

Introduction: Israeli Constitutional Law at the Crossroads

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ISRAELI CONSTITUTIONAL LAW is a sphere of many contradictions and traditions. Growing from the tradition of British law which was absorbed by the legal system of Mandatory Palestine, Israeli constitutional law had followed the path of unwritten constitutional principles. At the same time, inspired by the new arena of post-World War constitutionalism, as well as by Resolution 194 of the General Assembly of the United Nations recognizing the establishment of the new State and the wording of its Declaration of Independence, the newly established State planned to adopt a Constitution. However, at the time of writing, this vision has not been finalized due to inner controversies on the content of the Constitution. In the meantime, the vision has been converted to the enactment of a series of Basic Laws, which function as Israel's de facto Constitution. The constitutional outcomes of this special history are the subject of many controversies, to be explored in this book.

On 15 May 1948, close to the termination of the British Mandate in Palestine, the members of the People's Council representing the Jewish community assembled and proclaimed the establishment of the State of Israel. The Declaration of Independence promised, inter alia, a Constitution for Israel:

We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15 May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called 'Israel'.¹

The Declaration presented a course for the process of enacting a Constitution comprising three stages. In the first stage, the 'Provisional Council of State' was to act as a temporary legislative branch and in the second stage, elections were to be held for a 'Constituent Assembly' charged with drafting a Constitution. After accomplishing this task, the Constituent Assembly was supposed to disperse. In the third stage, elections were supposed to be held for a legislative authority according to the electoral system to be determined in the Constitution. With the election of a legislature, the Provisional Council of State would conclude its task and disperse as well.

¹ Declaration of the Establishment of the State of Israel, 1 LSI 7 (1948).

In reality, things had taken a different course. First, the Provisional Council of State decided it would cease to exist with the convention of the Constituent Assembly, and its powers would be transferred to the Assembly.² Thus, the Constituent Assembly was assigned the role of the ordinary legislator, alongside its original role as a body charged with the drafting of a Constitution.³ Second, the Constituent Assembly, already known by its new name – the Knesset – did not succeed in getting to a consensual constitutional text. From May 1949 until June 1950, the Knesset was the scene of stormy debates.⁴ Disagreements persisted, and the inability to reach consensus on the contents, the form, or even the need for a Constitution, finally led to the adoption of the compromise formula, proposed by Knesset Member Yizhar Harari. This compromise took the shape of a decision to adopt a piecemeal Constitution by enacting a series of Basic Laws, stating the following:

The First Knesset charges the Constitution, Law, and Justice Committee with the task of preparing a constitution for the country. The constitution will be built chapter by chapter, so that each one will in itself be a basic law. The chapters will be submitted to the Knesset as the Committee concludes its task and, together, all these chapters will become the constitution of the country.⁵

In fact, for many years, the ‘Harari decision’ was implemented only partly. Although the Knesset enacted a series of Basic Laws over the years, they addressed only the institutional aspects of Israeli constitutional law and focused on the ‘rules of the political game’, and not the arena of values and basic rights.

In the absence of a formal constitutional Bill of Rights, the Israeli Supreme Court created alternative mechanisms for the protection of human rights, by reference to unwritten principles and values, as well as by applying the doctrines of administrative law to limit executive power.⁶ Judicial activism, however, had its limits. The Supreme Court perceived itself as generally precluded from reviewing Knesset legislation (in contrast to administrative actions), following the British tradition of parliamentary sovereignty. Therefore, the lack of a formal Bill of Rights was still felt and relevant. For decades, however, several attempts to anchor a Bill of Rights in the form of a Basic Law proved unsuccessful,⁷ and no breakthrough seemed in sight.

A significant change followed the enactment of two new Basic Laws dealing with human rights – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty (hereinafter: the new Basic Laws).⁸ As its name attests, Basic Law: Freedom of Occupation deals with one right only – freedom of occupation and trade. Its counterpart – Basic Law: Human Dignity and Liberty – applies to several rights – property, movement from and to

² Transition Law, 5709-1949, s 1.

³ This decision evoked misgivings on both the right and the left of the political spectrum. See R Gavison, ‘The Controversy Over Israel’s Bill of Rights’ (1985) 15 *Israeli Year Book of Human Rights* 113, 117.

⁴ See J Segev, ‘Who Needs a Constitution? In Defense of the Non-decision Constitution-making Tactic in Israel’ (2007) 70 *Alberta Law Review* 409, s IIB; Gavison (n 3) 147–50.

⁵ DK 5 (1950) 1743 (in Hebrew).

⁶ See, B Bracha, *The Protection of Human Rights in Israel* (1982) 12 *Israeli Yearbook of Human Rights* 110; A Maoz, *Defending Civil Liberties Without a Constitution: The Israeli Experience* (1988) 16 *Melbourne University Law Review* 815.

⁷ Draft Bill Basic Law: Human and Civil Rights, 1973, HH 448; Draft Bill Basic Law: Bill of Rights, 1983, HH 111.

⁸ For an English translation of Israel’s Basic Laws see: knesset.gov.il/description/eng/eng_mimshal_yesod1.htm.

Israel, liberty, dignity, and privacy (but does not mention specifically several other important human rights, such as equality, freedom of expression, and freedom of religion).

Soon after the passing of the new Basic Laws, the Supreme Court stated that their enactment created a ‘constitutional revolution’, in the sense that they granted the Court the authority to review primary Knesset legislation.⁹ Since then, the Israeli constitutional arena has changed significantly. The Supreme Court has used the new Basic Laws as a platform for developing Israel’s constitutional law, by interpreting them broadly to include those rights not specifically mentioned in the constitutional text. It stated that many of these unenumerated rights were protected under the broad ‘umbrella’ of the right to human dignity.¹⁰ This judicial innovation was accompanied also by a rich scholarly discourse. Debates and controversies soon followed.¹¹ Unfortunately, due to the language barrier, only a small portion of that judicial and academic activity is known to the international constitutional law community.

This book attempts to make a modest contribution to overcoming the language barrier, and help expose the Israeli scene to the English speaking scholarly community. The book offers a comprehensive study of Israeli constitutional law in a systematic manner that moves from constitution-making to specific areas of contestation. The book features contributions by scholars of Israeli constitutional law, followed by comments by leading scholars of comparative constitutional law from Europe and the United States. In fact, it aspires not only to present Israeli constitutional law, but rather to present the controversies that shape it in a manner that sheds light on theoretical questions, as well as on the experience of other systems.

Part 1 of the book presents the reasons and justifications offered for promoting the Israeli constitutional project and adopting a full formal Constitution. This is a question still considered open in Israel, a country that has not yet completed the process of enacting its Basic Laws. *Gideon Sapir* discusses the various functions a Constitution can fulfill and evaluates their relevance to the Israeli context. He argues that Israel needs a Constitution that will serve as a gag rule which bars constant controversies over certain issues. *Alon Harel* bases the need to complete the Israeli constitutional project on the importance of judicial review which grants a hearing to aggrieved individuals. *Ariel L Bendor* discusses the importance of having a constitutional regime by reference to its contribution to defining the basic principles of the legal system. Part 1 concludes with a comment by *Sanford Levinson*.

Part 2 discusses the various institutional models for judicial review that may suit the needs of the Israeli constitutional arena. Currently, Israel follows the US model that recognizes the power of every court to review the constitutionality of legislation, but this has been a contested model in the Israeli public arena. *Yoav Dotan* argues that the scope of judicial review should be determined in correlation to the system for selecting judges, and therefore Israel should not follow the US model of full-fledged judicial review, as

⁹ CA 6821/93 *United Mizrahi Bank Ltd v Midgal Cooperative Village* 49(4) PD 221 [1995] (in Hebrew).

¹⁰ HCJ 6298/07 *Ressler v Knesset* (21 February 2012) (in Hebrew); HCJ 7052/03 *Adalah v Minister of Interior* 61(2) PD 202 [2006] (in Hebrew); HCJ 10203/03 *Hamifkad Haleumi v Attorney General* 62(4) PD 715 [2008] (in Hebrew).

¹¹ See, eg D Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective’ (1995) 26 *Columbia Human Rights Law Review* 309; G Sapir, ‘Constitutional Revolutions – Israel as a Case Study’ (2010) 5 *International Journal of Law in Context* 358; B Medina, ‘A Response to Richard Posner’s Criticism of Aharon Barak’s Judicial Activism’ (2007) 49 *Harvard International Law Journal* 1.

long as it follows a professional based process of selecting judges. *Joshua Segev* evaluates the prevalent view of the Israeli system and argues for a reform that will empower only the Supreme Court to practice judicial review of legislation. *Ori Aronson* criticizes this alternative, which seems to gain growing popularity. He argues that this model overlooks the redeeming potential of trial court adjudication for a deliberative, participatory, and pluralistic process of creating constitutional norms and understandings. *Tsvi Kahana* evaluates the Israeli experience with the notwithstanding mechanism which was incorporated in 1994 into Basic Law: Freedom of Occupation, as inspired by the Canadian Charter of Rights and Freedoms. *Kahana* argues that as long as Israel's Basic Laws can be amended without a super majority, deviations from them should be made by constitutional amendments, rather than through a notwithstanding mechanism. Part 2 concludes with a comment by *Víctor Ferreres Comella*.

Part 3 assesses the connections between Israeli constitutional law and global processes. *Iddo Porat* analyzes the persistent influence of foreign law on Israeli constitutional judicial decisions. Following a similar route, *Moshe Cohen-Elliya* discusses the influence of Western liberal thinking on Israeli constitutional law in the format titled by him as 'transformative constitutionalism'. *Margit Cohn* offers a detailed analysis of the constitutional doctrine of proportionality in a comparative perspective. Part 3 concludes with a comment by *Vicki C Jackson*.

Part 4 analyzes the process of constitutional balancing. *Mordechai Kremnitzer* offers a critical evaluation of the dangers ingrained in balancing for the protection of human rights. *Yaacov Ben-Semesh* offers an evaluation of the case study of balancing in the area of freedom of speech, with regard to speech allegedly offending the feelings of others. Part 4 concludes with a comment by *Sujit Choudhry*.

Part 5 discusses the status of the so-called unenumerated rights in Israeli constitutional law, focusing on the role played by the benevolent interpretation offered by the Israeli Supreme Court to the concept of human dignity, which enables it to fill the void created by the failure of the current Basic Laws to specifically mention rights such as: equality, freedom of speech and freedom of religion. *Tamar Hostovsky-Brandes* offers a broad overview of current judicial interpretations of the right to human dignity. *Sharon Weintal* discusses the possibility of compensating for the supposedly missing rights in the Basic Laws by reference to non-written constitutional principles. Part 5 concludes with a comment by *David Fontana*.

Part 6 focuses on the challenge of social rights in the context of Israeli constitutional law. The constitutional status of social rights and their enforceability is an open question in many systems, but even more so in Israel which lacks an express recognition of them. The result has been a limited protection of these rights as derivatives of the concept of human dignity, usually offering them only a 'minimum' level of protection. Both *Aeyal Gross* and *Amir Paz-Fuchs* discuss this model of minimum-level protection of social rights in a critical manner. *Neta Ziv* offers another critical view, by focusing on the dynamic of conditioning social rights entitlements. Part 6 concludes with a comment by *Mark Tushnet*.

Part 7 moves forward to assess the applicability of constitutional rights in private law. *Aharon Barak* discusses the Israeli approach to this question – defined as an 'indirect application model' – and compares it to other prevalent models. *Michal Tamir* discusses this question in a contextualized manner which focuses on contractual relations. Part 7 concludes with a comment by *Stephen Gardbaum*.

Part 8 is dedicated to the issue of emergency constitutional powers and other national security related constitutional matters. This topic is of the highest importance in the Israeli context, taking into consideration the threats to Israel since its establishment. *Daphne Barak-Erez* analyzes the Israeli model of regulating the power to declare an emergency situation in a comparative perspective. *Barak Medina* discusses the role of legislation in regulating national security threats. Part 8 concludes with a comment by *Adam Tomkins*.

Part 9 evaluates various outcomes of Israel's particular *raison d'être* as a State defined in its Basic Laws as 'Jewish and Democratic'. This constitutional formula has ramifications to both the nation state model and to the regulation of State and religion matters. *Chaim Gans* discusses the Israeli nation state model in the context of Zionist thinking, examining the various ideological streams within the Jewish national movement. *Aviad Bakshi* and *Gideon Sapir* evaluate the implications of Israel's identity as the nation state of the Jewish people for its immigration policy, by analyzing the case study of family reunification applications of Palestinians. *Gila Stopler* explores the connection between national identity and the regulation of religion-State relations in Israel. She claims that the Israeli model has been only partially successful in shaping national identity and relates this limited success to the State's lack of control over its own religious establishment. Part 9 concludes with a comment by *Susanna Mancini* and *Michel Rosenfeld*.

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Read together, the various chapters and comments included in this book present Israeli constitutional law as a living sphere, which reflects the dilemmas the country is faced with, as well as the challenges of constitutional theory in general. As such, our hope is that the book will promote not only the future study and development of Israeli constitutional law, but also the understanding of the complexities of constitutional systems that are still coping with the challenge of nation-building and transitions.

