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JUXTAPOSING CONSTITUTION-MAKING AND CONSTITUTIONAL-INFRINGEMENT MECHANISMS IN ISRAEL AND CANADA: ON THE INTERPLAY BETWEEN COMMON LAW OVERRIDE AND SUNSET OVERRIDE[†]

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This article explores the often neglected relationships between constitution-making (including amendment) mechanisms and constitutional-infringement mechanisms by focusing on the override as one of the possible tools to depart from a Constitution. The article suggests that there are two types of override: a 'common law override', which is not uniquely Canadian, and a 'sunset override'. The common law override evolves in the judicial decisions of a given country when the courts require the legislature to explicitly take responsibility for an action. Under the common law override, we may couple together phenomena that are not typically connected, including a means of protecting common law rights, a judicial presumption against delegation of power to administrative agencies, and mechanisms of dealing with procedural or substantive legislative entrenchment. In contrast, the sunset override is a Canadian invention. For the tool to be part of the infringement mechanisms of a country's Constitution, it must be provided for explicitly in that Constitution, and its exercise must be temporary.

This article follows the various possible uses of the common law override. It shows that Israel has vast experience with the common law override which may shed light on Israel's future possible exploitation of the sunset override. The article then shows that Israel has adopted the sunset override following the Canadian example. When the Rabin government adopted the tool as part of an exchange deal with the ultra-orthodox religious political party Shas, the terms of the deal included Shas' acquiescence to the peace process in exchange for the Rabin government's use of the override to protect the religious status quo from judicial intervention. In addition, the Israeli justices played an active and unique role in the birth and formulation of the Israeli override. As has happened with the Canadian override, supposedly these circumstances should have made the override illegitimate in Israel. However, this article argues that it is not the political uses of the override that result in its lack of use. Rather, the determining factor is the override's compatibility with the constitution-making process in a given country. From a normative perspective, it is easier for the Israeli legislature to override its own earlier enactments, even those titled Basic Laws, than it is for the Canadian legislature to override the People's enactment of the Charter. Thus, it is expected that Israel might more freely deploy the sunset override were it to become a general mechanism embodied in the Basic Laws, while, in contrast, the sunset override has fallen into disuse in Canada.

Keywords: override power, notwithstanding clause, transplants, constitution making, constitutional amendment, sunset override, common law override, desuetude, popular sovereignty, parliamentary sovereignty, non-delegation doctrine, constitutional statutes, infringement of rights, restriction of rights

[†] This article is part of a symposium collection of contributions relating to the constitutional override clauses in Israeli and Canadian constitutional law. The other articles in this issue making up this symposium are Adam Dodek, 'The Canadian Override', and Lorraine E Weinrib, 'The Canadian Charter's Override Clause'.

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1. Introduction

It is commonly asserted that the 'notwithstanding' (or 'override') mechanism is not native to Israeli constitutional law,[1] and that it is a transplant imported from the Canadian Charter.[2] The override mechanism allows the regular legislature, rather than the constitution-making body, to deviate from the obligations created by constitutional provisions – especially provisions that protect individual rights – by explicitly declaring its intention to do so. The common wisdom is that the override mechanism currently exists only in the 1994 Basic Law: Freedom of Occupation. Thus, the Knesset (Israel's legislature) may override only this Basic Law.[3] Numerous scholars and judges alike argue that Israel should refrain from adopting the override as a general mechanism applicable to all its Basic Laws.[4] They view the override as merely a technical matter, establishing procedural preconditions when constitutional rights are violated, and therefore, as a general mechanism, wholly inappropriate in a constitutional democracy.[5]

The discussion whether to expand the availability of the override and enable the Knesset also to override other Basic Laws gained new momentum amid recent political turmoil over the extent of individual rights and the need for national security. Primarily, recent right-wing governments have seriously toyed with the idea of adopting a general override clause empowering the Knesset

[1] eg, Lorraine E Weinrib, 'The Canadian Charter's Override Clause: Lessons for Israel' (2016) 49 *Israel Law Review* 67.

[2] Canadian Charter of Fundamental Rights and Freedoms, Constitution Act 1982 (UK), Pt I (Sch B to the Canada Act 1982 (UK), Ch 11). See, eg, Zeev Segal, 'Israel Ushers in a Constitutional Revolution: The Israeli Experience, The Canadian Impact' (1994) 6 *Constitutional Forum* 44, 45.

[3] Basic Law: Freedom of Occupation, 1994 (Israel), s 8(a) provides: 'A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4 [the limitation clause], if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein'.

[4] Revital Hovel, 'Supreme Court: Right to Overturn Laws Needed to Protect Israel's Minorities', *Ha'aretz*, 11 November 2014, http://www.haaretz.com/news/israel/.premium-1.625751 (discussing criticism of a general override clause by Supreme Court President Asher Grunis); Yonah Jeremy Bob, 'Ex-Chief Justice Barak: Override Legislation "Poison Pill for Every Basic Law"', *The Jerusalem Post*, 30 April 2015, http://www.jpost.com/Israel-News/Ex-chief-justice-Barak-Override-legislation-poison-pill-for-every-basic-law-400633 (discussing criticism of a general override clause by former President of the Supreme Court, Aharon Barak).

[5] Thus, for example, the Association for Civil Rights in Israel criticised the proposed Basic Law: Legislation, 2012 (Israel): 'The proposed law is important because it contains a dangerous paragraph that states that when the Supreme Court strikes down an illegal law, the Knesset can re-establish it with a majority vote of 65 Knesset members. The law would then be valid for five years, though it can be re-enacted every five years from that point without any restrictions. This provision will grant the Knesset majority the power to infringe upon human rights generally, and the rights of minorities in particular, in a manner that contradicts the essence of the Basic Law whose aim it is to protect the rights of minorities from the tyranny of the majority. It additionally threatens the balance necessary for an effective separation of powers needed in a proper democracy': The Association for Civil Rights in Israel, 'Update: Anti-Democratic Legislation Initiatives', 2 August 2012, http://www.acri.org.il/en/2012/08/02/update-anti-democratic-legislation-initiatives. See also Amir Fuchs, 'Viewpoint: Override – A Serious Blow to Democracy', *The Jerusalem Report*, 19 May 2015, http://www.jpost.com/Jerusalem-Report/Viewpoint-Override-A-serious-blow-to-democracy-402811.

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to override all Basic Laws, particularly Basic Law: Human Dignity and Liberty.[6] Their motive is to curtail the Supreme Court's power to have the final say in constitutional matters.[7] Their objections to judicial review stem, inter alia, from the Supreme Court's 1995 decision in *United Mizrahi Bank,* in which the Court declared that Israel's Basic Laws are tantamount to a formal Constitution over which the judiciary has review power to protect its provisions from erosion by the regular legislature.[8] The Court seized the opportunity provided by the Knesset in its 1992 enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, both of which provided for individual rights protected via limitation clauses.[9] The Court declared that the enactment of the 1992 Basic Laws transformed the Israeli constitutional system from parliamentary sovereignty to constitutional sovereignty. Until the *United Mizrahi Bank* decision, the Court had authorised the Knesset to amend Basic Laws even by regular statutes.[10] Since this constitutional revolution, the Court has used its power of judicial review over primary legislation to strike down around a dozen statutes for disproportionately infringing constitutional rights provided for in the Basic Laws. Right-wing politicians have argued that it is time to return the locus of power to the legislative branch.[11]

In a more particular context, between 2013 and 2015, the Supreme Court on three occasions struck down statutes dealing with illegal entrants who seek to be recognised as refugees, when it found that the statutes unconstitutionally infringed the constitutional rights of these persons.[12]

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[6] Draft of Basic Law: Legislation, 2012 (Israel), http://www.tazkirim.gov.il/Tazkirim_Attachments/41283_x_AttachFile.doc (in Hebrew; detailing the general override clause proposal of Minister of Justice Ya'akov Ne'eman); draft of Basic Law: Human Dignity and Liberty, 2013 (Israel), http://www.knesset.gov.il/privatelaw/data/19/1944.rtf (documenting Ayelet Shaked's draft amendment for Basic Law: Human Dignity and Liberty and including an override clause in it).

[7] For discussion of the override as a tool granting the legislatures the final word in constitutional matters, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 18–42; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) 97–129.

[8] CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* 1995 PD 49(4) 221 (*United Mizrahi Bank*), http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

[9] The 1992 Basic Laws include a limitation clause requiring any statute that infringes their provisions to pass muster under the following four-part cumulative substantive test: (1) the conflicting provision must be in a statute or authorised by a statute; (2) the infringement must be compatible with the values of a Jewish and democratic state; (3) it must be done for a proper purpose; and (4) it must be proportional: Basic Law: Human Dignity and Liberty, 1992 (Israel), s 8; Basic Law: Freedom of Occupation (n 3) s 4, as amended.

[10] HCJ 148/73 *Kniel v Minister of Justice* 1973 PD 27(1) 794, 795; HCJ 60/77 *Ressler v The Chair of the Central Elections to the Knesset Committee* 1977 PD 31(2) 556, 560.

[11] Jonathan Lis, 'Bill Allowing Knesset to Override High Court Goes to Cabinet', *Ha'aretz*, 21 October 2014, http://www.haaretz.com/news/.premium-1.621861.

[12] HCJ 7146/12 *Adam v The Knesset* (unpublished, 16 September 2013); HCJ 8425/13 *Eitan – Israeli Immigration Policy v The Government of Israel* (unpublished, 22 September 2014); HCJ 8665/14 *Dasta v The Knesset* (unpublished, 11 August 2015). The statute governing illegal entrants was first struck down for infringing too greatly the illegal entrants' right to freedom because the statute enabled the administration to hold them in detention for up to three years. After the legislature amended the statute to enable their detention for up to a year and then authorising the administration to hold them indefinitely in open guarded places, the Court struck down the one-year detention as too long, as well as the open guarded places for being, inter alia, unlimited in duration. In the third decision, the Court struck down the provision that still enabled the holding of illegal entrants in open guarded places for up to 20 months.

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This process of ping-pong between the branches of government and the repeated striking down of revised law to meet constitutional standards has prompted the government to consider the enactment of a general override clause that would remove the Supreme Court's interference in its immigration policy.[13]

The override mechanism has sometimes been offered outside this heated political climate in which the focus is a resistance to the rise of judicial power. The override appeared in numerous drafts of Basic Law: Legislation as part of a compromise that would lead to the acceptance, and even finalisation, of the constitutional revolution. Under the various drafts, the Knesset would explicitly recognise the judicial power to invalidate laws, set a more arduous track for amendment of current Basic Laws, and be granted a general override power.[14] So far, there is no consensus for the adoption of Basic Law: Legislation, either within or outside the Knesset. All sides are unwilling to end the controversy over the constitutional revolution.

This article argues that the portrayal of the override as a Canadian creation, alien to Israeli law, which is intended solely to enable the legislature to meddle with judicial power is inaccurate. Rather, this article suggests that we distinguish between two kinds of override: a general *common law override* and a *sunset override*. The *common law override* was developed through judicial decisions as a means by which the courts in various countries require the legislature to take explicit responsibility for an action or refrain from it. Under the common law override, we may connect divergent phenomena. This article traces the various uses of the common law override in Israel. The common law override has become embedded in the traditions of parliamentary sovereignty as a means to protect individual rights by requiring representative bodies attempting to infringe such rights to do so transparently. It later became a tool to override procedurally or substantively entrenched Basic Laws, as well as regular law. The override has also been used as a tool to require the legislature to explicitly take responsibility for delegating acts of legislation to the executive branch.

In contrast, the *sunset override* in Israeli law is the result of Canadian influence, which itself has roots in common law. This is why the title of section 33 of the Charter of Fundamental Rights and Freedoms, which provides for the override, is titled 'Exception Where Express Declaration'.[15] This title reflects the common law roots of the Canadian override by which Parliament is sovereign to explicitly repeal rights. The sunset override, in contrast to its common law counterpart, must be explicitly stated in the Constitution (or Basic Laws), and its power must be limited in duration. Only its sunset characteristic transforms it into a mechanism of infringement rather than one of amendment.[16] The relationship between these two kinds of override has

[13] Moran Azulay, 'Ministers Approve Bill to Override High Court', *Ynet*, 26 October 2014, http://www.ynetnews.com/articles/0,7340,L-4584500,00.html.

[14] Draft Basic Law: Legislation, prepared by the Ne'eman Committee in 2004: https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CDUQFjACahUKEwjbtM7Yy93IAhUEzRQKHZYyCik&url=http://%3A%2F%2Fmain.knesset.gov.il%2FActivity%2FConstitution%2FDocuments%2FH25-03-2004_9-27-09_hakika.doc&usg=AFQjCNFDsBJcG5YNqBWWQg5qR1lo2IxFJQ.

[15] Constitution Act 1982 (n 2) s 33.

[16] See Sections 3 and 10 below.

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never been fully explored by either the judiciary or the legislative branch;[17] nor has it been considered by Israeli academia.[18]

This article provides an innovative taxonomy of the different kinds and uses of the override. It explores the historical and theoretical relationships between the common law and sunset overrides. It should be emphasised that the override mechanism in either manifestation does not reflect the Court's technique to avoid deciding an issue. Rather, the override limits the Court's judicial power at most to extracting a political price from the legislature when it overrides a constitutional protection. Once the legislature explicitly declares its will, its will prevails.

No less than that, however, this article makes a normative argument about the fitness of the override with a constitutional system. It is often argued that the Canadian override fell into disuse because of Quebec's infamous exploitation of it. Its controversial uses by Quebec turned the override into an illegitimate tool in the Canadian political culture.[19] Now, given that the tool has been utilised in illegitimate ways elsewhere, Israeli society should have understood that the override mechanism would lend itself to misuse in Israel as well. That is in fact what happened: the sunset override emerged in Israel as part of a political exchange deal of 'support for peace' for 'maintenance of the religious status quo'. This equation should have led the public to distrust the mechanism, but this article argues that it is not past misuses of the tool that may lead to its dormancy in a constitutional system. Rather, it is the tool's compatibility or incompatibility with the constitution-making process of a given country that determines whether the tool will be utilised.[20]

Israel's constitution-making process involved the legislature alone,[21] while Canada's Charter was based on popular sovereignty. Thus, the override mechanism is a natural development of the Israeli constitutional system and takes on different forms within it. From a normative perspective, it is easier for the Israeli legislature to override its own prior enactments, even when titled 'Basic Laws', than it is for the Canadian legislature to override the People's enactment of the Charter.

This is why it should be expected that Israel might more freely deploy the sunset override were it to become a general mechanism embodied in the Basic Laws while, in contrast, the sunset override has fallen into disuse in Canada. Obviously, the use of the override lessens the protection of constitutional rights within a constitutional system and grants the last say in constitutional matters to the legislature. Thus, to make the override incompatible with Israel's democratic

[17] For Justice Cheshin's unique opinion regarding the override in the *United Mizrahi Bank* decision (n 8), see Section 4 below.

[18] A discussion of the existence of the override during Israel's founding period with regard to s 4 Basic Law: The Knesset may be found in Rivka Weill, 'Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power' (2012) 39 *Hastings Constitutional Law Quarterly* 457.

[19] eg, Adam Dodek, 'The Canadian Override: Constitutional Model or *Bête Noire* of Constitutional Politics?' (2016) 49 *Israel Law Review* 45.

[20] For a discussion of the connection between constitution making and strength of judicial review, see Rivka Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making' (2014) 62 *American Journal of Comparative Law* 127; cf Gardbaum (n 7); Tushnet (n 7).

[21] In support of this argument, see Rivka Weill, 'Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care' (2012) 30 *Berkeley Journal of International Law* 349.

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system, and enhance the chances that it is not used even if adopted as a general tool, the country must embark on an all-inclusive process of adopting a Constitution with popular consent. Until then, the override will be a better fit with the Israeli than with the Canadian constitutional system.

2. The Common Law Override as a Curtailment of Administrative Action

Israel's founding period (1948–92) preceded the enactment of the 1992 Basic Laws addressing individual rights. During that period, the courts treated Israel's legislature as sovereign.[22] Nevertheless, the Supreme Court developed a common law interpretive constitution, by which the Court inferred in every statute an overarching objective to protect individual rights and promote the basic values of the legal system, in addition to the statute's specific subjective legislative purpose. By interpreting statutes purposively – and even against legislative intent – the Court could best protect individual rights. If the legislature wanted to authorise the administrative branches to infringe these basic rights, the Court required it to do so *explicitly*. Otherwise the Court would interpret the statute to align with individual rights, and any administrative action to the contrary would be abolished as ultra vires.[23] By both adopting purposive interpretation and treating it as an exclusive interpretation theory early in the development of Israeli case law, the common law override doctrine could become a uniquely powerful tool in the hands of the Israeli courts even in comparative terms.[24]

This common law override doctrine is still applicable today, even after the constitutional revolution, when an administrative body attempts to infringe individual rights that are not protected by the Basic Laws and thus are not treated as of a constitutional nature. Their infringement nonetheless requires an explicit grant of authority to the administrative branches.[25] It should be emphasised that this common law override doctrine goes beyond the requirement that administrative action be proscribed by law to meet rule of law requirements. The doctrine requires *explicit* proscription by law.

Fascinating examples of this common law override doctrine arose in 1949 and again in the 1980s, and involved protecting the freedom of occupation of dealers who had established

[22] eg, CA 450/70 *Rogozinski v The State of Israel* 1971 PD 26(1) 129. In that case, a Jewish couple who wished to be wed in a civil ceremony, rather than according to Jewish law, claimed that the 1953 statute imposing Jewish religious law on every marriage and divorce of Jewish Israeli citizens and inhabitants infringed their right of freedom *from* religion. The Court denied their petition because individual rights, even if embodied in the Declaration of Independence, could not prevail over explicit conflicting statutes.

[23] eg, HCJ 1/49 *Bezerano v Minister of Police* 1949 PD 2 80; HCJ 262/62 *Peretz v Head of Local Municipality Kfar Shemaryahu* 1962 PD 16 2101; HCJ 337/81 *Miterani v Minister of Transportation* 1983 PD 37(3) 337.

[24] To this day there are ongoing hot debates among the judiciary in various common law countries regarding the legitimacy of purposive interpretation: Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997). This is not true of Israel, which has uniformly adopted purposive interpretation as the only legitimate interpretation method for its judiciary.

[25] With regard to infringement of constitutional rights, the requirement that the legislature should explicitly authorise the administrative branches to infringe rights arises from the requirements of the limitation clause in the Basic Laws. Furthermore, the text of the limitation clause sets additional requirements for infringing constitutional rights and is not satisfied with explicit authorisation alone. See discussion in Section 4 below.

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connections with the administrative agency that issued licences for vehicles. These dealers would charge car owners for handling the licensing process for them. They would exploit their connections with the administration to process the licences quickly while those who did not use their services would be subject to long waiting periods before the administration handled their request. When the administration tried to halt this nepotism as inappropriate for a law-abiding administration, the Court required explicit authorisation from the legislature before infringing the freedom of occupation of those dealers.[26] The first decision to consider the subject, *Bezerano* in 1949, did not even base the result on the ultra vires doctrine. The justices recognised the existence of the common law right of freedom of occupation as prevailing over conflicting administrative action. The Court required an explicit legislative authorisation for administrative action as a precondition for infringing that common law right.[27]

The power of this common law override doctrine was not to abolish statutes which conflict with individual rights but contain no override language. Rather, it was to interpret those statutes narrowly, so as not to enable the administrative branches to infringe individual rights. The actions abolished by the courts would be administrative rather than legislative. If the legislature did explicitly authorise the infringement of rights, then its will would prevail as being consistent with parliamentary sovereignty. The explicit statutory authorisation to infringe rights would become a permanent feature of the statutory landscape unless the legislature decided to amend the authorising statute. There was no sunset mechanism that limited the duration of this type of derogation of rights, nor any numerical requirement as to the extent of the majority required of the legislature (beyond a simple majority) that could authorise the infringement of rights. The doctrine enabled the Court and the public to extract a political price of shaming from the legislature, possibly deterring the legislature from interfering with individual rights altogether. The idea was to ensure that such infringements were carried out intentionally rather than by mistake, and were tailored to the specific context of the case in question. By using explicit language, the legislature could preempt any judicial decision on the subject.

Requiring explicit legislative authorisation as a precondition for infringing rights by the bureaucracy is a powerful tool in the hands of the judiciary. By interpreting statutes as not containing an explicit authorisation, the courts were setting the agenda and forcing the legislature to take a second look at the matter at stake. The courts were creating a new status quo of lack of administrative authority to infringe rights. Legislative inertia worked in favour of rights.

3. THE COMMON LAW OVERRIDE AS A MEANS OF OVERCOMING PROCEDURALLY ENTRENCHED BASIC LAWS

A second type of common law override arose in the context of overcoming procedurally entrenched Basic Laws. By 'procedural entrenchment' I mean that the Basic Laws set a special amendment process, usually requiring a specified supermajority of the legislature to amend

[26] *Bezerano* (n 23); *Miterani* (n 23).
[27] *Bezerano* (n 23).

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them.[28] The common law override in this context meant that instead of abiding by the content of the entrenched Basic Law, the Knesset could explicitly deviate from that content while paying a political price for such action by exposing itself as not abiding by its own substantive pre-commitment to protect rights and values. However, if the Knesset deviated from the procedurally entrenched Basic Law without using explicit override language, the Court would invalidate the breaching statute.

The lack of the first common law override, detailed above, led to abolition of administrative action alone, while the lack of this second type of override led to abolition of legislative action. The former override deals with the relationship between the legislature and the administrative branches. The latter override deals with the relationship between an entrenching legislature and a later legislature breaching its former self-entrenchment. The former may be implemented by simple majorities of the legislature; the latter must be carried out with the specified majorities required in the procedural entrenchment.

During the founding era, the Supreme Court struck down four regular statutes for breaching section 4 of Basic Law: The Knesset, which requires, inter alia, that elections be conducted in an equal manner, giving no unfair advantage to an incumbent or a large political party over new or smaller parties.[29] This provision may be amended by a majority of Members of Knesset (MKs), which has been interpreted by the Court to mean an absolute majority (61 out of 120 MKs).[30] For each of the four statutes that breached the norm of equal elections, the Court presented the Knesset with the option of either abiding substantively by the equality requirement or amending it by an absolute majority of MKs. The Court declared that the statutes were defunct.[31]

Rather than amending the Basic Law, the Knesset typically re-enacted the breaching statutes, with absolute majorities, to include an override. The notwithstanding clause would typically be worded along these lines: 'To prevent any doubt, the following list of statutes enumerated therein (or type of statutes dealing with election laws) were effective and valid from the day they were published in the official registrar'.[32] In other words, the Knesset used override language in an omnibus fashion and by way of reference to guarantee the validity of numerous statutes. It further retroactively revalidated the breaching statutes, thus overturning the judicial decision, even in its applicability to the parties in the case at hand and foreclosing any future cases.[33]

[28] Usually the Knesset may amend laws by simple majority: Basic Law: The Knesset, 1958 (Israel), s 25. Most Basic Laws may be amended via simple majorities: Weill (n 18) 473–76.

[29] Basic Law: The Knesset, ibid, s 4 states: 'The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset', http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm.

[30] HCJ 98/69 *Bergman v Minister of Finance* 1969 PD 23(1) 693; an English translation is available in (1969) 4 *Israel Law Review* 559.

[31] ibid; HCJ 246/81 *Agudat Derech Eretz v Broadcasting Authority* 1981 PD 35(4) 1; HCJ 141/82 *Rubinstein v Chairman of the Knesset* 1983 PD 37(3) 141; HCJ 142/89 *Laor Movement v Chairman of the Knesset* 1990 PD 44(3) 529.

[32] Weill (n 18) 488.

[33] In three out of four cases – *Bergman* (n 30), *Agudat Derech Eretz* (n 31) and *Laor Movement* (n 31) – the Knesset circumvented the Court's exercise of judicial review by using retroactive revalidation of infringing statutes: ibid 495.

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MKs were fully cognisant of the effects of this technique. Some viewed these statutes as 'revalidation laws' or even statutes 'to circumvent the High Court of Justice'[34] – and the Court cooperated. The Court affirmed the retroactive application, allowing the override to overcome both the Basic Law and the Court's own decision. In fact, nine days after Basic Law: Human Dignity and Liberty was enacted, Justice Barak wrote that this retroactive revalidation technique was valid.[35]

This unique dialogue enabled the peculiar coexistence of parliamentary sovereignty with the power of judicial review to invalidate primary legislation. The override allowed MKs to merely pay lip service to the substance of the Basic Law, since the Court did not require of the Knesset that each infringing statute should individually override the entrenched Basic Law. Thus, there was no requirement that the override be implemented intentionally, after weighing up whether the override was justified in the context of each individual statute. The retroactive nature of the override also meant that there was no requirement to consider the breach of equal elections *a priori* but it could rather be done *ex post facto*, and as a matter of formality and process alone.

Interestingly, neither the Knesset nor the Court distinguished between amendment and infringement during this period; both treated them as one and the same. In all four cases, the Knesset did not truly amend the Basic Law by setting a new norm that elections need not be equal, but rather infringed this norm in specific elections. The Court, in turn, viewed the infringement as amounting to an attempt to amend the Basic Law and declared it invalid because the Knesset lacked the necessary absolute majority support. In this game of ping-pong, the Knesset responded by overriding the Basic Law by an absolute majority.

This confusion over the differences between override and amendment resulted from the circumstances that existed during the founding of the country. At that time, neither the Knesset nor the Court treated Basic Laws as amounting to a formal Constitution. Thus, they did not contemplate the Court's power of judicial review over primary legislation to protect the constitutional status of the Basic Laws. Instead, they both respected the entrenched nature of section 4 of Basic Law: The Knesset by requiring the Knesset to abide by the absolute majority requirement as a precondition for breaching the section.

Put differently, at that time both the Knesset and the Court missed the fundamental distinction between override and amendment, which forms part of the meaning of constitutional democracy. Override, like other infringement mechanisms such as proportionality, deals with the relationship between the regular legislature and the constitution-making body; it deals with the relationship between regular law and constitutional law. Its exercise represents the legislature's will to deviate from a constitutional text in a specific context without challenging the validity of the general constitutional norm in other contexts. Amendment, like the procedural entrenchment provision of section 4 of Basic Law: The Knesset, deals with the relationship between the body authorised to amend the Constitution and the original constitution-making body. Its exercise does not intend

[34] Parliamentary Debates, Basic Law: The Knesset Draft Law, 1 August 1990, 4972–73.
[35] HCJ 410/91 *Blum v Chairman of the Knesset* 1992 PD 46(2) 201 (affirming the validity of Basic Law: The Knesset, 1990 (Israel), amendment 11).

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to deviate from a constitutional norm in a specific context but rather expresses the will to rewrite the norm. It is a challenge to the very existence of the norm. Had the Court and the legislature understood this difference between amendment and override before the constitutional revolution – a distinction that is relevant only when there is a supreme Constitution to expound – they would have realised that the Knesset, in the four cases mentioned above, did not attempt to amend the Basic Law. Thus, no special majority was required for its action. The requirement for the Knesset to explicitly deviate from section 4 of Basic Law: The Knesset thus became a common law rather than a statutory requirement in those cases.

However, since the constitutional revolution that took place in the mid-1990s, the Court has raised doubts about how to infringe section 4 of Basic Law: The Knesset. To date, with regard to section 4, the Court has left unanswered the question of whether infringement is different from amendment and whether the Court should overrule previous contrary judicial decisions. It is still undecided, even after the *Gutman* decision of 2015,[36] whether section 4 allows the legislature to infringe its requirements using an override language with an absolute majority support of MKs, or whether section 4 implicitly contains a judicial limitation clause (reading a limitation clause into the Basic Law by the judiciary) and requires the infringing legislature to fulfil its requirements of proportionality. It is also possible that section 4 requires the fulfilling of either or both requirements (override and judicial limitation clause), as the Knesset chooses.[37]

This confusion results from the peculiar constitutional history of section 4 of Basic Law: The Knesset – the only Basic Law over which the Court exercised judicial review over primary legislation before the constitutional revolution. At that time the Court was not acquainted with the difference between amendment and infringement, the two being interchangeable in a system of parliamentary sovereignty. With regard to all other provisions of the Basic Laws, the Court now clearly distinguishes between how to amend and how to infringe a provision of the Constitution.[38]

4. The Common Law Override as a Means of Overcoming Substantive Entrenchment in Basic Laws

Both academic writings and judicial decisions have proposed a third type of common law override as a means of overcoming substantive entrenchment in the Basic Laws. While procedural entrenchment made the amendment process more arduous, substantive entrenchment set substantive criteria that infringing statutes must fulfil, primarily proportionality requirements. To date,

[36] HCJ 3166/14 *Gutman v The Attorney General* (unpublished, 12 March 2015) (dealing with the rise of the election threshold to 3.25% in Israel's proportional representation election method). The justices expressed various opinions regarding this issue in the decision.

[37] A judicial limitation clause requires the legislature to infringe rights proportionally, just like the requirements of the explicit limitation clauses of the 1992 Basic Laws. For the requirements of the explicit limitation clauses, see n 9. For discussion of how to infringe s 4 Basic Law: The Knesset, see Rivka Weill, 'Did the Lawmaker Shoot a Canon to Hit a Flea? On Proportionality in Law' (2012) 15 *Law and Business Journal* 337, 384–90.

[38] HCJ 1368/94 *Porat v Government of Israel* 1994 PD 57(5) 913.

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the Knesset has not used the common law override to overcome substantive entrenchment in Basic Laws. It lays dormant as a tool offered in obiter dicta in judicial decisions. Its dormancy might not be a coincidence, as it is highly questionable whether the override may be used in this way in Israel.

Under Justice Cheshin's minority opinion in *United Mizrahi Bank*, the Knesset retained its sovereignty even after the constitutional revolution. Justice Cheshin agreed, both in *United Mizrahi Bank* and in later decisions, to the exercise of judicial review over primary legislation, despite his belief that Israel lacks a formal supreme Constitution. He likens judicial review to a framework of accountability: the legislature may infringe substantive entrenchment provisions in Basic Laws as long as it does so explicitly. If there is no explicit override, the Court may declare the infringing statute invalid.[39]

According to Cheshin's approach, in order to adopt a formal Constitution there must be an act of the popular sovereign body – the People. Because Israel's Basic Laws were adopted with the involvement of the legislature alone, the Israeli courts may exercise judicial review only under a 'manner and form' theory. 'Manner and form' allows the courts to review only the procedures by which the legislature enacts laws. As an artificial body composed of numerous members, the rules governing legislative processes, as well as the legislature's composition and membership, cannot logically be part of sovereignty and therefore free from external review. Thus, Parliament may de facto restrict itself procedurally by setting a more arduous or a different track for legislation. Once it has done so, if Parliament later tries to violate the predefined manner and form of the procedure, the Court may exercise judicial review to strike down the enactment. Parliament may change the rules that govern its procedures, as long as it follows predefined processes.[40] According to this theory, Parliament's sovereignty applies to the content, but not the process, of its enactments. Parliament is sovereign when it enacts norms that govern others, but may be restricted with regard to the rules governing its own conduct.

What kinds of procedural limitation are possible? The legislature might entrench statutes (regular or 'Basic'), as long as this entrenchment does not violate the democratic principle of majority rule. In this way the legislature remains sovereign and arguably does not truly bind its successors. In other words, rather than create true entrenchment, the legislature may set attendance or quorum requirements. The legislature may, for example, require the support of an absolute majority before an enactment is changed, or mandate explicit repeal or override of statutes. Statutory repeal requiring a supermajority of members of Parliament would accordingly be interpreted to require an absolute majority. In this way, the legislature's intent to tighten the requirements for repeal would be respected without defying majority rule.[41]

Arguably this theory is no longer plausible in the Israeli context (assuming it ever was). The Israeli Supreme Court has repeatedly struck down statutes based on the limitation clause found in Basic Law: Human Dignity and Liberty, which is a substantive entrenchment clause. A theory

[39] *United Mizrahi Bank* (n 8) 530–67 (Justice Cheshin).
[40] ibid 530–35 (Justice Cheshin).
[41] ibid 535–44 (Justice Cheshin).

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which allows only procedural, rather than content-based, limitations on the legislature – on the grounds that the latter negate the legislature's sovereignty – should not have potential explanatory force.

The answer to this challenge is that under 'manner and form', the legislature may also substantively entrench statutes; however, substantive entrenchment has a unique meaning in this context. Under 'manner and form' theory, substantive entrenchment presents the legislature with a choice: either abide by the substantive entrenchment or explicitly violate it (by explicit repeal or override), assuming public responsibility for those actions. Every substantive entrenchment would thus be translated into a procedural 'manner and form' requirement by preventing the legislature from unintentionally or implicitly repealing or overriding entrenched statutes. Only an intentional public act, with the legislature held publicly accountable for its actions, would validate the statute – in accordance with the theory that earlier statutes cannot bind a sovereign body.[42]

So far, Israel's legislature has not attempted to explicitly override Basic Law: Human Dignity and Liberty. We thus do not have a response from the Court to such a move. Israel has not yet seen the test case that would demonstrate whether this 'manner and form' theory is still plausible in the Israeli context. There is, however, support for such a theory in the Court's treatment of substantive entrenchment in regular statutes, as discussed below. Moreover, Israel is coming very close to testing this theory with regard to its treatment of illegal entrants seeking to be recognised as refugees – a policy that has been invalidated for the third time by the Israeli Supreme Court.

Of course, Cheshin's willingness to allow explicit override of substantive entrenchment provisions in the Basic Laws was not shared by the other justices in *United Mizrahi Bank*. In fact, for Barak, an explicit override of substantive entrenchment provisions would only have assisted the Court in invalidating the breaching statute. If the Knesset itself recognised that the statute is unconstitutional by including an override language, then why should the Court disagree?

However, Cheshin's theory has more support than meets the eye. When the Knesset enacted the 1992 Basic Laws, it intended to include procedural entrenchment in both. The common understanding at the time, shared by legislators, judges and academics, was that to enable judicial review over primary legislation in Israel, the Basic Law must be procedurally entrenched. This was true of section 4 of Basic Law: The Knesset, which served as the only example of the exercise of judicial review over primary legislation in Israel prior to the constitutional revolution. The draft of Basic Law: Human Dignity and Liberty thus required an absolute majority to amend the Basic Law. Alas, at the second reading in a recount of the vote, MK Charlie Biton changed his mind and voted against including procedural entrenchment in the Basic Law.[43]

The literature between 1992 (when the Basic Law was enacted) and 1995 (when *United Mizrahi Bank* was decided) ferociously discussed the meaning of the fact that Basic Law:

[42] ibid 551–63 (Justice Cheshin).
[43] Judith Karp, 'Basic Law: Human Dignity and Liberty: A Biography of Power Struggles' (1993) 1 *Mishpat Umimshal* [*Law and Government*] 323, 344 fn 78 (in Hebrew).

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Human Dignity and Liberty was not procedurally entrenched. Justice Barak, for example, wrote on the subject, suggesting that two routes are possible. One route is to require the Knesset to explicitly deviate from Basic Law: Human Dignity and Liberty. The lack of explicit repeal would enable the judiciary to invalidate the statute.[44] This route is actually Justice Cheshin's route in *United Mizrahi Bank*. The other route, Barak wrote, was to shift from judicial review based on procedural entrenchment to judicial review that is also based on substantive entrenchment. Thus, explicit repeal would not suffice and the Knesset would have to either abide by the substantive entrenchment or amend the Basic Law.[45] Barak ultimately opted for the second option in *United Mizrahi Bank*. However, between the enactment of the 1992 Basic Laws and *United Mizrahi Bank*, prestigious professors and justices, as well as high-ranking officials in the executive branch, expressed views similar to those of Justice Cheshin[46] – that is, that the Knesset may explicitly override Basic Law: Human Dignity and Liberty, and by doing so overcome the limitation clause with the proportionality requirement.

While Barak rejected Cheshin's approach in *United Mizrahi Bank*, even he suggested in the decision that when a Basic Law is silent regarding the means of infringement by regular statute, it implies that the means would be an explicit override. Without committing to a position, he acknowledged that a middle road might be necessary to distinguish the 'silent' Basic Law from a regular law, on the one hand, and from explicitly entrenched Basic Laws, on the other. If we allow implicit repeal of the silent Basic Law by ordinary law, then there is no difference between it and regular statutes. If we do not allow any infringement of the silent Basic Law by regular law, then we treat the silent Basic Law as more protected than an explicitly entrenched Basic Law. To resolve this dilemma, Barak suggested an explicit override as the means by which to infringe 'silent' Basic Laws using regular laws.[47]

One may argue, however, that these silent Basic Laws include substantive provisions that may be tantamount to a form of substantive entrenchment. Barak's opinion may thus be interpreted as suggesting an override as a means of overcoming substantive entrenchment in Basic Laws. In both judicial decisions and the literature, President Barak later opted to follow a different route to infringe silent Basic Laws by requiring the legislature to abide by a judicially imposed limitation clause. The Court has adopted this latter route in many decisions.[48] Nonetheless, this

[44] eg, Aharon Barak, 'The Constitutional Revolution: Protected Basic Rights' (1992) 1 *Mishpat Umimshal* [*Law and Government*] 9, 20–22 (in Hebrew); Aharon Barak, *Interpretation in Law: The General Theory* (Nevo Press 1992) 561–63 (in Hebrew).

[45] Barak, 'The Constitutional Revolution', ibid.

[46] eg, Karp (n 43) 380 (Judith Karp was the Vice Attorney General associated with the enactment of the 1992 Basic Laws); Menachem Elon, 'Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Personal Freedom' (1993) 17 *Iyuney Mishpat* [*Tel Aviv University Law Review*] 659, 662 (in Hebrew) (Vice-President of the Supreme Court at the time of writing his article); David Kretzmer, 'The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?' (1992) 26 *Israel Law Review* 238, 242 (Professor of Pubic Law at the Hebrew University).

[47] *United Mizrahi Bank* (n 8) 409 (President Barak).

[48] eg, HCJ 212/03 *Herut – The National Movement v Chairman of the Central Elections Commission to the Sixteenth Knesset* 2003 PD 57(1) 750; EA 92/03 *Mofaz v Chairman of the Central Elections Commission to the Sixteenth Knesset* 2003 PD 57(3) 793, 811.

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history does show how deep the roots of the override power in Israel are, even as means of overcoming substantive entrenchment in Basic Laws.

5. The Common Law Override as a Means of Overcoming Substantive Entrenchment in Regular Statutes

So far, I have examined the common law override in the context of protecting rights, or constitutional or semi-constitutional provisions.[49] However, the common law override arose in Israel in an additional context: that of overcoming purely regular law. Prior to the enactment of the 1992 Basic Laws, substantive entrenchment was relevant mainly to only a few regular statutes. The Woman's Equal Rights Law of 1951 provided, for example, that 'women and men shall be equal for purposes of every legal act; any legal provision which, for purposes of any legal act, discriminates against a woman because she is a woman shall not be complied with'.[50] Similarly, the Commodities and Services Control Law of 1957 provided that 'whenever a provision of this statute conflicts with the provision of any other law, the provision of this statute shall prevail'.[51] In both cases, the Court has interpreted these statutes as prevailing over conflicting *later* statutes, unless the later conflicting statutes included explicit override language.[52] Substantive entrenchment thus merely reversed the regular interpretation maxim that a later statute may impliedly repeal an earlier statute.[53]

As the requirement for explicit repeal came from the courts, it too may be classified as a form of common law override. Further, this type of dialogue between the Court and the legislature meant that the legislature had to use explicit language in the later statute if the legislature wanted to guarantee that the Court would allow it to override the substantive entrenchment of the earlier statute.

If the Woman's Equal Rights Law may be treated as quasi-constitutional in the sense that it deals with equality, the Commodities and Services Control Law aggrandises the power of the administrative branch and violates individual rights. Its justification is purportedly based on emergency necessity, but in fact it is frequently used outside the emergency context.

In recent years, the Court has discussed the status of substantive entrenchment in regular statutes. Specifically, it has focused on the relationship between a budget law and the 1985 Budget Principles Law. Section 3a of the Budget Principles Law requires that budget statutes

[49] Before the constitutional revolution, the Basic Laws dealt with constitutional issues, such as the division of power among branches of government, but they did not enjoy constitutional status. Thus, for example, s 4 Basic Law: The Knesset was a semi-constitutional provision during that period: Weill (n 18).

[50] Woman's Equal Rights Law, 1951 (Israel), s 1a(a). For a non-official translation, see http://financeisrael.mof.gov.il/FinanceIsrael/Docs/En/legislation/LaborSocialPolicy/5711-1951_Equal_Rights_for_Women_Law.pdf.

[51] Commodities and Services Control Law, 1957 (Israel), s 46(b).

[52] eg, HCJ 104/87 *Nevo v National Labour Court* 1990 PD 44(4) 749, 764 (regarding the Woman's Equal Rights Law); HCJ 256/88 *Medinvest Herzliya Medical Centre v CEO of Minister of Health* 1989 PD 44(1) 19, 42–46 (regarding the Commodities and Services Control Law).

[53] For the rationale of this maxim, see Karen Petroski, 'Retheorizing the Presumption against Implied Repeals' (2004) 92 *California Law Review* 487; Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982).

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apply equally to similar types of institution.[54] The Court treats this provision as a form of substantive entrenchment which requires budget statutes to conform to the norm of equality. Moreover, the entire Budget Principles Law is treated as a framework statute for regular annual budget statutes. Based on the substantive entrenchment of either the entire Budget Principles Law or solely its section 3(a), the Court may strike down a later conflicting provision of a regular budget statute.[55] In this context, too, Justice Cheshin has suggested that budget statutes may be able to explicitly override the Budget Principles Law.[56]

One may argue that we should understand this line of decisions not as a reflection of the entrenched nature of the Budget Principles Law, but as an indication of the unique legal status of budget statutes in Israeli law. Perhaps a budget statute should be viewed as inferior to regular statutes, because its content is not truly normative, making it easier for the Court to review budgetary statutes than regular enactments.[57]

The difficulty with this explanation is that in parliamentary systems (as distinguished from presidential systems), the budget is one of the main mechanisms by which parliament may express its confidence, or lack thereof, in the executive branch.[58] Thus, the Court's intervention in the application of the budget statute is actually more problematic than its intervention in other regular statutes. Such intervention may lead to a parliamentary crisis between the legislative and executive branches, which in turn can lead to a loss of parliamentary confidence in the government and dissolution of the government. This crisis might ultimately spur elections. The budget

[54] Budget Principles Law, 1985 (Israel), s 3a(d).

[55] In 2010, the Court found a provision in a budget statute to be invalid because it provided money to ultra-orthodox Yeshiva students who needed financial support, primarily because no similar stipend had been granted to students in the higher education system. The Court delayed the operation of its decision to the next budget year to allow the elected branches and the ultra-orthodox community to prepare for the change: HCJ 4124/00 *Yekutieli v Minister of Religious Affairs* 2010 PD 64(1) 142. The Court derived the annual budget's duty to treat similar positioned people alike from the Budget Principles Law, but, towards the end of its decision, the Court applied the substantive limitation test of the Basic Laws: ibid, President Beinish's opinion, paras 42–51. This limitation test is relevant only in the context of the Basic Laws and to protect their supremacy. Thus, it seems that, after all, the Court was undecided regarding the source of the duty to treat equally ultra-orthodox Yeshiva and higher education students: did it derive from the basic right to human dignity provided for in Basic Law: Human Dignity and Liberty, or from the Budget Principles Law? If the former, there was no need to rely on the substantive entrenchment nature of the Budget Principles Law. If the latter, there was no need to apply the Basic Law's substantive limitation test.

[56] HCJ 1438/98 *Conservative Movement v Minister of Religions* 1999 PD 53(5) 337. It should be clarified that even if, in some instances, one could derive the duty to allocate money equally to similarly positioned people from the constitutional right to human dignity, there are contexts in which the duty to allocate resources equally will not derive from this constitutional right and will thus have to rely on the substantive entrenchment provision of the Budget Principles Law alone. In such cases, the legislature will probably be able to explicitly override the equality provision of the Budget Principles Law, as provided in Justice Cheshin's *Conservative Movement* decision, ibid.

[57] It is more like an executive order than a statute. The budget law is also temporary in nature, applying to particular fiscal years: *Conservative Movement*, ibid 385–88.

[58] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text, Cases, and Materials* (6th edn, Cambridge University Press 2007) 567; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (12th edn, Pearson Education 1997) 218.

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is the means through which the executive puts its mandate into operation.[59] Thus, the better explanation for this line of decisions is that substantive entrenchment in a framework statute, like the Budget Principles Law, may be overcome by explicit repeal.

6. The Common Law Override as a Means of Overcoming the Non-Delegation Doctrine

Another use of the common law override is to overcome the presumption that the legislature does not intend to delegate legislative functions to the executive branch. The Supreme Court has defined Israeli democracy as one requiring, inter alia, that 'fundamental and material decisions in the life of its citizens be passed by the body elected by the people to make these decisions. The policy of society should be formulated by the legislative body'.[60] The Israeli Supreme Court developed the non-delegation doctrine by which certain decisions must be made by the Israeli legislature rather than by the executive branch. The Court developed criteria for identifying which decisions amount to primary arrangements and thus must be decided by the legislature. These criteria include whether the arrangements (i) have long-term effects on entire public sectors or even on society as a whole; (ii) are the subject of fierce public controversy; (iii) affect constitutional rights; and (iv) involve irreversible consequences.[61]

Utilising this doctrine, the Court has struck down certain regulations and government decisions, with the explanation that they were too important to be made by the executive branch and should have been decided instead by the Knesset. For example, the Court required the legislature to formulate primary arrangements regarding the deferral of army service to the ultra-orthodox community, thereby annulling the Defence Minister's decision on the matter.[62] However, if a statute *explicitly* authorised the executive branch to formulate primary arrangements, the Court would respect that decision. Some of the justices held that, if individual rights were at stake, the authorisation required would have to be more explicit than in other contexts.[63] Other justices held that the stringency of the explicitness required was a function of how primary was the arrangement at stake.[64] Thus, the Court requires an explicit provision to enable the legislature not to comply with the norm of the non-delegation doctrine.

[59] In fact, the House of Lords' rejection of the Budget Act 1909 in Britain led to a severe constitutional crisis and the enactment of the Parliament Act 1911, which curtailed the Lords' veto power with regard to the budget. The other branches of government could not accept that an unelected body, such as the Upper House, could intervene in the budget: Rivka Weill, 'We the British People' (2004) *Public Law* 380.

[60] HCJ 3267/97 *Rubinstein v Minister of Defense* 1998 PD 52(5) 481, 508 (President Barak, striking down the Minister of Defense directive to de facto exempt Yeshiva Students from serving in the army) (author's translation).

[61] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v Prime Minister of Israel* (unpublished, 27 February 2006), paras 37–40 (Vice-President Justice Cheshin), http://elyon1.court.gov.il/files_eng/03/630/111/a18/03111630.a18.htm; ibid 520–23.

[62] eg, *Rubinstein* (n 60) 490–531 (President Barak).

[63] HCJ 4491/13 *College of Law and Business v Government of Israel* (unpublished, 2 July 2014), para 26 (majority opinion written by President Grunis). The decision upheld the government's contentious decision regarding the export of natural gas.

[64] ibid, Justice Rubinstein minority opinion, para 11.

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The Court has not used the non-delegation doctrine to strike down a statute which grants too broad a discretion to the executive branch, although this may happen in the future.[65] Thus, instead of treating the non-delegation doctrine as a constitutional principle, its sting so far is confined to administrative law.[66] It strengthens the legislature in its relationship with the executive by requiring the executive to obtain explicit legislative authorisation to formulate primary arrangements.

7. THE BIRTH OF THE ISRAELI SUNSET OVERRIDE

A seemingly different kind of override that exists in Israeli law is the sunset override, which forms part of Basic Law: Freedom of Occupation.[67] This override mechanism allows the regular legislature to enact a statute notwithstanding Basic Law: Freedom of Occupation, provided the statute is passed by an absolute majority support of MKs and includes explicit override language. Unless a shorter duration is stated, this statute is in effect for four years – the term of the Knesset, unless it dissolves prematurely[68] – and will lapse thereafter.

A few features distinguish the common law from the sunset override. First, the common law override lasts until it is amended by the legislature. In contrast, the sunset override provided in the Basic Law intends that each new legislature should consider anew whether the override is justified.[69] Second, the possibility of using the sunset override must be explicit in the language of the Basic Law. It is not judge-made or implied, as is its common law counterpart. Third, the sunset override mechanism is a unique path for infringing Basic Law: Freedom of Occupation – and this Basic Law only.[70] The other common law mechanisms discussed so far are more general in nature.

The often repeated provenance of the sunset override mechanism is the Canadian override. The chair of the Constitution, Law and Justice Committee, MK David Zuker, has asserted that this override was moulded in light of the Canadian 'patent' or 'invention'.[71] By a majority of 67 to 9 MKs,[72] the Knesset replaced the original Basic Law: Freedom of Occupation, which was passed in 1992 with weak support,[73] with the 1994 version to incorporate this override mechanism and to enable the prohibition against imports of non-Kosher meat into

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[65] Weill (n 37) 409–10; Barak Medina, 'The Non-Delegation Doctrine – A Reply to Dotan and Sapir' (2012) 42 *Mishpatim* 449 (in Hebrew).

[66] Gideon Sapir, 'Non-Delegation' (2010) 32 *Iyuney Mishpat* [*Tel Aviv University Law Review*] 5 (in Hebrew); Yoav Dotan, 'Non-Delegation and the Revised Principle of Legality' (2012) 42 *Mishpatim* 379 (in Hebrew).

[67] Basic Law: Freedom of Occupation, 1994 (Israel), s 8.

[68] Basic Law: The Knesset, 1958 (Israel), s 8.

[69] Parliamentary Debates, Basic Law: Freedom of Occupation Draft Law, 9 March 1994, 5412 (MK David Zuker, opining that it should last for one term).

[70] HCJ 4676/94 *Meatrael Ltd v Knesset* 1996 PD 50(5) 15 (discussing when a statute which overrides Basic Law: Freedom of Occupation may be invalid under Basic Law: Human Dignity and Liberty).

[71] Parliamentary Debates, 9 March 1994 (n 69) 5412 (MK David Zuker).

[72] ibid 5439 (67 to 9 in last reading of Basic Law: Freedom of Occupation).

[73] Basic Law: Freedom of Occupation passed its first reading with a vote of 21 to 16, and the final reading was passed with the support of 23 MKs and none against; Basic Law: Human Dignity and Liberty passed its first reading with a vote of 40 to 12, and the final reading with the support of 32 MKs and 21 against: Amnon Rubinstein and Barak Medina, *The Constitutional Law in the State of Israel, Vol 2* (5th edn, Shocken 1996) 918.

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Israel.[74] The more significant majority of 1994 is said to have remedied the lack of a substantial majority in 1992 and demonstrated that the Knesset intentionally enacted the constitutional revolution which, among other things, granted the courts the power of judicial review over primary legislation.[75] In fact, some MKs argued in favour of this 'redemption story' during the passage of the Basic Law in 1994.[76] However, the actual story of the birth of the override is more complicated. Its common law origins also form part of the tale.

The Knesset enacted the two Basic Laws governing individual rights in March 1992, three months before holding general elections, during a legislative 'lame duck' period which suffered from the typical legitimacy problems attendant on such transitions of power.[77] While the Harrari Resolution orders that the Knesset's Constitution, Law and Justice Committee propose Basic Laws, the 1992 Basic Laws were initiated by private MKs – chief among them MK Amnon Rubinstein. At the time, Likud was the ruling party.[78] In the ensuing elections, the Labour party won for the first time since its defeat in 1977. Its leader, Yitzhak Rabin, created a coalition of 'strange bedfellows' with Shas, a religious right-wing party, and Meretz, a left-wing liberal party. Soon thereafter, in 1993, Rabin – together with PLO leader, Yasser Arafat – adopted the Declaration of Principles on Interim Self-Government Arrangements.[79] The Knesset endorsed the Declaration of Principles on 23 September 1993 by a majority of 61 to 50. Shas left the coalition to protest against the move and abstained in the vote on the endorsement.[80] The government remained in power as a minority government, relying on the support of the Arab political parties that did not form part of the coalition.[81] Rabin recognised that it was critical for him to bring Shas back into the coalition in order to advance the peace process. So, where does the override clause fit into these events?

A month later, on 22 October 1993, the Israeli Supreme Court issued the famous controversial *Meatrael* decision, which dealt with the issue of non-Kosher meat imports into Israel.[82] It concerned a decision of the Rabin government of 8 September 1992 to privatise the importation of meat, which until then had been within the government's national security purview. The government did not foresee that privatisation might lead to imports of non-Kosher meat. Although consumers could buy non-Kosher meat in Israel even before the privatisation decision, many

[74] Tsvi Kahana, 'Majestic Constitutionalism? The Notwithstanding Mechanism in Israel', in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013) 73.
[75] Dan Meridor, 'Court Rulings in Light of the Basic Laws', in Chaya Herskovic (ed), *Constitutional Reform in Israel and its Implications – Conference Proceedings June 1994* (Stiftung 1995) 69, 70–71. See also Rubinstein and Medina (n 73) 915; Amnon Rubinstein, 'The Story of the Basic Laws' (2012) 14 *Law and Business* 79 (in Hebrew).
[76] Parliamentary Debates, 9 March 1994 (n 69) 5413 (MK Dan Meridor).
[77] Rivka Weill, 'Constitutional Transitions: The Role of Lame Ducks and Caretakers' (2011) *Utah Law Review* 1087.
[78] Karp (n 43) 338.
[79] Eyal Benvenisti, 'The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement' (1993) 4 *European Journal of International Law* 542.
[80] This majority was composed of Labour (44), Meretz (12) and Arab parties (5): Colin Shindler, *A History of Modern Israel* (2nd edn, Cambridge University Press 2013) 235–36.
[81] The Thirteenth Knesset, http://www.knesset.gov.il/review/ReviewPage.aspx?lng=3&kns=13.
[82] HCJ 3872/93 *Meatrael Ltd v Prime Minister and Minister of Religious Affairs* 1993 PD 47(5) 485.

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MKs feared that imports would make non-Kosher meat cheaper, thereby increasing its consumption by Jews.[83] To steer clear of earlier case law that limited the administrative branch to economic considerations when licensing imports (and excluding religious considerations), the government decided to freeze its administrative decision to privatise the importation of meat and replace it with a statute. The government believed that a statute would enable it to privatise while simultaneously prohibiting imports of non-Kosher meat. Meatrael petitioned against the government's decision to freeze the privatisation of meat imports while the statute was being enacted, on the grounds that the government had acted to protect religious concerns. The High Court of Justice accepted Meatrael's claim.

Typically, scholars state that the Knesset replaced Basic Law: Freedom of Occupation by adding an override clause, to circumvent the *Meatrael* decision.[84] This description portrays the override as a mechanism which enables the legislature to override the Court, but in fact the Knesset revised the Basic Law in accordance with the Court's advice in the case, as described below. The override thus emerged as a tool to override the Basic Law rather than to express disagreement with judicial interpretations of the Basic Laws.

The *Meatrael* Court decided that even a statute which prohibits the importation of non-Kosher meat might be invalid because it would not align with the limitation clause in Basic Law: Freedom of Occupation, 1992. The justices suggested that the Basic Law would need to be amended to include a 'notwithstanding' mechanism if the government wished to prohibit imports of non-Kosher meat.[85] Thus, the Court – the justices of which, both present and former, are the most vocal opponents of the adoption of a general override clause in the Basic Laws – introduced the idea of such an override in Israel.

Requiring the combination of amendment and override to enable the prohibition of importation of non-Kosher meat resulted from a lack of understanding of the difference between amendment and infringement of the Basic Laws. Both the Court and the legislature shared this confusion. While the judiciary confused the two in *Meatrael*, the legislature demonstrated its confusion in the phrasing of the original draft of December 1993 of Basic Law: Freedom of Occupation (Amendment). It stated that a law must not contradict this Basic Law unless it includes an explicit override.[86] Vice-President Aharon Barak responded to this draft in an open letter to the Chair of the Knesset's Constitution, Law and Justice Committee on 11 January 1994.[87] He instructed the Knesset on the difference between infringement and amendment, and explained why an override should be used only as means of infringing rather than amending the Basic Law.[88] Following his advice, the Knesset drafted a revised Basic Law:

[83] Parliamentary Debates, Basic Law: Freedom of Occupation Draft Amendment (An Alternative Draft), 15 February 1994, 4546 (MK Tamar Gozansky).
[84] eg, Kahana (n 74) 83.
[85] *Meatrael* (n 82) 497, 505 (Justice Or requiring explicit authorisation and amendment of the Basic Law), 514 (Justice Cheshin requiring explicit authorisation).
[86] Draft of Basic Law: Freedom of Occupation (Amendment), 1993 (Israel), s 2.
[87] For Barak's letter, see Aharon Barak, 'On the Amendments to Basic Law: Freedom of Occupation' (1994) 2 *Mishpat Umimshal* [*Law and Government*] 545 (in Hebrew).
[88] ibid 547.

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Freedom of Occupation, this time limiting the use of the override to cases of infringement of rights.[89] Thus, the judiciary – through both the *Meatrael* decision and Barak's letter – was directly involved in the phrasing of Basic Law: Freedom of Occupation, and the birth and legitimation of the Israeli sunset override.

The deal being hatched demanded Shas' support throughout the peace process in exchange for the Rabin government's protection of the status quo in religious matters, and not just in prohibitions against importing non-Kosher meat. The means used was the override. During the passage of the Basic Law in 1994, MKs accused the government of enacting this statute as a 'bribe' to Shas. Some condemned the deal, arguing that the Declaration of Principles and its implementation would lead to further loss of life.[90] Many argued that, by law, the quid pro quo coalition agreement should be made known to the Knesset and to the public before the vote on the Basic Law and the law on the prohibition of importation of non-Kosher meat.[91] The government's spokespeople denied the existence of this coalition agreement.[92]

There was another incentive for the Knesset to quickly amend Basic Law: Freedom of Occupation. The 1992 Basic Law contained a different sunset clause, which was set to expire in March 1994, and which preserved prior existing law.[93] A similar clause existed in Basic Law: Human Dignity and Liberty with no expiration date. The Knesset believed that, without a permanent preservation clause, the 1992 Basic Law: Human Dignity and Liberty posed a serious challenge to existing incompatible legislation, consisting primarily of laws dealing with security or religious matters. Even with that insight, it did not anticipate that Basic Law: Freedom of Occupation would pose a challenge to existing law. The Knesset intended within two years to survey and amend all existing law to conform with Basic Law: Freedom of Occupation. As March 1994 was approaching, advisers from the Justice Ministry alerted the Knesset that chaos would ensue if the validity of the preservation clause was not extended.

The 1994 Basic Law: Freedom of Occupation was adopted hastily, within less than a month.[94] Some MKs assumed wrongly that they were voting for the statute prohibiting the importation of non-Kosher meat rather than for the Basic Law.[95] Many of the most important provisions in the Basic Law were not included in the first reading. When they appeared in the second and third readings, many MKs were unaware of the changed content.[96] Both Prime Minister Rabin and Shas later 'discovered' that the Basic Law for which they voted declared that the rights

[89] Parliamentary Debates, 15 February 1994 (n 83) 4522 (Minister of Justice Libai quoting Barak during the second and third readings of Basic Law: Freedom of Occupation, 1994).
[90] Parliamentary Debates, 9 March 1994 (n 69) 5368–71.
[91] ibid 5358–62.
[92] ibid.
[93] It should be emphasised that this preservation clause has a sunset mechanism but it does not reflect an override mechanism. A provision within the Constitution can never override another provision in the Constitution; it may only amend it.
[94] The government publicised the draft of the Basic Law on 14 February 1994, and the Basic Law became law soon after, on 9 March 1994: Basic Law: Freedom of Occupation, 1994 (Israel).
[95] Ariel Bendor, 'Defects in the Enactment of Basic Laws' (1994) 2 *Mishpat Umimshal* [*Law and Government*] 443, 445–46 (in Hebrew).
[96] ibid 447.

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enumerated in it and in Basic Law: Human Dignity and Liberty would be respected in accordance with principles embodied in the Declaration of Independence, and they felt 'cheated'.[97] Both Shas and Rabin claimed they never intended to incorporate the principles of the Declaration of Independence into the Basic Laws. Shas never returned to the coalition, which defeated at least one purpose of the amendment of the Basic Law.[98] This history does not easily support the 'redemption' story that has been ascribed to the 1994 enactment. The enactment of the 1994 Basic Law: Freedom of Occupation, although passed by a majority of 58 MKs (67 to 9), does not attest to broad, deep, and decisive support for the Basic Laws.

8. What Lapses? The Statute or the Override?

The override clause in Basic Law: Freedom of Occupation differs from the Canadian version. When an Israeli override lapses after four years, the entire statute and the override become ineffective. In contrast, in Canada, even when an override provision lapses, the statute that embodied the override remains intact. With the lapse of the override, the statute is no longer immune from judicial review by the Court. The Canadian mechanism thus assumes that the legislature may be wrong in its belief that a statute needs an override provision. If so, the Court will make that determination and retain the validity of the statute, as has in fact happened in Canada.[99] The Canadian override mechanism expresses the idea that the Court and the legislature may have different interpretations of what is constitutional.

Ayelet Shaked, Minister of Justice during Netanyahu's fourth term as Prime Minister, promoted the idea of amending Basic Law: Human Dignity and Liberty to include a sunset override clause that will empower the Knesset to express disagreement with the Court's holding of constitutionality. She suggested that the judicial interpretation of constitutionality should not prevail over the legislature's interpretation of what is constitutional. This was her position before becoming Minister of Justice.[100] However, the assumption of the Israeli override clause, as exhibited in the current Basic Law: Freedom of Occupation, is different. The Basic Law assumes that if the Knesset uses an override then an override is required, and its lapse is an indication that the statute is unconstitutional and thus invalid. In contrast to the Canadian model, the Israeli override mechanism assumes that both bodies share the same view about the constitutionality of the statute.[101] If the legislature uses an override, the statute is definitely unconstitutional, but it is nonetheless

[97] Basic Law: Freedom of Occupation, 1994 (Israel), s 1; Basic Law: Human Dignity and Liberty, 1992 (Israel), s 1 (as amended).
[98] Rubinstein and Medina (n 73) 924.
[99] Dodek (n 19).
[100] Jonathan Lis, 'Bill Allowing Knesset to Override High Court Goes to Cabinet', *Ha'aretz*, 21 October 2014, http://www.haaretz.com/news/.premium-1.621861. Shaked is quoted as saying: 'The override clause doesn't give the legislature a "pass" from its obligation to obey the Basic Law's values'. It is intended to grant the Knesset 'the last word in the situation of a sincere and genuine disagreement over values between the public's elected representatives and the court. In this situation, there is no justification for preferring the judge's world of values to that of the public and its elected representatives'.
[101] It should be noted that MK Yitzhak Levi from the Mafdal wanted to clarify in the phrasing of the Basic Law that the override is of judicial interpretation of the Basic Law rather than an override of the Basic Law, but his

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effective for a limited duration. Thus, the current Israeli sunset override is a mechanism designed to allow deviation from the Basic Law, not to express disagreement with the Court's interpretation of the Basic Law. The Israeli sunset override mechanism creates a non-rebuttable presumption of unconstitutionality of the statute, using override semantics; in Canada, such a presumption is rebuttable.

While an override mechanism that enables the overriding of the Constitution may implicitly be read to allow override of judicial decisions interpreting the Constitution, the reverse may not be true.[102] That is, we may envision a mechanism that overrides the Court but not the Constitution.[103] Such an approach breaks the Court's identification with the Constitution. It assumes that no constituted body, not even the Court, should be identified with the constitution-making power. Israel opted for the stronger mechanism of granting the legislature the power to override the very Constitution – its Basic Laws. This stronger model obviously includes also the lesser power to override judicial decisions.

9. OVERRIDING THE COURT

The replacement of Basic Law: Freedom of Occupation did not suffice to bring Shas back to the coalition. Instead, Labour and Shas reached further understandings. The 'commodities' exchanged during the deal remained the same: support for the peace process in return for maintaining the religious status quo. The means devised also remained similar: an override. The two political parties signed a letter of understanding on 13 March 1994 – four days after the adoption of Basic Law: Freedom of Occupation – stating, inter alia, that 'if there is a deviation from the religious status quo, the parties are committing to mend the deviation by proper legislation'.[104]

The Court interpreted this coalition agreement to mean that the two political parties had precommitted in an omnibus fashion to override by legislation any judicial decision that deviated from the religious status quo. It viewed the agreement as an attempt to threaten the Court not to deviate from the religious status quo because any attempt to do so would be futile. In the words of Vice-President Barak, 'every judicial decision that deviates from the constitutional status quo becomes the "poison pill" that destroys itself'.[105] Such judicial decision would automatically initiate the legislative override process to undo the decision. This is an implied threat to affect judicial independence by making the judges consider the threat rather than the law

comment did not materialise to affect the phrasing of the Basic Law: 'Parliamentary Debates', 9 March 1994 (n 69) 5372.

[102] Even if the Constitution contains an override clause, the political actors should not be able to overturn a judicial decision as it pertains to the parties to the case. Such an intervention would be against separation of powers and threaten the independence of the Court; however, they should be able to overrule the precedential nature of the decision with regard to future cases.

[103] These are the framework statutes identified by Bruce Ackerman in his *We the People* trilogy (Harvard University Press 1991); for discussion see Rivka Weill, 'Constitutional Statutes or Overriding the Court' (forthcoming) *Jerusalem Review of Legal Studies*.

[104] HCJ 5364/94 *Velner v Chair of the Israeli Labour Party* 1995 PD 49(1) 758, 771 (President Shamgar).

[105] ibid 787 (Vice-President Barak).

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regarding religious matters. The Court treated this agreement as an attempt to break public faith in the judicial system. In the words of Barak, '[w]ho will go to a doctor whose patients die one after the other?'.[106]

The justices held that the agreement infringed basic principles of separation of powers because it violated the proper dialogue that should exist between the branches of government.[107] The legislature may decide to overturn a specific judicial decision, but it must not pre-commit to an omnibus override of judicial decisions. There must be a process by which decisions are examined on their own merits. A proper constitutional dialogue requires the Court to justify its decisions and the legislature must listen to that justification before deciding whether to overrule it by proper legislation. Even then, the legislature should not be able to interfere retroactively with the applicability of the decision between the parties to the case. The legislature may override the decision only as it pertains to future cases – for example, regarding its precedential nature.

One of the prominent examples weighing on the justices was the *Bavli* decision of 7 February 1994, in which the High Court of Justice ordered the Rabbinical Courts to default to a presumption that couples are equal owners of their property. The coalition agreement would negate this decision and others like it, which are necessary for democratic notions of equality.[108]

Despite the harsh criticism against the coalition agreement, the Court refrained from invalidating it by a majority of three to two, with Vice-President Barak in the minority. With his swing vote, Justice Goldberg agreed with the harsh criticism of the minority but decided to refrain from invalidating the coalition agreement only because the judicial branch had self-interest in the result of the decision. He believed that invalidating the agreement would injure public faith in the judiciary more than a result which abstained from intervention.[109] To express the justices' disdain for the mechanism set in the coalition agreement, the *Velner* decision coined the term 'a statute to override (or circumvent) the High Court of Justice'.[110]

10. ON THE DELICATE RELATIONSHIP BETWEEN THE OVERRIDE AND CONSTITUTIONAL AMENDMENT

In Canada, a simple majority of the legislature of either the province or the federation is all that is needed to exercise the override power.[111] Amending the Charter requires a majority in each house of the federal assembly and a majority in the legislative assemblies of at least two-thirds of the provinces that represent at least 50 per cent of the total population of all the provinces.[112] Thus, it

[106] ibid 789 (Vice-President Barak).
[107] ibid 778 (President Shamgar), 790–92 (Vice-President Barak).
[108] ibid 777 (President Shamgar). HCJ 1000/92 *Bavli v The High Rabbinical Court* 1994 PD 48(2) 221.
[109] *Velner* (n 104) 811 (Justice Goldberg).
[110] ibid 784 (Vice-President Barak), 812 (Justice Or). Barak even viewed the agreement as circumventing democracy. The term first appears in the letter from Minister of Justice David Libai to the Attorney General expressing dismay with the agreement: ibid 811.
[111] Constitution Act 1982 (UK) (n 2).
[112] ibid s 38. An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorised by (a) resolutions of the Senate and House of

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is far more difficult to amend than to override the Canadian Charter. The Canadian legislature needs the override if it is to have the last say in constitutional matters.

In contrast, exercise of the sunset override in Israel requires only the support of an absolute majority of the Knesset – the same majority required to amend Basic Law: Freedom of Occupation – but the override is statutory while amendments of the Basic Law must be accomplished by an enactment titled 'Basic Law'. The override is temporary; only an amendment becomes a permanent feature of the Constitution. The Knesset is empowered to both override *and* amend the Basic Law. Supposedly, the override constitutes an exercise of legislative function, and the amendment represents an exercise of constituent power.

Because it is so easy to amend Basic Laws by merely giving the right title to the enactment ('Basic Law' rather than 'Law' alone), some have suggested that there is no place for an override power in Israel. Notably, most Basic Laws may be amended by simple legislative majorities.[113] The legislature may thus have the last word in constitutional issues simply by amending the Constitution. These scholars thus argue that any deviation from the Constitution should be performed via amendment alone. The amendment itself may express a transitory provision that lapses after a certain period. If an amendment were the only way to circumvent the Constitution, then the legislature might refrain from deviating altogether. This is so, because the political price exacted is greater when amending than is the case when simply overriding the Constitution.[114]

Others have suggested that a general sunset override power in Israel should make the override more difficult to exercise than amending the Constitution. Thus, the majority required to exercise an override should be at least 65 or 70 MKs – a much greater majority than the minimum majority of 61 MKs typically brought together by any Israeli coalition agreement to form a government.[115]

My argument is different. I treat the constitutional amendment power on a par with the original constitution-making power. The same body in charge of originating the Constitution should be in charge of amending the Constitution.[116] In Canada, both the constitution-making and constitution-amending powers are entrusted to the Canadian People, not the legislature. In contrast, in Israel, both powers are entrusted to the legislature.[117] Of the two powers to override and amend the Constitution, only the override power, by its very nature, must be entrusted to the legislature, as is the case in both Canada and Israel. This is so, since the body that can make or amend the Constitution may mould the provisions to its liking.[118]

Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50% of the population of all the provinces.

[113] Weill (n 18) 471.

[114] Kahana (n 74) 83–90.

[115] Bob (n 4) (discussing these opinions).

[116] Rivka Weill, 'Shouldn't We Seek the People's Consent? On the Nexus Between the Procedures of Adoption and Amendment of Israel's Constitution' (2007) 10 *Mishpat Umimshal* [*Law and Government*] 449 (in Hebrew); Weill (n 20).

[117] Weill (n 21).

[118] Unless the system is committed to a foundationalist theory: Weill (n 20).

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The override power does not attempt to rewrite the content of the Constitution. It merely deviates from its provisions, or from a related judicial interpretation, for a limited duration in a specific context. To preserve the Constitution as an ageless document, the number of amendments and the duration of deviation should both be restricted. Only when the same topic has been overridden multiple times can it be argued that there is a de facto constitutional amendment. Thus, repeated use of the override in a specific context after a certain period becomes unconstitutional. The courts should require the 'chronic deviator' to do so via constitutional amendment. This should be the case in both Israel and Canada. However, the override should not become more difficult to achieve than an amendment, to avoid incentivising the legislature to choose the amendment option first.

Further, a constitutional system should not require supermajority support of legislators as a precondition for exercising the override power. The override arose against the backdrop of parliamentary sovereignty to enable the legislature to have the last say in constitutional matters for a limited time period. Requiring legislative supermajority support goes against this tradition of parliamentary sovereignty and denies the parliamentary majority the power to decide. This is why, in Canada, the legislature may exercise the override power by simple majority, and why, so far, Israel does not require more than absolute legislative majority to exercise its sunset override provision.

In fact, Israel's experience with the meat crisis exhibits this understanding of the override. At first, within six days of the enactment of Basic Law: Freedom of Occupation of 1994, the legislature enacted the Importation of Frozen Meat Law containing 'notwithstanding' language.[119] Four years later – after gaining experience with the sunset override and remaining committed to the prohibition on importation of non-Kosher meat – the Knesset amended Basic Law: Freedom of Occupation to enable the prohibition to become a permanent fixture of the Constitution.

The Knesset tried to obscure its goal in 1998 when phrasing a constitutional amendment to make the Meat Law permanent. In that sense, the Knesset did try to grant the Constitution a 'majestic' style.[120] However, I reject the stronger contention that the override mechanism itself was born in 1994 to enable this camouflage.[121] As I have shown, the override is derived from the judicial decision in *Meatrael,* and it represents an evolution from the common law override. It arose out of the confusion between how to deviate from and how to amend the Constitution.

This confusion between infringement and amendment was so prevalent during the enactment of Basic Law: Freedom of Occupation in 1994 that the Basic Law's own constitutionality was put to trial before the Court. The petition suggested that the entire Basic Law was unconstitutional for infringing the limitation clause of Basic Law: Freedom of Occupation from 1992. The Court dismissed the petition, explaining that infringement, which is performed by the regular legislature,

[119] Importation of Frozen Meat Law, 1994 (Israel). Within a week, the Knesset had replaced this law with the Meat and Meat Products Law, 1994 (Israel), which removed the restricted definition of frozen meat.
[120] Kahana (n 74) 80.
[121] ibid 73–90.

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should meet the limitation or override tests, while amendment is carried out by the legislature as a constituent assembly and need only meet the test of rigidity (typically a procedural test – the title of 'Basic Law' and sometimes also with a low threshold of majority support).[122]

11. Compatibility of the Override with the Constitutional System

The nexus between the override and constitution-making (including amendment) power is deeper than that. It is often asserted that the Canadian override fell into disuse because of the abusive way in which it was used historically. These abhorrent precedents led to a general disdain towards the override by the public. The override was viewed as illegitimate and unethical. In a sense, the idea of the override – to deter the legislature by shaming it into refraining from infringing rights – succeeded; it is rarely used in Canada.[123]

The birth of the Israeli sunset override may also be viewed as tainted. In fact, Barak uses the term 'poison pill', derived from the *Velner* decision, to denounce the proposal for a general sunset override power in Israel.[124] Further, the override was the price paid for trading the peace process for religious status quo. In addition, in both Canada and Israel, the minority – whether Quebec or the ultra-orthodox religious political party, Shas – utilised the override to circumvent the majority will. Should we thus anticipate that the Israeli sunset override will fall into disuse, even if adopted as a general mechanism applicable to all Basic Laws? Some have suggested that not only will Israel refrain from applying the override, but its existence will ease the Court's work by legitimising its decisions to invalidate certain statutes.[125] In that sense, the message conveyed by judicial invalidation of statutes might become a challenge to the legislature: if the legislature disagrees with the Court, it may override. In this way, no harm would be done by the judicial decision.

I argue otherwise. It is not the precedential uses of the override, but the compatibility of the override with the constitution-making (including amendment) process that determines whether it will be used in a given system. The override technique aligns with *parliamentary* sovereignty systems and is foreign to a *popular* sovereignty approach. We should expect override techniques to emerge in parliamentary sovereignty systems, even absent a text. The reverse is also true: were a popular sovereignty system to explicitly embody an override technique, we should expect that this technique would not be utilised.

[122] *Porat* (n 38).
[123] In Canada, the override clause largely fell into desuetude because of Quebec's abuse of it in the *Ford* case (*Ford v Quebec (Attorney General)* [1988] 2 SCR 712). This caused widespread resentment against the override power in the other provinces and at the federal level: Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75, 83 ('In practice, section 33 has become relatively unimportant, because of the development of a political climate of resistance to its use').
[124] Bob (n 4).
[125] Barak Medina, 'The Law Recognizes the Constitution', *Ha'aretz*, 15 April 2012, http://www.haaretz.co.il/opinions/1.1685748.

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Why is that so? As I have shown, the 'manner and form' model implies a 'notwithstanding' technique, even if the Constitution does not contain an explicit clause to this effect. Under 'manner and form', any limitation (substantive entrenchment) clause may be translated into a procedural clause, which allows parliament to *explicitly* depart from it. The override clause is implicit in a system of manner and form, and allows the system to be faithful to majority rule. This is also why exercising notwithstanding powers usually requires a bare majority or an absolute majority.

In contrast, under the popular sovereignty model, the legislature should not be able to override the will of the People by simply declaring its intention to do so. This should be true regardless of whether the constitutional text contains an explicit override clause.[126] If the Constitution lacks an explicit override mechanism and the legislature explicitly overrides, breaching substantive entrenchment provisions, this will prompt the courts in deciding the unconstitutionality of the breaching statute. If the legislature itself declared that it did not fulfil the requirements of substantive entrenchment, why should the courts hold otherwise?

However, the argument is stronger than that. Even if the Constitution included an explicit override mechanism, the result should remain the same. The People's consent to an override mechanism in the Canadian Charter, to be used in a specific context, is incompatible with a popular sovereignty Constitution if its exercise requires only a simple legislative majority. Simple legislative majorities should not be able to overcome the popular will as embodied in the content of the Constitution.

These theoretical differences manifest themselves in various constitutional systems. In Canada, for example, the notwithstanding clause fell into disuse, and politicians often treat it as illegitimate – but not because political actors are not playing their cards right, as suggested by Gardbaum,[127] and not because Quebec misused the override. Instead, the negative regard for the override clause in a popular sovereignty system, such as the Canadian system, can be explained by the inability to justify the 'notwithstanding' technique. The Canadian Charter was adopted as a result of a popular sovereignty process, which involved the consent of the federal parliament and all provincial premiers except for Quebec.[128] A simple majority of the legislature should not overcome 'We the Canadian People' enactments. It is no coincidence that the United States did not adopt an override mechanism in that its Constitution is also based on popular sovereignty. Further, the United States never operated under parliamentary sovereignty; thus the override could never have been compatible with its constitutional system.[129]

[126] Brian Slattery, 'Canadian Charter of Rights and Freedoms: Override Clauses under Section 33 – Whether Subject to Judicial Review under Section 1' (1983) 61 *Canadian Bar Review* 391; Daniel J Arbess, 'Limitations on Legislative Override under the Canadian Charter of Rights and Freedom: A Matter of Balancing Values' (1983) 21 *Osgoode Hall Law Journal* 113.

[127] Gardbaum (n 7) 97–128, 222–44.

[128] For the Canadian process of adopting the Charter, see Peter W Hogg, *Constitutional Law of Canada, Vol 1* (5th edn, Carswell 2007) 65–68. The Charter amendment process also requires dualist consent: Constitution Act 1982 (UK) (n 2) s 38.

[129] For the United States' popular sovereignty model, see Bruce Ackerman, *We the People: Foundations* (The Belknap Press of Harvard University Press 1991). Some leading American scholars argue that the US should consider adopting the override mechanism to incorporate softer forms of judicial review: eg, Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 38 *Wake Forest Law Review*

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By contrast, Israel employed the 'notwithstanding' technique repeatedly during the founding era, even without an explicit clause, because both the legislature and the Supreme Court understood that it was legitimate within a parliamentary sovereignty structure. Were it to explicitly incorporate the mechanism in all its Basic Laws, Israel should also expect wide use of the 'notwithstanding' technique[130] since the legislature dominates the country's constitution-making process.[131] It is high time for Israel to strengthen its constitutional commitments by requiring the People's consent for its constitutional provisions. This would obviate the override. Otherwise, we should fear the rule of the override power.

635; Tushnet (n 7). See also Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51, 84–85 (writing that a congressional override may be suitable for the US and may in fact be used more prudently in a presidential, rather than a parliamentary, system).
[130] This was in fact proposed by the government in the draft of Basic Law: Legislation, 2012 (Israel) (n 6).
[131] Weill (n 21).

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