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## Does Israel Have a Constitution?

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## ARTICLE

### DOES ISRAEL HAVE A CONSTITUTION?\*

THE HONORABLE DALIA DORNER\*\*

1. As with every country, Israel has a material constitution, meaning governing arrangements that are anchored in legal norms that establish the branches of government - the legislative branch, the executive branch and the judiciary - and the relationships among them. The question is whether Israel also has a formal constitution: a norm that is superior to regular legislation so that if the laws and the constitution conflict, the provisions of the constitution will be preferred. A second question that arises asks which branch is authorized to determine the constitutionality of ordinary legislation.

2. From the outset of the establishment of the State, a formal constitution was anticipated. The Declaration of the Establishment of the State of Israel (hereafter the Declaration of Independence) promises that a formal Constitution would be adopted by the Elected Constituent Assembly no later than October 1, 1948. A formal Constitution was among the criteria discussed by the United Nations and favored in a United Nations decision of November 29, 1947. However, the plan of drafting a comprehensive written constitution for the State of Israel was never realized.

The Declaration of Independence of the State of Israel provides guiding principles for the State of Israel. It articulates the basis for a human rights charter that serves as a backdrop for the Basic Laws and all ordinary legislation. According to the Declaration of Independence, the State of Israel “will be based on freedom, justice and peace as envisaged by the prophets of

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\* Justice Dalia Dorner presented this lecture at Saint Louis University School of Law on April 12, 1999.

\*\* Associate Justice, Supreme Court of Israel.

Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.”

Because of constant threats to Israel’s security, Israel adopted Emergency Regulations and considered itself in a state of emergency, conditions that complicated the drafting and adoption of a formal Constitution. In addition, the religious community viewed the Torah, or Jewish law, as paramount and thus the notion of a supreme law embodied by the Constitution threatened to offend this segment of the population. Prime Minister David Ben Gurion was among the most famous opponents to the adoption of a constitution. He did not dispute the power of the Knesset to adopt a constitution, but argued that the Knesset was not required to do so immediately and that it had the power to postpone the adoption of a constitution until a later date.

In 1950, a compromise was reached that managed to preserve a number of options. This compromise, the Harari Resolution, established that Israel’s formal constitution would be drafted in a piecemeal fashion through the adoption of a series of Basic Laws. According to the Harari Resolution, these Basic Laws would ultimately be unified as the Constitution of the State of Israel. Thus the principle of a formal Constitution was preserved, while it was accepted that it would not have to be drafted as a single unified document from the beginning. Instead, articles of the Constitution could be adopted in the form of Basic Laws.

In reality, the principles of the bill of rights contained in the Declaration of Independence were not granted constitutional status, and the recognition of human rights – those of liberty, equality, freedom of expression and occupation, freedom of conscience and religion - as fundamental norms of Israeli law was a creation of the Supreme Court. The Court held that although legislation cannot be invalidated on the basis of the Declaration of Independence, all laws of Israel, including those enacted during the British Mandate before the establishment of the State, must be interpreted in light of the principles expressed by the Declaration.

The basic principle concerning freedom of expression in Israel was first established in the famous *Kol Ha’am* case. The rule provides that the right to free expression cannot be restricted unless the following concurrent conditions are met: (i) the explicit authorization of primary legislation; (ii) near certainty, or at least a reasonable likelihood, that the realization of the freedom of expression will harm an important interest; and (iii) that the harm to the interest will be actual and severe. On the basis of this rule, the Court ordered the police to allow demonstrations in situations in which a fear existed but did not reach the level of proximate danger to the public peace. In addition, the Court intervened against government decisions to restrict freedom of expression even when the expression was hurtful, offensive, or disgusting.

In the area of equality, judicial decisions established the principle that, in the absence of a legislative directive to the contrary, the government authorities must conduct themselves in an egalitarian or non-discriminatory manner. Discrimination is cause for the invalidation of an administrative decision, and the law will be interpreted, to the extent possible, in accordance with the principle of equality. On the basis of these rules, discriminatory decisions were invalidated, including those based on group membership (such as sex, race, religion, etc.) and those based on administrative or political rationales.<sup>1</sup>

3. The legal principles that anchored these human rights can also be considered part of Israel's constitution. Yet, these norms applied only to the administrative bodies. The power of the Knesset to legislate remained completely unrestricted. Indeed, over the years, eleven Basic Laws were enacted: Basic Law: the Knesset, Basic Law: Lands of Israel, Basic Law: The President, Basic Law: National Economy, Basic Law: The Army, Basic Law: Jerusalem the Capital of Israel, Basic Law: State Comptroller, Basic Law: The Government, Basic Law: Freedom of Occupation, Basic Law: Human Dignity and Liberty. Only the last two Basic Laws, enacted in 1992, deal with human rights. The primary legislation of the two is Basic Law: Human Dignity and Liberty.

The rights were defined in the two Basic Laws in absolute terms:

The life, body or dignity of any person shall not be violated.<sup>2</sup>

A person's property shall not be infringed.<sup>3</sup>

Every person is entitled to protection of his life, body and dignity.<sup>4</sup>

The liberty of a person shall not be deprived or restricted through imprisonment, detention, extradition or in any other manner.<sup>5</sup>

Every Israeli citizen is entitled to enter Israel.<sup>6</sup>

Every person is entitled to privacy and to the confidentiality of his life.<sup>7</sup>

Every Israel national or resident has the right to engage in any occupation, profession or trade.<sup>8</sup>

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1. H.C. 25/53, Koh Ha'am Ltd. v. Minister of the Interior, 7(1) P.D. 165.

2. Basic Law: Human Dignity and Liberty, § 2, 1992, S.H. 1391.

3. *Id.* at § 3.

4. *Id.* at § 4.

5. *Id.* at § 5.

6. *Id.* at § 6.

7. Basic Law: Human Dignity and Liberty, § 7, 1992, S.H. 1391.

8. Basic Law: Freedom of Occupation, § 3, 1992, S.H. 1391.

Alongside these rights that are defined in absolute terms, the authority to limit them is defined in the Basic Laws. Human rights are not absolute but relative, and their parameters are derived from the balance between them and other principles that society has an interest to protect. In the United States, the Constitution is silent as to the manner of balancing human rights, and thus the determination is left to the Supreme Court. In Israel, the Basic Laws, like many other constitutions, contain a Limitation Clause. The following language of the Basic Law: Human Dignity and Liberty explains the limitation:

There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such Law.<sup>9</sup>

This provision must be read in conjunction with the Declaration of Purpose in Section 1 of the Basic Law, which defines the values of the State as those of a Jewish and democratic state.

4. Because of difficulties in reaching a national consensus and fears of the religious parties concerning a change in the status quo according to which there is no separation between religion and State, and because the authority to determine issues concerning marriage and divorce is in the exclusive jurisdiction of the Rabbinical Courts, the Basic Laws included provisions that grant force to legislation enacted prior to these Basic Laws. In addition, the two most recent Basic Laws, according to the stated intent of the Knesset, reflect a political compromise and national consensus concerning specific rights. Thus the Basic Laws do not include central rights such as the principle of equality, freedom of expression, freedom of religion, conscience and information. To this day, the Knesset has not enacted a Basic Law: Legislation that establishes the superiority of the Basic Laws over ordinary legislation and the authority of the courts to review the constitutionality of legislation. The Basic Laws are not sufficiently entrenched, and most of the Basic Laws, including the Basic Law: Human Dignity and Liberty, which is the central law concerning the protection of human rights, can be changed by an ordinary majority of votes in the Knesset.

5. The argument has been made that the Basic Laws can be defined as *lex imperfecto* and that they determine principles that cannot be implemented in practice. There are those who believe that Basic Laws that were enacted by an ordinary majority of Knesset cannot be considered a constitution.<sup>10</sup>

6. This position was rejected by the Supreme Court of Israel.

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9. Basic Law: Human Dignity and Liberty, § 8, 1992, S.H. 1391.

10. Ruth Gavison, *The Constitutional Revolution – A Description of Reality or Self-Fulfilling Prophecy*, 38 MISHPATIM 21 (1997).

Already in 1969, in the *Bergman* case,<sup>11</sup> the Supreme Court held that the Knesset has the ability to limit itself through an entrenched clause in a Basic Law, and that the Court is authorized to invalidate an ordinary statute that contradicts such a provision. Indeed, in the same decision, the Court intentionally avoided ruling on “weighty preliminary questions of a constitutional nature, relating to the status of the Basic Laws, and to the justiciability before this court of the issue of the Knesset’s actual compliance with a self-imposed limitation.”<sup>12</sup> These questions were decided by a panel of nine judges in the case of *Bank Mizrahi* following the enactment of the Basic Laws.<sup>13</sup>

In the *Bank Mizrahi* decision, in establishing unanimously that the Court has the authority to review the constitutionality of legislation, the Supreme Court of Israel followed the law of the United States. In the United States, as in Israel and in contrast to other countries such as Canada, the Constitution has no explicit provision authorizing courts to determine the constitutionality of ordinary legislation.<sup>14</sup>

In the United States, the power of the Supreme Court to determine the constitutionality of acts of other branches of government is a basic element of the system of government. However, this has not always been the case. An examination of the history of the United States Supreme Court reveals the Court’s continuing effort to establish and maintain the power of the judiciary. In *Marbury v. Madison*, Chief Justice Marshall established the principle that the Constitution is a superior form of law and that the Court is the body to determine whether a statute is inconsistent with this law. Chief Justice Marshall established that “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>15</sup>

7. According to the Israeli constitutional structure, questions of constitutionality are decided by the judiciary. Therefore, in the absence of another arrangement in the law, the authority to review the validity of a statute is granted to all courts or tribunals. The decision of a judicial body other than the Supreme Court will, by the nature of things, be limited to the specific case before it. However, a decision of the Supreme Court, the court of highest instance whose decisions are binding precedents, can in fact invalidate a law that is unconstitutional.

In my opinion, criticism of the Court as having seized authority for itself is unfounded. The assertion that the Limitation Clause is of declarative force

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11. H.C. 98/69, *Bergman v. Minister of Finance*, 23(1) P.D. 693.

12. *Id.* at 696.

13. C.A. 6821/93, *Unified Mizrahi Bank Ltd. v. Migdal Collective Village*, 49(4) P.D. 221.

14. *See, e.g.*, CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 24(1).

15. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

only is negated by the explicit provision preserving the force of all statutes enacted prior to the Basic Law. Such a provision would have been completely superfluous had it been impossible to invalidate legislation that failed to pass the tests of the Limitations Clause.

8. In *Bank Mizrahi*, a majority of the Court held that the Basic Laws are enacted by the Knesset as the Constitutional Authority of Israel, and that the Basic Laws enjoy a superior normative status as compared with ordinary legislation, which is enacted by the Knesset in its role as the Legislative Body of Israel. The Knesset is not authorized to enact statutes other than those that befit the provisions of the Basic Laws. Therefore, when a conflict arises between a provision of a Basic Law and a provision of a statute that precludes the fulfillment of both simultaneously, the provision of the Basic Law will be favored as it enjoys a higher normative status than legislative provisions.

It becomes clear that the Basic Laws of Israel that are our formal constitution are also rigid or entrenched in the sense that an ordinary statute passed by the Knesset cannot infringe upon them unless the Basic law itself contains an express provision to that effect.

9. As discussed earlier, the Basic Laws fail to acknowledge central human rights, and there are those who believe that all the rights not explicitly mentioned - the principle of equality, freedom of expression, freedom of religion and conscience - can be included in the right to dignity. In this way, it is argued, the Basic Law: Human Dignity and Liberty can be transformed into a complete Bill of Rights.

I doubt whether it is possible, and in any case appropriate, to interpret the Basic Law as protecting rights that are not mentioned in the Law, when the clear intent of the legislator was to refrain from anchoring such rights in the Basic Law in the absence of a national consensus. At the same time, even if rights are not added through interpretation of the Law, there is no reasonable way to interpret the right to dignity such that degradation of an individual would not be considered an infringement of the right protected by the Basic Law. The Basic Law: Human Dignity and Liberty protects against a harm that leads to degradation, that is a harm to a human being that goes to the essence of his or her personhood. In this way, the Basic Law protects the principle of equality, when an individual is discriminated against on the basis of gender, race or religion<sup>16</sup> and the freedom of expression, religion and conscience, and scientific creation from statutes that limit the personal fulfillment of a human being.<sup>17</sup>

10. As I explained earlier, human rights anchored in the Basic Laws can be limited according to the measuring principles established by the Limitation

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16. H.C. 4541/94, *Miller v. Minister of Defense* P.D. 59(4) 94, 131-32.

17. Cr. A. 4409/94 *Golan v. Prison Services* 40(4) P.D. 136, 190.

Clause which include four elements: authorization by Law, a proper purpose, proportionality, and befitting the values of the State of Israel.

The first element reflects the Constitutional Principle that requires an infringement of a right to be authorized explicitly by Law or through explicit consent.

11. The element concerning a proper purpose requires that the infringement of a right be for a purpose that serves a public goal that could justify an infringement of a fundamental right in a democratic system.

12. The most important element is that the degree of harm to the right be no greater than required to attain the goal. This is the Proportionality Requirement, conformity with which is expressed through three balancing tests: the suitability of the means to the goal; the adoption of a means that infringes upon a fundamental right only as a last resort and for lack of any other reasonable means; and the adoption of a means that harms a right only in a case in which the objective is sufficiently important and the harm that would result from not pursuing such an objective justifies the harm to the fundamental right.

As for these balancing tests, it must be emphasized that no one of these tests is absolute. First, ordinarily, the legislative branch has discretion in applying the balancing tests. That is, it is enough that the legislator have a feasible view that the means chosen suit the purpose, or that the right is infringed to the smallest extent possible in achieving the purpose, or that the harm to the right necessary to achieve the goal is reasonable. According to the accepted terminology of administrative law, the legislator's view must be within the "margin of reasonableness" in order for the law to meet the proportionality requirement. Second, as part of the first balancing test, the suitability of the means to the goal, an absolute certainty that the means will achieve their purpose is not required. It is enough that there is a high probability that the goal will be achieved through the use of the chosen means. The degree of probability required will depend on the relative importance of the right being harmed and the purpose of the infringement. Third, the second balancing test, which requires that rights be infringed upon only as a last resort, does not obligate the Knesset to choose means that do not infringe upon a right or which curb the infringement at any cost. The public resources are by the nature of things limited. Despite the unquestionable importance of individual rights, it is not possible, nor appropriate to prefer their fulfillment absolutely over all other public interests. Thus, for example, it is possible to prevent suspects in all cases from endangering the public through "house arrest" under the auspices of the police. However, it is, at times, impossible to disregard the possibility of achieving the same goal by the less expensive means of detention in prison, even though such a measure infringes upon the rights of the suspect far more than house arrest would. Further, there are various levels at which a goal can be attained. Sometimes, a lesser harm of a right can enable a greater



realization of the goal. Therefore, it is sufficient that the Knesset reasonably consider, in light of the circumstances, the minimization of the harm to a right.

In my opinion, it is appropriate that in applying all three of these balancing tests, the substance of the right potentially harmed will be taken into account.

13. This concept is recognized in other countries and by the administrative Law in Israel.

In the United States, different levels of scrutiny were developed to test the constitutionality of statutes that infringe upon civil rights. These levels of scrutiny depend on the degree of importance of the values and interests underlying each right. At the bottom of the hierarchy of rights are economic rights. An infringement of such a right will be justified if it is reasonably related to a legitimate public interest.<sup>18</sup> At the top of the ladder are overriding rights with special status, such as the right to participate in elections, freedom of expression and freedom of movement. An infringement of such rights is allowed only to serve a compelling state interest that cannot be realized by less intrusive means.<sup>19</sup>

In Israel, when we are confronted by a harm to a right executed by an administrative body, we balance the substance of the right, the specific weight and the rationale at the root of the right on one side against the importance of the interest conflicting with the right, on the other.<sup>20</sup>

The degree of importance attributed to a right in the balancing framework in which the constitutionality of the infringement will be examined is likely to change from case to case pursuant to the values and interests harmed in the specific circumstances. Thus, for example, harm to an individual is not the equivalent of a harm to many people or to the public in general.

This approach applies to all three of the balancing tests.

Concerning the test of whether the means chosen suit the objective, the degree of certainty required in matching the means to the goal and concerning its effectiveness is influenced by the importance of the right and its underlying reasons. When dealing with rights of great importance, the standard will be one of "near certainty," and possibly nearly absolute certainty, that the means by which a right is infringed upon will enable the efficient and complete realization of the goal. In contrast, when a less weighty right is considered, it is possible that a "reasonable possibility" of realizing the goal will suffice.

As for the requirement that the means chosen be the least harmful to the right in question, which is clearly not an absolute test, the choice of means will be affected by the nature of the right being infringed. When considering the infringement of an especially important fundamental right, we must be stricter

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18. *See, e.g.*, *Railway Express Agency, Inc. v. New York*, 366 U.S. 106 (1949).

19. *See, e.g.*, *Shapiro v. Thompson* 394 U.S. 618 (1969).

20. *See, e.g.*, H.C. 399/85, *Kahane v. Executive Board of the Broadcasting Authority*, 41(3) P.D. 255, 284.

in our choice of the least restrictive means, even if such a means is expensive. The law will differ in cases in which the right in question is of lesser weight. Protection of such a right will not require the State to adopt especially burdensome means.

As concerns the test of balancing between the benefit resulting from attainment of the goal and the harm of the means by which it is attained, such a test will take into account, as is the case with administrative bodies, the nature of the right in question, the underlying rationales and the values and interests harmed in the specific case.

14. The element concerning the values of the State of Israel requires that the infringement of a right befit the values of the State of Israel as a Jewish and democratic state. Interpretation of this provision is by no means simple. Even though the meaning of democratic principles may be clear to all, the question remains as to how to interpret the principles of a Jewish state and how to resolve a possible conflict between the two sets of values. The Supreme Court has not yet been confronted directly with this question. A number of opinions have been expressed concerning this issue.

It is clear that the segment of Israeli society that supports a *Halachic* State, or a state run on the basis of Jewish religious law, believe that the principles of the Jewish state are those of adherence to Jewish religious law, which should prevail when in conflict with democratic principles. One Israeli Supreme Court Justice expressed the opinion that when confronted with a number of approaches compatible with a democratic value, we must prefer the approach most in agreement with principles expressed in the Jewish religious law. In this way, it is argued, we should synthesize democratic and Jewish principles.<sup>21</sup>

Another Supreme Court Justice expressed the belief that the Jewish values of the State of Israel are the values shared by Judaism and democracy: respect for your fellow being, the sanctity of life, social justice, preservation of human dignity and such values that Judaism has always imparted.<sup>22</sup>

Another argument asserted in academia is that the bi-principled mandate of a Jewish and democratic state broadens the protection of human rights. The Limitation Clause of the Basic Law does not specify when rights can be conferred and Jewish law does not recognize all human rights. As such, it is enough that legislation infringes on either democratic or Jewish principles so as to make it an invalid infringement on human rights. According to this view, a Law which violates rights under the Basic Law, that befits the principles of the State as a democracy, but does not befit the principles of a Jewish state cannot be enacted by the Knesset. And vice versa. Such a Law cannot be enacted if it befits the values of a Jewish state but does not befit the principles

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21. C.A. 294/93, *Burial Society of Jerusalem v. Kestenbaum*, 46(2) P.D. 464, 511.

22. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9, 30-31 (1992-1993).

of the state as a democracy. This approach requires that the principles of a Jewish state that protect human rights should be interpreted broadly so as to widen the protection of human rights by the Basic Laws.<sup>23</sup>

15. In my opinion, a suitable interpretation must create a harmony between democratic and Jewish values. The State of Israel is a state governed by law and not on the basis of Jewish religious precepts. Therefore the principles of a Jewish state are not identical to the principles of Jewish religious law. Instead, these Jewish values are those that were at the basis of the establishment of the State of Israel - the Zionism that led to the establishment of the State, the Hebrew language, the observance of holidays and days of rest according to the Jewish calendar, and most importantly the “principles of liberty, justice, equity and peace of the heritage of Israel” according to which the courts must also decide legal questions for which there are no answers in the legislation, case law, or by analogy.<sup>24</sup> These principles also befit the democratic character of the State. Thus there is nothing about the bi-principled mandate of the Basic Law that limits rights more than is necessary in a democratic system.

The United States Declaration of Independence reads:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.

However, over the course of many years, the Supreme Court of the United States ignored the discrimination against Afro-American individuals, and even granted legitimacy to slavery in the *Dredd Scott* case. Without the internalization of values by society, a constitution is not enough. Still, the declaration that “all men are created equal” continued to plague the American conscience and in the end, led to changes in the law and society. The poet Robert Frost expressed it well:<sup>25</sup>

That’s a hard mystery of Jefferson’s.  
What did he mean? Of course the easy way  
Is to decide it simply isn’t true.  
It may not be. I heard a fellow say so.  
But never mind, the Welshman got it planted  
Where it will trouble us a thousand years.  
Each age will have to reconsider it.

History proves, therefore, that the realization of a true democracy, as opposed to a formal democracy, requires the support and completion of the constitution by additional values, among them the obligation to treat all

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23. Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 MISHPAT UMIMSHAL 443, 443-52 (1994).

24. Foundations of Law Statute, 1980, S.H. 978.

25. See Simon Greenberg, *Judaism and the Democratic Ideal*, DEMOCRATIC CULTURE, (Avi Sagi & Yedida Stern, eds. 1999) at 189.

individuals equally, and to take responsibility for the fate of another. These values can be found in the heritage of Israel. The Talmud states:

For this reason, Adam was created an individual, to teach you that one who causes the loss of one life is considered to have caused the loss of an entire world; and one who saves a life is considered to have saved an entire world.

The synthesis between Jewish values, as I understand them, and democratic principles eases the internalization of democratic principles on the part of Israeli society and strengthens them.

16. On the basis of these principles, the Supreme Court of Israel invalidates provisions of a law that infringe upon the freedom of occupation.<sup>26</sup> Nevertheless, the Court upheld the constitutionality of a law that infringed upon the right to property as it determined that the infringement withstood the tests of the Limitation Clause.

17. Indeed, Israel's formal constitution is unfinished. It still needs to be completed through the enactment of additional Basic Laws and further entrenchment. I hope that the Knesset, as the legislative branch, will complete its endeavor. Yet, even in its unfinished state, the Constitution expressed by the Basic Laws enjoys full normative force and superiority over ordinary legislation. And even in the existing constitutional framework, the Basic Laws can be enforced through judicial review.

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26. H.C. 1715/97, *The Bureau of Investment Advisors in Israel v. The Minister of Finance*, 51(4) P.D. 367.

