According to this moral explanation, an equitable right is worthy of preference because the owner of that right is seeking rights in a specific asset and relies on the contract for that particular asset, whereas typical creditors do not depend on a particular asset at the time the debt is created and therefore, have no guarantee from the owner regarding that specific asset which they now wish to foreclose. The creditors assume the risk that the debtor will not have assets when they seek to recover that debt. The Court therefore held that a creditor whose claim derives from reliance on a particular asset takes precedence over a creditor whose claim does not derive from such reliance.[[43]](#footnote-43) This is a logical, reasonable and perhaps even justifiable rule, but it has no explicit basis in any Israeli legislation.

In order to create original independent rights stemming from equity, the Court had to overcome several obstacles. The first was the thirty year old precedent whereby Israel has no rights stemming from equity. The Justices, of course, believed that this precedent was inherently wrong. Chief Justice Barak explained his deviation from the precedent that had been adhered to in the past, in that previous rulings did not perceive the legislator’s underlying intent.[[44]](#footnote-44) Justice Strasberg-Cohen argued that the law should be changed in order to realize "the accepted view in our system of legal harmony between various arrangements relating to the same materia."[[45]](#footnote-45) Nonetheless, if the precedent was inherently wrong, why did the Court wait nearly three decades to make this ruling? Justice Strasberg-Cohen cited various reasons in explaining why the Court dared to revise a ruling at that particular point in time, including: the advanced age of the old ruling and the need to adapt it to the "changing reality of life," the growing number of relevant cases, criticism of the ruling, as well as “developments in law, which has come a long way from formalism to substance."[[46]](#footnote-46) This final reason appears to encapsulate the entire list: the power of the Court and its growing overall tendency towards judicial activism had finally reached, at the dawn of the third millennium, the realm of real-estate law.

   Another obstacle faced by the Court was the need to find an Israeli normative source for the independent creation of rights stemming from equity. This obstacle, as noted, was overcome by means of a creative interpretation of an article in Israeli law, and by repeatedly emphasizing that it was an original Israeli creation that must be developed in an original way, while learning from foreign sources but without adopting them as is.[[47]](#footnote-47) The Court was careful not to base equitable rights on the legal doctrine of ‘constructive loyalty,’ which was their foundation in the English and American equity laws. This doctrine assigns to the transferor and the transferee a relationship of trust by force (constructive), and hence, infers a preference for the transferee, as the trustee, over the transferor’s creditors. The Israeli Supreme Court sought to avoid basing its ruling on this doctrine, preferring to demonstrate that its ruling relies on the provisions of Israeli law.[[48]](#footnote-48) However, Israeli equitable rights were, ultimately, similar, almost identical, to the rights created by English laws of equity. Even the moral explanations given by the court had already been used to explicate the logic of the English law while it was in force.[[49]](#footnote-49)

In fact, the Supreme Court's action in 1999 was the very same judicial move made by the courts of equity hundreds of years earlier. The Aharonov ruling is more of an English-style judicial legislation than a conservative application of explicit legislation. Just as the English law developed step by step with each ruling, so did the courts, at all levels, continue to develop equitable rights through a series of rulings. They ruled that rights stemming from equity are also relevant to commitments to transactions other than ownership (such as mortgage or trust);[[50]](#footnote-50) they also took precedence over the transferor’s creditors in insolvency proceedings[[51]](#footnote-51) and they exist, albeit in a weaker sense, even when the transaction is free of charge.[[52]](#footnote-52) Ultimately, the Court also ruled that, similarly to English law, but without relying on it directly, there is a constructivist relationship of trust between the transferor and the transferee and that a claim for equity rights expires in the same way as a beneficiary's claim against a trust.[[53]](#footnote-53) The development of rights stemming from equity has become part and parcel of Israeli common law. On the one hand, it reflects the increasing power of the Court and its intellectual and interpretive independence. On the other hand, it reveals that the Israeli Supreme Court's judicial activism is no different from similar activity by powerful courts in other legal systems. The task of judging is ultimately a universal one, even when attempting to show originality.[[54]](#footnote-54)

Just four years after the development of original Israeli equitable rights of ownership, the Supreme Court independently developed yet another doctrine that is well known in the English equity laws: the doctrine of estoppel.[[55]](#footnote-55) Here, too, the court overturned a decades-old ruling; and here, too, it was an original Israeli development that relies on an activist, creative and moral interpretation of Israeli law. Here, too, the move was led by Chief Justice Aharon Barak, and here too the result is very similar to the original English doctrine. In the Ganz case,[[56]](#footnote-56) a landowner undertook to transfer his rights to one person (Mr. Ganz) and seventeen years later undertook to transfer the same rights to a second buyer (Mr. Afek). Neither of the buyers completed the transaction in the land registry, but the later buyer received the property in good faith, without notice, and in exchange. According to the explicit instruction of Article 9 of the Israeli Land Law, in such a case, the right of the first transaction holder time-wise overrides the other, since the later transaction was not completed in exchange and in good faith. Although the first purchaser could have prevented the later contradictory transaction by registering a caveat, Israeli law does not oblige a purchaser to register a caveat, nor does it not state that failure to register it should prejudice the preference of the earlier purchaser over the later. The later, second, owner of rights in this case (Afek), argued that, despite these explicit provisions of the law, he should be preferred over the first purchaser due to his negligent failure: he refrained for a very long time (seventeen years) from recording a caveat notice in the land registry. As a result of this failure damage was incurred by the second purchaser: he did not know about the existence of the first, and therefore entered into a contract to buy the property and even paid consideration and received possession of the property many years ago.[[57]](#footnote-57) When the Court encountered similar issues prior to the enactment of the Land Law, it could resolve them by integrating the doctrine of estoppel from English law.[[58]](#footnote-58) After the enactment of the Land Law, this path was blocked, since the legislation established explicitly that there are no rights stemming from equity and that any resolution should be based on original Israeli legislation. During the thirty years that passed between the enactment of the Land Law and the Ganz case, the Supreme Court consistently refused to add to the Israeli legislation conditions that had not been written in it. The Court refused to rule that there is an obligation to register a warning caveat and also refused to determine that any failure in the first transaction time-wise bears significance in a competition between two conflicting transactions. It insisted upon this point even when adamant academic criticism provided a compelling substantive reason for changing the rule. The main argument put forth by critics was that it is necessary to prevent damage to others and to prevent the failures that cause such damage, for example, the failure to register a caveat, by imposing responsibility for their consequences. When the right holder in an earlier transaction did not record a caveat and this omission led to the engagement in good faith and in exchange for a later transaction, the precedence of the negligent party responsible for the failure should be revoked.[[59]](#footnote-59) For many years, the Court, including Justice Barak, refused to accept the recommendations of its critics, despite explicit identification with their rationales. The main reason for this refusal lay in the explicit provisions of the law: the law does not impose any express obligation on the owner of the transaction.[[60]](#footnote-60) This was a clear example of judicial conservatism.

The Supreme Court’s conservatism ended with the Ganz case. The Court’s first task was to find an article in original Israeli law upon which to base the overruling of Ganz's priority (Ganz was the earlier rights-owner, whose years-long failure caused damage to Afek). Although the Court had argued for years that there was no such clause, it now found it easily, right under its nose. With the support of some but not all of his fellow justices, Justice Barak ruled that the obligation to prevent damage, as well as the obligation to register a warning caveat in order to prevent it, stems from a general principle that applies in Israeli law: the principle of good faith. Barak presents this principle at the beginning of his ruling in the Ganz case:

"The general doctrines of the law apply to all parts of the law. Specific legislation does not stand in isolation... One of those general doctrines that apply in all areas of law is the principle of good faith... Good faith sets an objective criterion of fair conduct by a right holder who seeks to realize their self-interest, against the background of the overall social interest and taking into consideration the interests of others... The principle of good faith also applies within the framework of the laws of property..."[[61]](#footnote-61)

Of course, Barak did not "discover" this principle when he came to the Ganz case. It is mentioned as a general principle in various Israeli legislation,[[62]](#footnote-62) and over the decades preceding the Ganz case many scholarly articles were written about it, some of which even suggested establishing principles based on the doctrine of estoppel in English law.[[63]](#footnote-63) Barak himself had mentioned and developed this principle in previous rulings.[[64]](#footnote-64) He even defined the way in which the ruling dealt with it as "salutary."[[65]](#footnote-65) It is a very convenient and flexible platform for interpretive creativity in ruling. However, it was only adopted in the Ganz case, after thirty years, in order to bring about the change in immovable property laws that Barak himself had hesitated to implement in the past.  
   Once the principle was identified, Barak was left with the task of imbuing it with substance. Barak adopted the critical arguments of academic scholars as to why a purchaser of real estate must be charged with registering a caveat: To avoid recording the caveat causes a "legal accident" for the later purchaser and therefore, it is the duty of the first purchaser to prevent that mishap.[[66]](#footnote-66) All that remained, then, was for Barak to formulate the obligation by means of judicial legislation of his own device:

"... The principle of good faith requires that the owner of the first transaction act fairly, taking into consideration the reasonable expectation of the owner of the second transaction. From this principle of good faith is derived the obligation, in principle, of the first transaction owner to do his best to record a caveat so as to prevent the owner of the second transaction from entering into contract with the seller."[[67]](#footnote-67)

As a judicial legislator, Barak was not satisfied with merely determining the principle, and he continued to set qualifications: Some were obiter dicta that had nothing to do with the facts of the case at hand. One was so general that it allowed for the Court, in the future, to qualify the rule no less freely than the way it was set. Thus, Barak ruled that refraining from recording a caveat would not be considered a failure "if under the circumstances there are weighty considerations of a legal policy that justify the absence of a caveat."[[68]](#footnote-68) He also provided an example of such a consideration: one spouse's failure to register a caveat regarding about the property of the other spouse "for reasons of family unity."[[69]](#footnote-69) Barak's ruling in the Ganz case was, thus, a masterpiece of judicial legislation. By interpreting a general principle anchored in Israeli legislation, Barak enacted both an obligation and qualifications, of which there is no explicit mentioned in the legislation, and which for years the Court, including Barak himself, argued could not be based on Israeli legislation. This is a clear expression of Barak’s power, as well as of the power of the Supreme Court at the time the judgment in the Ganz case was handed down.

Some of Barak's colleagues on the bench in the Ganz case expressed reservations about the breadth of the obligation he created. All agreed that, in this specific case, Ganz should be censured for his conduct and that the decision could be based upon the Israeli principle of good faith. However, most tended to restrict the rule only to the special circumstances of the Ganz affair: the long duration of the failure of the first right holder (17 years) and the later purchaser’s extended and significant dependence which caused harm.[[70]](#footnote-70) These conditions are very similar to the conditions of the English equitable doctrine of estoppel: the estopping of a claimant’s right because of a long-term failure and an ongoing long-term reliance which caused damage to another person.[[71]](#footnote-71) The Ganz case thus symbolized the birth of an independent Israeli twin to the English doctrine of equitable estoppel: the Israeli doctrine of estoppel. Although, as noted, the justices based the doctrine on the Israeli principle of good faith, they often used the term "estoppel" derived from English equity laws.[[72]](#footnote-72) Justice Barak similarly had no reservations about alternatively basing his rulings on the principle of "estoppel."[[73]](#footnote-73) Thus, the Ganz ruling set another independent foundation for the Israeli laws of equity: the “silencing” of a right holder who lingered and caused significant harm to others.

The Ganz ruling, like the Aharonov's ruling before it, and any judicial legislation that expands judicial discretion, opened the door to further development of the Israeli laws of equity. It also created uncertainty and left many open questions: should we prefer a broad or narrow interpretation of the principle of good faith? How should one rule on lesser failures than Ganz's failure? The courts in Israel, at all levels, have since been actively engaged in implementing and developing the Ganz ruling. For example, conditions were set for its application or its non-applicability in cases where the failures that caused the damage were briefer or less severe.[[74]](#footnote-74) Rules were set regarding failures caused by trust relations between neighbors or distant family members in a traditional Arab village.[[75]](#footnote-75) The court even applied the ruling to other registration failures, such as refraining from registering an agreement between common owners of real-estate.[[76]](#footnote-76) The doctrine of estoppel was also applied to failures that do not concern registration, such as written or oral false representations.[[77]](#footnote-77) The Court also clarified the relationship between the Ganz and the Aharonov rulings. Ostensibly, these were two contradictory rulings, since the Aharonov ruling established that an equity right supersedes the rights of the transferor’s creditors even without a recorded caveat, whereas the Ganz ruling determined that a person who did not record such a notice is liable to lose his priority. Justice Barak, who played a part in both rulings, clarified that while the Aharonov ruling was intended to provide priority over creditors who did not rely on the disputed property, the subsequent one (Ganz) has to do with determining priority in a competition between two creditors who, in turn, both relied on the property. In the first case, failure to register a caveat in favor of the first creditor does not harm the creditor who was had no interest in the property at all. In the second case, failure to register a caveat in favor of the first owner misleads the subsequent owner and causes him damages.[[78]](#footnote-78)

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The Ganz ruling and its descendants/derivatives combined with the Aharonov ruling to became an important part of the independent Israeli laws of equity. These laws are similar to English equity law, but they are the product of original Israeli development. Why was so much judicial energy invested in this independent creation if it ultimately led to a result that could have been imported? The answer to this question lies in the deep connection between the manner in which the ruling was made and the identity of the State. The independent development of case law is an expression of the independence and uniqueness of the Israeli judicial system.

**Constitutional safeguards to property**

Another manifestation of the independence and growing power of Israel's judicial system in recent decades is its ability to conduct constitutional reviews of legislation. This authority is expressed also in the field of constitutional protection of private property. Land expropriations or planning infringements are the most prominent examples of such harm to private property, and it might therefore be expected that the power of the Israeli judicial system would be particularly apparent in this area. As will be explained below, it is precisely in this area that the Supreme Court did not exhibit its full power and chose to exercise relative judicial restraint. One of the reasons for this is apparently the distributive approach of some of the justices.

   Even before the aforementioned constitutional revolution, the courts in Israel recognized the important status of private property rights and the obligation to compensate for expropriation of land.[[79]](#footnote-79) Furthermore, the key legislation in Israel dealing with expropriations has always established the right to compensation, even if partial and incomplete, for expropriations and for planning infringements.[[80]](#footnote-80) The enactment of Article 3 of the Basic Law: Human Dignity and Liberty in 1992, whereby "a person's property is not to be infringed" upon except by law, apparently reinforced this recognition.[[81]](#footnote-81) However, the courts’ jurisdiction to carry out constitutional reviews of expropriations and planning infringements to real-estate was limited a priori by the article on preservation of laws in the Basic Law (Article 10), according to which the Law shall not apply to legislation enacted prior to its entry into force. This restriction precluded the Court’s authority to revoke earlier legislation that infringes on private property. All the same, the Supreme Court adopted the approach whereby it is nonetheless authorized to interpret previous legislation differently in light of the Basic Law. In accordance with this approach, the Court does have the authority to carry out judicial review of actions that rely on old legislation, while interpreting this legislation in a manner that legitimates only actions that are consistent with the tenets of the Basic Law.[[82]](#footnote-82) Thus, despite the qualifications, the enactment of the Basic Law created among both jurists and landowners far-reaching expectations for a “revolution” that would strengthen the protections of private property in real-estate in comparison to the protections that existed before the Basic Law was enacted.[[83]](#footnote-83) The interpretive transformation is also reflected in the rhetoric of the courts themselves.[[84]](#footnote-84) However, in practice, the expectations for change, as well as the pronouncements on its occurrence, were both exaggerated. The Court’s willingness to effect a change in the laws of land expropriation and planning infringement was limited. We shall demonstrate this below through two main ways of infringing upon real-estate: the actual authority to carry out expropriation of land and the obligation to provide just compensation for land expropriations and infringements.

One of the areas in which one might expect to find expanded judicial review of the expropriation laws is the framework of the authority to expropriate. The two central laws dealing with expropriation in Israel, the Lands Ordinance of 1943 and the Planning and Building Law of 1965, define the purpose permitting expropriation by means of the broad term "public need."[[85]](#footnote-85) A similar term, “public use,” is recognized in the American Constitution.[[86]](#footnote-86) This term can be interpreted narrowly, to include only the use of/by the public, as well as broadly, to indicate any public purpose. The narrow interpretation does not allow the expropriation of lands for the purpose of transferring them to private entities or individuals, while the broader interpretation allows expropriation also for the purpose of transferring them to private entities or individuals, as long as this transfer fulfills its public purpose. The United States Supreme Court has debated these two possible interpretations and the majority has favored the broad interpretation.[[87]](#footnote-87) This is also the perspective of the Israeli Supreme Court. Many of the land expropriations in Israel were undertaken for purpose of constructing residential neighborhoods that were ultimately given to individuals. The public reasoning for the expropriation was usually that the land was distributed between multiple private owners, creating coordination problems that prevented development and thus required expropriation.[[88]](#footnote-88) Following the enactment of the Basic Law: Human Dignity and Liberty, an attempt was made to challenge the broader interpretation. Petitioners in the Nusseibeh case argued that, following the enactment of the Basic Law and the tests set forth therein, there were no longer grounds to expropriate land for a public purpose that the petitioners could carry out on their own.[[89]](#footnote-89) A minority of the Supreme Court justices held that in light of the Basic Law there was no longer justification for expropriating land for such a purpose and that market forces should be allowed to resolve the problem of coordination.[[90]](#footnote-90) The majority opinion, on the other hand, held that the market failure inherent in the problem of coordination between multiple owners would lead to an intolerable delay in carrying out the purpose of the expropriation, and therefore such expropriations should be permitted.[[91]](#footnote-91) The Court adhered to this position even when the owners of the land who wanted to realize the commercial purpose of the expropriation themselves were not Palestinian residents of East Jerusalem, as in the Nusseibeh case, but also when an Israeli businessman and even the Jewish National Fund declared their desire to realize themselves a commercial project on land expropriated by the municipality in the heart of Tel Aviv.[[92]](#footnote-92) Moreover, the courts refused to invalidate expropriations for public purposes even when the realization of that public purpose was delayed for decades after the expropriation. Such a delay ostensibly indicates that the expropriation was no better a solution than waiting for market forces. The constitutional protection of private property in the Basic Law: Human Dignity and Liberty did not convince the Court that a change to this approach was needed.[[93]](#footnote-93) What ultimately brought about a change in this area was legislation, which in 2010 enacted the obligation to specify a date for the execution of an expropriation, and furthermore, established a right to recover land that was expropriated in the event that its purpose was not realized within the time frame specified.[[94]](#footnote-94) However, this legislative amendment was not applied retroactively, nor does it apply to expropriations under the Planning and Building Law, which is the main law currently dealing with expropriations in Israel. Thus, the relevance of the amendment at present is very minor.

Yet another far-reaching transformation that could have been achieved through the interpretation of expropriation laws has to do with cases in which the public need for which the expropriation was carried out had expired or was realized, and the land is no longer needed for a public purpose. In the Karsik case, the Court supposedly created a revolution when it ruled that, in principle, land must be returned to its original owners when the purpose of the expropriation expires. The Court bases this ruling on a creative interpretation of the authority to expropriate for "public needs," whereby this ongoing authority expires when the public need for the expropriated land expires.[[95]](#footnote-95) However, this activist interpretation by the Court remains a matter of principle only. The Court was not prepared to rule accordingly in practice and to return expropriated land to its owners. Instead, it instructed the legislature to work out the details of the arrangement. The legislature consequently labored on a proposed legislation that overrode the Court's ruling in principle almost entirely. It determined that the right of restitution shall not apply to expropriations that were carried out in the past, but only to expropriations to be executed in the future, and when applicable, it will only give the original owner priority to purchase his land at market value.[[96]](#footnote-96) The Supreme Court did not insist at any point upon the principle that it had defined and even approved the constitutionality of the law that overrode it.[[97]](#footnote-97) It appears, therefore, that in the context of the constitutional revolution, the Israeli Supreme Court was extremely cautious, if not conservative, in its review of the actual execution of expropriations.

In contrast, the court demonstrated greater judicial activism in its constitutional review of the extent of compensation that should be paid for expropriation of land or damage to it. As noted, the two main laws that permit the state and local authorities to carry out expropriations of land determined even prior to the enactment of the Basic Law that expropriations must be compensated for. The Planning and Building Law also granted the right to sue for damages to real-estate as the result of local outline plans.[[98]](#footnote-98) However, these laws included various sections that exempted the authorities from paying full compensation for the expropriation and obliged them to pay only partial compensation. The scope of the exemption from compensation ranges from 25% at the national level to 40% at the local level.[[99]](#footnote-99) The exemption for planning infringements may be applied to damage that "does not exceed the reasonable."[[100]](#footnote-100) In the past, the Supreme Court interpreted the exemption from compensation as a kind of tax imposed on landowners. Therefore, it ruled that land may be expropriated without compensation even when the infringement does not improve the balance of the land remaining in the hands of the owners, and even if the land is expropriated in full without leaving the owner with any land whatsoever.[[101]](#footnote-101) With the enactment of the Basic Law, the Court changed its interpretation of this legislation. This was the most far-reaching amendment in the area of expropriations, even though it too was more moderate than might have been expected from the "constitutional revolution." In the Holzman case, the Supreme Court ruled that when a plot of land is expropriated in full, without anything remaining for the owners, the owners must be fully compensated and the tax embedded in the statutory exemption from compensation should not be levied.[[102]](#footnote-102) At the same time, the Court was less clear in its approach to exemption from compensation in cases where the authorities had expropriated only part of the land, but the expropriation did not improve the part remaining in the hands of the owners. While Justice Dorner supported in principle the elimination of the exemption from compensation in such cases as well, Chief Justice Barak proposed that it not be cancelled, because of the view that alongside the protection of private property, the landowners also have a "social responsibility." The exemption from compensation may express this responsibility. In his typical manner, Barak left the determination of in which cases the exemption expresses such responsibility and in which it did not to the future discretion of the courts.[[103]](#footnote-103) A few years later, following Barak's retirement, the Supreme Court ruled in the Rotman case that the owners should be fully compensated for the expropriation of part of a plot, if the expropriation did not improve the part remaining to the owner.[[104]](#footnote-104) Even before that, the legislature had canceled the exemption for expropriations to be carried out in the future on the national level, but not at the local level.[[105]](#footnote-105) To date, there are no empirical findings to indicate a correlation between the greater obligation to compensate and the extent of expropriations carried out by the authorities.[[106]](#footnote-106)

The justices of the Supreme Court were similarly divided over the interpretation of the article in the law that exempts the authorities from the need to compensate for planning infringements to real-estate that "do not exceed the limits of reasonableness."[[107]](#footnote-107) In the Horowitz case, some of the judges held that in light of the constitutional protection of property, compensation must be paid for any damage suffered beyond de minimis.[[108]](#footnote-108) Chief Justice Barak proposed a broader interpretation of the exemption from compensation, based on the idea that private property owners should be charged with "social responsibility."[[109]](#footnote-109) He proposed evaluating the question of compensation in accordance with the scope of the damage, the importance of its public purpose and the extent to which the damage is distributed. The greater the damage, the less important the public goal, and the less evenly distributed, the greater the obligation to compensate. On the other hand, the smaller the damage, the more important its public purpose, and the more equally and randomly the damage is distributed among the entire population – the lesser the obligation to compensate.[[110]](#footnote-110) Another Supreme Court hearing in a panel of seven justices which did not produce a binding ruling, created uncertainty among those involved in the field and increased the dependence on judicial discretion.[[111]](#footnote-111) This was an apt demonstration of the ideological differences between the justices. Opposing Chief Justice Barak's distributive approach, which supported the imposition of social responsibility on property owners, was his deputy, Justice Mishael Cheshin. Cheshin, who consistently upheld the defense of private property in his rulings, objected to imposing this social responsibility. The following socio-economic worldview was the foundation of his position on the issue:

"Today's real-estate owners – including the respondent - are not necessarily more well-to-do economically and financially than others in their community. And for some of them, the land infringed upon is their only property. Indeed, today’s feudal lords are capitalist feudalists. They are no longer the feudal lords of days past. It behooves us therefore to be more careful with those whose property, possibly their only property, is harmed by planning programs... This is also how to uphold the justice of equality, which is so vital to the existence of a healthy community..."[[112]](#footnote-112)

We see that the judicial activism of the Supreme Court in the field of constitutional protection of property was more significant in relation to the owner's right to compensation for expropriation. In this area, the court succeeded in changing, by interpretation, the law that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the court from implementing halakhic and activist changes through the authority to interpret previous legislation, which it took upon itself. Internal ideological disputes between judges, and not necessarily a conservative judicial approach, apparently prevented far-reaching precedents in the field of constitutional protection of property in real estate.We see that the judicial activism of the Supreme Court in the field of constitutional protection of property was more significant in relation to the owner's right to compensation for expropriation. In this area, the court succeeded in changing, by interpretation, the law that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the court from implementing halakhic and activist changes through the authority to interpret previous legislation, which it took upon itself. Internal ideological disputes between judges, and not necessarily a conservative judicial approach, apparently prevented far-reaching precedents in the field of constitutional protection of property in real estate.We see that the judicial activism of the Supreme Court in the field of constitutional protection of property was more significant in relation to the owner's right to compensation for expropriation. In this area, the court succeeded in changing, by interpretation, the law that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the court from implementing halakhic and activist changes through the authority to interpret previous legislation, which it took upon itself. Internal ideological disputes between judges, and not necessarily a conservative judicial approach, apparently prevented far-reaching precedents in the field of constitutional protection of property in real estate.We see that the judicial activism of the Supreme Court in the field of constitutional protection of property was more significant in relation to the owner's right to compensation for expropriation. In this area, the court succeeded in changing, by interpretation, the law that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the court from implementing halakhic and activist changes through the authority to interpret previous legislation, which it took upon itself. Internal ideological disputes between judges, and not necessarily a conservative judicial approach, apparently prevented far-reaching precedents in the field of constitutional protection of property in real estate.We see that the judicial activism of the Supreme Court in the field of constitutional protection of property was more significant in relation to the owner's right to compensation for expropriation. In this area, the court succeeded in changing, by interpretation, the law that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the court from implementing halakhic and activist changes through the authority to interpret previous legislation, which it took upon itself. Internal ideological disputes between judges, and not necessarily a conservative judicial approach, apparently prevented far-reaching precedents in the field of constitutional protection of property in real estate. Top of Form

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We see, then, that the Supreme Court’s judicial activism with regards to the constitutional protection of property was more significant in the area of the owners’ right to compensation for expropriation. In this area, the Court successfully changed, through interpretation, legislation that preceded the Basic Law, even though the relevant legislation was excluded from the application of the Basic Law. This fact did not prevent the Court from implementing activist judicial changes through the authority it took upon itself to interpret previous legislation. Internal ideological divisions among the justices rather than a conservative judicial approach, apparently, precluded even more far-reaching precedents in the field of constitutional protection of property in real-estate.

**Conclusion**

In this chapter we have seen that land laws are a prism through which the independence and legal creativity of Israel’s judicial authority is reflected. They were prominently expressed in two realms of protection of immovable private property. In the area of ​​private law, Israeli jurisprudence has quite creatively developed local doctrines similar to those developed by the English courts of equity hundreds of years earlier. The Supreme Court thus developed indigenous "Made in Israel" rights of equity and rights of estoppel. This development was aimed to exhibit the independence of the Israeli legal system from foreign sources, but it also clearly demonstrates the Israeli judiciary’s activist approach to the interpretation of legislation. Judicial activism is also expressed, albeit more limitedly, in the manner in which the Supreme Court has led to a change in the laws of expropriation and planning infringements on real-estate after the enactment of the Basic Law: Human Dignity and Liberty. The Court assumed the authority to interpret differently, in the spirit of the Basic Law, legislation to which the Basic Law explicitly did not apply. The Court’s creative and activist interpretation of those laws led to a significant reduction in the number of cases in which it is permissible to expropriate land without compensation. On the other hand, in its ​​judicial review of the very authority to expropriate, the Court led changes that were more minor. The main reason for this was not a conservative approach to the judicial role, but internal ideological divisions within the Court.

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52. C.A. 11502/05 Lanyado v. Holland Israel Ltd. (Nevo, 24.2.2008)(Hebrew). [↑](#footnote-ref-52)
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