Israel's Paradox of Authority

Yoav Sivan

Abstract. I propose a reconceptualization of Israeli constitutionalism, while considering fundamentals in jurisprudence. The focus is on Israel's early history, a surprisingly unexamined critical period, largely ignored even by Israeli constitutionalist scholarship: Having committed itself in its very first decision of the May 14, 1948, proclamation to govern through a constitution, Israel went to the polls to elect a constitutional assembly, which convened on February 14, 1949, only to get distracted immediately. In a bind, two days later the assembly adopted the Transition Law and morphed into the Knesset, the parliament we know today. But, as I show here, the metamorphosis was not fully successful: the Transition Law, not being an official constitution, could not be properly promulgated through the bilingual (Hebrew and Arabic) Official Gazette—that would have amounted to an acknowledgement of failure—instead, the new state started another gazette, only in Hebrew, in which new legislation is no longer numbered and not promulgated in Arabic. Moreover, from February 16, 1949, to this day, Israeli laws no longer declare their authority with an enacting clause, a common practice everywhere. This unresolved and unacknowledged workaround has led to a paradox of authority: the two competing official gazettes establish a highly inconsistent order of legal priority at the heart of the Israeli system that complicates democratic reform with considerable consequences.

I argue against comparing Israel to Great Britain or New Zealand, the two other countries without written constitutions. This misleading comparison belies a confusion between *formal* and *official*, related yet distinct concepts which are denoted by the same word in Hebrew. My proposal clears the metaphysical mess that is Israeli constitutionalism and provides a powerful model to account for the unfolding developments in politics and law. The particulars of the Israeli case have profound theoretical implications and would challenge assumptions. (1) I propose identifying an authority with its official record, and advance a practical interpretation of Hart's Rule of Recognition. (2) I argue for minimal formal conditions for *official* legal decisions to be normatively binding (a decision should identify its decision-maker). Given that these conditions have been wanting in Israel since 1949, Israeli decision-making thereafter could be viewed as private and therefore unfair. (3) I propose a conceptualization of a *constitutional order* of any decision-making body as the abstraction of the priority in authority expected and revealed while asking and answering questions.

> "The instructions are an order, not a recommendation; follow them, and the officers will be happy to help you." (Security guards instructing Israeli visa applicants lining up at the American embassy in Tel Aviv)

פַּעַם אַחַת הָיִיתִי מְהַלֵּךְ בַּדֶּרֶךְ, וְהָיְתָה דֶּרֶךְ עוֹבֶרֶת בַּשָּׂדֶה, וְהָיִיתִי מְהַלֵּךְ בָּהּ. אָמְרָה לִי תִּינוֹקֶת אַחַת: רַבִּי, לֹא שָׂדֶה הִיא זוֹ? אָמַרְתִּי לָהּ: לֹא, דֶּרֶךְ כְּבוּשָׁה הִיא. אָמְרָה לִי: לִיסְטִים כְּמוֹתְךָ כְּבָשׁוּהָ.

> **(One time I was walking along the path, and the path passed through a field, and I was walking on it. A certain young girl said to me: My Rabbi, isn't this a field?** One should not walk through a field, so as not to damage the crops growing there. **I said to her: Isn't it a well-trodden path** in the field, across which one is permitted to walk? **She said to me: Robbers like you have trodden it.** In other words, it previously had been prohibited to walk through this field, and it is only due to people such as you, who paid no attention to the prohibition, that a path has been cut across it. Thus, the young girl defeated Rabbi Yehoshua ben Ḥananya in a debate.)
>
> (Babylonian Talmud, Eruvin 53b, English rendition by Sefaria)

1. Introduction: How to recognize a law?

Every federal United States legislation today begins with an *enacting clause*, prescribed by the Code of Laws of the United States §101, of 1947: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." The Oath Act of 1789, the first law under the new constitution, opened with almost identical wording.[1] Though integral to the official text, this formulation (which I also call *authority preamble*) is so universal as to be hardly informative and practically invisible— it is usually not bothered with when a law is quoted.

[1] "*Be it enacted by the Senate and Representatives of the United States of America in Congress assembled*, That…" (italics in the original).

But is this like the cliché that a fish cannot observe the water that enables its existence? What can the template tell us about our system, and how authority is given, exercised and respected within it? What can we learn about the requirements and expectations of complying with the law? These philosophical questions, hard to answer meaningfully in the abstract, will benefit from an edge case where the proverbial waters are absent. The contrast will provide a perspective into questions of jurisprudence—questions that are so fundamental they are left to the care of theoreticians who disdain real-life examples, just as they are beyond the reach of practitioners who will be paralyzed should they take philosophical queries to heart.

Across the globe, the enacting clauses or preambles are as ubiquitous as they are unremarkable. They relate the authority of the law to a marker of authority in the law. The British preamble is more elaborate: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—." The German language versions, to illustrate, are no-nonsense, deprived of ornaments. On the federal level, in Germany, the formula is "Der Bundestag hat das folgende Gesetz beschlossen, …", while in Austria it is, "Der Nationalrat hat beschlossen: …" that is, making do with stating that the national parliament "decided that..." A typical formula of the Spanish-speaking world is Chile's, "Teniendo presente que el H. Congreso Nacional ha dado su aprobación al siguiente."[2] India mentions the political time— for example, "Be it enacted by Parliament in the Sixty-second Year of the Republic of India as follows:—" In officially bilingual Canada, federal laws are promulgated with the English and French texts appearing side by side. On the right, "Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :" and on the left,

[2] See this useful online resource for promulgation formulas in Latin America.

"Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:".[3]

Not only written decisions, but also spoken ones articulate authority. A famous example is the American marriage pronouncement: "By the power vested in me by…." Another example, from religion, is given by Jewish liturgy, which employs the formula: "Blessed are You, Lord our God, King of the universe, who has sanctified us with Your commandments, and commanded us [e.g., concerning the precept of tzitzit]."

It should come as no surprise that when Israel was founded in May 1948, it, too, celebrated the long-awaited sovereignty with such markers of propriety. From the very beginning, all new laws included an enacting preamble, referring to the pre-constitutional parliament: "the PROVISIONAL COUNCIL OF STATE hereby enacts as follows:—" (emphasis in the Hebrew original). The decisions were promulgated through the state's brand new *Official Gazette*.

In what language or languages shall the fledgling country run its record? Rather than positively establishing official languages, the Provisional Council, the legislature, simply reduced the English, Arabic and Hebrew trilingualism of British Palestine into an Arabic and Hebrew duo by revoking the status of English. A consequential implication of this fact, however, seems to have been hidden in plain sight, namely that Israeli laws of the period were promulgated in Arabic as well as in Hebrew. That is more dramatic than it may sound: Israel's very first decision, the

[3] In Australia, the formula is "The Parliament of Australia enacts:" but promulgation is obtained by the formal assent of the Governor-General, "In the name of Her Majesty, I assent to this Act." More details in the Australian Government, Legislation Handbook, Department of the Prime Minister and Cabinet, 2007. https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf

proclamation of the new Jewish state, was promulgated as the first decision of the new Official Gazette number (Number 1), in both Hebrew and Arabic[4].

The rather pedestrian practice of connecting a decision with its decision-maker continued for eight months, a period that is the focus of this paper. On February 16, 1949, Israel's Constituent Assembly, mandated by Israel's founding document, adopted *The Transition Law* (TL) in its fourth session and morphed into today's Knesset.

The Transition Law does not include an enacting clause, nor do any other laws —neither Laws nor the higher-status Basic Laws— adopted since. Moreover, unlike the previous, pre-February 1949 laws, the TL as well as future laws was not promulgated in Arabic—only in Hebrew.

The omission is not accidental, and points to a problem with the authority of the decision-making body, that leads to a paradox of authority that has never been resolved and is arguably at the core of the Israeli system.

---

[4] To illustrate the general ignorance of this fact consider a paper from 2000 by Orit Kamir, a law professor at the Hebrew University of Jerusalem, concerning Israel's proclamation of statehood. The author does not mention that the decision was promulgated as Official Gazette No. 1. She also seems unaware that it was promulgated in Arabic, in addition to Hebrew, which renders her criticism especially ironic. See T*he Declaration Has Two Faces: The Interesting Story of the Zionist Declaration of Independence and the Democratic Declaration of Independence*, *TEL AVIV UNIVERSITY LAW REVIEW*, Vol. 23/2 (March 2000), pp. 473-538.
Consider also the seminal CA 6821/93 Bank Mizrahi v. Migdal Cooperative Village (1995, Isr.),
Israel's Marbury moment in which the supreme court asserted its authority of judicial review of laws. Justice Levin wrote: "The Declaration of Independence, its ethical import notwithstanding, had never been recognized judicially as being legally valid, and accordingly it had not been considered to have the authority of law." (In the original: מגילת העצמאות, עם כל המטען הערכי הגלום בה, לא הוכרה משפטית כבעלת תוקף חוקית, וממילא לא ראו בה, ככזו, דין מחייב.
Read the intricate discussion on Israeli constitutionalism in the lengthy decision, and you will be convinced that none of the justices had been aware that the Declaration was promulgated as the Official Gazette No. 1: the Israeli court in effect does not recognize Israel's pronouncement of state as a *decision*.

The paper entwines details of the case study in question with theoretical considerations. Following a brief illustration of the paucity of Israeli constitutionalism (the section is not meant as an overview), the paper describes a history of Israel's authority through a careful examination of the promulgation of laws in the official records, from independence in 1948 through the formation of the Constituent Assembly on February 14, 1949 and its metamorphosis into today's Knesset two days later. *Promulgation* is the act of publication through which the status of a decision switches from private to public, i.e., by which a decision takes effect. Comparing the constitutional prescriptions (or lack thereof) with the actual conditions under which internal decisions become law may cast new light on questions in jurisprudence and sociology.

My historical analysis exposes a contradiction of authority. Israel's founding decision, promulgated as Official Gazette No. 1, establishes Israeli authority and prescribes a constituent assembly. The ensuing Constituent Assembly adopted the Transition Law which is not the Constitution. The way out was a new start: Israel abandoned its official record, the Official Gazette, and started a new one, Reshumot. Thereafter, the Knesset's decisions, promulgated through the new record, were no longer numbered and no longer include an authority preamble. The Official Gazette, which was published in both Hebrew and Arabic, was replaced by Reshumot that only appeared in Hebrew. The implication is that laws no longer were promulgated in Arabic, whose newly indeterminate status still beguiles the Israeli public and institutions to this day.

If you accept my historical and conceptual analyses, you will gain an innovative perspective of Israel's constitutional order: The Law of Transition should be considered Israel's formal but

unofficial Constitution. This formulation has the advantage of clarifying the taxonomy of Israel vs the U.K.: the U.K. has an official but informal Constitution; Israel has an unofficial formal constitution. I suggest that my model has considerable utility in accounting for the unfolding trajectory of the relationship between the Knesset and the Supreme Court, and in evaluating the Supreme Court's constitutional law reforms.

The paper advances an innovative methodology: to track authority I follow its official record. Concretely, I examine the official gazette as a record of decisions. Admittedly, this approach would yield only the public face of the body or organization in question, but in this limitation lies its power. It helps us abstract the skeleton of the system, or, what I call the constitutional order. Then, a useful perspective is achieved by comparing what is expected with what is revealed in practice — the similarity and contrast between what one says and what one does.

2. The poverty of Israeli constitutionalism

It is common to liken Israel's constitutional situation to that of the United Kingdom's. Israeli highschool students encounter that comparison in civics lessons, and first-year law students learn it casually and uncritically in the mandatory introductory class to constitutional law. The comparison has had a long pedigree, and already in 1956, Menachem Begin, then a member of Knesset, speaking in the Knesset, sounded the alarm:

> Why don't we have a constitution? … the common answer ... is that England, too, does not have a constitution. Out of respect for those distinguished scholars I would like to assume that they mean a written constitution. You have to be either ignorant or a sworn enemy of England to say that that country does not have a constitution. I am not a sworn

> enemy of England, and therefore believe that we have the right and obligation to say that England does have a constitution, a precise, detailed and committing constitution that is partly unwritten.

Begin's warning has not been heeded. A recent high-profile constitutional law compendium[5] tells us in the historical introduction that

> Similarly to the United Kingdom and New Zealand, Israel is one of the few countries that is *yet* to adopt a formal, complete, unified constitution. (My italics)

This description is technically correct but actually misleading. It overstates similarities, and has a normalizing, soothing effect by grouping Israel with some well-established democracies. The key here is the misguided "yet" that presents the U.K. and N.Z. constitutions as deficient. Flexible, changing and informal as they may be, these constitutions *exist*. The same cannot be said with factual certainty about Israel's constitution. What should be a factual question turns in Israel into a matter of opinion.

One may ask, does Israel really need a constitution? Aren't there frivolous, useless and even harmful constitutions aplenty that may challenge our notions about the utility and desirability of the concept? But these normative considerations, turning the problem into an *ought*-problem, must come second. They only distract from what is logically more fundamental, the *is*-problem: Israel's pervasive constitutional indecision and factual ambiguity about whether the country has a constitution and what it may be.

---

[5] *Israeli Constitutional Law in the Making, ed. Gideon Sapir, Daphne Barak-Erez, Aharon Barak (Oxford: Hart, 2013), p. 99.*

Indeed, the *ought* obfuscates the *is*. Israelis are brought up in a version of pre-1789 America, where the merits of adopting a constitution are contested within an everlasting intellectual discourse. The opening article in the said compendium is titled, W*hy a Constitution — in General and in Particular in the Israeli Context?*[6] A strange duality has taken root: whether to adopt a constitution and whether Israel has a constitution have become a matter of a purely theoretical debate that is not expected to be decided politically, while the court has introduced a de facto constitutionalism to blunt the constitutional dissonance. Israel is a powerhouse of constitutional law scholarship, and elite law schools, conferences and academic journals worldwide feature Israeli academics aplenty. This is a story full of ironies that may seem contradictory at first blush but are easily accounted for with a bit of a sociological reflection. The peculiar mess of Israeli constitutionalism has been enabled by as well as spurred a thriving cottage industry.

Concretely, let me briefly illustrate the seemingly universal perspective of Israeli constitutional law scholarship. Consider the rather typical "Historical Survey" in *Constitutional Law of Israel* by Suzie Navot (Kluwer Law International: 2007; p. 27-29):

> After the termination of the British Mandate, on 14 May 1948, the members of the People's Council convened and declared the establishment of the State of Israel. The People's Council became then the 'Provisional Council of State', which was the supreme organ of the State. The Declaration of Independence included a provision regarding the election of a 'Constituent Assembly' which was to frame a constitution. Following the election of the Constituent Assembly, the Provisional Council of State dispersed and its

[6] By Gideon Sapir, Ibid, p. 10.

> legislative powers were transferred to the elected Constituent Assembly, which in effect possessed both legislative and constituent authority. In Its First Session, on 17 February 1949, the Constituent Assembly enacted the Transition Law, 1949, by force of which the Constituent Assembly turned itself into 'the First Knesset'.[7]

In Navot's telling, it is well after February 1949— and in fact in 1951—, that the constitutional history begins in earnest. The post-1951 narrative is bestowed with more and better attention and balloons in terms of word count. Also note the erroneous date of February 17 in Nevot's text, and compare it with February 16, 1949, which is the watershed identified in this paper.

3. The Declaration, Official Gazette: No. 1

To supplement the missing bits in the traditional constitutional narrative, I will track Israel's official record. My starting point is the founding of the state, Israeli authority and the Official Gazette on May 14, 1948, in Tel Aviv. The date was determined in Westminster: As of midnight that day, the British Mandate of Palestine was to expire. The locals would be left masters of their own fate, independent of the Crown.

Reacting to the impending deadline, the Jewish establishment in Palestine took action. Just hours before the deadline, at 4 p.m. on that Friday, a small, by-invitation-only audience crowded the modest main hall on the ground floor of the Tel Aviv Museum of Art on Rothschild Avenue in

[7] Navot mentioned the Provisional State Council's decision that transfers its powers to the constituent assembly, a decision that plays a role in Israeli constitutionalism scholarship, but none in the account here, for several reasons. The decision does not alter the facts and theory I report here, nor do I believe it to determine the future course of the Israeli judiciary and jurisprudence. In my view, it was little more than an orderly administrative termination of the Council, intended to allow a clear start with full authority to the upcoming Constituent Assembly. In a story replete with ironies, here is yet another: the decision proved a distraction from the onset, and a great deal of the debate in the First Session, notably the exchange between Begin and Ben-Gurion, concerned its legal implications.

the city center, and thousands more gathered outside. David Ben Gurion read aloud the Declaration of the Establishment of the State of Israel (better known as the Declaration of Independence) to which fellow Jewish leaders joined their signatures. A new entity was born.[8]

At a little over half the length of its American counterpart, the Declaration is the nation's civic core. Israelis encounter it in school, and it is a source of quotes and perhaps inspiration for leaders in and outside the country. However, not all sections receive the same attention. Well known is the dramatic history of the Jewish people with the memorable opening line "Eretz Israel was the birthplace of the Jewish people"[9] —a statement which, as Israel's most prominent public intellectual Yeshayahu Leibowitz famously noted, brazenly contradicts the traditional Torah narrative where Mount Sinai, in the desert after the exodus from Egypt and before entering

---

[8]The Declaration was *not* of independence. The British revoked their authority on the land, and no act of severance was called for. The mistake appeared at the very start: the invitations to the ceremony cited "independence."
By comparison, the Americans founders did not establish a new entity but severed the ties of the already extant states with their sovereign. The American declaration truly proclaims independence.
Compare with India, which celebrates Independence Day on August 15, marking the day in 1947 when the Indian Independence Act, enacted by the U.K Parliament a month earlier, came into effect. There was, in fact, an Indian independence declaration. The Purna Swaraj or "self-rule" in Hindi was a declaration of intention by the Indian National Congress. Published on January 26, 1930, it ends thus:

> We therefore hereby solemnly resolve to carry out the Congress instructions issued from time to time for the purpose of establishing *Purna Swaraj*.

Exactly twenty years later, on January 26, 1950, the Indian constitution, enacted by a constituent assembly on November 26, 1949, came into effect.

[9] Here and in later decisions, I follow *Laws of the State of Israel, Authorized Translation from the Hebrew* (The Declaration is in Vol. 1, p. 3). Note that Law and Administration Ordinance voids English's official status, but not Arabic's. As far as I can tell, the Ordinances of the Provisional Council of State were promulgated also in Arabic, but later Laws were translated to Arabic by the Justice Ministry.
Note, however, that even an authorized translation does not amount to a promulgated text. See, for instance, the following clarification from a Japanese government website:

> The translations contained in the Japanese Law Translation Database System are not official texts, and not all of the translations are finalized versions. Only the original Japanese texts of the laws and regulations have legal effect, and the translations are to be used solely as reference materials to aid in the understanding of Japanese laws and regulations. The government of Japan is not responsible for the accuracy, reliability or currency of the legislative material provided in this website, or for any consequence resulting from use of the information in this website. For all purposes of interpreting and applying law to any legal issue or dispute, users should consult the original Japanese texts published in the Official Gazette.

the Promised Land, plays that critical role. Toward the end are moving promises of a future of equality, peace and justice that many like to invoke, often in a rebuke of a lesser present.[10]

Between past and future appear two paragraphs, rooted in the moment and with legal implications. The first, in a large font, parallels the climax when Ben Gurion dramatically raised his voice to pronounce the new state. The anticlimax second dully prescribes institutional arrangements, and christens the new entity "Israel."[11]

> ACCORDINGLY WE, MEMBERS OF THE PEOPLE'S COUNCIL, REPRESENTATIVES OF THE JEWISH COMMUNITY OF ERETZ-ISRAEL AND OF THE ZIONIST MOVEMENT, ARE HERE ASSEMBLED ON THE DAY OF THE TERMINATION OF THE BRITISH MANDATE OVER ERETZ-ISRAEL AND, BY VIRTUE OF OUR NATURAL AND HISTORIC RIGHT AND ON THE STRENGTH OF THE RESOLUTION OF THE UNITED NATIONS GENERAL ASSEMBLY, HEREBY DECLARE THE ESTABLISHMENT OF A JEWISH STATE IN ERETZ-ISRAEL, TO BE KNOWN AS THE STATE OF ISRAEL.
>
> WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the

[10] Note, for instance, the Opening of the Knesset ceremony, e.g, of the 23rd Knesset on March 16, 2020 which included an audio record of Ben Gurion reading the Declaration's first paragraph as well as a later one of a well curated selection of the promises for the future. You can see from the video (starting at minute 8:45) that the audio files were welded seamlessly.

[11] To gauge familiarity with the contents of the Declaration, I approached several Israeli acquaintances. Thoughtful and well educated as they come, these participants in a highly unscientific survey, were not aware of, and sometimes truly surprised to learn about, the constitution commitment therein.

> 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 second, "boring" paragraph articulates the new state's very first commitment, to govern through a constitution, complete with an ambitious deadline for execution: October 1, 1948. The juxtaposition of the attention-seeking announcement with the administrative formalities already hints at what is to come. Just observe that though the new state was officially named "Israel" in the second paragraph, it goes today by what should actually be the rather informal "State of Israel," of the first. And the name that should be more formal, "Israel," is considered casual[12].

Earlier drafts of the Declaration did not mention a constitution, but Ben Gurion penciled it in to echo U.N. Resolution 181, of November 29 the previous year, which gave the international go-ahead to the establishment of Jewish and Arab constitutional governments in Palestine. However useful, the insertion appears to have been a cynical action meant to maximize international recognition of the new state, and not motivated by any serious intention to carry it out. The deadline is the one demanded by Resolution 181.

[12] Here is a typical example, from 1956: Convention d'extradition entre l'État d'Israël et le grand-duché du Luxembourg (the official text is in French). Throughout this rather formal document, you will find references to "State of Israel," and even to "the Government of the State of Israel." However, if we were to maintain the naming convention introduced by the Declaration, "Israel" or "the Government of Israel" would have been more appropriate. We see that even in government usage, "State of Israel" is considered more formal than the supposedly casual "Israel."

The Declaration not only turned a new page in Jewish political history, but literally started a new chronicle. Continuing an excellent British practice,[13] the new state would promulgate official decisions through a brand new public record, to be called *Official Gazette— Iton Rishmi* (עיתון רשמי) in Hebrew, or *Al-Jaridat Al-Rasmiyat* (الجريدة الرسمية) in Arabic.[14]

The Declaration inaugurated the record as "Iton Rishmi: Number 1."

[13] Not only British. Promulgation is at the heart of government. Promulgation in France is regulated by the Civil Code Article 1:

> Les lois et, lorsqu'ils sont publiés au Journal officiel de la République française, les actes administratifs entrent en vigueur à la date qu'ils fixent ou, à défaut, le lendemain de leur publication. Toutefois, l'entrée en vigueur de celles de leurs dispositions dont l'exécution nécessite des mesures d'application est reportée à la date d'entrée en vigueur de ces mesures.

An example of British influence in Hong Kong, where the Basic Law provides for legislation and promulgation procedures (articles 17, 62(5), 73(1), 74, and others) that still echoe British traditions. The Legco website, clarifying How Laws Are Made, also pays attention to promulgation:

> A bill passed by the Legislative Council shall take effect only after it is signed and promulgated by the Chief Executive. The Chief Executive promulgates the law enacted by the Legislative Council (i.e. the Ordinance) through publication in the Gazette. The Ordinance commences on the day of publication in the Gazette or, if provision is made for it to commence on another day, on that other day.

Promulgation in Israel is informal and perhaps unofficial. The Knesset website, explaining Legislation Procedures, concludes with a rather casual reference to promulgation:

> חוק נכנס לתוקף עם פרסומו ב"רשומות".

(An act takes effect with its publication in Reshumot [the post-February 16 Gazette])

But no law actually prescribes promulgation today. By contrast, until February 16, 1949, promulgation of Ordinances (as acts were called) through the Official Gazette was prescribed by a formal and official constitutional procedure.

[14] The Israeli term *Al-Jaridat Al-Rasmiyat* (الجريدة الرسمية) is identical to the one used in other Arab countries. See, for instance, the promulgation of the 2014 Egyptian constitution in the Official Gazette of Egypt. The Turkish term is similar: Resmî Gazete.

ישראל
הממשלה הזמנית

עתון רשמי

מס׳ 1 | תל-אביב, ה׳ באייר תש״ח 14.5.1948 | עמ׳ 1

הכרזה על הקמת מדינת ישראל

בארץ-ישראל קם העם היהודי, בה עוצבה דמותו הרוחנית, הדתית והמדינית, בה חי חיי קוממיות ממלכתית, בה יצר נכסי תרבות לאומיים וכלל-אנושיים והוריש לעולם כולו את ספר הספרים הנצחי.

לאחר שהוגלה העם מארצו בכוח הזרוע שמר לה אמונים בכל ארצות פזוריו, ולא חדל מתפלה ומתקוה לשוב לארצו ולחדש בתוכה את חירותו המדינית.

מתוך קשר היסטורי ומסורתי זה חתרו היהודים בכל דור לשוב ולהאחז במולדתם העתיקה; ובדורות האחרונים שבו לארצם בהמונים, וחלוצים, מעפילים ומגינים הפריחו נשמות, החיו שפתם העברית, בנו כפרים וערים, והקימו ישוב גדל והולך השליט על משקו ותרבותו, שוחר שלום ומגן על עצמו, מביא ברכת הקידמה לכל תושבי הארץ ונושא נפשו לעצמאות ממלכתית.

בשנת תרנ״ז (1897) נתכנס הקונגרס הציוני לקול קריאתו של הוגה חזון המדינה היהודית תיאודור הרצל והכריז על זכות העם היהודי לתקומה לאומית בארצו.

זכות זו הוכרה בהצהרת בלפור מיום ב׳ בנובמבר 1917 ואושרה במנדט מטעם חבר הלאומים, אשר נתן במיוחד תוקף בין-לאומי לקשר ההיסטורי שבין העם היהודי לבין ארץ-ישראל ולזכות העם היהודי להקים מחדש את ביתו הלאומי.

השואה, שנתחוללה על עם ישראל בזמן האחרון, בה הוכרעו לטבח מיליונים יהודים באירופה, הוכיחה מחדש בעליל את ההכרח בפתרון בעית העם היהודי מחוסר המולדת והעצמאות על ידי חידוש המדינה היהודית בארץ-ישראל, אשר תפתח לרווחה את שערי המולדת לכל יהודי ותעניק לעם היהודי מעמד של אומה שוות-זכויות בתוך משפחת העמים.

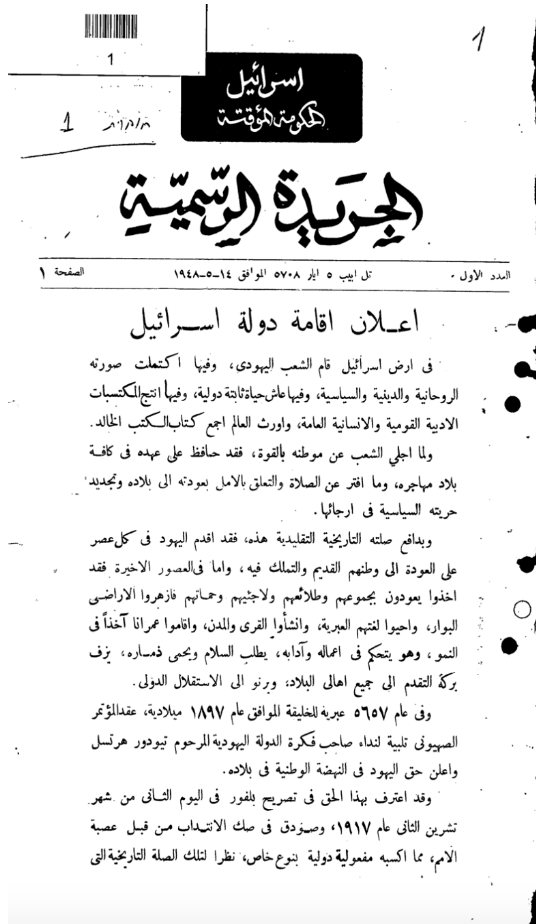
שארית הפליטה שניצלה מהטבח הנאצי האיום באירופה, ויהודי ארצות אחרות לא חדלו להעפיל לארץ-ישראל, על אף כל קושי, מניעה וסכנה, ולא פסקו לתבוע את זכותם לחיי כבוד, חירות ועמל-ישרים במולדת עמם.

במלחמת העולם השניה תרם הישוב העברי בארץ את מלוא-חלקו למאבק האומות השוחרות חירות ושלום נגד כוחות הרשע הנאצי, ובדם חייליו ובמאמצו המלחמתי קנה לו את הזכות להמנות עם העמים מייסדי ברית האומות המאוחדות.

ב־29 בנובמבר 1947 קיבלה עצרת האומות המאוחדות החלטה המחייבת הקמת מדינה יהודית בארץ-ישראל; העצרת תבעה מאת תושבי ארץ-ישראל לאחוז בעצמם בכל הצעדים הנדרשים מצדם הם לביצוע ההחלטה. הכרה זו של האומות המאוחדות בזכות העם היהודי להקים את מדינתו אינה ניתנת להפקעה.

זוהי זכותו הטבעית של העם היהודי להיות ככל עם ועם עומד ברשות עצמו במדינתו הריבונית.

לפיכך נתכנסנו, אנו חברי מועצת העם, נציגי הישוב העברי והתנועה הציונית, ביום סיום המנדט הבריטי על ארץ-ישראל, ובתוקף זכותנו הטבעית וההיסטורית ועל יסוד החלטת עצרת האומות המאו־חדות אנו מכריזים בזאת על הקמת מדינה יהודית בארץ-ישראל, היא מדינת ישראל.



اسرائيل
الحكومة المؤقتة

الجريدة الرسمية

العدد الاول | تل ابيب ٥ ايار ٥٧٠٨ الموافق ١٤-٥-١٩٤٨ | الصفحة ١

اعلان اقامة دولة اسرائيل

فى ارض اسرائيل قام الشعب اليهودى، وفيها اكتملت صورته الروحانية والدينية والسياسية، وفيها عاش حياة ثابتة دولية، وفيها انتج المكتسبات الادبية القومية والانسانية العامة، واورث العالم اجمع كتاب الكتب الخالد.

ولما اجلي الشعب عن موطنه بالقوة، فقد حافظ على عهده فى كافة بلاد مهاجره، وما افتر عن الصلاة والتعلق بالامل بعودته الى بلاده وتجديد حريته السياسية فى ارجائها.

وبدافع صلته التاريخية التقليدية هذه، فقد اقدم اليهود فى كل عصر على العودة الى وطنهم القديم والتملك فيه، واما فى العصور الاخيرة فقد اخذوا يعودون بجموعهم وطلائعهم ولاجئيهم وحماتهم فازهروا الاراضى البوار، واحيوا لغتهم العبرية، وانشأوا القرى والمدن، واقاموا عمرانا آخذاً فى النمو، وهو يتحكم فى اعماله وآدابه، يطلب السلام ويحمى ذماره، يزف بركة التقدم الى جميع اهالى البلاد، ويرنو الى الاستقلال الدولى.

وفى عام ٥٦٥٧ عبرية للخليقة الموافق عام ١٨٩٧ ميلادية، عقد المؤتمر الصهيونى تلبية لنداء صاحب فكرة الدولة اليهودية المرحوم تيودور هرتسل واعلن حق اليهود فى النهضة الوطنية فى بلاده.

وقد اعترف بهذا الحق فى تصريح بلفور فى اليوم الثانى من شهر تشرين الثانى عام ١٩١٧، وصودق فى صك الانتداب من قبل عصبة الامم، مما اكسبه مفعولية دولية بنوع خاص، نظرا لتلك الصلة التاريخية التى

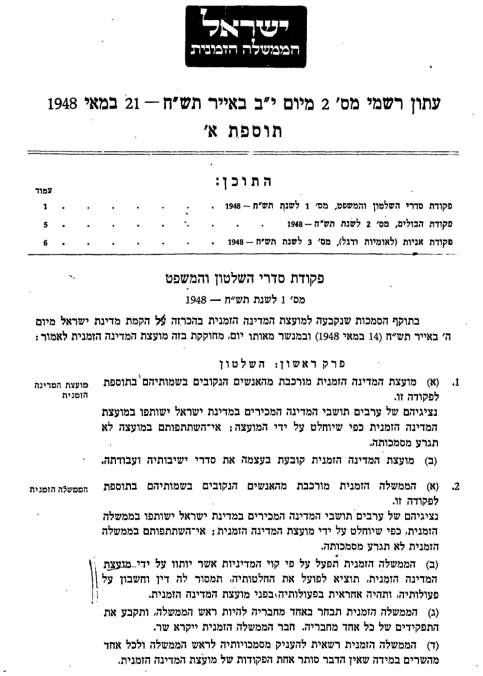
(**Left and Right: Promulgation of the Declaration in Arabic and Hebrew in Official Gazette No. 1**. Top-down: In a white font inside the black rectangle: “Israel | The Provisional Government;” immediately below in huge black letters the record’s name; number, location (Tel Aviv) and dates; below in bold “A Pronouncement of the Establishment of the State of Israel.” The text below is the first part of the Declaration.)

4. Official Gazette: No. 2 to 50

In the week following the Declaration, the Provisional State Council, the new name of the Jewish establishment's People Council which was now the acting legislature, adopted the 23-article Law and Administration Ordinance (Henceforth: LAO), which established legal continuity and a framework for government agency. On May 21 it entered the official record as Iton Rishmi No. 2.

Overall, the LAO is reasonable and well crafted, a document fit for purpose and nicely executed given the pressing exigencies and trying circumstances. In transparency of form that is consistent throughout the Provisional Council's legislation and is remarkable only by its future absence, the ordinance's language takes pain to explicitly articulate its authority by aligning the decision with the deciding body. The enacting clause elaborates:

> BY VIRTUE of the power conferred upon the Provisional Council of State by the Declaration of the Establishment of the State of Israel, of the 5th Iyar, 5708 (14th May, 1948) and by the Proclamation of that date, the PROVISIONAL COUNCIL OF STATE hereby enacts as follows



ישראל
המשלה הזמנית

עתון רשמי מס' 2 מיום י"ב באייר תש"ח — 21 במאי 1948
תוספת א'

התוכן:

פקודת סדרי השלטון והמשפט
מס' 1 לשנת תש"ח — 1948

בתוקף הסמכות שנקבעה למועצת המדינה הזמנית בהכרזה על הקמת מדינת ישראל מיום ה' באייר תש"ח (14 במאי 1948) ובמגשר מאותו יום, מחוקקת בזה מועצת המדינה הזמנית לאמור:

פרק ראשון: השלטון

1. (א) מועצת המדינה הזמנית מורכבת מהאנשים הנקובים בשמותיהם בתוספת לפקודה זו. — מועצת המדינה הזמנית

נציגיהם של ערבים תושבי המדינה המכירים במדינת ישראל ישותפו במועצת המדינה הזמנית כפי שיוחלט על ידי המועצה; אי־השתתפותם במועצה לא תגרע מסמכותה.

(ב) מועצת המדינה הזמנית קובעת בעצמה את סדרי ישיבותיה ועבודתה.

2. (א) הממשלה הזמנית מורכבת מהאנשים הנקובים בשמותיהם בתוספת לפקודה זו. — הממשלה הזמנית

נציגיהם של ערבים תושבי המדינה המכירים במדינת ישראל ישותפו בממשלה הזמנית, כפי שיוחלט על ידי מועצת המדינה הזמנית; אי־השתתפותם בממשלה הזמנית לא תגרע מסמכותה.

(ב) הממשלה הזמנית תפעל על פי קוי המדיניות אשר יותוו על ידי מועצת המדינה הזמנית, תוציא לפועל את ההחלטותיה, תמסור לה דין וחשבון על פעולותיה, והיה אחראית בפעולותיה בפני מועצת המדינה הזמנית.

(ג) הממשלה הזמנית תבחר באחד מחבריה להיות ראש הממשלה, ותקבע את התפקידים של כל אחד מחבריה. חבר הממשלה הזמנית ייקרא שר.

(ד) הממשלה הזמנית רשאית להעניק מסמכויותיה לראש הממשלה ולכל אחד מהשרים במידה שאין הדבר סותר אחת הפקודות של מועצת המדינה הזמנית.

(**Right**: first page of *Law and Administration Ordinance* in Iton Rishmi No. 2)

The *Third Chapter: Legislation* names new laws Ordinances to emphasize the provisional nature of the enacting body:[15]

> Article 7:
>
> (a) The Provisional Council of State is the legislative authority. The laws shall be called "Ordinances".
>
> (b) Every Ordinance shall be signed by the Prime Minister, the Minister of Justice and the Minister or Ministers charged with the implementation of the Ordinance.
>
> Article 10: Official Gazette
>
> (a) Every Ordinance shall come into force on the date of its publication in the Official Gazette, unless it has been provided therein that it shall come into force on an earlier or a later date than the date of publication. The date of the Official Gazette is deemed to be the date of publication.
>
> (b) The publication of an Ordinance in the Official Gazette shall be evidence that such Ordinance has been duly enacted and signed.
>
> (c) The provisions of this section apply also to regulations and emergency regulations.

Article 15(b) (“Any provision in the law requiring the use of the English language is repealed.”) voids the official status of the English language. With Article 11 re-effectuating the legislation of the British Mandate (“The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948)

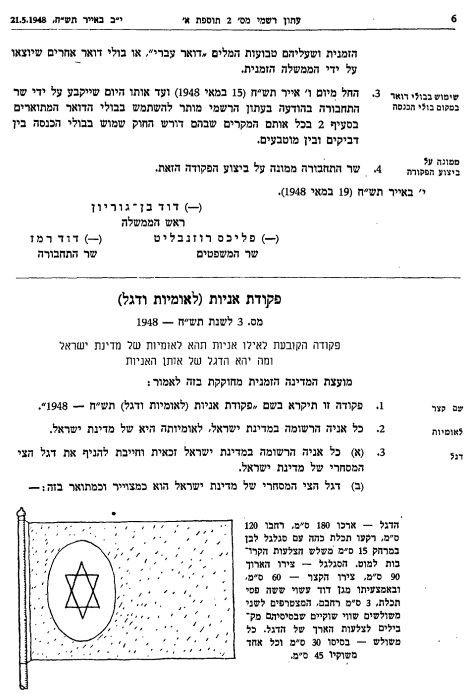
[15] See the record of the Provisional Council of State from May 16, 1948.

shall remain in force.”), Hebrew and Arabic (the official languages before 1948, alongside English) had remained official.

The final article establishes retroactive legal continuity and reiterates the connection to the Declaration:

Article 23:

This Ordinance shall have effect retroactively as from the eve of the Sabbath, 6th Iyar, 5708 (15th May, 1948), and its provisions amplify and interpret the provisions of the Proclamation of the Provisional Council of State of the 5th Iyar, 5708 (14th May, 1948).



6 עתון רשמי מס׳ 2 תוספת א׳ י״ב באייר תש״ח, 21.5.1948

הזמנית ושעליהם טבועות המלים „דואר עברי״, או בולי דואר אחרים שיוצאו על ידי הממשלה הזמנית.

שימוש בבולי דואר במקום בולי הכנסה 3. החל מיום ו׳ אייר תש״ח (15 במאי 1948) ועד אותו היום שייקבע על ידי שר התחבורה בהודעה בעתון הרשמי מותר להשתמש בבולי הדואר המתוארים בסעיף 2 בכל אותם המקרים שבהם דורש החוק שמוש בבולי הכנסה בין דביקים ובין מוטבעים.

ממונה על ביצוע הפקודה 4. שר התחבורה ממונה על ביצוע הפקודה הזאת.

י׳ באייר תש״ח (19 במאי 1948).

(—) דוד בן־גוריון
ראש הממשלה

(—) פליכס רוזנבליט
שר המשפטים

(—) דוד רמז
שר התחבורה

פקודת אניות (לאומיות ודגל)

מס. 3 לשנת תש״ח — 1948

פקודה הקובעת לאילו אניות תהא לאומיות של מדינת ישראל ומה יהא הדגל של אותן האניות

מועצת המדינה הזמנית מחוקקת בזה לאמור:

שם קצר 1. פקודה זו תיקרא בשם „פקודת אניות (לאומיות ודגל) תש״ח — 1948״.

לאומיות 2. כל אניה הרשומה במדינת ישראל, לאומיותה היא של מדינת ישראל.

דגל 3. (א) כל אניה הרשומה במדינת ישראל זכאית וחייבת להניף את דגל הצי המסחרי של מדינת ישראל.

(ב) דגל הצי המסחרי של מדינת ישראל הוא כמצוייר וכמתואר בזה:—

הדגל — ארכו 180 ס״מ, רחבו 120 ס״מ, רקעו תכלת כהה עם סגלגל לבן במרחק 15 ס״מ משלש הצלעות הקרו־בות למוט. הסגלגל — צירו הארוך 90 ס״מ, צירו הקצר — 60 ס״מ, ובאמצעיתו מגן דוד עשוי ששה פסי תכלת, 3 ס״מ רחבם, המצטרפים לשני משולשים שווי שוקיים שבסיסיהם מק־בילים לצלעות הארך של הדגל. כל משולש — בסיסו 30 ס״מ וכל אחד משוקיו 45 ס״מ.

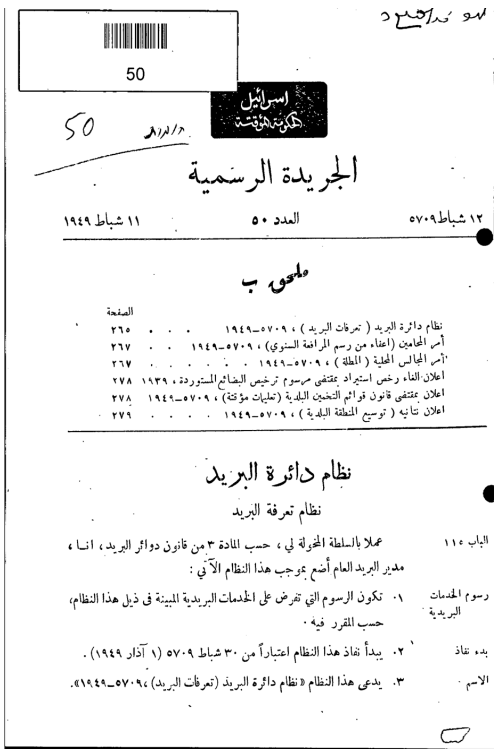
(**Right**: The *Ships (Nationality and Flag) Ordinance* in Iton Rishmi No. 2)

The Provisional Council’s decisions are marked by constitutional daring – or naivete. In hindsight we can appreciate the succinct *Ships (Nationality and Flag) Ordinance*, the third Ordinance to be enacted, on May 19, which acknowledges, if in passing, the nationality of the state:

> The nationality of every ship registered in the State of Israel shall be that of the State of Israel. (§2)

While the choice of a maritime flag arose a vivid discussion, the mention of "Israeli nationality" drew little attention. It is, however, the only piece of Israeli legislation to date to acknowledge Israeli nationality, alongside the *Shipping Law* that in 1960 repealed the Ordinance but maintained the phrase.[16]

In its final law the Provisional Council of State prescribed the oath of office for delegates to the upcoming constituent assembly. It was published in Iton Rishmi No. 50, Page 174 on February 11, in Hebrew and Arabic. That was the last time we heard from official Israel.


50

اسرائيل
الحكومة المؤقتة

الجريدة الرسمية

١٢ شباط ٥٧٠٩ — العدد ٥٠ — ١١ شباط ١٩٤٩

ملحق ب

الصفحة

نظام دائرة البريد (تعرفة البريد) ، ٥٧٠٩–١٩٤٩ . . . ٢٦٥
أمر المحامين (اعفاء من رسم المزاولة السنوي) ، ٥٧٠٩–١٩٤٩ . . ٢٦٧
أمر المحاكم المحلية (المطلة) ، ٥٧٠٩–١٩٤٩ . . . . . ٢٦٧
اعلان الغاء رخص استيراد بمقتضى مرسوم ترخيص البضائع المستوردة ، ١٩٣٩ ٢٧٨
اعلان بمقتضى قانون قوائم التخمين البلدية (تعليات مؤقتة) ، ٥٧٠٩–١٩٤٩ ٢٧٨
اعلان تثنية (توسيع المنطقة البلدية) ، ٥٧٠٩–١٩٤٩ . . . . ٢٧٩

نظام دائرة البريد

نظام تعرفة البريد

الباب ١١٥ عملا بالسلطة المخولة لي ، حسب المادة ٣ من قانون دوائر البريد ، انـا ، مدير البريد العام أضع بموجب هذا النظام الآتي :

رسوم الخدمات البريدية ١. تكون الرسوم التي تفرض على الخدمات البريدية المبينة في ذيل هذا النظام، حسب المقرر فيه .

بدء نفاذ ٢. يبدأ نفاذ هذا النظام اعتباراً من ٣٠ شباط ٥٧٠٩ (١ آذار ١٩٤٩) .

الاسم ٣. يدعى هذا النظام « نظام دائرة البريد (تعرفة البريد) ، ٥٧٠٩–١٩٤٩».

(**Right**: The most recent Official Gazette, No. 50, promulgated in Arabic)

[16] See CA 8573/08 *Ornan v. Ministry of Interior* (2013, Isr.). Uzi Ornan, joined by 20 civic-minded Israelis, asked the court to order the government to register the plaintiffs as Israeli nationals in the population registry, a status that appears under the rubric "nationality" in government-issued identity cards. Ironically, the interior ministry's list of 137 permissible nationalities excludes "Israel." A lower court rejected the appeal on "institutional ground." The high bench concurred and concluded (my translation): "...at this time it is still the case that citizenship is distinct from nationality."

5. The Constituent Assembly is distracted

The Declaration committed the new state to a constitutional government and provided an ambitious deadline, October 1, for adoption of a constitution by a constituent assembly. The missed deadline notwithstanding, a national poll took place on January 25, 1949 to elect the constituent assembly. The country was at war, Jerusalem largely disconnected from the major cities. Still, on February 14, over 100 of the Constituent Assembly's 120 elected delegates convened in the Jewish Agency headquarters in the capital, and pledged "to be loyal to the State of Israel and to carry out my mandate in the Constituent Assembly."

The trappings of the emerging Jewish sovereignty must have inspired and awed delegates. The beginning seemed promising, with Council President Chaim Weizman presiding over the choice of speaker. "Whom do you propose?," he asked, and Yosef Sprinzak was swiftly elected. But as soon as the floor opened to debate the number of deputy speakers, the festive session turned into a farce, a tragicomic affair bordering on the surreal.[17]

At stake was neither whom to appoint, nor how many deputy speakers should discipline a future parliament. The question that proved insurmountable was both abstract and immaterial: how many deputy speakers to appoint to the constituent assembly? "I propose we elect two deputies," began one delegate; the next suggested to postpone the decision; the third, a young Menachem Begin, articulated a chain of legal reasoning against the assembly's authority to decide. By the time Begin concluded, the assembly was hopelessly distracted.

[17] Details and quotes are from the Knesset record of the first meetings on February 14, 1949, and the meetings that followed in the next two days. See hyperlinks in the text.

The debate became enmeshed within a meta-debate about the procedure of the debate itself and the assembly's authority to make decisions.

- I propose to end the debate and vote on the decision [to delegate the decision on the deputy speakers to a committee].
- I object to ending the debate. I would request the honorable constituent assembly not apply the guillotine to discussions ...
- (Speaker) Who is in favor of ending the debate? Who is against it? [No vote was recorded]
- No one yet argued against ending the debate.

And so it goes.

A delegate noted that the agenda did not list the deputy speakers as an item, triggering an exchange on the differences between an agenda and a program; one delegate complained about how the voting was conducted; another meanwhile insisted on the "right" to take a break; decisions were challenged the moment they were made; Begin never gave up on hearing from the justice minister; no idea, however frivolous or unhelpful, proposed from the floor could be tabled and everything was in principle to be put to a vote. After two hours of "disgrace," to quote another delegate, delegates settled on having two deputies (to be chosen the next day, it was decided) only for someone to complain that the option of four deputies had never been put to a vote. The session concluded with the national anthem Hatikva, for the second time that evening. Israeli parliamentarism would never recover.

Jerusalem was not about to experience a Philadelphia moment. Israel may not have had a full year of legislation behind it, but the constituent assembly was already mulling the meaning of procedure and the implication of the Provisional Council's decisions. Only once did Prime Minister David Ben Gurion speak, from the floor:

> There is no question here for an expert to answer. The constituent assembly is sovereign and is not tied to the decisions of the Provision Council of State, should it decide otherwise… Should the assembly decide there shall be 4, 6, 2 deputies or one deputy, by its decision it overrules the other article, and it is acting fully within its authority when canceling and changing, and no legal expert's opinion is needed. This is a sovereign assembly, and the proposal to choose two deputies or any other number is absolutely legal, and the matter depends solely on whatever the assembly should decide.

The next delegate to take the floor was Begin: "We asked for a legal opinion. I must insist on the legal reservation."

Read records of the time and you will see that leaders debated intelligently and converged to decide pressing, focused, "provisional" issues, but a hint that deliberations were to conclude in official decisions to stand for generations was enough to distract. The record of that fateful session may well be the most instructive document in Israeli history, a grain of sand that brilliantly reflects the world of Jewish politics from time immemorial and of Israeli politics for years to come.

The debate in the First Session was dominated by members of the opposition and backbenchers of the ruling *Mapai* party. Perhaps Ben Gurion and the other members of the Provisional Government who doubled as delegates to the Constituent Assembly were not fully engaged because they could smell the imminent combina (a workaround in Israeli vernacular). In the Second Session the next day, a new creature suddenly took over, a hybrid or bastard: it would take the constitution off the agenda and fuse the Constituent Assembly with the legislature. The delegates received the bill's draft the day before (i.e, February 14), the speaker reminded them. The implication is that from its first day, the Constituent Assembly was a charade.

Exhibiting a colossal breach of trust—recall the delegates' oath of office!— on February 16 during the Fourth Session, 77 delegates approved (11 abstained, none opposed) the *Transition Law* (or TL). Delegate Hillel Kook (of the Herut party) decried the act as a putsch.[18]

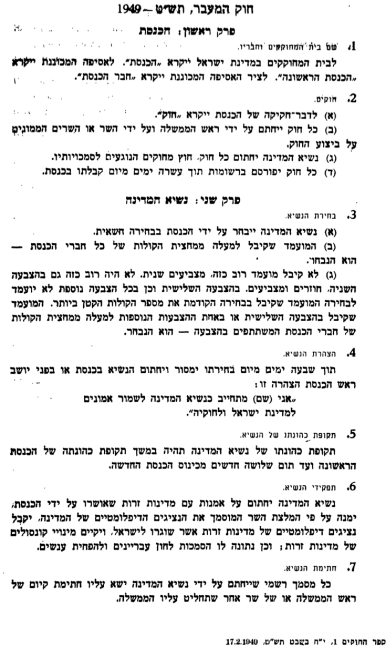
[18] Agassi, Joseph, *Liberal Nationalism For Israel: Towards An Israeli National Identity* (Gefen: Jerusalem, New York, 1995).

6. Transition Law, the Unofficial Constitution

With 15 short articles, the Transition Law tries to square the circle, and unsurprisingly fails to do the impossible. Was it a law or a constitution? It was not a constitution, the minister who presented the bill was clear. But he and other delegates stumbled, not knowing how to refer to and capture the slippery creature, alternating between and combining formulations. The speaker finally introduced it to a vote as "The Transition Constitution." (Chukat Maavar חוקת מעבר).[19]

The ambiguity has not been resolved. It lives on and has continued to flourish in court decisions and scholarly discourse. In the Supreme Court's famous *Mizrahi* decision (1995), sometimes referred to as Israel's Marbury moment, chief justice Aharon Barak called the TL "the minor constitution." The multitude of sobriquets testifies to a lack of clarity about the nature of the thing itself, and is, wittingly or not, a useful obfuscation strategy.

(**Image on the right:** The Transition Law in *Reshumot*)



חוק המעבר, תשיש–1949

פרק ראשון: הכנסת

1. שם בית המחוקקים וחבריו.
לבית המחוקקים במדינת ישראל ייקרא "הכנסת". לאסיפה המכוננת ייקרא "הכנסת הראשונה". לציר האסיפה המכוננת ייקרא "חבר הכנסת".

2. חוקים.
(א) לדבר-חקיקה של הכנסת ייקרא "חוק".
(ב) כל חוק ייחתם על ידי ראש הממשלה ועל ידי השר או השרים הממונים על ביצוע החוק.
(ג) נשיא המדינה יחתום כל חוק, חוץ מחוקים הנוגעים לסמכויותיו.
(ד) כל חוק יפורסם ברשומות תוך עשרה ימים מיום קבלתו בכנסת.

פרק שני: נשיא המדינה

3. בחירת הנשיא.
(א) נשיא המדינה ייבחר על ידי הכנסת בבחירה חשאית.
(ב) המועמד שקיבל למעלה ממחצית הקולות של כל חברי הכנסת — הוא הנבחר.
(ג) לא קיבל מועמד רוב כזה, מצביעים שניה. לא היה רוב כזה גם בהצבעה השניה, חוזרים ומצביעים בהצבעה השלישית וכן בכל הצבעה נוספת לא יועמד לבחירה המועמד שקיבל בבחירה הקודמת את מספר הקולות הקטן ביותר. המועמד שקיבל בהצבעה השלישית או באחת ההצבעות הנוספות למעלה ממחצית הקולות של חברי הכנסת המשתתפים בהצבעה — הוא הנבחר.

4. הצהרת הנשיא.
תוך שבעה ימים מיום בחירתו ימסור ויחתום הנשיא בכנסת או בפני ישב ראש הכנסת הצהרה זו:
"אני (שם) מתחייב כנשיא המדינה לשמור אמונים למדינת ישראל ולחוקיה".

5. תקופת כהונתו של הנשיא.
תקופת כהונתו של נשיא המדינה תהיה במשך תקופת כהונתה של הכנסת הראשונה ועד תום שלושה חדשים מכינוס הכנסת החדשה.

6. תפקידי הנשיא.
נשיא המדינה יחתום על אמנות עם מדינות זרות שאושרו על ידי הכנסת, ימנה על פי המלצת השר המוסמך את הנציגים הדיפלומטיים של המדינה, יקבל נציגים דיפלומטיים של מדינות זרות אשר שוגרו לישראל, ויקיים מינויי קונסולים של מדינות זרות; וכן נתונה לו הסמכות לחנן עבריינים ולהפחית עונשים.

7. חתימת הנשיא.
כל מסמך רשמי שייחתם על ידי נשיא המדינה ישא עליו חתימת קיום של ראש הממשלה או של שר אחר שתחליט עליו הממשלה.

ספר החוקים 1, י"ח בשבט תש"ט, 17.2.1949

[19] Even the "transition" in the name is questionable. Compare with an Ordin days before,"Transition Law to the Constituent Assembly," which articulates the target state of the transition (transition to what). Perhaps it is fitting that Transition Law renders transition not a process but a state.

Ordinance (LAO), which is overall straightforward and clear. To illustrate, try to decipher how a bill becomes a law based on Article 2:

> (a) An enactment of the Knesset shall be called a Law.
>
> (b) Every Law shall be signed by the Prime Minister and by the Minister or Ministers charged with its implementation.
>
> (c) The President of the State shall sign every Law, except Laws concerning his powers.
>
> (d) Every Law shall be published in *Reshumot* [sic] within ten days from the date of its being passed by the Knesset.

This instruction carelessly *names* a Knesset decision "Law" rather than stating that it *is*, or would be, the law — a nominal rather than substantive definition, which has the unfortunate consequence of voiding the word "law" of its usual meaning. (The problem is somewhat more pronounced in the Hebrew original.) Signatures are next to be added to what may be a Knesset decision or a law, and the bill-or-law ambiguity continues with the final stage of publication in the record, which rather than making a fact seems to come after the fact. To see how the key issue of legislation could have been improved, consult the LAO, which in Articles 7 and 10 (quoted above) provides substantive and clear definitions and specifies the "date of publication" for the law to come into force (though it remains uncertain under the LAO whether the several signatures specified there should be a prerequisite for the publication in the record).

Who is to enact the Transition Law itself? *Creatio ex nihilo*: To evade the problem, the Transition Law does not include an enacting clause, a legacy that continues to this day. Starting

with the TL, all Israeli laws —including the higher-status Basic Laws— do not include an enactment clause. Moreover, unlike the previous, pre-February 1949 laws, it as well as future laws was not promulgated in Arabic in addition to Hebrew.

In the absence of an enacting clause— starting with the Transition Law— Israeli laws appear in the record with an asterisk next to their title directing to a footnote, "adopted by the Knesset on [date]." Now comes a delicate point: it is important to note that such a footnote is critically different from an enacting clause and necessarily *cannot* be part of a decision promulgated as law.

To see why, consider that in, say, American or British laws, the enacting clauses are included in earlier drafts and in the final bill; Israeli bills, by contrast, naturally do not include the "adopted by... " formula. To see the point from another perspective, one may reflect on our normal use of email, which parallels the promulgation of a decision: Your draft letter identifies the author and recipient; press "send," and now your outgoing email carries a timestamp and will be stored in the Sent folder and acknowledged with the formula "on [date, time], [name, email] wrote:" on the recipient's end. But the passive-style "adopted by" is akin to making do with only the final step, the acknowledgement that appears after the fact.

This is an opportunity to sharpen our understanding of promulgation. A proper promulgation of laws, I suggest, is to result in "full" decisions (which explicate their authority) that can be viewed separately from the record through which they have been promulgated. Thus, to consider some federal act, we can make do with the full text of the decision, without recourse to the official

record through which it was promulgated. To continue the previous analogy, promulgation could be thought of as hitting *send*, by which the private draft becomes a relatively public and committing document, now part of the Sent folder (akin to the official gazette). But a printout of a single email, separately from other correspondences, will identify the sender— in effect a body of text is given an author and authority.

To clarify—there is little doubt that Transition Law or any other Law or Basic Law is part of Israel's legal corpus. But the Laws themselves do not project their authority. This puts the onus on the citizen to *discover* what the law is, and the law remains, in a sense, *private*[20], a status which undermines its legitimacy. (When the law is *public*, one may be expected to *know* or *learn* it.)

We may turn H.L.A. Hart's Rule of Recognition[21] on its head: Imagine you gain access to all the laws in the world (the full texts of the decisions, as if they were scattered on the floor). If you are in, say, New York, you will be able to identify the desired federal, state and city laws among the decisions scattered at your feet; these name the decision-making bodies that have decided them, and thus purport to speak their authority. But should you repeat the same exercise, only now looking for Israeli laws — and assuming the Hebrew is not a giveaway— you will find it challenging to identify the decisions you need. It is only because you are familiar in advance with Israeli pieces of legislation that you know how to look for them. Put another way: Israeli law post February 16 1949 is preferentially knowable to officials, relative to citizens; hence it is

[20] Perhaps this nuance is hard to grasp. The Knesset legal corpus is available, but availability does not make it authoritative. A Knesset decision remains, in a sense, a recommendation (the status is not sufficiently public). The quote at the beginning of this paper is an illustration that this theoretical distinction has real-world implications.
[21] H.L.A. HART, THE CONCEPT OF LAW 91 (Joseph Raz and Penelope Bullock eds., 2d ed. 1994). The rule of recognition, I suggest, could be usefully interpreted as a second-order rule that determines the relative priority of the official records.

not fair. This delicate point needs clarification: of course officials everywhere typically have an advantageous mastery of the statutes, but the public record is accessible to all. Accordingly, we should expect officials to have a better *understanding* of the law relative to the citizens, but not, in principle, to possess a better *knowledge* of it. This distinction is blurred in Israel because the post-1949 Israeli law is not properly promulgated.

The rather theoretical problem of promulgation presents an important sociological corollary, considering the efficacy of the law. The relatively weak power of the law in Israel is a telltale sign of considerable deficits with the authority of the government that decides, executes and adjudicates the law. While this empirical statement is in dire need of precision, it is my impression that it would be endorsed by Israelis of all walks of life with the possible exception of members of the legal establishment.

Although Legal Positivism and Natural Law (law as non-decisional) are classifications of schools in jurisprudence, it is useful to see these terms through a sociological lens— as ideologies. The ensuing weakness of Israeli law following February 16, 1949, indirectly promoted an interest in jurisprudence and political philosophy and gave rise to a Natural Law ideology in Israel, which can be seen in civic and law school education. This argument about Israel can be generalized as a hypothesis relating the emergence of non-decisional law (or legal, political and philosophical theories thereof) to the local inefficacy of decisional law.[22]

[22]The realm of *civil rights* in U.S. discourse roughly overlaps that of *human rights* in Israeli discourse. One speaks also of *human rights* in the US but to refer to a broader and softer category which is more theoretical than decisional or political. The distinction between the terms is important and goes to the heart of the respective political systems and cultures: Civil Rights connotes the Greek idea of the *citizen* as a member of a polity, a political animal with a private life and public persona, in Plato (from the early Socratic dialogues, through *Republic*, to *Laws*) and Aristotle to Alexander Hamilton and James Madison, and, perhaps surprisingly, Kant in *Perpetual Peace* and *What is Enlightenment?* (Hannah Arendt is a notable recent adherent to that tradition). Human Rights, by contrast, conjures *Man*, in the tradition of Hobbes, Locke and Rousseau, a social animal perhaps but not yet political. This school of

7. Pressing Restart: A New Record

But where shall the Transition Law be published? Not through the Official Gazette/Iton Rishmi — that would have amounted to an admission of error, exacerbating the problem of the constituent assembly's authority to deviate from its mandate. Article 13 of the Transition Law attempted a workaround:

> Everything required by law to be published in *Iton Rishmi* [sic] shall be henceforward be published in *Reshumot*; every reference in the law to *Iton Rishmi* shall henceforward be deemed to be a reference to Reshumot.

The state thus started a new record, the name of which was at first a matter of some debate. The Transition Law's draft called that new record *Megillot Ha-Medina* or the Books (lit. scrolls) of State, but the name sounded "pretentious," as one delegate put it, since it evoked Biblical megillot or Books. While the sentiment may seem in good taste, you have here an example of the instinctive distancing from anything that exudes officiality that would become a constant of Israeli politics. The assembly resolved to leave the matter open, but approved the TL anyway. The next day the chair opened the meeting by matter-of-factly proposing to name the record *Reshumot*, all agreed, and the law was published on the same day, February 17.

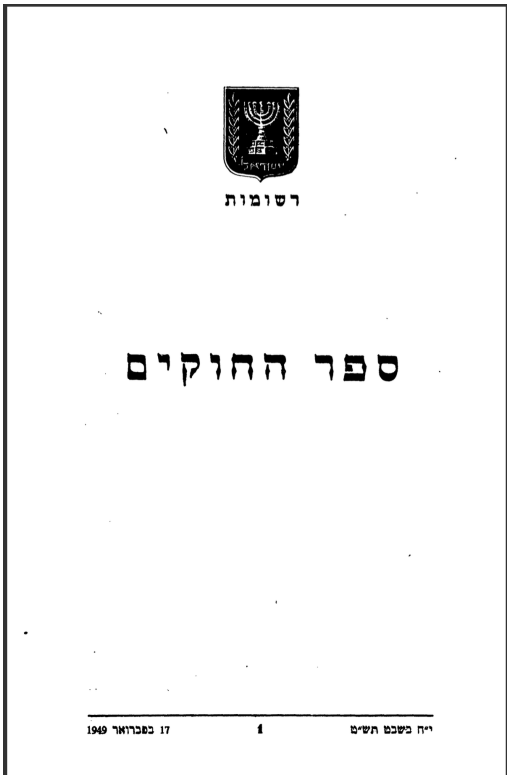
---

thought could be traced back to medieval and early Christian thought that emphasized the private consciousness in lieu of *civis romanus sum.*

If pretentiousness had been a concern, you would not find a more unassuming name than Reshumot. The word, indefinite and in plural, roughly means collated information (think of a spreadsheet). Reshumot are no longer numbered (I located them according to the year of publication). The name appears in a small font under the state's emblem.

A measure of dignity was restored through nesting a new layer within Reshumot: *Sefer Ha-khukim* (Book of Laws) has a serious sound. The series is ordered, but the counter had shrunk and was exiled to the bottom of the page, away from what it was to count.

(**Right**: the cover of Transition Law. Below the state emblem: "Reshumot," in a small font; in center, "Sefer Ha-khukim" (Book of Laws) in a large font; the footer includes the date and the counter for Book of Laws, "1". The emblem of the state includes the word "Israel" but otherwise nowhere — neither in the general format nor in any law's language (with minor exceptions) — does it indicate the names of the authority, the government that exercises its power or the very country.)


רשומות

ספר החוקים

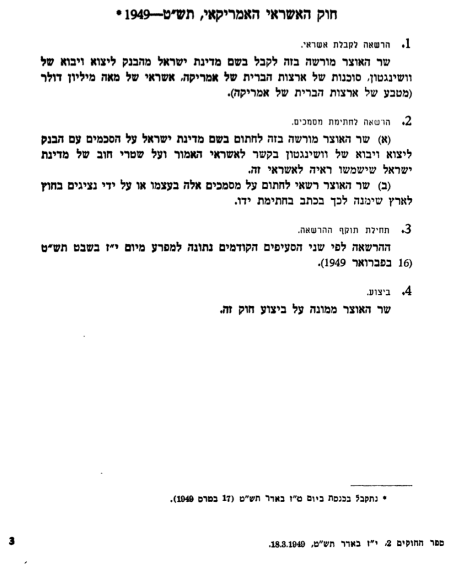
ז' בשבט תש"ט 1 17 בפברואר 1949

Flip the cover to read the actual law. Unlike Iton Rishmi, which included a fully informative header on every page to maintain a visual clue of context, Reshumot had no header.

The new record no longer orders the decisions. The Provisional Council's pronouncements had a name (e.g., "Tobacco (Amendment) Ordinance"), and the record Iton Rishmi arranged them according to the order of publication in the Hebrew year ("No. 6 in [Hebrew year] 5709 - 1949"). The Transition Law, however, did not start a new counting, and the solution was to have the year incorporated in the title—maintaining order at the expense of a chronicle.

The deterioration in standards had been swift. The next law to be enacted by The First Knesset was probably (I truly had difficulties establishing the order) American Credit Law, which authorized the treasury minister to borrow from the U.S. This law's verbal and visual presentation was even poorer: using passive voice (the minister "is authorized" but by whom?) and making do without any of the required signatures.

*(**Right**: American Credit Law, Israel's second off-the-record law)*



חוק האשראי האמריקאי, תש"ט—1949 •

1. הרשאה לקבלת אשראי.
שר האוצר מורשה בזה לקבל בשם מדינת ישראל מהבנק ליצוא ויבוא של וושינגטון, סוכנות של ארצות הברית של אמריקה, אשראי של מאה מיליון דולר (מטבע של ארצות הברית של אמריקה).

2. הרשאה לחתימת מסמכים.
(א) שר האוצר מורשה בזה לחתום בשם מדינת ישראל על הסכמים עם הבנק ליצוא ויבוא של וושינגטון בקשר לאשראי האמור ועל שטרי חוב של מדינת ישראל שישמשו ראיה לאשראי זה.
(ב) שר האוצר רשאי לחתום על מסמכים אלה בעצמו או על ידי נציגים בחוץ לארץ שיבונה לכך בכתב בחתימת ידו.

3. תחילת תוקף ההרשאה.
ההרשאה לפי שני הסעיפים הקודמים נתונה למפרע מיום י"ז בשבט תש"ט (16 בפברואר 1949).

4. ביצוע.
שר האוצר ממונה על ביצוע חוק זה.

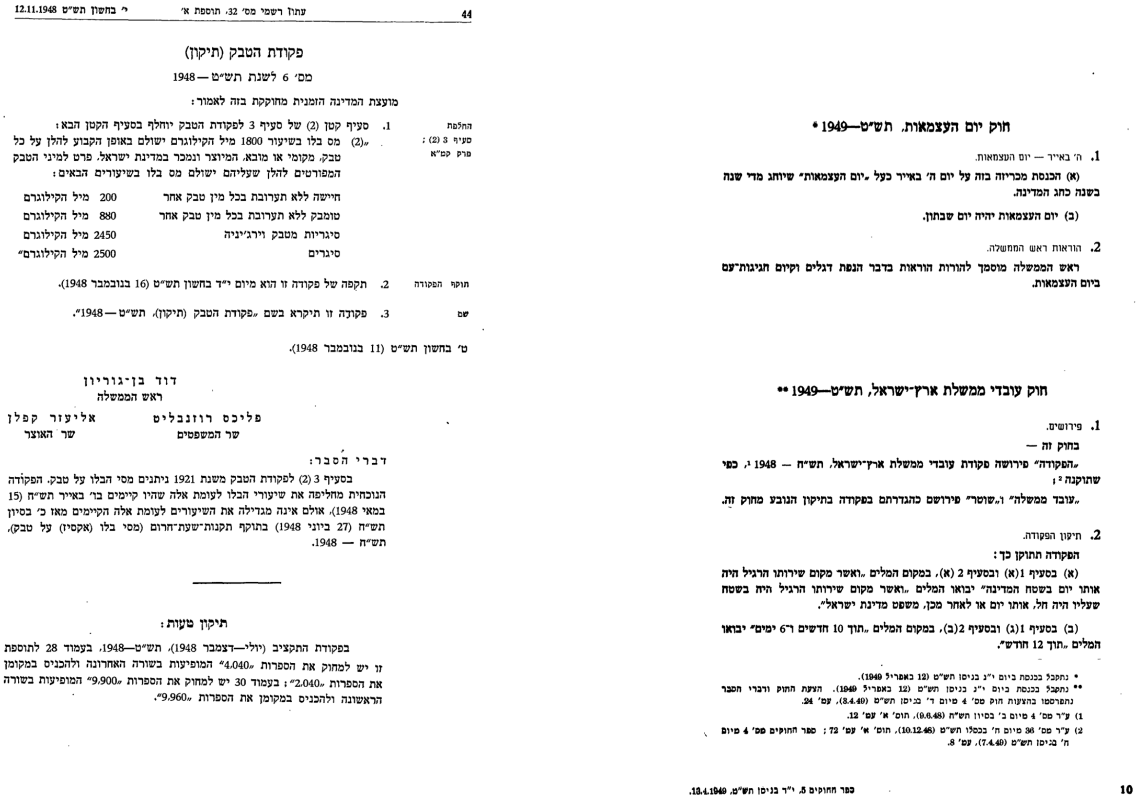
• נתקבל בכנסת ביום ס"ו באדר תש"ט (17 במרס 1949).

ספר התוקים 2, י"ז באדר תש"ט, 18.3.1949. 3

A month later, the Independence Day Law mixed form and content. Its first article says, "The Knesset hereby declares [...a national holiday]" forgetting that the Knesset should declare the law, and not *in* the law. A humble enacting clause would have prevented such poor copy.

This law, like other laws of the period, carried no signature and the date appears in a footnote, as part of the record and not the decision. Look at Laws in Reshumot alongside Ordinances in Iton Rishmi, and even if you don't understand a word of Hebrew, you

can tell the differences in the arrangement of and in the page. The efficient part of government may have remained intact, but the dignified part was already under strain.



פקודת הטבק (תיקון)

מס' 6 לשנת תש"ט—1948

מועצת המדינה הזמנית מחוקקת בזה לאמור:

1. סעיף קטן (2) של סעיף 3 לפקודת הטבק יוחלף בסעיף הקטן הבא:

"(2) מס בלו בשיעור 1800 מיל הקילוגרם ישולם באופן הקבוע להלן על כל טבק, מקומי או מובא, המיוצר ונמכר במדינת ישראל, פרט למיני הטבק המפורטים להלן שעליהם ישולם מס בלו בשיעורים הבאים:

חיישה ללא תערובת בכל מין טבק אחר	200 מיל הקילוגרם
טומבק ללא תערובת בכל מין טבק אחר	880 מיל הקילוגרם
סיגריות מטבק וירג'יניה	2450 מיל הקילוגרם
סיגרים	2500 מיל הקילוגרם"

2. תקפה של פקודה זו הוא מיום י"ד בחשון תש"ט (16 בנובמבר 1948).

3. פקודה זו תיקרא בשם "פקודת הטבק (תיקון), תש"ט—1948".

נ' בחשון תש"ט (11 בנובמבר 1948).

דוד בן-גוריון
ראש הממשלה

פליכס רוזנבליט — אליעזר קפלן
שר המשפטים — שר האוצר

דברי הסבר:

בסעיף 3 (2) לפקודת הטבק משנת 1921 ניתנים מסי הבלו על טבק. הפקודה הנוכחית מחליפה את שיעורי הבלו לעומת אלה שהיו קיימים ביר באייר תש"ח (15 במאי 1948). אולם איננה מבדילה את השיעורים לעומת אלה הקיימים מאז כ' בסיון תש"ח (27 ביוני 1948) בתוקף תקנות-שעת-חרום (מסי בלו (אקסיז) על טבק), תש"ח — 1948.

תיקון טעות:

בפקודת התקציב (יולי—דצמבר 1948), תש"ט—1948, בעמוד 28 לתוספת זו יש למחוק את הספרות "4.040" המופיעות בשורה האחרונה ולהכניס במקומן את הספרות "2.040"; בעמוד 30 יש למחוק את הספרות "9.900" המופיעות בשורה הראשונה ולהכניס במקומן את הספרות "9.960".

חוק יום העצמאות, תש"ט—1949*

1. ה' באייר — יום העצמאות.

(א) הכנסת מכריזה בזה על יום ה' באייר כעל "יום העצמאות" שיוחג מדי שנה בשנה כחג המדינה.

(ב) יום העצמאות יהיה יום שבתון.

2. הוראות ראש הממשלה.

ראש הממשלה מוסמך להוראות הוראות בדבר הנפת דגלים וקיום תגיגות עם ביום העצמאות.

חוק עובדי ממשלת ארץ-ישראל, תש"ט—1949**

1. פירושים.

בחוק זה —

"הפקודה" פירושה פקודת עובדי ממשלת ארץ-ישראל, תש"ח — 1948[1], כפי שתוקנה[2];

"עובד ממשלה", "שופר" פירושם כהגדרתם בפקודה בתיקון הנוגע מחוק זה.

2. תיקון הפקודה.

הפקודה תתוקן כך:

(א) בסעיף 1(א) ובסעיף 2 (א), במקום המלים "אשר מקום שירותו הרגיל היה אותו יום בשבוע המדינה" יבואו המלים "אשר מקום שירותו הרגיל היה בשבוע שעליו היה חל, אותו יום או לאחר מכן, משפט מדינת ישראל".

(ב) בסעיף 1(ג) ובסעיף 2(ב), במקום המלים "תוך 10 חדשים ר"ל "ימים" יבואו המלים "תוך 12 חודש".

* נתקבל בכנסת ביום י"ג בניסן תש"ט (12 באפר[1] 1949).
** נתקבל בכנסת ביום י"ג בניסן תש"ט (12 באפר[1] 1949). הצעת החוק ודברי הסבר נתפרסמו בהצעות חוק סי 4 סיום ד' בניסן תש"ט (8.4.49), עמ' 24.
1) ע"ר מס' 4 סיום ב' בסיון תש"ח (9.6.48), תום' א' עמ' 12.
2) ע"ר מס' 36 סיום ח' בכסלו תש"ט (10.12.48), תום' א' עמ' 72; ספר החוקים סי 4 סיום ח' בניסן תש"ט (7.4.49), עמ' 8.

*(**Left:** Tobacco (Correction) Ordinance, **Right**: Independence Day Law and Eretz Israel Government Employee Law.*

The Ordinance on the left is numbered, includes a preamble, and indicates the date and signatures at the bottom as part of the text, like in a formal letter. It is recorded in Iton Rishmi which is also dated and ordered, in a clear header. The Laws, on the right, do not have a preamble or signatures, the date is indicated in a footnote of the record and in passive voice "adopted by the Knesset." The footer refers to Sefer Hakhukim or Book of Laws but not Reshumot.)

A little exercise may be instructive. Take a fresh look at a piece of Israeli legislation post February 16. Assuming the Hebrew language is not a giveaway, from the full text of the decision alone you usually cannot infer its author, authority and jurisdiction. You will even face difficulties inferring what country, government (or, sometimes, budget) is concerned. By contrast, no such question marks would arise from the Official Gazette laws, which are clear and instructive. Look at Laws in Reshumot today and you will still find the footer with Sefer Hukhukum/Book of Laws and a statement on the last page, "arranged by Reshumot Department, the Justice Ministry."

Reshumot is no longer the name of the record but of its publisher.

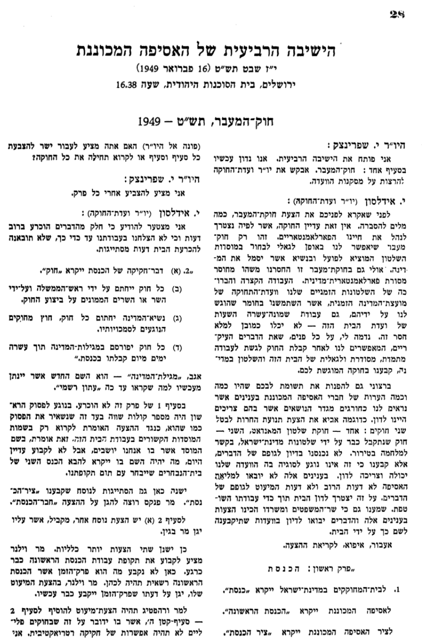
8. The Officiality Paradox

The first article of the Transition Law take pains to transition the constituent assembly into a parliament, in fact, the Knesset as we know today:

> The legislative body of the State of Israel shall be called The Knesset. The Constituent Assembly shall be called "The First Knesset." A delegate to the Constituent Assembly shall be called "a member of the Knesset."

This renaming has left a very clear mark. According to the record of "The Fourth Session of the Constituent Assembly," the session ended at 9:13pm, with the adoption of Transition Law. But before time to call it a night, Chaim Weizman, hitherto the president of the Council of State, had to be reelected as President (facing considerable opposition). So just before midnight, at 11:55,

delegates convened anew, and this meeting's record is titled "The Fifth Session of the First Knesset," no longer mentioning the Constituent Assembly. The TL would be "promulgated" only the next day but the inglorious revolution had been complete.


28

הישיבה הרביעית של האסיפה המכוננת

י"ז שבט תש"ט (16 פברואר 1949)

ירושלים, בית הסוכנות היהודית, שעה 16.38

חוק־המעבר, תש"ט – 1949

היו"ר י. שפרינצק:

אני פותח את הישיבה הרביעית. אנו נדון עכשיו בסעיף אחד: חוק־המעבר. אבקש את יו"ר ועדת־החוקה להרצות על מסקנות הוועדה.

י. אידלסון (יו"ר ועדת־החוקה):

לפני שאקרא לפניכם את הצעת חוקת־המעבר, כמה מלים להסברה. אין זאת עדיין החוקה, אשר לפיה נצטרך לנהל את חיינו הפארלאמנטאריים.

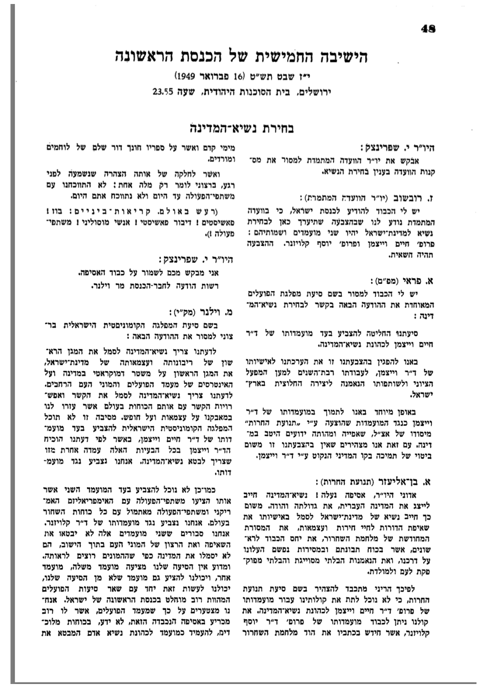
(פונה אל היו"ר) האם אתה מציע לעבור ישר להצבעת כל סעיף וסעיף או לקרוא תחילה את כל החוקה?

היו"ר י. שפרינצק:

אני מציע להצביע אחרי כל פרק.

י. אידלסון (יו"ר ועדת־החוקה):

אני מצטער להודיע כי חלק מהדברים הוכרע ברוב


48

הישיבה החמישית של הכנסת הראשונה

י"ז שבט תש"ט (16 פברואר 1949)

ירושלים, בית הסוכנות היהודית, שעה 23.55

בחירת נשיא־המדינה

היו"ר י. שפרינצק:

אבקש את יו"ר הוועדה המתמדת למסור את מסקנות הוועדה בענין בחירת הנשיא.

ז. רובשוב (יו"ר הוועדה המתמדת):

יש לי הכבוד להודיע לכנסת ישראל, כי בוועדה המתמדת נודע לנו שבהצבעה שתיערך כאן לבחירת

מימי קדם ואשר על ספריו חונך דור שלם של לוחמים ומורדים.

ואשר לחלקה של אותה הצהרה שנשמעה לפני רגע, ברצוני לומר רק מלה אחת: לא התווכחנו עם משתפי־הפעולה עד היום ולא נתווכח אתם היום.

(רעש באולם. קריאות־ביניים: בוז! פאשיסטים! דיבור פאשיסטי! אנשי מוסוליני! משתפי־

*(**Left**: "The Fourth Session of The Constituent Assembly." **Right**: "The Fifth Session of the First Knesset.")*

Thus Israel became entangled in a paradox of officiality and legitimacy. It is as real a paradox as you will ever find in politics. If you accept the Declaration, you are then bound to consider the state's acting legislature and executive to this very day as officially provisional (read again the Declaration to be convinced) –the judiciary is not!–and therefore as lacking the authority to decide constitutional questions.[23] Unless, that is, the Transition Law, which is not the constitution, is the constitution—or, in a useful paradoxical formulation: the *Unofficial Constitution*.

[23] Viewed from the external or constitutional perspective, judgment is an answer to a question, not its decision (epistemology rather than ontology; knowledge rather than creating a change; opinion rather than a fact). Although when viewed from the "inside" perspective of the judiciary, judgment is also a decision.

Leave aside the curiosity that no procedure could have enacted the Transition Law, a Knesset-duality has materialized. Two distinct bodies are called The Knesset[24]: there is the constituent assembly, which had adopted the decision and which was to be called "the First Knesset"; the second is the future legislature, a new entity. Note that Article 1 does not stipulate that the constituent assembly or Knesset-number-one shall be the legislature, but that the legislature (which has yet to be established) shall also be named "The Knesset." The distinction between definition and assignment would be clear to anyone with knowledge of computer programming. Contrast it with the coherent and unproblematic LAO, which unambiguously points to a known body and assigns it a function. Article 15, the Transition Law's final, insidiously merges Knesset-number-one with Knesset-number-two:[25]

Article 15: This law shall have effect from the day of its being passed by the Knesset.

This paradox is not just a turn of phrase. The images of Iton Rishmi I brought here are of documents in the online Knesset legal archive. That is, all but one. The only decision I could not find in the online Knesset archive is the Hebrew-language Declaration of the Establishment of the State of Israel.[26]

---

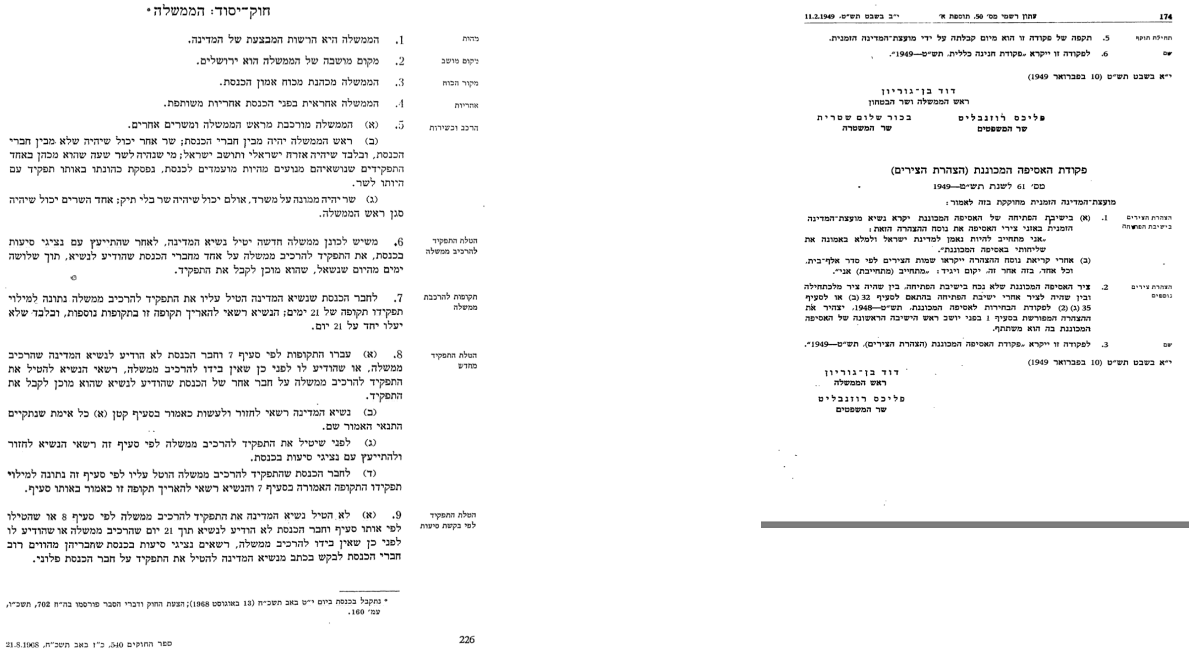
[24] In the *Mizrahi* decision, there is only *one* Knesset, whose existence the justices take for granted, as they debate whether it has maintained, in addition to legislative powers, also constitutive powers—the main question is whether the first Knesset transferred its constitutive powers to the second Knesset. The divergent answers to this question define two camps in Israeli constitutionalism in the Mizrahi decision and beyond: (1) the majority in Mizrahi, lead by the entering chief justice Barak but also supported by the retiring chief justice Meir Shamgar, opted for an expansive answer; (2) Justice Heshin's minority opinion restated the same legal facts in a constitutionally parsimonious manner that effectively achieved the same legal conclusions while minimizing constitutional innovation.
The justices infer authority from power. The more they quote academic accounts and legal theories (I doubt Kelsen stars as often even in German constitutional decisions as he does in Israel's), the less they quote laws and facts. They are silent on the facts that the 1949 poll elected a constituent assembly, and not "the First Knesset," and that the elected representatives took an oath of office accordingly.

[25] A recent Knesset report on legislation history considers the First Knesset to open on February 14, 1949. (Appendix: Knesset terms)

[26] A recent Knesset report on legislation history considers the First Knesset to open on February 14, 1949. (Appendix: Knesset terms)

The last and final time the Provisional Council of State had spoken was through Ordinance No. 61, promulgated in Iton Rishmi 50. The Council's final official utterance started: "The Provisional Council Of State hereby enacts as follows: —", a phrase which in Hebrew ends with "to say."

The Transition Law, by contrast, never had an enacting preamble, nor did any of the future Laws or Basic Laws that followed. The new Knesset still talks but it lost its ability to speak.



חוק־יסוד: הממשלה*

כינון
1. הממשלה היא הרשות המבצעת של המדינה.

מקום מושבו
2. מקום מושבה של הממשלה הוא בירושלים.

מיקוד הכוח
3. הממשלה מכהנת מכוח אמון הכנסת.

אחריות
4. הממשלה אחראית בפני הכנסת אחריות משותפת.

הרכב וכשירות
5. (א) הממשלה מורכבת מראש הממשלה ומשרים אחרים.
(ב) ראש הממשלה יהיה מכין חברי הכנסת; שר אחר יכול שיהיה שלא מכין חברי הכנסת, ובלבד שיהיה אזרח ישראלי ותושב ישראל; מי שנהיה לשר שעה שהוא מכהן באחד התפקידים שנושאיהם מנועים מהיות מועמדים לכנסת, בפסקת כהונתו באותו תפקיד עם היותו לשר.
(ג) שר יהיה מבונה על משרד, אולם יכול שיהיה שר בלי תיק; אחד השרים יכול שיהיה סגן ראש הממשלה.

הטלת התפקיד להרכיב ממשלה
6. משיש לכונן ממשלה חדשה יטיל נשיא המדינה, לאחר שהתייעץ עם נציגי סיעות בכנסת, את התפקיד להרכיב ממשלה על אחד מחברי הכנסת שהודיע לנשיא, תוך שלושה ימים מהיום שנשאל, שהוא מוכן לקבל את התפקיד.

הקופה להרכבת ממשלה
7. לחבר הכנסת שנשיא המדינה הטיל עליו את התפקיד להרכיב ממשלה נתונה למילוי תפקידו תקופה של 21 ימים; הנשיא רשאי להאריך תקופה זו בתקופות נוספות, ובלבד שלא יעלה יחד על 21 יום.

הטלת התפקיד מחדש
8. (א) עברו התקופות לפי סעיף 7 וחבר הכנסת לא הודיע לנשיא המדינה שהרכיב ממשלה, או שהודיע לו לפני כן שאין בידו להרכיב ממשלה, רשאי הנשיא להטיל את התפקיד להרכיב ממשלה על חבר אחר של הכנסת שהודיע לנשיא שהוא מוכן לקבל את התפקיד.
(ב) נשיא המדינה רשאי לחזור ולעשות כאמור בסעיף קטן (א) כל אימת שנתקיים התנאי האמור שם.
(ג) לפני שיטיל את התפקיד להרכיב ממשלה לפי סעיף זה רשאי הנשיא לחזור ולהתייעץ עם נציגי סיעות בכנסת.
(ד) לחבר הכנסת שהתפקיד להרכיב ממשלה הוטל עליו לפי סעיף זה נתונה למילוי תפקידו התקופה האמורה בסעיף 7 והנשיא רשאי להאריך תקופה זו כאמור באותו סעיף.

השלת התפקיד לפי בקשת סיעות
9. (א) לא הטיל נשיא המדינה את התפקיד להרכיב ממשלה לפי סעיף 8 או שהטילו לפי אותו סעיף וחבר הכנסת לא הודיע לנשיא תוך 21 יום שהרכיב ממשלה או שהודיע לו לפני כן שאין בידו להרכיב ממשלה, רשאים נציגי סיעות בכנסת שחבריהן מהווים רוב חברי הכנסת לבקש בכתב מנשיא המדינה להטיל את התפקיד על חבר הכנסת פלוני.

* נתקבל בכנסת ביום י"ט באב תשכ"ח (13 באוגוסט 1968); הצעת החוק ודברי הסבר פורסמו בח"ח 702, תשכ"ח, עמ' 160.

ספר החוקים 540, כ"ז באב תשכ"ח, 21.8.1968 226

174 עתון רשמי מס' 50, תוספת א' י"ב בשבט תש"ט, 11.2.1949

תחילת תוקף
5. תקפה של פקודה זו הוא מיום קבלתה על ידי מועצת־המדינה הזמנית.

שם
6. לפקודה זו ייקרא „פקודת תגינה כללית, תש"ט—1949".

י"א בשבט תש"ט (10 בפברואר 1949)

דוד בן־גוריון
ראש הממשלה ושר הבטחון

פליכס רוזנבליט — בכור שלום שטרית
שר המשפטים — שר המשטרה

פקודת האסיפה המכוננת (הצהרת הצירים)

מס' 61 לשנת תש"ט—1949

מועצת־המדינה הזמנית מתוקנת בזה לאמור:

הצהרת הצירים בישיבתה הראשונה
1. (א) בישיבתן הפתיחה של האסיפה המכוננת יקרא נשיא מועצת־המדינה הזמנית באוזני צירי האסיפה את נוסח ההצהרה הבאה:
„אני מתחייב להיות נאמן למדינת ישראל ולמלא באמונה את שליחותי באסיפה המכוננת".
(ב) אחרי קריאת נוסח ההצהרה ייקראו שמות הצירים לפי סדר אלף־בית, וכל אחד בזה אחר זה, יקום ויגיד: „מתחייב (מתחייבת) אני".

הצהרת צירים נוספים
2. ציר האסיפה המכוננת שלא נכח בישיבת הפתיחה, בין שהוא ציר מלכתחילה ובין שהיה לציר אחרי ישיבת הפתיחה בהתאם לסעיף 33 (ב) או לסעיף 35 (ג) (2) לפקודת הבחירות לאסיפה המכוננת, תש"ט—1948, יצהיר את ההצהרה המפורטת בסעיף 1 בפני יושב ראש הישיבה הראשונה של האסיפה המכוננת בה הוא משתתף.

שם
3. לפקודה זו ייקרא „פקודת האסיפה המכוננת (הצהרת הצירים), תש"ט—1949".

י"א בשבט תש"ט (10 בפברואר 1949)

דוד בן־גוריון
ראש הממשלה

פליכס רוזנבליט
שר המשפטים

*(**Right**: With a preamble. Ordinance 61 and the following white page, February 11, 1949. **Left**: A typical law without a preamble. Basic Law: The Government, August, 21, 1968.)*

9. Recasting Israel's constitutional order

I propose to capture the differences between Israel and the UK through two related yet distinct concepts – formality and officiality, the distinction between which is fairly clear in English but is lost in modern Hebrew. "Official" conveys status: for instance, by the officiant's marriage

pronouncement, authority will now view two individuals as a union. “Formal” relates to the nature of the procedure: the officiant in Westminster Abbey is rather formal, the Elvis-clad one in a Vegas parlor, not so much. Or imagine a typical American suburb without fences to separate neighboring houses. The borderlines are official (ownership changes from one plot to another) but not formal (the borders are not marked; no physical procedure facilitates the transition between the plots). We see the tradeoff between “official” and “formal”— it is the strength of property rights in the US that renders a physical barrier superfluous.

In Hebrew, it’s hard to grasp this tradeoff. The Hebrew term *rishmi* (רשמי) —derived from Arabic and relates to the root “to mark” — ties officiality with formality and is used for both concepts. In Hebrew thus an important conceptual distinction is lost.

Given the lexical deficiency, it is understandable that Israeli teachers would find it hard to impart nuanced civic facts to their students. Ignorance begets ignorance, and the students are now teachers. Let’s correct the misconception: The U.K. has an official but informal constitution: The British constitution is real but is not given as a public document —imagine the queen keeps a perfect copy in her study, but her text is private. Israel, I argue, has a formal constitutional-like document, which is not considered the constitution, the Transition Law. So Israel does not have a constitution but it has, paradoxically, an unofficial formal constitution. The Israeli law of Iton Rishmi, from May 1948 to February 1949, should be considered as *official*, and that of Reshumot, from the Transition Law onward, as *unofficial* (or as “official”, i.e., with quotation marks). This distinction allows us to bravely glance at the constitutional abyss that underlies the Israeli state, and to clearly delineate its contours. This clarity may not bring about the much needed reform of government that all seem to agree is badly needed, but may explain why a substantial proactive constitutional reform of government has eluded us so far.

10. Does it matter?

The natural objection to my argument, I think, is to contextualize it: my presentation dramatizes Israeli constitutional history, so one may want to do the reverse. All that nitpicking and hairsplitting, one could argue, betray a naive expectation of perfection in the messiness of human affairs. Look back far enough, and you can unpick any chain of authority. It is not hard to find Americans who challenge the legitimacy of the U.S. constitution and the Philadelphia Convention; it is even easier to find republican Britons who reject the Royal *dieu et mon droit*. Isn't Europe littered with heirs to bygone dynasties, who, in a varying degree of self importance, claim ancestral thrones? In China, for thousands of years, whoever maintained order and held power, and however that power had been obtained, was seen as having been bestowed with the Mandate of Heaven. Step down from the ivory tower of social contract theories to confront an old if uncomfortable truth: Authority always originates from power.

In response, I note that Americans and Britons may challenge the legitimacy of the constitution and queen, because it is clear they exist and their actual authority is recognized. Clarity promotes debate but is also risky. The continued survival of the constitutional scaffolding is always in danger, and depends on popular support or at least indifference. Authority then hangs in a shaky equilibrium with public opinion, and a Damocles sword must threaten the throne. This idea is traceable to Hobbes and was formalized in the American Second Amendment. By contrast, no one truly challenges the legitimacy of the Knesset (even those who question Israel's legitimacy, do not question the Knesset's authority in Israel). Israel's constitutional order is stable, and was motivated by a concern for stability. Even Hillel Kook, the most vocal objector to the First Knesset metamorphosis, did not vote against the Transition Law.[27]

[27] Major constitutional turning points had been motivated by a desire for political stability and structural/institutional stability. That, however, leaves out socio-economic stability. The exception is Chief Justice Aharaon Barak's

The original sin, without which the constitutional conundrum could not have emerged, and which, to my knowledge, is unique, is the Declaration's constitutional commitment. The conundrum is not an outcome of Israel's not having a constitution but of the entanglement of that fact with the constitution commitment of the very decision and recorded in the very paragraph from which, however technically, authority of government springs.

The Israeli conundrum stems not from taking power but from a refusal to acknowledge it. Power is humdrum. When Napoleon placed the crown on his own head at Notre-Dame, he did what the Israeli leadership has not done since 1949: he acknowledged his own authority. It is as if Israel were to promulgate its next decision as Iton Rishmi no. 51, picking up from where we left off.

The conundrum is also not simply an outcome of *ultra vires* – unauthorized actions will happen as long as authority is given and action is taken. And it is not about self-contradiction emerging from sloppy writing – everyone not keeping silent is bound to contradict themselves eventually. Inconsistency is so unremarkable –isn't consistency what's truly remarkable?– that the Talmud examines the implications arising when the beginning of an utterance contradicts its end, and

---

so-called Constitutional Revolution of 1992 (the Mizrahi decision was published in 1995) when the high bench elevated Basic Laws to the rank of a bill of rights. Barak's step may be viewed with sympathy given that Israel could not enact a bill of rights any more than it could decide any other constitutional fundamentals. Barak's audacity ushered in an activist court, an institution which was under an obligation to make decisions and was on occasion willing to make them. Unlike the U.S. Supreme Court, which selects the cases it would hear, the Israeli Supreme Court must take on all cases thrown at his door.

The Court, naively failing to grasp that it could not pull Israel up by the bootstraps, compromised its constitutional legitimacy. The court paid a price: the post-1992 court had grown more hesitant, if more powerful, mindful of its shaky position that it must now defend vis-a-vis the Knesset, cabinet, the public, and increasingly even the professional milieu of lawyers and legal scholars. No longer was it the underdog that is hesitant to bark, but occasionally bites.

In the meantime, Israel's judicial class has developed a towering constitutional superstructure hovering over the abyss. The more elaborated that superstructure has become, the more it has distanced from its shaky roots. For an illustration look no further than at *Israeli Constitutional Law in the Making*, the already mentioned high-profile survey of the topic. Note that in the book's List of Legislation and Documents, the Declaration is classified under "Documents." In a Freudian slip, the Transition Law, which is mentioned in the book, is not listed. In concert with the scholarly and popular approaches to Israeli constitutionalism, the book regards the constitution as an open normative issue, rather than a legal fact from which normative considerations would arise (the opening essay, by the first editor, is "Why a Constitution—in General and in Particular in the Israeli Context?").

opinions split between Rabbi Yehuda and Rabbi Shimon whether the intention at the beginning or execution at the end should prevail.

Rather, flip the causality. If clarity of authority is lacking in government (resulting in chronic ultra vires), perhaps it is because of the conundrum. If laws no longer explicate why they should be followed, why would any other decision? And why should they be followed?[28] And it is not the brazen and obfuscating language of the Transition Law that is to blame—in the impasse, only a constitution could have been better written—but it is the evident decline of the quality of writing from the TL onwards that suggests that the art of composing—now, unofficial—documents had lost its appeal.

And yet, the deficiencies of style and clarity are, by definition almost, technicalities and formalities, which do not affect the daily functioning of government. Why, then, import American or British formalism, pedantry, pretentiousness? Will efficiency improve in a more dignified government? Do you really need to read at the top of every American or English law "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled" or "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—" to know what, strictly speaking, goes without saying?

I will let the question stand.

[28] Israel's failure of proper promulgation should give pause to followers of Hart (The Concept of Law, 1951) and his prominent student Joseph Raz (The Authority of Law, 1979).