The State Comptroller and Human Rights in Israel[[1]](#footnote-1)\*

Aharon Barak[[2]](#footnote-2)\*[[3]](#footnote-3)\*

1. Human Rights in Israel

The state of Israel has a three-level system for protecting human rights against the government authorities. **The first level** is jurisprudential. Since the founding of the State, the Supreme Court has recognized a long list of human rights, such as freedom of occupation,[[4]](#footnote-4) liberty,[[5]](#footnote-5) freedom of expression,[[6]](#footnote-6) and the rights of association,[[7]](#footnote-7) and of demonstration.[[8]](#footnote-8)

**The second level** is statutory. The Knesset has recognized human rights in legislation, the most important of these are equal rights for women, equal employment opportunities, and the right to privacy.[[9]](#footnote-9)

**The third level**, which is the one I shall be focusing on in this lecture - is constitutional. These are the human rights that were (explicitly or implicitly) recognized by the Basic Laws of Israel [i.e., a series of constitutional laws adopted by the Knesset throughout its history]. Most of these [constitutionally protected] rights are entrenched in the Basic Law: Human Dignity and Liberty, which recognizes the following rights as constitutional imperatives: the right to life,[[10]](#footnote-10) the right to bodily integrity,[[11]](#footnote-11) the right to human dignity,[[12]](#footnote-12) the right to property,[[13]](#footnote-13) the right to personal liberty,[[14]](#footnote-14) the right to leave and enter Israel,[[15]](#footnote-15) and the right to privacy and freedom from unsanctioned intrusion. .[[16]](#footnote-16)

Human rights are to be interpreted using purposive interpretation.[[17]](#footnote-17) This interpretation method endeavors to give the legal text a meaning consistent with the contemporary social objectives underlying the text. The interpretation should be undertaken with a "spacious view". It is not legalistic or pedantic.[[18]](#footnote-18) It is practical and reflects the long-term views of Israeli society. In interpreting human rights, the Court looks at and draws conclusions from international human rights law and comparative constitutional law. These bodies of law, are, of course, not binding on the Israeli Supreme Court – indeed, the Court is guided by its own extensive jurisprudence regarding human rights, going back to the time the State was established.

Most Israeli constitutional rights are framework rights.[[19]](#footnote-19) These are each comprised of a bundle of subordinate rights that reflect the various aspects of the parent right from which they are derived.[[20]](#footnote-20) The most important of these rights is the right to human dignity, which encompasses the right to protection against any limitation of the humanity of a person as human being. Human dignity is a person's freedom to choose, his autonomy of will: it is his personality, the "I" which ensures his identity as a human being. It is the individual’s freedom to compose his life story and influence its contents; it is the freedom from humiliation and degradation; it is the principle that prevents a person from becoming a mere means for the satisfying another's desires; it is a freedom which operates within society.

The framework right of human dignity includes the following subordinate rights: the right to personality, the right to equality, the right to a reputation, the right to freedom of expression, the right to freedom of conscience and religion, the right to education, the right to a family (such as marriage and parenthood), the right to employment, the right to health, the right to freedom of movement within the State borders, the right to due process, and the right to a dignified human existence.. This is, of course, not an exhaustive list. The right to human dignity includes both civil and social subordinate rights; both the core and the penumbra of human dignity are included within the set of subordinate rights and certainly within the parent right.

The right to human dignity imposes both a "negative" obligation on the State to refrain from limiting the right, and a "positive" obligation to protect the right from being limited by others.[[21]](#footnote-21) The scope of the subordinate rights, such as the rights to equality and to freedom of expression, is different from what it would have been had they been recognized as independent rights. The subordinate rights remain a part of the bundle known as human dignity. Thus, the subordinate right to equality encompasses only those characteristics of equality which are connected to human dignity. Discrimination in a form that does not limit human dignity is not superseded by the subordinate right to equality – however, protection against such discrimination could have been included as a part of an independent right to equality, had such an independent right been recognized. All the constitutional rights, including those deriving from the right to human dignity, are rights of the individual vis-à-vis the state authority. They do not directly apply to relationships between individuals.[[22]](#footnote-22)

All the constitutional rights, including, of course, the right to human dignity and its subordinate rights, are relative. They are not absolute. The significance of this characteristic is that limits can be properly imposed on these rights, in appropriate circumstances. Such limitations will be constitutional only if they are within the range allowed by the principle of proportionality. According to the (express and limited) rules of proportionality, a statutory limitation of a constitutional right will be constitutional if it has been imposed for a proper purpose; if a rational connection exists between the realization of the proper purpose and the statutory measures taken; the limitation is necessary because the proper purpose cannot be realized through alternative means that would be less harmful to the affected human right; and that there is a proper balance between the marginal public benefit generated or the right being protected by the statutory means adopted – on the one hand - and the marginal damage to the constitutional right caused by such statutory intervention – on the other hand.[[23]](#footnote-23)

2. The Protection of Human Rights in Israel

**A. Normative Violations**

Are constitutional rights properly protected in Israel? Are they being infringed upon or otherwise limited? In answering this question, we draw a distinction between normative limitations of constitutional rights and physical limitations thereof. A limitation is normative if it is entrenched in a sub-constitutional legal norm (whether a statutory or common law norm). The violation is physical when it is not entrenched in a legal norm.

Regarding normative violations, it should be noted that most of the new legislation in Israel − enacted after Basic Law: Human Dignity and Liberty came into force – complies with the constitutional imperatives. Even where this legislation imposes a restriction on a constitutional right, that restriction usually satisfies the requirements of the proportionality test. The paucity of petitions of the Supreme Court challenging the constitutionality of new legislation is not indicative of a restrictive approach on the part of the Court, but rather of the conscientious work undertaken by legal advisors – both in the Government and in the Knesset – for the purpose of ensuring that the Knesset does not enact legislation that infringes on any constitutionally protected rights in a disproportionate manner.

A different picture emerges regarding old legislation − laws that were enacted prior to the enactment of the ?Basic Law: Human Dignity and Liberty. A significant portion of this older legislation does place restrictions on constitutionally protected rights, a manner which does not satisfy the proportionality principle. Thus, for example, the laws regarding marriage and divorce in Israel, which do not recognize civil marriage and divorce or civil unions, imposes disproportionate limitations on the right to a family – a right which is derived from the constitutional right to human dignity.[[24]](#footnote-24) The Court is powerless to intervene regarding this matter, since the validity of laws clause, in section 10 of the Basic Law: Human Dignity and Liberty, provides as follows:[[25]](#footnote-25)

"This Basic Law shall not affect the validity of any law in force prior to the commencement to the Basic Law."

However, this restriction on the Court’s ability to change the provisions of legislation does not apply to the legislature itself, which has the power − and in my opinion, the duty − to amend the old legislation in order to bring it in line with the constitutional rights. I find this situation to be regrettable – i.e., a situation in which, despite the language of the Basic Law: Human Dignity and Liberty which provides that "[a]ll governmental authorities shall respect the rights under this Basic Law", little has been done in this context to correct the unconstitutional infringements contained within the older laws.. "All governmental authorities", includes, first and foremost, the Knesset itself. The validity of laws clause does not release the Knesset from this duty to correct that body’s past errors, even if clause does prevent any direct judicial relief in this regard.

B. Physical Violations

There are numerous physical (i.e., non-normative) violations of constitutionally protected rights. In this regard, section 11 of the Basic Law: Human Dignity and Liberty provides that "[a]ll governmental authorities shall respect the rights under this Basic Law". As we have seen, the term "[a]ll governmental authorities" includes the legislature, as well as additional authorities – amongst them the executive branch, the judiciary and the local authorities. Every statutory authority is a governmental authority. The State Comptroller is certainly "one of the government authorities".

The State − and its enforcement entities − must of course maintain a system that ensures that the protection of the constitutional rights of the individual are protected against violation by the State’s own authorities. Within the framework of judicial review over executive decisions, the Courts must of course adjudicate allegations concerning the infringement of the constitutional rights of all citizens and [other] persons [whose rights are subject to the Court’s jurisdiction]. The State Comptroller − in both his general capacity as the State auditor and as the Ombudsman − must ensure that constitutional rights are respected. Indeed, section 2(B) of the Basic Law: The State Comptroller, provides as follows:

"The State Comptroller shall examine the legality […] of the bodies' actions."

This provision empowers the State Comptroller to examine whether the executive branch is properly protecting the constitutional rights of the individual vis-a-vis the State.

In my view, not enough protection is afforded [under Israel’s current structure]. In many democratic countries in which constitutional rights are protected, that protection is secured through a functioning human rights commission. The countries whose governmental systems provide for such a commission include Australia, the United States (in several of the individual states, such as Massachusetts, and at a federal level, only with respect to the right to equality), the UK, Denmark, South Africa, New Zealand, and Canada (at both the Federal and provincial levels).[[26]](#footnote-26) These commissions play an important role in protecting human rights. They are engaged in various activities which the Court – the main defender of human rights – cannot be engaged. These types of activities include the initiation of hearings regarding human rights violations, and the promotion of human rights issues through the use of non-legislative or judiciary methods – such as education, public relations, the collection of information and the expression of public positions. The idea of creating a statutorily enshrined human rights commission in Israel did arise during Yossi Beilin's tenure as Minister of Justice. Between 2000 and 2001, at Minister Beilin's request, a comprehensive and important research study on the subject was undertaken at the Hebrew University's Minerva Center, and a draft law was even prepared.[[27]](#footnote-27) Most regrettably however, the bill was shelved. [Today], the absence of the institution is conspicuous. However, even without a consensus on whether or not it can be viewed as an independent, statutory authority – the work of such a commission can certainly be deemed to be part of the mandate of the Office of the State Comptroller and Ombudsman.

Thus, so long as legislation is not forthcoming regarding the creation of an independent human rights commission, the State Comptroller, both in his general capacity and as the ombudsman, should regard it as his responsibility to function as the country’s human rights commissioner. Indeed, one of the State Comptroller's mandates is to examine the activities of audited bodies to determine whether those activities have led to the infringement of constitutional rights. There is no difference in this context between the infringement of "civil" constitutional rights, such as the rights to freedom of expression and to equality, and the infringement of "social" constitutional rights, such as the right to health and education.[[28]](#footnote-28) Indeed, every constitutional right has a civil aspect. The infringements in question are engendered by both the over-activity of the State which threatens to undermine "negative" constitutional rights, and the under-activity of the State which fails to adequately protect "positive" constitutional rights.

The State Comptroller's activity in this area does not replace that of the Court – rather, it functions as an additional form of rights protection activity. It is not a substitute for judicial review – if only because it is not binding (although the assumption should be that non-compliance with the State Comptroller's recommendations is [inherently] unreasonable activity). It should also not be seen as an "alternative remedy" which must be exhausted before a petition may be filed in court. The State Comptroller’s activity in the area of human rights is important, because it is of wider scope than judicial activity can be.

The Supreme Court does not evaluate the efficiency and wisdom of administrative decisions, but only their reasonableness. The Comptroller, in contrast, is empowered to examine the "orderly management, the efficiency, and the economy of the audited bodies".[[29]](#footnote-29) Thus, in this context, the State Comptroller's audit is broader in scope than the Court’s judicial review of reasonableness or of proportionality. Actions that are within the zone of reasonableness or of proportionality may still be activities that are deemed to be inefficient. Indeed, inefficiency in the protection of human rights is a subject within the purview of the State Comptroller's jurisdiction. Needless to say, the state audit itself is not immune from being subjected to judicial review. On a previous occasion, I explained the relationship between judicial review and the state audit function, as follows:[[30]](#footnote-30)

"The State Comptroller, in his capacity as Ombudsman, seeks effective justice, as do the courts. Like us, he is independent in his decisions, and he has no master other than the law. He performs his functions with fairness and objectivity, mindful of the importance of the mission with which he has been entrusted. Both the court and the Ombudsman seek resolution to disputes between the individual and the government authorities. We do not compete with each other. We are not envious of you. Quite the opposite: we shall be pleased to see you bolster and expand the state audit function, and to see you solve problems that, if they are not resolved, will find their way to us. The two institutions − the Court and the Ombudsman − act to impose the rule of the law. We are not competitors - rather, we complement each other."

Indeed, with regard to human rights, the more protectors there are, the better the situation will be. It is important to remember: without human rights, there is no democracy, and we must all protect democracy. If we do not protect democracy, democracy will not protect us.

1. \* This article based on lecture that was given during a study day "The institution of the State Comptroller and the Ombudsman in a changing social environment", IDC Herzliya, 11.7.2013. The lecture was translated to English and published in the journal "State Audit and human rights" of the office of the State Comptroller and the Ombudsman of Israel (2014). The article were also published in A "Selection of Articles", Vol. 3 − Constitutional Studies 81 (2017). [↑](#footnote-ref-1)
2. \*\* The retired President of the Supreme Court; the Redsinger Law School, IDC, Herzliya. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. HCJ 1/49 *Bejerano v. the Police Minister* [1949] IsrSC 2 80, 82-83. [↑](#footnote-ref-4)
5. HCJ 95/49, *El Kuri v. the CGS of the IDF* [1950] IsrSC 4 80, 82-83.. [↑](#footnote-ref-5)
6. HCJ 75/53, *Kol Ha'am Ltd v. the Minister of the Interior* [1953] IsrSC 7 871. [↑](#footnote-ref-6)
7. HCJ 241/60, *Kardosh v. the Companies Registrar* [1961] IsrSC 15(2) 80, 82-83. [↑](#footnote-ref-7)
8. HCJ 148/79, *Sa'ar v. the Minister of the Interior and the Police* [1980] IsrSC 34(2) 169; HCJ 153/83, *Levy v. the Commander of the Southern District of the Israeli Police* [1984] IsrSC 38(2) 393.. [↑](#footnote-ref-8)
9. See Women's Equal Rights Law of Israel (5711 - 1951); Employment (Equal Opportunities) Law (5758 - 1998); Protection of Privacy Law (5741 - 1981). [↑](#footnote-ref-9)
10. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 2, 4. [↑](#footnote-ref-10)
11. *Ibid.* [↑](#footnote-ref-11)
12. *Ibid.* [↑](#footnote-ref-12)
13. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 3. [↑](#footnote-ref-13)
14. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 5. [↑](#footnote-ref-14)
15. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 6. [↑](#footnote-ref-15)
16. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 7. [↑](#footnote-ref-16)
17. Aharon Barak, Interpretation in Law, Vol. 3 − Constitutional Interpretation 285 (1994) (Hebrew). [↑](#footnote-ref-17)
18. *Ibid*, at p. 289. [↑](#footnote-ref-18)
19. Aharon Barak Human dignity − the constitutional right and its Derivative Rights, Vol. 1, 303 (2014) (Hebrew). [↑](#footnote-ref-19)
20. For the concepts of a parent right and a subsidiary right - see Aharon Barak, Human Dignity − the constitutional right and its daughters, Vol. 2, 533 (2014) (Hebrew). [↑](#footnote-ref-20)
21. HCJ 6298/07, Rasler v. the Israeli Knesset [2012] IsrSC 265(3) 1. Para. 54, per President Beinish; see also *supra* note 16, at p. 347. [↑](#footnote-ref-21)
22. See, *supra* note 16, at p. 379. [↑](#footnote-ref-22)
23. Aharon Barak, Proportionality in justice − the injury to the constitutional right and its limitations, 419 (2010) (Hebrew). [↑](#footnote-ref-23)
24. Aharon Barak, *The Family Constitution: Constitutional Aspects of Family Law*, 16 Law and Business, 13, 50-54 (2013); See also, *supra* note17, at p. 632. [↑](#footnote-ref-24)
25. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 10. [↑](#footnote-ref-25)
26. *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* (Kamal Hossain et al., eds. 2000). [↑](#footnote-ref-26)
27. Proposed Human Rights Commission Law, 5766-2006, P/17/1561. [↑](#footnote-ref-27)
28. *Supra* note 17, p. 793; see also, Yoram Rabin, The right to education, 304 (2002). [↑](#footnote-ref-28)
29. Basic Law: The State Comptroller (5748 - 1988), SH No. 30, § 2(b). [↑](#footnote-ref-29)
30. Aharon Barak, *On Values, Justice, and Democracy in Israel*, 59 *Iyunim* - Studies in State Audit, 21, 25 (2002). [↑](#footnote-ref-30)