

# On the Need for a Constitution

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**Abstract:** This article describes the Israeli constitution as partly written and partly unwritten. The constitutional rules of Israel are included in Basic Laws and other constitutional provisions, in abstract legal norms defined in Supreme Court rulings as well as in customs and practices. The constitution is thus evolutionary in character, exhibiting a gradual organic growth and development. I note that its composition changes from mainly ordinary laws, norms and customs to constituting Basic Laws. Presently Israel has a series of Basic Laws but only two Basic Laws defining part of human rights. These are Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. It is still in need of a complete, codified and consolidated constitution, which covers each and every subject normally included in such constitutional code. Among the missing Basic Laws are laws on freedom of expression, freedom of religion, freedom of scientific research and freedom of demonstration.

## GENERAL PRINCIPLES

The legislation of a comprehensive and unified constitutional code, having an elevated and protected status, is an immediate necessity for Israel. This article describes the main contents and hallmarks of a constitution, the constitutional developments of the Israeli system of law and the main reasons underscoring the present need for a constitution in Israel.

A constitution is a statutory enactment having in most cases a theoretically elevated and practically entrenched status which defines the allocation of functions, powers and duties of the different arms and institutions of government, their main spheres of operation and the relationships among themselves and between each of them and the citizens and inhabitants. In many countries the constitution also enumerates and defines, as an essential and most important part of the provisions, the basic human rights protected by it.<sup>1</sup> This last mentioned part of the constitution, which includes the so-called 'Bill of Rights', covers in a number of constitutions not only the basic political and human rights but also the main basic social and economic rights of the citizen. One should add, in this context, that according to several interpretations the enumeration of basic rights is not to be regarded in any case as exclusive. It does not negate the residual existence of a wider range of rights, not included in the Bill, and which are evolving indirectly by way of interpretation, from the rights which are explicitly defined. Some constitutions even refer in their provisions<sup>2</sup> to

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this rule of construction. In order to allay any doubts, I should add that this rule of interpretation should not lead to the conclusion that the entire series of definitions of basic freedoms and rights is superfluous. The opposite is true: The enumeration and definition of rights is deemed expedient and even crucial in order to declare and to express explicitly in the constitutional document the existence and meaning of basic human rights and to prevent thereby governmental excesses resulting from the absence of a written definition of rights. The complete lack of a Bill of Rights is apt to release the legislature and its institutions from any duty to respect basic rights in its ordinary legislation and in its governmental practices. Moreover, the existence of defined and written rights creates the legal background for a beneficial and broadening construction of the provisions of the constitution.<sup>3</sup> The existence of definitions of the main basic rights enables the extension, by exegesis or hermeneutics, of the meaning and contents of any given freedom already defined. In order to exemplify this proposition, I venture to put forward as an example the construction that the basic right of 'Human Dignity'<sup>4</sup> can reasonably be interpreted as including the extremely important norm of 'equality' and also the social right 'education'.

It should therefore be regarded as appropriate to lay down in the constitution the definition and the meaning of the basic human rights and to delimit the range and extent of the powers of the authorities accorded by the constitution. The French even found it fitting to underline in the constitution the didactic and practical characteristics of the enumeration of rights by mentioning in the Declaration of Rights of Man and the Citizen of 1789 that the National Assembly had declared these rights so that, *inter alia*:

This Declaration, perpetually present to all members of the body social, shall be a constant reminder to them of their rights and duties. So that, since it will be possible at any moment to compare the acts of the legislative authority and those of the executive authority with the final end of all political institutions, those acts shall thereby be the more respected.<sup>5</sup>

The constitution is in most cases an enactment having an elevated status in comparison to ordinary primary legislation of the parliament; moreover, ordinary primary legislation is subject to the normative directives and restrictions expressed in the constitutional document. In other words, the constitutional enactment is supreme in order of the relative priority of legislative acts: The constitution is of the highest level; thereafter ranges ordinary parliamentary legislation and, at the third level, secondary legislation, namely regulations and by-laws. Even the absence (as in New Zealand for example), of an institution having the power to review such ordinary legislation, which is amending, contradicting or limiting constitutional provisions or infringing on them, does not deprive the constitutional provisions of their superiority

in line of precedence and of their normative (even if only theoretical) supremacy.

Written constitutions are a means to the end of limiting governmental power and, in a democracy, even limiting the power of the elected representatives of the people in parliament.<sup>6</sup> The elevated status of constitutional provisions is created by the inclusion in the constitution of qualitative or quantitative preconditions for the enactment of ordinary legislation which is contradicting or infringing constitutional norms. Such conditions are expressed by the definition of the unique and exceptional situations in which such ordinary legislation can be regarded as constitutional, e.g. conditions in relation to legislation by law (as distinct from that by secondary legislation) which befit the basic norms and principles of the state, designed for a proper purpose and proportional;<sup>7</sup> these are qualitative conditions. The constitutional demand for a special majority in parliament is a quantitative condition.<sup>8</sup>

Such qualitative or quantitative legislative preconditions included in the constitution provide supreme normative principles which delimit the powers of the institutions of government, define the necessary separation of powers and safeguard human freedoms in order to protect the inhabitant from governmental excesses and acts of oppression by the authorities. The elevated status of these normative constitutional principles also prevents their circumvention by unintentional or incidental statutory steps.

The preservation and protection of the principles of liberal democracy and the promotion of their stability and certainty call for their manifest and distinct expression in the supreme constitutional enactment, so that they do not bow to the winds of opportunity or to the passing sentiments and impressions of the legislators or the public. The constitution therefore prevents, *inter alia*, legislation which contradicts basic human rights. The constitutional provisions bind both the parliament adopting them and future legislators. Thereby the rights of the people and the fundamental elements of democracy and the rule of law remain permanent and strong. By obliging the majority to respect the norms, as mentioned above, the rights of the minority are protected and the consciousness and awareness of human rights are promoted and cherished.

The adoption and enforcement of constitutional norms and provisions and their consolidation and codification in one unified constitutional document is generally regarded, especially since World War II, as a vital prerequisite of a democratic system of government. It is moreover accepted as an essential structural component in most states, even if they have not adopted a fully fledged system of democratic rule. In consequence of the above-mentioned attitudes and approaches we witness the development of the readiness to formulate the supreme rules, principles and limitations

governing the powers and courses of action of the governmental authorities and to declare publicly, formally and explicitly the basic human rights and freedoms which are the dominating principles that have to be respected by the legislature and all other arms of government. To define the scope of functions of the legislature is, *ipso facto*, to limit power.

The readiness to formulate rules and limitations represented the sound and well-founded recognition of the necessity to safeguard both the principles of liberal democracy and the material rule of law as an essential proposition, by according them the legal status of elevated statutory rules which govern ordinary laws and regulations, prescribe their contents and ensure their universal observance and application.

Earlier we mentioned the need to grant elevated statutory status to the codified norms of democracy. Constitutions both liberate and bind; they provide for a framework of ordered freedom<sup>9</sup> within a set of rules which prevents both majorities and their elected parliamentary representatives from acting against the basic freedom of individuals, minorities, or the definition of the powers of public authorities.

Two additional remarks are important. First, there are a number of states which have laid down constitutional norms in a codified document or in a Bill of Rights without according to them supremacy over ordinary legislation; in other words, their norms are morally and socially binding but do not carry with them the quality and hallmark of legal supremacy (e.g. New Zealand and Finland<sup>10</sup>). It goes without saying that the effectiveness of such constitutional limitations is thereby decreased.

Secondly, the existence of a constitution does not necessarily mean that such a code will achieve its aims as described above and obtain the respect and observance owed to constitutional norms. Some totalitarian states were the progenitors of very advanced verbal promises of freedoms and human rights, but these were in fact disregarded and were accompanied by an atmosphere of public apprehension preventing any demand for their practical enforcement.

The effectiveness of the provisions of a constitution therefore depend to a large extent on the attitude of the people, their awareness of the constant necessity to defend respect for and enforcement of human rights and of the other maxims of democracy, including limitations on governmental powers, comprising the separation of powers. But the laying down of norms in a constitutional code is the logical starting point for the fashioning of public opinion; in other words, without the definitions of rights, duties and functions, the public voice favouring the implementation of the rule of law and of democracy in action lacks the basic criteria and guidelines and remains a voice in the wilderness. The public misses the background of the explicit and defined expression of the constitutional intention and of any statutory clarity.

## ISRAEL – THE CONSTITUTIONAL DEVELOPMENTS

The Israeli constitution has been described as an ‘emerging constitution’. However, since the accepted use and definition of the word ‘constitution’ includes constitutions based on unwritten rules and embraces the norms embodied in ordinary laws prescribing constitutional principles, and especially in so-called Basic Laws (part of them do not so far possess an elevated legal status) this description lacks precision. Israel already has in its Basic Laws and judgments of the Supreme Court parts of a constitution possessing components of the above-mentioned categories.

It has further been said that the constitution of Israel is unwritten. There is no constitution which is entirely written or entirely unwritten. A constitution generally regarded as written is in the form of a consolidated document which has special sanctity, but this description is not always exhaustive. A constitution generally regarded as unwritten is one which has evolved on the basis of custom or ordinary laws rather than of written law of special status. In many cases the so-called written constitution is a very complete instrument in which the framers have attempted to arrange for every conceivable contingency in its operation. In other cases the written constitution is composed of a number of fundamental or ‘basic’ laws which the constitution makers have framed or adopted in order to give as wide a scope as possible to the process of ordinary legislation in the development of the constitution within the framework thus set.

The Israeli constitution is best described as partly written and partly unwritten although there are as yet only a small number of norms of special preferential status from the legislative point of view. The constitutional rules of Israel are included in Basic Laws (so named and of a fundamental character), in ordinary laws including constitutional provisions, in abstract legal norms defined in judgments of the Supreme Court and in customs and practices. The constitution is thus evolutionary in character, exhibiting a gradual organic growth and development, changing from being comprised largely of ordinary laws, norms and customs to constituting, to a large extent, Basic Laws in the general sense of that term.

Because of its gradual growth the Israeli constitution is best understood in the context of its historical development. A review of this development demonstrates that the approach to the creation of a written constitution has been variegated and full of vicissitudes.

The first tentative steps were taken in the Resolution of the UN General Assembly of 29 November 1947, proposing the convening of a Constituent Assembly and the adoption of a constitution and even adumbrating some of its provisions. It may be assumed that regard was had to certain aspects of international law and to the political problems of the immediate occasion. Further developments, however, deprived this first approach of

any, except historical, significance. On 14 May 1948 the Provisional Council of the State of Israel adopted the Declaration of Independence, which included *inter alia* a provision that a constitution should be adopted not later than 1 October 1948.

The Declaration of Independence of 14 May 1948 proclaimed the establishment of the State of Israel and enunciated the basic conceptual values of the state. The declaration also established the provisional arms of government, which were to function until regular authorities were duly elected in accordance with a constitution that had to be adopted, according to the explicit wording of the declaration. The declaration stated the aims and interests of the new state. It provided:

The State of Israel will be open for Jewish immigration and for the ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants, it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principle of the Charter of the United Nations.

After the establishment of the state, the Supreme Court of Israel ruled in the *Gubernik* case<sup>11</sup> that the Declaration of Independence did not have the force of a constitutional legislative enactment. In the eyes of the court, it rather served as an instrument for the interpretation of the 'spirit of the laws', namely as an abstract guideline, assisting in the understanding of the basic aims and goals of the state, its values and concepts, and as a document relating to 'international recognition'.

Two Basic Laws, enacted in 1992, dealt with a number of basic human rights, namely human dignity, personal freedom, the right to property and privacy, and liberty in the choice of occupation. They were amended by the Knesset in 1994, by the inclusion of the following provision:

Basic Principles: 1. The basic rights of the individual in Israel are based on the recognition of the value of the human being, on the sanctity of his life and on his being free, and they shall be respected (or upheld) in the spirit of the principles set forth in the Declaration on the Establishment of the State of Israel.

In other words, the declaration was formally accorded, by law, the status of a fundamental and value-loaded guideline, underlying the constitutional norms which were the statutory cornerstone of our basic human rights. According to the majority opinion amongst legal authorities, this provision did not amount to the transformation of the declaration into an integral part of the written constitution or of a positive law,<sup>12</sup> but, as stated, instead

of such inclusion, the law giver merely recognized the elevated and binding status of the declaration as a spiritual guideline.

The first legislative enactment of the State of Israel, passed in 1948 after the establishment of the state by the Provisional State Council (i.e. the provisional parliament of Israel) was the Rule of Government and Law Ordinance, 1948.<sup>13</sup> According to its provisions, pre-existing law was retained: section 11 of this ordinance provided that the laws in force in Mandatory Palestine on the eve of the establishment of the state on 15 May 1948 would continue to be the law of the land, subject to any enactments of the new independent legislature and subject to such modifications as may result from the establishment of an independent state and its authorities. This meant, in other words, the adoption of the legal concept of 'succession of laws', according to which no legal vacuum remained and existing laws remained in force as long as they were not abolished, changed or amended by legislation of the new independent parliament. The ordinance provided that certain changes would arise automatically, as the inherent result of the establishment of an independent sovereign state.

The legal system of the new state did not include a consolidated comprehensive constitutional statute. It comprised remnants of Ottoman law, British Mandatory law passed before 15 May 1948 by the high commissioner for Palestine (the British head of the Mandatory government), certain Acts of Parliament and Orders-in-Council emanating from London, certain rules of common law and equity and in matters of personal status (marriage, divorce, alimony), the laws of the various religious communities, namely – and as the case may be – Jewish Halachic law, Islamic Sharia law and the canonical law of the various Christian communities (numbering about ten) formerly recognized by the Mandatory government, and in each case applying in relation to the members of such community only.

The Declaration of Independence included, as mentioned, the statement that the duly elected bodies of the state should be instituted 'in accordance with a Constitution which shall be adopted by *the Elected Constituent Assembly* not later than 1 October 1948' [italics added]. Preparations for a constitution were initiated by the provisional authorities even before the state was proclaimed. However, it became very clear that a constitution would not be forthcoming. The reason for this was, first of all, the War of Independence which raged for many months following the establishment of the state after the invasion on 15 May 1948 by the neighbouring Arab countries and the continuing strife with the local Arab habitants. The population was enlisted in the war effort, and thus a 'Constituent Assembly' could not be elected by the date – 1 October 1948 – which had been set out in the declaration. The first elections were held only in January 1949 after the Armistice Agreements.

The religious parties in the Israeli parliament objected to any constitution<sup>14</sup> and harboured apprehensions that certain provisions of religious law (marriage and divorce) would be regarded unconstitutional if contradictory constitutional norms are introduced. But they were not the only sceptics.

In the ongoing debate the then prime minister, David Ben-Gurion,<sup>15</sup> and the members of the Knesset representing his party (Mapai) expressed a negative approach to the immediate materialization of the constitutional task: His arguments were based, *inter alia*, on the fact that at that stage only a small percentage of the Jewish people (less than one million) lived in Israel and the ongoing repatriation by immigration would drastically change the composition and numbers of the population. The passing of a binding constitution at such an early stage, without the participation of the multitudes returning to their homeland, might be regarded as prejudicial. He rather supported the passing of ordinary laws including the necessary provisions for the fashioning of a democratic statehood than the adoption of a constitution. The inherent reason of the opposition by the Labour Party to a constitution was the negative approach to any restriction of parliamentary powers and preference for the British systems of absolute parliamentary supremacy and sovereignty.

But there were additional undercurrents and reasons over and above these mentioned by Ben-Gurion which found their indirect expression or echo in these arguments. Thus one should accord appropriate weight to the misgivings of political parties and their parliamentary representatives in relation to any restriction on the powers of parliament, which would be the normal *sine qua non* of the introduction of any supreme constitutional norm.

Summing all this up one may conclude that the combination of the English tradition, inherent initially in the ordinary Israeli system of law, that denied the need of a supreme law which would be binding on parliament and which would be contrary to the Blackstonian heritage of the absolute powers of parliament, the above-mentioned opposition of the religious parties to any constitution, and the reliance on the sufficiency of the democratic basis of the state in order to safeguard basic human rights were dominant factors in the considerations of most groups opposing in 1949 the adoption of a legally elevated constitutional document. The demand for a constitution was voiced at that time mainly by the right and the centre parties, but they were in the opposition and in a minority.

The government regarded it then as necessary to seek a way out of the deadlock in relation to the drawing up of a constitution. Early in 1949, after the election of the Constituent Assembly, the first law considered by the newly elected Parliamentary Assembly provided for a change in the name of the elected parliamentary body which initially carried the name and mission of a 'Constituent Assembly', and turned it by law into the 'First Knesset'.

This change of name was not a mere matter of semantics; it meant a departure from the initial determination to immediately base the newly established country on a comprehensive written constitutional document, having an entrenched and elevated status.

The compromise of enacting separate Basic Laws, stage by stage, instead of a comprehensive constitution was the solution found in 1950: The initiator of that compromise was a member of the Knesset, Jizhar Harari, and the resolution, adopted by the Knesset on 13 June 1950, still bears his name in the political jargon and is still considered binding. Such was the wording of this parliamentary resolution:

The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the State. The Constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work and all the chapters together will form the Constitution of the State.

Behind this resolution and the reason for its adoption lay the three divergent approaches which had become apparent in the course of the preceding discussions

- (a) opposition to any written constitution mainly expounded by Prime Minister Ben-Gurion and the religious parties;
- (b) support for the idea of a formal written constitution;
- (c) a proposal for a 'chapter by chapter' process by trial and error and the gradual development of written constitutional norms, keeping in line with social, cultural and political developments.

The political powers opposing a constitution regarded this compromise as the achievement of an indefinite postponement or at least a material delay in the planned constitutional legislation. In other words, in 1950 the ongoing constitutional debate in the Knesset ended and a compromise was reached whereby the constitution would be drawn up chapter by chapter through enactments, by way of ordinary legislation of Basic Laws, which in time would be consolidated into one document, receive an elevated status and together form Israel's constitution.

The first of Israel's Basic Laws, Basic Law: The Knesset, was enacted in 1958, and it was followed, at a slow pace, by eight additional ones, all dealing only with the structure, powers and duties of the arms of government.<sup>16</sup> A number of drafts of comprehensive Bills of Rights, presented during these years to the Knesset, were not adopted. In 1992

the Knesset passed two additional Basic Laws which dealt for the first time with the basic human freedoms: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. These Basic Laws included provisions according to these statutes an entrenched status: violation of the basic rights accorded by these two laws is restricted by provisions included in section 4 of Basic Law: Freedom of Occupation and Section 8 of Basic Law: Human Dignity and Liberty.

Basic Law: Freedom of Occupation can be changed only by a Basic Law, adopted by a majority of the members of the Knesset. There is no such provision in Basic Law: Human Dignity and Liberty.

At present, Israel has a series of Basic Laws, including only two Basic Laws defining part of the human rights, but it still misses so far a complete, codified and consolidated constitution covering each and every subject which is normally included in such constitutional codes. There are as yet no Basic Laws on freedom of expression, freedom of religion, freedom of scientific research, freedom of demonstration, etc. although all these are regarded by the Supreme Court as positive law – namely as inherent ingredients of a democratic system of government; but they are not included in statutes and leave the door open, at least theoretically, to contradictory legislation.

#### ASSETS OF A CONSTITUTIONAL CODE

What are the factors which should be taken into account when considering the need of a constitution for Israel? First and foremost is the importance of a written and codified constitution in order to lay down the rules and maxims of a liberal democracy. Such rules should be changed or amended only by certain accepted and binding legal procedures. These should not create rigidity, but their flexibility should be accompanied by previously defined legal ways and means in order to ascertain that the legislators are aware of the fact that any proposed abolition, change or amendment of the law in force affects constitutional norms and not ordinary statutory provisions devoid of a constitutional effect. The function of democratic institutions has become interwoven and combined with the working of constitutions. The understanding of what part the constitution plays in a state's politics is essential to a correct appreciation of the working of modern democratic government. We mentioned before that the concept of a constitution is closely bound up with the notion of the limitation of government by law, namely legal restrictions by a source of authority higher than the executive arm and beyond its reach. An enacted constitution is an effective method of securing this end.<sup>17</sup> The limitation by constitutional provisions of a fortuitous or international change of constitutional norms, whether in relation to the structure, functions and powers of the arms of government or in relation to the definition and

binding character of basic freedom can be safeguarded by constitutional provisions like section 8 of the Israeli Basic Law: Human Dignity and Liberty which provides that there shall be no violation of rights under the Basic Law except by a law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required.

The need to define human rights in a constitutional code derives from their character and substance as elementary ingredients of a liberal democracy. Their inclusion in a constitutional document ensures the acceptance and safeguarding of these rights. Formal recognition of a given liberty is achieved – at the first stage – through a declaration of its existence: A given fundamental right cannot be viable without continuous, positive and reciprocal interaction between the legal and socio-moral areas. But the declaration on the existence of an abstract right is only the starting point; it must be one of the fundamental components of the law in force. The delineation of the rights in terms of the wording of the law is the basic and primary footing upon which their actual protection depends; the very existence of a statute lends tangible expression as well as stability to the political regime and its prevailing fundamental concepts. The stability stems from the existence of a statutory norm embodying the standard against which the legality of the acts of governmental agencies is measured. Therefore, it is of special significance and weight that the constitutional principles defining the fundamental rights be given explicit expression in a legislative act and not merely remain in the realm of the oral or unwritten law. In this way, it is ensured that the substance and scope of the rights will be defined in clear language, upon which the individual citizen can rest his or her demands and claims. Therein, among other things, lies the importance and value of a written constitution.

To sum up: firstly, the first component of egalitarian democracy is the transformation of abstract ideas of rights into written constitutional norms and their integration into the legal system of the country. Thereby we also promote the introduction of a common legal culture and prevent the change or amendment of ordinary laws serving as imperfect surrogates of constitutional provisions; the passing of a constitution in Israel will therefore prevent, *a priori*, amendments which infringe human rights or democratic principles.

Secondly, a constitution ensures the existence of clarity in the definition of powers, functions and rights and expresses their binding force, clearly and in unequivocal terms, as compared to unwritten conventions, customs or constitutional understandings. An important effect of the written constitution is the clarification and substantiation of the character of constitutional rights and their legal force as well as the precise formulation of the sanctions, safeguarding their rights by the legislative process in respect of matters covered by the constitution.

Thirdly, judicial review, namely the scrutiny of legislative acts by a court of law or any other similar institution constituted by legislation in order to ascertain their conformity to constitutional norms, is the natural result of the creation of binding norms: once you create binding norms, define them or accord them recognition, you are bound to ask yourself how these norms shall be enforced. In other words, is judicial review one of the alternative responses to the question of enforcement, and what is the practical meaning of these norms within the framework of the legal system? The main alternatives are two: norms can serve the legislature merely as guidelines of a political, moral or philosophical nature, or they can be legally binding. However, in order to be binding one needs the machinery which empowers one or more of the arms of government to enforce the observance of the norms.

Judicial review is the machinery which serves as the yardstick of legitimacy. It normally comes into being with the creation of a constitutional system, as the institutionalized mission which guards the constitutional norms, and ensures the observance of these provisions by the legislature. Without such supervisory institution, every norm is bound to remain at the mercy or will of its creator who may deplete it of its contents and disregard it, by his or her mere whim or under the pressure of circumstances, without adopting the procedures and ways and means laid down beforehand for any change and transformation of constitutional values.

The forms of judicial review, the institution or courts of law empowered to carry it out and the extent of such powers are normally provided for in a constitutional code. In Israel we have adopted, so far, the system of judicial review by the ordinary courts of law (as compared to special courts of constitutional review, as, e.g., in Germany or Italy). The necessary legislated provisions on this subject are to be included in one of the Basic Laws in preparation, so as to become part of the constitution.

Four, we underscored the vitality of a proper system of restraints expressed in limitation of the powers of government, in order to prevent totalitarian centralization of power and lack of balance caused by a separation of powers leading to unrestricted absolutism. Such balance and separation of powers must necessarily find its expression in the constitutional code, whose permanence and supremacy ensures the democratic equilibrium which is a vital part in forging the unity of a nation.

Five, the constitutional code is a set of comprehensive and systematically organized principles, whose unitary and coordinated order of provisions is preferable to a fortuitous and uncoordinated development of separate constitutional statutes or, even worse, to unwritten conventional rules.

Six, society's needs are constantly developing and changing.<sup>18</sup> Law makers therefore experience the pressure inherent in every society to introduce adaptations to fit the demands of social change. The constitutional code provides normally the opportunity and ability to

create a compromise between changing needs on the one hand and the creation of entrenched written norms on the other, providing the appropriate flexibility which is not excessive and therefore not stultifying.

Seven, a constitution has a significant didactic influence. People grow up with the knowledge of their basic rights and become aware of their rights. The constitutional norms are absorbed by the people as rightful parts of their state and society.

## CONCLUSIONS

The everlasting effect of the introduction of a consolidated and unified constitution in Israel is the infusion and absorption of the spirit of law, or, as we call it, the rule of law, at all levels of society. Political and social co-existence is thereby fashioned according to a system of supreme and elevated normative values and rules, which serve as universal guiding principles of the nation.

The basic human rights enumerated in a constitutional code are of first-rate didactic importance and ensure, or at least facilitate, their enforcement. They guide the people, perhaps indirectly, towards the adoption of more just and equitable rules of conduct and further the respect of human dignity and quality.

The written rules which compose the constitutional code are clearer, stronger and more binding than any customary or oral traditions. They lead to coherence instead of diffusion and safeguard the basic freedoms of the individual by more effective and lasting means. The by-products of such reality include stronger solidarity, mutual consideration and social cohesion.

In relation to the system of government, it formulates the separation of powers essential for the negation of totalitarian centralization and prevents legislation which is contrary to the basic elevated constitutional principles; except where adopted by special procedures and majorities as laid down in the code.

Democracy in Israel will be strengthened by the protection of rights accorded to social or ethnic minorities and by the negative prescription of fortuitous legislation disregarding the norms of the constitution.

The constitutional code safeguards the non-negotiable demands of human dignity. It should be mentioned that the interpretative adjudication of the Supreme Court has underscored the relative importance of 'Human Dignity' as a mainstay of the values of equality, respect for the individual and negation of any discrimination and of the right of privacy. The rule of law puts limits on the absolute power of the state, and ensures free speech, freedom of worship, equal justice, respect for women, religious and ethnic tolerance, and respect for private property.

The most perfect way to safeguard rights and duties, obligations and limitations, prescriptions and norms in Israel is by defining them clearly in written form and in this context, in a written and comprehensive constitution.

## NOTES

1. The most modern British enactment of constitutional character, namely the Human Rights Act, 1998 contains only a Bill of Rights.
2. Article IX of the Amendment to the US Constitution of 15 December 1797 states: 'The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people', and cf. *Richmond Newspapers v. Virginia* (1980), 448 U.S. 555, 579.
3. Agranat (D.P.) stated in F.H. 13/60 A.G. v. *Matana* (16 PD.430): 'Paying attention to the manifest constitutional contents of this law, and considering the tendency behind the shortened and general wording of the powers mentioned in it, I am of the opinion that the way to construe it should not be one of a narrowing interpretation (following, Chief Justice John Marshall in *M'Culloch v. Maryland*, 17 US (4 Wheat.) 316, 4 L.Ed. 579 (1819), 602: 'It is a constitution we are expounding', and Justice Frankfurter in *Youngstown Sheet and Tube Co. v. Sawyer* (1952) 26 A.L.R. 1378, 1399: 'Because the President does not enjoy unmentioned powers does not mean that the mentioned one's should be narrowed by a niggardly construction ...').
4. Section 1 of Basic Law: Human Dignity and Liberty. *Sefer Hachukim* (Book of Laws) 1391 (1992), p.150. Amended S.H.1494 (1994), p.90.
5. La Declaration des droits de l'homme et du citoyen votée le 27 août 1789 par l'Assemblée Constituante.
6. Vernon Bogdanor, 'Introduction', *Constitutions in Democratic Politics*, Oxford, 1988, p.3. Madison wrote in the Federalist Papers (No.51): 'In framing a government which is to be administered by men over men the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precaution' (Such precautions are expressed in the constitution – MS).
7. See Section 8 of Basic Law: Human Dignity and Liberty, which states: 'Violation of rights. There shall be no violation of rights under this Basic Law except by a Law fitting the value of the State of Israel, designed for a proper purpose, and to an extent no greater than required...'
8. See Section 4 Basic Law: The Knesset, which states: 'Electoral system. The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law: this section shall not be varied save by a majority of the members of the Knesset'. *Sefer Hachukim* (Book of Laws) 244 (1958), p.69.
9. Bogdanor, *Constitution in Democratic Politics*, p.4.
10. Finland: subject to section 74 of the Constitution of 11 June 1999.
11. H.C. 10/48 *Ziv v. Gubernick*, 1 P.D. 85, 89 (1948).
12. H.C. 7/48 *Ziv v. Gubernik*. H.C. 10/48 *Karbutli v. Chief of Staff* 2 P.D. 5 (1949).
13. *Official Gazette* No.2 of 21 May 1948, suppl. A. p.1.
14. D.H. Vol.IV (23 January 1950–29 March 1950), session 136, p.1323.
15. *Ibid.*, session 117, p.812.
16. Basic Law: Knesset (1958); Basic Law: Public Lands of Israel (1960); Basic Law: The President (1964); Basic Law: The Government (1968) and (1992); Basic Law: The Government Finance (Budget) (1975); Basic Law: The Army (1976); Basic Law: Jerusalem the Capital of Israel (1980); Basic Law: Adjudication (1984); Basic Law: State Comptroller (1988).
17. Bogdanor, *Constitution in Democratic Politics*, p.4; Meir Shamgar, 'On the Written Constitution', *Isr. L. Rev.*, Vol.9 (1974) p.467.
18. M. Shamgar, 'The Supreme Court of Israel: Present Trends and Concepts', *Isr. L. Rev.*, Vol.20 (1985), p.175.