

Israel: Public Law

Assaf Meydani

School of Government and Society, Academic College of Tel-Aviv Yaffo, Tel-Aviv, Israel

Yoram Rabin

Haim Striks School of Law, College of Management Academic Studies, Rishon Lezion, Israel

Abstract

Public law in Israel reflects the collection of norms that govern the legal relationships between the state and individuals, and the relations among governmental agencies. Public law covers constitutional law and administrative law. It also incorporates the sociopolitical aspects that infuse it with positive and normative content and play a role in shaping it. The main issues governed by public law include the protection of human rights, the regulation of administrative authorities, and the oversight and monitoring of how administrative authority is used, as well as the formal and material definition of constitutional norms, the legal status of government agencies, and the administrative process.

INTRODUCTION

Public law in Israel reflects the collection of norms that govern the legal relationships between the state and individuals, and the relations among governmental agencies. Public law covers constitutional law and administrative law. It also incorporates the sociopolitical aspects that infuse it with positive and normative content and play a role in shaping it. The main issues governed by public law include the protection of human rights, the regulation of administrative authorities, and the oversight and monitoring of how administrative authority is used, as well as the formal and material definition of constitutional norms, the legal status of government agencies, and the administrative process. Constitutional law is the body of law that governs the legal status of the basic norms in the Israeli legal system and defines the interrelationships and powers of governmental agencies and other state entities. The constitutional mechanism is designed around legal norms, each of which has a different normative status. A formal constitution is generally at the top of this pyramid. Unlike countries such as the United States and Canada that have coherent constitutional documents, Israel does not have a formal constitution. However, over the years, a system of 11 Basic Laws has been enacted, which are designed to address specific constitutional issues. At some point in the future, those Basic Laws may be compiled into a complete constitutional document. The 11 Basic Laws are recognized as having constitutional supremacy status over primary legislation in Israeli judicial interpretation.^[1] The recognition of the Basic Laws as having constitutional status was dubbed the “constitutional revolution.”^[2] Thus, Israel now has constitutional norms that override normal statutes and provide the legal basis according to which the Supreme Court interprets Israeli legal provisions and conducts judicial review of primary legislation. The Basic Law that has had the most

significant impact is Basic Law: Human Dignity and Liberty providing the normative framework required for instituting judicial review of Knesset (the Israeli Parliament) legislation as well as governmental decisions.

ISRAEL’S CONSTITUTIONAL HISTORY

When Israel was founded in 1948, after 30 years of the British Mandate, its founders assumed that a constitution and a bill of rights would be forthcoming in the near future.^[3,4] Indeed, the Declaration on the Establishment of the State of Israel (also known as the Declaration of Independence) contained an explicit promise to draft a written constitution. However, soon after the Declaration was proclaimed, events took a different course. Internal political squabbles regarding the content of the future constitution rendered it impossible to agree upon a text which would gain broad-based support in a heterogeneous Israeli society, composed of immigrants coming from diverse cultural backgrounds with strongly held opposing ideologies—nationalist, socialist, and religious. In 1950, it became apparent that MAPAI—the ruling party at the time (an antecedent of the current Israel Labour Party) was unwilling to draft a constitution over the opposition of the religious parties, which formed part of the coalition government. (There are also speculations that Prime Minister Ben-Gurion was reluctant to restrict, through the enactment of a constitution, his freedom of political maneuvering, see Cohen.^[5]) Consequently, the First Knesset adopted a historical compromise—the “Harari Resolution” (named after its sponsor). This resolution stated the following:

The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the State. The Constitution shall be

composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and all the chapters together will form the State Constitution.

—DK (*Knesset Records*)^[6]

The wording of the Harari Resolution represents a political compromise that has enabled the Knesset to evade the obligation articulated in the Declaration of Independence to produce a formal constitution, while at the same time preserving its legal competence to enact one. Although it was questioned in academic circles whether the First Knesset's authority to enact a constitution was validly delegated to subsequent elected Knessets,^[7] in practice, the Knesset (from the Third Knesset onwards) enacted a series of 11 Basic Laws. (This practical custom received a legal approval by the majority opinion in *United Mizrahi Bank v. Migdal Cooperative Village*.^[11])

The first nine Basic Laws enacted until 1992 addressed the structure of the state's political and legal system and the powers of its principal institutions. Some Basic Laws defined the powers of the legislative,^[8] the executive (the original Basic Law: the Government, 22 L.S.I 257, 1969,^[9] was replaced by two new Basic Laws: first in 1992, Basic Law: the Government, L.S.I 1396, 1992, and then again in 2001, Basic Law: the Government, 2001, L.S.I 1780), the president,^[10] the judiciary,^[11] and the state comptroller.^[12] Other Basic Laws contained essential principles concerning the management of state lands,^[13] the state economy,^[14] the armed forces,^[15] and the designation of Jerusalem as the national capital of Israel.^[16] However, until 1992, the Basic Laws did not, by and large, protect human rights. (An exception could be found in Article 4 of the Basic Law: the Knesset, which pronounce, among other things, the right to equality in voting to the Knesset. This Article contain the so-called "entrenchment clause" providing that its provisions shall not be amended except by a special majority vote in the Knesset. In 1969, the Supreme Court has recognized the validity of this entrenchment clause and invalidated legislation conflicting with the entrenchment provision since it was not been adopted by the requisite majority. See Bergman.^[17]) As a result, the pre-1992 "Israeli constitution" was described as a "body without a soul"—an institutional and political legal framework lacking meaningful safeguarding of substantive values.

This state of things changed dramatically in 1992 when the Knesset adopted two new Basic Laws designed to protect human rights: Basic Law: Human Dignity and Liberty (printed in Is. L.R.^[18]) and Basic Law: Freedom of Occupation^[19] (this Basic Law was replaced in 1994 by Basic Law: Freedom of Occupation, 1994, S.H. 1454, 90. The full text of this Basic Law is also reprinted in Is. L.R., 1997, 31, 21–25)—establishing the constitutional supremacy of several important human rights: the right to life, the right to

body integrity, the right to human dignity, the right to property, the right to personal liberty, the right to leave the country and the right of citizens to re-enter it, the right to privacy, and the freedom of occupation. Most significantly, both Basic Laws included "entrenchment clauses" (or supremacy clauses)—i.e., specific language prohibiting infringement upon these protected rights, including by way of legislation, unless it meets four basic conditions (contained in "limitation clauses"): 1) it is prescribed by law; 2) it is compatible with Israel's basic values as a Jewish and democratic state; 3) it is enacted for a proper purpose; and 4) and it does not introduce excessive restrictions.^[20]

THE CONSTITUTIONAL REVOLUTION: JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF LAWS

The enactment of the 1992 Basic Laws underlies the claim that Israel has undergone a "constitutional revolution," transforming it from a parliament-supremacy-type democracy (similar to the United Kingdom) to a constitutional democracy (like most other Western democracies) where human rights serve as powerful "trumps."^[21] Indeed, the President of the Israeli Supreme Court, Aharon Barak, a main proponent of the "constitutional revolution" theory, has argued that the cumulative effect of these provisions had provided the State of Israel with a de facto constitution, albeit of a limited scope, encompassing the power of judicial review over primary legislation.^[22]

Since 1997, the Court moved to strike down ten statutory provisions perceived to conflict with constitutionally protected human rights: (pp. 199, 200),^[23] i.e., a provision mandating practicing investment consultants to take a new licensing examination;^[24] a military law provision authorizing the 96-hour detention without judicial review of soldiers suspected of committing felonies;^[25] a law that granted broadcasting license to a number of pirate radio stations—adversely affecting thereby the commercial interests of preexisting licensees;^[26] a law that exempts ultra-orthodox Jewish students (*yeshiva* students) from military service;^[27] and a law that provided that the state would establish a prison to be operated by a private corporation rather than by the state.^[28]

However, since 1992, the process of creating a constitution through the enactment of Basic Laws has come to a halt. While numerous Basic Law bills had been introduced to the legislative process by the government and by private members of Knesset (MKs), none of them had been adopted.

The immediate "victims" of the growing opposition to the "constitutional revolution" have been three government-sponsored draft Basic Law bills that had been first introduced to the Knesset in 1993—Basic Law: Rights in the Judicial Process; Basic Law: Freedom of Expression and Association; and Basic Law: Social Rights.^[29] All three draft bills have encountered strong political opposition and their

prospects of passage in the Knesset anytime in the near future are unclear.

THE CONSTITUTIONAL PRINCIPLES

Separation of Powers

The separation of governing powers into three independent authorities—legislative, judicial, and executive—is a clear characteristic of modern democratic regimes. This principle is also a fundamental element of the Israeli system of government. In Israel, the relationship between the legislature and the judiciary is complex. The High Court of Justice (HCJ) is the authorized interpreter of legislation and often partakes in the legislative process, thus giving rise to tension between these two powers (although such tension exists in many democratic regimes).^[30] The separation of powers exists to restrain the executive branch, as principally expressed in the “principle of administration’s legality,” according to which the Executive is authorized to act according to powers assigned to it by law. According to HCJ rulings, the Knesset may not settle for generally establishing a certain government authority, but must outline the main arrangements that it must follow in legislation (primary arrangements). In the *yeshiva student’s recruitment affair*, the HCJ ruled that the defense minister is not authorized to establish principles and rules for exemption from military duty because these rules should be specified by “primary arrangements” that define the general policy and its guidance, which should be introduced as a state law.^[31] The Court therefore instructed the Knesset to pass a law governing this matter, which it did.

The Rule of Law

The rule of law principle in Israeli legal system has at least two meanings: The first is that government and public bodies require lawful authority in order to act. This formal view of the rule of law was employed to restrict and limit governmental powers, particularly on human rights issues (see, for example, Bejerano^[32]). The second meaning of the rule of law requires equality before the law. The Israeli democracy demonstrated that equality before the law is not just a fundamental principle *de jure*, but that the state’s legal system applies the same criteria and moral standards to the head of state as to its lowliest citizen. For example, in 2009, an acting President of Israel Moshe Katzav was charged (for some sexual offences), convicted, and imprisoned as an ordinary citizen. In the same year, the finance minister Avraham Hirshzon was convicted of theft (and other offenses) and sent to serve five and a half years in prison. In another example, in 2014, the district court of Tel-Aviv-Yaffo convicted former Prime Minister Ehud Olmert of bribery (among other offenses) and sent him to serve 6 years in prison.

Independent Judiciary

The judicial branch in Israel has the status of first among equals relative to the other branches of government.^[33] It is set out according to Basic Law: The Judiciary and the Courts Law as comprising three levels: magistrates’ courts, six district courts, and the Supreme Court. In addition to these three courts, the Israeli judicial system includes particular tribunals the jurisdiction of which is limited to certain issues or individuals: the religious tribunals with powers to rule on mainly matrimonial issues, labor tribunals that rule on labor-related matters, and military tribunals that deal with issues concerning people in the military and others.

The judicial branch enjoys a substantial degree of independence from political influence.^[34] This independence is expressed in the statement that “A person vested with judicial powers shall not, in judicial matters, be subject to any authority but that of the law.”^[35] Judges in the Supreme Court are appointed by a Judges’ Appointment Committee, comprising nine members, five of whom are not in the political system (namely, three HCJ judges, including the President and the Vice President, and two representatives of the Israeli Bar Association), and four politicians (two MKs selected by the Knesset, and two Cabinet members, including the Minister of Justice, who serves as the Committee Chairman). Thus, the Committee represents all three branches of government ensuring a professional and apolitical selection process. A candidate for presidential appointment as judge must be selected by the majority of the Committee members (that is, at least five) and a Supreme Court candidate must secure the votes of at least seven Committee members.^[36]

The Supreme Court is the highest court in the State of Israel and it plays two roles: it is the court of final resort for appeals against verdicts handed down by district courts and thus rules on civil, administrative, and criminal matters. In addition, it sits as the HCJ and hears petitions against state authorities and other tribunals. Fifteen judges serve on the Supreme Court, which generally hears cases in panels of three, unless the court president decides to expand the panel. In 2000, the Knesset introduced the Administrative Affairs Courts Law, which authorized district courts to sit as administrative courts and address such issues. The law was intended to reduce the HCJ workload as both an administrative court and a criminal and civil appeals court. The administrative courts were mainly assigned cases which address issues such as local taxes, education, religious councils, public tenders, association, business licensing, and so on.

A Jewish and Democratic State

Any discussion of the Israeli constitution must deal with the tension which arises from the definition of Israel as both a Jewish and a democratic state, two principles that

apparently contradict one another. Israel was defined as a “Jewish and Democratic state” in the 1992 Basic Laws. This description of Israel is taken for granted by most of Israel’s Jewish political leaders. It was presupposed by the UN Resolution of November 29, 1947 to the effect that Palestine should be divided into two states, both democratic, one Jewish and one Arab. It is part of the most basic political sentiments of most citizens of Israel, Jews and non-Jews alike. Yet, the argument that Israel cannot simultaneously be both Jewish and Democratic is presently expressed on all sides of the political spectrum.^[37] According to the HCJ, the State of Israel’s fundamental characteristics shape the minimalistic definition of Israel as a Jewish state, primarily: the right of every Jew to immigrate to the State of Israel and become citizens of the state, where Jews are the majority (the Law of Return), the first official language is Hebrew, Jewish tradition is a key element of its religious and cultural heritage, and the major holidays and symbols reflect the historical revival of the Jewish nation. A minimizing definition, such as the one given by the Supreme Court, was meant to prevent, as much as possible, conflicts between Jewish and democratic values. There are, however, issues in relation to which this clash is inevitable.

The incorporation of arrangements that shape Israel’s public life according to Jewish tradition often means that originally religious norms are imposed on the public as a whole. These include, for example, Sabbath labor rules and public transportation restrictions, and the ban on the sale of pork. According to Rabbinical Courts’ Jurisdiction Law (Marriage and Divorce) (1953), marriage and divorces of Jews who are citizens or residents of Israel are conducted exclusively in accordance with Jewish religious law.

The fact that Israel is a Jewish state does not give the Israeli government the power to enforce religious laws. It is a basic principle in Israel that civilians and citizens enjoy freedom of religion and freedom from religion.^[38]

Though defined as Jewish, the State of Israel is also a democracy, foremost in the formal sense that its parliament (the Knesset) is made up of representatives of all the state’s citizens, regardless of their religion or ethnicity and the state is representative of all citizens, including non-Jews. Arab citizens partake in Israel’s political life and enjoy significant civil and political rights and representation, although attempts have been made by MKs to disqualify certain Arab political parties. Over the years, the Israeli public law has undergone a substantial development toward the recognition of the rights of the Arab minority (see, for example, Kaadan^[39]). However being a permanent minority in a Jewish state, they argue that the country does not truly accord its non-Jewish citizens with equal status and rights, meaning that Israel is not sufficiently democratic.

The diversity among Jewish groups and the varying concepts of Judaism that they embrace is fascinating, extending from Orthodox and ultra-Orthodox Jews at the one end of the scale to Jews who define themselves in a secular-ethnic way as Israelis at the other end. Tensions between different

groups erupt every time an issue dealing with the religious “status quo” arises on the public agenda. It seems that the Supreme Court is taking a position against religious coercion and in support of people’s freedom from religion (p. 80).^[23]

ADMINISTRATIVE LAW

Public law also encompasses the provisions of administrative law. This legal field regulates the activities of all governmental administrative agencies. Israeli administrative agencies include, for example, the Ministry of Environmental Defense, the Ministry of Education, the National Building and Planning Commission, and the National Insurance Institute (the Israeli equivalent of the United States Social Security Administration). Administrative law deals with the structure of the administration and its authorities, the proper conduct of the administrative process, the amount of discretion the authority is allowed, the oversight of the administrative agency, and the degree of freedom of activity the administrative agency has under private law.^[40]

Historically, Israeli administrative law was born from English administrative law and like its English counterpart was developed against the background of two significant factors: the relative dearth of constitutional law concerning the protection of human rights on the one hand, and the power of the central government on the other. These two factors had traditionally contributed to the centrality of administrative law that underwent a radical change. First, constitutional law is now an independent source for the recognition and enforcement of human rights following the enactment of new Basic Laws on human rights—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. Second, privatization has changed completely the scope and pattern of activities conducted by administrative agencies in Israel (as well as in other countries like the United States).^[41]

The administrative authorities in Israel generally have a decentralized, hierarchical structure. Thus, for example, there are central administrative authorities (such as the Ministry of the Interior) that have offices around the country (local authorities).^[42] Similarly, the different administrative jurisdictions embody various types of authority, among them, quasi-judicial, legislative, and executive authorities. The guideline directing the activity of administrative agencies in Israel is the rule of law and the principle of legality. The principles stipulate that government and public bodies require lawful authority in order to act. As opposed to a private individual who is allowed to do anything that is not explicitly prohibited, administrative agencies begin at a higher standard. Implementation of the principle of legality with respect to the administrative agencies assumes that everything that is not explicitly allowed is prohibited. In other words, the activity of the administrative agency must be stipulated explicitly in the law.

Administrative law in Israel is enormously important. Owing to the history of governmental control of many aspects of the economy, economic activity is highly regulated. In addition, the government is the source of financial support for many private endeavors. Governmental decisions on all these matters are subject to the rules of administrative law and to judicial review of agency decisions. The requirements of administrative law apply to the national government, the ministries, and all subunits of the ministries as well as local governments.

The Israeli Supreme Court is widely perceived as a very activist court in public law areas. One of the most important grounds for judicial review of the acts of administrative agency decisions is the reasonableness test. In Israeli administrative law, a decision is considered unreasonable when it reflects an improper balance between the various considerations addressed by an agency (in contrast to a different test—taking irrelevant considerations into account).^[43] In contrast, in constitutional law, reasonableness test is not a separate ground for judicial review (when there is no infringement of human rights). The new Basic Laws on human rights have introduced a new form of judicial review regarding both legislation and administrative decisions—the proportionality test. (For example, the Israeli Supreme Court used the proportionality principle for the review of the decisions regarding Israel's security barrier, see *Beit Sourik Village Council v. the Government of Israel*^[44]) To some extent, the proportionality standard is similar to the reasonableness standard, because it also focuses on balancing, more specifically on the balance between the purpose of the administrative decision and the measure used to promote it.^[45]

THE ATTORNEY GENERAL AND OTHER WATCHDOGS

There are different watchdog agencies who contribute to the constitutional system of public law in Israel, i.e., the Attorney General, the State Comptroller and Ombudsman, Commissions of Inquiry, media, as well as nongovernmental organizations (NGOs).

The Attorney General plays one of the key roles in providing government oversight, mainly as the guardian of the rule of law. The Attorney General is Israel's chief prosecutor, represents the state in judicial cases, serves as legal advisor to government authorities and is viewed as the authorized interpreter of the law for the government and whose legal opinions are binding. Fierce debates are held from time to time—mainly in the media—as to the role of the Attorney General and the decisions he takes concerning certain government policies.^[46]

In general, the broadcast and print media, as well as the activism of other NGOs, perform an important watchdog role. Israeli NGOs frequently launch campaigns in the media; at the same time, they provide social services outside

government and serve as provider of alternative source of information. As a result of such activism, decisions about funding NGOs and other forms of support are discussed in a public forum (p. 188).^[23]

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