

Gideon Sapir, Daphne Barak-Erez, Aharon Barak (eds)

Israeli Constitutional Law in the Making (Hart, 2013)

Book Review

This book is a collection of essays, edited by Gideon Sapir, Daphne Barak-Erez and Aharon Barak. It consists of 9 “Parts”, subdivided into 34 chapters. Each Part of the book pursues a specific theme (Towards a Full-Fledged Constitution, Models of Judicial Review in Israeli Constitutional Law, Global Impacts on Israeli Constitutional Law, Balancing in Israeli Constitutional Law, UnEnumerated Rights in Israeli Constitutional Law, Social Rights in Israel, Constitutional Rights and Private Law, Constitutional Rights and State of Emergency, and Jewish and Democratic). Each theme is addressed by a number of contributors, sometimes from differing perspectives.

The introductory chapter, written by the three editors, is outwith the 9 “Parts”. It lays the foundations for the discussions, and assesses the general challenges facing the Israeli constitution, its various influences, the failure of the founding fathers to produce a constitution, and the internal controversy that Israeli constitutional law is enmeshed in. From this chapter one learns that abandonment of an apparent Holy Grail (the search for a single constitutional document) in favour of a series of Basic Laws that would form the constitution resulted in a focus on institutional matters, originally to the detriment of basic rights legislation. Two new *Basic Laws*, on *Freedom of Occupation*, and, *Human Dignity and Liberty*, led to a new approach to rights protection by the Israeli Supreme Court. This new approach involved the assumption of jurisdiction to review primary legislation. Unsurprisingly, much controversy and debate followed this “judicial innovation” – but much of it is withheld from the world at large due to the language barrier. This pinpoints a major aim of the book – to bridge the language barrier by making the Israeli constitutional debates accessible to an English speaking audience.

The material is presented as contributions from Israeli scholars accompanied by comments from European and American comparative constitutional law experts. I do not intend in this review to discuss

the detail of every theme or every contribution. Instead, let us examine Part 1 (“Towards a Full-Fledged Constitution”) which exemplifies the form and structure of the discussions. First, Gideon Sapir (chapter 2) contends for a move from the protectionist model of a constitution to alternative dialogical and gagging models. Alon Harel (chapter 3) highlights the growing elitophobia in which an activist judiciary is part of the vilified elite, and presents the case for judicial review of legislation from the perspective of its being the only conceptually possible realization of the right to a hearing (which right is intrinsically valuable). In chapter 4, Ariel Bendor, in discussing the purpose of the Israeli constitution, assesses the role of the Basic Laws (which he equates to the “Constitution”, while accepting that this is controversial) and the relationship between this role and judicial review. In his view, since the essence of constitutional law is the imposition of restrictions on the exercise of the majority’s desires and interests, democratised review will frustrate the *raison d’etre* of constitutional law. It follows, according to him, that only review by professional judges is capable of promoting the purpose of Israeli constitutional law. Sanford Levinson (in chapter 5) provides an incisive and excellent commentary on these three thought-provoking chapters. He addresses the issue of consensus in constitution making, the difficulties of achieving such consensus and the compromises that often have to be made (e.g., the old three-fifths slavery bonus compromise relating to the head count for representation to the US House of Representatives, in which each slave effectively counted as 3/5 of a person). Clearly, some rotten compromises, such as this, did not work, and did not prevent the American civil war. Constitutions, it seems, are not always made for homogenous societies, but often for divided societies comprising people of fundamentally differing views. That being so, the aim of constitution drafters must often be to achieve a *modus vivendi* that affords conflicting groups the ability to coexist peacefully. Consequently, it is, according to Levinson, erroneous to suppose that the most important function of a constitution is “to announce (and to protect) some set of substantive values that ostensibly define the polity”. Rather, it may be something as pragmatic as constructing “a set of political institutions ... that are empowered to make necessary decisions capable of meeting the pressing needs of the moment, and, one hopes, thereafter”. Levinson laments the lack of explicitly institutional discussion in the three chapters whereon he is commenting, including “the way that given institutional designs inevitably reflect various normative views”. He

concludes his commentary by noting that the dilemma faced by both Israel and the USA is whether the operating political systems can respond adequately to the challenges that they face.

The rest of the book follows in similar vein. There are erudite discussions on such topical issues as constitutional deviation, accountability, proportionality, the use of foreign law and the impact of globalization on and in Israeli constitutionalism, substantive rights under Basic Laws, “unenumerated” constitutional rights, the challenges of balancing rights, vertical/horizontal effects and the public/private divide, Zionism/post-Zionism, national emergency, and religion. Each chapter is very well written. The commentaries are penetrating and assist the reader in concretising his or her own thoughts on the preceding material. They form very valuable contributions to the quality of the book.

Typical of the superb analyses is that by Justice Aharon Barak in chapter 25. In this discussion Justice Barak assesses the issue of constitutional rights and private law, and argues that direct application of constitutional rights against non-state parties is methodologically problematic and wrong, and, unsatisfactory in application. Similarly problematic is the non-application model that postulates only a vertical relationship, since it creates too deep a rift between constitutional law and private law. Rather, Justice Barak favours the indirect application model of applying constitutional rights to non-state actors. This model “recognises the difference between the individual’s constitutional right directed towards the state and the individual’s sub-constitutional (statute or common law) right directed towards another individual”. His view is, of course, controversial. This writer, for example, subscribes to one of the positions that he rejects. Indeed, it is difficult to find any chapter in which the author does not present controversial views or hypotheses. Such controversy is not gratuitous, but rather attests to the intellectual rigour of the debates. Given the political nature of constitutionalism, it is probably inevitable that virtually any position that one could take on a topical issue would be contested.

While it is a relatively big book (529 pages, excluding tables and index), it makes riveting reading, and can be hard to put down. The discussions are rich, and, although the book relates mainly to the Israel context, the issues and concepts addressed in the topics and analyses therein transcend national

boundaries. Most modern states face more than a few of these issues. Among other things, questions relating to the purpose of a constitution, the proper role of the courts, the weight to be given to democracy, or proportionality, or the public/private divide, etc., are broad public law issues. Thus the book would be attractive and useful to constitutional law scholars, judges, and students worldwide.

In my view, this outstanding book achieves its stated aims (of making the Israeli constitutional debates accessible to an English speaking audience), and more. Upon reading it, the reader would be reasonably well informed on general Israeli constitutional law matters, and the particular issues facing the Jewish state and how it is endeavouring to address them. This is not to say that the book is perfect. There are instances of the odd grammatical error, including the increasingly common but problematic “different ... than” construct; and one cannot help feeling at times that certain discussions merited more detailed discussion than what was presented. It would perhaps be churlish to focus too much on this rather minor issue. It is clear that certain restrictions had to be in place in terms of the length of each chapter, so this is understandable. And, this observation is not meant to suggest that the quality, depth or completeness of the analyses are compromised. They clearly are not.

In sum, comparative constitutionalism is much richer for this book. Among other thing, this book should serve as an important reference point on constitutionalism for pluralistic societies, especially those with a significant or large dominant majority or that harbour deep divisions and mutually incompatible aspirations within their populace. Increasingly, this is the experience of modern states, so this is just another way of saying that this book should serve as an important reference point on constitutionalism.

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