

April 2013

The State of Israel's Constitution; A Comparison of Civilized Nations

Mark Goldfeder
Georgia State University College of Law

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

Recommended Citation

Mark Goldfeder, *The State of Israel's Constitution; A Comparison of Civilized Nations*, 25 Pace Int'l L. Rev. 65 (2013)

Available at: <http://digitalcommons.pace.edu/pilr/vol25/iss1/3>

THE STATE OF ISRAEL'S CONSTITUTION; A COMPARISON OF CIVILIZED NATIONS

Mark Goldfeder*

ABSTRACT

The art of constitution-making is never one-dimensional. In regard to the United States' model, it has recently been argued that "[d]espite the enormous literature on the critical period, including the foreign affairs imperatives behind the movement for reform, it is not fully understood that the animus behind the reform effort that culminated in the new Constitution was a desire to ensure that the United States would be in a position to meet its international commitments and thereby earn international recognition."¹ While there are obvious differences, and while this concept is perhaps of even greater importance and more poignantly felt for a nation that has so long been plagued with issues of *de facto* and *de jure* recognition, many of the same factors that would make it incomplete to view the purpose of the American Constitution as a strictly internal document hold true for our strongest ally in the Middle East. After the establishment of the State of Israel in 1948, the young country experienced diplomatic isolation and Arab League boycotts. Today, Israel has diplomatic ties with 154 out of the other 191 member states of the United Nations, as well as with non-member Vatican City. This paper argues that the

* Adjunct Professor of Law, Georgia State University College of Law; SJD Candidate in Law and Religion at Emory University, alumnus of the Wexner Graduate Fellowship (Rabbinate, Yeshiva University). Served on the rabbinic staff at Mt Sinai Jewish Center in Washington Heights and the Beth Din of America in New York City; J.D., New York University School of Law, LL.M., Emory University School of Law.

¹ David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition* 116 (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper No. 222), available at http://lsr.nellco.org/nyu_plltwp/222.

developing Israeli constitutionalism (this term is used broadly to cover not only the Basic Laws but also the quasi-constitutional founding documents and semi-constitutional proclamations of the Israeli Supreme Court) is also to a large extent about facilitating the admission of the new nation into the community of civilized states. From treaty making and economic development, to existential security issues, Israel recognized early on that it needed to quickly develop a strong and responsible federal government capable of enforcing compliance. It established a judiciary with capability of maintaining and enforcing the law of nations, and even challenging the state itself. More importantly though, while in the American model the framers were looking for and trying to gain *trust* in an economic sense, the Israelis are more focused on gaining international *respect*, especially on civil rights issues.

Israel has no foreign policy, only domestic policy.

-Henry Kissinger

I. INTRODUCTION

In Professors David Golove and Daniel Hulseboch seminal article, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, they argue that the animating purpose of the American Constitution was, in a large part, to facilitate the admission of the new nation into the European-centered community of “civilized states.”² Achieving international recognition, which entailed legal and practical acceptance on an equal footing, was a major aspiration of the founding generation, and creating a constitution was a key means of realizing that goal.³ Towards the end of their piece, the authors observe that, “[t]he United States was the first postcolonial republic in which constitution-making was inextricably linked to the pursuit of international recognition, but it was not the last.”⁴ They go on to note that,

² *Id.*

³ *Id.* at 101.

⁴ *Id.* at 223.

2013] *STATE OF ISRAEL'S CONSTITUTION* 67

“[b]ecause the United States was first, the connection between the federal Constitution and international recognition may shed light on constitution-making across the globe since 1787. We are in no position now to trace this connection; that must await further research, by ourselves and others.”⁵ This article will attempt to trace that connection in regards to the constitutional movement and development in the modern State of Israel.

In accordance with *A Civilized Nation*, this paper argues that the developing Israeli constitutionalism (and the term is used here broadly to cover not only the Basic Laws of Israel, but also the quasi-constitutional founding documents and semi-constitutional proclamations of the Israeli Supreme Court)⁶ has not only been about domestic governing; but also, to a large extent, about facilitating the admission of the new nation into the enlightened community of civilized states. There are obvious differences between the founding of the United States and of Israel. For instance, in the American model, the framers were looking for and trying to gain *trust* in an economic sense,⁷ while the Israelis are more focused on gaining international *respect*, especially on civil rights issues. Yet, this concept of national citizenship is perhaps of even greater importance and more poignantly felt for a nation that, like Israel, has so long been

⁵ *Id.*

⁶ Daniel J. Elazar, *The Constitution of the State of Israel*, JERUSALEM CENTER FOR PUB. AFF., <http://jcpa.org/dje/articles/const-intro-93.htm> (last visited Oct. 12, 2012) (“By and large, modern political science has emphasized the distinction between written and unwritten constitutions as basic to the understanding of constitutionalism, citing the American constitution as the prime example of the former and the British constitution as the prime example of the latter. That distinction has come under increasing criticism in recent years. Political scientists have pointed out that the American constitutional document cannot be understood on the basis of the plain text alone but only as it has been interpreted by the Supreme Court of the United States and in light of various conventions and usages that have grown up in the course of two hundred years. Similarly, the ‘unwritten’ British constitution is built around a series of fundamental documents (from the Magna Carta to the reform of the House of Lords after World War II) as hallowed in their way as their American counterpart.” Israeli constitutionalism, as it stands, falls somewhere in between.); see also Carl J. Friedrich, *Constitutions and Constitutionalism*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1G2-3045000244.html> (last visited Oct. 12, 2012).

⁷ Golove & Hulsebosch, *supra* note 1, at 105.

plagued with issues of *de facto* and *de jure* recognition.⁸ As in the American case, it would be incomplete to view the purpose of the Israeli constitution as that of a strictly internal document.

We will adopt as our framework the “basic underlying dynamic” that Golove and Hulseboch identified for developing constitutional governments, which broadly stated is the idea that constitution-makers undertake their projects not only to consolidate power at home, but also to gain recognition abroad.⁹ “To do so, they incorporate commitments to international law in their domestic constitutions.”¹⁰ From treaty making and economic development to existential security issues, Israel recognized early on that it needed to quickly develop a strong and responsible government capable of handling its responsibilities to other countries and with the capacity to enforce compliance.¹¹ It also established a judiciary with the capability of maintaining and enforcing the law of nations and even challenging the state, while at the same time attempting to raise the country’s standing in the eyes of a watchful world.¹²

Much like the United States, it all began with a Declaration.

II. THE FOUNDING AND THE EARLY DAYS

The United Nations Partition Plan for Palestine, adopted on November 29, 1947 by the General Assembly of the United Nations, recommended the termination of the British Mandate for Palestine and the partition of the territory into two states, one Jewish and one Arab.¹³ Part I Section B of the Partition Plan called for both the emerging State of Israel and State of

⁸ See HOWARD M. SACHAR, A HISTORY OF ISRAEL FROM THE RISE OF ZIONISM TO OUR TIME 310 (2007).

⁹ Golove & Hulsebosch, *supra* note 1, at 223.

¹⁰ *Id.*

¹¹ See generally GARY JEFFREY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 3-9 (1993).

¹² *Id.*

¹³ G.A. Res. 181 (II), at 131, U.N. Doc. A/RES/181(II) (Nov. 29, 1947), available at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/UN%20General%20Assembly%20Resolution%20181>.

2013] *STATE OF ISRAEL'S CONSTITUTION* 69

Palestine to adopt democratic constitutions.¹⁴ The very first foundational concept of Israeli constitutionalism was thus an attempt to gain approval and acceptance in the international arena.

Israel's Declaration of Independence, which was adopted unanimously by all the representatives of the newborn Jewish state on May 14, 1948, expressly stated that the form of government in Israel would be based on a constitution.¹⁵ The Declaration also provided for temporary institutions, meant to serve until an elected Constituent Assembly adopted a constitution that would establish the permanent institutions of government.¹⁶ It stated that Israel was a Jewish state, and promised equal civil, political, and social rights to all of its citizens.¹⁷ Several draft constitutions were prepared prior to formal independence, and one of them, composed by Leo Kohn, had even been selected as the starting point for the deliberations,¹⁸ with a final decision to come no later than October 1, 1948.¹⁹ Things, however, did not go exactly as planned.

As soon as the British Mandate ended, a violent war erupted, temporarily pushing aside all thoughts of anything but survival. "By the time elections were actually held in 1949, the temporary organs were quick to transfer to the constituent

¹⁴ *Id.* at 135 ("The Constituent Assembly of each State shall draft a democratic constitution for its State and choose a provisional government to succeed the Provisional Council of Government appointed by the Commission.").

¹⁵ The Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3 (1948) (Isr.) [hereinafter Declaration] ("WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), and until the setting up of the duly elected bodies of the State in accordance with a Constitution, to be drawn up by the Elected Constituent Assembly not later than the first day of October, 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall constitute the Provisional Government of the Jewish State, to be called 'Israel.'"), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Amihai Radzyner, *A Constitution for Israel: The Design of the Leo Kohn Proposal*, 27 J. EDUC. SOC. 369, 369 (1954).

¹⁹ See Declaration, *supra* note 15 (explaining that at least this is what the Declaration called for).

assembly all powers of regular legislation.”²⁰ The elected body thus became endowed with both legislative and constitutional authority.²¹ The Constituent Assembly was elected on January 25, 1949, and it met for the first time on February 14, 1949.²² Two days later it passed the Transition Act of 1949, providing that the legislature be called the Knesset and the Constituent Assembly the First Knesset.²³ In early 1950, a long debate was held on the issue of whether or not to enact a constitution.²⁴ The governing coalition, headed by Prime Minister David Ben Gurion, and including the religious parties, mostly opposed the enactment of a constitution.²⁵ While the religious parties’ fears of having any legislation that could theoretically trump religious law are well documented, some of Ben Gurion’s main reasons for opposing an entrenched constitution included a fear of limits on the powers of government and the legislature and a fear of judicial review over laws.²⁶ Ben Gurion believed that a young nation that was literally fighting for its life against external enemies, while at the same time contending with economic hardship and massive immigrant absorption, could not allow itself the luxury of severe structural limitations on the power of the government.²⁷ The opposition, on the other hand,

²⁰ Ruth L. Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 CTR. FOR CONST. STUD. 345, 366 (2006).

²¹ *Id.*

²² *Id.*

²³ Shlomo Guberman, *The Development of the Law in Israel: The First 50 Years*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (June 19, 2000), <http://www.mfa.gov.il/MFA/Government/Branches+of+Government/JudicialDevelopment+of+the+Law+in+Israel+The+First+50+Yea.htm> (noting that the change, was not a mere matter of semantics; “it meant a departure from the initial determination to base the newly-established country on a democratic Constitution.” As we shall see, that departure was explained at the time as partially resulting from the notion that the existing population of Israel ought not to impose its ideals on the coming generations; “and therefore only when more Jewish immigrants came to the country - only then - would the time be ripe for drafting a Constitution.”).

²⁴ *Id.*

²⁵ See Ruth Gavison, *The Controversy Over Israel’s Bill of Rights*, 15 ISR. Y.B. ON HUM. RTS. 113 (1985), available at <http://www.gavison.com/a2645-the-controversy-over-israel-s-bill-of-rights> (explaining this debate).

²⁶ *Id.*

²⁷ Ruth Gavison, *A Constitution for Israel: Lessons from the American Experiment*, 12 AZURE 133, 146 (2002).

2013] *STATE OF ISRAEL'S CONSTITUTION* 71

wanted a constitution to protect democracy and human rights.²⁸

The debate ended with a practical agreement that came to be known as the “Harari decision.”²⁹ It stated, in principle, that the process of creating a unified supreme constitution would be postponed, and that the Knesset would instead pass a number of essential “Basic Laws,” which would ultimately be brought together in the form of a constitution.³⁰ “The task of crafting the Basic Laws in order to create a constitution was given to a standing committee of the Knesset: the Committee on Constitution, Law, and Justice.”³¹ Neither the status of the Basic Laws nor the process and the timetable of their enactment were specified.³² The proposal for the piecemeal writing of the constitution meant that every Knesset, to this day, is also a constituent assembly that can enact Basic Laws.³³

The Harari decision was the first concrete step on the journey towards an Israeli Constitution. In a very real and existential sense, it was also about foreign policy. In the ruling party’s view, in order to be accepted as a nation, Israel first needed to demonstrate its viability by shifting its focus away from internal political conflicts while continuing to defend itself from immediate threats.³⁴ It is worth noting that Ben-Gurion’s opinion was *not* meant to reflect a disregard for the importance of human rights.³⁵ Nevertheless, it was apparent that any constitution would have to take into account some very real and

²⁸ Gavison, *supra* note 20, at 361.

²⁹ DK (1950) 1743 (Isr.) (It was initiated by Knesset Member Yitzhar Harari) (“The first Knesset directs the Constitutional, Legislative Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State’s constitution.”).

³⁰ *See id.*

³¹ Gavison, *supra* note 27, at 154.

³² Gavison, *supra* note 25, at 117

³³ Elazar, *supra* note 6.

³⁴ *See* DAFNA SHARFMAN, *LIVING WITHOUT A CONSTITUTION; CIVIL RIGHTS IN ISRAEL* 42-44 (1993).

³⁵ *Id.* at 41. At least if we are to believe his own numerous explanations both in speech and in writing.

very pressing security requirements. There was thus a fear of two opposing dangers in writing a constitution at that moment: on the one hand, the lack of legal flexibility necessary to cope with the state of war, and on the other, a reluctance to adopt a constitution which would not give due respect to human rights.³⁶ It was genuinely believed that a constitution of the latter type would not serve as a deserving model for generations to come.³⁷ For Israel then, not only the content, but even the practical *manner* in which the Constitution could be written, was influenced and shaped by outside forces. The process could not even begin until Israel felt that it had the luxury and the peace of mind to be able to do it right.

III. THE JUDICIARY AS FRAMERS

If the Harari decision was step one, history has shown that the founding of the Supreme Court of Israel, with its emerging power of judicial review, was the second step in the establishment of an Israeli Constitution. During the Mandate period when the British instituted their legal system; Magistrate's Courts, District Courts, and a Supreme Court were established.³⁸ With the establishment of an independent State, the Provisional Council became the legislative authority empowered to enact the laws, and in order to prevent a devastating legal vacuum, the Council immediately decided that all the laws prevailing before 1948 should continue to be in force, with only slight modifications as prescribed by legislation.³⁹ Judges of the Supreme Court were appointed by the Provisional Government on the recommendation of the Minister of Justice and subject to the approval of the Provisional Council of State.⁴⁰

³⁶ See *id.* at 45.

³⁷ See Gavison, *supra* note 25, at 136-37.

³⁸ See generally, Shmuel Orenshtein, Adv. Dir. of Legal Aid, & Michal Cohen, Adv. Dept. of Advice & Legis., The Israeli Legal System and Current Innovations in its Administration, Paper Presented at the Ministry of Justice, Jerusalem (Apr. 2007), available at http://www.eipa.eu/modules/EuroMedJustice/Conferences/Istanbul_16_19Apr07/reports/10_Israel.pdf

³⁹ Law and Administration Ordinance, 5708-1948, 1 LSI 7, § 11 (1948) (Isr.).

⁴⁰ Courts (Transitional Provisions) Ordinance, 5708-1948, 1 L.S.I. 23, § 1(c) (1948) (Isr.).

2013] *STATE OF ISRAEL'S CONSTITUTION* 73

By virtue of this authority, on July 22, 1948, the first five Supreme Court justices were appointed.⁴¹ The Court was empowered to begin functioning in September 1948.⁴² It opened its doors on September 15 and held its first hearing the very next day.⁴³ Today, the Court functions as the Supreme Court of Civil Appeals, the Supreme Court of Criminal Appeals, and the High Court of Justice.⁴⁴ As The High Court of Justice, it is an administrative law court of first and last instance that has the authority to enjoin public officials and other courts, award compensation, and intervene in every case not within another court's jurisdiction in which it is "necessary to grant relief in the interest of justice."⁴⁵

In the early years of the State, the Supreme Court interpreted the Declaration of Independence, and particularly the "individual rights" clause,⁴⁶ as incorporating the "founding principles" of the State. Accordingly, the Court used the Declaration as a normative source in several decisions in which petitioners claimed an infringement of their rights and freedoms; ruling that in cases where legislation may be interpreted in several ways, the laws should be interpreted in a way consistent with the principles expressed in the Declaration.⁴⁷ Utilizing this method, the Court struck down several governmental decisions because they contravened fundamental rights enumerated in the Declaration. For example, in the famous *Kol Ha'am* case, the Court guaranteed freedom of speech when it invalidated a government decision to shut down a newspaper

⁴¹ *Historical Background*, THE STATE OF ISR., THE JUD. AUTHORITY, <http://elyon1.court.gov.il/eng/system/index.html> (last visited Mar. 14, 2013).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Basic Law: The Judiciary, 5744-1984, 38 LSI 101, § 15 (1984) (Isr.).

⁴⁶ Gavison, *supra* note 25, at 116 ("THE STATE OF ISRAEL . . . 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; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.").

⁴⁷ See Patricia J. Woods, *The Ideational Foundations of Israel's "Constitutional Revolution"*, 62 POL. RES. Q. 811, 819-20 (2009).

because of a controversial op-ed criticizing government policy.⁴⁸ In doing so, the Court stated that:

The system of laws under which the political institutions . . . have been established and function is witness to the fact that this is indeed a State founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards basing the State 'on the foundations of freedom' and securing freedom of conscience, mean that Israel is a freedom-loving country. It is true that the Declaration "does not include any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" . . . but in so far as it "expresses the vision of the people and its faith," . . . we are bound to pay attention to the matters set forth therein when we come to interpret and give meaning to the laws of the state.⁴⁹

While the *Kol Ha'am* decision did nullify an order promulgated by the Minister of the Interior to close down the newspaper for a few days, the Court still refused to accept the argument that an actual statutory provision enacted by the Knesset, or even a provision of the British Mandatory legislation that remained in force, could be struck down just because it was in conflict with a recognized individual right.⁵⁰ As Justice Z. Berenson famously put it:

The legal force [of the Declaration] exists in the [rule] that every legal provision should be interpreted in its light and to the extent possible, in keeping with its guiding principles and not contrary thereto. However, when an explicit statutory measure of the Knesset leaves no room for doubt, it should be honored even if inconsistent with the principles in the Declaration of Independence.⁵¹

Therefore, there was no sense of authoritative judicial review of Knesset legislation at that time.

⁴⁸ HCJ 73/53 *Kol Ha'am Co. Ltd. v. Minister of Interior* 7 PD 871, 903 [1953] (Isr.).

⁴⁹ *Id.* at 884.

⁵⁰ *See id.*

⁵¹ E. Gutmann, *The Declaration of the Establishment of the State of Israel*, JEWISH VIRTUAL LIBRARY <http://www.jewishvirtuallibrary.org/jsource/History/decind.html> (last visited Oct. 16, 2012). Interestingly enough, it was actually Justice Berenson who wrote the first draft of what would become the Declaration of Independence.

2013] *STATE OF ISRAEL'S CONSTITUTION* 75

The move towards judicial review took another small step forward in 1984, when then newly elected Chief Justice Meir Shamgar expounded on *Kol Ha'am* and wrote a rousing defense of civil rights as related to embedded constitutional principles in the Israeli legal system, despite the fact that for years the State had avoided entrenching these constitutional principles in a written constitution.⁵² While in *Kol Ha-Am* Justice Agranat had almost poetically used the Declaration of Independence as an expression of the “spirit of the people,” and thus figuratively, if not normatively, “binding” on the state (at least until it stood in contradiction to the explicit current “will of the people” as demonstrated by their elected officials), Shamgar took the idea one step further.⁵³ For Shamgar, the idea that the Declaration embodied something greater than “normal law” was a strong enough binding principle on its own that it made a return to the debates over writing a constitution practically moot. He wrote, “it will be enough . . . that there exists judicial-constitutional force to parts of the Declaration of Independence, which gave expression to fundamental principles that reflect the existing judicial spirit in Israel.”⁵⁴ Shamgar and his followers came to view both *Kol ha-Am* and the Declaration of Independence as documentation able and worthy to support the spirit of justice and rights that would otherwise be entrenched in a constitution.⁵⁵ Although it did reflect an interesting shift in perspective, the majority of the Court did not ever share that view.

Things began to change from another angle with the landmark case of *Bergman v. Minister of Finance* (1969).⁵⁶ The very first Basic Law, enacted in 1958, dealt with the Knesset com-

⁵² Woods, *supra* note 47, at 819-20 (discussing Shamgar’s evolving position).

⁵³ *Id.* at 819.

⁵⁴ *Id.*

⁵⁵ *Id.* at 819-20.

⁵⁶ See generally Benjamin Akzin, *Judicial Review of Statute*, 4 ISR. L. REV. 559 (1969) (translating HCJ 98/69 Bergman v. Minister of Finance and State Comptroller 23(1) PD 693 [1969] (Isr.)) (this case has often been referred to by scholars as “Israel’s Marbury v. Madison,” although to be fair that term has also been used to describe *Kol Ha’am* and, as we shall soon see, the Mizrahi Bank case).

position, procedures, and rules.⁵⁷ Only one section of the law, the section holding that elections in Israel will be “general, national, proportional and equal,” was entrenched; requiring a special absolute majority of sixty 61 out of 120 Knesset members for its amendment.⁵⁸ In *Bergman*, the High Court ruled that a law violating the equality of elections, by not funding new parties, could only be enacted with the consent of the special majority.⁵⁹ Since the law in question had not been enacted in that way, the Court invalidated it.⁶⁰ In doing so, the Court established the principle that in addition to invalidating administrative acts and governmental decisions that contradict “constitutional” values, the Court has the power to void *actual* Knesset legislation that violates a Basic Law.⁶¹ This has been entrenched by a special majority, thus developing the beginnings of a very limited *de facto* power of judicial review.

While the *Bergman* decision was, in a certain sense, paradigm shifting, over the next several decades the explicit idea of judicial review was invoked for only *very* specific reasons. Courts could review laws that violated entrenched provisions, not enacted with the proper majority, in the context of election laws that touched on the Basic Law: The Knesset.⁶² In short, they almost never could review these laws. The Court continued to insist that even the non-entrenched Basic Laws were just regular laws, and no one argued that the *Bergman* case by itself meant that Israel now had a set of higher laws, or a constitution.⁶³ Still, in the years following their experiment with judicial review in *Bergman*, the Court did begin to increasingly assert a form of judicial oversight in practice if not overtly, in regard to administrative decisions, including executive and military actions, over which it had heretofore not claimed ju-

⁵⁷ Basic Law: The Knesset, 5718-1958, 12 LSI 85 (1957-58) (Isr.).

⁵⁸ *Id.* Regular legislation can be amended by an ordinary majority of present members.

⁵⁹ Akzin, *supra* note 56, at 563-64.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2046-47 (1988-1989).

⁶³ See *id.*

2013] *STATE OF ISRAEL'S CONSTITUTION* 77

risdiction.⁶⁴

The court's expanding "activism" focused primarily on individual rights against governmental authorities, specifically those including employee rights, freedom of speech, national service, security, gender equality, religious freedom, and the like.⁶⁵ In 1972, for instance, the Court declared that military laws do not have the same status as primary legislation.⁶⁶ Rather, military laws must be bound by international law.⁶⁷ In the case of *Khelou v. Government of Israel*, the Court, acting in its capacity as the High Court of Justice, not only used a form of judicial review to check military decisions, but also established for the first time the idea of a constitutional-*type* appeal to extra-statutory sources for legal interpretation in nothing less than international law.⁶⁸ In the words of Justice Kister, "[t]he military commander in any *enlightened state* . . . must act in accordance with the rules of international law which set limits and boundaries to his authority."⁶⁹

The *Khelou* decision famously granted standing to non-citizen residents in non-sovereign territories to file suit before the Court.⁷⁰ The use of international law as binding legal principle was thus established through Israeli Supreme Court precedent in the 1970s, and may be an important component of Israel's developing constitutional tradition.⁷¹ The fact that the decision is quoted frequently by domestic and international courts, and has been held up as a paradigm of the protection of

⁶⁴ Woods, *supra* note 46, at 813.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The appeal to legal sources outside of the domestic nation-state context has created controversy in many country contexts, including, recently, the United States, where discussion of international sources in legal decisions was a subject of debate between Justice Breyer and Justice Scalia. See Justice Antonin Scalia & Justice Stephen Breyer, Debate at American University, Washington College of Law on the Constitutional Relevance of Foreign Court Decisions at American University (Jan. 13, 2005) (transcript on file with the Federal News Service), available at <http://www.freerepublic.com/focus/news/1352357/posts>; see also *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁹ Burt, *supra* note 62, at 2032 (emphasis added) (citations omitted).

⁷⁰ See *id.* at 2032-33.

⁷¹ See *id.*

habeas corpus rights, speaks volumes about what the incorporation of international law into underlying Israeli legal norms has done and can continue to do for Israel's international reputation and standing amongst the other "civilized" nations.⁷²

"Attempts to enact more Basic Laws and complete the constitution continued throughout the 1970's."⁷³ Slowly, Basic Laws began to cover most of the central organs of government. Mostly, they reflected the existing structure of government organs and their relations, and were fairly uncontroversial. None of the provisions of these Basic Laws were entrenched, and everyone, from the Members of the Knesset to the members of the Supreme Court, agreed that they did not form a unified constitution.⁷⁴ It became apparent that there were two main stumbling blocks to the completion of a constitution: the enactment of an agreed upon basic Bill of Rights, and of an accompanying Basic Law; and legislation that would openly deal with the issue of entrenchment, resolve the question of supremacy, and presumably, involve the creation of real and open judicial review of the laws by the courts.⁷⁵

In 1992, members of the Knesset, who supported the writing of a constitution and of a Bill of Rights, realized that their chances were very slim to complete legislation of both Basic Law Legislation *and* an accompanying Bill of Rights, *and* to declare the combination as the Israeli constitution, entrenched and supreme.⁷⁶ Instead, in a Harari-like decision, the members decided that the best way to proceed would be to divide the Bill of Rights into separate Basic Laws, seeking to enact only those that enjoyed a broad consensus first, and hoping that once the basic structure was in place the rest would follow.⁷⁷ The Knesset succeeded in gaining the consensus to pass two Basic Laws on human rights that year; Basic Law: Human Dignity and

⁷² See, e.g., Brief for Bipartisan Coalition of Nat'l. & Int'l. Non-Gov't. Org. as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 96763.

⁷³ Gavison, *supra* note 20, 368.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 370.

⁷⁷ *Id.*

2013] *STATE OF ISRAEL'S CONSTITUTION* 79

Liberty,⁷⁸ and Basic Law: Freedom of Occupation.⁷⁹

Basic Law: Freedom of Occupation was fully entrenched, requiring the special majority of sixty-one votes in the Knesset to make changes.⁸⁰ Basic Law: Human Dignity and Liberty was not entrenched, and it contained an explicit provision granting all prior existing legislation immunity from judicial review.⁸¹ In regard to future legislation, however, although the human rights laws did not specify judicial review, they *did* both contain a section stating that all relevant authorities must protect the rights enumerated, and that these rights could only be infringed upon according to law and in a proportionate manner; a limitation clause.⁸² Specifically, the bills stated that, "[t]here 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 is required."⁸³ They also declared that human rights were to be protected according to the values of "Israel as a Jewish and democratic state."⁸⁴

A minimalist interpretation would have seen that clause as another Declaration of Independence style add on; powerful prose but with limited legal weight. A slightly less conservative approach might have taken that phrase as the weight-giving solidifier it was meant to be, and would have added the two new Basic Laws to the short list of already entrenched ones. However, Chief Justice Aharon Barak championed a more radical and active interpretation of the new laws, declaring in the landmark case of *Bank Mizrahi v. The Minister of Finance*⁸⁵ that their enactment – and particularly the new limitation clause concept – signified the elevation of *all* Basic Laws to supremacy over ordinary legislation.⁸⁶ Although in this par-

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 367.

⁸¹ *Id.* at 370.

⁸² *Id.* at 371.

⁸³ Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 § 4 (Isr.).

⁸⁴ *Id.* § 2.

⁸⁵ Gavison, *supra* note 20, at 371 (discussing CA 6821/93 Bank Hamirzachi v. Migdal Communal Village 49(4) PD 221 [1995] (Isr.)).

⁸⁶ *Id.*

ticular instance the Court concluded that the legislation being challenged did not contravene the constitutional right to property articulated in Section 3 of Basic Law: Human Dignity and Liberty, it nonetheless declared that, based on the limitation clause, the Supreme Court now has the power to judicially review parliamentary legislation passed after the enactment of each of the Basic Laws.⁸⁷ This historic decision put *all* of the Basic laws on top and established the modern Court's practice of real judicial review of statutes.⁸⁸

What the *Mizrahi* decision means is that the Supreme Court has done what everyone has been waiting for; it declared that the eleven Basic Laws drafted over some forty five years are, in fact, already a constitution.⁸⁹ It has also granted itself the power to analyze the constitutionality of laws and regulations, and to strike down new legislation that contradicts any Basic Law.⁹⁰ Describing this "constitutional revolution," Chief Justice Barak famously said that, "[w]e are creating our own foundations. In a way, I, as a Supreme Court judge, have the sense that we are now the framers of our unwritten constitution."⁹¹

IV. CONSTITUTION-MAKERS UNDERTAKING PROJECTS TO GAIN RECOGNITION ABROAD

Having established the structure of Israel's constitution to date and having established the Israeli Supreme Court as the *de facto* framers of the Israeli-Constitution-to-be, we can now take a closer look at some of the steps that the Court has taken. Before looking at the Israeli High Court in particular though, it is important to place it in the proper context of the particular international community of which it is a part.

Scholars have noted the "growing tendency of jurists and

⁸⁷ *Id.* at 378.

⁸⁸ *Id.*

⁸⁹ *Id.* at 367 (referring to CA 6821/93 Bank Hamirzachi v. Migdal Communal Village 49(4) PD 221 [1995] (Isr.)).

⁹⁰ *Id.*

⁹¹ RAPHAEL COHEN ALMAGOR, *THE BOUNDARIES OF LIBERTY AND TOLERANCE: THE STRUGGLE AGAINST KAHANISM IN ISRAEL* 176 (1994) (citations omitted).

2013] *STATE OF ISRAEL'S CONSTITUTION* 81

human rights activists from different countries to identify themselves as part of a 'unified international community.'"⁹² Harold Koh, for instance, points to the role of transnational issue networks and activists who trigger processes of nationalization of international law.⁹³ Others claim that this transjudicial communication is seen not only in the application of international norms, but also in the recourse to comparative law, particularly in the area of constitutional law.⁹⁴ This is especially important for Israel because, existing as it does without a fully written constitution, international law actually has the potential to affect not only the interpretation, but also the ongoing *shaping* of that document. Indeed, as we shall see, it arguably already has.

By way of background, under Israeli law norms of *customary* international law are applied in domestic courts, except where inconsistent with domestic legislation; whereas norms of *conventional* international law are enforced only if incorporated in domestic law by legislation.⁹⁵

A judicial desire to resolve the seeming disparity between Israel's obligation to respect international conventions to which it is a party and its failure to adopt their norms in its legislation, has resulted in an interpretive approach stating that statutes should be construed, as much as possible, as conforming to international

⁹² Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT'L. J. CONST. L. 611, 612 (2004), available at <http://www.tau.ac.il/law/barakerez/articles/icon.pdf>.

⁹³ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2658 (1997), available at http://digitalcommons.law.yale.edu/fss_papers/2101; see also Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 649 (1998), available at http://digitalcommons.law.yale.edu/fss_papers/2102.

⁹⁴ See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 542 (1988), available at http://heinonline.org/HOL/Page?handle=hein.journals/clr88&div=29&g_sent=1&collection=journals.

⁹⁵ The traditional justification for the distinction between customary and treaty-based international law was based on the principle of separation of powers. Treaties are made by the government, and not by the legislature. If they had the force of law the government could have the power to legislate with no involvement of the legislature.

customary and treaty-based law.⁹⁶

It is also important to briefly mention the status of Israel's reputation internationally, particularly on the civil rights and freedoms front. For quite some time, Israel has considered the international legal arena as another battlefield where its legitimacy is constantly being challenged.⁹⁷ For years, Israel has had to contend with a plethora of anti-Israel resolutions passed in the United Nations General Assembly and its constituent organizations. The best-known example was Resolution 3379 of November 10, 1975, which concluded with the phrase: "Zionism is a form of racism and racial discrimination."⁹⁸ The resolution also condemned Zionism "as a threat to world peace and security," and called "upon all countries to oppose this racist and imperialist ideology."⁹⁹ The automatic majority in favor of the Arab nations in the United Nations has left Israel with little or no maneuvering space and dependent on an American veto in the UN Security Council.

Perhaps due in part to its location and its particular security concerns, Israel's movements are scrutinized and criticized more than almost any other country. So, it is no wonder that when looking to interpret, if not to form, its brand new constitution, Israel would stake a great claim to being a part of the international legal world and tradition of protecting human rights. Explicitly making this point, Chief Justice Barak, in his treatise on legal interpretation, stated that "the international conventions on human rights to which Israel is a party should be given a special interpretive status, because they reflect the consensus of the international community to which Israel aspires to belong on an equal standing."¹⁰⁰ This is why Israel has

⁹⁶ Barak-Erez, *supra* note 92, at 615.

⁹⁷ Arie J. Kochavi, *Israel and the International Legal Arena*, 25 J. ISR. HIST. 223, 223 (2006), available at <http://www.tandfonline.com/doi/abs/10.1080/13531040500502866#preview>.

⁹⁸ U.N. GAOR, 30th Sess., 2400th plen. mtg. at 84, U.N. Doc. A/PV.2400 (Nov. 10, 1975).

⁹⁹ *Id.* (noting that on December 16, 1991 the UN General Assembly revoked Resolution 3379, following a diplomatic battle that began when Israel conditioned its participation in the Madrid Peace Conference on the revocation of this resolution.).

¹⁰⁰ Barak-Erez, *supra* note 92, at 615 n.20 (citations omitted).

2013] *STATE OF ISRAEL'S CONSTITUTION* 83

increasingly accepted international law in order to gain international acceptance.

The Iraqi Detainees case, decided under Barak, is one of the first cases where international law played a part since the Court adopted its newer, more active jurisprudence.¹⁰¹ Petitioners were Iraqi citizens who were arrested soon after they had crossed the Israeli border.¹⁰² They were kept in detention with an eye to deporting them to a third country. In their petition to the High Court, the detainees argued that they were entitled to be treated as refugees and therefore demanded prohibition against deportation to countries in which their lives or their freedom would be threatened.¹⁰³ They also sought to be released from detention until their deportation materialized.¹⁰⁴ The Israeli Supreme Court accepted the view that the power to deport should be exercised in line with the limitations posed by Article 33 of the Convention Relating to the Status of Refugees,¹⁰⁵ and ordered the authorities to reconsider their decisions.

Another important decision in our line of cases was the so-called Torture case,¹⁰⁶ “which raised the question of whether the Israeli General Secret Service could use physical measures, such as deprivation of sleep, shackling and vigorous shaking,

¹⁰¹ *Id.* at 623 (referring to HCJ 4702/94 Al-Tai v. Minister of Interior 49(3) PD 843 [1994] (Isr.)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Convention Relating to the Status of Refugees art. 3, Apr. 22, 1954, 189 U.N.T.S. 137. (explaining the prohibition of expulsion or return (“refoulement”));

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

¹⁰⁶ Barak-Erez, *supra* note 92, at 623 (referring to HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel 53(4) PD 817 [1999] (Isr.)).

for purposes of interrogating suspected terrorists.”¹⁰⁷ The Court, in one of its landmark precedents, answered in the negative.¹⁰⁸ While the formal basis for the decision was the principle of legality, as the General Secret Service was not authorized by Israeli law to use physical force while conducting investigations, it also drew heavily on the international norm that clearly mandates the prohibition of torture.¹⁰⁹ Chief Justice Barak stressed that at the international level, Israel was obligated to refrain from torture, and that this prohibition was “absolute and without exceptions.”¹¹⁰

Moving ever closer towards the constitutionalization in Israel of internationally accepted norms and rights, when the question of the legality of charging parents supplementary fees for children’s high school education came before the Court, the policy was overruled based on the concept of the right to (free) education.¹¹¹ In addition to Israeli sources that talked about this right, Justice Prokacia cited several international documents such as the International Convention on Economic, Social and Cultural Rights, the European Convention on Human Rights, and the Convention on the Rights of the Child, which supported his conclusion.¹¹²

Building on the above, the most definitively important case in this context was the petition of an organization representing families of children with Down syndrome.¹¹³ In *Poria Ilit Committee v. Minister of Education*, the petitioners argued that the state must cover the expenses of the special assistance that a group of children with Down syndrome needed when they enrolled in regular schools.¹¹⁴ The state, however, argued that

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 625.

¹¹² *Id.*

¹¹³ Ran Hirschl, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471, 591, 507 n.109 (2005).

¹¹⁴ Barak-Erez, *supra* note 92, at 626 (referring to HCJ 4363/00 Committee of Poriya Ilit v. Minister of Education 56(4) PD 203 [2004] (Isr.)).

2013] *STATE OF ISRAEL'S CONSTITUTION* 85

they only needed to finance their special needs in special education classes.¹¹⁵ Justice Dorner decided to accept the petition based on the “*unwritten constitutional right*” to education.¹¹⁶ Among the sources cited for establishing this Israeli right were the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child.¹¹⁷ In this context, Justice Dorner used the presumption of compatibility of national law with the international obligations of the state to say that the state must inherently contain within it those same internationally recognized rights.¹¹⁸ The Court thereby elevated international rights and standards to new *internal* and *domestic* constitutional heights.¹¹⁹

V. CONCLUSION

In short, the new jurisprudence of the Israeli Supreme Court has attached increasing significance to norms of international law, even citing provisions of international instruments that have not ever been incorporated into domestic legislation, and going so far as establishing and recognizing unwritten constitutional givens. In return for the gifts that international law has contributed to its constitutional corpus, the Court has handed down precedent setting decisions in areas such as detainee rights¹²⁰ and targeted killings.¹²¹ These decisions have

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 622-23.

¹²¹ Compare HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel 56(5) PD 834 [2006] (Isr.), with *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT'L REV. OF THE RED CROSS 373, 393 (2007) (“The paradox that therefore emerges from comparing these two decisions is that *Hamdan*, the one which is on its face more favorable to the petitioners, might actually be less so in the long term. The Israeli Supreme Court is clearly superior to its US counterpart in applying humanitarian law to the phenomenon of terrorism, and it is even more so in its application of human rights law. This might actually prove to be the most enduring quality of the

dealt with some of the day's toughest questions and have paved the way for future thought and international development.¹²² In doing so, the Court, and Israel as its sponsor, has participated in the complex processes of dialogue and inspiration within the international community of judges and jurists; contributing to the setting of standards for the protection of human rights in both Israel and the world and elevating Israel's status to being recognized as one of the "enlightened" or civilized nations at the table, at least in the area of human rights jurisprudence.¹²³

As Golove and Hulsebosch noted in regard to the early United States, recognition "brings more than legal status. It also has powerful existential dimensions."¹²⁴ The desire for recognition, as Clifford Geertz observes, unites the vast majority of postcolonial nations. "[T]he peoples of the new states," Geertz argued:

Are simultaneously animated by two powerful, thoroughly interdependent, yet distinct and often actually opposed motives—the desire to be recognized as responsible agents whose wishes, acts, hopes, and opinions "matter," and the desire to build an efficient, dynamic modern state. The one aim is to be noticed: it is a search for an identity, and a demand that the identity be publicly acknowledged as having import, a social assertion of the self as "being somebody in the world." The other aim is practical: it is a demand for progress, for a rising standard of living, more effec-

Targeted Killings judgment: that it shows so clearly how the relationship between human rights law and humanitarian law can be a two-way street, and how that relationship can be far more complex than is usually thought."). See generally Anthony Dworkin, *Israel's High Court on Targeted Killing: A Model for the War on Terror*, CRIMES OF WAR PROJECT (Dec. 15, 2006), <http://www.crimmesofwar.org/onnews/news-highcourt.html>.

¹²² J. Nicholas Kendall, *Israeli Counter-Terrorism: Targeted Killings Under International Law*, 80 N.C. L. REV. 1069, 1073 (2002).

¹²³ See Barak-Erez, *supra* note 92, at 631 (depicting that while the Court still struggles with questions in regard to its willingness to limit government action in the disputed territories, they are undeniably at the forefront of the challenge that the international world of law is facing; updating the concepts of internal law and the Geneva Conventions to fit a war on terror. Since Israel has not yet completed formulating its constitution, international law has the potential at this stage to inspire the process by imbuing human rights with meaning, and to influence the drafting of future Basic Laws.).

¹²⁴ Golove and Hulsebosch, *supra* note 1, at 224.

2013] *STATE OF ISRAEL'S CONSTITUTION* 87

tive political order, [and] greater social justice.¹²⁵

After the establishment of the State in 1948, Israel, alone and inexperienced, was forced to endure diplomatic isolation and harsh Arab League boycotts.¹²⁶ Today, Israel has diplomatic ties with 159 out of the other 192 member states of the United Nations, as well as with non-member Vatican City and the European Union.¹²⁷ While there are many factors that have gone into this newfound level of acceptance, early Israeli constitutionalism, especially the incorporation of international norms and rights into fundamental Israeli national jurisprudence as a method and way of foreign policy, has gone a long way towards facilitating Israel's admission into the community of civilized states. Not only has Israel established and enshrined greater and clearer protections for its own human rights issues, Geertz's second aim, is that Israel has also contributed to the conversation and come to be recognized for its own unique talents and expertise. Its Courts are quoted in our courts as "somebody in the world."¹²⁸

As with the America of the 1780s, internally, Israeli society is deeply divided on key issues, but it has guaranteed its citizens levels of political freedom, welfare, and education unknown in the region.¹²⁹ While Israel is host to a number of groups seeking to change the country in accordance with their own visions, these groups all share an interest in common; that

¹²⁵ *Id.* (quoting Clifford Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in CLIFFORD GEERTZ, *OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA* 105 (1963)).

¹²⁶ *Israel's Bilateral Relations, Israel's Diplomatic Missions Abroad: Status of Relations*, MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/foreign%20relations/bilateral%20relations/> (last visited Mar. 10 2013).

¹²⁷ *Id.*

¹²⁸ *See generally, Israel's Bilateral Relations*, MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/foreign%20relations/bilateral%20relations/> (last visited Mar. 10 2013) (noting that Israel is still very much at odds with much of the civilized world in regard to the application of specific international law, particularly in the disputed territories. They are, however, at least genuinely considered to be part of the conversation, and worth talking to, which, for the purposes of this paper, is definitive recognition.)

¹²⁹ Gavison, *supra* note 25, at 135; *see generally* Donna E. Arzt, *Growing a Constitution: Reconciling Liberty and Community in Israel and the United States*, 19 *LAW & SOC. INQUIRY* 253, 256-63 (1994).

Israel should continue to secure their basic rights.¹³⁰ Israel today, fragmented and strife-ridden, may at times seem farther than ever from seeing a constitutional process through, and the sense of crisis that has enveloped the country since negotiations with the Palestinians collapsed in October 2000 tends to direct attention to issues that seem more urgent.¹³¹ Outside of the country, recent polls show that Israel is still viewed negatively by many.¹³² Nevertheless, it is precisely difficult times such as these that reveal the pressing need for a constitution, and that are most likely to precipitate its creation.¹³³ Only in these moments is the need most keenly felt to forge and finalize one basic document, a document that would create a shared political framework and provide a basis and starting point for both internal domestic disputes and international comparison in the international community of civilized nations.

¹³⁰ Gavison, *supra* note 25, at 135.

¹³¹ *Id.*

¹³² *Views of Europe Slide Sharply in Global Poll, While Views of China Improve*, GLOBESCAN (May 10, 2012), <http://www.globescan.com/commentary-and-analysis/press-releases/press-releases-2012/84-press-releases-2012/186-views-of-europe-slide-sharply-in-global-poll-while-views-of-china-improve.html>.

¹³³ Gavison, *supra* note 25, at 135.