

The Administrization of Constitutional Law

Iddo Porat

This Article suggests a new perspective on the radical changes in recent decades in the constitutional law of many countries, including Israel; it suggests viewing them as an adoption of the logic of administrative law into constitutional law – the administrization of constitutional law. These changes, which began in Europe after WWII and spread to many other countries worldwide, not including the U.S., include the blurring of the distinction between rights and interests, a reduction in the importance of the constitutional text, and an increase in the importance of "justification" tests, in particular balancing and proportionality. These features are also among the distinctive traits of administrative law, for which the distinction between rights and interests is insignificant, text is inessential, and balancing and proportionality tests for the justification of administrative action are central.

The Article also suggests a historical explanation for this process, according to which it is the result of the fact that in Europe (but not in the U.S.) the rights discourse was first developed in administrative law, which imprinted its own logic upon it. The Article also applies this thesis to Israel in which not only the logic but also the institutional apparatus of administrative law was incorporated into constitutional law, as Israel has morphed from an administrative to a constitutional model without any change in its legal institutions.

upon the right of Members of Knesset (MKs) to fully participate in proper legislative processes. This infringement of the right of deliberation is especially egregious in the case of new members who were not present at the first reading held in the previous legislature and are thus disadvantaged in their ability to influence the content of that law. The Continuity Law thus establishes a formalistic, majority-based democracy in Israel. It has also strengthened the government's standing in the legislature and weakened the power of individual members, factions, and even legislative committees, by giving the government tools to achieve a majority in manipulative and artificial ways. This Article argues that the Israeli rule of continuity, formulated as an ordinary law, does not pass constitutional muster. Even if formulated as part of the Constitution, it would be advisable to condition the applicability of continuity to specific cases on a broad consensus of MKs.

The Law of Lawmaking

Ittai Bar-Siman-Tov

This Article explores the "law of lawmaking" – the body of rules that govern the legislative process in parliament. It argues that this body of law, which has received very little attention in legal scholarship, has great practical and normative importance. The Article develops the theoretical and normative thinking about the law of lawmaking by focusing on what the aims of this body of law are (and should be). It argues that the law of lawmaking should serve six main purposes: (1) organizing legislative activity and decision-making; (2) increasing the efficiency of the legislative process; (3) providing clear criteria for recognizing valid law; (4) restraining the legislature and protecting the opposition and citizenry; (5) improving the quality of legislation; and (6) guaranteeing a legitimate democratic process. It also offers ways for realizing an optimal balance among these goals.

The Article then analyzes the existing rules governing lawmaking in the Knesset in light of these goals, arguing that the two main purposes that are insufficiently manifested in the current law of lawmaking are restraining the legislature and ensuring the quality of legislation. It also highlights some room for improvement in applying the principles of transparency and public participation. It then turns to discussing the implications of the discussion on the proper purposes of the law of lawmaking for amending the rules governing lawmaking or designing new rules, including a Basic Law on Legislation. Finally, it also discusses the implications for the various types of judicial review: judicial review of the legislative process, judicial review on the content of the legislative rules, and substantive constitutional review.

Abstracts

Why Hasn't the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Counter-Majoritarian Difficulty

Ori Aronson

This Article shows how, in the two decades since the “constitutional revolution,” Israel’s constitutional regime has become fixed in the mold designed by the Supreme Court, which is based on judicial supremacy in constitutional interpretation, with practically no reaction by the Knesset seeking to change, undo, or otherwise challenge it. This is a striking reality because formally the Knesset is capable of modifying the constitutional revolution regime through simple majority legislation, and given that at least at certain times during this period there were ostensible political majorities who were highly critical of the Supreme Court’s model of judicial review or its use in particular cases.

The Article employs methods of institutional analysis and namely the notion of path dependence, in order to explain this reality. It reveals how distinct institutional characteristics have enabled the Supreme Court to turn initial constitutional legislation by the Knesset into a new normative status quo, which has gradually become entrenched in the institutional culture of Israel’s constitutional politics, substantially limiting the ability of the Knesset to produce an alternative constitutional vision to the one designed by the Court.

The Article contributes to an understanding of the political conditions and institutional qualities that underlie the establishment of a certain normative structure as the status quo, and as such also to the appreciation of the conditions for breaking away from an existing regime. In the Israeli context, it adds to the ongoing discussion on the legitimacy of Israel’s version of judicial review, and reflects on the possibilities of reform in Israel’s constitutional future.

Reviewing Continuity in Legislation

Rivka Weill

The Israeli legislature (the Knesset) applies continuity to pending bills on a regular basis. Thus, a statute may be enacted for which the first reading took place in one Knesset and later readings took place in a subsequent Knesset. Israel enacted a Continuity Law in the 1960s to increase legislative efficiency and enable the legislature to continue debates on bills pending from the previous legislature. In spite of changes that occur in the composition of its members, the Israeli legislature thus operates *de facto* as a “continuing body.”

This Article argues that Israel’s Continuity Law is incompatible with representative democracy. Continuity diminishes the significance of Israeli elections and undermines accountability for the laws that are passed. It infringes

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