

## *Preface*

We hereby declare the establishment of a Jewish State in *Eretz-Israel*, to be known as the State of Israel.<sup>1</sup>

The Land of Israel is the birthplace of the Jewish nation, where its national identity was developed over the ages and its right to self-determination was realised in 1948. On 29 November 1947, the United Nations (UN) General Assembly endorsed the Partition Plan, which represented the basis for the establishment of a Jewish State on Palestine soil, then a territory under the British Mandate. The Holocaust expedited the implementation of the decision to grant the Jews a national homeland, as presented by the British government in the Balfour Declaration of 1917.

According to the Partition Plan, as confirmed in UN Resolution 181, three independent entities were to be established: a Jewish state, an Arab state and another entity under a UN-governed international regime in Jerusalem. While the leadership of the Jewish settlement in Palestine accepted the Resolution, the Arab countries rejected the legitimacy of a new Jewish state and launched a comprehensive attack against the Jewish settlement, comprising some 600,000 people, starting what Israel has since called the War of Independence. The Jews saw the creation of Israel as the embodiment of their long-held aspiration for a land of their own, but for Palestinians, the loss of their homes and land in 1948 became known as the '*Nakba*' or 'the catastrophe'. Some 700,000 Palestinians left what had been British-controlled Palestine, becoming refugees in neighbouring countries.

The UN Resolution ordered Great Britain to evacuate the land and the British Parliament decided that the Crown rule of Palestine would end on 15 May 1948. In view of the ensuing power vacuum, the local Jewish population decided to establish initial governing bodies for the future Jewish state. On 14 May 1948, the leaders of the Jewish organisations, known as

<sup>1</sup> The Declaration of the Establishment of the State of Israel, 14 May 1948. For the English version, see: <http://mfa.gov.il/MFA/AboutIsrael/State/Pages/A%20Free%20People%20in%20Our%20Land-%20Declaration%20of%20Independence.aspx>.

the National Council, gathered in a special session in Tel Aviv and declared the establishment of the State of Israel, publishing a document that was later known as the Declaration of the Establishment of the State of Israel, or the Declaration of Independence. This document was ratified by the National Council and was personally signed by each member. It was based on the UN Partition Plan and treated that Plan as the legal foundation for the Jewish nation's right to establish its state. David Ben-Gurion, soon to be Israel's first Prime Minister, opened his declaration speech by saying:

Accordingly, we, the members of the National Council, representing the Jewish people in Palestine and the Zionist movement of the world, met together in solemn assembly today, the day of the termination of the British Mandate in Palestine, and by virtue of the natural and historic right of the Jewish Nation and of the Resolution of the General Assembly of the United Nations, hereby proclaim the establishment of the Jewish State in Palestine, to be called the State of Israel.<sup>2</sup>

The Declaration stated that once the Mandate ended and until regular and elected government bodies started functioning, the National Council would serve as the state's Constituent Assembly. It further stated that the 'setting up of the duly elected bodies of the State' would be done 'in accordance with a Constitution, to be drawn up by a Constituent Assembly no later than the first day of October 1948'.

The Provisional National Council's first legislative act was the enactment of the Law and Administration Ordinance 1948, which partially arranged the distribution of powers in the new state and the transition from the Mandate to the new government. This volume will elaborate upon the history of those first days, because decisions made then are still of crucial and constitutional importance today. The Declaration of Independence stated that Israel would elect a constituent assembly that would draft a constitution for the State of Israel that would guide the establishment and activities of the elected authorities. The constitution of which the founding fathers dreamt was, however, never written.

The Israeli Constituent Assembly was indeed elected and even discussed the future constitution, but never truly used its constituent power. The discussions ended in deadlock. The Constituent Assembly (which renamed itself the First Knesset) reached a compromise (known as the Harari Resolution) that is unique and unusual in terms of comparative

<sup>2</sup> Ruth Lapidoth and Moshe Hirsch (eds), *The Arab-Israel Conflict and its Resolution: Selected Documents* (Dordrecht, Martinus Nijhoff Publishers, 1992).

constitutional law. Israel would enact a constitution ‘in stages’: the constitution would be composed of chapters, each of which would stand as an independent basic law, each chapter would be endorsed by the Knesset and, after this, the chapters would form the Israeli constitution.

Following this Resolution, the First Knesset, Israel’s constituent power, eventually dispersed, transferring its powers to the next and all subsequent Knessets. In theory, this meant that Israel’s *pouvoir constituant* ceased to exist and its powers expired. Some believe that this move severed the constitutional chain that started when the state was founded. Others argue that the constituent power is alive and ‘belongs’ to the parliament; thus, every elected Knesset holds that constituent power and may endorse a constitution whenever it sees fit.

In any event, Israel started out without a constitution or a bill of human rights, based on the British tradition of parliamentary sovereignty. In the early years, the prevailing concept was that the Knesset was legislatively sovereign and ‘omnipotent’, and that the Supreme Court was not competent to review its legislative acts. Attempts made over the years to convince the Supreme Court that, in the absence of a constitution, the Declaration of Independence is the fundamental Israeli legal norm have failed.

The first chapter of this book outlines Israel’s unique constitutional history and deals with the basic laws that were enacted over the years and were meant to comprise Israel’s constitution. In 1992, two basic laws on human rights were introduced that limited the legislative power to infringe human rights. These laws were the focal point of a crucial Supreme Court ruling in 1995 that fundamentally changed Israel’s constitutional nature. The monumental *Bank Hamizrahi* ruling marked the climax of what became known as the ‘constitutional revolution’. In it, the Supreme Court declared the supremacy of the basic laws and their constitutional status. Overnight, the basic laws became ‘constitutional’ and all regular laws became subordinate to them. The sovereignty of the Knesset was thus declared to be limited by norms that the Knesset itself established in its ‘constituent’ capacity. At the same time, the Supreme Court recognised its power to judicially review laws.

As a result, the State of Israel underwent a constitutional metamorphosis from a state based on the British model of parliamentary sovereignty to a constitutional state. Furthermore, the Supreme Court’s generous interpretations of those basic laws introduced significant constitutional concepts.

The status of the basic laws will be extensively discussed in this book. Presently, the basic laws together form the Israeli constitution, which is written but is still being formed. It is a limited constitution, and the Israeli constitutional arrangement is a unique and incomplete project. Chapter two shall discuss the sources of Israel's constitution. Many argue that Israel has a 'judicial' constitution that lacks many elements that characterise more complete constitutions found in other countries. For example, some of the basic rights are not entrenched in basic laws, but were created by the Supreme Court. Some of the requirements of the basic laws are rigid, while others can be modified by an ordinary Knesset majority. Some of the provisions were written in flowery and festive language, offering general and very brief instructions, while others are too detailed and cumbersome. Certain fundamental constitutional issues do not appear in Israel's basic laws and their legal status remains unclear. Yet, though the constitution is incomplete, the Israeli courts have acknowledged certain principles that may not be modified – primarily the constitutional principle that refers to the Jewish and democratic nature of the State of Israel.

The Declaration of Independence singled out some of the basic principles of the new state. It stated that the Jewish state established in Israel '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 or sex'. Thus, it was founded as a 'Jewish and democratic' state. These fundamental principles will be discussed in chapter three. The Jewish nature of the state is a fundamental characteristic that was determined by the international community in the 1947 UN Partition Plan before the State of Israel was established. It was further explicitly stated in the Declaration of Independence and subsequently in a long series of practical arrangements by which Israelis live.

Israel is a Jewish state in the sense that it is the nation in which the Jews realised their right to self-determination. A Jewish state has constitutional consequences: it serves as the basis for arrangements such as the Law of Return, according to which all Jews – and only Jews – may become Israeli citizens automatically upon immigration. Although the Jewish religion is not a state law, as we shall see, the state may impose restrictions on individual liberties when seeking to promote and preserve the Jewish heritage and nature of public life.

Potential tensions exist between the basic Jewish and democratic tenets of Israel. As will become clear, Israel's commitment to the basic

values of democracy – primarily the acknowledgement that all people were created equal and have a right to dignity – leads to the conclusion that it is a Jewish nation state only so long as this does not impair the fundamental principles of democracy, namely, the rule of law, the separation of powers and the protection of acknowledged human rights.

Chapter four is dedicated to the Israeli parliament, the Knesset. This single-chamber house serves as the constituent power that is authorised to enact and amend basic laws. The Israeli parliamentary system follows the British model, in which the government must have the confidence of the House of Parliament. The Knesset supervises the executive and the state budget. Focusing on the Knesset and its role in the Israeli constitutional set-up, this chapter opens with a discussion of the Israeli election method, which is unique in comparative law terms. Israel is a single, undivided constituency that elects 120 representatives as Members of the Knesset. In the 1990s, the State of Israel experimented with a special arrangement that combined the presidential and parliamentary methods: the Prime Minister was elected personally and did not require the confidence of the Knesset. This method failed and, less than a decade later, Israel returned to the parliamentary method with slight modifications. This chapter will also examine the activities of the Knesset and the various political parties, focusing on unique issues such as the status of political parties and the disqualification of anti-democratic parties.

Chapter five addresses the government and the executive in Israel. In the first part of this chapter, we will present a brief overview of the presidency, its status and the (mostly symbolic) roles of the state's President. Further on, we discuss the election and composition of the government, and focus on the new system for the election of the Prime Minister, the reasons that prompted it and why it failed. Here, a special discussion is devoted to the nature of government performance, the rules of responsibility and accountability, and the role of the military in the constitutional context. Finally, we will present Israel's civil service, which serves any government in power, and the local government powers.

Chapter six reviews Israel's supervising bodies such as the State Comptroller, commissions of inquiry and the Attorney General. The latter holds one of the most powerful public positions in Israel, but is not mentioned in any constitutional text. It is surprising that no basic law applies to the Attorney General and that the powers enjoyed by that office are not even gathered under a single law. The Attorney General is

the chief prosecutor and has the power to order criminal prosecutions, represents the state in the courts, offers legal advice to the government and is the government's official interpreter of the law. Furthermore, the Attorney General's legal opinions are binding on the government. This chapter will also discuss the special role of non-governmental organisations and the media in Israeli society.

Chapter seven addresses the judiciary, focusing on the Supreme Court, which serves as the High Court of Justice (HCJ), as court of appeals, and as Israel's constitutional court. It is impossible to describe the development of the Israeli constitution without considering the role of the Supreme Court sitting as the HCJ. The HCJ's impact on constitutional law is crucial, as is its influence on Israeli society. Despite the fact that the HCJ did not have powers to oversee all government and legislative decisions granted by the constitution, the public has used the Court to obtain public policy decisions that could not be obtained through any other means. This phenomenon gradually enhanced and strengthened the Court's position as a key political player which may be seen to have resulted in a new balance of power between the branches of government. Until the 1980s, the HCJ set a threshold requirement of standing as a precondition for hearing petitions, and many issues were treated as unjudicial. Following various political and social changes in the 1980s, the HCJ dropped these justiciability barriers, thereby becoming an influential – even dominant – force in shaping the Israeli constitutional system. The Court's activist adjudication on political, military and security issues, coupled with its criticism of government powers, is famous worldwide. Presently, it plays the most significant role in shaping Israel as a democratic society, as we shall see in this contextual analysis.

The last chapter of this book deals with human rights. The public debate over human rights is particularly complicated for several reasons. Israel does not have a complete constitutional text that defends human rights. A political compromise in 1992 allowed the Knesset to agree on and vote for the constitutional entrenchment of a few particular human rights on which consensus has been reached, leaving the discussion of 'problematic' rights such as equality and freedom of religion, speech and conscience pending. These human rights are not anchored in Israeli basic laws and a single comprehensive basic law on human rights has not yet been written.

Furthermore, since its establishment, Israel has been in a state of war and in extended periods of emergency. War and terror acts have resulted

in an almost daily examination of restrictions of human rights, pressing the need to find the right balance between defending those rights and protecting national security. A special part in this chapter will deal with security cases. One-fifth of Israel's citizens are Arab nationals (Palestinian Israelis) who wish to preserve their culture, religion and language, while sympathising with the Palestinian nation and the Arab world, with which the State of Israel is in a state of ongoing belligerency. This unique relationship between majority and minority populations is particularly important and shall be discussed within the principle of equality. Furthermore, in the 1967 war, Israel occupied populated territories, which created serious debate about the civil status and general fate of the Palestinian population of the West Bank and the Gaza Strip. The Supreme Court allowed these Palestinians to appeal against decisions made by the military commanders of the occupied regions, sharply defending the need to protect human rights even in times of emergency. The unresolved conflict between Israel and the Palestinians presented the Supreme Court with problematic questions which will be discussed, such as the legality of the Security Fence and pre-emptive killings. The challenges that Israel has faced and will face in this context are central in this final chapter.