

*Adam Shinar**

A. INTRODUCTION

Providing an overview of freedom of expression in Israel involves making a choice at the outset. How does one determine the scope of the protection of speech (or for any right for that matter)? One way to begin such an enterprise would be to systematically describe the various measures designed to foster and advance freedom of expression. Thus, for example, a possible overview would involve laying out the constitutional provisions, statutes, regulations, and case law that create the system of freedom of expression.¹

While such an overview would no doubt be comprehensive, it might conceal the cleavages and conflicts inherent in the system itself, or fail to properly analyze how the various components work against each other. Put differently, such a direction would provide a thorough doctrinal gloss, but would lack the political element that seeks to situate freedom of expression in broader ideological divisions. Hence the second approach that will be favored in this chapter: providing a descriptive account that is both critical and mindful of the rival political elements that hang together (and against each other) to generate Israel's current system of freedom of expression.

Broadly speaking, this chapter advances the position that protection of speech of in Israel has been almost exclusively reserved to the judiciary, particularly the Supreme Court, in the face of suspicion and sometimes hostility to speech protection in the legislature and the executive. This should not be particularly surprising, since the system of speech protection (or lack thereof) has its roots in a security-driven colonialist paradigm that still maintains its hold on legal consciousness. According to this paradigm, security considerations are paramount and legitimate speech restrictions. To be sure, this is the case in many if not all jurisdictions, except that in Israel, security considerations have been understood in an expansive and expanding way, thus serving to increase speech restrictions.

Protection of free speech was thus left to the Supreme Court, which, over the years, has increasingly opted to resist the security-based paradigm, rooted in Israel's colonialist inheritance and its attendant conservatism.² Yet even after partly breaking with that paradigm, developments in Israel, underscored by a permanent state of emergency, have all but guaranteed that security-based considerations receive a great deal of deference, even when security is merely a cover for preserving Israel's constitutional identity and ideological hegemony. These considerations also jibe with, to an extent, other speech restrictions or the recognition that speech can sometimes be restricted for causing an offence to public feelings or because it might incite racism.

* Associate professor, Harry Radzyner Law School, IDC Herzliya.

¹ For the idea of a "system" in protecting speech, see Thomas I. Emerson, *The System of Freedom of Expression* (Random House 1970).

² Aharon Barak, 'The Tradition of Free Speech in Israel and Its Problems' (1997) 27 Hebrew University Law Review 223.

The conflicting approaches to free speech generate, on the one hand, a right that commands broad consensus in the abstract, yet on the other hand, a right whose standing is still precarious. This Chapter thus seeks to tell the story both of the protection and the vulnerability of speech protection in Israel, amidst these competing poles.

Before proceeding, one important caveat should be noted at the outset. This Chapter addresses the protection of speech in Israel. Consequently, I will not discuss the protection of speech in the territories Israel controls, namely the Occupied Palestinian Territories. The Territories are not part of Israel. They are subject to a military administration and a military government that derives its authority first and foremost from international humanitarian law. While I do not accept the crisp distinction between Israel and the Territories in that such a distinction is no longer tenable given the extensive Israeli settlement activity, the prolonged occupation, and the ongoing blurring of the 1949 ceasefire line, my analysis is confined to Israel proper.³ Of course, an analysis of speech protections in the Territories alongside those in Israel would throw into sharp relief the fairly robust protections enjoyed by Israelis and the almost total lack of those enjoyed by Palestinians who are subject to military decrees.⁴

Part B provides a brief account of the history of speech protection in the years prior to the establishment of Israel and the legal status at independence. Part C describes the early protection of speech, centering on the seminal *Kol Ha'am*⁵ case and the paradigm shift it embodied. Part D details how the Court relied on the core of *Kol Ha'am* to upgrade its protection of speech more generally, whereas part E further details the elevation of speech after Israel's constitutional revolution. Part F suggests that new restrictions on speech paint a more complex picture of protection, noting how by restricting speech Israel is seeking to preserve its constitutional identity as a Jewish state. Part G concludes.

B. HISTORICAL BACKGROUND

When Israel was established in 1948, there was, of course, no Israeli-made law to speak of. The Israeli Declaration of Independence,⁶ though not part of the legal system in the sense of a binding norm,⁷ articulated the vision for the young country. In particular, the Declaration made repeated references to UN Resolution 181, which adopted the 1947 UN Partition Plan.⁸ The Plan, in the eyes of the framers of the Declaration was an important piece in the legitimation of the new country, and so it was crucial to demonstrate that the new state was mindful and respectful of its

³ Adam Shinar, 'Israel's External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction' (2018) 57 *Virginia Journal of International Law* 735.

⁴ For a discussion on the free speech rights of Palestinians, see Association of Civil Rights in Israel, 'one Rule: Two Legal Systems: Israel's Regime of Laws in the West Bank' (October 2014) 79, <law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf> accessed 14 February 2021. It should be emphasized, however, that Jewish settlers living in the OPT enjoy all the constitutional rights enjoyed by Israeli citizens inside Israel, including free speech. See H CJ 1661/05 Gaza Coast Regional Council v. The Knesset 59(2) P.D. 481 (IsrSC 2005).

⁵ H CJ 73/53 *Kol Ha'am v. Minister of Interior* 7 P.D. 871 (IsrSC 1953).

⁶ Declaration of Independence, Official Gazette, May 14, 1948, p. 1. 1 L.S.I. 3 (1948).

⁷ H CJ 10/48 *Ziv v. Guvernik* 1 P.D. 85 (IsrSC 1948).

⁸ UNGA Res 181 Adopted on the report of the ad hoc committee on the Palestine Question (1947).

content. According to the Plan, the new Jewish state must guarantee “to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association”.⁹

The Plan’s expansive protection of freedom of expression (speech, publication, assembly and association) did not make it into the Declaration of Independence. In lieu of explicitly protecting speech, the Declaration opted to guarantee “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.” In particular, the Declaration announced the protection of the right to religious freedom, conscience, language, education and culture. Speech was conspicuously absent.¹⁰

Soon after Israel’s establishment, the Temporary State Council (Israel’s designated legislature prior to the creation of the its permanent legislature, the Knesset) enacted the Law and Administration Ordinance of 1948. The Ordinance provided, in section 11, that the law that existed in Palestine up until independence shall remain in force, unless it conflicted with Israeli legislation.¹¹ While this measure ostensibly served to prevent a legal vacuum,¹² it preserved legislation enacted by the British Mandate authorities whose aim was not to secure freedom or free expression, but rather to control Jewish and Arab inhabitants of the land.¹³

Chief among the incorporated legislation were laws severely limiting speech. For example, the Press Ordinance of 1933 conditioned the publication of newspapers on government licenses and gave the Minister of the Interior draconic authority, that was in fact exercised, to shut down newspapers he believed would likely to endanger the public peace.¹⁴ Emergency regulations gave the censor (after Israel’s establishment the censor became the military censor) authority, among others, to review any publication prior to its release and prohibit its publication;¹⁵ The Films and Plays Ordinances established a censorship apparatus over movies and plays, requiring approval prior to screening and showing.¹⁶ And the Police Ordinance de facto prohibited most demonstrations that did not possess a police permit.¹⁷ Unsurprisingly, all these arrangements privileged state security, law and order, and the preservation of the “public peace” over the protection of speech.

⁹ Ibid, s 10(d).

¹⁰ In the deliberations leading up to the adoption of the Declaration, one Council representative suggested to include free speech, but the proposal was rejected. See Yizhar Tal, ‘The Declaration of Independence – A Historical-Interpretive Investigation’ (2003) 6 Law and Government 551, 567.

¹¹ Translation available at <www.knesset.gov.il/review/data/eng/law/kns0_govt-justice_eng.pdf>.

¹² Indeed, the British used a similar device in order to preserve Ottoman Law when they assumed control of Palestine. See article 46 of Palestine Order in Council, 1922.

¹³ David French, ‘Nasty Not Nice: British Counter-Insurgency Doctrine and Practice, 1945-1967’ (2012) 23 Small Wars & Insurgencies 744.

¹⁴ Section 19 of The Press Ordinance, 1933.

¹⁵ Regulations 87 and 97 to the Defense (Emergency) Regulations, 1945.

¹⁶ The Films Ordinance, 1927; The Public Plays (Review) Ordinance, 1927.

¹⁷ Police Ordinance [New Version], 1971, S.H. 643 22.

These (and other) repressive measures were heavily criticized by Jewish leaders during the British Mandate.¹⁸ Yet when Israel was established, it chose not to repeal these laws or amend them in a manner fitting a country that aspired to be a democracy. Instead, it relied on them to achieve its own political objectives. As Supreme Court President Aharon Barak wrote, the normative background against which Israel's free speech tradition had to be created was rooted in a colonialist paradigm that did not seek to promote free speech.¹⁹ But no less crucial is the fact that the Israeli legislature and government chose to maintain this paradigm in order to preserve, at least at the outset, the police powers that the British deployed in Palestine to control the local population.

Free speech protection circa 1948 was thus predicated upon a colonialist framework that in turn explicitly favored security and regime interests over the protection of free speech. Having the option to discard these arrangements, Israel instead embraced them. It would be up to the Supreme Court to pave a different, often oppositional path, a path to which I now turn.

C. EARLY PROTECTION OF FREE SPEECH

For five years the colonialist paradigm largely persisted. In the few cases that made their way to the Supreme Court,²⁰ the Court understood free speech to be an important principle, but failed to formulate a comprehensive test for its application. In some cases it opted for a narrow interpretation of the enabling legislation so as to limit the scope of the free speech violation. In other cases, it did not perceive speech to be especially worthy of protection, siding with the government when it chose to limit speech.²¹ Thus, for example, in cases of shutdowns of newspapers critical of the government's policies, the Court held that it was not its role to second-guess the Minister of Interior's assessment, unless it implicated irrelevant considerations. Yet as long as the Minister perceived the speech to endanger the public peace, the Court would uphold that decision.²²

The clearest and most dramatic break from the colonial paradigm came in 1953, in what is still regarded as the most important Supreme Court free speech decision: *Kol Ha'am*.²³ Briefly, *Kol Ha'am* was the newspaper for the Israeli communist party. In one op-ed, the paper criticized, in what was considered to be harsh words at the time, an alleged plan by the government to assist U.S. troops in Korea. In response, the Minister of the Interior, relying on the Press Ordinance of

¹⁸ Jo Roberts, *Contested Land, Contested Memory: Israel's Jews and Arabs and the Ghosts of Catastrophe* (Dundurn 2013) 90.

¹⁹ Barak (n 2) 229.

²⁰ The structure of the Israeli judiciary, also a legacy from the British Mandate, is unique. The Supreme Court, in addition to serving as a court of appeal, also sits as a High Court of Justice with original jurisdiction over most constitutional matters. A major reform in 2000 transferred a sizable portion of administrative law issues to the district courts, but maintained the Supreme Court's control of the constitutional law docket.

²¹ Pnina Lahav, 'Freedom of Expression in the Decisions of the Supreme Court' (1977) 7 *Hebrew University Law Review* 375.

²² See, e.g., HJC 213/52 Stein v. Minister of Interior 6 P.D. 867 (1952)

²³ *Kol Ha'am* (n 5). Some equate the status of *Kol Ha'am* with *Marbury v. Madison* in the collective legal memory. See Yoram Shachar, Ron Harris, Meiron Gross, 'The Reliance Practice of the Supreme Court – Quantitative Analyses' (1996) 26 *Hebrew University Law Review* 119, 176. An empirical examination performed in 2004 showed that *Kol Ha'am* was the most cited Supreme Court case. See Yoram Shachar, Meiron Gross, Chanan Goldschmidt, 'The One Hundred Leading Precedents in the Supreme Court – A Quantitative Analysis' (2004) 7 *Law & Government* 243, 248.

1933, shut down the newspaper for ten days believing it likely that the op-ed would endanger the public peace.

Despite a previous decision a few months earlier that upheld a very similar shutdown, this time the Court intervened. Lacking the power of judicial review over primary legislation, the Court instead narrowly interpreted the term “likely to endanger the public peace”, holding that likely is not merely a “bad tendency” to endanger public peace,²⁴ but a more exacting standard of “near certainty”. Only if the speech is almost certain to endanger the public peace then the Minister can exercise his authority to shut down the newspaper. Importantly, the interpretive choice rested on free speech grounds. Notwithstanding the lack of a formal right of free speech, the Court derived the right from the normative fact that Israel is a democracy, and there cannot be a democracy without free speech. In doing so, the Court expounded on the importance of free speech and elaborated its central underpinnings (autonomy and self-realization, truth-finding potential in the marketplace of ideas, and the central link between speech and a democratic regime).

Presumably, Kol Ha’am should have ushered in a new era in speech protection in Israel. After the decision, every piece of primary legislation should have been interpreted in light of the right to free speech, and every piece of secondary legislation would be subject to invalidation if the conflict with the right to free speech could not be reconciled through interpretation. This, of course, threatened to erode the British legacy (and its Israeli adoption) of speech limits justified by the need for security and order.

Perhaps surprisingly, this did not immediately happen. Indeed, it took eight years for Kol Ha’am to be cited,²⁵ and until 1977 it received mostly cursory references in seven other cases.²⁶ The second edition of Israel’s leading treatise on constitutional law, published in 1974, twenty-one years after Kol Ha’am, referenced it only twice in its index, and not in relation to free speech.²⁷

During this period, protection of speech was spotty at best, and one would be hard pressed to find an overarching framework. To give just a few examples, on the one hand, the Court resisted governmental censorship of offensive ads²⁸ and news stories that depicted civic unrest.²⁹ On the other hand, it relied on the idea of “defensive democracy” to uphold the Election Commission’s decision to ban a political party that advocated the rejection of the Jewish nature of the state.³⁰ It also upheld government censorship of a movie, which the censorship board disqualified due to its overt sexual nature its offense to religious feelings.³¹ The record was mixed, at best. Despite the seminal status accorded to free speech in Kol Ha’am, the Court took its time to catch up both with the case and the importance of the right.

²⁴ For the elaboration of that test, see *Abrams v. United States*, 250 U.S. 616 (1919).

²⁵ F.H. 241/ 60 *Kardosh v. Companies Registrar* 15 P.D. 1151 (1961) (IsrSC).

²⁶ Shachar, *Hundred Leading Precedents* (n 23).

²⁷ Lahav (n 21) 107.

²⁸ HCJ 206/61 *Israel Communist Party v. Mayor of Jerusalem* 16 P.D. 1723 (1961) (IsrSC).

²⁹ HCJ 243/62 *Israel Film Studios v. Levy Gery* 16 P.D. 2408 (1962) (IsrSC).

³⁰ EA 1/65 *Yardor v. Chairman of the Central Election Committee* 19 P.D. 365 (1965) (IsrSC).

³¹ HCJ 383/73 *Avidan v. Gery* 28(2) P.D. 766 (1974) (IsrSC).

Eventually, the Court came around, but this did not happen until the late 1970s, and more so during the 1980s. Two reasons can be offered for the switch from a position skeptical of the importance of the right to free speech, to the more robust position embraced until today that accounts for the centrality of free speech in a democracy.

One reason is simply a changing of the guards at the Supreme Court. Over time, the first generation of Israeli Supreme Court judges, trained mostly in continental Europe and Britain, were replaced by judges that were either trained in or drew inspiration from the United States.³² The former did not “grow up” with speech as a right that is apriori more important and worthy of protection than other rights or state interests, and thus refused to give it magisterial status. In contrast, the younger generation of judges was more hospitable to American conceptions of liberty that positioned free speech as centerpiece of a vibrant democracy.³³ Thus it is not a coincidence that Kol Ha’am, although a decision firmly rooted in the first generation of judges, was written by Shimon Agranat, whose legal training was in the University of Chicago Law School.³⁴ Not only does Kol Ha’am praise free speech in general, it does so by heavily drawing on American case law and conceptions of free speech. One could even say that Kol Ha’am was the first major Court decision that relied on American constitutional law, contrary to most other cases at the time (private and public), which relied on English common law.

The second reason for the paradigm shift is that with the new generation of judges came new approaches to adjudication, chief among them was the role that human rights played in a democracy. Scholarly literature of human and civil rights was on the rise, with the Warren Court decisions in the United States providing a role model. In Israel, calls to protect human rights became more visible especially as it was pulling out of its existential phase, where everything was tied to the country’s survival during the first decades after independence. Political corruption, the occupation of the Palestinian Territories, disappointment in the political leadership after the 1973 war, and later an economic crisis, all contributed in some way to the formation of civil rights organizations. Those borrowed from the experience in the United States, including the idea that advances in human rights can come about through litigation. In that spirit, the need to protect human rights became, over time, a discrete agenda among judges, politicians, lawyers, and legal academics.³⁵

A case in point, demonstrating the judicial split over free speech and that sowed the seeds of the nascent transition is *Electric Company v. Haaretz*.³⁶ The case involved a libel suit by Israel’s

³² Eli Salzberger and Fania Oz-Salzberger, ‘The Tradition of Free Speech in Israel’ in Michael Birnhack (ed.), *Quiet, Someone is Talking: The Legal Culture of Free Speech* (TAU Press 2006) 27.

³³ For the argument that the central value in the US is liberty whereas in Europe it is dignity, see James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 YLJ 1151. An emphasis on liberty means a robust protection of speech, whereas an emphasis on dignity pulls toward recognizing other values that are commensurate, if not above, speech.

³⁴ Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press 1997).

³⁵ Adam Shinar, ‘Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel’ in Dennis Galligan & Mila Versteeg (eds) *The Social and Political Foundations of Constitutions* (CUP 2013) 207.

³⁶ F.H 9/77 *Israel Electric Company v. Haaretz* 32(3) P.D. 337 (1978) (IsrSC).

Electric Company against the newspaper Haaretz over an article criticizing the purchase of an expensive car for the Electric Company CEO, a quasi-public official in Israel. Judge Shamgar's dissent relied on *Kol Ha'am*, but also drew heavily on the U.S. Supreme Court case of *New York Times v. Sullivan*,³⁷ which held that absent actual malice (knowing the statements are false or recklessly disregarding their veracity), a newspaper cannot be held liable for making false statements regarding the conduct of a public official. In so doing, Judge Shamgar wanted to import First Amendment principles into Israeli case law as a method to moderate the interpretation of the Israeli Libel Law. The majority opinion, however, authored by Judge Landau, would have none of that. It refused to follow the path of free speech "fundamentalism" paved by Shamgar, holding that free speech is not privileged over the right to a good name embodied in the Israeli Libel Law, and that, in fact, other common law jurisdictions have rejected the holding in *Sullivan*. This was to be, as we shall soon see, the swan song of the old approach.

In conclusion, protection of free speech from Israel's establishment in 1948 until the late 1970s was sporadic and lacked an overarching doctrinal framework. Resting on a colonialist conception of speech that privileged state interests, namely security and order, the Court toed the line set by the executive, which did not accord any special status or concern to free speech. Israel's legislature, The Knesset, was largely absent from the picture. It failed to repeal British legislation, preserved the extensive censorship regime headed by the military censor, and, overall, its contributions to the protection of free speech were meager and came quite late. They culminated in abolishing the censorship over plays (though not movies) in 1989 and narrowing the scope of the sub-judice offense, limiting it only to certain publications of criminal procedures. Needless to say, this changed very little.

This dismal picture opened a space for a third actor, the Supreme Court. Over time, especially since the 1980s, it was the Court that has been the most dominant institution when it comes to speech protection, a role it assumed in opposition to the political branches. The next part tells this story.

D. THE EVOLUTION OF FREE SPEECH PROTECTION

It will not be an understatement to argue that beginning in the late 1970s and 1980s, Israeli free speech law was transformed. As noted above, much of this was due both to a changing of the guards at the Court and new civil libertarian tendencies. This transformation had its roots in the *Kol Ha'am* case, but its success was in deploying *Kol Ha'am*'s rationale, extending it to most other areas of expressive activity, and developing a comprehensive doctrine that addressed free speech restrictions in their various forms, subjecting them to generally applicable doctrinal tests. This was important not only because speech would be better protected, but also because it ended the Court's incoherent approach to speech that largely depended on the particular composition of the bench.

To instantiate this transformation, the Court did two things. First, it presented free speech as a staple of Israeli democracy, almost a presupposition that did not require explanation or

³⁷ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

justification. Second, it resurrected Kol Ha'am, imbuing it with a canonical status that it heretofore lacked.

As for the first, consider, for example, *Sa'ar v. Minister of Interior*, a case from 1979 challenging the police's refusal to grant a demonstration permit on the grounds that the demonstration would lead to public disorder and would cause a traffic interference.³⁸ The Court, in a brief opinion, simply stated that the Israeli legal system recognizes basic individual rights, as those are accepted in "enlightened states", among them free speech and assembly. The Court saw no need to explain how, and in what way, is free speech part of the Israeli system, but simply took it as a given. It then went on to hold that the police failed to show that disruption to public order is likely or that the flow of traffic would be impaired in a way that overrides the right to demonstrate.

Sa'ar illustrates that in 1979 free speech was already an important and recognized individual right. Moreover, its incorporation into the legal order did not stem from specific legislation but rather from the acceptance of the idea that Israel should be governed like a democracy. But, much like previous cases, the Court did not announce a clear standard governing free speech violations. Instead, it engaged in a balance of interest analysis that was not precise about the weight free speech should receive.

This approach changed in a string of cases in the late 1980s. In these cases, the Court (notably then Judge Aharon Barak, who was also the author of the *Sa'ar* opinion) finally developed a comprehensive and systematic approach for the protection of speech. This doctrinal framework essentially repeats Kol Ha'am, but also extends it. Each of the three cases addressed a different type of free speech violation, but all received the same treatment, relying on Kol Ha'am's formula of near certainty.

In *Kahane v. Broadcasting Authority*,³⁹ the Court struck down the Israel Broadcasting Authority's policy of not giving airtime to Meir Kahane, then a member of the Knesset, due to his racist Jewish-supremacist views. Relying extensively on Kol Ha'am, the Court held that the right to free speech applies to every type of speech, including racist speech and lies. Only speech that creates a near certainty for actions that will seriously harm the social order, public peace, or the essentials of democracy can be limited. In *Laor v. Film and Plays Censorship Board*,⁴⁰ the Council decided to ban Laor's play on the grounds that it encourages negative sentiments toward Israel and equates the Israeli military's rule in the Occupied Palestinian Territories with the Nazi Occupation forces. The Court applied the near certainty test and struck down the ban, holding that the merits of the play cannot be considered by the Council, only its likelihood to seriously harm public order, of which there was none. Finally, in *Schnitzer v. The Military Censor*,⁴¹ the Court once again applied the near certainty doctrine to a decision made by the Military Censor to censor an article critical of the Mossad (Israel's equivalent of the CIA). While the Censor believed the article compromised the safety of the head of the Mossad, it failed to produce any evidence to that effect. Accordingly, the Court invalidated the decision, noting that the near certainty standard was not

³⁸ H CJ 148/79 *Sa'ar v. Minister of Interior and Police* 34(2) P.D. 169 (1979) (IsrSC).

³⁹ H CJ 399/85 *Kahane v. Israeli Broadcasting Authority* 41(3) P.D. 255 (1987) (IsrSC).

⁴⁰ H CJ 14/86 *Laor v. Film and Plays Censorship Board* 41(1) P.D. 421 (1987) (IsrSC).

⁴¹ H CJ 680/88 *Schnitzer v. Military Censor* 42(4) P.D. 617 (1989) (IsrSC).

met. *Schnitzer* is important not only because it confirmed the Court's transformation, lending to its systematicity, but also because it was the first time, in the speech context, that the Court was willing to overrule a governmental decision that explicitly rested on security grounds.

The aftermath of these (and other) cases was a seeming judicial convergence on three points. First, consensus on the normative status of free speech as an important right. Second, consensus that every type of utterance counts as "speech" for free speech analysis, thus rejecting the American doctrine of unprotected speech.⁴² Third, consensus on the "near certainty" test as the appropriate test for determining the legality of free speech violations.

This new consensus, however, was underscored by the reality that certain types of speech were not to receive the exacting judicial scrutiny of the "near certainty" standard. And although the Court rejected the idea of speech that was *a priori* unprotected, some speech would end up being less protected, for several reasons.

First, the Court often classifies speech into distinct categories depending on its relation to the rationales of protecting speech. So, for example, "low value" speech that is not part of the democratic rationale for free speech, such as commercial speech aimed at generating an economic profit, generally receives less protection than "political speech" that is intimately tied to the rationales of protecting speech.⁴³ Similarly, pornography is covered by the right to free speech, but its protection is less than the protection that would be accorded to artistic speech.⁴⁴

Second, the Court was limited by specific legislation that carved out particular spheres of speech that restricted the Court's discretion. Consider three examples.⁴⁵ One, the Libel Law, discussed above, allows plaintiffs to receive compensation for libel. The Law provides a list of defenses to defendants, but those are not comprehensive, nor do they overlap with any "near certainty" standard. Two, although racist speech is within the ambit of free speech, incitement to racism is a criminal offense. Unlike the judicially created "near certainty" standard, the Knesset opted for a more permissive restriction, requiring only a "real possibility" that the speech will lead to racism.⁴⁶ This choice can be attributed to the low value of inciting speech in general, and incitement to racism in particular. Three, the Knesset created substantive ideological criteria determining which parties and candidates can run in the elections. Parties and candidates that deny the existence of Israel as a Jewish and democratic state, that incite to racism, or that support an armed struggle of an enemy country or a terrorist organization against the state, are prohibiting from running.⁴⁷ The Court has limited the scope of these criteria, but for the most part has eschewed a probabilistic test for determining whether there had been a violation of the statute.⁴⁸

⁴² Daniel A. Farber, 'The Categorical Approach to Protecting Speech in American Constitutional Law' (2009) 84 *Indiana Law Journal* 917.

⁴³ H CJ 606/93 Kiddy v. Israeli Broadcasting Authority 48(2) P.D. 1 (1994) (IsrSC). See also Genevieve Lakier, 'The Invention of Low-Value Speech' (2015) 128 *HLR* 2166.

⁴⁴ H CJ 4804/94 Station Film v. Film Censorship Board 50(5) P.D. 661 (197) (IsrSC).

⁴⁵ For more recent examples, see *infra* Part F.

⁴⁶ The Criminal Law, 1977, s 144D2, S.H. 864 226 (1977).

⁴⁷ Basic Law: The Knesset, s 7A, S.H. 244 69 (1958).

⁴⁸ E.A 11280/02 Central Election Committee v. Tibi 57(4) P.D. 1 (2003) (IsrSC).

Third, and finally, even if near certainty is applied, its understanding is bound to be vary among judges and is culturally and temporally contingent. To illustrate, consider two film censorship cases, Ein Gal and Bakri. The first, Ein Gal, from 1979, upheld a decision to ban a film that portrayed Jews in Israel as settler colonialists, on the grounds that the film falsely portrays Israel in a negative light and would incite Israeli Arabs against the state. Applying the near certainty standard, the Court had no problem determining that the standard was met and the decision to ban justified.⁴⁹ Fast forward to the Bakri case from 2003 and the movie “Jenin, Jenin”, which aimed to portray the consequences of the Israeli operation “Defensive Shield” in the Jenin refugee camp in the West Bank. Similar to the Ein Gal case, the Censorship Board rested its decision on what it believed was the distorted presentation of events in a biased and one-sided manner. Here, however, the Court had no problem holding that the near certainty standard was not met. Although the movie certainly would cause an offense to parts of the Israeli public, that offense was not at a sufficiently grievous level to warrant the banning of the film.⁵⁰

Despite these exceptions and reservations, the Court’s advances in the protection of speech have been significant. Over a period of several decades, mostly in the 1980s and 1990s, free speech was recognized by all judges to be one of the most central rights in Israel. The Court did this, much in the spirit of Kol Ha’am, without relying on any legislation that enshrined the right. To the contrary, the Court developed a robust right of free speech against a background of hostile British and Israeli legislation that viewed speech with suspicion, as threatening the stability of the regime and society. It was thus no accident that much of the advance in free speech jurisprudence was a response to government censorship of what it deemed to be security interests in the broad sense, be they the functioning of the intelligence services, the image of Israel among its domestic Arab minority, or Israel’s international standing.⁵¹

In this climate, and this should be acknowledged as a remarkable achievement, the Court managed to develop an oppositional role vis-à-vis the government and Knesset, all the while maintaining high levels of public trust.⁵² Yet the Court’s approach had at least three limitations.

First, it is difficult to say whether the Court truly instilled a culture of free speech that exceeded the legal realm. Although petitioners to the Court would often succeed in free speech claims, the overall culture in Israel has remained fairly conservative.⁵³ Of course, this is true generally for the prospect of social change through courts and not just free speech,⁵⁴ but in the Israeli context there is a second, additional limitation to the way in which the Court protected speech.

⁴⁹ HCJ 807/78 Ein Gal v. Film and Plays Censorship Board 33(1) P.D. 274 (1979) (IsrSC).

⁵⁰ HCJ 316/03 Bakri v. Film Censorship Board 58(1) P.D. 249 (2003) (IsrSC).

⁵¹ While this is beyond the scope of this chapter, it should be added that similar constraints exist in Israel’s freedom of information law, which either categorically excludes all material held by security services, and also carves secrecy exceptions for material held by other government agencies. See Freedom of Information Law, 1998, S.H 1667 226 (1998).

⁵² Gad Barzilai, Ephraim Yuchtman-Yaar, Zeev Segal, *The Israeli Supreme Court and the Israeli Public* (Papyrus 1994),

⁵³ Salzberger and Oz-Salzberger (n 32).

⁵⁴ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008)

According to the Court, all persons enjoy the right to free speech. Yet the application of that right has often (though not always) been skewed by a nationalistic and security prism that is more suspicious of speech by Israeli Arabs or speech critical of Israeli policies vis-à-vis Israeli Palestinians or Palestinians in the Occupied Territories.

Consider these examples: decisions upholding closures of newspapers or the refusal to grant licenses have only involved Arabs or political groups with close ties to the Arab population. Cases where the Court upheld the closings of newspapers or the refusal to grant licenses have often downplayed the importance of freedom of speech, a marginalization that is not present in cases where petitioners are Jewish or the subject matter is not security.⁵⁵ Most telling is that even in cases that invalidate restrictive government decisions, the Court sometimes goes out of its way to explain that although the right to free speech prevails, it still finds the speech abhorrent, false, and harmful. The rhetoric is apologetic, presenting to the reader the feeling that the Court's hands are tied. In these cases, the Court tries its best to distance itself from the speech, lest the reader think that striking down the governmental decision is tantamount to approving the speaker's message. Thus, for example, in the Bakri case mentioned above, the Court, although striking down the decision, makes explicit its substantive agreement with the state that the movie misrepresents the actions of the military and deeply offends the soldiers and the general public when it accuses Israel of war crimes. Similarly, in cases that seek to prevent Israeli Palestinians from running in elections because of past statements that can be interpreted as denying the Jewish nature of the state or supporting an armed struggle against the state, some judges take pains to explain why, despite the abhorrent nature of the statements, the candidate is allowed to run.⁵⁶

The Court's unease with the speech in these cases and its seeming need to "take sides" is most likely a result of two, not mutually exclusive, reasons. First, it might very well be that the Court fundamentally disagrees with the speech because its judges are, on the whole, committed to the Zionist project of Israel as a Jewish and democratic state, and thus wish to distance themselves from the speech, rendering their disdain explicit. The speech is then allowed merely because that is what the law commands.⁵⁷ Another explanation is that in light of right-wing attacks on the Court that identify its judges as a "leftist" cabal, the Court wishes to demonstrate that its decisions are rule bound and that the Court is a neutral institution. On this account, explaining why the speech is harmful is conducive to rehabilitating the Court's declining public legitimacy.⁵⁸

The third limitation with the Court's approach to free speech was that in the end, it was grounded in administrative law, and therefore confined to its parameters. Freedom of speech was, to be sure,

⁵⁵ HCJ 644/81 Omar International v. Minister of Interior 36(1) P.D. 227 (1981) (IsrSC); HCJ 322/81 Makhoul v. Commissioner of the Jerusalem District 37(1) P.D. 789 (1982) (IsrSC).

⁵⁶ Tibi (n 48); E.A 9255/12 Central Election Committee v. Zoabi (unpublished 2013) (IsrSC); E.A. 852/20 Katz v. Yazbak (unpublished 2020) (IsrSC).

⁵⁷ For the Zionist tilt of the Court, see Hassan Jabarin, 'Can the Court Normalize the Exception in Non-Emergency Cases? Palestinian Cases before the Israeli Supreme Court' (2020) 18 International Journal of Constitutional Law 788. For the idea that judges tend to defend the speech they support, see Lee Epstein, Christopher M. Parker, Jeffrey A. Segal, 'Do Justices Defend the Speech They Hate?' (2018) 6 Journal of Law and Courts 237.

⁵⁸ On the decline in public trust in the Supreme Court, Israel Democracy Institute, 'IDI's Democracy Index: Public Trust, Social Solidarity and Democracy in Danger' (Jan. 11, 2021) < <https://en.idi.org.il/articles/33415> > accessed 15 February 2021.

an important right, but it was judicially created and enforced. At most the Court could strike down secondary legislation or interpret existing legislation in a way that advances free speech. It could not, however, strike down primary legislation that consciously purported to limit speech. Judicial review of legislation would only become possible after Israel's "constitutional revolution", which also elevated the status of free speech. The next part discusses this development.

E. THE CONSTITUTIONAL REVOLUTION AND THE ELEVATION OF FREE SPEECH

Israel's transformation from a parliamentary democracy to a constitutional democracy, known as the "constitutional revolution", has been documented extensively.⁵⁹ Very briefly, two Basic Laws (Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty) were enacted in 1992. Previous basic laws addressed the structural aspects of the constitutional order, but the basic laws of 1992 were the first to address individual rights and included a limitations clause. In 1995, in the Bank Hamizrachi case,⁶⁰ the Supreme Court held, contrary to previous rulings,⁶¹ that the Basic Laws were in fact Israel's constitution; that the Knesset retained the constituent power that the First Knesset had in 1949, and that ordinary legislation was now subordinate to the Basic Laws. Correlatively, the Court also held that it now possessed the power of constitutional judicial review and could strike down statutes that conflicted with provisions of the basic laws.

As a result, all legislation was subordinated to the rights provisions in the two Basic Laws of 1992. Those include the right to dignity, privacy, movement, property, occupation, and liberty. Freedom of expression, however, was not among the incorporated rights. In fact, the decision to exclude freedom of expression (along with equality and the free exercise of religion) was intentional, stemming from a political compromise between secular and religious legislators who wished to preserve the status quo.⁶²

Presumably, then, the constitutional revolution did not affect free speech doctrine, since free expression was not constitutionalized. This would have meant that dignity, property, and privacy, for example, would have received superior status with speech receiving less protection. This division was possible, but ultimately untenable. Immediately after Bank Hamizrachi, the Court started to expand the scope of the constitutional right to dignity to include additional rights, such as free expression, by interpreting the right to dignity as the right of personal autonomy.⁶³ Thus, for example, when a person is not allowed to speak, her autonomy is violated, compromising her right to dignity.⁶⁴ By interpreting the right to dignity as including the right to speak, the Court elevated the status of the right of free expression to a constitutional right.

⁵⁹ See e.g. Gideon Sapir, Daphne Barak-Erez, Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013); Gideon Sapir, *The Israeli Constitution: From Evolution to Revolution* (OUP 2018); Gary J. Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020).

⁶⁰ C.A. 6821/93 United Mizrahi Bank v. Migdal Cooperative Village, 49(4) P.D. 221 (1995) (IsrSC).

⁶¹ C.A. 107/73 Negev Service Station for Automobiles v. Israel 28(1) P.D. 640 (1974) (IsrSC).

⁶² Shinar (n 35) 213.

⁶³ This interpretive choice rests on the idea that only the individual endows her existence with meaning, and it is up to her to be the author of her life. For an elaboration of this view, see Adiel Zimran, 'The Theological Value of Autonomy' (2020) 18 International Journal of Constitutional Law 687.

⁶⁴ See e.g. HCJ 10203/03 Hamifkad Haleumi v. Attorney General 62(4) P.D. 715 (2008 (IsrSC); HCJ 5239/11 Avneri v. The Knesset (unpublished 2015) (IsrSC).

This interpretive move had three consequences. First, if a person could show that her free speech right was violated, and that that violation implicated the right to dignity, this would suffice for constitutional judicial review, with one caveat. Basic Law: Human Dignity and Liberty immunized from judicial review all legislation enacted prior to 1992,⁶⁵ so in effect all of the British legislation could not be invalidated. This meant, among others, that the Press Ordinance remained in force (until it was repealed by the Knesset)⁶⁶ as well as the military censorship apparatus enacted as part of the Emergency Regulations in 1945.

Second, the constitutionalization of free expression elevated the importance of the right, in all types of cases and not just those implicating judicial review of legislation.⁶⁷ The Court could now credibly claim that although free expression was always important, it was now a constitutional right, and that this upgrade should project on the interpretation of the right. Consider these two examples: Relying on the newly minted constitutional right of free speech, the Court overhauled its doctrine on demonstrations. Prior to the constitutional revolution, the Court would routinely review the manner in which the police exercised discretion when deciding on the granting of a demonstration permit. But after the constitutional revolution, the Court interpreted the Police Ordinance in a way that would almost always allow the demonstration without the need to seek a permit.⁶⁸ The Court also harnessed the constitutionalization of free speech to develop the positive aspect of the right. Thus, in *Mate Harov v. Israel police*,⁶⁹ the Court held that the positive obligation to protect human dignity guaranteed in Basic Law: Human Dignity and Liberty, means that the state has an obligation to allocate, within reasonable bounds, the necessary resources in order to realize the right to free speech and demonstration. In that case, the Court held that the police must bear the costs of securing a political demonstration and that the Tel Aviv municipality had to bear the costs for firefighter services.

Third, constitutionalization of speech instantiated a transition (still ongoing today) from the “near certainty” formula (and other probabilistic formulae used for determining the legality of free speech violations) to the limitations clause in the Basic Law. Under Basic Law: Human Dignity and Liberty, all rights violations must be grounded in law, befit “the values of the state of Israel, enacted for a proper purpose, and to an extent no greater than is required.”⁷⁰ Essentially, this meant discarding (or incorporating) the older probability-based doctrines for proportionality analysis.

This generated uniformity across all violations of constitutional rights. After the constitutional revolution, every infringement of a constitutional right had to meet the same requirements in order to be upheld. However, it is possible that dispensing with near certainty and switching to proportionality made speech protection less robust. This is due to the familiar features of proportionality analysis, namely giving courts greater discretion when employing standard-based rather than rule-based reasoning. Under the old doctrine, even though judicial discretion was inevitable, the standard for upholding violations was set rather high. Proportionality, however,

⁶⁵ Basic Law: Human Dignity and Liberty, s 10.

⁶⁶ Repeal of the Press Ordinance Law, 2017, S.H. 2643 986 (2017).

⁶⁷ A.P.A. 4463/94 Golan v. Israel Prison Service 50(4) P.D. 136 (1996) (IsrSc).

⁶⁸ HCJ 6536/17 Movement for Quality Government in Israel v. Israel Police (unpublished 2017) (IsrSC).

⁶⁹ HCJ 2557/05 Mate Harov v. Israel Police 62(1) P.D. 200 (2006) (IsrSC).

⁷⁰ Basic Law: Human Dignity and Liberty, s 8.

promotes a type of interest balancing that might not give the right its full effect.⁷¹ In any event, the consequences of this transition have yet to be determined.

In conclusion, the constitutional revolution strengthened the status of the right of free speech. From a judicially created right subordinate to primary legislation that could override it at will, free speech became a constitutional right superior to all legislation. Moreover, the constitutionalization of the right meant that the right to free speech received greater weight, both in constitutional and sub-constitutional cases. Finally, the constitutional transformation also brought about a systematization in the method protecting the right. The “near certainty” doctrine and other probabilistic tests were either abandoned or incorporated in the new proportionality analysis, which might, at times, lead to under-protection of rights.⁷²

F. CONSTITUTIONAL REGRESSION AND THE NEXT GENERATION OF FREE SPEECH RESTRICTIONS?

Up until now, the story of free speech protection has been a relatively linear line (with some interruptions) of progress. From no protection in 1948, to some protection in the ensuing decades, to constitutional protection toward the close of the twentieth century.

This linear progress however has been cast into doubt in recent years with a new string of speech restrictions by the Knesset and the government. Driven by right-wing populism and growing Jewish nationalism, the various Netanyahu governments have trained their sights on the declining left, the Supreme Court, and law enforcement institutions as institutions that lack democratic accountability intent on replacing the will of the people with that of an unelected leftist bureaucratic elite. With PM Netanyahu indicted for corruption charges in January 2020, the attacks have amplified,⁷³ with the ultimate intention of capturing these institutions and avoiding conviction.

As part of this regressive trend, the Knesset enacted a new Basic Law, dubbed as the Nation State Law, that seeks to bolster and constitutionalize the Jewish elements of the state that the Court has supposedly eroded in favor of liberal democratic values;⁷⁴ the government has attempted to introduce an override mechanism to Basic Law: Human Dignity and Liberty;⁷⁵ it has also suggested changing the judicial appointment process.⁷⁶ Rhetoric against Arab citizens and leftists, portraying them as not loyal is rife, as are attacks against human rights organizations. Reasons of space prevent me from elaborating, but these developments should be familiar to students of populism and democratic regression.⁷⁷

⁷¹ Moshe Cohen-Eliya and Gila Stopler, ‘Probability Thresholds as Deontological Constraints in Global Constitutionalism’ (2010) 39 Columbia Journal of Transnational Law 75.

⁷² Francisco Urbino, *Against Proportionality and Balancing* (CUP 2017); Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 International Journal of Constitutional Law 468.

⁷³ Nadiv Mordechai and Yaniv Roznai, ‘A Jewish and (Declining) Democratic State: Constitutional Retrogression in Israel’ (2017) 77 Maryland Law Review 244.

⁷⁴ Basic law: Israel – The Nation State of the Jewish People, S.H. 2743 898 (2018).

⁷⁵ Mordechai and Roznai (n 73).

⁷⁶ Ibid.

⁷⁷ Populist leaders often borrow from one another, thus establishing a ‘playbook’ of typical moves. See e.g. Julius Maximilian Rogenhofer & Ayala Panievsky, ‘Antidemocratic Populism in Power: Comparing Erdoğan’s Turkey with Modi’s India and Netanyahu’s Israel’ (2020) 27 Democratization 1394.

Speech has also come under attack, this time under the guise of the principle of “defensive democracy”. Whereas in the past restrictions on speech were justified by an appeal to security, protecting life and limb, law and order, privacy, and so forth, the new wave of restrictions has been justified by the need to protect Israel’s “Jewish and democratic” constitutional identity. In other words, restrictions on speech are introduced as a measure of social control in order to insulate the extant ideological hegemony and government from critique. This is a significant departure from more traditional, and legitimate, speech restrictions.⁷⁸

In 2011, the Knesset passed a law, known as the “Nakba Law”. The law authorizes the Minister of Finance to reduce the funding of a subsidized entity if the entity spent funds on, among others, the denial of Israel as a Jewish and democratic state or commemorates Israel’s Independence Day as a day of mourning. By conditioning the receipt of public funds, the state seeks to control the type of speech that will be allowed. Private speech, which does not receive government funding, will not be harmed. But since many organizations require public support, the restriction’s impact is significant.⁷⁹ While the law provoked much criticism,⁸⁰ a petition challenging the law was dismissed by the Court on ripeness grounds, despite the chilling effect the law created.⁸¹

Concerned by the perceived rise in popularity of the BDS (boycott, divestment sanction) campaign, the Knesset passed the “Anti-Boycott Law”.⁸² Its main provision allowed plaintiffs to sue those who called for boycott of Israel or the areas it controls (i.e. the Occupied Palestinian Territories) without proving economic harm. The Court struck down this provision, but left untouched other provisions, such as those allowing Minister of Justice to limit the participation in government tenders of those who call to boycott Israel or the Territories or agree to take part in such a boycott and those allowing Minister of Finance to strip funding and remove tax exemptions from the same groups. It also upheld the provision allowing plaintiffs to sue for harm that could be proved, as a result of the boycotters’ speech. To be sure, one could argue that boycotts are harmful and should be prohibited, but Israel chose to limit only a specific type of a call for boycott, that which criticizes its policies vis-à-vis the Palestinians. The Court thus upheld a non-neutral viewpoint restriction, and not just a content-based restriction.⁸³

The fear of being boycotted and its economic and international ramifications have led Israel to ramp up its speech restrictions, beyond the Anti-Boycott Law. In 2017 it amended the Entry into Israel Law of 1952, which now authorizes the Minister of Interior to deny entry to Israel to any non-citizen or permanent resident if he or the organization for whom he works has called to boycott

⁷⁸ Barak Medina, ‘Unintended consequences of prohibiting advocacy of hatred and regulating campaign finance: The weakening status of freedom of speech in Israel’ (2020) 18 International Journal of Constitutional Law 804.

⁷⁹ Yifat Gutman and Noam Tirosch, ‘Balancing Atrocities and Forced Forgetting: Memory as a Means of Social Control in Israel’ (2021) Law and Social Inquiry <<https://doi.org/10.1017/lsi.2020.35>>.

⁸⁰ Ayman Odeh, ‘Israel Celebrates Its Independence, We Mourn Our Loss’ *New York Times* (18 April 2018); Adalah, ‘Nakba Law Violates Rights of Arab Minority to Preserve its History and Culture’ (2011) <www.adalah.org/en/content/view/7181> accessed 15 February 2021.

⁸¹ H CJ 3429/11 Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance (unpublished 2012) (IsrSC).

⁸² The Prevention of Harm to the State of Israel by means of Boycott Law, 2011, S.H. 2384 972 (2011).

⁸³ Avneri (n 64).

Israel.⁸⁴ A petition against the law was dismissed by the Court⁸⁵ and the government has twice sought to rely on the law. Once, in refusing to admit a pro-Palestinian activist who was accepted to the Hebrew University. The Court overruled the decision and the student was allowed entry.⁸⁶ The second time, it refused to extend the visa of Omar Shakir, the Israel and Palestine Director at Human Rights Watch, for allegedly supporting a boycott of the settlements. This time, the Court upheld the decision and Shakir was deported.⁸⁷

These statutes were joined by numerous regulatory devices whose aim was one: limit state support for critical speech, especially speech critical of Israeli actions toward Israeli Arabs and Palestinians. For example, the Minister of Culture has attempted to deny funding from theatres and cinemas that put up plays or movies relating to the Palestinian Nakba. The Ministry of Culture devised funding criteria that grant bonuses to theatres that appear in Jewish settlements in the Occupied Palestinian Territories, while reducing funding for theatres that refuse to appear there.⁸⁸ The government also sought to deny civil society organizations tax exemptions based on criteria that filter out organizations carrying out activity the state views as undesirable, for example organization that “act against the state,” i.e. accuse Israel of committing war crimes or calling for a boycott of the state or its citizens.⁸⁹

The emerging picture from all of the above is that much of the new restrictions (whether realized or not), have focused on the positive aspects of speech. On the whole, the state does not interfere with private speech, even though its commitment to free speech is not as strong as it once was.⁹⁰ The new restrictions seek to bypass legal difficulties by focusing on the state’s role in creating and incentivizing speech. Given that much of the speech in the public sphere is the result of government funding and support, this trend is especially alarming. Moreover, these restrictions are geared toward stifling dissent, grant significant discretion to the executive, and seek to promote a particular political conception, the one held by the political majority.

G. CONCLUSION

This chapter addressed two issues. First, it described how the protection of speech in Israel has evolved since the founding to the present day. Inheriting a security-based colonialist paradigm of speech protection, Israel largely sought to maintain the status quo rather than embark upon a

⁸⁴ Entry into Israel Law, 1952, s 2(d).

⁸⁵ HCJ 3965/17 Harel v. The Knesset (unpublished 2018) (IsrSC).

⁸⁶ L.A.A 7216/18 Alqasm v. Ministry of Interior (unpublished 2018) (IsrSC).

⁸⁷ A.A.P 2966/19 Human Rights Watch v. Minister of Interior (unpublished 2019) (IsrSC).

⁸⁸ The Court struck down the criteria awarding increased funding because the state failed to show why other regions in Israel, which also suffer from lack of access to culture, were not similarly eligible for increased funding. The Court also found a violation of free speech, in that the state discriminated among speakers. The Court upheld, on ripeness grounds, the criteria penalizing theatres. HCJ 7647/16 Association for Civil Rights in Israel v. Minister of Culture (unpublished 2020) (IsrSC).

⁸⁹ For discussion on these measures, see Adam Shinar, ‘Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment’ (2021) AJCL (forthcoming).

⁹⁰ In 2019 Israel dropped one point in political and civil rights in the Freedom House survey “Freedom in the World”. Freedom House, ‘Freedom in the World 2019’ (2019) <<https://freedomhouse.org/report/freedom-world/2019/israel>> accessed 15 February 2021.

democratic revision. Although the much-maligned British legislation was used against Jews in Palestine, the newly created Jewish state believed it effective in dealing with threats it believed were posed by the minority Arab citizens and their political sympathizers. It was only due to prodding from the Supreme Court that the legal climate started to change.

In the decades that ensued, the Court positioned itself as the central institution in protecting speech. It did so through repeated confrontations with the executive in its various attempts to limit speech, often when that speech was viewed as harmful to state interests, namely security. True, the protection accorded by the Court was never wholesale, and the Court itself was inconsistent at times, but the overall trajectory was clear. Indeed, soon after the constitutional revolution, the Court seized the opportunity and interpreted the right to dignity as including free speech, despite the clear legislative intention to omit speech from constitutional protection.

While this is a fairly rosy picture of speech protection, the reality is less so. First, much or almost all of the advancements in protecting speech have been the result of judicial activity. As the status of the judiciary declines, so will its ability to better protect speech and enforce its decisions. Attacks on the Supreme Court and its legitimacy, rampant today, mark the potential path free speech protection might be headed.

Second, the security-based paradigm is still dominant. Arrangements preceding 1992 cannot be invalidated by the Court, and the Court is sympathetic to security considerations in general, as can be deduced from other areas of judicial activity, not just speech.⁹¹

Third, the fairly robust doctrine of free speech applies to Israelis and people inside Israel. It does not apply to the large population Israel controls in the Occupied Territories, despite the enduring occupation, now entering its fifty-fourth year.

Fourth, new regulation of speech, mostly in the form of conditional funding, is a source of concern, especially since the restrictions target speech that does not cause harm in the classical sense, but resists Israel's constitutional identity as Jewish and democratic state or opposes its policies, mostly toward Palestinians. Going beyond the traditional rationales to limit speech, such restrictions subordinate the protection of free speech to the government's ideological agenda. In this respect, the Court's erstwhile staunch defense of speech has been partial.

Given the overall trajectory of speech protection, there might be some room for optimism. Yet recent developments do not bode well for a robust system of freedom of expression. When the commitment to free speech is promoted mostly in the Court and through litigation, the status of free speech becomes precarious when the Court itself scales back its protection.

⁹¹ For example, in the cases originating from the Occupation of the Palestinian Territories, but also domestically. See David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, OUP 2021); David Kretzmer, 'Fifty Years of Public Law in the Supreme Court: Human Rights' (2000) 5 *Law and Government* 297; Yitzhak Zamir, 'Human Rights and State Security' (1989) 19 *Hebrew University Law Review* 17.