CHAPTER IV

CREATING CONSTITUTIONS: CONSTITUTIONAL MOMENTS AND TRANSITIONS

Constitutions are "higher" law. In addition to creating the institutions of government, constitutions limit what those governments can do. In constitutional democracies, constitutions can preclude today's majority from doing what it prefers. Why today's majority should accept limitations placed on its power by yesterday's majority is a difficult question of political and legal theory, on which we touch only briefly in these materials. Assuming for present purposes that the answer lies in some concept of legitimacy, we explore here how constitutions gain legitimacy. We begin by describing a number of the processes by which constitutions have been adopted. Some of the questions these materials raise are: What is the relationship between crisis, extralegal behavior, and constitution-making? What is the relationship between coercive power and consent in establishing a constitution? And how is "consent" manifested, or determined? We then place the descriptive materials in more theoretical contexts. How do the different processes reflect or express popular consent (at the time of adoption, and afterward) to constitutions? Are there some regularities in the processes that aid or impede a constitution's ability to become legitimate? The Chapter concludes with a note on problems associated with constitutional transitions as such—mainly, questions of restorative justice—and their relation to the establishment of constitutional legitimacy.

A. CONSTITUTIONAL LEGITIMACY: PROCESSES AND SUBSTANCE

Constitutions almost universally create procedures by which they can be amended. If the constitution itself is accepted by the public, amendments produced by the constitution's amendment procedures will almost inevitably be accepted as well. A constitution's amendment procedures can—at least in theory—be used to replace the constitution in toto. Typically, though, the amendment procedures are used to make discrete changes that leave most of the constitution's provisions in place. Why might the constitutional amendment processes in place be ignored when large-scale constitutional transformations occur? Sometimes those processes seem too cumbersome to be used in the circumstances, which can include domestic crisis, military occupation,

* For an argument that the U.S. Constitution can be amended in discrete ways by procedures other than those specified by the amendment process of Article V, see Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 467 (1994).
and revolution. Sometimes the regime created by the existing constitution has been discredited, so that the amendment processes in that constitution cannot lend any legitimacy to a replacement constitution. How can a completely new constitution be created, being relatively new, so that the amendment processes are ignored (or, as we will see, substantially modified in the process of transformation itself)?

Students sometimes find a distinction drawn in European constitutional theory helpful. The distinction is between the pouvoir constituant (constituting power) and the pouvoir constituè (constituted power). The constituting power is the people organized to create a government, while the constituted power is the people organized in the government they have created. The distinction attempts to capture the fact that the people of a nation might be thought unconstrained when they design a constitution, but then those same people are constrained when they operate within the constitutional framework they create. Because the two “powers” are organized in different ways, the distinction suggests that the constituting power might be embodied in a different institutional form from the constituted power.

1. PROCESSES AND INSTITUTIONS OF CONSTITUTIONAL TRANSFORMATION: AN INTRODUCTION

We begin by describing some of the more simple processes and institutions by which new constitutions can be put in place. Our discussion is quite general, and omits a large number of qualifications that are needed. Considered in isolation, these materials are this: To what extent are the processes and institutions of constitutional transformation subject to real policy choices? The authors of this first Federalist Papers, wrote, "[I]t seems to be reserved to the people of this country ... to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for the political constitutions on accident and force." The designers of the U.S. Constitution put in place institutions for choosing a new form of government, but consider what their range of choices about those institutions was (as distinguished from choices about what should go into the new constitution). Similarly, consider whether modern constitution designers have real choices about the processes and institutions for creating new constitutions, which constrains those choices and what those choices are.

Drafting a new constitution. When a prior constitutional regime has been discredited, a new constitution might be drafted by a new body, created to be independent of the prior regime. Today, such bodies are called constituent assemblies; the Constitutional Convention that met in Philadelphia in 1787 was such an assembly. Constituent assemblies are single-purpose bodies, whose job is to draft a

* Ackerman also argues that the amendments adopted after the Civil War were formally illegal, because during the early post-War years, representatives to Congress from many of the states that had seceded were not seated and because ratification of the 14th Amendment was made a condition for readmission to the Union, after several southern states had failed to ratify the Amendment.
interests of the drafters as politicians may play a larger role than they do in constituent assemblies. And, the reasons voters have for choosing representatives who will be developing ordinary legislation might be different from the reasons one would like them to have for choosing those who will be drafting a constitution. People might want ordinary legislation to focus on the relatively short term, for example, but might want a constitution’s drafters to have a longer-term perspective. Given a choice between candidates for a dual-purpose body, one with a shorter-term perspective and another with a longer perspective, how can such voters sensibly choose? Or does this question itself depend on a contestable understanding of the relationship(s) between voters and representatives? If a representative is to “stand for” her constituents, acting for them in a substantive way that is at once independent of and responsive to the voters through institutions of government, see generally Hanna Pitkin, The Concept of Representation (1967), does the distinction between longer term and shorter term perspectives capture what voters would (or should) focus on? Might voters prefer to select representatives to a single body, with both constitution-making and ordinary legislative capacities, in order to assure that a variety of perspectives (including those of ordinary legislators, and long term and short term) are present in drafting a constitution? For other approaches to drafting, see Section 2 below.

b. Ratification of a proposed constitution. Once a new constitution has been drafted, how can it gain popular assent? Referenda appear to be a technique that is gaining in popularity. Again, however, important questions of design arise. What are the voting rules? Is a mere majority enough? A majority of voters, or of the voting-age population? Must the constitution be approved as a whole, or can voters accept some parts and reject others, or accept the new constitution on condition that particular amendments be added? In a federal system, is a national majority sufficient, or must there be majorities in a majority (or more) of the sub-national units? Apart from referenda, what other methods of assuring popular assent can be used? Can regular legislative assemblies function to provide such assent and, if so, under what conditions? Can courts serve as a vehicle for manifesting or evaluating popular assent? Who determines these questions of design? And, again, can there be “law” that determines the answers to these questions? For one effort to deal with that question, see the discussion of the framing and adoption of the 1986 Constitution of South Africa, below.

2. PROCESSES AND INSTITUTIONS OF CONSTITUTIONAL TRANSFORMATION: SOME EXAMPLES

We present some examples here, followed by questions and notes about the entire group.

a. The “Round Table Process” in Hungary

In a number of countries in Eastern Europe, a “round-table” process of constitutional negotiation was central to the transitional period of the late 1980s and early 1990s. The excerpt below provides one description of the process in Hungary.

István Pogany, Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy, 42 Int’l & Comp. L.Q. 352 (1993)

The decision of the ruling Hungarian Socialist Workers’ Party, or Communist Party, to take part in “round table” talks with opposition and other elements, beginning in June 1989, was due to the conjunction of various factors. In part, the willingness of the Party to engage in a dialogue with opposition groups, leading to agreement on the path of transition to a market economy, was made easier by the Party’s awareness that, following Gorbachev’s initiation of radical reforms in the Soviet Union, Hungarian policy no longer had to be constrained by the threat of external intervention. In part, also, the Communist Party participated in the talks because of pressure exerted by an increasingly prominent and influential reformist wing within the Party.… Following the removal of János Kádár as Party leader, in May 1988, the new leadership found it difficult to resist the reformists who sought to democratise the political processes in Hungary and to revitalise the sluggish economy by making it more responsive to market forces.

Further demands for reform, impacting on the Party, came from Hungary’s progressively more vocal and organised opposition elements. Prominent among these was the Hungarian Democratic Forum (MDF), established in September 1987, and the Alliance of Free Democrats, created in November 1988. In essence, these movements represented, respectively, traditionalist, predominantly provincial, sentiment and the more cosmopolitan and Western-orientated urban intellectual circles.

In March 1989, with a view to conciliating their strategies, the principal opposition parties formed an Opposition Round Table. Among the parties involved were the Alliance of Young Democrats, the Independent Smallholders’ Party, the Hungarian Democratic Forum, the Hungarian People’s Party, the Hungarian Social Democratic Party and the Alliance of Free Democrats. The Christian Democratic People’s Party was admitted to the Opposition Round Table in May.

During April delegates from the Communist party met representatives from the Opposition Round Table and formally agreed that “the solution of the political, economic and moral crisis [in Hungary] and the transition to democracy can only occur peacefully, without coercion, and in accordance with law.” This agreement paved the way for the tripartite National Round Table talks, attended by delegations from the Communist Party, from the Opposition Round Table, as well as from various social organisations and movements, the latter representing a nominal “third” party in the deliberations.

The National Round Table talks, which were held from 13 June to 8 September 1989, were conducted at three levels, ranging from a Political Committee, composed of high-ranking political figures, to 12 subcommittees concerned with specific legal, political and economic issues. The talks resulted in the adoption of an agreement which was signed by the Communist Party delegation and by the social movements and organisations participating in the talks. Of the Opposition Round
Table members, however, the Alliance of Free Democrats and the Alliance of Young Democrats declined to sign it.

The agreement, which laid the foundations for the peaceful transition to multi-party democracy founded on respect for human rights and the rule of law and for the creation of a social market economy, envisaged the submission of draft legislation to Parliament to amend the Constitution, to establish a Constitutional Court, to provide for the operation and financing of political parties, to secure the election of members of the National Assembly, and to amend the Criminal Code and the Code on Criminal Procedure. The constitutional amendments were adopted by the National Assembly on 18 October 1989 and entered into force on 23 October. The statutes, including the Act on the Constitutional Court, were enacted by the National Assembly during the latter months of 1989. Thus, the process of constitutional reform, which first manifested itself in the political sphere in the dialogue between the Communist Party and the various opposition political groupings, culminated in the formal revision of Hungary's 1949 Constitution, and in the passage of several additional laws deemed necessary to secure the process of constitutional transition.

In the following March fully democratic general elections resulted in the formation of a coalition government in which the Hungarian Democratic Forum (MDF) became the dominant partner, together with the Independent Smallholders' Party and the Christian Democrats. The Communist Party, more properly known as the Hungarian Socialist Workers' Party, having reconstituted itself as "the Socialist Party" with a range of broadly Eurocommunist-type policies, formed the parliamentary opposition together with the Alliance of Free Democrats and the increasingly popular Alliance of Young Democrats.

It remains a singular irony of this entire process of constitutional reform that the bulk of the laws providing for the democratisation of the political process in Hungary, for the recognition of human rights and fundamental freedoms, for the establishment of a Constitutional Court and for the creation of a social market economy, should have been adopted by a legislature which, in 1989, had itself not been democratically elected. This inescapable fact has afforded politicians on the right, including senior members of the Hungarian Democratic Forum, the claim that the Constitution, as amended during 1989, and the Constitutional Court lack democratic legitimacy and that they are tainted by the "old order." . . .

b. South Africa's Two-Stage Process

South Africa experienced one of the most dramatic political, social, and constitutional transformations of the late twentieth century. Generations of legal commitment to racial apartheid and institutionalized control by a white minority were abandoned. Internal resistance and external pressure resulted in the 1990 release of Nelson Mandela after many years in prison and the onset of formal negotiations between the white government in power (the National Party), the African National Congress (ANC) and other political groups (including followers of KwaZulu Chief Minister Buthelezi). (The negotiations are referred to as the Multi-Party Negotiating Process.) The background to these talks is summarized by the Constitutional Court of South Africa.

(i) Historical and Political Context

In re Certification of the Constitution of the R.S.A.
1996; (4) S.A. 744, 776–79 (Constitutional Court Sept. 6, 1996) (South Africa).

Judgment by:
THE COURT

[5] South Africa's past has been aptly described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge". From the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal "traditional authorities" passed smoothly from British colonial rule to the new government, which continued its predecessor's policy.

[6] At the same time the Montesquieuian principle of a threefold separation of State power—often but an aspirational ideal—did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the north.

[7] From time to time various forms of limited participation in government were devised by the minority for the majority, most notably the "homeland policy" which was central to the apartheid system. Fundamental to that system was a denial of socio-political and economic rights to the majority in the bulk of the country, which was identified as "white South Africa", coupled with a Balkanisation of tribal territories in which Africans would theoretically become entitled to enjoy all rights. Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.

[8] As the apartheid system gathered momentum during the 1960s and came to be enforced with increasing rigour, resistance from the disenfranchised—and increasingly disadvantaged-majority intensified. Many (and eventually most) of them demanded non-discriminatory and wholly representative government in a non-racial unitary State, tenets diametrically opposed to those of apartheid. Although there were reappraisals and adaptations on both sides as time passed, the ideological chasm remained apparently unbridgeable until relatively recently.
[9] The clash of ideologies not only resulted in strife and conflict but, as the confrontation intensified, the South African government of the day—and some of the self-governing and “independent” territories spawned by apartheid—became more and more repressive. More particularly from 1976 onwards increasingly harsh security measures gravely eroded civil liberties. The administration of urban black residential areas and most “homeland” administrations fell into disarray during the following decade. The South African government backed by a powerful security apparatus operating with sweeping emergency powers, assumed strongly centralised and authoritarian control of the country.

[10] Then, remarkably and in the course of but a few years, the country’s political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation. After a long history of “deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination”, [quoting Aza-po President of the Republic of South Africa, 1986 (4) S.A. 671, 676], the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights. The majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national Legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But found therein lies the key to the resolution of the deadlock—that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.

With this end in view the IC

“... need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional State in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms”.

[11] Following upon exploratory and confidential talks across the divide, the transitional process was formally inaugurated in February 1990, when the then government of the Republic of South Africa announced its willingness to engage in negotiations with the liberation movements. Negotiations duly ensued and persevered, despite many apparent deadlocks. Some of the “independent homeland” governments gave their support to the negotiation process. Others did not but were overtaken by the momentum of the ensuing political developments and became part of the overall transition. Unwillingly or by default.

[12] One of the deadlocks, a crucial one on which the negotiations all but founded, related to the formulation of a new constitution for the country. All were agreed that such an instrument was necessary and would have to contain certain basic provisions. Those who negotiated this commitment were confronted, however, with two problems. The first arose from the fact that they were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was that the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.

The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black and coloured majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national Legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But found therein lies the key to the resolution of the deadlock—that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.

(ii) The Multi-Party Negotiating Process, the Interim Constitution, and the Role of the Constitutional Court

Over years of talks, largely between 1992 and 1994, the so-called Multi-Party Negotiating Process resulted in an extraordinary agreement on the substance and process of developing a new South African Constitution. In a compromise between those in the existing

* The following account is based on an Address by Justice Albie Sachs, a human rights scholar and member of the Constitutional Court, at the Georgetown University Law Center (October 3, 1996); Dretwin, A. Basson, SOUTH AFRICA’S INTERIM CONSTITUTION 96-100 (1994); Constitution of the Republic of South Africa 1996, as adopted by the Constitutional Assembly on 8 May 1996 with accompanying Explanatory memorandum;
Constitution and the proposed Final Constitution included provisions mandatory the consideration of international law, and authorizing the consideration of foreign law, in dealing with the interpretation of the Constitution and the Bill of rights provisions.

In early September 1996, after receiving substantial public comment concerning many aspects of the draft Constitution, the Constitutional Court issued its judgment, commending the draft as a "monumental achievement," the overwhelming majority of whose provisions complied with the 34 principles. However, it also found that in 9 respects, the draft Constitution did not sufficiently comply with the 34 principles. For example, it found that the draft Constitution's provisions permitting Parliament to amend the Bill of rights provisions by a two-thirds vote was not sufficient adequately to entrench those rights; something beyond a mere majority in the ordinary Parliament was required. It also found that the provisions permitting removal by a majority vote of the Parliament of the "Public Protector," an entity designed to serve as something between an ombudsman and an Inspector General and protect the honesty and integrity of government, insufficiently assured the position of its needed impartiality and independence. Another area of concern was that the draft Constitution allocated too much power to the central and too little to the provincial governments.

Thus, the Constitutional Court found that the draft Constitution was not constitutional and could not be certified as in all respects complying with the 34 basic principles. Resubmission of the proposals for Constitution by Parliament to the Constitutional Court took place quickly, with passage of an amended version of the new Constitution on October 11, 1996. The revised draft left the Constitution substantially similar but made about 40 revisions to address the Court's objections. For example, the proposal for amending the Constitution was made more rigorous, language assuring the entrenchment and judicial enforceability of fundamental rights and freedoms was added, and, in order to assure more independence and impartiality a provision was added to require a two-thirds vote in the National Assembly to dismiss the Public Protector. After a public comment period, the Constitutional Court approved the new draft in late 1996. In January

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4 See S. Afr. Const. of May 8 1986 (Explanatory Memorandum). Justice Sachs said in his Government Address that survey research showed that the percentage of the public that understood the constitutional process increased from 30% to 70% as a result of this campaign, which included radio and television broadcasts, meetings, and pamphlets using cartoons and simple language.

5 This Interim Constitution, Section 74(1) of Act 200 of 1993, prohibited amendment of the provisions of the 34 basic constitutional principles and of the requirement for the Constitutional Court to review the Interim Constitution to review the Constitution or the Bill of rights provisions with those principles. These provisions were thus entirely entrenched against change, though a procedure for amending other parts of the Interim Constitution was provided for.

Alternative procedures were specified in the Interim Constitution. In the event that a constitutional draft received the requisite 2/3 vote, but was passed by a majority, Section 73(2) of the Interim Constitution required that the draft be referred to a panel of "constitutional experts" for advice. If an amended text unanimously recommended by the experts passed by a 2/3 vote in the legislature, it would become the Constitution (subject, though, to Constitutional Court approval). If the experts failed to submit a unanimous text or if it was not adopted by a 2/3 vote, "any proposed text" passed by a majority of the Constitutional Assembly would then be referred to the electorate for decision in a national referendum. If 60% of the voters cast were in favor, it would become the Constitution. The requirement that the Constitutional Court approve the constitution text as complying with the 34 Constitutional Principles appears to apply to all methods of enactment, see Basson, supra note 5, at 100, a point noted since the proposed constitution passed the legislature by the requisite 2/3 vote.

The legislative debate was introduced in re Certification of the Constitution of the S.R.A., 1996 (4) B.A. 744, 745-86, 910-11 (Constitutional Court Sept. 6, 1996); see also Rwezwanis, supra note 4 (for a summary of the decision). The Court received objections from 5 political parties and on behalf of 34 private parties. The political parties and 27 others were allowed to appear in person to present argument to the Court, whose "underlying principle was to hear the widest spectrum of potentially relevant views." 4 B.A. at 783. Justice Sachs indicated that proceedings in the Constitutional Court would be receiving public comment and in rendering their decision, "were televisual—not for immediate public broadcast but to create a historical record of those aspects of the constitution-making process."
1997 President Nelson Mandela issued a proclamation by which the Constitution was to come into effect beginning in February, 1997.

c. *Silent judicial-legislative partnership: Incremental constitutional lawmaking in Israel?*

When Israel was established as a modern state in 1948, its Declaration of Independence called for election of a constituent assembly to prepare a written constitution. The elected constituent assembly did not do so, but reconstituted itself as the Knesset, the legislature. In what became known as the Harari Resolution, the Knesset in 1950 decided to enact, over time, a series of “Basic Laws” on different topics, that eventually would constitute a constitution for the state. As the legislative body, the Knesset adopts both “Basic Laws” and other statutes, with no ex ante difference in voting rules between these categories of laws. As explained in Martin Edelman, *The Changing Role of the Israeli Supreme Court*, in COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS (John R. Schmidhauser, ed. 1987):

> The attempt to adopt a written constitution founded on the division between religious and secular parties about the role of religious law in the new State. That issue could not be resolved without doing irreparable harm to the much-needed consensus of all elements in the community. Moreover, many Israeli leaders—most notably Prime Minister David Ben Gurion—saw political advantages in a constitutionally unenfranchised supreme parliament. The move for a formal written constitution was tabled.

Because the Constituent Assembly was more representative than the Provisional Government, it was decided that the newly elected body would function as the supreme governing agency. Therefore the Constituent Assembly assumed the functions of a parliament; it became the First Knesset (Transitional Act, 1949). Israel’s constitutional arrangements are in large measure a product of the decisions of the Provisional Government and the 1949 Transition Law.


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2. See also Resolution on the Future Government of Palestine (The Partition Resolution), U.N. General Assembly, Resolution 181, November 29, 1947; Part I, B. 10 (calling for constitutional arrangements in the proposed new Jewish and Arab states to prepare written constitutions protecting human rights).

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3. **SECTION A**

**Constitutional Legitimacy: Processes and Substance**

Notwithstanding the absence of a traditional written constitution, the Israeli Supreme Court issued a number of decisions in its first decades regarding its capacity to adjudicate on the constitutionality of the Basic Laws. The *Kol Ha’Am* case (1953) held that the Basic Law on freedom of religion without clear authorization was ultra vires, adopting a “clear statement” requirement for legislation claimed to abridge civil rights. The *Bergman* case (1989) invalidated an election law on the ground that it was inconsistent with an entrenched provision of a Basic Law. In 1979, the *Elon Moreh* case found invalid a military taking of Arab lands in occupied territory. Each of the latter decisions was treated as a “landmark decision.” The *Bergman* case is described below.


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Dr. Aharon Bergman brought an action before the Supreme Court, sitting as the High Court of Justice, to block the implementation of the (Campaign) Financing Law of 1969. Dr. Bergman’s complaint was that the law unfairly discriminated against new political parties because it provided governmental funds only for those parties represented in the outgoing Knesset. Specifically, he argued that the Financing Law violated the equality required by section 4 of The Basic Law: The Knesset. Moreover, that section expressly provided that its provisions “shall not be voided save by a majority of the Members of the Knesset.” In 1959, the Knesset had entrenched that provision still further. Because the Financing Law had passed its first reading in the Knesset by a vote of 24 to 2 (a majority of the plenum would consist of not less than 6 votes), Dr. Bergman also argued that it plainly could not be viewed as an amendment to section 4 of the Basic Law: The Knesset.

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1. In *Kol Ha’Am* the Israel Supreme Court held invalid the Interior Minister’s suspension of a newspaper that had criticized a supposed government decision to send troops to Korea. The allegation that a decision had been made proved false. Analogizing to U.S. law, the Court held that a more “concrete” reason to endanger the public peace was not sufficient to warrant the Minister in finding a likely endangerment of the public peace; unless the publication posed a “near certainty” or real probability of endangering the public peace, the suspension was unwarranted in the absence of very explicit legislative authorization. See *Kol Ha’Am*, Ltd. v. Minister of Justice (1958), 7 P.D. 871, reproduced in English translation in Selected Judgments of the Supreme Court of Israel, 1948-53 at 90 (1962); Stephen Goldstein, Protection of Human Rights by Judges: The Israeli Experience, 38 St. Louis U.J. 505, 611-12 (1994). *Kol Ha’Am* has been applied in more recent cases. See Schmitter v. Chief Military Comptroller (1989), 42 P.D. (5) 617, reproduced in 9 Selected Judgments of the Supreme Court of Israel, 1977-80 at 77, 93-94, 109-10 (1995) (issuing an order preventing the censor from interfering with the publication of an article critical of the financier head of the Mossad where the Censor’s basis for acting did not meet the test of there being a “near certainty” of real danger to the security of the state).

2. The Majority by this law for a change of sections 4, 44 or 45 shall be required for decision of the Knesset plenary at every stage of lawmaking except on a motion for the Knesset agenda. In this section “change” means both an express or an implied change. (Basic Law: The Knesset, section 46).