**Response paper to the Kahn Freund article on the impact of a constitution on labor law**

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**Introduction:**

At the start, the author explains the principles on which he bases the article, the first of which is the use of the concept of legislation in its essence, and the second is the fact that the concept of constitution is undergoing a process of standardization and formalization.[[1]](#footnote-1) He goes on to explain that constitutional considerations regarding a particular law usually take priority over legislative ones, and that the court has the authority to interpret what is contained in it, but not to invalidate its actual legality[[2]](#footnote-2). After establishing the background, the author goes on to discuss the main issue, and that it is the effect of constitutional law on labor laws. He reviews the developments in the labor law legislation in various countries, in light of the influence of various factors operating in joint federations, and especially in light of legislative-legal developments in that country / federation. Later on, he focuses on the ability of the courts to influence legislation in judicial review or interpretation (citing as an example the impact in the United States of the First Amendment, and the impact of the Bill of Rights).[[3]](#footnote-3)

The conclusion reached by the author is that bills of rights allow judges to implement their moral and social preferences, by using constitutional doctrines and applying them to constitutional principles.[[4]](#footnote-4)

That is, the judges’ interpretation of the law may be a kind of distortion of the constitution writers’ intent, but the author of the article does not necessarily see this as a negative, but as a natural evolutionary process that carries risk on the one hand, but also developmental potential on the other, and which may eventually lead to dispensing justice in a more equitable way.

In the response paper below, I would like to compare the core principle presented in the article with the laws of The State of Israel, with particular reference to Jewish Law, from which Israeli Law sprung. I would then like to illustrate the comparison with specific examples, and ending by discussing the article author’s conclusion.

**Comparing the concept of an evolving constitution to the situation in the State of Israel:**

We shall start with a comparison of the conceptual premise on which the author bases the article (a constitution in a substantive sense, a constitution that undergoes formalization). You can see how this perception[[5]](#footnote-5) existed in the State of Israel from its early days. When the State of Israel was established, it was decided by the Constituent Assembly, which would eventually become the legislature of the State of Israel known as the "Knesset", that it was necessary to draft a constitution for the nascent state. Following disagreements during the drafting of the constitution[[6]](#footnote-6), the proposal by Kneeset Member Yuval Harari was accepted[[7]](#footnote-7), which suggested that the constitution be written chapter by chapter, with each chapter named a Base Law, until they all coalesce into a single constitution.[[8]](#footnote-8) In this proposal one can see how the principles set out by the author of the article as a basis, come to practical application - constitution in a substantive sense, and the evolving formalization of the constitution.

As part of the controversy surrounding the drafting of the constitution, a number of other issues related to the judicial policy of the State of Israel were in contention, chief among them the relationship between the evolving Israeli law and traditional Jewish law, known as “The Halakha”, which had been the basis of Jewish conduct for thousands of years. We will not list all the steps which led to the creation of the Base Laws[[9]](#footnote-9), and the amendment made to it[[10]](#footnote-10), but let it be briefly mentioned that even in the first years of the state, even before the above law was formulated, there were judges who were more influenced by the tenets of Jewish law[[11]](#footnote-11), and then there were those who were strongly opposed to it[[12]](#footnote-12). We can see it as the natural progression of the two parallel stands, the conservative and the liberal[[13]](#footnote-13).

We see how disputes which are rooted in different values and worldviews create different interpretation of the language of the law, and may even lead to a different view of the legislator's intent, if a specific judge believes that this is how justice will best be meted out. If we focus on the Base Laws mentioned above, we can cite the well-known dispute between Justice Menachem Alon (Conservative) and Justice Aharon Barak (Liberal) regarding the law, which consists of three main points:

1. Is the regulation valid in any case of doubt of interpretation (Alon) or only when there’s a lack of reference (Barak)?

2. What is the reach of *the principles of freedom, justice, honesty and peace as determined by Jewish legacy* – is it based on Jewish Law (Alon) or on a more general concept of Jewish tradition (Barak)?

3. Do the Base Laws signal that Jewish law takes precedence in Israeli law as compared to other considerations when interpreting legislation and determining the core principals of Israeli judiciary?[[14]](#footnote-14)

**The effect of the interrelationship between Jewish law and Israeli law on labor law in Israel:**

As stated above, this debate is a continuation of the debate between the "conservatives" and the "liberals" in relation to the constitution, and comes into play whenever there are instances of a contradiction between Israeli law and Jewish law. Having this as a background, I would like to focus specifically on labor law, and through two examples see the processes of influence of Jewish law on Israeli law, and finally to try, through these examples, to connect them to the conclusion of the article’s author.

Let’s start with the current differences in the law of withholding wages between Jewish law and Israeli law.[[15]](#footnote-15)

The source of the prohibition in Jewish law is in the Torah verses:

“‘Do not defraud or rob your neighbor. Do not hold back the wages of a hired worker overnight.”[[16]](#footnote-16)

“Do not take advantage of a hired worker who is poor and needy…”[[17]](#footnote-17)

That is, in the verses of the Torah we find a prohibition to suspend the payment of wages to the worker, and even see that whoever withholds wages is deemed an opressor.

In Israeli law, too, we find a prohibition from withholding a laborer's wages, which is specified in the Wage Protection Law[[18]](#footnote-18). Some specifications can be observed in the law about compensation to the employee following the withholding of wages[[19]](#footnote-19), and the instances in which the withholding of wages may be considered a criminal offense[[20]](#footnote-20).

But here we come to a significant difference between the two law philosophies-

In Jewish law, the obligation to claim wages is on the laborer, and as long as they have not claimed their wages, there is no obligation on the employer to pay them. This is not to say that the debt has been written off, but that it is in a state of delay until the laborer demands it, and as long as he does not demand his wage, it’s considered as if he had temporarily forgiven the debt.[[21]](#footnote-21)

In Israeli law, on the other hand, the obligation to pay wages is on the employer, and it in effect even without the employee's explicit demand[[22]](#footnote-22). Furthermore, if the employer delays payment, he will be given a fine on top of the salary payment he already owes the employee.

We see a significant difference between the perception of Jewish law and Israeli law-

In Jewish law, most of the burden on the claim of the right rests on the shoulders of the worker, and he must go through the steps of claiming what he is owed. In Israeli law, on the other hand, most of the weight of the obligation rests on the shoulders of the employer, and it is his duty to ensure payment to his employee, otherwise he will be fined for late payment.

The drafters of Jewish law for generations have felt a certain injustice in placing the weight of responsibility for the wage claim on the shoulders of the worker, and therefore for generations have tried to give different explanations for this determination.

Some have said that if the laborer is intimidated by the employer or is in a situation where he cannot claim his wages - it is prohibited to withhold wages even without the laborer's claim[[23]](#footnote-23). Some have added that if the employee worked for two employers and demanded from only one of them, or there were two employees and only one of them demanded his wages from the employer - that is enough to be considered a claim for wages.[[24]](#footnote-24) And some explained that although the employer did not violate wage withholding if there is no claim, he did violate another prohibition - "you will give him his daily wage."[[25]](#footnote-25)

However, the basic principle remains within all the interpretations – that the onus of claiming is on the employee, not on the employer[[26]](#footnote-26).

We see from the above examples that despite the legal obligation to draw inspiration from Jewish law, the Israeli legislature chose in the case of wage withholding to deviate sharply from the perception of Jewish law, and to enact a law that imposes the weight of the obligation to pay on the employer and not the employee. As an impartial observer, it could be said Israeli law is more socially just, and to regard it as preferable over Jewish law in this instance.

In light of the analysis above, the author of the article can have reservations with regard to activism and judicial interpretation. The author of the article suggests that the judges’ interpretation of the law might be a kind of reform to the legislators' original intention, but this is not necessarily a negative, but rather something that carries some risk on the one hand, but developmental potential on the other, which can dispense justice in a better way. It can be assumed that had there been judicial intervention in the ruling regarding the Wage Withholding Law, it would have caused the law to be skewed in the direction of Jewish law, as recommended by the Base Laws mentioned above. Such a situation would violate the socio-economic justice that the Israeli legislature strives to implement, and violate the intent of the law. From this one can dissent with the conclusion of the author of the article, and see how an activist and judicial interpretation of the law may actually detract from the justice that that law is trying to implement.

We will review another example that deals with the gap between Jewish law and Israeli law, this time regarding the exercise of claiming benefits[[27]](#footnote-27). I will bring up some of the paragraphs, quoting of Prof. Porat's remarks on the matter:

As part of the desire to protect the well-being of the weaker populations, the legislature and the judiciary may enact various laws concerning the provision of assistance to people living in poverty and to other vulnerable groups. The question arises - does the state or community's obligation to provide assistance to the needy depend on these claiming their right? It seems that at this point there is a fundamental difference between the perception of Jewish law and the perception of Israeli law.

In Israel, the Social Security Administration grants various benefits to groups eligible for support (those entitled to income support, the unemployed, the elderly, etc.). These benefits are paid to eligible groups only if they have actively claimed the benefits to which they are entitled. The Social Security Administration, for its part, does not actively initiate the provision of benefits without a claim having been filed[[28]](#footnote-28). For example, an unemployed person who has not claimed the unemployment benefits due to him by law will not be entitled to receive them. If he files the claim more than 12 months after the start of his eligibility, he will not be entitled to retroactive payment, but only for a period of 12 months prior, since his eligibility is conditional on him claiming what he deserves in the first place.[[29]](#footnote-29)

The requirement to file a claim for the purpose of exercising the right creates a problem of non-take-up of benefits. Many of those eligible may not take advantage of their right for income support, just because they failed to apply for what is coming to them. There can be several reasons for the non-claiming of benefits - bureaucratic barriers, lack of knowledge about eligibility, fear of social labeling as needy, etc. Although attempts are being made to solve the problem of take-up[[30]](#footnote-30), they are not enough to bridge all the obstacles mentioned above.[[31]](#footnote-31)

In Jewish law, on the other hand, we find a different approach to helping the needy. The ruling in Jewish law places the burden on those in charge of community charity to actively initiate assistance to the needy, even if they, on their part, do not ask for it. The primary source for this is the Tosefta in the Pe’ah Tractate, Chapter D Mishnah 12 - "He who says I do not make a living from others – we try and help him make a living." This statement was even established in practice in the book "Baal HaTurim" by Rabbi Yaakov ben Asher - "... we pile it on and give it to him"[[32]](#footnote-32). We see that even an act of deceit may be justified if it leads to the needy receiving money, should he refuse to accept it as charity (giving through a loan, a donation, etc.). Rabbi Yechiel Michal Halevi Epstein went above and beyond in his book Aruch Hashulchan[[33]](#footnote-33), and ruled - "A poor man who does not want to receive charity and we know that he is in need of it - we are obligated to make an effort for him to accept" - ​​that is, there is a real obligation for the officials in charge of funds to provide money to those in need.

We see another example of the fact that despite the constitutional imperative to base legislation on Jewish law, the Israeli legislature chose in the case of benefits claiming to deviate sharply from the philosophy of Jewish law, and to establish a system of assistance to the needy based on the claim of that right by the needy. To an outside observer, it may seem that there is fault in the approach of Israeli law, which unintentionally prevents the granting of relief to all of those who need it.

In this example, as compared to the previous example, we would think that the intervention of Israeli law as an interpreter of the intention of the legislature would actually be for the better, and the bias of Israeli law towards Jewish law as required by the Base Laws would implement justice in a better and broader way. The tenets of Jewish law are indeed more appropriate so far as it applies to communal conditions[[34]](#footnote-34), but the question arises whether it could also be practical on a nationwide basis. In a communal model, it is indeed easy and clear to ascertain who needs financial assistance, but can this also be applied to a nationwide model? Is not the fear that cheaters will try to defraud the system outweigh the desire to help the needy? Or running the risk of distributing money to those who do not really need it at the expense of people who do need it? Are these concerns not sufficient to turn the communal model proposed by Jewish law into the national model proposed by Israeli law? Although this merits a long discussion, this is not the proper forum to elaborate, but it can only be concluded that the judicial intervention in the Israeli model does not necessarily lead to a better dispensation of justice. Therefore, one could disagree with the conclusion of the author of the article, and see how activism and judicial interpretation of the law may actually detract from the justice that that law is trying to dispense.

**Summary:**

We first compared between the article author’s concept of the development of the constitution to the model finally adopted by the State of Israel. We saw how many controversies arose around the same model, and we reviewed in depth one of them, and that is the controversy over how much Israeli law should draw from Jewish law. Through the examples of wage withholding and the claiming of benefits, we have seen how activism and judicial interpretation[[35]](#footnote-35) may actually cause a flaw in the administration of justice, or at least raise questions about its correctness and suitability. In light of this, one has to wonder about the conclusion of the author of the article, and the leeway he allows the judiciary to interpret the original lawmakers’ intent. In my humble opinion, it is not easy to allow judges a free hand to carry out reforms in the language of the law or to act in judicial activism, unless this is done carefully and under the supervision of an external body. Suffice it to mention the constitutional revolution that Aharon Barak carried out while presiding as Head of the Supreme Court of the State of Israel[[36]](#footnote-36) to see its consequences and the disputes engendered by the possibility of a free hand in interpretation allowed to Israeli judges[[37]](#footnote-37). I do not mean to recommend carrying out judicial court cases in a purely technical manner, but the rulings that reform the intention of the legislature must be carried out carefully, and in commensurate steps, so as not to create an upheaval in the existing structures, and to create a healthy and appropriate development of the rule of law in its application by the judiciary.

1. Page 3 [↑](#footnote-ref-1)
2. Pages 4-6 [↑](#footnote-ref-2)
3. Pages 23-24 [↑](#footnote-ref-3)
4. Page 31 [↑](#footnote-ref-4)
5. which posits the constitution’s standing as increasing and as an evolving mechanism, in particular in its core concepts and its formalization. [↑](#footnote-ref-5)
6. Two main stands can be discerned in the debate over the constitution - the conservative stand which believed that the creation of a constitution is essential for maintaining balance between the authorities and the protection of civil rights and the liberal stand which believed that it was possible to run the country without a constitution [and used Britain as an example, whose legal system inspired Israel’s, and which conducted its affairs without a constitution], and that a constitution should not be established at this point in time, since large waves of immigration were expected to soon double or triple the population, and this constitution would soon need to be redrafted in view of this development. Naturally, there were also political motives fueling this debate. [↑](#footnote-ref-6)
7. known forthwith as “The Harari Compromise” [↑](#footnote-ref-7)
8. Details of this debate and the various contentions can be found at the Knesset website: <https://main.knesset.gov.il/en/activity/pages/BasicLawsAndConstitution.aspx> [↑](#footnote-ref-8)
9. page 195 <https://www.knesset.gov.il/laws/special/heb/knesset_laws.pdf> [↑](#footnote-ref-9)
10. [https://www.nevo.co.il/law\_html/law01/055\_007.htm סוף סעיף 1](https://www.nevo.co.il/law_html/law01/055_007.htm%20%D7%A1%D7%95%D7%A3%20%D7%A1%D7%A2%D7%99%D7%A3%201) [↑](#footnote-ref-10)
11. Judges Rabbi Prof. Simcha Assaf, Dr. Moshe Silverberg, Haim Cohen and Dr. Itzhak Kister. [↑](#footnote-ref-11)
12. Judges Moshe emora, Alfred Vitkin, Yoel Sussman and Zvi Berenzon. [↑](#footnote-ref-12)
13. See footnote 6 [↑](#footnote-ref-13)
14. We can see an example of this conflict in ruling 40/80, **Koenig V Cohen**, as well as in ruling 1635/90 **Zerzevski V Israeli Prime Minister and others.** [↑](#footnote-ref-14)
15. The example and citations are taken from Prof. Benny Porat’s article *Is the Rights Claim Necessary? Between* Duties *and Rights* (p.18-22) [↑](#footnote-ref-15)
16. Leviticus Chapter 19 Verse 13 [↑](#footnote-ref-16)
17. Deuteronomy Chapter 24 Line 14 [↑](#footnote-ref-17)
18. <https://www.nevo.co.il/law_html/law01/090_001.htm#Seif1> [↑](#footnote-ref-18)
19. Article 17 of the Wage Protection Law [↑](#footnote-ref-19)
20. Article 25B (B1) 17 of the Wage Protection Law [↑](#footnote-ref-20)
21. Safra Kdoshim 2, end of chapter 3. Parallel to it is the Babylonian Talmud, Baba Metziah 112, line 75:”with you, with your discretion”. Rashi interpreted: “with your, not his.” And the Hefetz Haim interpreted: “If the hired hand does not claim… It is not a wrongdoing since it is as if he allows it.” (Ahavat Hessed, Chapter 9, article 11) The Baba Metziah 9, 12. And this is how the Halakha interpreted it – see Mishneh Torah, leasing laws 11, 4. Shulchan Aruch, Chushan Mishpat, article 10. Regarding temporary reprieve – see Rabbi Gershon Ashkenai in his book Avodat Hagershoni, 7, as well as Shilem Verheftig’s “cancellation of contract due to infringement according to Jewish Law”, Dinei Israel b-155, 165 (1971) [↑](#footnote-ref-21)
22. The determining day according to the Wage Protection Law is “the ninth day after the payment is due.” [↑](#footnote-ref-22)
23. Ahavat Hessed, Chapter 9, article 11 as well as in addendum 29 [↑](#footnote-ref-23)
24. Gidulei Shmuel on Baba Metziah, 111-1 [↑](#footnote-ref-24)
25. Yereim, 135 [↑](#footnote-ref-25)
26. As regards the two law systems and their emphasis on claimant/claimed, see Itzhak Breuer’s “The laws of woman, slave and gentile” Tziunei Derech 57 as well as Robert Cover, *Obligation a Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION. 65 (1987) [↑](#footnote-ref-26)
27. This example is also extracted from the above-mentioned article by Prof. Porat, pages 17-18. This issue is also addressed in another of Prof. Porats articles “The Right to a Dignified Existence in the Eyes of Israeli Law: Its Legal Standing” [↑](#footnote-ref-27)
28. For example, the Welfare Services regulations state:” The Welfare Service shall provide welfare and social amenities to the recipient who has applied for it”- Article 2 of the Welfare Department regulations (1986) [↑](#footnote-ref-28)
29. An example of a claim on this matter can be seen in court case 08/628, Eliezer Giladi V The Social Security Administration (15.04.2010) [↑](#footnote-ref-29)
30. For example- the Social Security’s obligation to notify the eligible. An example of this imperative can be seen in Section 2B which was added to the Welfare Provision Act (amendment 8) in 2018 [↑](#footnote-ref-30)
31. The obligation to notify does not solve bureaucratic or psychological obstacles. [↑](#footnote-ref-31)
32. Yoreh De’ah 248 [↑](#footnote-ref-32)
33. Yoreh De’ah 248, article 17 [↑](#footnote-ref-33)
34. The model of synagogues and closed communities as the Jews have had for centuries before establishing a sovereign state. [↑](#footnote-ref-34)
35. Which would skew Israeli law towards Jewish law as required by the law. [↑](#footnote-ref-35)
36. <https://he.wikipedia.org/wiki/%D7%94%D7%9E%D7%94%D7%A4%D7%9B%D7%94_%D7%94%D7%97%D7%95%D7%A7%D7%AA%D7%99%D7%AA> [↑](#footnote-ref-36)
37. We can see how this dispute manifests itself throughout the legal professions, and we can especially see how to this day it is represented in cases which have not yet received a final ruling. [↑](#footnote-ref-37)