

Chapter 14

Codification of Human Rights at National and International Levels General Perspectives

National Report—Israel

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14.1 Introduction

Israeli human rights law is strongly linked to a variety of historical and political circumstances. Israel is considered to be a ‘mixed jurisdiction’, with common law roots incorporating aspects of civil law as well as deference to religious legal systems in some dimensions. This diversity is evident also in the constitutional protection of human rights. Israel lacks a comprehensive formal constitution, and yet some institutions and rights are enshrined in statutory instruments that enjoy a higher status in the legal hierarchy. Otherwise, much of the constitutional law is judge-made, primarily by the Israeli Supreme Court in its capacity as High Court of Justice. In 1992, the Israeli parliamentary assembly (the Knesset) adopted two substantive laws of a fundamentally constitutional character, significantly enhancing the scope of judicial review of legislation on some human rights bases. This development is widely known as Israel’s ‘constitutional revolution’, as explained in more detail below.

On the level of international law, Israel is bound by most of the existing universal human rights treaties, and this has had some expression in Israeli jurisprudence; nevertheless, there is no explicit implementing legislation in the field, significantly weakening the impact of international human rights law in Israel. Moreover, Israel’s legal system’s incorporation of international human rights, including the application of human rights to non-nationals and beyond the territory of the state has to a large extent been defined by Israel’s belligerent occupation of territories on the West Bank and the Gaza Strip since June, 1967.

In this report, we will provide a survey of Israel’s constitutional protection of human rights according to the following headings. First, we will set out the existing system of basic laws, its genesis and the substantive rights protected therein, whether

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explicitly or implicitly (Sect. 2). Then we will compare the constitutional protection before and after the ‘constitutional revolution’ (Sect. 3 and 4 respectively). Subsequently we will address the application of Israeli constitutional law to non-Citizens and to territories outside the municipal boundaries of the state of Israel, and the status of international human rights law in Israeli domestic law (Sect. 5 and 6 respectively).

14.2 Israel’s Piecemeal Constitution: The Basic Laws and the Rights Protected

Israel’s Declaration of Independence (the “Independence Document”) charged the nation’s constituent¹ or founding assembly—in essence, the first Knesset—with the task of formulating a constitution. However, agreeing on a constitution proved to be too formidable a task for the Knesset, with a range of objections posed by different Members of Knesset (MKs). The state was in a precarious situation, finding itself fighting for its survival from birth in the War of Independence, and many felt that it was simply not the right time to carry out the constitutional project. Then Prime Minister Ben-Gurion expressed the position that it would be impossible to protect civil rights to the extent required by any proper bill of rights during wartime. Furthermore, he posed the unique argument that the constitution of the Jewish state should not be formulated when so much of the Jewish people lived abroad. Religious groups initially opposed the formulation of a constitution, not wanting to declare allegiance to a secular document, and fearing that it would bring a change to the status quo with respect to the presence of religion in the State. However, once convinced that the majority supported a constitution, they played an active role in its formulation. Narrower partisan political considerations also prevented the adoption of a written constitution, and many of the above issues continue to pose a challenge to Israel’s constitutional development today.²

In an attempt to deal with these objections while satisfying the State’s commitment to formulating a constitution, the first Knesset adopted a resolution proposed by MK Yizhar Harari, subsequently known as the “Harari Decision” or the “Harari Compromise”. The gist of the decision was that in lieu of adopting a full formal written constitution, the Knesset would engage in a gradual process of passing individual “Basic Laws”, until a complete constitution was formulated. The Harari Decision failed to address many normative questions about the Basic Laws—what would be their normative status vis-à-vis regular laws? Would each basic law have constitutional status, or would they all possess such status only when the entire set was complete? What would be the issues addressed in substance in the Basic Laws?

¹ UN General Assembly Resolution 181 of November 29, 1947 (the “Partition Plan”) called for the creation of separate states for Palestine’s Jewish and Arab populations, requiring each state to elect a Constituent Assembly that would draft a constitution.

² For a discussion on the initial objections to a constitution, see Ruth Gavison (1985) *The Controversy over Israel’s Bill of Rights*. 15 *Isr. Y.B. On Hum. Rts.* 113:148–49 (opposition of religious parties to constitution), and 137–38 (opposition on the basis of timing).

Ultimately, nine Basic Laws were passed from 1948 to 1986, mostly dealing with various state institutions, not with substantive rights. In 1992, two additional Basic Laws were passed that heralded a new era in Israeli constitutional law—the ‘constitutional revolution’ (this topic will be discussed in greater depth in Sect. 4). Israel’s Basic Laws are as follows:

Basic Law: The Knesset (1958);

Basic Law: The Israeli Lands (1960);

Basic Law: The President of the State (1964);

Basic Law: The Government (1968, replaced in 1992 and in 2001);

Basic Law: The State Economy (1975);

Basic Law: The Army (1976);

Basic Law: Jerusalem, the Capital of Israel (1980);

Basic Law: The Judiciary (1984);

Basic Law: The State Comptroller (1986);

Basic Law: Freedom of Occupation (1992, replaced in 1994);

Basic Law: Human Dignity and Liberty (1992, amended in 1994).

A number of human rights are granted explicit protection under *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty*. These include: the freedom of occupation; the sanctity of life, body, and dignity; the right to property; the right of every person to leave Israel, and the right of Israeli nationals to enter Israel;³ and the right to privacy. These rights are not unlimited, as will be explained below.

There are several important rights that are not expressly protected, but have nevertheless been recognized in the framework of a ‘judicial bill of rights’ developed by the courts in the absence of protective constitutional legislation. These include: the right to equality; freedom of religion and conscience; freedom of expression; the right to due process; and the right to personal autonomy.⁴

Perhaps the most conspicuously absent among the explicitly enumerated rights is the right to equality, a right incorporated into the constitutions of most Western democracies. Nonetheless, the Supreme Court has ruled that equality is an integral part of the *Basic Law: Human Dignity and Liberty* as a necessary extension of the protection of human dignity,⁵ albeit limiting this inclusion to only those aspects of equality that are ‘closely related’ to the principle of human dignity.⁶ Like the right to equality, the Supreme Court has interpreted *Basic Law: Human Dignity and Liberty* to implicitly include other rights as well. In the 2006 *Shani Cohen* decision, the court

³ Note that freedom of movement is not included, due to concerns by religious groups of legislation that would infringe on the status quo regarding transportation on the Sabbath (Suzie Navot (2007) *The Constitutional Law of Israel*. Kluwer, Netherlands).

⁴ For examples of relevant case law, see Navot, 210.

⁵ ‘Today the principle of equality can be considered included in the Basic Law: Human Dignity and Liberty. This inclusion implies the elevation of the principle of equality to a constitutional, super-legislative normative status.’ per Justice Or in H CJ 5394/92 *Hoppert v. ‘Yad Vashem’ Holocaust Martyrs and Heroes Memorial Authority*, P.D. 48(3) 353, 362 (1994).

⁶ H CJ 7052/03 *Adalla v. Minister of Interior*, P.D. 61(2) 202 (2006), at paragraph 39.

emphasized that due process extended from the explicitly protected rights to human dignity and property,⁷ and the 2005 *Hadar* decision provided the same treatment for Freedom of Contract.⁸

Israel's foundation is not only as a democratic state, but as a Jewish state as well.⁹ Nevertheless, the freedom of religion is upheld, albeit subject to limitations. Most religious legislation is pluralistic, often allowing the various religious sects to set their own rules.¹⁰ Some laws are uniquely associated with Judaism and with Jewishness—such as the prohibition on the importation of non-Kosher meat into Israel¹¹, and the Law of Return¹², which allows Jews to immigrate and receive automatic citizenship. On this backdrop, the courts have nevertheless exercised a measure of protection of freedom of religion, declaring it to be “among the fundamental human liberties,” and invalidating secondary legislation as *ultra vires* if it violated the freedom of religion.¹³

14.3 Human Rights Protection Before the ‘Constitutional Revolution’

As a result of the failure of the Harari Decision to address normative issues regarding the Basic Laws, the courts consistently held these laws to be of regular normative status. In fact, under the principle of the superiority of specific laws to general laws on a particular issue, provisions of the Basic Laws were even held to be normatively inferior to regular laws in some instances.¹⁴ Amending a Basic Law did not require another Basic Law—it could be effected by way of regular legislation.¹⁵

⁷ HCJ 2171/06 *Shani Cohen v. Knesset Speaker* (2011), at paragraph 19.

⁸ SC 8163/05 *Hadar Insurance Co. v. Anon.* (2007), at paragraph 23.

⁹ As determined in Israel's Independence Document, declaring the “establishment of a Jewish State in the land of Israel.” For a broader discussion on religious freedom in Israel, see Natan Lerner (2007) *Religious Liberty in the State of Israel*. 21 *Emory Int'l L. Rev.* 239 (Hereinafter: ‘Lerner’); and Stephen Goldstein (1991–1992) *Israel: A Secular or Religious State*. 36 *St Louis U. L. J.* 143.

¹⁰ For example, while Saturday is the official day of rest for Jews, members of other religions may choose to take their day of rest on Friday, Saturday, or Sunday pursuant to Art. 7 of the *Labor and Rest Hours Law, 1951*. Likewise, matters of marriage and divorce are under the jurisdiction of the religious courts of each individual religion in Israel, as a remnant of the Ottoman “Miller” system.

¹¹ *Meat and Meat Products Law, 1994*.

¹² *Law of Return, 1950*.

¹³ In CR 3471/87 *State of Israel v. Kaplan*, P.D. 5748(2) 26 (1987) (Hereinafter: ‘Kaplan’), the Jerusalem Magistrate's Court invalidated a municipal regulation that prohibited the running of cinemas on Shabbat as a violation of freedom of religion.

¹⁴ HCJ 98/69 *Bergman v. Finance Minister* 23(1) 693 (1969).

¹⁵ “The only difference between basic laws and regular ones is semantic, and there is no basis to the claim that only a basic law can amend a basic law.” HCJ 60/77 *Ressler v. Chairman of Elections Committee*, P.D. 31(2) 556, 560 (1977).

There were particular Basic Law provisions that did receive normative superiority, but these received a ‘formal’ entrenchment—an absolute majority of Knesset members was required in order to pass laws that violated these provisions. The Knesset could override Basic Law provisions with a majority vote, and therefore the Basic Laws did not yet serve as an instrument that could limit the Knesset’s legislative authority.

Still, even before the ‘Constitutional Revolution’, the State had a long history of protecting basic human rights on a judicial basis. Citing the Independence Document as the ideological foundation of the State, the courts took a variety of measures in protecting those values that emerged from the Independence Document’s description of Israel as a state founded on Jewish and Democratic values. The Independence Document did not have superior constitutional status,¹⁶ so the courts could not strike down primary legislation that contravened its values. However, they could disqualify government actions or secondary legislation that infringed upon these values, deeming them *ultra vires*¹⁷; and when presented with multiple interpretations of legislation, they expressed a preference for interpretations that conformed with these values. Consequently a ‘judicial bill of rights’ developed out of the Supreme Court’s case law, providing precedents for the protection of a number of human rights without a written bill of rights.

This ‘judicial bill of rights’ developed by the Supreme Court eventually included almost all basic human rights, including freedom of expression¹⁸, personal liberty¹⁹, certain aspects of the right to equality²⁰, the right to privacy²¹, as well as procedural due process²², and this bill of rights continues to be developed by the courts even after the existence of a formal, if piecemeal constitution has been recognized, since a number of basic rights were omitted from the *Basic Law: Human Dignity and Liberty*.

14.4 Human Rights Protection Following the ‘Constitutional Revolution’

In 1992, the Knesset passed two important new Basic Laws which ushered in a ‘Constitutional Revolution’, the full significance of which became apparent in the landmark *Mizrahi* ruling in 1995²³. The constitutional difference between these two

¹⁶ Dalia Dorner (1991) Does Israel Have a Constitution? 43 St. Louis U. L.J. 1325 (Hereinafter: ‘Dorner’).

¹⁷ For instance, see *Kaplan*, *ibid.* Note 13.

¹⁸ HCJ 73/53 *Kol Ha’am v. Interior Minister*, P.D. 7(2) 871 (1953).

¹⁹ HCJ 7/48 *El-Karbotli v. Minister of Defense*, P.D. 2(5) (1949).

²⁰ HCJ 7052/03 *Adalah v. Interior Minister* (2006).

²¹ HCJ 355/79 *Katlan v. Prison Services*, P.D. 34(3) 294 (1980).

²² HCJ 3/58 *Berman v. Interior Minister*, P.D. 12(2) 1508 (1958).

²³ SC 6821/93 *Bank Mizrahi v. Migdal*, P.D. 49(4) 22 (1995) (Hereinafter: ‘*Mizrahi*’).

most recent Basic Laws and the earlier nine is the inclusion of a ‘Limitation Clause’ (similar to the ‘Reasonable Limits’ clause found in the Canadian Constitution²⁴). The Limitation Clause in Art. 8 of *Basic Law: Human Dignity and Liberty* reads as follows: “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 is required.” The inclusion of the clause served a dual purpose: first, it limited the power of the Knesset to impair the rights constitutionally protected in the Basic Law, subjecting such impairment to certain substantive rather than formal conditions, establishing the supremacy of the Basic Law; and second, pursuant to the Supreme Court’s ruling in the *Mizrahi* case, this shift from a formal entrenchment to a substantive entrenchment of constitutional rights effectively granted powers of judicial review to the courts.

This Limitation Clause is also found in *Basic Law: Freedom of Occupation*, although an additional ‘Override Clause’ (similar to the ‘Notwithstanding Clause’ of the Canadian Constitution²⁵) was added in 1995 when the Knesset wished to pass legislation that would not have satisfied the limitation clause. The Override Clause allows for the legislation of laws that do not meet the Limitation Clause provided that the law expressly states that it shall be in effect notwithstanding the provisions of that Basic Law, and the law automatically expires after four years.²⁶ Note that the impact of the Override Clause was tempered in the 1994 *Meatrel* case²⁷ where the Supreme Court asserted that a law infringing upon *Basic Law: Freedom of Occupation* could concurrently be in violation of *Basic Law: Human Dignity and Liberty* as well, rendering the law subject to constitutional scrutiny on the basis of both basic laws. Since the latter does not contain an Override Clause, such a law would still be subject to judicial review.

The 1995 *Mizrahi* case was the first to deal with a wide array of constitutional issues following the 1992 legislation of the two basic laws, including the constitutional ramifications of the new Limitation Clause. The case scrutinized the ‘Gal Law’, a law that introduced measures to help the agricultural sector recover from a crippling economic crisis, including extending their dates of loan repayment to the various industrial banks. The banks argued that the Gal Law violated their constitutional right to property, under *Basic Law: Human Dignity and Liberty*. The Supreme Court found that the law violated the banks’ property rights, and that it did have the authority to strike down the law—but that the violation was justified under the Limitation Clause.

²⁴ “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”, Sect. 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. (Hereinafter: ‘*Canadian Constitution*’).

²⁵ Section 33 of the Canadian Constitution. See H CJ 4676/94 *Meatrel Ltd. v. Israel Knesset*, P.D. 50(5) 15 (1996) (Hereinafter: ‘*Meatrel*’) at paragraph 13, where Barak asserts that the Canadian Notwithstanding Clause was adopted in Israel with certain changes, and only with respect to Freedom of Occupation. (paragraph 13).

²⁶ Article 8(a) of *Basic Law: Freedom of Occupation*.

²⁷ *Meatrel*, at p. 25.

The recognition of the authority of the court to strike down laws that violated the new Basic Laws, subject to the review of their compatibility with the substantive requirements of the Limitations Clause, can be compared to the United States' *Marbury v. Madison* decision, completely changing Israeli constitutional law by recognizing the normative supremacy of the Basic Laws, and by providing the courts with the authority to exercise judicial review. The newfound normative superiority attributed to the Basic Laws as a result of the *Mizrahi* case meant that amending Basic Laws could now only be done by way of a Basic Law, since a law can only be amended by means of a law of equal normative weight.²⁸ However, because most Basic Laws do not include any 'formal entrenchment' requiring a particular Knesset majority to make amendments, most Basic Law provisions can be amended by means of a simple voting majority.

The Limitation Clause included in the two most recent Basic Laws can be reduced to four requirements for the legitimate infringement of constitutional rights by the Knesset or the government: (1) that the infringement be authorized by law or by explicit consent, (2) that it be for a proper purpose, (3) that it befit the values of the State of Israel, and (4) that it be proportional. A 'proper purpose' is a public goal that could justify an infringement of a fundamental right in a democratic system. The term 'values of the State of Israel' refers to the application of Jewish and Democratic values in the State (and there are a number of opinions on the right way to synthesize these two value systems). The 'proportionality' requirement ensures that the degree of harm to the right be no greater than that which is necessary to attain the goal, and it is implemented by way of three balancing tests: (i) the suitability of the means to the objective; (ii) the adoption of a measure that infringes on a fundamental right only as a last resort, where no other reasonable means are sufficient; and (iii) the adoption of a measure that infringes on a fundamental right only where the objective is sufficiently important that the harm that would result from not pursuing such an objective justifies the harm to the fundamental right.²⁹

Many questions about the scope and nature of judicial review remain unanswered in the jurisprudence to date. At the present time it is very broad, both in terms of which courts can exercise judicial review, and in terms of matters that are subject to the courts' scrutiny. The courts have raised the possibility of reviewing primary legislation in the following situations: if there were procedural flaws in enacting the law³⁰, if the law violates a basic principle of a democratic society,³¹ or if the law fundamentally violates a protected human right³². In practice, the courts have exercised restraint in utilizing their authority to review primary legislation and only

²⁸ *Mizrahi*, at pp. 320–321.

²⁹ Dorner, p. 1331, paragraph 12.

³⁰ HCJ 4885/03 *Poultry Growers Association v. Government of Israel*, P.D. 59(2) 14 (2004). Note that the case was dismissed.

³¹ Suggested in the minority opinion of Justice Chaim Cohen in HCJ 1/65 *Yardor v. Chairman of the Elections Committee*, P.D. 19(3) 365, 384 (1965), which has not found acceptance in later opinions.

³² As charged in the *Mizrahi* case.

very few legal provisions that violated protected constitutional rights have been stricken by the courts as unconstitutional.

In a 2011 High Court of Justice petition against Israel's National Insurance Institute (NII), a provision of the *Income Support Law*³³ preventing those with regular access to a car from receiving income support was stricken. The NII proposed that a more limited system of judicial review be employed for matters governing social-economic rights as opposed to civil-political rights, since, it was argued, laws protecting social rights involve the expenditure of government resources and are based on policy questions that are the purview of the legislature, not the judiciary. The High Court of Justice ruled against the idea of employing different systems of judicial review, rejecting the validity of the dichotomy proposed by the NII.³⁴

While direct concrete challenges to the constitutionality of laws or government actions are normally within the exclusive jurisdiction of the Supreme Court in its capacity as the High Court of Justice, any Israeli court may examine the constitutionality of a statutory provision within the indirect framework of a legal case or dispute.³⁵ Such cases are, however, extremely rare. As part of a criminal case, a 1996 amendment to the Income Tax Code which prohibited anyone not listed in the Registry of Tax Consultants from providing tax consultancy services was deemed to disproportionately limit freedom of occupation, and was struck down by the Tel Aviv Magistrate's court.³⁶ To date, this is the only case where a court of lower jurisdiction than the Supreme Court exercised such judicial review.

14.5 Human Rights Protection of Non-Citizens

The core human rights protected under *Basic Law: Human Dignity and Liberty* apply to all people in Israel, including non-Israeli citizens, with the exception of the right of entry, which expressly applies only to Israeli citizens present outside of Israel. The major precedents on the protection of human rights for non-citizens is a High Court of Justice decision from 2006, as well as another by the same petitioner in 2011—the petitioner being *Kav Laoved*, a non-governmental organization representing the rights of weaker segments of the working population. In 2006, the court ruled on the legality of an immigration law which stipulated that a foreign worker could only work for the particular employer that sponsored his visa, having the name of that employer stamped in his passport, and risking deportation if he stopped working for that employer. According to the court, this law led to a situation where workers were badly mistreated, effectively creating modern-day slavery for these workers.³⁷ In the 2011 decision, the Court ruled on the legality of a Ministry of Interior protocol that

³³ *Income Support Law, 1980*.

³⁴ HCJ 10662/04 *Salah Hassan v. National Insurance Institute (2012)*, not yet published.

³⁵ Navot, p. 160.

³⁶ CR (T'A) 4696/01 *Israel v. Moshe Handelman (2003)*.

³⁷ HCJ 4542/02 *Kav Laoved v. Government of Israel (2006)* (Hereinafter: '*Kav Laoved (2006)*').

forced foreign workers that became pregnant to leave the country.³⁸ In both cases, the Court ruled that the basic human rights protected under *Basic Law: Human Dignity and Liberty* apply to all persons in Israel—not only citizens. Since these measures violated the right to autonomy and the right to human dignity respectively, both were struck down by the High Court of Justice.

Note that the extension of human rights protection to all people in Israel has been enforced only with respect to the rights found in *Basic Law: Human Dignity and Liberty*. *Basic Law: Freedom of Occupation* protects “Israeli nationals and residents,” and therefore it is not clear whether the courts will extend this protection to non-Israelis as well. Presently, the courts have abstained from ruling on this question; however, the Court did indicate that the position which holds that the Basic Law completely denies foreign workers protection from violations of freedom of occupation was untenable.³⁹

14.6 Extra-Territorial Application of Human Rights Protections

After the 1967 Six Day War, Israel remained in control of Judea and Samaria (formerly under Jordanian rule) and the Gaza Strip (formerly under Egyptian rule), and after establishing military rule in accordance with international law, the areas were considered as under belligerent occupation and therefore subject to the provisions of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War (“*Fourth Geneva Convention*”) and the 1907 Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land (“*Hague Regulations*”). In the 1972 *Hilu* decision⁴⁰, the High Court of Justice established that challenges against the legislative and administrative orders of the military governor could be heard by the Court. Ruling that the Hague Regulations constituted customary international law while the Fourth Geneva Convention was conventional international law that had not been incorporated into domestic law, the court ruled that such cases would be decided based on the Hague Regulations and based on Israeli administrative law.⁴¹ Consequently, this ruling opened the door to a large number of cases that dealt with the application of international law on Israeli actions, especially with respect to Israel’s actions in the territories.

In 2005, the High Court of Justice ruled on the legality of the Israeli government’s decision to remove Israeli residents from occupied territory in the Gaza Strip, as part of the disengagement plan. The court held that Israeli civilians living in the Gaza Strip were entitled to constitutional protection since they lived under effective

³⁸ HCJ 11437/05 *Kav Laoved v. Interior Ministry* (2011) (Hereinafter: ‘*Kav Laoved* (2011)’).

³⁹ *Kav Laoved* (2006), paragraph 41 of the decision of J. Levy.

⁴⁰ HCJ 302/72, *Hilu et al. v. Government of Israel et al.*, 27 (2) P.D. 169, 176 (1972).

⁴¹ HCJ 606/78, *Ayub et al. v. Minister of Defence et al.*, 33 (2) P.D. 113, 120–23, 125–29 (1979). It should be noted, however, that in subsequent jurisprudence the Government of Israel has stated that it applies the humanitarian provisions of the Fourth Geneva Convention in the occupied territories.

Israeli rule, and subsequently reviewed the government decision under the Limitation Clause. Thus the court provided a basis for the extra-territorial application of Israeli constitutional law, albeit one limited to Israeli citizens in areas under effective Israeli control. The court carefully abstained from ruling on the protection of non-Israelis living under Israeli rule in the Occupied Territories on the basis of the constitution, as well as the question of whether the constitution may be applied extra-territorially in general, focusing instead on the application of the constitution on a personal level to Israeli nationals⁴².

14.7 International Human Rights Commitments and Their Status in Israeli Domestic Law

The status of international law in Israeli domestic law is not determined in any statute, and the courts have developed legal rules to fill this void.⁴³ Israel, like other common law countries, follows a dualistic system with respect to the distinction between international and domestic laws. Provisions of international treaties are only binding in domestic law if explicitly adopted by legislation.⁴⁴ The traditional rationale for requiring domestic implementing legislation is that insofar as the treaty-making power is the prerogative of the executive branch, automatic incorporation of treaties into domestic law would turn the executive into a de facto legislator. A secondary rationale expressed by the Supreme Court is that automatically incorporating international treaties would bind the Israeli public to laws that have not been formulated in accordance with Israeli needs and conditions, though this rationale seems to ignore the fact that customary law, which is also not necessarily attuned to the Israeli system, is automatically adopted into domestic law.⁴⁵

The Knesset's adoption of international treaties in domestic law can take place in a number of ways, including the adoption of an entire treaty as an addendum to a law⁴⁶; the adoption of provisions of the treaty in a domestic law; legislating that a minister has the authority to grant legal status to provisions of a treaty in the framework of a by-law; etc. Note that even without explicit domestic adoption, the courts tend to interpret domestic legislation in harmony with ratified international treaties, under the "presumption of concordant meaning" doctrine⁴⁷, provided this

⁴² HCJ 1661/05 *Hof Azza Regional Municipality v. Israel Knesset*, 59(2) PD 481 (2005), at paragraph 80.

⁴³ Yaffa Zilbershats (1996) *The Adoption of International Law into Israeli Law—The Real is Ideal*. 25 *Isr. Y.B. On Hum. Rts.* 243 (Hereinafter: 'Zilbershats').

⁴⁴ HCJ 785/87 *Affo et al. v. Commander of IDF Forces in the West Bank et al.*, P.D. 42(2), 4, 37 (1988) (Hereinafter: 'Affo').

⁴⁵ Zilbershats, p. 248.

⁴⁶ As is the case with the *Hague Convention (Return of Abducted Children) Law, 5751–1991*, stating that "The articles of the Convention, the language of which appears in the Schedule, shall have statutory effect, and shall apply notwithstanding any law."

⁴⁷ *Kav Laoved* (2006), at paragraph 37.

interpretation does not entirely distort the original intention of the law, in which case the domestic statute prevails⁴⁸.

In contrast, customary international law (including “declaratory” treaty provisions that codify existing custom) is automatically considered part of domestic law provided that it does not conflict with existing Israeli legislation⁴⁹, without requiring any internal legislation.⁵⁰ The automatic incorporation of customary law does not negate the separation of powers because customary international law binds states without any action on the part of the government.

Israel is committed to most universal human rights treaties. It has ratified the two major conventions on human rights of 1966—the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), although entering a reservation on Art. 23 of the former, which deals with matters of marriage and family: Israel reserved the right to decide matters of personal status by way of religious law.⁵¹

Similarly, Israel has signed most of the other international conventions on human rights. Israel’s ratification of the 1948 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment notably included two reservations: firstly, Israel did not recognize the competence of the Committee set up by the convention for the investigation of allegations of torture; and secondly, Israel did not authorize the International Court of Justice in the Hague to adjudicate disputes that arose out of the convention. Among the main treaties that Israel has signed and ratified are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, the 1989 Convention on the Rights of the Child, and the 2006 Convention on the Rights of Persons with Disabilities.

Israel has not signed the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the 2006 Convention for the Protection of All Persons from Enforced Disappearance.

Aside from these conventions, Israel is not a party to any of the regional conventions, the most notable of which is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which established the European Court of Human Rights. As a non-European state, Israel cannot formally be a party to this treaty. Nonetheless, Israeli courts have frequently cited judicial decisions from the European Court of Human Rights, since it is considered authoritative on matters of human rights that also relate to the interpretation of the universal human rights treaties.⁵²

⁴⁸ See Tomer Broude (2009) *The Status of International Law in Domestic Law*. In: Robbie Sabel (ed) *International Law § 3* (in Hebrew), at Note 15.

⁴⁹ CR 5/51 *Steinberg v. Attorney General*, 5 P.D. 1061.

⁵⁰ See the Affo decision, at p. 35, where the court held that customary international law was automatically part of Israeli law, so long as it does not conflict with existing legislation.

⁵¹ Sabel, pp. 211–212.

⁵² See, for instance, 2160/99 *L. v. L.* (Jerusalem Family Court, 2005), where the court cited two cases of the European Court of Human Rights dealing with cases of degrading treatment of children by their parents, holding that these violated various human rights conventions.

14.8 Conclusion

Israel's founding document describes a state built on the protection of equality, freedom, and other human rights for all of its inhabitants. Absent a formal constitution, however, the courts could only protect human rights through the development of a 'judicial bill of rights' that they employed to disqualify secondary legislation and government actions. With the legislation of two additional 'basic laws', laws that were meant to eventually form a constitution, and the inclusion of a Limitation Clause, the court began scrutinizing primary legislation (albeit infrequently) against the enumerated rights, as well as rights that, for reasons outlined above, were not included in the basic laws, but were included in the judicial bill of rights. The courts play an important role in Israeli society, with a willingness to examine a broad range of government actions and legislation.

Israel has signed and ratified most major international treaties on human rights, and is consistent with other common law countries regarding the adoption of international law, requiring explicit internal legislation for incorporating treaties, and deferring to international law when it believes that it has customary status (such as the 1907 Hague Regulations). To date, the extent of the application of Israeli constitutional law on an extra-territorial basis has not been completely settled. The courts have applied it on a personal basis to Israelis living in Israeli-controlled territories, but many questions remain.

References

Books and chapters

- Ruth Gavison (1985) The Controversy over Israel's Bill of Rights. 15 *Isr. Y.B. On Hum. Rts.* 113:148–49 and 137–38.
- Suzie Navot (2007) *The Constitutional Law of Israel*. Kluwer, Netherlands.
- Yaffa Zilbershats (1996) The Adoption of International Law into Israeli Law—The Real is Ideal. 25 *Isr. Y.B. On Hum. Rts.* 243.
- Tomer Broude (2009) The Status of International Law in Domestic Law. In: Robbie Sabel (ed.) *International Law § 3* (in Hebrew), at Note 15.

Cases

- CR 5/51 *Steinberg v. Attorney General*, 5 P.D. 1061.
- CR 3471/87 *State of Israel v. Kaplan*, P.D. 5748(2) 26 (1987).
- CR (T" A) 4696/01 *Israel v. Moshe Handelman* (2003).
- HCJ 1/65 *Yardor v. Chairman of the Elections Committee*, P.D. 19(3) 365, 384 (1965).
- HCJ 3/58 *Berman v. Interior Minister*, P.D. 12(2) 1508 (1958).
- HCJ 7/48 *El-Karbotli v. Minister of Defense*, P.D. 2(5) (1949).
- HCJ 60/77 *Ressler v. Chairman of Elections Committee*, P.D. 31(2) 556, 560 (1977).
- HCJ 73/53 *Kol Ha'am v. Interior Minister*, P.D. 7(2) 871 (1953).

- HCJ 98/69 *Bergman v. Finance Minister* 23(1) 693 (1969).
 HCJ 302/72, *Hilu et al. v. Government of Israel et al.*, 27 (2) P.D. 169, 176 (1972).
 HCJ 355/79 *Katlan v. Prison Services*, P.D. 34(3) 294 (1980).
 HCJ 606/78, *Ayub et al. v. Minister of Defence et al.*, 33 (2) P.D. 113, 120–23, 125–29 (1979).
 HCJ 785/87 *Affo et al. v. Commander of IDF Forces in the West Bank et al.*, P.D. 42(2), 4, 37 (1988).
 HCJ 1661/05 *Hof Azza Regional Municipality v. Israel Knesset*, 59(2) PD 481 (2005).
 HCJ 2171/06 *Shani Cohen v. Knesset Speaker* (2011), at paragraph 19.
 HCJ 4542/02 *Kav Laoved v. Government of Israel* (2006).
 HCJ 4676/94 *Meatrel Ltd. v. Israel Knesset*, P.D. 50(5) 15 (1996).
 HCJ 4885/03 *Poultry Growers Association v. Government of Israel*, P.D. 59(2) 14 (2004).
 HCJ 5394/92 *Hoppert v. 'Yad Vashem' Holocaust Martyrs and Heroes Memorial Authority*, P.D. 48(3) 353, 362 (1994).
 HCJ 7052/03 *Adalla v. Minister of Interior*, P.D. 61(2) 202 (2006), at paragraph 39.
 HCJ 10662/04 *Salah Hassan v. National Insurance Institute* (2012).
 HCJ 11437/05 *Kav Laoved v. Interior Ministry* (2011).
 SC 6821/93 *Bank Mizrahi v. Migdal*, P.D. 49(4) 22 (1995) (2004).
 SC 8163/05 *Hadar Insurance Co. v. Anon.* (2007), at paragraph 23.
 2160/99 *L. v. L.* (Jerusalem Family Court, 2005).

Journals and articles

- Natan Lerner (2007) Religious Liberty in the State of Israel. 21 *Emory Int'l L. Rev.* 239.
 Dalia Dorner (1991) Does Israel Have a Constitution?. 43 *St. Louis U. L.J.* 1325
 Stephen Goldstein (1991–1992) Israel: A Secular or Religious State. 36 *St Louis U. L.J.* 143.

Statutes

- Labor and Rest Hours Law*, 1951.
Basic Law: Freedom of Occupation.
Hague Convention (Return of Abducted Children) Law, 5751–1991.
Income Support Law, 1980.
Law of Return, 1950.
Meat and Meat Products Law, 1994.
 Constitution Act, 1982, Canada Act 1982 (U.K.), 1982, c. 11.
 UN General Assembly Resolution 181 of November 29, 1947.