

## **A Constitutional Revolution or Only a Human Rights Revolution?**

### **The Status of "Institutional" Constitutional Law**

**Barak Medina & Asor Watzman**

It is customary to distinguish between two main branches of constitutional law: institutional norms and human rights law. While the former type of norms primarily regulate the government so as to enhance the public interest, the latter aims at protecting individual interests. The Israeli Supreme Court's recent jurisprudence reflects interesting developments regarding the institutional norms. On one hand, the Court has recognized the constitutional status of several such norms, notwithstanding the fact that they are not explicitly enumerated in the Basic Laws that serve as Israel's constitution. This ruling has led to a significant restriction of the Knesset's power to, for example, enact laws catering to special interest groups, pertaining to privatization of certain governmental powers. On the other hand, the Supreme Court has ruled that the constitutional status of these norms is based on an expansive interpretation of Israel's bill of rights, namely Basic Law: Human Dignity and Liberty. The Court has ruled that a person has a constitutional right that the government will act in accordance with the rule of law, which incorporates the entire set of "institutional" norms.

This reading has provided a basis for establishing the constitutional status of institutional public law. However, it has blurred the distinction between institutional norms and human rights law. In particular, this development has led to the implementation of human rights law methodology in reviewing state actions that arguably violate institutional norms. It is a standards-based approach, requiring a case-by-case, all-things-considered analysis, implementing the proportionality doctrine to determine if the infringement of the norm is justified. Furthermore, in recent years, the Court has applied this methodology even to institutional norms that are explicitly anchored in the Basic Laws, developing a doctrine known as "implied" limitation clause.

In this article, we characterize and critically evaluate these developments in Israel's constitutional law. While we defend the recognition of the constitutional status of unenumerated institutional public law norms, we argue that their constitutional status should be anchored in the institutional Basic Laws, namely Basic Law: The Knesset and Basic Law: The Government, rather than in human rights law. We maintain that the two-stage, standards-based human rights methodology is not suitable for reviewing state actions that violate these norms. Rather, a rule-based approach should be preferred.