

The Appraisal Expert Report and its Constitutional Standing According to the Israeli Basic Law: Human Dignity and Liberty

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ABSTRACT

The constitutional aspects of 'Israeli Basic Law: Human Dignity and Liberty' were reviewed in an earlier work.¹ Formal procedural aspects often appear to be less significant than constitutional elements, but this is not the case. The notion of *proportionality* is the primary subject of this study. According to any constitutional judicial review, proportionality is the greatest judicial instrument of *Freedoms and its Betrayal* (Isaiah Berlin (1954), 2002). Proportionality is a contemporary instrument of *judicial review* and the scrutiny power of *judicial activism*. The constitutional scrutiny power annexed in *Marbury v. Madison* (1803) enabled courts to infringe on basic liberal principles of the *Corrective Justice* (according to Aristotelian and Kantian philosophy of rights (Private; Tort Law; England, 1993). It infringes on basic ideas of *liberty* and the constitutional idea that *rights* acquired (*private law* premises) and endowed by *liberty* (*public law* premises) should be protected by the application of private law on state authorities. This is Locke's (1690) (*Civil Government*, Ch. 11 Laski, 1936) basic idea of constitutional *liberalism* (American Constitution Fifth Amendment; R. Epstein, 1985; and Gaus, 1983). However, liberal/libertarian protection of private property is considered to be "Public enemy number one" by Welfare Social Justice schools of thought (Marx; A. Sen., 1993). Israel's so-called *constitutional revolution* (according to Basic Law) was enacted in 1992 and is considered *libertarian* by social democrats. This revolution included: formal interpretative establishment by the Israeli Supreme Court *judicial review*; constructional *Corrective Justice* liberal interpretations; and institutional duties to respect and to protect property acquired rights (*United Mizrahi Bank Case*, 1995 and *Holtzman Case*, 2001). Therefore, in a major backward step, the doctrine of *individual social responsibility* was entrenched by an Israeli Supreme Court ruling (*Horovits Case*, 2004); the doctrine was influenced by the left wing academy of *distributive justice*, espousing the reshuffle of wealth perceptions. Social responsibility (i.e., the 'Idea of Private Law') and *corrective justice* (i.e., according to Kant's normative deontology, E. Weinrib 2002) should not to be deterministically implemented by the constitution. *Proportionality* is the weapon against restitution and the economic rectification of property rights impaired by state authorities. Judicial review enables courts to strike a balance between public (social) and private (property interests), despite classical theories of law that consider property rights to be absolute (Kelsen, 1934 and Bentham, 1789). This *balancing* between conflicting interests can only occur when the harm is legally done and then properly executed for a proper public end (*Kol Haam Case*, 1953; freedom of the press). Therefore, we are not obliged to corrective justice rectificatory duties that compensate for owners' property rights. The only normative limited protection against state police power is constitutionally embedded with the same notion in opposite form, the *un-proportional* harm. Property rights are hostages to appointed judges

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(political social agents), their subjective personal opinions, and judicial discretion. Therefore the constitutional importance of an *appraisal report* constitutional importance lies in the description of individual economic impact by the harm done. The three universal fundamentals of jurisprudence are: (1) *truth*, (evidence); (2) *justice* (formal-positive) or moral (normative); and (3) and *mercy* (humanity). The appraisal report is the truth, which should be within the courts judgment (*Practical Reason*, Kant, 1797; *Pure Judgment*, Kant, 1790) and subject to the unlimited power of judicial discretion. In the *Horvitz Cases*, the appraisal report, which describes the un-proportional harm of \$24,000, was within the court's mercy discretion to compensate, subject to the normative dispute between *corrective liberals* judges (Justice M. Heshain) and *institutional* judges (Chief Justice A. Barak and Justice T. Or).

With acknowledgement to Richard Epstein² for to his attention, which is appreciated for the following statement:

"The germ of truth in this summary is that we cannot have a coherent public law unless we have a coherent private law and that we cannot get that if we always start on a blank slate in the public space. But there is no clarity in why proportionality is the wedge that creates this separation. '*Marbury* [Case]' did have a much disputed proposition of private law, that the commission was valid when sealed".

The *Appraisal Report* is the economic expression to a legally acquired right within the constitutional discourse.

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1. CONSTITUTIONAL FORGOTTEN FORBIDDEN GROUNDS

The common denominator of political philosophy is that *freedom of will* and *autonomy of use* are innate, and no political entity is rational without it (Johan Locke, 1690; 'Human Understanding', Charles Taylor, 1989; Jerrold Seigel, 2005). Freedom of will is subordinated only to *liberty*, which is negative (protecting what is yours) and positive (protecting what belongs to others). This is the premise of Public Law and the laws of community and state (E. Weinrib, 2003). Liberty enables the acquisition of rights, such as effectuating contracts and voluntary exchanges. Acquired rights are protected by a common consent to not impair the acquired rights of others under the premise of private law. The only exemption from bilateral horizontal individual duties is public law, which grants state police the power to impair individual acquired rights; this is the power to "renounce" *property rule*. Constitutional law is the limitation of state police power from the arbitrary impairment of individual liberties and acquired rights. In fact, constitutional law is the implementation of the duty not to impair individual rights without *just compensation*. In other words, the basic idea of constitutional law is the implementation of private law's review standard on state authorities (Locke, 1690; *Civil Government*). The idea of implementation by state authorities (*Idea of Private Law*, Weinrib, 1995) is common liberal knowledge, and it also renounces the *property rule*, which is the right to refuse prospective purchaser (with the exception of *eminent domain*), and the *liability rule*, which is the rectificatory remedy duty of just compensation (Aristotle, Book V *Corrective Justice*; Kant, *System of Rights*, 1797; Blackstone, 1803; Grotius, 1625; Poffendorf, 1672; Calbrisy and Melamed, 1972; Epstein, 1972; Mulholland, 1990; and Murphy, 1970). This coherent liberal idea is not accepted by communitarian political movements. Limited economic resources and limited-budget communities developed distributive ideas which do not implement these rules and are not subordinated to state authorities. The liberal sublime rhetoric was limited to communitarian social ideas. The limitation of private law by public law was embedded by *limitation clauses* post-World War II, when property rights and rules were limited by *public needs* and *proper purpose (purposeuality)*. Post-World War II constitutions were influenced by the Universal Declaration of "Human Rights" (1948), which abandoned liberal ideas in favor of communitarian distributive social obligations. However, *demoralization costs* (Michelman, 1967) have re-established the need to find a *third way* to respect and restore liberal moral fundamental ideas of individual dignity and freedom of will (Giddens, 2000 and Mandelson, 2003). The Third Way Idea can be summarized as the opposite interpretation of the limitation clause; property and liability rules are limited in favor of social responsibility, and the power of the police to impair individual rights is also limited. These limitations are endowed by liberties in general and property rights in particular. A description of the positive limitation to forestall individual liberties and the distinction from negative liberties to protect acquired rights is explored in *The Problem of Accessibility* and discussed by philosophers (Berlin, 1969; Rawls, *Theory*, 1975; U.S. *Brown Cases*, 1954 and 1955). This distinction sometimes creates misunderstandings between notions of rights as positive inflicting duties and application of no valid philosophical positive or negative rights. The primary question remaining is whether there are only absolute rights or whether relative rights exist as well. The way to maintain balance between liberal and communitarian ideals is to find the proportion of harm done to the individual (proportionality), which is an objective requirement to achieving the social-public proper-propose. The tension between the two is a major concern of judicial review disputes. Therefore, the expert's appraisal report is an

important constitutional instrument to describe the costs of demoralization and the unproportional harm done to individuals by communitarian police power. Despite grand constitutional rhetoric, the problem of the state's *unequal bargaining power of exchange* with individuals (Uchida, 1988; Levmore, 1990, 1991; and Ely, 1980) and obedience to state police authority must be discussed. Courts face scrutiny when they fail to act as true independent agents, allowing individuals to be "deep pocket property owners" via distributive agendas, leaving the community in a state of continuous need (Dowrkin, 1977, 1978; Fiss, 2003; Landes-Posner, 1975; and Emil Zola, 1898, '*J'accuse*').

2. ISRAELI BASIC LAW: HUMAN DIGNITY AND LIBERTY 1992 (NORMATIVE DESCRIPTION)

The implementation of The Idea of Private Law, *Corrective Justice Moral Responsibility*, is represented by the *Protection of Property Clause*, in article 3 of the Basic Law. [*Recht: right*]
§ 3. Protection of property [Dominium, Property Rule]

'There shall be no violation of the property of a person'.

[Thou shall not steal. (The 8th commandment)] Rights (Recht) and duty of rectificatory restitution [private law Liability rule entitlements to fair compensation]

And the subordination of all state authorities and agencies to the [Duty] not to harm, represented by the *Application Clause*, article 11.

§ 11. Application [of private law, legal formalism]

'All government authorities [including the judicial] are bound to respect the rights under this Basic Law'.

[The [constitutional] duty to protect and not to harm legal protected right by private law without rectificatory restitution (constitutional liability rule)]

The only exemption from the moral deontological rules represented by private law (Kant, 1797; Hohfeld, 1913, 1917; *Podamski Case*, 1952) is *legal formalism*. This term refers to the rights and obligations extending from duties *not* to infringe (i.e., the duty to protect an acquired right), which is represented by The Idea of Public Law, Distributive Justice, Social-Moral responsibility, and Social Utility (*Imperium*, the Police power of eminent domain to harm without fault and liability, according to the *Limitation Clause*, article 8).

§ 8. Violation of rights

'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose [*purposeuality*], and to an extent no greater than is required [*proportionality*], or by regulation enacted by virtue of express authorization in such law'.

[Distributive Justice by the communal sharing of public burdens (Equality Rule) and state distributive responsibility to the poor (Dignitary Entitlements).]

On one hand, the Basic Law is phrased according to classical Pre-World War II liberal constitutions, such as the Fifth Amendment of the American Constitution. On the other hand, the door to infringement lies embedded in the Limitation Clause. It is up to judicial review and the discretion of appointed judges (rather than elected judges, thus eliminating political

influences) to determine the extent of protection afforded to basic constitutional rights (Dowarkin, 1981 and Epstein, 1993).

The so-called constitutional revolution is a relatively new event in Israeli jurisprudence. The Basic Law was enacted only in 1992 (Barak A, 1993; Barak-Erez, 1995; and Holzman, 2007). According to the Basic Law, the declaration of Human Rights created constitutional protection (based on judicial review) from arbitrary police power, established by disputed court interpretory decree in the *Hamizrahi Bank Case* (1995) (compare to U.S. *Marbury v. Madison*, 1803). Since the *Hamizrahi* decision, the Israeli Supreme Court has ruled on three landmark cases: the *Holzman* (2001), *Nusseibea* (1994, 1995), and *Horovitz* (2002, 2004) cases, all of which established the grand rhetoric of Israeli constitutional protection of property rights.

3. SOME HISTORICAL COMPARATIVE LANDMARKS

Seal of Edward I, *Magna Carta* (1297):

[29] No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

U.S. Constitution *Bill of Rights* (1791):

“...nor be [a person] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Code: Title 42, Sec. 1981, *Equal Rights under the Law*:

(c) Protection against impairment. Sec. 4651: Uniform Policy on Real Property Acquisition Practice.

(5) No owner shall be required to surrender possession of real property before the head of the Federal agency concerns pays the agreed purchase price....

Declaration of the Rights of Man, approved by the National Assembly of France, August 26, 1789

2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

4. Liberty consists in the freedom to do everything, which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

German Basic Law, Article 14 (1949):

(1) Property and the right of inheritance are guaranteed...

3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of compensation; recourse may be had to the ordinary courts.

The liberal spirit expressed by these constitutions, particularly the respect paid to *freedom of will* and *property rights* (private law), are acquired by liberties endowed by public law (Montesquieu, "By political laws we acquire liberty and by civil law property" (*L' Esprit des Lois*, (1784)). Locke's idea that state authorities should respect the alimentionation of private law theory is well described by Epstein:

"In Private Law, the law [governs] relations between individuals. Public law, which is all the law that is not private, would be limited, permitting the state to do only those things to individuals that private law permits one individual to do to another." (Epstein, *Taking*)

The basic notions of rectificatory Aristotelian *corrective justice* implementing *liability rules* on all state agencies has been explored by scholars (i.e., Blackstone, Grotius, and Pufendorf). These notions direct us to the importance of the appraisal report and also lead us to scrutinize the *legal realism* school of thought (i.e., Cohen, 1927; Hale, 1923; and Radin, 1988) and the *new property* school of thought (Rich, 1964). After scrutinizing the protection of these philosophies, there is a common consent that proportionality and a fair balance between old and new property must be maintained. According to any property-based school of thought, the only real legal instrument enabling courts to review constitutional impairment and wrongdoing is the appraisal report. There is a common consent that *property rule* (the private law right to refuse any offer) must defer when public need and proper purpose for the common good of the community is exercised by police power. This *distributive justice* is the constitutional interpretation of the notion of *just compensation* (Michelman, 1967). In the U.S. case *Armstrong v. United States* (1960), Justice Black writes:

"The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here." Cf. *Thibodo v. United States*, 187 F.2d 249.

I shall not argue the validity of the moral communitarian distributive and social responsibility espoused in this eloquent passage, which frames the liberal perspective of man's protection and his acquired rights (Waldron, 2003). There are also arguments against the constitutional protection of property rights, mostly from those without such rights (D. Harvey, 2005). In addition, the arbitrary expropriation, deprivation, and disposition of legally-acquired rights (and with equal bargaining power and exchange) must not be tolerated by any democratic state systems, including Canada (containing a post-World War II constitution) (David Johansen, 1991; Weinrib.L. 1993). Therefore, the appraisal report is instrumental, and its procedural importance is obvious. Instruments of justice are not, however, the main concern of philosophers. For example, Rawls (*Justice as Fairness*, 2001) also pays attention to welfare economists (such as Pareto, 1906). This discipline is respected by law economists (i.e., Sen, 1993 and Michelman, 1967) and others. For any public social utility analysis, the [demoralization] cost of *just compensation* is a major factor that must be considered. Liberalism might tolerate the *benefit offset* of Pareto optimal proportionality accounts. Without the appraisal report, an analysis of any *property rule* by real estate economic experts

(public law, the police power of eminent domain to impose unwilling sale) would be simply theory, no more useful than simple scholastic discourse. Real analyses of *liability rule* proportionality requires the quantities of factual instruments in order to give courts a sense of reality.

4. ISRAELI PROPERTY BASIC [CONSTITUTIONAL] RIGHTS (COURTS INTERPRETATION)

I shall focus again on the deontological moral *legal formalism*, in which the Basic Law of Human Dignity and Liberty was correctly interpreted by the Supreme Court.³ As mentioned, legal formalism is the classical form of corrective justice. Rights, vis-à-vis duty, are the duty not to infringe on and to respect the acquired rights of others.

The most accurate formalistic corrective description was made by Justice Dalia Dorner in the ‘*Holzman Case*’ (641):

“An impairment of real property for public needs is appropriate, usually, the state values, and it is for a proper purpose [property rule]. However, in order that, the impairment by the expropriation will be by proportion no more it’s required, there is a need for fair compensation and equal in value [liability rule]. Without such compensation the expropriation will violet the equality. Because, only owned lands that are required for the public use, are secluded from other owned lands or other properties, must burdensome the finance of public [social] utility, without the justification to carry out the burden of the [public] finance on those owners only [selective singling out]. Unequal violation of the right is impairment to an extant no greater than is required (equality rule).”

Justice Dorner’s dissent in the *Noseeba Case* (1995) (85) emphasizes the important constitutional duty to defer to private law corrective ground of review:

“...[e]xercising [judicial] discretion empowered by article 11 of the Basic Law. According to that article, all government authorities- including the court- are obliged to respect the rights anchored by the Basic Law.”

It is an accurate phrasing of old wisdom.

Blackstone states:

“But how does it interpose and compel? But by giving him a full indemnification and equivalent for the injury thereby sustained. *The public is now considered as individual, treating with an individual for an exchange.*”

All the legislator does is to oblige the owner to alienate possession for a reasonable price and even this is an exertion of power, which the legislator

³ supra note 1

indulges with caution and nothing but the legislator can perform.” (Vol. 1 p.135, emphasis by author)

The conceptual basics of tort law philosophy and *corrective justice* are coherent and well-represented in the corresponding relations among Basic Law Article 3 [the right], Article 11 [the authorities’ duty to respect], rights, duties, and rectificatory restitution.

I am not concerned with whether indemnification (full or not) should be corrective or distributive. I expressed my great distrust of the Israeli courts as honest agents when the individual is the *creditor* and the state is the *debtor*. I shall address the readers elsewhere to support my critiques of the *Hamizrahi Bank* and *Noseeba* cases, even though *Hamizrahi Bank* sacrifices individual property rights for communitarian considerations, and Justice Donner considers *Noseeba* to be a simple case of plunder (Comp. *Die Weisse Rose / La Rosa Blanca / The White Rose* – Traven B, 1929). I am concerned with the constitutional instrumental importance of the appraisal report, an instrument that describes the indemnification fee to be scrutinized by judicial discretion.

The appraisal report played a major role in the *Horovitz Case* (2002), in which the court ordered full indemnity payment. While there are differences of opinion regarding normative disputes (i.e., corrective vs. social responsibility), the case made a reasonable social contribution to the community. According to administrative law, it was not proportional in absolute terms. The case facts concerned a regulatory taking according to an administrative law (Planning and Building Law, Sec. 200, 1965), which permitted regulatory taking without compensation on the basis of reasonable impairment. The relative harm of 11% lost in building rights, when compared to city planning needs, was considered to be “reasonable” and therefore not compensable. Judicial review required constitutional scrutiny if proportional harm was done according to Section 8 of the Basic Law (in absolute figures of \$24,000).

The *Horivitz Case* is one of the most scrutinized and disputed real property cases. The decree reflects the opinion of an adversary normative political judge. *New property* theories (the positive "right to property") are not formally adopted, and three normative points of view are observed and distinguished. The first is the liberal conservative interpretation of just compensation, in which full indemnity must be paid to the individual without any exceptions (represented by Justice Heshuin). The second is the *social responsibility* of real property landowners to the community, which may be identified as regulatory NeoLiberalism (Harvey, 2005). The idea of social responsibility burdens landowners in favor of communitarian consideration, in which compensation might not be paid at all (under a subjective analysis of proportionality). This idea is well-described by Chief Justice Barak. The third is *social communitarian corrective distributive justice*, in which the accumulation of landowner wealth is endowed and capitalized by community contributions to betterment [market] value, thus justifying a distributive share of "social return." This theory of distributive justice should not be confused with the second analysis of subjective proportionality. It is a constructionist structure, and it may even be analyzed with neo-Marxist social structure scrutiny (Harvey 1973). This idea of social distributive justice is well-represented by Justice Or. This door was constitutionally opened with objective scrutiny of the proportionality welfare egalitarian analysis (Sen, 1993 and Kaldor, 1939). This idea justifies "renouncing" compensation when "social [historical] justice" is done, creating "a fair and balanced distribution" between

individuals and communitarian interests. Court pluralism (freedom of normative interpretory realism) was advocated in Justice Elon's dissent in '*Kestenbaum Case*' (1992) 508, based on articulations of Jewish law. However, in the second enlarged court decision, despite grand adversarial rhetoric, the court was influenced by the appraisal report and deemed that the burden be shared by the community and not by individuals alone. This is not justified according to any property rights theory of justice. Considering the court's unanimous decision, it might be reasonable according to administrative law, but it is not constitutional considering the proportions of real harm done. The appraisal report was the epistemological key factor which convinced the court that the described real figures should not to be burdened upon individuals. There will always be theories on behalf of those against distributive taking from those who already possess (i.e., *marginal utility* theories; Stigler, 1957). The appraisal report is an important instrument to identify constitutionally-protected rights in unproportional impairments. Shared ownership is not in favor of courts or any property theory (*Robinshtein Case*, 1975). Kant put it in simple words: "There is no mine and yours there is only mine or yours" (*Practical Reason*). This is the essence of the idea of private law. Is there a perceptually-shared ownership of public and private land ownership? Is the answer given by Rousseau's *Social Contract* (1742) and *Origins of Inequality* (1754) satisfactory? I do not judge the answer here, but rather underscore the importance of the appraisal expert report as an instrument of judicial review over private vs. common property rights.

5. CONCLUSION

Wherever there is a corrective rectificatory theory of justice that considers property rights, the constitutional, instrumental, and procedural importance of the appraisal report is undisputable.

The idea of property is the notion of private law. Property is the expression of self-governing, autonomy of choice, and freedom. *Property rule*, the right to refuse any purchase offer, is respected by ideas of privacy and the notion of rights. The only exemption from the property rule is the police power to renounce this refusal right when there is a public need to acquire the land for community benefit. The coercion of landowners to renounce property rights for the public good is not disputed, but the application of a *liability rule*, according to the corrective rectificatory of full indemnification on public resources, is generally disputed. The specific dispute concerns the remedy and relief of such takings. The basic ideas of constitutional protection are to prevent arbitrary use of police power and avoid unproportional harm to individual community members. The conflict between private law (notions of a bilateral duty to protect rights) and public law (the obedience to authorities) is not to be solved here. However, the importance of procedural instruments is grossly underappreciated by normative schools of thought. The *ivory towers* and *pillars of justice* are often roaming sky-high, but practical reason and reality requires certain procedural instruments in order to face the earthly truth of figures and numbers. George Bernard Shaw once pronounced property rule price theory in the most eloquent manner: "When the price is right, who cares."

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⁶ Piske Din Shel Bet Hamishpat Haelyon [Decisions of the Israeli Supreme Court].