ISRAELI CONSTITUTIONAL LAW IN THE MAKING

In the domain of comparative constitutionalism, Israeli constitutional law is a fascinating case study constituted of many dilemmas. It is moving from the old British tradition of an unwritten Constitution and no judicial review of legislation to fully-fledged constitutionalism endorsing judicial review and based on the text of a series of Basic Laws. At the same time, it is struggling with major questions of identity, in the context of Israel's constitutional vision of 'a Jewish and Democratic' state.

Israeli Constitutional Law in the Making offers a comprehensive study of Israeli constitutional law in a systematic manner that moves from Constitution-making to specific areas of contestation including State/religion relations, national security, social rights, as well as structural questions of judicial review. It features contributions by leading scholars of Israeli constitutional law, with comparative comments by leading scholars of constitutional law from Europe and the United States.

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Edited by
Gideon Sapir, Daphne Barak-Erez and Aharon Barak

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Gideon Sapir, Daphne Barak-Erez and Aharon Barak

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Table of Contents

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Table of Cases

European Court of Human Rights (By Case Name)

France

Constitutional Council

Germany

Federal Constitutional Court (By Case Year)

India

Delhi High Court

Ireland

Supreme Court

Israel

Supreme Court (By Case Number)

District Court (By Case Name)

Magistrate Court (By Name)

Labour Court (By Case Name)

New Zealand

Court of Appeal

South Africa

Constitutional Court (By Case Name)

Swaziland

High Court

Turkey

Constitutional Court

UK

House of Lords (By Case Name)

Supreme Court (By Case Name)

Court of Appeal (By Case Name)

Privy Council

Special Immigration Appeal Commission

USA

Supreme Court (By Case Name)

Federal Courts (By Case Name)

Zimbabwe

Supreme Court

Table of Legislation and Documents

National (In Alphabetical Order)

Australia

Canada

Egypt

Germany

Greece

Hungary

India

Israel

Documents

Basic Laws

Laws, Ordinances and Orders

Draft Bills and Bills Memoranda

Italy

New Zealand

Norway

South Africa

Spain

Swaziland

Turkey

UK

Acts

Bills

USA

International (In Alphabetical Order)

European Union (In Alphabetical Order)

1

Introduction: Israeli Constitutional Law at the Crossroads

GIDEON SAPIR, DAPHNE BARAK-EREZ AND AHARON BARAK

ISRAELI CONSTITUTIONAL LAW is a sphere of many contradictions and traditions. Growing from the tradition of British law which was absorbed by the legal system of Mandatory Palestine, Israeli constitutional law had followed the path of unwritten constitutional principles. At the same time, inspired by the new arena of post-World War constitutionalism, as well as by Resolution 194 of the General Assembly of the United Nations recognizing the establishment of the new State and the wording of its Declaration of Independence, the newly established State planned to adopt a Constitution. However, at the time of writing, this vision has not been finalized due to inner controversies on the content of the Constitution. In the meantime, the vision has been converted to the enactment of a series of Basic Laws, which function as Israel's de facto Constitution. The constitutional outcomes of this special history are the subject of many controversies, to be explored in this book.

On 15 May 1948, close to the termination of the British Mandate in Palestine, the members of the People's Council representing the Jewish community assembled and proclaimed the establishment of the State of Israel. The Declaration of Independence promised, inter alia, a Constitution for Israel:

> We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15 May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called 'Israel'.[1]

The Declaration presented a course for the process of enacting a Constitution comprising three stages. In the first stage, the 'Provisional Council of State' was to act as a temporary legislative branch and in the second stage, elections were to be held for a 'Constituent Assembly' charged with drafting a Constitution. After accomplishing this task, the Constituent Assembly was supposed to disperse. In the third stage, elections were supposed to be held for a legislative authority according to the electoral system to be determined in the Constitution. With the election of a legislature, the Provisional Council of State would conclude its task and disperse as well.

[1] Declaration of the Establishment of the State of Israel, 1 LSI 7 (1948).

In reality, things had taken a different course. First, the Provisional Council of State decided it would cease to exist with the convention of the Constituent Assembly, and its powers would be transferred to the Assembly.[2] Thus, the Constituent Assembly was assigned the role of the ordinary legislator, alongside its original role as a body charged with the drafting of a Constitution.[3] Second, the Constituent Assembly, already known by its new name – the Knesset – did not succeed in getting to a consensual constitutional text. From May 1949 until June 1950, the Knesset was the scene of stormy debates.[4] Disagreements persisted, and the inability to reach consensus on the contents, the form, or even the need for a Constitution, finally led to the adoption of the compromise formula, proposed by Knesset Member Yizhar Harari. This compromise took the shape of a decision to adopt a piecemeal Constitution by enacting a series of Basic Laws, stating the following:

> The First Knesset charges the Constitution, Law, and Justice Committee with the task of preparing a constitution for the country. The constitution will be built chapter by chapter, so that each one will in itself be a basic law. The chapters will be submitted to the Knesset as the Committee concludes its task and, together, all these chapters will become the constitution of the country.[5]

In fact, for many years, the 'Harari decision' was implemented only partly. Although the Knesset enacted a series of Basic Laws over the years, they addressed only the institutional aspects of Israeli constitutional law and focused on the 'rules of the political game', and not the arena of values and basic rights.

In the absence of a formal constitutional Bill of Rights, the Israeli Supreme Court created alternative mechanisms for the protection of human rights, by reference to unwritten principles and values, as well as by applying the doctrines of administrative law to limit executive power.[6] Judicial activism, however, had its limits. The Supreme Court perceived itself as generally precluded from reviewing Knesset legislation (in contrast to administrative actions), following the British tradition of parliamentary sovereignty. Therefore, the lack of a formal Bill of Rights was still felt and relevant. For decades, however, several attempts to anchor a Bill of Rights in the form of a Basic Law proved unsuccessful,[7] and no breakthrough seemed in sight.

A significant change followed the enactment of two new Basic Laws dealing with human rights – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty (hereinafter: the new Basic Laws).[8] As its name attests, Basic Law: Freedom of Occupation deals with one right only – freedom of occupation and trade. Its counterpart – Basic Law: Human Dignity and Liberty – applies to several rights – property, movement from and to

[2] Transition Law, 5709-1949, s 1.

[3] This decision evoked misgivings on both the right and the left of the political spectrum. See R Gavison, 'The Controversy Over Israel's Bill of Rights' (1985) 15 *Israeli Year Book of Human Rights* 113, 117.

[4] See J Segev, 'Who Needs a Constitution? In Defense of the Non-decision Constitution-making Tactic in Israel' (2007) 70 *Alberta Law Review* 409, s IIB; Gavison (n 3) 147–50.

[5] DK 5 (1950) 1743 (in Hebrew).

[6] See, B Bracha, *The Protection of Human Rights in Israel* (1982) 12 *Israeli Yearbook of Human Rights* 110; A Maoz, *Defending Civil Liberties Without a Constitution: The Israeli Experience* (1988) 16 *Melbourne University Law Review* 815.

[7] Draft Bill Basic Law: Human and Civil Rights, 1973, HH 448; Draft Bill Basic Law: Bill of Rights, 1983, HH 111.

[8] For an English translation of Israel's Basic Laws see: knesset.gov.il/description/eng/eng_mimshal_yesod1.htm.

Israel, liberty, dignity, and privacy (but does not mention specifically several other important human rights, such as equality, freedom of expression, and freedom of religion).

Soon after the passing of the new Basic Laws, the Supreme Court stated that their enactment created a 'constitutional revolution', in the sense that they granted the Court the authority to review primary Knesset legislation.[9] Since then, the Israeli constitutional arena has changed significantly. The Supreme Court has used the new Basic Laws as a platform for developing Israel's constitutional law, by interpreting them broadly to include those rights not specifically mentioned in the constitutional text. It stated that many of these unenumerated rights were protected under the broad 'umbrella' of the right to human dignity.[10] This judicial innovation was accompanied also by a rich scholarly discourse. Debates and controversies soon followed.[11] Unfortunately, due to the language barrier, only a small portion of that judicial and academic activity is known to the international constitutional law community.

This book attempts to make a modest contribution to overcoming the language barrier, and help expose the Israeli scene to the English speaking scholarly community. The book offers a comprehensive study of Israeli constitutional law in a systematic manner that moves from constitution-making to specific areas of contestation. The book features contributions by scholars of Israeli constitutional law, followed by comments by leading scholars of comparative constitutional law from Europe and the United States. In fact, it aspires not only to present Israeli constitutional law, but rather to present the controversies that shape it in a manner that sheds light on theoretical questions, as well as on the experience of other systems.

Part 1 of the book presents the reasons and justifications offered for promoting the Israeli constitutional project and adopting a full formal Constitution. This is a question still considered open in Israel, a country that has not yet completed the process of enacting its Basic Laws. *Gideon Sapir* discusses the various functions a Constitution can fulfill and evaluates their relevance to the Israeli context. He argues that Israel needs a Constitution that will serve as a gag rule which bars constant controversies over certain issues. *Alon Harel* bases the need to complete the Israeli constitutional project on the importance of judicial review which grants a hearing to aggrieved individuals. *Ariel L Bendor* discusses the importance of having a constitutional regime by reference to its contribution to defining the basic principles of the legal system. Part 1 concludes with a comment by *Sanford Levinson*.

Part 2 discusses the various institutional models for judicial review that may suit the needs of the Israeli constitutional arena. Currently, Israel follows the US model that recognizes the power of every court to review the constitutionality of legislation, but this has been a contested model in the Israeli public arena. *Yoav Dotan* argues that the scope of judicial review should be determined in correlation to the system for selecting judges, and therefore Israel should not follow the US model of full-fledged judicial review, as

[9] CA 6821/93 *United Mizrahi Bank Ltd v Midgal Cooperative Village* 49(4) PD 221 [1995] (in Hebrew).

[10] HCJ 6298/07 *Ressler v Knesset* (21 February 2012) (in Hebrew); HCJ 7052/03 *Adalah v Minister of Interior* 61(2) PD 202 [2006] (in Hebrew); HCJ 10203/03 *Hamifkad Haleumi v Attorney General* 62(4) PD 715 [2008] (in Hebrew).

[11] See, eg D Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective' (1995) 26 *Columbia Human Rights Law Review* 309; G Sapir, 'Constitutional Revolutions – Israel as a Case Study' (2010) 5 *International Journal of Law in Context* 358; B Medina, 'A Response to Richard Posner's Criticism of Aharon Barak's Judicial Activism' (2007) 49 *Harvard International Law Journal* 1.

long as it follows a professional based process of selecting judges. *Joshua Segev* evaluates the prevalent view of the Israeli system and argues for a reform that will empower only the Supreme Court to practice judicial review of legislation. *Ori Aronson* criticizes this alternative, which seems to gain growing popularity. He argues that this model overlooks the redeeming potential of trial court adjudication for a deliberative, participatory, and pluralistic process of creating constitutional norms and understandings. *Tsvi Kahana* evaluates the Israeli experience with the notwithstanding mechanism which was incorporated in 1994 into Basic Law: Freedom of Occupation, as inspired by the Canadian Charter of Rights and Freedoms. *Kahana* argues that as long as Israel's Basic Laws can be amended without a super majority, deviations from them should be made by constitutional amendments, rather than through a notwithstanding mechanism. Part 2 concludes with a comment by *Víctor Ferreres Comella*.

Part 3 assesses the connections between Israeli constitutional law and global processes. *Iddo Porat* analyzes the persistent influence of foreign law on Israeli constitutional judicial decisions. Following a similar route, *Moshe Cohen-Elliya* discusses the influence of Western liberal thinking on Israeli constitutional law in the format titled by him as 'transformative constitutionalism'. *Margit Cohn* offers a detailed analysis of the constitutional doctrine of proportionality in a comparative perspective. Part 3 concludes with a comment by *Vicki C Jackson*.

Part 4 analyzes the process of constitutional balancing. *Mordechai Kremnitzer* offers a critical evaluation of the dangers ingrained in balancing for the protection of human rights. *Yaacov Ben-Semesh* offers an evaluation of the case study of balancing in the area of freedom of speech, with regard to speech allegedly offending the feelings of others. Part 4 concludes with a comment by *Sujit Choudhry*.

Part 5 discusses the status of the so-called unenumerated rights in Israeli constitutional law, focusing on the role played by the benevolent interpretation offered by the Israeli Supreme Court to the concept of human dignity, which enables it to fill the void created by the failure of the current Basic Laws to specifically mention rights such as: equality, freedom of speech and freedom of religion. *Tamar Hostovsky-Brandes* offers a broad overview of current judicial interpretations of the right to human dignity. *Sharon Weintal* discusses the possibility of compensating for the supposedly missing rights in the Basic Laws by reference to non-written constitutional principles. Part 5 concludes with a comment by *David Fontana*.

Part 6 focuses on the challenge of social rights in the context of Israeli constitutional law. The constitutional status of social rights and their enforceability is an open question in many systems, but even more so in Israel which lacks an express recognition of them. The result has been a limited protection of these rights as derivatives of the concept of human dignity, usually offering them only a 'minimum' level of protection. Both *Aeyal Gross* and *Amir Paz-Fuchs* discuss this model of mimimum-level protection of social rights in a critical manner. *Neta Ziv* offers another critical view, by focusing on the dynamic of conditioning social rights entitlements. Part 6 concludes with a comment by *Mark Tushnet*.

Part 7 moves forward to assess the applicability of constitutional rights in private law. *Aharon Barak* discusses the Israeli approach to this question – defined as an 'indirect application model' – and compares it to other prevalent models. *Michal Tamir* discusses this question in a contextualized manner which focuses on contractual relations. Part 7 concludes with a comment by *Stephen Gardbaum*.

Part 8 is dedicated to the issue of emergency constitutional powers and other national security related constitutional matters. This topic is of the highest importance in the Israeli context, taking into consideration the threats to Israel since its establishment. *Daphne Barak-Erez* analyzes the Israeli model of regulating the power to declare an emergency situtation in a comparative perspective. *Barak Medina* discusses the role of legislation in regulating national security threats. Part 8 concludes with a comment by *Adam Tomkins*.

Part 9 evaluates various outcomes of Israel's particular raison d'etre as a State defined in its Basic Laws as 'Jewish and Democratic'. This constitutional formula has ramifications to both the nation state model and to the regulation of State and religion matters. *Chaim Gans* discusses the Israeli nation state model in the context of Zionist thinking, examining the various ideological streams within the Jewish national movement. *Aviad Bakshi* and *Gideon Sapir* evaluate the implications of Israel's identity as the nation state of the Jewish people for its immigration policy, by analayzing the case study of family reunification applications of Palestinians. *Gila Stopler* explores the connection between national identity and the regulation of religion–State relations in Israel. She claims that the Israeli model has been only partially successful in shaping national identity and relates this limited success to the State's lack of control over its own religious establishment. Part 9 concludes with a comment by *Susanna Mancini* and *Michel Rosenfeld*.

* * *

Read together, the various chapters and comments included in this book present Israeli constitutional law as a living sphere, which reflects the dilemmas the country is faced with, as well as the challenges of constitutional theory in general. As such, our hope is that the book will promote not only the future study and development of Israeli constitutional law, but also the understanding of the complexities of constitutional systems that are still coping with the challenge of nation-building and transitions.

Part 1

Towards a Full-Fledged Constitution

2

Why a Constitution – in General and in Particular in the Israeli Context?

GIDEON SAPIR

I. INTRODUCTION

ACCORDING TO A common rationale, a Constitution is required to defend basic values. The constitutional model necessary for that purpose comprises three components: supremacy, entrenchment and judicial review. This chapter, however, considers two more constitutional rationales that are completely different from the one just described. According to one alternative view, the function of the Constitution is to create public dialogue over important issues, and according to the other a Constitution can serve as a silencing mechanism, or as a 'gag rule'.

This chapter is divided into three parts: in part II, I present the three rationales for adopting a constitutional strategy and three different constitutional models that derive from them, respectively; in part III, I examine which of the models is appropriate for Israel and in part IV, I examine which of the models has been chosen thus far in Israel.

II. THREE RATIONALES AND THREE MODELS

A. Protecting Constitution

According to a common rationale, a Constitution is required to defend basic values. This rationale is based on two main premises: that certain values are of supreme importance and that those values are under threat of attack. When sober, we know what is permitted and what is prohibited, but we also know that there may be situations – under conditions of inebriation – in which control over clear reasoning is lost. Hence we strive, while sober, to make it difficult for ourselves, when in a state of loss of control, to perform acts we will later rue.[1] The constitutional model necessary for that purpose comprises three components: granting supreme status to the document that anchors the values (supremacy), safeguarding it from ordinary legislative amendment (entrenchment), and granting authority

[1] The technical term used in this context is precommitment, and a common metaphor used in this context is Ulysses and the Sirens. J Elster, *Ulysses and the Sirens* (Cambridge, Cambridge University Press, 1979) ch 2; S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327; M Klarman, 'Majoritarian Judicial Review: The Entrenchment Problem' (1997) 85 *Georgia Law Journal* 491, 496.

to the courts to invalidate primary legislation that contradicts this document (judicial review).

This rationale and its accompanying model are the best known of the three that will be discussed in this chapter, but, as is known, they suffer from a number of weaknesses that are the subject of an extensive body of literature. We shall note some of them in brief: even if we agree that there are values of supreme importance, in a pluralistic society a consensus does not exist on the identity of these values. If a Constitution should be accepted by consensus and not forced on a segment of the public, it is not clear how it is possible to overcome the lack of agreement and to adopt a Constitution. Moreover, even if we were to succeed in solidifying an agreed upon list of supreme values, there would still be a significant dispute over how to apply them in concrete circumstances. This model authorises the court to interpret the Constitution and to enforce it, thereby granting the court the power to decide over many constitutional dilemmas, an approach that does not coincide with the democratic principle.[2] Furthermore, owing to the tension between this model and the democratic principle, the court might be perceived by the public as a political player whose actions lack legitimacy, a situation that is liable to erode its standing. Finally, the great difficulty in changing the Constitution and the transferring of the moral discourse to the confines of the court is likely to weaken the public's motivation to deal with issues of values, which would lead to the dilution of the democratic discourse.[3]

Various attempts have been made to overcome the failings of this constitutional model, or at least some of them. One proposed solution is to adopt a democratic apparatus for electing justices that would grant the public control over the composition of the court. The selection of justices whose stance on disputed constitutional issues coincides with the public's position could be used by the public as a means, albeit indirect and slow, yet effective, to participate in the process of fashioning the Constitution through interpretation. Thus, for example, Donald Kommers explains the system applied in Germany according to which the Parliament elects the judges of the Constitutional Court:

> What makes the Constitutional Court's 'activism' less objectionable in terms of democratic theory, however, is that Parliament – not the executive – elects each justice by a two-thirds vote for a single nonrenewable term of twelve years, thereby averting the rise of an aging judicial oligarchy out of tune with major currents of modern life.[4]

[2] For a classical expression of this argument, see AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Yale University Press, 1962) 16: 'The root difficulty is that judicial review is a counter-majoritarian force in our system'. For a contemporary expression of the argument, see J Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999) 255–62.

[3] The classical expositor of this argument is James Bradley Thayer. See JB Thayer, OW Holmes, F Frankfurter and PB Kurland (eds), *John Marshall* (Chicago, University of Chicago Press, 1967) 106–07: 'the exercise of judicial review, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors'. For a contemporary expression of this claim, see M Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245, 247.

[4] See DP Kommers, 'Comparative Constitutionalism: German Constitutionalism: A Prolegomenon' (1991) 40 *Emory Law Journal* 837, 844. On this argument, within the American context see, TJ Peretti, *In Defense of a Political Court* (Princeton, Princeton University Press, 1999) 84–85, 131. See also L Hilbink, 'Beyond Manicheanism: Assessing the New Constitutionalism' (2006) 65 *Maryland Law Review* 15, 21–25; W Cohen and M Cappelletti, *Comparative Constitutional Law: Cases and Materials* (Indianapolis, Bobbs-Merrill, 1979) 76.

Similar statements were made by Victor Comella:

> Judicial review of legislation may give rise to a 'democratic objection', inasmuch as the legislation in question is the product of a democratic legislature. This objection may be minimised if the members of the court are selected in ways that are relatively democratic.[5]

There are those who propose adding to the democratic election apparatus a term limit for judges. Comella explains this as follows:

> [A] country . . . may limit the term of judges of the constitutional court to reduce the risk of a serious gap between the constitutional jurisprudence of the court and the basic moral and political beliefs of the people and their elected representatives.[6]

It is customary in most Western countries to limit the tenure of judges to about 10 years.[7] The United States is an exception to this trend: the term of service is not set in years, and there is no mandatory age of retirement.[8] Yet, scholars in the United States are critical of the current apparatus and call for aligning it to that of other democracies.[9]

A standard argument raised against democratization of election apparatuses is that this would expose the appointment process to political wheeling and dealing. This claim should be rejected outright for two reasons. First, if we agree that deciding constitutional issues is not mechanical but demands the application of strong discretion, and if it is presumed that the stances of a judge influence his discretion, then political trading at the election stage, during which every side tries to bring about the election of a judge whose worldview seems to that side fitting and proper, is precisely the aim which the democratic apparatus for electing justices wishes to obtain and not a shortcoming it wishes to avoid. Second, political tradeoffs around the appointment to an office that concentrates within its grasp such great political power is unavoidable.[10] The question is

[5] VF Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2 *International Journal of Constitutional Law* 461, 468; J Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge, Cambridge University Press, 2006) 25–26.

[6] Comella, ibid.

[7] In Germany the judges of the Federal Constitutional Court are appointed for a 12-year period, and they cannot be reappointed at the end of the period. See DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd edn (Durham, Duke University Press, 1997) 20–21; In Italy, and Spain, judges of the Constitutional Court are appointed for nine years and cannot be reappointed for a second consecutive term. For Italy, see Costituzione [Cost], art 135; TG Watkin, *The Italian Legal Tradition* (Farnham, Ashgate Publishing, 1997) 90; for Spain, see Constitución Española, BOE n 311, 29 December 1978, s 159(3); E Merino-Blanco, *The Spanish Legal System* (London, Sweet & Maxwell, 1996) 97.

[8] This situation raises more than a few doubts as to the capability of the aged judges. See, eg DJ Garrow, 'Mental Decrepitude on the US Supreme Court: The Historical Case for a 28th Amendment' (2000) 67 *University of Chicago Law Review* 995: 'Mental decrepitude and incapacity have troubled the United States Supreme Court from the 1790s to the 1990s. The history of the Court is replete with repeated instances of justices casting decisive votes or otherwise participating actively in the Court's work when their colleagues and/or families had serious doubts about their mental capacities'. It should be noted, though, that the average age of retirement of American Supreme Court Justices is 70, after an average term of 15 years. See the statistics appearing in HJ Abraham, *Justices, Presidents and Senators: A History of the US Supreme Court Appointments from Washington to Clinton,* revised edn (Lanham, Rowman & Littlefield Publishers, 1999) 379–81.

[9] See SB Prakash, 'Book Review: Americas Aristocracy: Taking the Constitution Away from the Courts. By Mark Tushnet' (1999) 109 *Yale Law Journal* 541; J Resnik, 'Judicial Selection and Democratic Theory: Demand, Supply and Life-Tenure' (2005) 26 *Cardozo Law Review* 579; DR Stras and RW Scott, 'Retaining Life Tenure: The Case for a Golden Parachute' (2005) 83 *Washington University Law Quarterly* 1397.

[10] See JC Yoo, 'Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy' (2000) 98 *Michigan Law Review* 1436, 1437: 'If . . . judicial power has expanded such that in one direction or another, the Court will be a pervasive influence on a wide range of issues that can only in a partial and peripheral way be considered legal rather than political, it is only inevitable that players in the political process will seek to advance their preferences via Supreme Court nominations'.

only whether it will take place under fair conditions and in the light of day or will be determined under inequitable conditions and in secrecy. Of these two possibilities, the first seems more attractive.

If there is any drawback at all to the proposal to adopt a democratic judicial selection process and to limiting judges' terms of service, then it resides in this proposal not properly avoiding the dilution of the democratic discourse. As noted, the source of the difficulty rests in making the court the final arbiter over serious issues. This problem does not change even if judges are elected democratically. To be sure, the adoption of a democratic apparatus allows the public to influence the judicial product, but it does not return the moral discourse to the public arena. The public can, perhaps, try to influence the outcome, but it cannot take an active part in the decision-making process. I agree wholeheartedly with the opinion of Jeremy Waldron that 'impotent debating about what a few black-robed celebrities might decide in the future is hardly the essence of democratic citizenship'.[11]

B. Dialogical Constitution

According to a second rationale, the function of the Constitution is to create public dialogue over important issues. This rationale is based on a number of premises: first, in every political unit, as homogeneous as it may be, there are disputes over many issues. Second, under these circumstances, the principle of justice that should be applied is the principle of democratic determination. Third, democracy requires that decisions over essential issues be taken by the public. Democracy not only grants the public a *right* to discuss and decide on these issues, but imposes on it a moral *obligation* to effectuate this right. Fourth, the structure of the political system provokes a fear that the decisions over essential issues will be made in passing. The role of the Constitution is to provide a response to this fear and to ensure that essential questions will receive proper attention.

In a constitutional system based on the premises just described, the constitutional model will be delineated as follows: the Constitution will determine a series of abstract principles, leaving their precise manner of implementation open to discussion. The court will be given a certain amount of authority to interpret the Constitution and review primary legislation but the final word will be reserved for the legislature. According to this model, the function of the court is to stimulate the political system to discuss constitutional issues seriously.

The rationale of a Constitution as promoting dialogue is relatively new in constitutional discourse, but in recent years it has been gaining momentum. As Stephen Gardbaum notes,[12] constitutional models appropriate for this rationale were adopted in recent decades in a number of countries belonging to the British Commonwealth group, such as Canada, New Zealand, and Britain.

Adopting the dialogic model involves two main dangers that have been well described by Mark Tushnet. The first peril is that the legislature will do as it wishes while ignoring the court's positions and the second, that the legislature will accept the court's positions

[11] See Waldron, *Law and Disagreement* (n 2) 291.

[12] S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.

without invoking independent reasoning. Both dangers are actually one set in two scenarios, namely, that the model will not succeed in creating true dialogue.

Tushnet argues that the Canadian experience demonstrates well the realization of the second danger.[13] He points out the dearth of instances in which the Canadian legislature – federal or provincial – made use of the known 'Notwithstanding Clause' as an indication that the Canadian legislature accepts the judiciary's positions without reflection, in a way that prevents the formation of a true dialogue.[14] Yet, just as Tushnet himself alludes, it is possible to propose at least two alternative explanations for the scant use of the 'notwithstanding' mechanism. First, the Canadian 'notwithstanding' mechanism is formulated not as an instrument for *overriding the court's interpretation of the Constitution*, and for the proposal of a no less legitimate alternative interpretation, but as an *instrument for overriding the Constitution*.[15] Under these circumstances the legislature's abhorrence of the use of the 'notwithstanding' mechanism is understandable, since it erroneously perceives – or at least assumes that the public will perceive – this use as an illegitimate attempt to detract from basic constitutional principles.[16] A change in the formulation of the 'notwithstanding' apparatus, which would be accompanied by a campaign explaining the dialogic logic underlying it, might lead to a conceptual change, which would increase the legislature's willingness to use the implementation that was put at its disposal.[17]

Another possible explanation for the scant use of the Canadian 'notwithstanding' mechanism is related to the way the apparatus and its use were etched into the awareness of the Canadian public. The first to use the mechanism, applying it most extensively, was Quebec. In June 1982, a short time after the enactment of the Charter, the Quebec National Assembly passed a law that presumed to immediately add to all existing Quebec legislation a 'notwithstanding' mechanism, which would apply retroactively through to the day of the passing of the Charter. This law did not pretend to defend specific enactments against annulment but rather to challenge the very legitimacy of the Charter.[18] The law was discussed in a number of courts and ultimately ratified in principle by the Canadian Supreme Court.[19] Perhaps the use Quebec made of the 'notwithstanding' mechanism, as well as the confirmation the Canadian Supreme Court gave to this use, unfairly

[13] M Tushnet, 'Comparative Constitutionalism: State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations' (2002) 3 *Chicago Journal of International Law* 435, 450: 'Canada's experience with the notwithstanding clause suggests, although not conclusively, that the clause has failed to create a distinctive form of judicial review, and that Canada has a rather robust form of judicial review, the notwithstanding clause notwithstanding'.

[14] ibid: 'The clause has rarely been invoked, for reasons that are complex'. For a review of the range of the use of this apparatus up to 2000, see B Billingsley, 'Section 33: The Charter's Sleeping Giant' (2002) 21 *Windsor Year Book of Access to Justice* 331, 339–43; K Roach, 'Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience' (2005) 40 *Texas International Law Journal* 537, 543.

[15] S 33 of the Canadian Charter states that: '33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate *notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter*' (emphasis added).

[16] See J Waldron, 'Some Models of Dialogue Between Courts and Legislatures' (2004) 23 *Supreme Court Law Review (2d)* 7, 36–38.

[17] Yet, I agree with the misgivings expressed by Waldron concerning the chance of convincing the supporters of a human rights regime to agree to his formulation of the '"Notwithstanding" clause that involves an honest acknowledgment that . . . a . . . legislature might have a view of rights that was, though controversial, no less reasonable than the view arrived at by the judiciary' (ibid).

[18] See CP Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Oklahoma, University of Oklahoma Press, 1993) 200–01.

[19] *Ford v Quebec (AG)* [1988] 2 SCR 712 (Can).

blemished this apparatus and created an image of it as a tool undermining the essential public responsibility to guard basic fundamental values.[20] In conclusion, the scant use of the Canadian Notwithstanding Clause does not necessarily attest that the mechanism is unable to serve as an instrument for the creation of dialogue. Proper formulation and judicial meticulousness over the proper use of the apparatus will enhance its chances to attain the goal for which it was created.

C. Gagging Constitution

In a democracy decisions are commonly made after open public discussion in which each side attempts to gain supporters for its position. Yet, even in a democratic system there may be reasons to want to silence certain disputes and to prevent dealing with them publicly and openly. This refers to topics that are particularly divisive, and on which public discussion is liable to arouse negative feelings, to deepen fissures and demand a high cost in terms of time and political inputs. In such instances, and in contrast to accepted psychological intuitions, gagging can play a positive role. An entrenched Constitution can be of help in the creation and maintenance of a particularly strong gag rule. The reason is rather simple: the supremacy and entrenchment of the Constitution make it difficult to amend. Under these circumstances, it is very likely that civil motivation to take part in the decision-making processes will decline, a fact that will limit the scope and lower the intensity of the public discourse over the issues being anchored in the Constitution.

This last point clarifies one major difference between the first justification for utilizing constitutional strategy and the rationale proposed now. It has to do with the way each model perceives the silencing effect of the constitutional strategy. According to the first understanding, the silencing effect is perceived as a disadvantage that one should try to overcome, or to take into overall consideration.[21] Yet, according to the understanding proposed now, the dilution of the public discourse is essentially the *aim* for which the constitutional strategy is chosen. Note well that the perception of the Constitution as a gag rule does not mean that the dilution of public discourse constitutes by its very nature an advantage, but that for certain issues and under certain circumstances, it serves a positive purpose.

A second significant difference between protecting Constitution and gagging Constitution has to do with their criteria for selecting the issues to be included in the Constitution. Protecting Constitution attributes a positive intrinsic value to the content of the Constitution. The Constitution contains the 'correct' value determinations that need protection. In contrast, gagging Constitution does not assume the justness of the determinations anchored in the Constitution. The criterion for selecting the issues to be included in the Constitution according to this model is not justice or importance but rather utility. It is highly probable that all the rival groups will find flaws in the agreement anchored in the gagging Constitution and will even criticise it harshly. Yet, despite this, they will agree that it is worthwhile to include the determination in the Constitution,

[20] For a description of Quebec's use of the Notwithstanding Clause as a blemishing factor, see PW Hogg and AA Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 83.

[21] See n 3 above.

for fear that the political system will pay too heavy a price for leaving it outside the Constitution. The constitutional document that will result in the gagging Constitution model will not be one that we will hang on the walls of schools and oblige our children to memorise. It does not set high-minded principles. Just the opposite, it anchors compromises that no one actually loves, and despite that, we can agree that it is valuable for its silencing effect.

For a Constitution to reach its goal as a gag rule, it must silence all the players in the arena, that is, to gag both the political system and the court. At first glance, it seems that this is an impossible goal, since ostensibly there are only two possibilities: that the constitutional method will create a selective gag rule, or that it will not succeed to create a gag rule. The question as to which of the possibilities will materialise depends upon the constitutional model that will be chosen. If the protecting Constitution is selected, the gag will be selective since the Constitution will be submitted to the interpretation of the court. Conversely, in choosing the dialogical Constitution, no gagging will be created at all. According to this model, the court, to be sure, does not enjoy preference over the political system, but the equality between them is not in that both are gagged but in that both are not gagged. The question, therefore, is whether a Constitution can serve as a gag rule silencing all, or whether it is destined to one of two failures: fanning the discussion, or selective gagging that leaves the court free to fashion the arrangements as it wishes.

Elsewhere I have argued that it is possible to employ a Constitution to obtain full gagging by means of including in the Constitution detailed arrangements for the topics whose gagging is sought. This specification will achieve gagging because whether the right to the last word is reserved to the court (as in protecting Constitution) or given to the legislature (as in dialogical Constitution), the holder of the right to the last word is not authorised to ignore or annul clear instructions rooted in the Constitution.[22]

The proposal to include in the Constitution detailed arrangements and not just to include abstract principals does not fit the common approach that presumes as obvious that the Constitution is intended to be vague by virtue of its definition. Yet, generalization and vagueness are not a logical derivative of the concept 'Constitution'. The question as to whether to specify and clarify or to generalise and make vague this document of the highest normative validity depends on the aim that is to be achieved. In order to achieve the silencing effect, clarity and specification are needed.

III. WHICH MODEL IS APPROPRIATE FOR ISRAEL?

A. The First Model Does Not Fit

The protecting constitutional model is patently unfit for the State of Israel because the special nature of Israel's society and political system hones and worsens each of its shortcomings. The Israeli society is characterised by deep rifts among the groups composing it.

[22] It should be noted though, that even with the most detailed text it is not possible to completely prevent the court from employing creative methods of interpretation. The continental experience clarifies this point. See, eg JR Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 *Tulane Journal of International and Comparative Law* 541, 570–71; R Zimmermann, 'Statuta Sunt Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective' (1997) 56 *CLJ* 315, 320–21, 325–26.

In such circumstances, doubt grows stronger over the possibility of achieving consensus on the momentous questions of values; an agreement which is, of course, an imperative condition for the legitimacy of a protective Constitution. Placing the authority to enforce the Constitution in the hands of the court would allow it to fashion the Israeli value system. The latter danger is particularly strong in the light of the judicial culture that has developed over the past few decades in Israel, which is characterised by a self-awareness of mission and duty to serve as the delineator for issues of values.

The culture of political discourse and decision-making in Israel is woefully poor, and the ethos of governmental fairness is deficient. These facts usually serve in Israel precisely as an argument in favour of enhancing the court's role in supervising government goals as well as fashioning them – with or without the aid of a Constitution – with the claim that the court is the last hope. It seems, however, that reality, after three decades of intensive judicial intervention, shows that alongside a certain benefit (that grew out of the court's ever-increasing intervention) in eliminating phenomena of corruption and improper administration, this intervention also contributed to the weakening of the political system and to detracting from its ability to develop an independent moral spine. When the court took upon itself the role of gatekeeper, the legislature considered itself free of acting according to its wishes without being bothered by the question of whether its behaviour was upstanding.[23]

The final reason for the incompatibility of the first model with Israeli reality resides in the Israeli judicial selection mechanism. This mechanism ascribes to the incumbent Supreme Court justices a great deal of power in choosing those who will join their ranks.[24] In the past, the composition of the Israeli Supreme Court reflected the values of the old elite. As long as the system for electing judges remains as it is, this elite is ensured that its values will continue to dominate the court. This fact increases the tension between the great power placed in the hands of the court and the principle of democratic determination, and it severely erodes the Israeli public's faith in the court.

[23] D Barak-Erez, 'The Justiciability of Politics' (1999) 8 *Plilim* 369 (in Hebrew). A similar danger exists in other countries as well. For such a fear as expressed by a New Zealand scholar, see G Huscroft, 'Protecting Rights and Parliamentary Sovereignty: New Zealand's Experience with a Charter-Inspired, Statutory Bill of Rights' (2002) 21 *Windsor Year Book of Access to Justice* 111, 123: 'The power of the courts to strike down legislation can . . . result in perverse incentives. Governments may exploit judicial willingness to make hard decisions by leaving rights to be vindicated in litigation rather than dealing with them in the legislative process. American experience suggests that the temptation is always there to leave the constitutional dirty work to the courts'. For the argument that that is what happens in reality, in the American context, see M Tushnet, *Taking the Constitution Away From the Courts* (Princeton, Princeton University Press, 1999) 54–71.

[24] See, eg M Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville, University of Virginia Press, 1994) 34: 'By established practice, appointments to the Supreme Court require an affirmative vote of all three justices on the panel'. Moshe Ben-Zeev, who served as the Attorney General between the years 1963–68 wrote: 'It is impossible to appoint a person to the post of a judge, and certainly not to the post a Supreme Court justice, if the appointment is uniformly opposed by the three Supreme Court judges participating in the Committee. I had hoped that this was an unwritten custom, but if this is not the case, it should be anchored in law' (my translation, GS), M Ben-Zeev, 'Politics in the Appointment of Judges' (27 May 1981) *The Lawyer* 13 (in Hebrew). For additional sources see M Haller, 'The Court That Packed Itself' (1999) 8 *Azure* 64. Over the last few years fissures are beginning to appear in this conventional understanding, and the Supreme Court justices are increasingly confronting Ministers of Justice who are unwilling to be submissive.

B. The Second and Third Model Fit

As the first model does not fit Israel, it is not recommended to adopt it. There is, however, definitely room to consider use of the third model, the second model, or a combination of the two.

As stated, the decision to impose a gag over a certain issue derives from its being the subject of deep dispute, and from the conclusion that an open discussion on that topic is liable to be detrimental to national cohesiveness and to waste a great deal of precious public energy. In Israel, which is riven in terms of values and which grapples with maintaining the elementary conditions of security and stability, there are a number of disputed issues whose gagging by means of the Constitution would likely be beneficial.

The most salient candidate for such a treatment is the controversy over matters of religion and State, which has split the Jewish public in Israel from the beginning of the Zionist movement. Another dispute that warrants consideration of gagging by means of the Constitution is the one between the Jewish majority and the Arab–Palestinian minority over the identity of the State. Conducting debate on these two issues within the ordinary political process utilises unreasonable inputs from the political system and sunders the Israeli public, so it seems reasonable to anchor arrangements in these two spheres in a Constitution of the gag rule type.

A possible argument against the proposal to employ a gagging Constitution in Israel is that it is not necessary. In order to gag a given topic, it is not imperative to adopt a constitutional strategy. The gag rule can also be rooted in regular legislation, in secondary legislation, or even in a political agreement. The 'status quo' arrangement on matters of religion and State, which operated within the Israeli political system for a long period,[25] could serve as a good example of a successful, non-constitutional gag rule. From the establishment of the State, and for over a generation, the realm of religion and State in Israel enjoyed relative quiet and stability. This is somewhat surprising considering the rampant differences of opinion among the various groups in Israel on these matters. The startling relative quiet in this sphere may be attributed to the notion that the political system chose to invoke a gagging approach for this topic. Traditionally included in the coalition agreements for establishing the government was a paragraph stating that the status quo over matters of religion and State would remain unchanged.[26] As many writers note, that gagging agreement, which was re-anchored from one Knesset (Israeli Parliament) to the next and from government to government, derived from exactly those reasons cited above as the motive for adopting a gagging Constitution: understanding

[25] On the 'status quo', see, eg G Sapir, 'Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment' (1999) 22 *Hastings International and Comparative Law Review* 617.

[26] See, eg The Coalition Agreement between the Alignment Parties (The Labour Party – Mapam – Arab Lists), The National Religious Party, The Independent Liberal Party, DK 69 (1974) 706: '(e) Status quo over religious issues (1) In continuation of previous coalition agreements, also in the period of the Eighth Knesset the status quo will be maintained concerning public transportation on the Sabbath and holidays. (2) As above, the status quo will be maintained over the law of marriage and divorce and all other religious matters'. The Coalition Agreement between the Parties, The Israel Labour Party, the Herut Bloc – Liberals, the National Religious Party, The Independent Liberal Party, DK 56 (1970) 272: '(e) Status quo over religious issues (1) In continuation of coalition agreements in the Third, Fourth, Fifth, and Sixth Knessets, there will be maintained in the term of the Seventh Knesset the status quo concerning public transportation on the Sabbath and holidays. (2) As above, the status quo will be maintained over the law of marriage and divorce and all other religious matters' (my translation, GS).

that the topic is hotly disputed and that open discussion is liable to create a rift among different groups that will deter from national cohesiveness and draw a large part of the public energy that is needed for the solution of other vital tasks.[27]

If, as just demonstrated, the goal of gagging destructive disputes is realised even without using constitutional weaponry, the question arises as to why this should not be sufficient without involving the Constitution on the issue at hand. Two responses can be given to this question: the first is that there is indeed no need to use the Constitution for purposes of gagging, and it is required only in cases in which we are interested in a particularly forceful gag rule. The second answer is more interesting: precisely when the political system chooses to switch from a model of parliamentary democracy to a model of constitutional democracy, the efficacy of the usual gagging techniques is weakened and the need arises to use a constitutional gagging technique.

Let us assume that the parties to the dispute agree to gag it. The gagging will be maintained as long as the sides continue to want it, or if the agreement included an efficient enforcement mechanism. That is the usual situation, but when the Constitution enters the picture, the fate of the gag rule is expropriated from the grip of the parties, and it becomes exposed to possible third-party intervention, since the court is empowered to interpret and implement the Constitution. The only way to ensure effective gagging in a constitutional democracy is to upgrade the gag rule and give it constitutional status.

It is possible to illustrate this argument through the history of the Israeli gag rule in the area of religion–State relations. After a long period in which it was, more or less, maintained, the agreement concerning religion and State, and with it the gagging, is quite obviously collapsing. Arrangements maintained for a great many years with no significant change are being opened and abandoned with the waging of a fierce, harsh dispute. This change can be attributed to many factors,[28] but it seems that the Supreme Court is playing a central role in this change. If in the past, the players in the political system could suffice with political agreements for removing certain issues from the public agenda, once the court determined that it was within its purview to invoke judicial review, they became dependent upon the good will of the court. In these circumstances, the need arose to change the pattern of gagging and to reinforce it.

The dialogical Constitution model is also particularly appropriate for Israel. As stated, one of the premises at the base of this model is that the regular political apparatus does not motivate the political players to discuss vital issues seriously enough. This assumption is clearly verified in the State of Israel, a country in which there is a dangerous combination between the intensity of the disagreements over essential issues and the

[27] Eliezer Don-Yihya characterizes the 'status quo' arrangement as consociational, See E Don-Yihya, *Religious Institutions in the Political System – The Religious Councils in Israel* (Jerusalem, Jerusalem Center for Public Affairs, 1989) (in Hebrew). As Lijphart explains, at the basis of consociationality stands the awareness of the political leadership for the potential for a rift and instability inherent in a dispute that splits society, an awareness that leads to the development of patterns whose aim is to enable coexistence, and foremost among them being to refrain from applying the principle of decision by majority. See A Lijphart, 'Consociational Democracy' (1969) 21 *World Politics* 207. My argument is that the 'status quo' arrangement is in effect an informal gag rule coinciding well with this description. Accordingly, not only is the content of the arrangement intended to ensure stability and cooperation but also willingness in principle to immunize it against discussion and change.

[28] For a discussion, see A Cohen and B Susser, 'Between Fragile Consensus to Breaking Consensus – Changes in the Relationship between Religion and State: Between Consociationalism and Resolution' in M Mautner, A Sagi, and R Shamir (eds), *Multiculturalism in a Democratic and Jewish State* (Tel-Aviv, Ramot Publishing House, 1998) 675, 675–701 (in Hebrew).

lack of discourse and deep thinking about those issues before deciding upon them. It is therefore important in Israel to create mechanisms that will guarantee a minimal degree of seriousness. Yet, these apparatuses must absolutely not bypass the political system and replace it, as the first model proposes, but rather guide the political system and obligate it to develop a proper culture of discourse and decision-making. This is precisely what the model of a Constitution as promoter of dialogue offers.

As was pointed out above, the great doubt hovering over the dialogic model is whether it will succeed in achieving the double purpose set for it: reinforcing seriousness over vital issues without taking away from the public the right and duty to decide upon these issues by itself. As noted, there is a fear that the dialogic model will not attain the goal of dialogue, either because the legislature will ignore the position of the court and refuse to seriously consider constitutional issues, or because it will unquestioningly accept the court's stance, without actively participating in the decision-making process.

There are some who argue that in light of the political culture prevailing today in Israel, the greater fear is the legislature ignoring the court.[29] Conversely, Jeremy Waldron is convinced that the opposite fear is always stronger:

> Partly because systems of judicial supremacy are associated with a strong culture of self-righteousness on the part of the judiciary and its academic supporters, there tends to be much less in the way of genuine dialogue than in constitutional systems where there is legislative supremacy (of one kind or another). Legislative supremacy is very seldom accompanied by a sense, among legislators, that they have nothing to learn from any other branch of government; and in cases where the legislature remains sovereign, but the judiciary is given a role, the judges are more likely to be listened to by the legislature than the legislators are likely to be listened to in a system that gives the judges final say.[30]

It seems that Waldron's fear is especially relevant in the Israeli context. Those who set the tone in the media and in legal academe in Israel regularly provide broad public backing to the Supreme Court and take care to describe its rulings as deriving directly from the Constitution, without admitting that on many topics there is legitimate debate that cannot be decided upon easily. This approach delegitimises the legislators who try to stand as equals vis-à-vis the court. Under these circumstances, if the dialogic model is to be adopted in Israel, it would have to be fashioned in a way that would not only grant the legislature the theoretical possibility to overturn the court's position, but would reinforce the legitimacy of this step. Owing to lack of space, I will not expand on this issue.

C. Can the Dialogical and Gagging Models be Combined?

Thus far this chapter has argued for the option to use the dialogical and gagging models separately, but their combination is also possible, both intellectually and practically. As for their respective rationales, these two models are akin. To be sure, the second model seeks to achieve dialogue while the third wishes to gag it, but both of them begin at the same starting point, namely, the existence of ideological pluralism. Even the different

[29] See AL Bendor and Z Segal, *The Hat Maker – Discussions with Justice Aharon Barak* (Or-Yehuda, Kinneret Zmora-Bitan Dvir, 2009) 138 (in Hebrew) (Barak says, 'The British approach is considered by the English as good for them . . . It's not England here. In Israel there would be a great deal of hoopla and nothing would change') (my translation, GS).

[30] Waldron, 'Some Models of Dialogue' (n 16).

mechanisms that they propose do not clash. Anyone convinced that public discussion is valuable can agree that for certain issues prolonging discussion, rather than being beneficial, will be harmful. The same applies to the obverse. Those who support gagging certain issues do not do so out of an abhorrence of debates over essential issues but because they feel that with regard to those issues the danger inherent in discussion is greater that the possibilities it provides.

The aim of the gagging Constitution is to remove the issues included in the Constitution from public discourse. To attain this goal, the Constitution must contain a detailed arrangement for the gagged topics. Conversely, creation of dialogue obliges the constitutional anchoring solely of abstract principles. Nevertheless, it is possible to combine these two models, although such a blend will create a hybrid product with obvious differences among its elements. The part whose aim is gagging will be detailed while the part whose goal is encouragement of dialogue will be succinct and abstract. The combination of the objective of the second model with the third is, therefore, intellectually logical and practically possible, but the seam between its different parts will be sewn together with rough stitching.

IV. WHICH MODEL IS USED IN ISRAEL TODAY?

A. Not Dialogue

Some people argue that the State of Israel has already adopted the dialogical model. This claim is supported by two pieces of data. The first is that in contrast to other Constitutions, in which there is great difficulty in changing the constitutional text, Israel's Basic Laws are relatively easy to change. This fact enables the Knesset to overturn a decision of the court – if it does not see this determination as favourable – by an amendment to the Constitution. Yoav Dotan feels that

> in line with this concept both the Knesset and the court have to reconcile to the idea that a situation in which the Knesset overturns a determination by the court and amends the constitution is not a situation of severe 'constitutional crisis,' indicating a major confrontation between these two authorities, but rather a normal, possible situation in which each side fulfills its function in the constitutional dialogue.[31]

Aharon Barak, too, has reiterated this point several times in his academic writings,[32] even though he himself has expressed support for raising the threshold of the entrenchment.[33] Another datum cited as support for the argument that Israel has adopted the dialogical model relates to the 'notwithstanding' mechanism, which is contained in the Basic Law: Freedom of Occupation. To evaluate these claims, especially the second one, one must first describe the circumstances in which the 'notwithstanding' mechanism was adopted and the context in which it was employed in Israel.

Since the establishment of Israel, frozen beef has been imported exclusively by the State. The reason given was that this was a necessity since Israel was in a state of emer-

[31] Y Dotan, 'A Constitution for the State of Israel – The Constitutional Dialogue after the "Constitutional Revolution"' (1997) 28 *Mishpatim* 149, 207 (in Hebrew).

[32] A Barak, *The Judge in a Democracy* (Princeton, Princeton University Press, 2006) 236 ff.

[33] ibid 239–40.

gency and therefore had to ensure the regular supply of basic commodities and prevent speculation. According to this arrangement, the State imported only kosher meat, explaining that this simplified the task, since all citizens of the State can eat kosher meat. In 1992 the Government decided to privatise the import of meat. The Shas Party, which was a member of the coalition, opposed granting import licenses in an uncontrolled manner. Shas argued that giving a license for the import of non-kosher meat would disrupt the status quo on this issue and lead to the flooding of the country with non-kosher meat whose price is lower than kosher meat. The Government discussed this issue a number of times and ultimately decided to arrange for the privatization of the meat import branch through legislation. Until the legislation is completed, the prevailing situation will remain as it is, meaning, the State will be the sole importer of meat. The Mitral Company – which sought to import meat to Israel – submitted a petition on this issue.[34] The Supreme Court accepted the petition and ordered the State to give Mitral import licenses. The court determined that the refusal to grant import licenses violated Mitral's freedom of occupation, and noted in dictum that this violation would not meet the proportionality test set in the Basic Law: Freedom of Occupation.[35]

The ruling in the *Mitral v Prime Minister* case made the coalition frantic. The Shas faction, which understood that the usual political instruments would not suffice in this instance, aimed its arrows at the Basic Law: Freedom of Occupation. The political crisis kept intensifying and the Basic Law was put in danger. At this stage Supreme Court Justice Aharon Barak entered the fray and proposed to the political system a compromise solution – the inspiration for which he gained from the Canadian Charter – according to which the Basic Law would be amended and a Notwithstanding Clause would be added to it.[36] Barak's intervention in the political crisis derived from his desire to protect the Basic Law: Freedom of Occupation and the entire endeavour of Basic Laws. As he saw it, it was preferable to weaken the Basic Law a little rather than endanger its very existence.

The Government adopted Barak's compromise proposal, and following it, the Knesset, too. After the amendment of the Basic Law: Freedom of Occupation, the Knesset enacted the Import of Frozen Meat Law, 5754-1994. The law – which met the requirements set forth in the 'notwithstanding' mechanism – determined that 'no person shall import meat unless he has received a certificate of *kashrut* in relation to it'.[37] From 1994 until today the Knesset has made no further use of the Notwithstanding Clause.

Is it true that the constitutional model applied in Israel promotes dialogue between the legislature and the court? I think not. Amendment of the Constitution, even if it can be done relatively easily, does not constitute dialogue, since the very amendment gives vent to an 'admission' of deviation from the Constitution in its present format. The Notwithstanding Clause in the Basic Law: Freedom of Occupation is phrased not as an instrument *for overriding the court's interpretation of the meaning of the Constitution,*

[34] HCJ 3872/93 *Mitral v Prime Minister and Minister of Religious Affairs* 47(5) PD 485 [1993] (in Hebrew).

[35] ibid para 24 of Or J's opinion: 'It seems that any legislation which is seeking to condition the import of meat upon its being "kosher meat" is imposing restrictions upon the freedom of occupation. These restrictions are in contradiction to the restriction criteria' (my translation, GS).

[36] See A Barak, 'On Amendments to the Basic Law: Freedom of Occupation' (1994) 2 *Law and Government* 545 (in Hebrew); Bendor and Segal (n 29) 57 (Barak says: 'I am the one who advised adding this paragraph, the Notwithstanding Clause').

[37] S 2 of the law. Later the name of the law was changed, and today it is the Meat and Meat Products Law, 5754-1994.

and for the proposal of an alternate interpretation no less legitimate, but as an instrument *for overriding the Constitution*, and even then, this is possible only for a short period of time. The circumstances for the introduction of the 'notwithstanding' mechanism as well, and the fact that apart from once the Knesset has made no use of it, show that the apparatus is not perceived by the Israeli public as a legitimate tool for conducting a dialogue between the legislature and the courts.

It seems, therefore, that the presentation of the relatively easy possibility to amend the Constitution or use of the Notwithstanding Clause in its present format as dialogue is erroneous and attests to a basic lack of understanding of this concept. Additional proof of such misunderstanding can be found in Aharon Barak's claim that dialogue exists even when the legislature does not use the Notwithstanding Clause, and it does not even amend the Constitution, but simply amends a law invalidated by the court according to its directives.[38] As Manfredi and Kelly note 'Genuine dialogue only exists when legislatures are recognised as legitimate interpreters of the constitutions and have an *effective* means to assert that interpretation'.[39]

B. Not Gag Rule

In part II I argued that for a Constitution to serve as a successful gag rule it must gag all the players and not only some of them. For that purpose, the Constitution must anchor a detailed arrangement concerning the issues that are to be gagged. The Israeli Constitution does not meet this requirement. The two Basic Laws dealing with human rights are extremely laconic in formulation. This conciseness serves the Israeli Supreme Court as an instrument for developing the Basic Laws and for using them as a platform for the creation of a complete Constitution, while totally ignoring the original intention of their framers.

The enactment of the two Basic Laws on human rights took place after 44 years of failure to carry out this mission. Elsewhere I have dealt with the question of how did the Knesset, one fine day, find itself establishing a charter of human rights in a Basic Law? What prepared the way for enacting what many thought to be impossible?[40] One of the answers I presented there, which was provided by the Knesset Members who promoted the step, is that the success stemmed from adopting a compromising approach in which disputed rights, such as freedom of speech, were removed from the Basic Laws and a number of concessions were made to the Orthodox camp, which traditionally opposed anchoring human rights in the Constitution. Unfortunately, it is already completely clear today that the intentions of compromise have been set aside by the Supreme Court, through its rulings that granted the Basic Laws a totally different meaning than intended by their framers.

In this reality, the Israeli Constitution, a large part of which is the product of the Supreme Court, not only does not gag disputes and rifts that threaten the stability of Israeli society but even inflames disagreements and deepens rifts. If in the past decisions

[38] Barak, *The Judge* (n 32) 157.

[39] See CP Manfredi and JB Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 *Osgoode Hall Law Journal* 513, 524.

[40] G Sapir, 'Constitutional Revolutions – Israel as a Case Study' (2010) 5 *International Journal of Law in Context* 355.