

APPLICABILITY OF BASIC LAW: HUMAN DIGNITY AND FREEDOM IN THE WEST BANK

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This article examines the applicability of Israel's Basic Law: Human Dignity and Freedom in the West Bank in light of international law, in theory and practice. The first part of the article concerns the need for such applicability in light of alternative domestic and international legal regimes. The article then explores three bases for the extraterritorial application of the law, and examines relevant practice. Finally, the article addresses the consequences of the extraterritorial applicability of the Basic Law for Israel's compliance with its obligations under the law of occupation. It argues that the application of the Basic Law extraterritorially in the West Bank may result in violation of Israel's obligations under the law of occupation.

Keywords: occupation, Basic Law, High Court of Justice (HCJ), extraterritorial application, settlers, human rights

1. INTRODUCTION

Does Basic Law: Human Dignity and Freedom apply in any way in the West Bank? What can be the normative basis for such application and what are its consequences? The notion that the Basic Law applies in the West Bank emanates from the jurisprudence of the Israeli High Court of Justice (HCJ). It has been stated *ex cathedra*, without systematic analysis of the necessity of such application or its implications. Nor is practice consistent. In some cases the Court applies the Basic Law extraterritorially; in other cases it notes that there is no need to consider the matter of principle given the applicability of other legal regimes which, in the Court's view, respond to the needs which the Basic Law aims to address; and in other cases the Court applies the Basic Law rather than decide on the applicability of these alternative regimes on the ground that the Basic Law embodies the requirements of these regimes. The overall result is that the law regarding the extraterritorial applicability of the Basic Law is developing in a haphazard and incoherent manner.

The purpose of this article is to examine systematically the extraterritorial applicability of the Basic Law, and specifically in the West Bank, from the perspective of international law. The article considers three principal questions. First, does compliance with Israel's obligations under international human rights law necessitate, and is it enhanced by, the extraterritorial application of the Basic Law? The article argues that in view of the similarity and partial overlap between constitutional law and other legal regimes, both under Israeli law (administrative law) and international law (human rights law), the contribution to the protection of human rights

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by the extraterritorial applicability of the Basic Law is minor at best. Second, the article examines three normative bases for applying the law extraterritorially: (i) territorially; (ii) on the basis of personal applicability to particular beneficiaries; and (iii) through applicability on the state as the duty-holder. Each of these options finds some expression in the Basic Law or in Israeli jurisprudence. However, as the practice review indicates, no coherent doctrine exists as to the trigger for application of the Basic Law or to its relationship with other regimes. Finally, the article examines the impact of the extraterritorial application of the Basic Law on Israel's compliance with the law of occupation.

2. EXTRATERRITORIAL APPLICABILITY OF THE BASIC LAW – *LEX FERENDA*

This article's point of departure is the prevalent view in international law, according to which the responsibility of states under international human rights law extends beyond their sovereign territory, including to areas where they exercise effective control – that is, to occupied territory.¹ The exact scope of this responsibility is far from settled, as is the question whether the West Bank, specifically, is occupied territory. For present purposes, suffice to say that Israel itself has acknowledged the status of the West Bank as occupied territory² and, more often, the applicability of the law of occupation to its own conduct in the territory. As long as Israel cites the law of occupation as the source of its authority in the West Bank, its acknowledgement of having effective control in the areas where this law applies creates a presumption of effective control also for the purpose of the applicability of international human rights law,³ although this presumption is rebuttable.⁴

Generally speaking, international law is indifferent to the manner in which the state regulates its compliance with its international legal commitments. Extraterritorial application of domestic law is not prohibited in itself, although under certain circumstances it may constitute a violation of particular norms. The law of occupation specifically also does not prohibit the extraterritorial application of domestic law to occupied territory, so long as such application does not constitute an attempt at unilateral annexation,⁵ and does not infringe upon the obligations due to the local population.⁶ But the absence of a blanket prohibition on extraterritorial application of domestic law does not imply, of

¹ *Loizidou v Turkey (Merits)* 1996–VI ECHR (18 December 1996), para 56; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 [107]–[113] (*Wall Advisory Opinion*)

² 'The Judea and Samaria area and the Gaza Strip area have been held by Israel, since the six-day war to date, by way of military occupation or "belligerent occupation": HCJ 1661/05 *Gaza Coast Regional Council and Others v Israeli Knesset*, Response of the State (21 March 2005), para 8.

³ As proposed by Judge Bonello in *Al Skeini and Others v UK* App No 55721/07 (ECtHR, 7 July 2011), Concurring Opinion, para 24: 'Once a State is acknowledged by international law to be "an occupying power", a rebuttable presumption ought to arise that the occupying power has "authority and control" over the occupied territory, over what goes on there and over those who happen to be in it – with all the consequences that flow from a legal presumption'.

⁴ This issue is pertinent particularly with respect to spheres and responsibilities over which Israel has transferred authority to the Palestinian Authority. The present article focuses on issues over which control remains with Israel

⁵ *CrimA 1/48 Sylvester v The State Attorney* 1949 PD 1 5, 29–30, paras 29–32.

⁶ Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 113, para 263.

course, that such application is necessary or justified. The question is whether in order to optimise the protection of human rights in accordance with Israel's obligations under international law, it is necessary or even helpful to interpret constitutional law embodied in Basic Law: Human Dignity and Freedom as applicable extraterritorially.

According to Israeli law, legislation must be interpreted to the extent possible in a manner which advances the protection of human rights. If human rights obligations extend to conduct in occupied territory, interpreting the Basic Law as applicable extraterritorially would appear to be a no-brainer. Nonetheless, it may be helpful to identify the rationales for the extraterritorial application of international human rights law, and examine their validity with respect to applying domestic law extraterritorially. Under international human rights law, as developed primarily in the jurisprudence of the committees monitoring the implementation of the UN conventions and of the European Court of Human Rights, the justification for the extraterritorial application of human rights law is that it would be unconscionable to permit a state to perpetrate human rights violations outside its territory which it could not perpetrate on its own territory.⁷ A more general rationale is that power comes with responsibility: when a state has the capacity to respect rights in the sense of avoiding their violation, it must not be exempt from the obligation to exercise that power.⁸ As for a state's obligation to protect individuals from violation of their rights by third parties, opinions differ. Some argue that, here too, responsibility follows power,⁹ while others contend that the obligation of a state to take positive action should not extend extraterritorially, at least not with respect to the territory of another state which is directly responsible for discharging such protection.

The doctrine regarding the extraterritorial application of international human rights law was developed in bodies whose mandate was limited to that particular body of law. Their analytical point of departure was therefore that without the extraterritorial application of human rights law, states exercising control over individuals outside their territory would be operating in a legal vacuum. In contrast, Israeli law and judicial review in Israel permit recourse not only to constitutional law but also to numerous other legal regimes – domestic administrative law, the law of occupation and international human rights law. Accordingly, even without the extraterritorial applicability of constitutional law, state action does not take place in a legal vacuum. It follows that protection of human rights does not require the extraterritorial application of constitutional law, so long as there are other legal regimes available. Indeed, the HCJ itself has relied on the similarity between constitutional law and administrative law,¹⁰ international human rights law

⁷ Human Rights Committee, *Lopez Burgos v Uruguay*, Communication No R.12/52, view of 6 June 1979, UN Doc Supp No 40 (A/36/40) 176 (1981), para 12.3.

⁸ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy* (Oxford University Press 2011) 59.

⁹ *Al Skeini* (n 3) Concurring Opinion of Judge Bonello, para 11.

¹⁰ eg, HCJ 1890/03 *Bethlehem Municipality and Others v State of Israel and Others* (3 February 2005), para 15: '[W]e are not called upon to decide the question whether and to what extent the principles of Israeli constitutional law and the international human rights conventions apply in Judaea and Samaria ... It is sufficient for us to say that within the framework of the duty of the military commander to exercise his discretion reasonably, he must also take into account, among his considerations, the interests and rights of the local population, including the need to minimize the degree of harm to their freedom of movement'.

and the law of occupation, to exempt itself from deciding on the extraterritorial applicability of constitutional law, suggesting that the other regimes constitute sufficient basis for analysis. In *Marab*, for example, the HCJ noted that ‘there is no need, in the context of this petition, to decide to what extent these principles [namely the constitutional right to liberty] apply to internal Israeli law regarding detention in the area’,¹¹ because ‘we are convinced that internal Israeli law corresponds to international law in this matter’.¹² In *Beit Ichsa*, too, the Court exempted itself from discussing the applicability of the Basic Law, noting that ‘in the present proceedings we need not address the applicability of basic constitutional rights under Israeli constitutional law, since, as will be clarified, the right to property with which we are concerned is normatively entrenched also in international law’.¹³ Conversely, in *Afram* the Court applied the Basic Law rather than international law, on the ground that the constitutional standard is more demanding on the state.¹⁴

The Court’s premise in all these cases regarding similarity (and consequently interchangeability) of the various legal regimes merits close inspection. What follows is a comparison of the protection of human rights under Israeli constitutional and administrative law and jurisprudence, as well as of their protection under Israeli constitutional law and international law. This comparison addresses both substantive norms and the manner in which each body of law is implemented.

2.1 CONSTITUTIONAL LAW V ADMINISTRATIVE LAW

Even before the enactment of the Basic Law, Israeli administrative law protected human rights, under the principles that a governmental authority may not restrict individual conduct unless specifically authorised under law,¹⁵ and that any such authorisation must be interpreted in a manner which is favourable to human rights.¹⁶ Arguably, then, administrative law can, to a large extent, replace the Basic Law, given the obligation on state authorities to comply with it in all their actions, whether within the state’s territory or outside it.¹⁷

The protection of human rights through administrative law suffers from two weaknesses. One weakness is that administrative law only governs executive action and cannot serve to scrutinise primary legislation.¹⁸ A second weakness of reliance on administrative law to enforce human rights is

¹¹ HCJ 3239/02 *Marab and Others v Commander of IDF Forces in the West Bank and Others* (5 February 2003), para 20, official translation at http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf.

¹² *ibid.* See also paras 21, 32–34, 36, 49.

¹³ HCJ 281/11 *Beit Ichsa Council Head and Others v Minister of Defence and Others* (6 September 2011), para 25.

¹⁴ HCJ 5488/04 *Afram Local Council and Others v Government of Israel and Others* (13 December 2006), para 46.

¹⁵ HCJ 1/49 *Begerano and Others v Minister of Police and Others* 1949 PD 2 80, para 5.

¹⁶ David Kretzmer, ‘Fifty Years of Public Law at the Supreme Court – Human Rights’ (2000) 5 *Mishpat Umimshal* 297, 300–30 (in Hebrew).

¹⁷ HCJ 2056/04 *Beit Sourik Village Council v Government of Israel and Others* 2004 PD 58(5) 807, para 24, official translation at http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf.

¹⁸ HCJ 1661/05 *Gaza Coast Regional Council and Others v Israeli Knesset* 2005 PD 59(4) 481, para 79: ‘[T]he law according to which every Israeli soldier in the disengaged area carries in his rucksack the basic values of Israeli admin cannot override a law of parliament’: Liav Orgad, ‘Whose Constitution and for Whom?’ On the Scope of Application of the Basic Laws’ (2009) 12 *Mishpat Umimshal* 145, 185 (in Hebrew).

that this body of law restricts state action but does not create positive obligations, for example, to protect from violation by third parties.

Neither weakness, however, is particularly significant with respect to the protection of human rights specifically in the West Bank. The absence of judicial scrutiny of primary legislation is of little relevance since interferences with human rights in the West Bank are the result principally of military orders, which constitute secondary legislation and are therefore subject to judicial scrutiny under administrative law. Reliance on the Basic Law may be useful in exceptional cases where primary legislation by the Israeli parliament does have effect in the West Bank.¹⁹ If Basic Law: Human Dignity and Freedom is interpreted in light of international human rights law, it could serve as a means of reviewing primary legislation in light of what are essentially international legal norms.²⁰ The inability of administrative law to impose positive obligations may also be inconsequential for the enforcement of international human rights law in the West Bank, since it is debatable whether the latter imposes any positive obligations extraterritorially in the first place.²¹ Thus, while reliance on the Basic Law is advantageous for the protection of human rights in comparison with administrative law as a matter of principle, the practical significance of this advantage with respect to the West Bank should not be overstated.

2.2 CONSTITUTIONAL LAW V INTERNATIONAL LAW

Another interchangeability proposed by the Court is between constitutional law on the one hand, and international human rights law and the law of occupation on the other. Although the Court often lists the latter two bodies of law together, there are important differences between them, in both content and place within the legal order. As in the case of administrative law, it is necessary to compare not only the substantive norms under each body of law, but also the relative strengths and limitations of each body of law in implementing the rights.

2.2.1 SUBSTANTIVE LAW

The Basic Law and international human rights law share many substantive characteristics. They protect similar rights, although differences do exist. The right to property, for example, is guaranteed under the Basic Law (and under the law of occupation), but not under the universal human rights treaties.²²

¹⁹ H CJ 253/99 *Sajadia and Others v Minister of Defence* 1988 PD 42(3) 801 and H CJ 2690/09 *Yesh Din and Others v Commander of IDF Forces in the West Bank and Others* (28 March 2010), unofficial English translation at http://www.hamoked.org/files/2010/111511_eng.pdf; Emergency Regulations (Judea and Samaria and the Gaza Strip – Jurisdiction in Offences and Legal Assistance), 1967, s 6, as extended by the Law for Extending the Validity of Emergency Regulations (Judea and Samaria and the Gaza Strip – Jurisdiction in Offences and Legal Assistance), 2012.

²⁰ H CJ 366/03 *Commitment to Peace and Social Justice and Others v Minister of Finance and Others* (2005) PD 60(3) 46, Dissenting Opinion of Judge Levy.

²¹ For the existence of such obligations see *Ilaşcu and Others v Moldova and Russia* ECHR 2004-VII (8 July 2004) and the critique by Milanovic (n 8) 210.

²² It is guaranteed under the Universal Declaration of Human Rights (entered into force 18 December 1948) UNGA Res 217A(III) UN Doc A/810 (1948), art 17, but is not generally accepted as customary international law.

Conversely, freedom of movement within the country is guaranteed under international law but not under the Basic Law.²³

The Basic Law and international human rights law employ the same balancing mechanism between rights and interests, namely a test of proportionality. The Basic Law is more permissive, with an open-ended category of interests that may justify limitations on rights, while under international human rights law limitations must in some cases fulfil specific enumerated goals if they are to be acceptable. For example, the right to property may be limited for any worthy cause under the Basic Law or in the public interest under international human rights law (where the latter recognises the right to property²⁴), provided that the limitation complies with other requisites (such as proportionality) in the limitation clause. The Basic Law and international human rights law thus share a legal paradigm, albeit in different normative spheres. Both, therefore, differ from the law of occupation, which rests on a different paradigm.

Unlike the human rights regime, which is essentially shaped for a relationship of shared interests between a state and its own citizenry, the law of occupation is premised on a relationship of hostility between the occupying power and the population under its control, and on power disparities which require special protection for that population. Accordingly, the permissible scope of action for the occupying power is in many respects narrower under the law of occupation than under human rights law.²⁵ This rationale has a number of manifestations.

First, Article 43 of the Hague Regulations provides that the criterion for assessing the military commander's conduct is 'necessity',²⁶ a term which also implies a balancing of conflicting interests.²⁷ But this balancing is much more limited than the human rights mechanism. 'Necessity' is limited to the parameters of Article 43 – military needs, and under the more prevalent, expansive interpretation, also the welfare of the population of protected persons. It does not automatically extend to all other interests perceived by the occupying power as worthy of pursuit. Second, the law of occupation also contains absolute prohibitions and exclusive grounds for limiting rights. For example, seizure or destruction of private property is only permitted for military purposes²⁸ or under local law.²⁹ Third, the law of occupation protects first and foremost the local population of 'protected persons'. Other individuals, such as nationals of the occupying power, are entitled to the more limited set of rights, which apply to any individual caught in the theatre of conflict.

²³ Many rights are not enumerated explicitly in the Basic Law but are protected in Israeli jurisprudence, either directly or within the umbrella term of 'human dignity'.

²⁴ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 18 May 1954) 213 UNTS 222 (ECHR Protocol 1), art 1.

²⁵ Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law' (2010) 43 *Israel Law Review* 514.

²⁶ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, *Martens Nouveau Recueil* (ser 3) 461 (entered into force 26 January 1910), art 43, and more generally in Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 27.

²⁷ *Wall Advisory Opinion* (n 1) Dissenting Opinion of Judge Kooijmans on this issue, [34].

²⁸ *Dinstein* (n 6) 226 para 537, 228 para 542.

²⁹ *ibid* 225 para 533.

As a consequence of these differences, the executive's freedom of action is wider under human rights law, whether international or domestic, than it is under the law of occupation.³⁰

To conclude, it appears that since the Basic Law is based on a human rights law paradigm, reliance on norms of international human rights law may achieve its goals, and can make the extraterritorial application of the Basic Law superfluous to the extent that human rights law can be implemented in court in the same manner as the Basic Law. This issue is the subject of the next section. Equally, perhaps, recourse to the Basic Law (extraterritorially) may render international human rights law redundant. The same cannot be said with respect to the law of occupation, which cannot be replaced by constitutional law.

2.2.2 IMPLEMENTATION

A further issue which is separate from the substantive similarity or difference between the norms is the force of each of the normative sources within the Israeli legal order. Israeli courts are accessible to appellants from the West Bank, and they frequently consider norms of international law, including human rights law. But international law is not as easily invocable in Israeli courts as is domestic law, including the Basic Law, for a number of reasons.

First, the applicability to the West Bank of certain international legal norms binding upon Israel is not beyond dispute. While the Hague Regulations are routinely applied as customary international law, the applicability *de jure* of the Fourth Geneva Convention has been contested, and consequently the Convention has not been applied routinely, although parts of it are applied *de facto*. The applicability of international human rights law to Israeli action in the West Bank has also not been definitively established. On the international front, the Israeli government maintains that international human rights law does not govern its conduct in the West Bank. One ground for this position is that human rights treaties do not apply outside a state's 'territory and jurisdiction'.³¹ Another ground cited by Israel is that even if human rights treaties do apply extraterritorially, they are superseded by the laws of armed conflict³² (although, as noted, Israel also holds that the law of occupation as embodied in the Fourth Geneva

³⁰ Amichai Cohen, 'Rules and Standards in the Application of International Humanitarian Law' (2008) 41 *Israel Law Review* 1.

³¹ 'Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction': Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Israel, Second Periodic Report, Addendum, UN Doc CCPR/C/ISR/3002/3, 4 December 2001, para 8, paraphrasing the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 2: 'within its territory and under its jurisdiction'.

³² Israel's Replies to List of Issues to be Taken up in Connection with the Consideration of Israel's Third Periodic Report concerning Articles 1 to 15 of the International Covenant on Economic, Social, and Cultural Rights (E/C.12/ISR/3), UN Doc E/C.12/ISR/3/Add.1, September 2011, response to question 2: 'In these circumstances Israel can clearly not be said to have *effective control* in the Gaza Strip, in the sense envisaged by the Hague Regulations. It is against this background that Israel is called on to consider the relationship between different legal spheres, primarily the Law of Armed Conflict and Warfare and Human Rights Law. This relationship remains a subject of serious academic and practical debate. For its part, Israel recognizes that there is a profound connection between Human Rights Law and the Law of Armed Conflict, and that there may well be a convergence between these two bodies of law in some respects. However, in the current state of international law and state practice

Convention does not apply de jure in the West Bank). In addition, the Israeli government claims that in view of the transfer of powers and responsibilities under the Interim Agreement, it is the Palestinian Authority which is accountable with regard to the rights of the Palestinian population.³³ The HCJ, on the other hand, has acknowledged in a number of judgments that international human rights law may be utilised to fill lacunae in the law of occupation. In *Marab*, for example, the Court ruled that military orders allowing a 12- and 18-day detention without judicial review were illegal, mentioning, inter alia, ICCPR Article 9.³⁴ The Court did not address the question of the ICCPR's de jure applicability to the West Bank. Similarly, in *Dir Samet*, which concerned Palestinian movement within the West Bank, the Court cited Article 27 of the Fourth Geneva Convention and Hague Regulation 46 (neither of which explicitly mentions freedom of movement), as well as constitutional law and international human rights law.³⁵ In other words, the Court does not seem to share the view that responsibility under international human rights law is confined to sovereign territory or that it is entirely excluded by the laws of armed conflict.³⁶ At the same time, the HCJ has yet to rule directly on the applicability of human rights law in the West Bank, and its jurisprudence to date does not rely directly on such applicability.

Second, the human rights and occupation law treaties to which Israel is party have not been directly incorporated into domestic law. Under Israel's dualist system, treaty norms that are not customary law are not directly enforceable in Israeli courts; at most, they may be applied

worldwide, it is Israel's view that these two systems of law, which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances'.

³³ ECOSOC, Implementation of the International Covenant on Economic, Social and Cultural Rights, Additional Information submitted by States Parties to the Covenant following the Consideration of Their Reports by the Committee on Economic, Social and Cultural Rights, Addendum, Israel, UN Doc E/1989/5/Add.14, 14 May 2001, paras 2–3. Human Rights Committee (n 31) para 8. This issue arises in every dialogue between Israel and the treaty monitoring bodies with respect to reporting on the West Bank (and, in the view of the treaty bodies, also in the Gaza Strip). Despite Israel's principled stance, in the oral debate Israel does respond to questions relating to spheres where responsibility remains with it and not in the hands of the Palestinian Authority. Committee on Economic, Social and Cultural Rights, Consideration of Reports, Third Periodic Report of Israel, UN Doc E/C.12/2011/SR.36, 22 November 2011, para 56.

³⁴ *Marab* (n 11) paras 19, 41.

³⁵ HCJ 3969/06 *Dir Samet Village Council Head and Others v Commander of IDF Forces in the West Bank and Another* (23 July 2007), para 17. Notably, Basic Law: Human Dignity and Freedom does not guarantee freedom of movement within the state. Accordingly it is a weak source for the right of movement within occupied territory. International human rights law therefore offers the strongest basis for this freedom.

³⁶ On the parallel applicability of human rights and the law of occupation see (2007) 42(1) *Israel Law Review*; John Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations' (2006) 39 *Vanderbilt Journal of Transnational Law* 1447; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 *American Journal of International Law* 1, 9; Naz K Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *US Naval War College International Law Studies (Blue Book) Series* 349. The Court would be inconsistent if it were to adopt the position that constitutional law applies extraterritorially, while accepting the state's position that international human rights law does not apply extraterritorially at all, or in occupied territory, or during armed conflict. If the character of international human rights law does not justify its applicability in these circumstances even when it constitutes customary law, there is no justification for applying law emanating from the domestic law of the occupant.

indirectly through the presumption of conformity, according to which Israeli law should be interpreted, to the extent possible, in compliance with the state's international obligations.³⁷ Norms grounded in customary law, whether human rights law or the law of occupation, do form part of the law of the land, but they too would yield to explicit, conflicting legislation.³⁸ Such legislation would take precedence even if at issue is the applicability of norms in occupied territory (an exceptional situation, as discussed below) when in conflict with the law of occupation.³⁹ In contrast, a right entrenched in constitutional law is directly enforceable in court, and if it is entrenched in the Basic Law, it enjoys a higher normative status than other norms emanating from domestic law.⁴⁰ In the event of a conflict between ordinary domestic legislation and a right protected by the Basic Law, the latter prevails. Courts are required to interpret ordinary domestic law in the spirit of the constitutional norm, and where such interpretation is impossible, they may be obligated to declare the legislation invalid⁴¹ (subject to the preservation of laws under Article 10 of the Basic Law).

This analysis indicates that the advantage in reliance on the Basic Law might not be very significant since, as noted earlier, the limitations on rights in the West Bank (emanating from either international human rights law or the law of occupation) are not characteristically entrenched in primary legislation. Nonetheless, interpreting the Basic Law as applicable extraterritorially may, in rare cases, entrench Israel's international obligations and thereby enable their implementation. If so, interpreting the Basic Law as applicable extraterritorially may be not only a matter of policy but a legal obligation deriving from the presumption of conformity. There is no doubt that interpreting the Basic Law as applicable extraterritorially would modify – elevate – the place of the presumption of conformity in the Israeli legal order. First, the presumption was developed with respect to the interpretation of ordinary legislation, while here it is proposed to apply it to constitutional norms. Second, the presumption has so far served for the interpretation of substantive law, while here it concerns the outer reach of the legal system as such. These expansions of the presumption may present difficulties for the separation of powers.⁴² Indeed, the presumption of

³⁷ HCJ 279/51 *Amsterdam v Minister of Finance* 1952 PD 6 945, 966; CrimFH 7048/97 *John Doe v Ministry of Defence* 2000 PD 54(1) 721, para 20, official translation at http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf; CrimApp 6659/06 *A v State of Israel* (11 June 2008), para 9, official translation at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

³⁸ The HCJ noted this in *Gaza Coast Regional Council* (n 18) para 55: 'It is also not sufficient to determine that they [Israeli settlers] enjoy the common human rights under public international law. Such entrenchment – on which we express no position – with all its significance, cannot create a constitutional problem in Israel. The reason is as follows: when the infringement of a right emanating from common law or from international public law conflicts with an express provision in a law of the Knesset – the law prevails, and no constitutional problem arises'.

³⁹ *Yesh Din* (n 19) paras 4, 6.

⁴⁰ For a discussion of the greater political legitimacy of domestic law see Eyal Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State"' (1994) 5 *European Journal of International Law* 423, 427; Shai Dothan, 'Judicial Tactics in National Courts: A Case Study of the Israeli Supreme Court' (2011, on file with author).

⁴¹ CivApp 6821/93 *United Mizrahi Bank Ltd v Midal Cooperative Village and Others* 1995 PD 49(4) 221, Concurring Opinion of Justice Shamgar, para 60, official translation at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

⁴² Yuval Shany, 'How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31 *Brooklyn Journal of International Law* 341, 381–84.

conformity itself endows the executive branch with significant power to impact, indirectly, on Israeli law given that, under the Israeli constitutional order, it is the executive which is empowered to undertake international obligations on behalf of the state. The proposed expansion of the presumption ostensibly exacerbates this problem, because it allows the executive to encroach also on constitutional law. However, specifically in the context of human rights, the erosion of separation of powers might be less harmful because, generally speaking, human rights treaties *limit* the powers of the executive rather than expand them. Where the encroachment of international law into domestic law through the presumption of conformity results in additional constraints on the executive, as compared with the Basic Law, an executive acting in compliance with its international obligations will, by definition, also comply with the requirements of domestic law. Interpretation of the Basic Law in light of international human rights law might prevent the executive from exhausting powers that constitutional law allows it; but self-restraint on the part of the executive presents no difficulty (other than in the unlikely situation that constitutional law *obligates* the executive to take action which international law *prohibits*). Granted, difficulties would exist where international law creates positive obligations which do not exist under domestic constitutional law, such as an express obligation on the legislature to legislate.⁴³

2.3 CONCLUSION

The analysis above indicates that while the Basic Law and constitutional law in general are not identical to administrative law and international human rights law, they share similar characteristics which render them interchangeable to an extent. The Basic Law and the law of occupation, on the other hand, rest on different normative grounds, and cannot be used one in place of the other. The Basic Law does have a certain advantage over the bodies of international law in view of its normative status, but the practical significance of this is minor in the legal circumstances pertaining to the West Bank. To implement international human rights law, it might be sufficient that domestic legislation or executive powers be interpreted in light of the pertinent international obligations, as the presumption of conformity already dictates.

Against these reservations regarding the usefulness of interpreting the Basic Law as applicable extraterritorially, the following section considers whether extraterritorial applicability of the Basic Law is compatible with international law regarding the extraterritorial application of domestic law. The normative analysis will then serve as the backdrop for examining how the Basic Law is applied in practice, in terms of the basis for its extraterritorial applicability as well as of the compatibility of such applicability with substantive norms of international law applicable in the West Bank.

⁴³ ICCPR (n 31) art 20; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85, art 14; International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195, art 6.

3. EXTRATERRITORIAL APPLICABILITY OF BASIC LAW: HUMAN DIGNITY AND FREEDOM – *LEX LATA*

3.1 TERRITORIAL APPLICATION

Extraterritorial application of domestic law on a territorial basis is, as a rule, a violation of the sovereignty of any state to whose territory domestic law is thus extended. In the case of occupied territory, extraterritorial application of domestic law may constitute an attempt at unilateral annexation of territory,⁴⁴ which international law prohibits.⁴⁵ These prohibitions apply to all state authorities, including the judiciary.⁴⁶ If local law must be amended in occupied territory, this can be done through orders of the military commander, and there is no need to apply the occupying power's legal system or specific norms thereof on a territorial basis.⁴⁷ Accordingly, the jurisprudence of the occupying power's courts which results in the applicability of the occupying power's norms in the occupied territory on such a basis – for example, interpreting Basic Law: Human Dignity and Freedom as applicable in the West Bank on a territorial basis – could constitute a violation of international law.

Israeli law is largely in line with international law, in that legislation is presumed to apply only territorially, unless its language or subject suggest otherwise.⁴⁸ This presumption excludes the applicability of Israeli law also with respect to occupied territory.⁴⁹ Thus, when the state opted to extend the application of its law beyond existing territory, it either declared the extension of Israeli territory (in the Jerusalem area),⁵⁰ or expressly declared the extension of its law to the territory in question (in the Golan Heights).⁵¹

Israel has never purported to apply any of its law in the West Bank (or in the Gaza Strip) on a territorial basis. All changes to local law – those which duplicated Israeli law throughout the West Bank (such as with respect to transportation) or specifically in the relations among Israelis within the settlements⁵² – have been made through orders of the military commander

⁴⁴ Benjamin Rubin, 'The Scope of the Application of the Law, State Territory, and What Lies between Them' (1995) 25 *Mishpatim* 215, 218 (in Hebrew).

⁴⁵ Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Resolution 2625(XXV), 24 October 1970.

⁴⁶ Iris Canor, 'Israel and the Territories: On Private International Law, Public International Law and What Lies between Them' (2005) 8 *Mishpat Umimshal* 551, 581–82 (in Hebrew).

⁴⁷ Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *European Journal of International Law* 661, 668.

⁴⁸ *Amsterdam* (n 37).

⁴⁹ Aharon Barak, *Interpretation in Law – Statutory Interpretation* (Vol 2, Nevo 1993) 578–80; HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel and Others v Minister of Defence and Others* (2006) (2) IsrLR 352, para 22: 'There is a presumption that Israeli legislation applies in Israel and not in the territories, unless it is stated in legislation (expressly or by implication) that it applies in the territories'.

⁵⁰ Law Amending the Orders of Government and Law Ordinance, 1967, s 11B, and Orders of Government and Law Order (No 1), 1967, s 1.

⁵¹ Golan Heights Law, 1981, s 1.

⁵² Order on Administration of Municipal Councils (Judea and Samaria) (No 892), 1981, Order on Administration of Regional Councils (No 783), 1979. On the legality of extending Israeli law to apply to Israel in the areas of the settlements see Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004) 137.

in accordance with his authority under the law of occupation, and not through parliamentary legislation. The possibility of territorial applicability of the Basic Law in occupied territory has arisen in the jurisprudence of the HCJ, but has never been considered, let alone decided, directly.⁵³

At the same time, certain judicial statements do imply the applicability of the Basic Law in the occupied territories on a territorial basis. For example, *El Amarin*, one of the first cases in which the HCJ referred to the Basic Law in the context of the occupied territories, concerned the authority of the military commander to order the demolition of property in the Gaza Strip. Relying on local law – Regulation 119 of the Emergency Regulations, 1945 – Justice Cheshin contended, in a dissenting opinion, that the Regulation must be interpreted in the spirit of the Basic Law. He did not ignore the fact that at issue was the application of the Regulations outside Israel rather than within it, but said that ‘the difference is neither great nor significant. The link between Israel and the Gaza Strip – and similarly in Judea and Samaria – is so tight in daily life that it would be artificial to speak of exercise of powers in Gaza as if it were overseas’.⁵⁴ Although Justice Cheshin was in a minority regarding the interpretation of Regulation 119, the difference of opinion between him and the majority, in this case and in subsequent ones,⁵⁵ did not revolve around whether the Basic Law governed the decisions of the military commander to demolish houses in occupied territory.⁵⁶ Justice Cheshin did not directly address the manner in which the Basic Law would apply, but the use of the Basic Law to review actions authorised under local law applicable on a territorial basis implies that the standard for review also functions on a territorial basis. Most importantly, the reference to the proximity to Israel reflected an assumption that the application of the Basic Law was a territorial matter.

Finally – but significantly – while territoriality has not served as a stand-alone basis for applying the Basic Law in the West Bank (at least not openly), it has formed a component of the single basis on which the HCJ has expressly applied the Basic Law in the West Bank, namely *ad personam*. This basis is explored in the next section.

3.2 PERSONAL APPLICATION – ON PARTICULAR BENEFICIARIES

In *Gaza Coast Regional Council* the HCJ ruled⁵⁷ that

the Basic Law provides rights to every Israeli settler in the evacuated area. This application is personal. It derives from Israel’s control over the evacuated area. It reflects the perception that Israelis situated

⁵³ *Gaza Coast Regional Council* (n 2) para 79.

⁵⁴ HCJ 2722/92 *El Amarin v Commander of IDF Forces in the Gaza Strip* 1992 PD 46(3) 693, Dissenting Opinion of Justice Cheshin, para 8.

⁵⁵ HCJ 6026/94 *Nazal and Others v Commander of IDF Forces in the West Bank* (17 November 1994).

⁵⁶ For similar arguments regarding the criminal and administrative authority to detain see HCJ 3412/92 *Sufian v Commander of IDF Forces in the Gaza Strip and Others* 1993 PD 47(2) 843, paras 8–11, 13–15; HCJ 2320/98 *El Amla and Others v Commander of IDF Forces in the West Bank* 1998 PD 52(3) 346, para 10.

⁵⁷ *Gaza Coast Regional Council* (n 2) para 80.

outside the state but in territory under its control by way of belligerent occupation are governed by the state's Basic Laws regarding human rights.

In this case the Court applied Basic Law: Human Dignity and Freedom outside Israel's territory by defining its beneficiaries. This case did not concern the rights of Palestinians under the Basic Law, and accordingly by itself it cannot serve as an authority for the applicability or non-applicability of the Basic Law to them. However, in *Mara'abe* the HCJ added elements – and perhaps an explanation – to the applicability of the Basic Law to Israelis, which does bear on its applicability to Palestinians. First, the Court noted⁵⁸ that

the constitutional rights which our Basic Laws and our common law grant to every person in Israel are also granted to Israelis who are located in territory under belligerent occupation which is under Israeli control ... Israelis present in the area have the right to life, dignity and honor, property, privacy and the rest of the rights which anyone present in Israel enjoys.

In other words, the basis for applying constitutional law is not only the identity of the beneficiaries and their residence within territory over which Israel has effective control, but also the need to apply a uniform legal regime to residents of the settlements and to residents of Israel. Second, the Court relied on the state's commitment to the welfare of its citizens, especially 'when many of the Israelis living in the area do so with the encouragement and blessing of the government of Israel'.⁵⁹ These two rationales negate the possibility that Palestinians count among the beneficiaries of the Basic Law.

The applicability of the Basic Law exclusively to Israelis follows not only from the Court's reasoning, but also from the absence of any mention of the Basic Law in statements on the normative framework that does apply to Palestinians. Unlike *Gaza Coast Regional Council*, in *Mara'abe* the Court could not avoid identifying the normative source for the rights of the Palestinian residents of the West Bank. According to the Court, 'it is unanimously agreed that international humanitarian law is the central source of these rights',⁶⁰ and it is possible that international human rights treaties are also applicable.⁶¹ The Court made no mention of constitutional law in this context. In an obiter dictum, the Court suggested that 'with regard to "protected inhabitants", international human rights law replaces Israeli internal law'.⁶² This statement follows a number of judgments in which the Court ruled that 'it is possible, at times, to complement the humanitarian provisions by international human rights law'.⁶³

⁵⁸ HCJ 7957/04 *Mara'abe and Others v Prime Minister of Israel and Others* (15 September 2005), para 21, official translation at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf. Interestingly, in determining the normative framework, the Court stated (at para 14) that 'the legal regime which applies in these areas is determined by public international law regarding belligerent occupation' and by 'basic principles of Israeli administrative law'. It did not mention Israeli constitutional law.

⁵⁹ *ibid* para 21.

⁶⁰ *ibid* para 26.

⁶¹ *ibid* para 27.

⁶² *Adalah Legal Centre* (n 49) para 22.

⁶³ *Dir Samet* (n 35) para 10.

Both the extension of the Basic Law's applicability extraterritorially and the restriction of this extension to Israeli nationals are exceptional in Israeli law. There are, indeed, certain legislative instruments which apply to Israelis on a personal basis also when present outside Israel. For example, under the Penal Law, Israeli nationals and residents may be indicted for certain offences committed outside the country.⁶⁴ Enforcement of the prohibitions will only take place in Israel, of course. In addition, residents of the settlements who are Israeli nationals (or have a right to be so by virtue of their Jewish ethnicity) are regarded as Israeli residents for the purpose of the application of a series of laws.⁶⁵ Basic Law: Human Dignity and Freedom does not count among those laws. The effect of the presumption of residence is that Israeli nationals acquire rights and obligations in Israel; the laws in question have no effect on governmental conduct outside Israel, as would be the case if the Basic Law is interpreted as applicable extraterritorially.

Moreover, if the Basic Law is applicable extraterritorially, the basis for limiting its applicability to Israeli nationals remains elusive. The text of the Basic Law certainly does not justify such a limitation as a general proposition. Throughout the Basic Law the beneficiary of rights is a 'person', and the rights enumerated in the Basic Law are premised on 'recognition of the value of a person' (section 1). Section 2 adds that there shall be no violation of the life, body or dignity 'of any person as such'.⁶⁶ This terminology cannot be read other than as applying also to non-nationals. Where the legislature did exceptionally opt to restrict a right to nationals, the Basic Law provides so expressly, namely in section 6(b) concerning the right to enter Israel. *A contrario*, other provisions apply to all persons. Moreover, the HCJ has ruled (in another judgment relating to the disengagement from the Gaza Strip) that a 'person' under the Basic Law also extends to corporations (registered in Israel).⁶⁷ Applying the Basic Law to abstract legal persons as 'persons' but not to all natural persons would be awkward, to say the least.

This is not to say that there may not be legitimate distinctions under constitutional law between nationals and non-nationals. Constitutional law is a means of regulating the political organisation of a social group; nationality indicates affiliation with the group, creating a more significant relationship between the individual and the group's mechanisms of governance than the relationship with a foreigner coming into contact with the group. But a nationality-based distinction can only be justified with respect to rights that concern affiliation with the group and its organisation, such as entry into the group's physical or social domain, or participation in the establishment of governance mechanisms. Indeed, a distinction between nationals and non-nationals is common with respect to immigration and the right to elect and be elected to government. Yet, with the exception of entry into the country, the Basic Law addresses not these but rather rights that are perceived as universal – namely applying to every individual everywhere,

⁶⁴ Penal Law, 1977, s 15.

⁶⁵ Law for Extending the Validity of Emergency Regulations, 2012 (n 19) s 6B and annex.

⁶⁶ Compare, on this issue, with Basic Law: Freedom of Occupation, which only protects nationals and residents.

⁶⁷ HCJ 4593/05 *United Mizrahi Bank Ltd v Prime Minister and Others* (20 September 2006). For a critique on applying the Basic Law to corporations see Ofer Sitbon, 'On Persons, Corporations and What Lies between Them – Should Basic Law: Human Dignity and Freedom Apply to Corporations?' (2009) 8 *Kiryat Hamishpat* 107 (in Hebrew).

inhering in humanity, and therefore not conditional upon a person's identity or status.⁶⁸ Granted, in order to be effective, a human rights regime must circumscribe the obligations of states so as to enable them to discharge their obligations.⁶⁹ Accordingly, international law does not hold states responsible towards any person anywhere, but only towards persons under their effective control, sovereignty being a primary indicator of such control. However, there is no justification for the *identity* of the individual to dictate the existence of an obligation or its extent. For example, the ability of a state to respect a person's right to life does not depend on whether the person is its national or not. Accordingly there is no justification for limiting the right to life so that it accrues only to nationals (whether situated within sovereign territory or outside it). Indeed, international human rights law does not generally distinguish between nationals and non-nationals (although such a distinction exists in the constitutional law of certain states with respect to extraterritorial applicability⁷⁰).

A distinction on the basis of nationality creates a presumption of prohibited discrimination,⁷¹ which may be rebutted in a limited context – principally, as stated above, that of election and immigration.⁷² The presumption is clearly valid with respect to civil and political rights, which find expression primarily in a duty to abstain from action, and therefore fundamentally do not require allocation of resources. With respect to economic, social and cultural rights, which require the determination of budgetary priorities, there may be scope for distinguishing among individuals with respect to their entitlement to rights according to the degree of their affiliation to the political community, for example, by nationality and residence. Nonetheless, even these rights feature a core which is applicable to any person, regardless of formal status.⁷³

In practice, there is an undeniable difference between the rhetoric of the Court and its actual practice. The Court announces that different legal regimes apply to different populations, but refrains from following the consequences of these statements to their logical end. It therefore has not yet directly addressed the implications of the distinction on a personal basis. In *Mar'abe*, for example, the Court relied on the constitutional right of Israelis (exclusively) only for the purpose of deciding on the military commander's *authority* to erect the separation barrier.⁷⁴

⁶⁸ Universal Declaration of Human Rights (n 22) art 2.

⁶⁹ In *Al Skeini* Judge Bonello recalls that 'the cornerstone' and the 'agenda heralded' in the Preamble to the European Convention on Human Rights and Fundamental freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), is 'the *universal* and effective recognition and observance' of fundamental human rights. He notes that "'Universal" hardly suggests an observance parcelled off by territory on the checkerboard of geography': *Al Skeini* (n 3) Concurring Opinion of Judge Bonello, para 9. However, the Preamble refers to 'securing the universal and effective recognition and observance of the Rights therein declared': Milanovic (n 8) 56.

⁷⁰ For a review of state practice see Orgad (n 18) 185.

⁷¹ Milanovic (n 8) 81, citing CERD General Recommendation 30; Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd edn, Engel 2005) 54–55, 618–23.

⁷² Accordingly the exclusivity of the right to enter Israel to nationals under s 6 of the Basic Law does not violate international law.

⁷³ Committee on Economic, Social and Cultural Rights, General Comment 3 (The Nature of States Parties' Obligations) (1990), UN Doc HRI/GEN/1/Rev.9 (vol I) 27 May 2008, para 10. On the customary legal nature of this interpretation see the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22 January 1997, Introduction and para 9.

⁷⁴ Similarly *Mara'abe* (n 58) para 21 and HCJ 2150/07 *Beit Sira Village Council Head and Others v Minister of Defence and Others* (29 December 2009), para 21.

When discussing the *manner* in which the commander exercised this authority, the Court did not invoke constitutional rights of either of the parties involved, but only examined the balance between state security and the rights of Palestinians under international humanitarian law, applying that law to all parties involved.

In *Alam* the appellants comprised Israeli nationals, non-national Palestinian permanent residents and residents of the West Bank. The appeal concerned various segments of the separation barrier in the Jerusalem area, some of which pass through territory regarded under Israeli law as Israeli, and some of which pass through West Bank territory. Accordingly, the appeal concerned populations subject to different legal regimes.⁷⁵ In determining the normative framework for examining the route of the barrier in the West Bank, the HCJ described the obligation of the military commander toward protected persons as governed by ‘the human rights accepted under international law which accrue to each member of the local population’,⁷⁶ and his obligation towards Israelis residing in the West Bank as governed by international law and Israeli law, ‘primarily the Basic Laws relating to human rights’.⁷⁷ In determining the normative framework for examining the route of the barrier within Israeli territory, the HCJ noted the need to take into account ‘human rights entrenched in Israeli law of Israelis residing in Israel and in the West Bank, who are affected by the barrier’s route’,⁷⁸ and separately, ‘the welfare of “protected persons” residing in the area’.⁷⁹ In other words, with respect to both routes, the HCJ distinguished Israelis, who enjoy the protection of the Basic Law within Israel and in the West Bank, from Palestinians resident in the West Bank, who do not.⁸⁰ Ultimately, however, the HCJ stated that, although the normative systems applicable to Israeli and Palestinian residents were different, it would not make any normative distinctions among the populations, since the basic principles of international law and of Israeli law are similar as well as the manner of balancing conflicting interests, and the parties themselves had not argued for any distinctions. It therefore examined the military commander’s decision on the route of the barrier in its different segments, ‘under strict standards, such as those applicable under the Basic Law’.⁸¹

Naturally, if the HCJ had tried to apply different normative regimes according to the appellants’ identity, it would have encountered a practical difficulty, since residents of Israel (who are protected by the Basic Law) and residents of the West Bank who are protected persons (who are not) were on the same side of the barrier – and of the legal dispute. The Court would have had to examine the route of a particular segment of the barrier under Israeli constitutional law with respect to some appellants, and under the law of occupation with respect to others. But in practice it would have been impossible to apply different regimes. At the end of the day, arrangements on

⁷⁵ *Alam* (n 14).

⁷⁶ *ibid* para 42.

⁷⁷ *ibid*.

⁷⁸ *ibid* para 45.

⁷⁹ *ibid*.

⁸⁰ Conversely, it distinguished between Palestinian residents in the West Bank who enjoy the protection of the law of occupation from Israeli residents in Israel or in the West Bank, who do not. The Court made no reference to Palestinians residing in Israel – but see *Salameh*, text to n 82.

⁸¹ *Alam* (n 14) para 46.

the ground would have been in line with the stricter standard (which the Court determined to be the constitutional one), and both populations would have benefited from it.

It should be noted that insofar as Israeli territory is concerned, there is no dispute regarding the applicability of the Basic Law, irrespective of the identity of beneficiaries or the applicability of other bodies of law. *Salameh*, for example, was a joint petition by persons residing within Israel: Palestinian permanent residents of Jerusalem and Palestinians from the West Bank. The petition concerned the route of the barrier within the municipal boundaries of Jerusalem. The HCJ stated⁸² that

powers which infringe upon basic constitutional rights will be exercised in accordance with the criteria provided in the limitation clause of the Basic Laws relating to human rights ... where the route of the barrier pertains to residents of the West Bank, even if the route does not pass through the West Bank, the respondents must also take into account the needs and interests of the population in the area, whether under international human rights law or under international humanitarian law applicable to residents of the territory under belligerent occupation.

In other words, both Israelis and Palestinians of the West Bank residing within Israel enjoy the protection of the Basic Law. West Bank Palestinians benefit also from the protection of international human rights law (without any clarification why Israelis do not) and of the law of occupation, which indeed does not recognise Israeli nationals as protected persons.

In conclusion, the only case law which directly addresses the possibility of extraterritorial applicability of the Basic Law relies on the identity of the beneficiaries on the basis of a limited rationale that is valid for Israeli nationals or residents only. This distinction is suspect under international law. The practice of the HCJ, however, does not pursue this distinction, and when Israelis are involved in a case the Court applies the Basic Law, including with respect to Palestinians and regardless of whether the interests of Israelis and Palestinians are shared or in conflict.

3.3 APPLICABILITY OF THE BASIC LAW ON THE STATE AS DUTY-HOLDER

A third basis for applying the law outside sovereign territory is by imposing the obligations it creates on state organs, regardless of where they act and who the beneficiaries are. *Prima facie*, the distinction between the individual's right and the state's obligation is semantic, given that every obligation has a corresponding right and vice versa. But defining the legal regime as duty-holder-dependent rather than as beneficiary-dependent clarifies that the responsibility of the state is unrelated to the individual's identity.⁸³

This interpretation is in line with the language of the Basic Law. According to section 11, '[a]ll governmental authorities are bound to respect the rights under this Basic Law'. The

⁸² HCJ 1073/04 *Salameh and Others v Commander of Central Command and Others* (6 August 2006), para 12.

⁸³ Hilly Moodrick-Even Khen, 'Obligations at the Border: The Obligations of an Occupying State towards an Occupied State' (2005) 8 *Mishpat Umimshal* 471 (in Hebrew).

Basic Law thus stipulates its applicability by reference to the governmental authorities as its addressees and as the direct duty-holders.⁸⁴ According to this view, a duty under the Basic Law emanates from the exercise of power by organs of the state. This approach is also in line with the prevailing doctrine under international law, according to which the realisation of human rights is expressed in the imposition of obligations on the state, and responsibility under human rights law follows the exercise by the state of power and authority. Support for this approach may be found by analogy in former Chief Justice Barak's interpretation of the term 'authority' in section 11. According to this interpretation, 'an authority of the governmental authorities is any body or person who holds the (governmental) power to change a person's status without that person's consent'.⁸⁵

A teleological interpretation of section 11 might also lead to the conclusion that this provision stipulates an extraterritorial applicability of the Basic Law; otherwise it is redundant. Clearly, section 11 is not needed merely to confirm the applicability of the Basic Law to the branches of government since the executive and the judiciary are already bound by administrative law, while the legislature's subjection to the Basic Law is inherent in the limitation clause, which prescribes the parameters for limiting rights by law. Nonetheless, extraterritorial applicability may not be the only valid teleological interpretation of section 11. For example, this section might clarify that the law only governs the conduct of public authorities rather than of private entities. In such case, extraterritorial applicability of the Basic Law is not an unavoidable conclusion.

The extraterritorial applicability of the Basic Law on the basis of the state's obligation was suggested in obiter dictum in *Adalah*. Chief Justice Barak proposed that the Basic Law accompanies the governmental authorities rather than the beneficiaries, and accordingly 'wherever the official goes, the Basic Law goes with him'.⁸⁶ Nonetheless, according to Barak, 'this approach is particularly appropriate when the act of the official is done in a place that is subject to Israeli belligerent occupation',⁸⁷ again linking applicability to territorial control. A hint that the Basic Law applies to the state may also be inferred from earlier jurisprudence. For example, in *Marab* the Court noted that '[t]here is no need, in the context of this petition, to decide to what extent these principles of internal Israeli law [namely the constitutional right to liberty] apply *detention performed* in the area [of the West Bank]'.⁸⁸ This drafting links the potential applicability of the law to the act of the executive authority, rather than to the identity of the detained or to the territory itself. The terminology focusing on the obligation of the authorities

⁸⁴ Daphne Barak-Erez and Israel Gilead, 'Human Rights in Contract Law and Tort Law: The Quiet Revolution' (2009) 8 *Kiryat Hamishpat* 11, 16 (in Hebrew). According to a more expansive interpretation of the Basic Law, such as that of former Chief Justice Barak, according to which the Basic Law also creates obligations on individuals (Aharon Barak, *Interpretation in Law – Constitutional Interpretation* (Vol 3, Nevo 1994) 367), the question of the Basic Law applicability outside state territory is even wider because it may involve the obligations of the territory's inhabitants.

⁸⁵ Barak, *ibid* 449.

⁸⁶ *Adalah Legal Centre* (n 49) para 22.

⁸⁷ *ibid*.

⁸⁸ *Marab* (n 11) para 20 (emphasis added). The official translation is grammatically incorrect and inaccurate. The present translation is provided given the significance of the precise wording.

is also evident in other judgments. Furthermore, linking the applicability of the law to the acts of the executive is also implied from the presumption that the Basic Law can be replaced by administrative law, which also applies to the executive. Thus, *Center for the Defense of the Individual* concerned the conditions of incarceration in detention centres in the West Bank. The HCJ ruled⁸⁹ that

[t]he question of whether or not the Basic Law: Human Dignity and Freedom applies to detention conditions in the area need not be answered here. The general principles of administrative law, which apply to Israeli soldiers in the area, are sufficient for this matter ... How could we consider ourselves civilised if we did not guarantee civilised standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli government, in accord with its fundamental character: Jewish, democratic and humane.

Since administrative law serves to review the conduct of the authorities (everywhere and with respect to every person), substituting it for constitutional law, similarly to the focus on ‘the duty of the Israeli government’, may indicate that the Court viewed the applicability of the Basic Law as pertaining to the authorities. At the same time, however, it underscores the sufficiency of the existing legal order to guarantee the protection of human rights in the West Bank.

The *Public Committee against Torture* case also suggests acknowledgement of the Basic Law’s extraterritorial applicability based on the authorities’ obligations. This is particularly evident in the opinion of Justice Rivlin, noting that in armed conflict two normative systems apply simultaneously which place human dignity at their centre – the laws of armed conflict and Israeli public law. According to Justice Rivlin, the value of human dignity implies ‘particular obligations’, an expression which implies the applicability of the Basic Law and the rights expressly enumerated therein, which together with other rights reflect the notion of human dignity. The reference to armed conflict as a basis for applying Israeli public law again implies a link between the application of the law and the conduct of the governmental authority, regardless of the territory in which it applies or its beneficiaries. If there was doubt as to the applicability of the Basic Law to all those subject to the authorities’ power, Justice Rivlin removed it by noting that a relevant principle for the maintenance of human dignity is universality.⁹⁰ Perceiving the Basic Law as applicable extraterritorially on the basis of the authorities’ obligations is also in line with the interpretation of other Basic Laws which empower the authorities to act outside state territory.⁹¹

Prima facie, there is nothing novel about state organs being bound by Israeli law in their acts in the West Bank. Military law and administrative law, for example, also regulate such conduct.

⁸⁹ HCJ 3278/02 *The Center for the Defense of the Individual founded by Dr Lota Salzberger and Others v Commander of the IDF Forces in the West Bank* (18 December 2002), paras 23–24, official translation at http://elyon1.court.gov.il/files_eng/02/780/032/A06/02032780.a06.pdf.

⁹⁰ HCJ 769/02 *The Public Committee against Torture in Israel and Another v Government of Israel and Others* (13 December 2006), Concurring Opinion of Justice Rivlin, para 4, official translation at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

⁹¹ Basic Law: The Government, s 40(b); *The Public Committee against Torture*, *ibid* para 19.

But the Basic Law holds special power: unlike legislation which regulates the internal mechanisms of government, the Basic Law regulates the relations between the state and individuals. Unlike administrative law, the Basic Law not only enforces existing law, but creates substantive rights or imposes substantive obligations.⁹² In practice then, the application of the Basic Law to state action outside sovereign territory modifies the legal regime applicable to the population under the state's control. So long as this modification applies to the entire population and is necessarily of temporary duration – in other words, only for as long as the territory is under occupation – it might not be prohibited per se, since it is not tantamount to an extraterritorial application of the law on a territorial basis. For one thing, the Basic Law does not become the law of the land in the occupied territory. At the end of the occupation, for example, frequently adopted transitional provisions, such as continuity in the applicability of the law of the land, would not govern the Basic Law. Secondly, if the extraterritorial applicability of the Basic Law concerns only the obligations of state organs, other provisions of the law would be irrelevant, or would be interpreted differently than they are with respect to territory where the law applies territorially. For example, even if the Basic Law imposes obligations also on individuals, as advocated by former Chief Justice Barak,⁹³ these additional obligations would not necessarily extend beyond state territory. Other provisions that may be interpreted differently are the limitation clause in section 8, which refers to limitation by or according to 'law', and section 10, on the preservation of validity of 'any law (*din*) in force prior to the commencement of the Basic Law'.

If the Basic Law applies in the West Bank only on the basis of the obligations of state organs, the term 'law' should probably be interpreted as relating only to Israeli law. If the Basic Law applies on a territorial basis, local law might also be pertinent. Interestingly, however, the HJC has already been willing to regard Jordanian law, identical to Israeli law in content and in historical origin, as 'law' for the purpose of section 10. *Nazal* concerned the military commander's order to demolish a structure in the Gaza Strip, invoking local law – Regulation 119 of the Mandatory Emergency Regulations, 1945. Following its ruling in *El Amarin*, the Court examined the military commander's discretion under the Basic Law. In response to the appellants' claim that the exercise of authority under Regulation 119 was contrary to Basic Law: Human Dignity and Freedom, the majority opined that 'the Regulations constitute law [*din*] in force prior to the commencement of the Basic Law, and the provision of section 10 of the Basic Law regarding preservation of law [*dinim*], maintains them intact'.⁹⁴ The notion that a right protected by an Israeli Basic Law may be limited by foreign law is odd. Foreign law does not enjoy the legitimacy of parliamentary legislation, which is deemed to reflect the collective view as to the appropriate balance between conflicting rights and interests. Yet it was easy to overlook the fact that the limitation on the right under the Basic Law was grounded in foreign law since, as stated by Judge Cheshin earlier, this foreign law was not only identical in content to Israeli law and historically emanating from the same source (mandatory legislation), but was also applied in

⁹² Daphne Barak-Erez, *Administrative Law, Vol 1* (The Israel Bar Publishing House 2010) 18.

⁹³ Barak (n 84) 367.

⁹⁴ *Nazal* (n 55) para 13.

the same security context, with the geographical distinction between Israel and the West Bank or Gaza Strip being of secondary significance.⁹⁵ The reference to local law under section 10 does fit well with the earlier analysis,⁹⁶ according to which the application of the Basic Law already contained an undertone of application on a territorial basis.

In conclusion, of the various means of extending Basic Law: Human Dignity and Freedom with respect to the West Bank, interpreting it as imposing obligations on state organs appears to be the only legal construct compatible with the language of the Basic Law and with international law. This possibility had found express and implicit expression in the HCJ's jurisprudence. But this basis is so akin to administrative law that the benefit of applying the Basic Law extraterritorially becomes altogether questionable.

4. PRACTICE

The practice of the Court is far from lucid with respect to the normative basis for applying the Basic Law: Human Dignity and Freedom and to the relationship between the Basic Law and other regimes. The landmark case in this context is *Hess*, which concerned the military commander's authority to seize private Palestinian property in order to secure the route of Israeli worshippers from Kiryat Arba to the Cave of the Patriarchs. According to the HCJ, at issue was the relationship between the rights of worshippers to movement and worship, and the right to property over the land referred to in the order of seizure.⁹⁷ The HCJ noted that the constitutional rights to freedom of religion and worship, as well as of movement, applied to both the Palestinian and the Israeli residents of the West Bank.⁹⁸ Although the judgment refers to the right to worship and the right to property as 'constitutional', it is difficult to state categorically that the HCJ grounded these rights in the Basic Law: Human Dignity and Freedom, or even in Israeli constitutional law in general. When describing the normative framework generally governing the military commander's authority (rather than specific rights), the HCJ listed, in addition to the law of occupation and local law, the 'principles of Israeli law', which included, 'inter alia, the principles of [Israeli] public law, including the principles of natural justice and administrative reasonableness'⁹⁹ – but not constitutional law.¹⁰⁰

There are other indications that the term 'constitutional rights' refers to the substantive character of the rights rather than to their normative source. For example, the HCJ noted that 'alongside the rules of international law, domestic Israeli laws applicable to the military commander are

⁹⁵ *El Amarín* (n 54) Dissenting Opinion of Justice Cheshin, para 8. One might argue that the 'law' which permits limitations on rights includes customary international law, including the law of occupation. However, the fact that the law of occupation stipulates that local law continues to prevail in the territory does not render local law part of the law of occupation itself.

⁹⁶ Text at nn 54–56, 87.

⁹⁷ HCJ 10356/02 *Hess and Others v Commander of IDF Forces in the West Bank and Others* 2004 PD 58(3) 443, para 1.

⁹⁸ *ibid* para 15.

⁹⁹ *ibid* para 8.

¹⁰⁰ *ibid*.

binding', which suggests that the previous mention of 'constitutionality' pertained only to norms of international law.¹⁰¹ However, the Court's analysis of specific rights does rest on constitutional law. With respect to freedom of religion, the Court was explicit that it is a 'constitutional basic right', recognised by the King's Order-in-Council, in Israel's Declaration of Independence and in Israeli constitutional jurisprudence.¹⁰² Notably, the protection of freedom of religion under constitutional law pertained only to Israelis. The HCJ referred to constitutional law also with respect to Palestinians' right to property and with respect to freedom of movement, although it is unclear from the judgment whether at issue was the freedom of Israelis, Palestinians or both. The Court listed the right to property as a right under the law of occupation, but noted that it was also constitutionally protected under the Basic Law.¹⁰³

Finally, when examining whether the military commander was allowed to place restrictions on the right to property of Palestinians in order to protect freedom of worship, the HCJ stated that the question was 'whether the means of restricting private property for the purpose of achieving a worthy cause complied with the constitutional proportionality test'.¹⁰⁴ The Court thus utilised the constitutional proportionality test rather than the test under the law of occupation (which permits seizure of private property only for military purposes). The Court noted that it was implementing the 'spirit of the principles of the limitation clause [under Basic Law: Human Dignity and Freedom]' but not the limitation clause itself; it is not clear whether the limitation clause did not apply directly. One possibility is that the Court implemented the Basic Law but the conflicting rights were both protected by the Basic Law, in which case the limitation clause does not formally apply. The other possibility is that the Court applied the law of occupation, with the limitation clause applying only by analogy.¹⁰⁵

Despite the ambiguities in *Hess* relating to the normative sources of the enumerated rights, later jurisprudence regarded the judgment as an authority for the applicability of the Basic Law with respect to the West Bank. In *Bethlehem Municipality*, again the authority of the military commander to seize property in order to secure access for Israeli worshippers to a place of worship (Tomb of Rachel) was at issue. The HCJ again analysed the situation as a matter of balancing between the right to worship and the right to property and freedom of movement of the landowners.¹⁰⁶ The Court grounded freedom of worship as it had in *Hess*, and added other sources, including freedom of worship as an aspect of human dignity protected under Israeli

¹⁰¹ This reading of the ruling is supported in the subsequent statement that the military commander is entrusted with protection of constitutional human rights: *ibid* para 9. Since the military commander is not entrusted with the protection of domestic law, presumably 'constitutional' refers not to the normative source of rights but to their substance.

¹⁰² *ibid* para 15.

¹⁰³ *ibid* para 17.

¹⁰⁴ *ibid* para 19.

¹⁰⁵ According to the view of former Chief Justice Barak, the spirit of the limitation clause, namely the proportionality test, applies within the law of occupation, as discussed above.

¹⁰⁶ *Bethlehem Municipality* (n 10) para 11, official translation at http://elyon1.court.gov.il/files_eng/03/900/018/N24/03018900.n24.pdf.

legislation.¹⁰⁷ With respect to freedom of movement, and in *Bethlehem Municipality* it was clear that at issue was the movement of Palestinians, the HCJ stated¹⁰⁸ that

it is one of the basic human rights and it has been recognized in our law both as an independent basic right ... and as a right that is derived from the right to liberty ... In addition, there are some authorities who believe that this freedom is derived also from human dignity.

The authorities for freedom of movement are also taken from jurisprudence relating to the freedom within Israel. Evidently the Court grounded the freedom of movement of Palestinians within the West Bank in Israeli constitutional law. As for the right of Palestinians to property, this was grounded in the Basic Law and in the law of occupation.¹⁰⁹ This confusion regarding the rights protected by the ruling and their normative source has been carried over to later judgments.¹¹⁰

Reference to the Basic Law as a standard for review was also made in *Abu Dahr*, which concerned the authority of the military to fell trees on private land in the West Bank in order to provide protection for the residence of a government minister (residing within Israel). The HCJ analysed the situation in terms of the balance between the minister's constitutional right to protection of security of life and bodily integrity¹¹¹ (and to this added the minister's right to effectuate the right to property 'in conditions of protection of life and bodily integrity'¹¹²) which is 'a constitutional right according to Israeli public law, as provided in Article 4 of Basic Law: Human Dignity and Freedom', and 'the right to property of residents of the West Bank, which is also recognised as a protected constitutional basic right. It is recognised as such under Article 3 of Basic Law: Human Dignity and Freedom'.¹¹³

There is no doubt that the Basic Law obligates the state to protect the rights of the minister, who resides within Israel. Less obvious is the Court's application of the Basic Law as a standard for review of the military commander's conduct with respect to Palestinians in the West Bank. It is in fact a novel approach, given that for many decades the judicial review over seizure of Palestinian property in order to protect military needs was conducted by reference to Article 43 of the Hague Regulations. *Abu Dahr* added the rights discourse to buttress the military interest. This may have been related to the fact that at issue was a well known individual, and it was therefore convenient to frame the conflict as pertaining to an individual right rather than to a public security interest. In any case, for present purposes it is significant that the right to property of the Palestinian tree owner, resident in the West Bank, was framed in terms of the Basic Law.

In *Murar* the HCJ considered the authority of the military commander to declare the closure of a certain area within the West Bank as a means of ensuring both the security of Israelis (from

¹⁰⁷ *ibid* para 12.

¹⁰⁸ *ibid* para 15. Human dignity is also mentioned in GC IV (n 26) art 27, and its mention may therefore be a reference to the law of occupation.

¹⁰⁹ *Bethlehem Municipality* (n 10) para 20.

¹¹⁰ For example, HCJ 4331/10 *Hebron Municipality and Others v State of Israel and Another* (19 February 2012).

¹¹¹ HCJ 7862/04 *Abu Dahr v Commander of IDF Forces in the West Bank* (16 February 2005), para 8.

¹¹² *ibid* para 10.

¹¹³ *ibid* paras 8 and 10.

terrorism) and the security of Palestinians (from settler violence).¹¹⁴ Among the considerations of the commander, the Court cited the right to security and protection of bodily integrity – of both Israelis and Palestinians – under international humanitarian law as well as under the Basic Law. It thus cited the Basic Law also as the basis for the rights of Palestinians to property and freedom of movement.¹¹⁵

In disputes before the HCJ in which Israelis are not involved, the Court has relied on constitutional law only in rare cases. One such case is *Barghuti*, which concerned the rights of family members to enter Israel in order to visit a Palestinian prisoner held in a prison within Israel. The Court stated, citing *Hess*, that the military commander must act, inter alia, to provide ‘adequate protection to constitutional rights, within the limits that the conditions and factual circumstances on the ground permit’.¹¹⁶ The application of constitutional law to the family members may have been related to the fact that the judgment also referred to the prisoner’s right to personal liberty, a right which is clearly protected by the Basic Law, given that the prisoner was incarcerated within Israel.¹¹⁷

The HCJ’s reluctance to apply the Basic Law directly to Palestinians is also evident in *Adalah*. This case concerned the constitutionality of an amendment to the provision in the Civil Torts Law (Liability of the State), 1952, which created a blanket obstruction for Palestinians resident in the West Bank or Gaza Strip to file tort claims following actions by security forces in the occupied territories. Unlike *Barghuti*, for example, which concerned the rights of specific, identifiable appellants (family members of a particular Palestinian prisoner in Israel), *Adalah* concerned a large number of Palestinians whose link to Israel consisted of living in territory under the state’s control and being affected by its conduct. A determination that the Basic Law applied to them with respect to the issue before the Court, even if on a personal rather than territorial basis, would have had far-reaching consequences, as it could have easily been interpreted as the application of the Basic Law to all Palestinians resident in the West Bank in many other respects.

The Court, presided by Chief Justice Barak, avoided a decision on the applicability of the Basic Law to Palestinians in the West Bank by reframing the question before it as a matter of the Basic Law’s applicability within Israel. The Court ruled that the amendment to the Civil Torts Law (Liability of the State) constituted a limitation on rights within Israel rather than in the West Bank, since it constituted a hindrance to the right to bring forward claims, in accordance with the rules of private international law, in Israeli courts and under Israeli tort law.¹¹⁸ The Court characterised the state’s exemption from tortious liability as a limitation on the right to property, since compensation for tort constitutes a component of that right¹¹⁹ as well as a limitation on the

¹¹⁴ HCJ 9593/04 *Murar and Others v Commander of IDF Forces in the West Bank and Another* (19 January 2006), para 13.

¹¹⁵ *ibid* para 14.

¹¹⁶ HCJ 7615/07 *Barghuti and Another v Commander of Military Forces in the West Bank* (25 May 2009), para 12.

¹¹⁷ The latter right referred to in HCJ 2245/06 *Member of Knesset Neta Dovrin and Another v Prison Service and Others* (13 June 2006), regarding the right to liberty under Basic Law: Human Dignity and Freedom.

¹¹⁸ *Adalah Legal Centre* (n 49) para 23.

¹¹⁹ *ibid* para 24.

rights to life, liberty, dignity and privacy, which tortious liability protects.¹²⁰ However, this reasoning is problematic, since, as noted by Judge Gronis in an individual opinion, it is not self-evident that Israeli courts are the *forum conveniens* for the potential claims, and therefore it does not follow that preventing such claims from being put forward is an interference of a right within Israel. It is also not self-evident that Israeli tort law would apply, or, moreover, that there is a right to the applicability of a specific legal system, in which case again the non-applicability of Israeli law would not constitute an interference with any right.

Moreover, even if Israeli law governs the potential claims, it is unacceptable that the Basic Law would necessarily apply to any legal proceedings conducted in Israel in accordance with Israeli law.¹²¹ If it had been posited that the right of access to justice in Israel had been violated, it would have been pertinent to consider the implications of the Basic Law for this right. But it seems that Chief Justice Barak was referring not to the right of access to justice as a first right order, but to the right to a legal remedy as a means of realising the specific rights he enumerated. The right to a legal remedy, unlike the right of access to justice, is not necessarily an independent right. In international law, both universal and European, the former right is contingent upon the existence of a violation of a first right order. Without a violation of a substantive right, there is no right to a remedy.¹²² Accordingly, whatever the applicable tort law, in order to determine that the absence of tortious liability constitutes a violation of a basic right protected under the Basic Law, there is no alternative to determining whether the life, liberty, dignity and privacy of Palestinians injured by the conduct of security forces in the West Bank are rights protected under the Basic Law. The skirting of this issue is not wholly convincing.

What emerges from these and other judgments¹²³ is that whenever the interests of Israelis are directly involved, the HCJ applies the Basic Law, in which case it also applies it to Palestinians. When the dispute directly involves only the interests of Palestinians in the West Bank, the Court relies on other bodies of law, primarily the law of occupation. This practice raises no problem of inequality before the law, but the normative basis for the application of the Basic Law becomes blurred even further.

As for determining which body prevails when both the Basic Law and international law apply, in most cases the Court emphasises that the rights at issue are entrenched not only in Israeli constitutional law but also in international human rights law or in the law of occupation (or in both), thus ostensibly circumventing the issue. Moreover, in view of the Court's use of the constitutional test for balancing rights and interests also within the law of occupation, it is often difficult to identify the exact normative framework it employs, and it is not always clear whether its decisions are underpinned by constitutional law or by the law of occupation.

¹²⁰ *ibid* para 25.

¹²¹ *ibid*, Concurring Opinion of Justice Gronis, paras 2–3.

¹²² ICCPR (n 31) art 2(3), ECHR (n 69) art 13; Nowak (n 71) 62 marginal 62.

¹²³ eg *Dir Samet* (n 35) para 17.

5. EXTRATERRITORIAL APPLICABILITY OF THE BASIC LAW AND THE LAW OF OCCUPATION

The standard for identifying a need to modify local law under Article 43 of the Hague Regulations or Article 64 of Geneva Convention IV consists of the law of occupation and customary international human rights law. If local law is incompatible with the customary international legal standard, the occupying power may – indeed, must¹²⁴ – modify local law, to put it in line with that standard.¹²⁵ The occupying power's domestic law is not, in itself, relevant to the issue.¹²⁶ The question arises whether there is any impediment to the occupant applying its domestic constitutional law *in addition* to the international regimes, provided that it does so by imposing on itself extraterritorial obligations.

Prima facie, it would be unreasonable to prohibit the occupying power from enabling the residents of the occupied territory to enjoy and enforce a higher standard of protection than is provided by the law which applies territorially. It has nonetheless been argued that applying a standard other than customary international law on a population which did not choose that standard constitutes 'legal imperialism'.¹²⁷ A more profound difficulty is that where the application of a regime (constitutional law) sets a new standard, it necessarily interferes with rights and obligations under existing regimes. Thus, the purportedly additional protection offered to some individuals by application of the Basic Law may conflict with rights and interests of individuals that are protected by other applicable regimes, such as the law of occupation. In *Gaza Coast Regional Council* the Court did not face this problem since the case concerned the relations only between Israeli settlers and the Israeli government, and applying to them the standard of Basic Law: Human Dignity and Freedom did not implicate other legal regimes. In contrast, applying the Basic Law in cases such as *Hess* and *Bethlehem Municipality* does raise the question of the relationship between the Basic Law (and constitutional law and human rights more generally) and the law of occupation.

One aspect of this relationship has already been demonstrated with respect to *Hess*, namely the endowment of Israelis with rights to which they are not entitled under the law of occupation. The use of a human rights paradigm and specifically the Basic Law to Israelis (regardless of whether it is applied also to Palestinians) dilutes the protection under the law of occupation.

¹²⁴ Dinstein (n 6) 113 para 263.

¹²⁵ See the Preamble to Coalition Provisional Authority Order No 7 (Penal Code), 10 June 2003, <http://www.unhcr.org/refworld/docid/452524304.html>; and Coalition Provisional Authority Memorandum No 3 (Revised), Criminal Procedures [Iraq] No 3 (Revised), 27 June 2004, s 1(1)(c), <http://www.unhcr.org/refworld/docid/469cd1b32.html>, which notes the need to modify aspects of Iraqi law which violate basic standards of human rights law. Both are orders of the military commander of the forces of occupation in Iraq.

¹²⁶ Dinstein (n 6) 121–22 paras 282–83. Dinstein suggests that modification of the law of occupied territory by duplication of the occupying power's domestic law is evidence of the latter's sincerity in undertaking the modification of local law. Notably, this was said with respect to adopting the domestic standard through military legislation, not to applying domestic law extraterritorially.

¹²⁷ For a critique of the legal imperialism of human rights law argument with respect to the ECHR in occupied territory outside Europe see Ralph Wilde, 'Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms' (2009) 42 *Israel Law Review* 80.

Israeli nationals are not protected persons under the law of occupation, and they are not entitled to the protections reserved to such protected persons. Use of the Basic Law, however, obfuscates this difference between the two populations. Moreover, human rights discourse, embodied in the Basic Law, is premised on equality between the populations whose interests and rights must be balanced, contrary to the premise of power disparities underpinning the law of occupation.¹²⁸

To appreciate the significance of applying the Basic Law in these circumstances, it is useful to consider the unusual structure of the H CJ's normative analysis: in ordinary constitutional cases the Court examines whether a right has been interfered with, whether it is a constitutional right, and then whether the interference complies with the limitation clause, namely is based on a law which pursues a worthy cause and is proportionate to the goal sought. *Hess, Bethlehem Municipality, Murar* and other cases¹²⁹ feature a converse analysis. They begin by describing the worthy cause in pursuit of which the right of Palestinians has been interfered with, namely the protection of a constitutional right of Israelis (freedom of worship in *Hess* and *Bethlehem Municipality*, bodily integrity and life in *Murar* and *Abu Dahr*). Only then the Court turns to examine the balance between the competing rights (of the Palestinian petitioners on the one hand and of Israelis on the other). Since the Court's point of departure is the protection of interests which the law of occupation does not protect – namely freedom of worship and movement of persons other than protected persons – the Court resorts to Israeli constitutional law where these interests are legally protected, effectively summoning it as a justification for limiting rights (protected by the law of occupation) rather than as a means for their further protection. This dilution is the consequence of giving constitutional law priority over the law of occupation, where the law of occupation is more protective of the population of protected persons.

The dilution of protection under the law of occupation risks even greater severity if the Basic Law is applied only to Israelis but not to Palestinians (a scenario that is implied in the rationales for extraterritorial applicability of the Basic Law but has never yet materialised). Given the normative priority of domestic law over international law, the interests of the Israeli party – protected by the Basic Law – would acquire, at least *prima facie*, a normative advantage over those of the Palestinians – protected only by international law. This would violate the underlying principle of the law of occupation, namely the need to offer the local population special protection against the occupying power's pursuit of its own interests.

Once the human rights paradigm is applied, dilution of the law of occupation can occur even when at issue are the rights and interests only of protected persons. This is illustrated in *Yesh Din*, an appeal against the holding of Palestinian residents of the West Bank in jails within Israeli territory, in contravention of Geneva Convention Article 78. The H CJ ruled that this detention or imprisonment is authorised under primary legislation,¹³⁰ which under Israeli law takes priority

¹²⁸ For a discussion of this issue see Aeyal M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

¹²⁹ *Abu Dahr* (n 111) in part.

¹³⁰ Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria and the Gaza Strip – Jurisdiction in Offences and Legal Assistance), 2007, art 6.

over conflicting international law.¹³¹ In obiter dictum, the Court added that the interpretation of the Fourth Geneva Convention ‘must be carried out in a manner corresponding to the special circumstances and characteristics dictated by the need to apply the laws of occupation in conditions that match the manner in which the territory is held ... primarily, giving significant weight to the rights of the protected population, and, in so doing, the rights of detainees’, inter alia under the ICCPR¹³² and the UN 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.¹³³ The Court applied a human rights balancing test, finding that holding detainees in Israel ensured ‘conditions of detention befitting human dignity’,¹³⁴ and thus did not violate the substantive provisions of international law, namely Geneva Convention IV Article 27, but rather was necessary for complying with them.¹³⁵ The Court concluded that ‘the obligation to comply with the humanitarian provisions of the Geneva Convention regarding conditions of detention of detainees must be distinguished from the claim regarding the location of detention’,¹³⁶ ignoring the fact that the location of detention served a humanitarian purpose. It moreover transformed the specific and absolute prohibition on removing detainees from the occupied territory into a technical matter that could be dismissed through a human rights balancing analysis under Article 27, which stipulates only a general obligation (which is not absolute) to treat protected persons with respect.¹³⁷

The priority given to rights under the Basic Law over restrictions under the law of occupation is a violation of the law of occupation. This is not an unavoidable consequence of recourse to the Basic Law. Even under the Israeli legal order, domestic law, including the Basic Law, should take precedence over international law only where there is an irreconcilable conflict between the norms. The Basic Law can be interpreted in conformity with the law of occupation. The law of occupation should be regarded as ‘law’ pursuing a worthy cause, justifying a proportionate limitation on rights guaranteed by the Basic Law. As described, however, the practice of the H CJ is the converse: rather than use the law of occupation as a limitation on the Basic Law, the Court imposes limitations based on the Basic Law and constitutional law on rights protected under the law of occupation.

Another aspect of applying Basic Law: Human Dignity and Freedom in the West Bank is the equalisation of public law in the West Bank and public law in Israel. If the application of the Basic Law is unencumbered by the law of occupation, its implementation in the West Bank resembles its implementation in Israel.¹³⁸ This creates a semblance of uniformity of law between Israel and the West Bank, at least insofar as it concerns Israelis.

¹³¹ *Yesh Din* (n 19) paras 4, 6. The Court could have enquired whether a narrower interpretation of the law could be in line with GC IV (n 26), thereby reconciling the two bodies of law, rather than resorting to conflict-resolving rules that are only valid within the Israeli legal system.

¹³² ICCPR (n 31).

¹³³ UNGA Res 43/173, UN Doc A/RES/43/173, 9 December 1988; *Yesh Din* (n 19) para 7.

¹³⁴ *Yesh Din* (n 19) para 13.

¹³⁵ *ibid* para 14.

¹³⁶ *ibid* para 14.

¹³⁷ *ibid* para 13.

¹³⁸ The H CJ noted that ‘the scope of the human right of the Israeli living in the *area*, and the level of protection of the right, are different from the scope of the human right of an Israeli living in Israel and the level of protection of that right’: *Mara'abe* (n 58) para 22, citing *Gaza Coast Regional Council* (n 18) para 126. The Court referred to

The assimilation of public law in the West Bank with that which governs in Israel has far-reaching, detrimental consequences for Israel's compliance with the law of occupation and international law generally. First, in view of the uncertain basis for the applicability of the Basic Law and the strong territorial element that it seems to contain, it may indicate an attempt at de jure annexation of the territory, contrary to general international law. Second, it encourages Israeli settlement in the West Bank, which is not only prohibited under the law of occupation, but also facilitates de facto annexation of the territory.¹³⁹ Such assimilation is not an isolated phenomenon. It should be assessed in light of other measures in Israeli law, which in combination result in the legal regime in the West Bank increasingly resembling that of Israel, despite the non-applicability of Israeli law in the West Bank on a territorial basis. These include the duplication of domestic law into military orders, generally and specifically in respect of relations between settlers within the territory of settlements; and the use of choice-of-law rules that expand the use of Israeli law insofar as it concerns life in the settlements.¹⁴⁰ The HCJ's statement in *Mar'abe* that 'Israelis present in the area have the right to life, dignity and honour, property, privacy and the rest of the rights which anyone present in Israel enjoys'¹⁴¹ demonstrates that this assimilation is not an incidental side effect but a deliberate choice. One might suggest that the uniform application of the Basic Law illustrates the universality of human rights under the jurisprudence of the HCJ. Yet the reference to the need to equate rights available to Israelis in the West Bank to the rights accruing to 'anyone present in Israel' rather than 'everyone else in the territory' or 'any person' suggests that the expansion of the Basic Law's applicability rests on something other than universality.

The relationship between the legal regimes in Israel and in the West Bank has been addressed in Israeli jurisprudence, but not in the same context as that which is considered here. In one case, a petition was submitted demanding the extension of certain benefits to residents of the settlements on the ground that these benefits had been granted to residents within Israel and that equality dictates that they be granted also to residents of the settlements in the West Bank. The HCJ rejected the claim that Israelis in the West Bank are entitled to be governed by the same law as Israelis in Israel or, for that matter, as Palestinians in the West Bank.¹⁴² The Court did not need to consider the present question, whether uniformity was objectionable. A question which was more closely related to the issue at hand arose in *Abu Itta*, which concerned the imposition of value added tax in the West Bank and the Gaza Strip after a similar tax had been introduced in

the fact that Israelis are not owners of real property but are lessors. Notably, however, this limitation on rights was acknowledged in the relationship between the government and individuals. No limitations on the constitutional rights of Israelis were imposed on the ground of satisfying the rights of Palestinian individuals under the law of occupation.

¹³⁹ On the internal contradictions and vagueness of the West Bank's status under Israeli policy see Neve Gordon, *Israel's Occupation* (University of California Press 2008) Introduction.

¹⁴⁰ Canor (n 46); Amir Paz-Fuchs and Yaël Ronen, 'Occupational Hazards: Labor Rights in the Occupied Territories' (2012) 30 *Berkeley Journal of International Law* 580.

¹⁴¹ *Mar'abe* (n 58) para 21.

¹⁴² HCJ 9594/09 *Legal Forum for Eretz Israel and Others v Ministerial Committee for National Security and Others* (21 April 2010), para 19.

Israel. The HCJ accepted the state's position that uniformity in taxation was essential for maintaining commercial relations between Israel and the occupied territory, a goal perceived as beneficial to the Palestinian population.¹⁴³ The *Abu Itta* rationale does not reflect directly the issue of applying the Basic Law with respect to the West Bank. First, in *Abu Itta* the uniform law applied equally to all, whereas with respect to Basic Law: Human Dignity and Freedom this remains unclear, given the uncertainty of the normative basis for its applicability. Moreover, the effect of the legal change in *Abu Itta* was identical for all individuals concerned, since the taxation regime that had applied previously was identical for all. In contrast, the application of the Basic Law in the West Bank has different repercussions for Israelis and Palestinians, since they are governed by different regimes to begin with (the Palestinians being protected persons). As indicated above, the change is beneficial for the rights of Israelis, whereas it is largely detrimental to the rights of Palestinians. Second, in *Abu Itta*, uniformity – of the regime, regardless of its specific content – was not advocated as an independent goal but as a means of serving the interests of the local population, a consideration within the mandate of the military commander. In respect of the Basic Law the Court stated that uniformity in the legal regime is itself normatively justified, without engaging with whether it is advantageous or detrimental to the population, and whether it is a factor which the military commander may take into consideration.

To conclude: if the extraterritorial applicability of Basic Law: Human Dignity and Freedom is subject to the law of occupation, it might not be objectionable. But the practice whereby the Basic Law takes precedence normatively and substantively over the law of occupation leads to outcomes that are in violation of the law of occupation, both in concrete cases and in the regime prevailing in the West Bank.

6. CONCLUSION

The 1992 constitutional revolution in Israeli law has not passed over the West Bank. Like international human rights law, constitutional rights discourse in the HCJ's jurisprudence knows no territorial boundaries. Formally, Basic Law: Human Dignity and Freedom does not apply in the West Bank on a territorial basis, but beyond that the picture emerging from HCJ practice is vague. The interchangeable use of constitutional law, administrative law, international human rights law and the law of occupation is chaotic, ignoring the differences in the substantive and normative distinctions between these bodies of law, and paying insufficient attention to the uncertainty as to the applicability of some of them.

From the perspective of international human rights law and its optimal implementation, the necessity for applying the law extraterritorially is far from established. Substantively, there is

¹⁴³ HCJ 69/81 *Abu Itta and Others v Commander of IDF Forces in the West Bank and Others* 1983 PD 37(2) 197, 320–21. The stance that promoting the welfare of the population in the occupied territory justifies the pursuit of interaction with the sovereign territory is not free of difficulties. The population may benefit (financially, in the case of value added tax) in the immediate term, but in the long term uniformity may weaken the occupied territory and even create dependence on the sovereign territory. A preference for welfare in the immediate term may be justified as military necessity. For a critique of the *Abu Itta* ruling see Benvenisti (n 52) 141–44.

no guarantee that the Basic Law would replicate international norms. Procedurally, the advantage of invoking domestic rather than international law in Israeli courts has only a limited effect insofar as concerns action in the West Bank. Recourse to the Basic Law, which can mitigate the primacy of ordinary domestic legislation over conflicting international law, is less pronounced with respect to conduct in the West Bank, which is regulated principally by military orders which constitute secondary legislation within the Israeli legal order. Otherwise, unincorporated international norms may already be implemented to a large extent through interpretation of domestic law under the presumption of conformity.

If extraterritorial applicability of the Basic Law is nonetheless pursued, it must be carried out in conformity with international legal principles regarding the extraterritorial application of domestic law. The Basic Law cannot be extended to the West Bank on a territorial basis. Its application on a personal basis may maintain the fiction that the Basic Law does not apply territorially and pre-empt claims that Israel is acting towards annexation of the West Bank, but it is incompatible with the international human rights prohibition on discrimination; it is also contrary to the letter and spirit of the Basic Law. Applying the Basic Law extraterritorially as a regime of obligations imposed on state organs towards to all residents of the West Bank equally, presents other challenges, some of which are inevitable given the complex situations which the Court faces. Ultimately, the merit of applying the Basic Law extraterritorially depends on how its implementation relates to the applicability of other bodies of law.

There is a conceptual difficulty in applying substantive human rights law, based on mutual commitment between government and population, in situations of mutual hostility. Human rights discourse is based on equality and universality, concepts which are based on 'blindness' regarding the addressees of the law. Employing it when there is an inherent conflict of interests between the state and the local population, and especially when a civilian population of the occupying power is also involved, may render meaningless the law of occupation, which is geared precisely to address the inequality and lack of governmental neutrality which characterise situations of occupation.¹⁴⁴ To the extent that extraterritorial applicability of the Basic Law exacerbates these problems, there are strong legal and policy considerations against it. Indeed, this article proposes that, rather than expand the applicability of Basic Law: Human Dignity and Freedom, the Basic Law should be interpreted narrowly, giving effect to the obligation to comply with international law as a worthy justification for limiting rights.

¹⁴⁴ Paz-Fuchs and Ronen (n 140).