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Abstract
Israel's development of constitutional law without a written constitution presents a fascinating picture of how a system, unable to develop a constitution in the usual manner, has developed one in another manner. It shows how innovative lawmaking can be - and sometimes must be - to maintain a democratic political system.

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Planned constitution never got written, but Israel still got constitutional law

By Marcia Gelpe

Israel is a young democracy. Despite the immigration of tens of thousands of refugees from other countries, repeated wars, and economic uncertainty, Israel has maintained a stable democratic society since her establishment as a modern state in 1948. She has done it without a written constitution — but not without the development of a substantial body of constitutional law that is politically and legally important.

Israel is a parliamentary democracy. At any given time, about eight active parties obtain substantial shares of the vote, and each gets proportional representation in the parliament.

Israel’s legislative branch, the Knesset, has 120 members. Most bills are enacted by majority vote, with no minimum quorum. As in Great Britain, statutes enacted by the parliament are technically the highest law of the land.

The executive branch is headed by the prime minister, who — until now — has been chosen from among the members of the Knesset. Starting with the next elections, the prime minister will be chosen by direct vote of the electorate. The prime minister is always the head of one of the two largest parties, depending on which one is able to garner a majority of Knesset votes by forming a coalition with other parties. The prime minister forms the Government, which includes heads of the ministries. The ministers have a more political role than the secretaries who head departments in the United States. The ministers participate in the Government, a creature of the parliamentary system that has no precise parallel in the U.S. system.

The president is appointed by the Knesset for a five-year term. The presidency is largely ceremonial, although the president may hold considerable influence over the conscience of the people — by personal stature as much as the office.

Israel has a full system of trial and appellate courts. The highest court is the Supreme Court, which sits on all types of cases. Most important, sitting as the High Court of Justice, it reviews actions of administrative authorities, to see that they are consistent with statutes and — more broadly — with the “rule of law,” the concept that the government is subject to structured principles in her actions. Administrative authority is defined broadly and even includes committees of the Knesset. Justices of the Supreme Court are appointed by a committee on which sitting judges and members of the bar hold the majority of seats, largely freeing the selection process from strong political influence.

In democratic nations, constitutions generally fill two purposes: They set out the structure and powers of government, and they declare the individual rights that are to be protected from government interference. In other words, they grant and limit government power. Constitutions are supra-legal documents. They are the highest law of the land, subject to change only by extraordinary means.

Most of the main body of the U.S. Constitution, for example, is devoted to setting out the structure and powers of the federal government. The first ten amendments are devoted mainly to setting out individual rights, in the form of limitations on federal power.

Although Israel lacks a written constitution, it has a body of law that defines the structure and powers of the government, declares individual rights, and is subject to change only by extraordinary means.

The founders of the State of Israel planned to have a written constitution, but none was ever adopted.

That was, and is, attributable in part to the continuous state of war. Within 24 hours of its establishment in 1948, Israel was invaded by all her neighbors — Lebanon, Syria, Jordan, and Egypt — plus Iraq. There was no time for the newly forming government to debate and draft a constitution. Needing a legal regime, a law was enacted declaring that law existing at the time would remain the law of the land, to the extent it was not inconsistent with the Declaration of the Establishment of the State of Israel, and subject to change by later acts of the parliament.

Egypt and, recently, Jordan have signed peace treaties with Israel, but otherwise the state of war and persistent internal threats to Israel’s security have continued, making it difficult to develop a written constitution. Democracies face extraordinary constitutional problems in times of war. Evidence of that is found in our own World War I–era cases on freedom of speech, which defined that freedom restrictively. To develop an entire constitution in such times is an even more daunting task.

Compounding the challenge of writing a constitution is an unresolved debate on the religious nature of the Israeli state. Israel was established to be the homeland for the Jewish people. Most Israelis agree that it is essential to maintain the Jewish nature of the state — but whether and to what extent the state should define and enforce Jewish religious norms is a subject of vigorous debate. The lack of agreement on this important matter hinders the enactment of a written constitution, which would be expected to address the issue. Much of this debate seems inescapable to many in the West. Unlike most Western religions, Middle Eastern religions, including Judaism and Islam, intertwine religion

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with what we in the United States call nationalitiy and law.

Finally, Israel’s political structure has made constitutional enactment difficult. Because Israel’s parliamentary system has many actively participating parties, and because minority parties play a crucial swing role in her coalition governments, it has been difficult to enact a constitutional document, which by its nature must reflect majority consensus more than minority demands.

Despite those problems, the Israelis have felt the need for law of a constitutional nature. In 1950, the Knesset declared its intention to develop a constitution piecemeal, by enacting a series of “Basic Laws.” In addition, the Supreme Court has repeatedly recognized the need for preserving the rule of law and for protecting the rights of individuals from undue intrusion by the government. The public seems supportive of these attitudes.

Without a written constitution, Israel has developed constitutional doctrine through two methods: enactment of Basic Laws by the Knesset and pronouncement of constitutional doctrine by the Supreme Court.

The Knesset has enacted eleven Basic Laws. Six deal directly with the structure of the state (Knesset, President of the State, the Government, Armed Forces, Judiciary, and State Comptroller); two with individual rights (Freedom of Occupation, and Human Dignity and Freedom), and three with other matters (Israel’s Land, State Economy, and Jerusalem as Israel’s Capital). Many of these laws, or their essential provisions, are “entrenched,” which means they cannot be altered except by a majority of the members of the Knesset.

This is an extraordinary requirement, for two reasons. First, the Government usually constitutes only a slim majority of all Knesset members, so any vote that requires an absolute majority is really a vote of confidence in the Government. Second, because no quorum is required for most Knesset action, most laws can be and are passed by a majority of the small fraction of the Knesset’s members who actually vote on a particular matter.

The idea that the Knesset can bind itself not to change future laws except through an extraordinary procedure is one difficulty. In the United States, for example, a legislature can always change an earlier law by a later one. Moreover, the Israeli Supreme Court has taken upon itself the task of declaring invalid later laws which contradict entrenched provisions in earlier Basic Laws. That, too, is odd in a system in which the parliament is conceived of as supreme and not subject to constitutional review in a court.

The constitutional nature of the Basic Laws, at least their entrenched provisions, is evidenced by two features. First, at least eight of them deal with the usual topics of a constitution: the structure and powers of government and the protection of individual rights. Second, they can be altered only by extraordinary means. This second feature is recognized by the Knesset and also by the Supreme Court, even though it presents some theoretical difficulties.

Another constitutional doctrine, not anchored in the Basic Laws, is found in the case law developed by the Supreme Court. This law appears mainly in the context of Supreme Court opinions interpreting statutes and in cases determining the validity of administrative action. The court has been aggressive in interpreting legislation and administrative authority through rulings that establish principles of governmental structure, on the one hand, and recognize individual freedoms, on the other.

For example, the Supreme Court has repeatedly exerted its power to consider the validity of administrative action asserted to be nonjusticiable based on its recognition of the importance of the doctrines of separation of powers and checks and balances, and its own role in preserving these doctrines.

On the side of recognizing individual freedoms, the Supreme Court has been even more aggressive. It has recognized, at a minimum, the freedoms of speech, assembly, religious practice, and occupation (even before this was recognized in a Basic Law); freedom from religious coercion and from discrimination on the basis of nationality or gender; and the right not to be deprived of property without just compensation.

When the court recognizes one of these freedoms, it interprets legislation or administrative authority in a ways consistent with those freedoms. In other words, it presumes that it was not the legislative intent to enact a law or authorize administrative action that would infringe on such a freedom. The presumption, almost irrebuttable, sometimes is used to justify an otherwise quite surprising interpretation of a statute.

The court finds the constitutional principles which it recognizes in a number of places: the Declaration of the Establishment of the State of Israel, the democratic nature of the state, the general themes evidenced in her statutes, the concept of natural justice, and the concept of the rule of law. Some might say that the principles are also based on the ideas of the justices themselves.

What justifies the court behaving in this way? One justification is the Foundations of Law Statute (1980), which says that if the court cannot resolve a case before it on the basis of statute, case law, or by analogy, it should resolve the case in “in light of the principles of freedom, justice, equity and peace of Israel’s heritage.” Another justification is akin to that offered by Justice Marshall in Marbury v. Madison: In a democracy, some institution has to watch the government, and the court is the institution to do it. Others might argue that the best justification is the fact that the Israeli Supreme Court is the most respected institution of Israeli government — and maintains that respect by protecting important principles. Still others might claim that the only justification is the court’s bald assertion of power.

In any case, this is how the court in fact works and establishes constitutional doctrine. The basic characteristics of constitutional doctrine are present. The rulings deal with constitutional subject matter: the structure and power of government and the protection of individual rights. The rulings can be changed only by extraordinary means. Although in theory these court-developed rules can be overturned at any time by the Knesset through ordinary legislation, in fact they cannot be so easily altered. The court’s own aggressive protection of the such principles in its readings of statutes limits the Knesset’s ability to alter them by any but the most explicit means. Moreover, the prestige of the court functionally dissuades the Knesset from overturning the principles without extraordinary political debate and even upheaval.

Israel’s development of constitutional law without a written constitution presents a fascinating picture of how a system, unable to develop a constitution in the usual manner, has developed one in another manner. It shows how innovative lawmaking can be — and sometimes must be — to maintain a democratic political system.