On a 'Thin Constitution'

By Elyakim Rubinstein

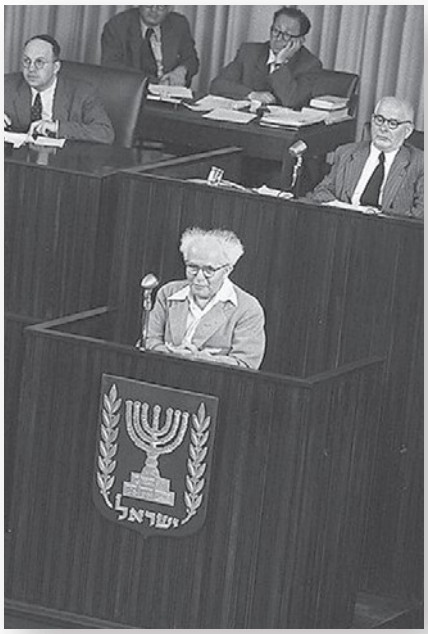
IN THE absence of any possibility of a full constitution at the present time, Israel needs a framework of rules that can be agreed upon and that are not heavily burdened by contrasting ideologies and can thus contribute to stability. This is the rationale behind the Jewish People Policy Institute's Thin Constitution project.

We our living in a time unlike any other in the history of the State of Israel. I say this unequivocally from the perspective of someone who recently turned 77. Nothing similar to the events of October 7 had ever happened before in the history of the state, indeed nothing like it has happened since the Holocaust. (Incidentally, I believe "the October 7 war" is the best name for this war. I certainly can't call it the Simchat Torah war.) The behavior of the Hamas monsters on that bitter day was Nazi in nature. This is not an empty comparison. Mass murder of people in their beds, in their homes, rape, pillage – all because they were Jews and Israelis – cannot be called by any other name.

We remain in the midst of the war. Hamas has been weakened but not yet eliminated, and the hostages cry out for redemption. There are other fronts. But part of our collective therapy is going on with life in a way that is as close to normal as possible. Therefore, what is being done here today is not disconnected from the grief over those we have lost, the hope that the captives are released, the wish to see the wounded heal, with the grace of God, or the desire to see the evacuees return to their homes and begin the process of restoration.

As for myself, my great hope is placed in the soldiers, the hundreds of thousands gradually released from the reserves, in which the brotherhood of warriors is sanctified in blood. If Jew and non-Jew, religious and secular, Ashkenazi and Sephardi, left- and right-wing – all the tribes of the people of Israel and the State of Israel – can fight together, shoulder to shoulder and trust their comrades in arms, quite literally, through fire and mud, then why should they not continue their dialogue of trust as civilians? Hope has been sown; I hope it will take root.

Between January and October 2023, we were swept up in the frenzy of the judicial revolution. The storm came mostly by surprise.



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Israel's founding prime minister, David Ben-Gurion, addresses the Knesset.

It was not the central issue of the November 2022 elections. My wife, Miriam, and I found ourselves demonstrating week after week, the Israeli flag in our hands. It was a trauma for both of us, public servants since a young age. These events, however, were pushed aside by the enormity of the war effort, which locked the dispute away for the moment and led us to focus on the more immediate challenge. The psychic energies are in the war effort.

Moshe Dayan, whom I served under as his assistant at the Foreign Ministry early in my career, used to quote David Ben-Gurion and would sometimes impersonate him as saying there are things that are "dead" but can be resurrected, and there is "dead and buried" – when resurrection is no longer possible. I assume that the judicial overhaul is "dead" but not "dead and buried." But it seems that many, perhaps a great majority, understand that to advance such issues that go to our very essence, a broad consensus is required. Here, we will discuss one of these possibilities as a look toward the future.

I will not talk about the ruling nullifying the Reasonableness Law, the leak of which was a dark day in the history of the Supreme Court. There is no need to say much about the problematic of "woe unto me from my Creator and woe unto me from my inclination" that was before the court. Much will yet be said about this.

In times almost forgotten, the United Nations partition plan of November 29, 1947, called for the Jewish and Arab nascent states to establish constitutions. This seemed obvious, primarily because there was a need to ensure the rights of minorities in each of the states. Indeed, many talented people worked on a draft, but that is beyond the scope of this article. The Constituent Assembly was elected to create a permanent constitution and later changed its name to the First Knesset.

Ben-Gurion decided, with characteristic pragmatism, not to enact a constitution. Among his reasons were that only a relatively small part of the Jewish people lived in Israel, that the conflict with Israel's neighbors and with Israel's Arab population had not yet been resolved, thus it was not advisable there and then to obligate future generations. Surely there was a tangible pragmatic consideration behind this. It was classic Ben-Gurion – the reluctance to tie the hands of the government; and we should remember that in those days, Israel's Arab citizens were under military rule – something we cannot imagine today.

In his exceptionally polemical Knesset speech on February 20, 1950, Ben-Gurion explained, in less than a fully explicit way, why in his opinion there was no place for a constitution at that time, and he strongly sanctified the Declaration of Independence, even in the absence of its formal enshrinement in law. In his view, there was no need for freedoms to be anchored in a constitution because, after all, Israel was a free country. Rather, he saw the need for a bill of obligations that would focus on immigration, settlement, and security, and for this purpose there was no need to be confined to a rigid framework and artificial tools. All this led to the Harari Decision of June 13, 1950 (named after Knesset House Committee Chairman Yizhar Harari), which established a

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Justice Elyakim Rubinstein (center) is flanked by judges Neal Hendel and Hanan Meltzer at the Supreme Court in Jerusalem in 2015.

framework of Basic Laws. Today Israel has 13 Basic Laws, of which eight can be called "governmental" (The President of the State; The Knesset; The Government; The Judiciary; The State Comptroller; The Military; The State Economy; Israel Lands), and the rest of which have varying national, political, and diplomatic value. But the Basic Laws never coalesced into a general constitution as anticipated by the Harari Decision.

Since the 1995 High Court of Justice ruling in the Mizrahi Bank case (which had some origins in the court's 1969 Bergman decision), the Supreme Court, which was originally sitting as a High Court of Justice, serves as a constitutional court. It has interfered with some Knesset legislation, mainly on the basis of Basic Law: Human Dignity and Liberty. It has done so sparingly – 24 interventions in nearly 30 years, out of some 500 constitutional petitions. Some of its interventions have been minor, but the very existence of its authority to do so, which over time has been accepted as fact, today is almost unquestioned. This has caused religious politicians (especially) to oppose any enactment of a Basic Law on human rights for fear that it would be interpreted by the High Court in a liberal/secular/left manner – a very exaggerated concern.

The constitutional project has yet to be completed. Basic Law: Legislation is a missing piece. While this may not go to the heart of the difficulties, without such a law most of the Basic Laws are not entrenched and can be changed with a simple Knesset majority as if they were insignificant municipal bylaws. A futile debate over the Judicial Override Clause was, among other things, detrimental to the cause. I have been complaining for many years about the inability to complete the constitutional project, despite the great efforts of parliamentary and extra-parliamentary bodies – for example, the committee at the Israel Democracy Institute headed by the late Supreme Court president Meir Shamgar, a liberal-nationalist, exemplary nationalist and exemplary liberal; and the efforts of MK Michael Eitan as chairman of the Knesset Constitution, Law and Justice Committee.

Why do I believe a constitution is important? It is not so much in the "net" substantial context because if, for example, the issue of equality is taken up, even if it does not appear in the Basic Laws, the High Court will uphold it through its interpretation of the Basic Law: Human Dignity and Liberty and the Declaration of Independence; it did so in petitions regarding the 2018 Basic Law: Israel - The Nation-State of the Jewish People (Nationality Bill).

The most important value of having a constitution, in my view, is the educational aspect. In the United States, every high school graduate knows what the First Amendment, which guarantees freedom of speech, is; many know about the Second Amendment, which guarantees the right to bear arms; the Fourth Amendment, which protects individuals from unreasonable government searches and seizures; and the Fifth Amendment, which shields individuals from self-incrimination.

Incidentally, amending the United States Constitution is a lengthy process requiring a privileged supermajority of Congress and ratification by three-fourths of the individual state

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Israel's Declaration of Independence in English, 1948. The brass plaque was made in New York in honor of the establishment of the State of Israel and awarded by the Israeli delegation in New York as a gift to American Jews who helped Israel in the War of Independence.

legislatures. We don't have any such document to be taught in our schools.

Israel's Declaration of Independence fills part of this vacuum and is of great importance, but it certainly does not fill it entirely. The Nation-State Basic Law could have played a certain role – and could have served as a kind of first chapter of the constitution – had it not lacked any reference to civil equality (as opposed to national equality), so that every non-Jewish citizen would have a sense of partnership in the state, a feeling that should be encouraged and which is in great demand.

Unfortunately, a full constitution, something I would very much like to see, is not on the horizon. In my view, as I have already mentioned, an equality clause is of particular importance. It exists in the Declaration of Independence, and the courts apply it as part of the interpretation of Basic Law: Human Dignity and Liberty. A few years ago, I joined forces with a Druze brigadier general and several professors to draft a proposed amendment to the Nation-State Law, which could have served as a sort of preamble for a constitution in a way that would have considered all the major questions. The endeavor did not take off. I now see the current initiative of Prof. Yedidia Stern and the Jewish People Policy Institute to draft a "thin constitution" as a first stage toward completion of the constitution, including an equality clause. Perhaps sharing the burden of the war will open new doors.

"Constitution" (*chukah* in Hebrew) is an uplifting word. Together with its derivatives, the word appears in Hebrew in the Bible 100 times, including the grouping "a law of justice" (*Numbers* 27:11 concerning laws of inheritance, including daughters; and Chapter 35 verse 29 concerning cities of refuge). Other common groupings are "an eternal statute" (for example, in *Exodus* 27:21 concerning the *ner tamid* [eternal flame]); "My commandments, My laws and My teachings" (for example, *Genesis* 26:5 on Abraham's path). The biblical term does not refer to a "supra-legal" document of the kind we are familiar with today but to something analogous to the law (see Ben-Gurion's speech to the Knesset mentioned above). Nor do the Ten Commandments exactly make up a constitution, the specifications of which in law are to be found in the Torah portion *Mishpatim* (laws) in the *Book of Exodus*. But Hans Kelsen's hierarchy of norms places at its head the constitution, the constituent document.

Some want to see in the Declaration of Independence the nucleus of a constitution – and I, too, find supreme educational importance in it – and, of course, its principles are mentioned as an interpretive basis in the Basic Laws of rights, human dignity and liberty, and freedom of occupation, with perhaps equality being the most important principle of all. Nevertheless, the Declaration of Independence is not a constitution. Some 25 years ago, my colleague Justice Noam Solberg and I wrote an article in which we did not go so far as to confer legal validity to the Declaration of Independence, but we talked about an expansive interpretive model, although not about the declaration as an independent source of human rights. In any event, after decades of statehood, the result of the absence of any overarching governing framework (I do not like the phrase "rules of the game") is constitutional chaos. The main ill is – as already stated – the ease of amending a Basic Law.

Basic Law: The Knesset, for example, has been amended some 50 times, many of them to serve transitory political needs. The one-year budget stipulated by Basic Law: The State Economy has repeatedly been transformed through temporary orders into a two-year budget to make things politically expedient for the government, and this is just one of many examples. In order to enable so-and-so to serve as a minister, Basic Laws can be amended at will, like changing socks.

Given such impudence, which also affects the position of the Knesset, which is not supposed to act as a band of cheerleaders for the government (as I had occasion to write in one of my judgments), the Basic Laws are often relegated to an ordinary law that masquerades as a Basic Law in name only. In England,

where there is also no constitution, there is a phrase "It isn't done," something that wouldn't be done even in the absence of a written rule saying so; here however, it is done, again and again. Any coalition majority, even theoretically a 2:1 majority in the plenum, can, at will, change most of the Basic Laws.

The late Rabbi Shlomo Zalman Auerbach said there are some things that may not be written but are obvious to everyone. Nowhere does it say that one cannot put a cat in the Torah ark, but would anyone think to do so? Unfortunately, we have not created a legislative parliamentary culture that acts by these "unwritten rules"; therefore, we need a framework that protects the Knesset from the government. A framework that prevents chaos and instability, such as Basic Law: Legislation, which would establish rules and set boundaries, does not exist.

I can attest to this personally as a former cabinet secretary, attorney-general, and judge. Let me present another example. In one of the iterations of Basic Law: The Government, the government could have no more than 18 ministers. In 1999, the elected government, for political reasons, needed to increase the number of ministers. This was something that had already happened in the past, for example in the National Unity governments of 1984-1990. In 1999, I was attorney-general and, based on my earlier experience as cabinet secretary, I tried to dissuade the government from increasing the number of ministers. In an article I published 28 years ago concerning Basic Law: The Government, I wrote: "On the balance of considerations, it seems that there is reason to limit the number of members of the government, first and foremost for public reasons, related to the large expense from the public treasury inherent in each ministerial position – the minister's office and accompanying allowances. Experience shows that all government functions can be fulfilled without difficulty with a composition of up to 18 government ministers. Governments that reached 26 ministers [...] were no more effective than governments with a much smaller number of ministers." I can therefore state unequivocally: All government missions can be conducted successfully and effectively with 18 ministers.

A framework to regulate this would have served the state well. The large number of ministers, which has reached new records, is superfluous from both a public service and financial perspective. Moreover, sitting in court, I was often saddened, not to mention horrified, by how the Knesset was losing its identity as a legislature and as a body supervising the government, and how the government controlled the Knesset like a puppet on a string. Petitions are submitted; what should the court do? Should it, like the three monkeys, see no evil, hear no evil, and speak no evil? As our sages say: "My handiwork is drowning in the sea, and you are reciting a song?" Should it betray its role and say, "The elected representatives have decided, and peace be upon you," even if the result is instability that rocks the ship to and fro, a driven leaf? And then, when the court speaks, comes the cry, "Why are you interfering?" After all, we know that constitutional intervention should be used sparingly, and that only 5% of constitutional petitions have been accepted.

Everything so far shows that the status of the Knesset is at a low point compared to the government. And the implications for the status of the court are clear, and humiliate it as well, exposing it not only to criticism but also to attempts to undermine it like the ones we have witnessed, especially in the past year. The question of intervention in Basic Laws, with all its problems, has now been determined in the affirmative. How do we extricate ourselves, at least to a significant extent, from this situation? By the way, contrary to the prevailing image among certain publics, the court is not really "searching for cases" in order to undermine the government and the Knesset. Quite the opposite.

In the absence of any possibility of a full constitution at the present time, Prof. Yedidia Stern's proposed "thin constitution" – a regulating framework of rules that can be agreed upon and is not heavily burdened by contrasting ideologies – can thus contribute to stability. He has convened a group of scholars and advisers to attain this goal. A substantial portion of this "thin constitution" can already be found in the Basic Laws. Now the time has come to bind them together and add to them the keystone of this framework – Basic Law: Legislation. As already stated, we should see in this idea a step on the way toward a constitutional text that will also include equality; it will be the beginning of the redemption, *atchlata de'geula*.

Prof. Ariel Bendor has catalogued the issues that need to be dealt with – the legislative process, its principles and stages – be they with regard to regular legislation or Basic Laws, judicial oversight including over Basic Laws, override, and more. I should note here that I have long believed that if Basic Law: Legislation is passed and Basic Laws are adopted and amended by special procedure, there will be little need for judicial review of Basic Laws, as opposed to ordinary laws, although there will be those who disagree with me for their own reasons, which should not be ignored.

Prof. Stern has acted according to the Talmudic maxim "If you grasped many, you did not grasp anything; if you grasped a few, you grasped something." It is for this reason that we have come together. Perhaps the approaching ruling, which I would like to hope will be for good, and the double upheaval we all went through this year – "the judicial revolution" and the terrible war – will serve as a source of motivation for change and perhaps will also pave the way for [actual] change. We hope not to be disappointed. This will require preparatory work, building on the legacy of our predecessors, but no less, and clearly so, we will be tasked with persuading the political establishment to learn the lessons of the difficult period we have been through.

And just one more thing: modesty, which Nachmanides talks of as "the best of all virtues." The effort we are engaged in must also be undertaken with modesty, not only because many good people have tried before us and not succeeded but also because of the very gravity of the issue.

Hoping for good luck and the help of heaven. ■

Justice (Ret.) Elyakim Rubinstein is a co-chair of the Jewish People Policy Institute (JPPI) Thin Constitution project. He served as vice president of Israel's Supreme Court, attorney-general, and government secretary, and participated in peace negotiations with Israel's neighbors. He continues to serve as chair and member of several public bodies.