

SYMPOSIUM ARTICLE

The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?

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Abstract

The protests against the Israeli government's proposed constitutional changes, which started in January 2023, have escalated into overall social upheaval. Protestors, politicians and academics have claimed that the existing 'social contract' has been violated, that Israel needs a 'new contract', and that such 'new contract' should be enacted through a constitution. This article argues that while the calls for the enactment of a constitution are understandable, Israel's current form of control of the West Bank and its commitment to the settlement project hinders the political feasibility of the enactment of a constitution. Those calling for a constitution for Israel perceive it as a solution to the indeterminacy and ambiguity that plague the Israeli constitutional framework. However, Israel's current form of control of the West Bank depends on ambiguity, on the existence of legal grey areas, and on fragmentation of the normative framework. The resolution of these is thus inconsistent with the maintenance of this form of control.

Keywords: constitutional overhaul; occupation; Israel

1. Introduction

The constitutional crisis in Israel exposed to the public the magnitude of the flaws in Israel's constitutional framework. Among these flaws are the fact that Basic Laws are enacted in the same manner as regular legislation, thereby allowing their misuse for narrow political interests; the insufficient protection of basic rights such as equality and freedom of expression; and the lack of explicit entrenchment of the hierarchy between norms, for example, between Basic Laws and regular laws. While these issues have long been acknowledged

and debated by Israeli constitutional scholars,¹ until recently they were of little interest to the general public.

These flaws, coupled with the political instability leading to multiple rounds of elections and with the deep social divide, have led to claims that the existing 'social contract' has been violated and that a radical change is needed. The alleged need for a new 'social contract' has given rise to calls to enact a full constitution for Israel as a formalisation of the new contract. Protestors carry signs demanding 'a constitution now', opposition politicians explain the need for exacting a constitution,² and academics launched an initiative to establish a constitutional assembly that will enact a full constitution for Israel, once and for all.³ Israel, it is argued, is experiencing a 'constitutional moment', and the enactment of a constitution could be the way out of the crisis.⁴

This article argues that Israel is indeed experiencing a constitutional moment, in many respects. However, while the longing for a constitution is understandable, the political reality of the occupation and the dependency of this reality on a premise of temporariness and on a fragmented normative framework hinder the possibility of materialising the constitutional moment.

The leaders of the protest movement, for many months, have avoided putting the question of the occupation at the forefront of the protests. Some of them may have done so for strategic reasons, fearing alienation of centrists and right-wing protestors, while others may have done so for their own ideological reasons.⁵ To the extent that the occupation has come up in the context of the constitutional overhaul, it has been mostly with regard to the means by which the constitutional changes will foster and facilitate the settlement project.⁶ This article highlights an additional angle of the relationship between the constitutional crisis and the occupation. It argues that there is a structural relationship between the two. The constitutional crisis is a result of the temporariness and ambiguity of Israel's constitutional framework, and the quest for a constitution seeks to remedy these flaws. However, these characteristics are an inherent feature of the normative framework necessary to maintain

¹ See, eg, Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21 *European Journal of Law Reform* 403; Ori Ahronson, 'Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty – On the Status Quo as Counter-Majoritarian Difficulty' (2014) 37 *Tel Aviv University Law Review* 509 (in Hebrew); Hillel Sommer, 'From Childhood to Maturity: Outstanding Issues in Implementation of the Constitutional Revolution' (2004) 1 *Law and Business* 59.

² Michael Starr, 'Lapid Calls to Write Israeli Constitution in Response to Judicial Reform', *The Jerusalem Post*, 10 March 2023, <https://www.jpost.com/breaking-news/article-733948>.

³ A Constitutional Assembly for Israel, 2023, <https://www.asefam.org/team> (in Hebrew).

⁴ Lazer Berman, 'Why the Deepening Judicial Crisis Could Be Israel's Constitutional Moment', *The Times of Israel*, 10 July 2023, <https://www.timesofisrael.com/why-the-deepening-judicial-crisis-could-be-israels-constitutional-moment>.

⁵ Oren Ziv, 'Israel's Protest Leaders Give the Anti-Occupation Bloc the Cold Shoulder', +972 *Magazine*, 6 June 2023, <https://www.972mag.com/anti-occupation-bloc-protests-kaplan>.

⁶ Tamar Hostovsky Brandes, 'Annexation Is in the Details: Why There Will be no Formal Annexation of the Occupied Territories', *VerfBlog*, 1 March 2023, <https://verfassungsblog.de/annexation-is-in-the-details>.

Israel's current form of control in the West Bank, particularly the settlement enterprise.

2. Why does Israel not have a constitution? The historical narrative

On 14 May 1948 the People's Council, the temporary representative body of the Jewish community living in Israel, declared the establishment of the State of Israel. The Declaration of the Establishment of the State of Israel provided an outline for the transitional period:⁷

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.

The drafters of the Declaration thus entrusted with the Elected Constituent Assembly the role of adopting a constitution. However, the reality unfolded differently. The elections to the Constituent Assembly took place on 25 January 1949, but the Assembly did not adopt a constitution. The Assembly adopted a law, named the Transition Law, which determined that the Parliament in Israel would be called the 'Knesset', and that the Constitutional Assembly would be known as 'the first Knesset'. The two institutions – the legislative body and the Constituent Assembly – were therefore merged into one body, with dual roles.⁸

There are various explanations as to why the first Knesset did not enact a constitution. One argument made explicitly during the debates in the first Knesset was that the Israeli nation was still in the process of formation, with many of its potential members still in the diaspora, and that the time was not ripe to enact a constitution. Other concerns included possible controversies during the drafting process, in particular between religious and non-religious Jewish members of the Knesset. In addition to these explicit reasons, the objection of David Ben-Gurion, Israel's first Prime Minister, who opposed a constitution that would limit the Knesset and government, probably played a decisive factor in the decision not to adopt a full constitution.⁹

In 1950 the Knesset adopted a decision, known as the 'Harari Decision', which stated that the Knesset would enact a series of Basic Laws that would come together to form the Israeli Constitution.¹⁰ The gradual process was justified as a means of enabling the Knesset first to address less controversial

⁷ The Declaration of Independence, 15 May 1948, <https://main.knesset.gov.il/en/about/pages/declaration.aspx>.

⁸ Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Hart 2014) 5–11.

⁹ *Ibid.* See also Nir Keidar, *Ben-Gurion and the Constitution: On Constitutional Democracy and Law in David Ben-Gurion's Policy* (Bar-Ilan University Press 2015) (in Hebrew); Menachem Mautner, *Liberalism in Israel: Its History, Problems and Future* (Tel Aviv University Press 2019) 30 (in Hebrew).

¹⁰ Navot (n 8) 10.

issues while postponing to a later stage discussion of issues perceived as more politically charged. Once the process was completed, and all Basic Laws enacted, the Israeli Constitution would be concluded.

The Harari Decision raises an abundance of questions and difficulties, which include the status of the Basic Laws in the interim period until the anticipated conclusion of the constitutional project, the fact that the procedure for the enactment of Basic Laws is identical to the procedure for the enactment of regular legislation and, consequently, the ease with which Basic Laws can be enacted and amended to facilitate narrow political interests.¹¹ Some questions have been answered by the Supreme Court. In the famous *Bank Hamizrachi* decision, for example, Justice Barak expressly addressed the question of the normative hierarchy, arguing that Basic Laws were superior to regular laws.¹² Other issues remain open to this day.

One such issue is the finalisation of the enactment of ‘all’ Basic Laws. Indeed, according to the Harari Decision, this was the point at which the Israeli Constitution would be completed. However, as the decision sets no limits to the process of enacting Basic Laws, either in terms of time or in terms of number of Basic Laws to be enacted, the process can go on indefinitely. Theoretically, the Harari Decision laid down a process that should have come to a conclusion at some point, and was hence planned to be temporary. In reality, the temporary process of enacting Basic Laws has become a permanent feature of Israel’s constitutional framework. The lack of a complete and stable constitution and the ambiguity of the normative structure is, in many respects, the defining characteristic of Israel’s constitutional framework.

3. The normative framework in the Occupied Territories: Temporary turned permanent

The normative framework that Israel formally applies in the West Bank derives from the international law of occupation.¹³ Under this framework the domestic law that applied in the West Bank on the eve of the occupation continues to apply. Jordanian law is the first layer of the law in the West Bank.¹⁴ On top of this layer are several additional layers. One such layer includes the military orders issued by the military commander, which have the status of law in the West Bank. Many of these orders have been issued since 1967, considerably amending Jordanian law. An additional layer includes laws and regulations

¹¹ Amir Fuchs, ‘The Frequent Changes to Israel’s Basic Laws’, Israel Democracy Institute, 10 August 2023, <https://en.idi.org.il/articles/39441>.

¹² CA 6821/93 *United Mizrahi Bank v Migdal Cooperative Village* (1995) 408–09.

¹³ With the exception of east Jerusalem, which Israel annexed and to which it applies Israeli law. The recognition of international law as the governing framework is not complete: Israel has consistently objected to the application of the Fourth Geneva Convention to the territories, although it has declared that it will respect its ‘humanitarian clauses’: Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

¹⁴ David Kretzmer and Yaël Ronen, *The Occupation of Justice* (Oxford University Press 2021) 41–50.

that pertain personally to Israeli citizens residing in the West Bank – that is, to settlers.

Additional norms were applied in the West Bank by the Supreme Court. The Court has determined, for example, that Israeli administrative law governs the manner in which the military commander may exercise his authority.¹⁵ With regard to the application of constitutional law, the situation is more complex. The Court has explicitly recognised that Israeli settlers in the West Bank benefit from the protection of Basic Law: Human Dignity and Liberty, allegedly on a personal, rather than a territorial basis.¹⁶ However, it has also applied the Basic Laws in cases that apply to Palestinian residents of the West Bank, although the rationale for doing so was not clear.¹⁷ Over the years, the willingness of the Court to apply parts of Israeli constitutional law to the West Bank has grown.¹⁸ However, as Kretzmer and Ronen demonstrate, the Court's practice with regard to the application of constitutional law in the West Bank has been incoherent and inconsistent, depending on circumstances.¹⁹

When the Court directly encountered the question of the applicability of the constitutional law to the West Bank, it chose to circumvent it. In the case of *Silwad Municipality v The Knesset*²⁰ the petitioners challenged the constitutionality of the Land Regularization Act, a law legislated by the Knesset, which established a mechanism for expropriation of usage rights on private Palestinian land on which settlements were built in exchange for compensation. The Court invalidated the Law, finding that it was incompatible with Basic Law: Human Dignity and Liberty. However, the Court reached this conclusion without determining the general applicability of Basic Law: Human Dignity to the West Bank. Instead, Chief Justice Hayut anchored the applicability of the Basic Law to the case in the parties' consent regarding such application and, notably, in the statement that the Knesset itself, when legislating, is bound by the Basic Laws, wherever the enacted laws may apply. Notably, the Chief Justice stated explicitly that there was no need to decide the question whether Basic Law: Human Dignity and Liberty applies to Palestinian residents of the West Bank. Despite decades of growing recourse to Israeli constitutional law in cases that concern the West Bank, and despite the fact that the *Silwad* decision itself was based on Israeli constitutional law, the Court was careful not to cross a line that could undermine Israel's claims regarding the formal normative framework that it applies in the Occupied Territories.

¹⁵ *ibid* 4–52.

¹⁶ *ibid* 45. See also Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 353.

¹⁷ Kretzmer and Ronen (n 14) 102.

¹⁸ Tamar Hostovsky Brandes, 'The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court concerning the Occupied Territories' (2020) 18 *International Journal of Constitutional Law* 767.

¹⁹ Kretzmer and Ronen (n 14) 104.

²⁰ HCJ 1308/17 *Silwad v The Knesset* (9 June 2020), unofficial translation at: https://www.adalah.org/uploads/uploads/PDF_Final_English_translation_Settlements_Regularization_Petition_May_2017.pdf.

Commentators, including the author of this article, have long noted the erosion of the distinction between the normative framework that applies in Israel and the law that applies in the West Bank, and specifically the growing practice of applying substantive elements of Israeli law in the Occupied Territories to the settlements by the military commander.²¹ Scholars have analysed the ways in which this process, sometimes referred to as the ‘creeping annexation’, changed the reality on the ground and facilitated the settlement project.²² This process, no doubt, is consistent with intentions to permanently control at least parts of the West Bank. However, Israel has yet to declare or admit openly in the international arena that this is indeed its intention. While the internal discourse within Israel largely refers to the settlements as part of Israel, Israel’s outward-facing official position is that there is no change in the formal legal framework applicable in the West Bank.

This twofold discourse exists even in the most extreme official document issued to date regarding the status of the West Bank: the agreement subordinating the Civil Administration to the Additional Minister in the Ministry of Defence.²³ The agreement implements the coalition agreement between the Likud party and the Religious Zionism party. It transfers most of the powers of the Civil Administration (the military body charged with the management of civilian aspects of the military government in the West Bank) to Bezalel Smotrich, who is designated as an ‘additional minister’ in the Ministry of Defence, and confers upon him elaborate powers regarding the settlements, including the ‘mission’ of equalising the law that applies to settlers to the law that applies to Israelis within Israel. The agreement explicitly provides Smotrich with manpower and resources for this goal. Despite the fact that the agreement lays out a plan that cannot be understood as anything other than a plan for annexation, it nonetheless declares that ‘nothing in the present document changes the legal status of Judea and Samaria, the law that applies in it, and the authorities of the civic branch and Ministry of Defence authorities in it’.²⁴ Thus, the pretence of the application of the international law of occupation framework is one that even Israel’s current government finds necessary to uphold.

4. Is Israel’s constitutional moment occupied?

Bruce Ackerman famously coined the term ‘constitutional moment’ to describe periods of constitutional change. Drawing on experience in the United States, Ackerman argues that while in regular times citizens are generally detached

²¹ See generally Gross (n 16); Kretzmer and Ronen (n 14).

²² Kretzmer and Ronen (n 14) 25.

²³ For analysis of the agreement see The Israeli Law Professors’ Forum for Democracy, ‘Position Paper No 24: Implications of the Agreement Subordinating the Civil Administration to the Additional Minister in the Ministry of Defense’, 5 March 2023, <https://www.lawprofsforum.org/post/pp24-e>.

²⁴ ‘Memo of Understanding and Division of Responsibility and Authorities between the Minister of Defence and the Additional Minister in the Ministry of Defence’ (in Hebrew), https://ynet-pic1.yit.co.il/picserver5/wcm_upload_files/2023/02/23/SkylTh4As/_____.pdf.

from politics, constitutional moments are characterised by elevated interest in politics, and by 'a broad movement of transformative opinion'.²⁵ In such a moment, 'the people speak', and there is potential for creating a new constitutional order.

Many characteristics indicate that Israel is indeed experiencing a constitutional moment.²⁶ The political and constitutional crisis is profound, and the public debate is occupied with constitutional issues. Debates on the incoherent nature of Israel's existing constitutional framework, on the desired checks and balances in democracy, on the role of judicial review, and on the lack of sufficient protection of human rights take place on a daily basis, not only in the media outlets but in households, workplaces, and essentially wherever people gather.

In the light of the heightened interest in constitutional matters coupled with the deep social divide,²⁷ it is perhaps not surprising that calls for the enactment of a constitution are made. The political consciousness has awakened, and a constitution appears to be a possible solution. In Israel, the aspiration for a constitution embodies the longing for everything that is lacking in, or threatened by, the current Israeli reality: stability, certainty, and the protection of human rights from the arbitrary power of the government. The enactment of a constitution is perceived as having the potential for healing the social rift. The vision of a Constitutional Assembly is a vision in which members of all segments of Israeli society will come together, express a commitment to a shared future, and agree on the basic terms of common life. A constitution is seen as having the ability to stabilise the rocking boat, and perhaps even to bring it safely ashore. The enactment of a constitution has the potential to conclude the permanent temporariness caused by the loopholes in the Harari Decision, answering the questions left open, clarifying Israel's constitutional framework, and ending the political turmoil brought about by the flaws in the existing system.

The difficulty, however, is that to the extent that Israel insists on its current mode of control of the Occupied Territories, Israel's constitutional framework cannot be clarified because this mode of control is facilitated by a premise of temporariness, even if this premise is inconsistent with either Israel's actual plans or with the reality on the ground. Maintaining this premise, on the one hand, and promoting the settlement project, on the other, requires ambiguity, fragmentation, and leeway for legal manoeuvres. Indeed, the greater the gap is between Israel's formal position regarding the normative framework that Israel applies in the West Bank and the reality on the ground, the more it is essential, from the state's perspective, to maintain legal uncertainty.

Thus, while incoherence, inconsistencies and temporariness are perceived as flaws in Israel's constitutional framework, in the context of Israel's control

²⁵ Bruce Ackerman, *We the People: Transformation* (Harvard University Press 1998) 409.

²⁶ See Manal Totry-Jubran, 'Constitutionalising Israel's Constitutional System' (2023) *Israel Law Review* 355.

²⁷ See Iddo Porat, 'Political Polarisation and the Constitutional Crisis in Israel' (2023) *Israel Law Review* 369.

of the Occupied Territories, these are tools employed by the state to further projects that are inconsistent with international law, explicit recognition of which may bear international repercussions. The settlement project formally rests on a matrix of low-level, temporary norms, predominantly military orders. However, substantially, this matrix functions as part of Israel's constitutional framework.

A relatively recent example of the latter claim is evidenced by the events that led to the dissolution of Israel's 36th government, the Bennet-Lapid government. While the government was unstable for many reasons, the immediate reason for its dissolution was, ultimately, the political failure to pass a temporary legislative provision, heretofore periodically adopted, which extended to Israeli settlers in the West Bank regulations applying segments of Israeli law, in particular with regard to criminal jurisdiction.²⁸ While the opposition at the time was in favour of the substance of the legislation, opposition members of the Knesset stated that they would refuse to extend it in order to destabilise the government. Under Israeli law, any law that is due to expire during the last two months of the term of office of the outgoing Knesset or within four months after the Knesset has decided to dissolve itself or during the first three months of the term once the Knesset is dissolved, remains in force.²⁹ Bennet and Lapid thus decided to dissolve the Knesset, an act that would lead to automatic extension of the regulations. In explaining the decision, Bennet stated that the dissolution was necessary to avoid 'constitutional chaos'.³⁰ The choice of this term, and the magnitude of the pending crisis, are in stark contrast to the formal low-level status of the norms at stake. This contrast is rooted in the political will to maintain a facade of temporariness with regard to what is perceived as a fundamental feature of Israel's normative framework. It allows the evasion of fundamental issues that would arise should the permanence of Israel's control of the West Bank be declared openly, and, first and foremost, the right of Palestinian residents to citizenship and equality.

In the unlikely scenario that a Constitutional Assembly is convened, the process of drafting a constitution would expose the fallacies of this normative framework and bring these issues to the forefront of public debate. The process of drafting and enacting a constitution crystallises questions of constitutional identity. It casts light on the identity of the 'makers' of the constitution as well as on the constitutional subject.³¹ In the case of Israel, as the weakness of the

²⁸ The regulations were extended by the Knesset upon the establishment of the new government: 'Knesset Extends Judea and Samaria Emergency Regulations by Five Years', *Knesset News*, 25 January 2023, <https://main.knesset.gov.il/EN/News/PressReleases/Pages/press25123r.aspx>.

²⁹ Basic Law: The Knesset, s 38.

³⁰ Colm Quinn, 'Israel's Government Collapse Complicates Biden's Visit', *Foreign Policy*, 21 June 2022, https://foreignpolicy.com/2022/06/21/israel-lapid-bennett-biden/?tpcc=recirc_latest062921; Carrie Keller-Lynn, 'Bennett Announces Coalition's Demise, New Elections: "We Did Our Utmost to Continue"', *The Times of Israel*, 20 June 2022, <https://www.timesofisrael.com/bennett-we-made-a-tough-decision-but-it-was-the-best-for-the-country>.

³¹ Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge 2010) 147.

institutional constitutional framework is perceived as one of the main issues that needs to be addressed, it will also bring to the forefront debates regarding the formal relationship between legal norms and their application in various cases.

In such a scenario it will be impossible to circumvent foundational questions: Who is included in the *body politik*; that is, who are 'the people' enacting the constitution? Who are the subjects of the constitution, and are they identical to those who are enacting it? Where will the constitution apply? In answering these questions, both political and geographical lines will be delineated.

Assuming that Israel has no intention of formally annexing the West Bank and granting Israeli citizenship to its Palestinian residents, the answer to the first question is that participation in the constitution-making process is likely to be based on the voters' registry. All those entitled to vote for the Knesset – namely, Israeli citizens who are residents of either Israel or the West Bank – will be included in the constitution-making process. Palestinian residents of the West Bank will not participate in it.

With regard to the second question, there are, theoretically, four possible answers. The first is that the constitution will apply only within Israel. While this may seem the natural answer, as constitutions often apply territorially, for reasons of political feasibility, it is unlikely that it will be chosen. In the process of drafting the constitution, the question of its applicability to the settlements will undoubtedly arise. Once this is the case, in order to limit the application of the constitution to Israeli territory, the Constitutional Assembly would need to determine explicitly that the constitution does not apply in the West Bank. It is difficult to see how excluding Israeli settlers from the application of the constitution would be politically feasible after the Supreme Court has already accorded them constitutional rights under Basic Law: Human Dignity and Liberty. It is also not feasible politically for other reasons: if one of the main purposes of enacting a constitution is to overcome social and political division, excluding a segment of Israeli society would achieve the opposite. Thus, in practice, territorial application of the constitution only within Israel is not an option.

Another possibility is that the constitution will formally apply in both Israel and the West Bank. This would amount, of course, to a full-blown annexation, a blatant violation of international law, one that may carry international repercussions for Israel. It would also entitle Palestinian residents to full constitutional protection, which can be expected to include the right to vote and to be elected, and the right to equality. For obvious reasons, this is a route Israel is unlikely to take.

A third option is to selectively apply the constitution beyond Israel, but only to the settlements or only to Israeli citizens in the West Bank. The first option would amount to annexation of the settlements. The second would arguably not constitute an annexation; however, it would formalise and explicitly endorse the existence of two separate normative systems applying to different populations residing in the same area. With the constitution serving as the overarching normative framework for Israeli citizens, and the international law of occupation as the normative framework for Palestinian residents, this

would make it more difficult for Israel to continue to deny the charges of apartheid it faces.

The fourth option is that the application of the constitution in the West Bank will be similar to the application of other pieces of Israeli law today – that is, that the constitution will not formally apply, but some of its substantive content will be applied through the same measures that exist today: military orders, laws and regulations, court decisions. The tactics and manipulations that work with bits and pieces of Israeli law, however, cannot easily be transferred to the constitutional realm. First, the Constitutional Assembly would still need to decide that the constitution does not formally apply in the West Bank. Such explicit recognition is in contrast to the political (as opposed to the legal) discourse within Israel today, in which the settlements are referred to as part of Israel. Settlers would need to accept that while they are taking part in the constitution-making process, they are not full constituents of it. Second, it would need to be decided which parts of the constitution apply in the West Bank and to whom, a discussion that would bring to the forefront issues that Israel is trying to keep away from international scrutiny. Finally, applying the constitution through military orders undermines the celebratory and redemptive qualities of the constitution. Constitutional law carries with it symbolic and expressive power. The process of enacting a constitution is intertwined with the creation of a people, raising the question of ‘who we are’.³² The need to define the application of the constitution in the Occupied Territories will confront Israelis with the question of whether being an occupant is part of Israel’s constitutional identity, a question that the ambiguousness and fragmentation of the existing normative framework have allowed them to evade.

5. Conclusion

Israel’s fragmented constitutional framework may have been a historical accident, but in the context of the occupation this fragmentation has provided Israel with considerable political leeway. For example, it allowed the Supreme Court to apply constitutional rights protection to Israeli settlers of the West Bank, without addressing the applicability of other parts of Israel’s constitutional framework or the applicability of constitutional rights to Palestinian residents. It also enabled the Court to do so selectively, only in respect of constitutional rights, thus formally maintaining a framework of the international law of occupation.

A constitution is the product of ‘the people’ speaking, and it carries with it expressive and symbolic weight unparalleled by other normative sources.³³ The constitution-making process is akin to a collective soul-searching process, in which basic questions, such as who we are and who we want to be, are discussed. Constitutionalism, in the context in which the calls for it have come up

³² I discussed this power in another context in Tamar Hostovsky Brandes, ‘Basic Law: Israel as the Nation State of the Jewish People – Implications for Equality, Self Determination and Social Solidarity’ (2020) 29 *Minnesota Journal of International Law* 65.

³³ On the expressive functions of law see generally Cass R Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021.

in Israel, is a project that seeks to provide certainty and stability. However, the maintenance of Israel's current form of control in the West Bank, and its ability to continue to further the settlement project under the radar of the international community, require the exact opposite: ambiguity, the existence of a normative grey area, and the ability to maintain and selectively apply a fragmented normative framework, at times inconsistent. As long as Israel's strategy in the West Bank continues to be deepening the settlement project, on the one hand, and claiming that nothing has changed in the normative framework, on the other, it is difficult to see how a full constitutional enterprise can come into effect.

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