

# UPDATE CONSTITUTIONAL DEVELOPMENTS IN ISRAEL

## INTRODUCTION

The State of Israel was born on the 14th of May 1948 (corresponding in the Jewish calendar to the 5th day of the month of Iyar 5708). From the earliest days of the new state's existence, attempts have been made to write a constitution. First a constituent assembly was elected to write a constitution. They met in February of 1949 but the task of drafting a constitution proved too daunting and they abandoned the idea. Instead, the assembly transformed itself into the first Knesset (Parliament) with full legislative authority in spite of the fact that no constitutional framework existed for the Knesset's actions.<sup>1</sup>

In 1951, the Harari Resolution solved this dilemma. Pursuant to this resolution, the constitution would be attacked in a "piecemeal fashion."<sup>2</sup> A series of "Basic Laws" have, since 1951, been enacted to cover all aspects of Israeli governmental institutions and functions — the Government, the Knesset, the Army, the Office of President, the Supreme Court, the State Comptroller, and so forth.

All that appeared to be missing was a Basic Law providing constitutional protection for individual rights and freedoms.

Two Basic Law dealing with human rights — *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Freedom* — were enacted in the last Knesset. A translation of these laws follows. A third Basic Law — *Basic Law: Fundamental Rights of the Person* — provides a more general law protecting individual human rights and is presently before the Knesset for consideration. An unofficial translation of this proposed Basic Law follows as well.

In the Spring of 1990, *Constitutional Forum constitutionnel* published an article by David Kretzmer on constitutional change in Israel.<sup>3</sup> The articles that follow by Justice Aharon Barak and Professor Lorraine Weinrib provide an update on the situation and some thoughts on the effect that the *Canadian Charter of Rights and Freedoms* has had as a model for the new Israeli Basic Laws. — *B.P.E.*

1. L. Susser, "We the People" *Jerusalem Report* (5 November 1992).

2. D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 *Israel Law Review* 238-249.

3. D. Kretzmer, "The Constitutional Debate in Israel" (1990) 1:3 *Constitutional Forum constitutionnel* 13-14.

## BASIC LAW: FREEDOM OF OCCUPATION<sup>1</sup>

### **Freedom of Occupation**

1. Every citizen or resident of the State may engage in any occupation, profession or business; this right shall not be restricted except by statute, for a worthy purpose and for reasons of the public good.

### **Grounds for Licensing**

2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.

### **Application**

3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.

### **Stability of the Law**

4. Emergency regulations shall not have the power to change, temporarily suspend or place conditions on this Basic Law.

### **Entrenchment of the Law**

5. This Basic Law shall not be changed except by a Basic Law enacted by a majority of Knesset members.

### **Temporary Provision**

6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

<sup>1</sup> Enacted by the Knesset on 28th Adar A, 5752 (3 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2096, 17th Tevet 5752 (24 December 1991), 102.

## BASIC LAW: HUMAN DIGNITY AND FREEDOM<sup>2</sup>

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| <b><i>Purpose</i></b>                                | 1. The purpose of this Basic Law is to safeguard human dignity and freedom, in order to entrench in a Basic Law the values of the State of Israel as a Jewish and democratic state.  |
| <b><i>Safeguarding of Life, Body and Dignity</i></b> | 2. The life, body or dignity of any person shall not be violated.  |
| <b><i>Protection of Property</i></b>                 | 3. A person's property shall not be infringed.   |
| <b><i>Protection of Life, Body and Dignity</i></b>   | 4. Every person is entitled to protection of his life, body and dignity.   |
| <b><i>Personal Liberty</i></b>                       | 5. The liberty of a person shall not be deprived or restricted through imprisonment, detention, extradition, or in any other manner.   |
| <b><i>Exit from and Entry into Israel</i></b>        | 6. (A) Every person is free to leave Israel.<br>(B) Every Israeli citizen outside Israel is entitled to enter Israel.  |
| <b><i>Privacy and Personal Confidentiality</i></b>   | 7. (A) Every person is entitled to privacy and to the confidentiality of his life.<br>(B) A person's private domain shall not be entered without his consent.<br>(C) No search shall be carried out of a person's private domain, on his body, of his body, or of his personal effects.<br>(D) The confidentiality of a person's conversations, writings and records shall not be infringed.   |
| <b><i>Infringement of Rights</i></b>                 | 8. The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.  |
| <b><i>Exception for Security Forces</i></b>          | 9. The rights according to this Basic Law may not be restricted, qualified or waived for those serving in the Israel Defense Forces, the Israel Police, the Prison Service or in other security organizations of the State, except according to law and to an extent that does not exceed what is required by the nature and character of the service.   |
| <b><i>Conservation of Laws</i></b>                   | 10. Nothing in this Basic Law affects the validity of law that existed prior to the coming into force of this Basic Law.   |
| <b><i>Application</i></b>                            | 11. All governmental authorities are obligated to respect the rights under this Basic Law.   |
| <b><i>Stability of the Law</i></b>                   | 12. Emergency regulations shall not have the power to change this Basic Law, to suspend its force temporarily, or to set conditions upon it; however, when there exists a state of emergency in the State by virtue of a proclamation under s. 9 of the Law and Administration Ordinance, 5708-1948, <sup>3</sup> emergency regulations may be promulgated under the aforesaid section which deny or restrict rights according to this Basic Law, provided that the denial or the restriction are for a worthy purpose, and for a period and to an extent that shall not exceed what is necessary. |

<sup>2</sup> Enacted by the Knesset on 12th Adar B, 5752 (17 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2086, of 6th Kislev 5752 (13 November 1991), 60.

<sup>3</sup> *Official Gazette*, no. 2 5708, 1; *Sefer Ha-Chukkim* 5741, 306.

## BASIC LAW: FUNDAMENTAL RIGHTS OF THE PERSON

### Chapter 1: Fundamental Principles

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| <b>Fundamental Principles</b>                                   | 1. Fundamental human rights in Israel are founded on the recognition of the value of the human being, the sanctity of his or her life and being free; and these rights will be honoured in the spirit of the principles that are in the Declaration of the Establishment of the State of Israel |
| <b>Derogation or Limitation of the Fundamental Rights - How</b> | 2. Fundamental human rights may be derogated from or limited only by means of a statute or explicit agreement in a statute which are consistent with a democratic state, which have a proper purpose and do not go beyond what is required.   |

### Chapter 2: Fundamental Rights

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| <b>Equality Before the Law and Prohibition of Discrimination</b> | 3. Everyone is equal before the law: There shall be no discrimination between persons for reasons of sex, religion, nationality, race, community, country of origin or any other reason. This holds only when the reason is not relevant to the matter.   |
| <b>Physical Integrity and Human Dignity</b>                      | 4. (A person's life, body, and human dignity may not be violated.)<br>Every person has the right to life, physical integrity, and human dignity. [handwritten]  |
| <b>Personal Liberty</b>  | 5. A person's liberty may not be taken away or violated by imprisonment, detention, extradition, or in any other way.   |
| <b>Freedom of Movement</b>                                       | 6. a. Every person lawfully present in Israel is free to move throughout the country as he wishes.<br>b. Every citizen or resident of the State has the freedom to chose his or her place of residence in Israel.<br>c. Every person is free to leave Israel.<br>d. Every Israeli citizen who is outside of Israel has the right to enter Israel.                                 |
| <b>Freedom of Religious Belief</b>                               | 7. Every person has freedom of religious belief and also the freedom to fulfil the ([principles of] his or her belief and) the commandments of his or her religion.   |
| <b>Freedom of Opinion and Expression</b>                         | 8. Every person has freedom of opinion and expression and also the freedom to publicly express opinions and information in any manner.  |
| <b>Artistic Freedom and Freedom of Scientific Research</b>       | 9. Every person has artistic freedom and freedom of scientific research.  |
| <b>Personal Privacy and Privacy of One's Life</b>                | 10. a. Every person has the right to privacy and to the privacy of his or her life.<br>b. The entry onto private property without permission is prohibited, as is the carrying out of a search on a person's private property, on a person's body, inside a person's body or clothing.<br>c. The privacy of a person's conversations, writings and records shall not be violated. |
| <b>Legal Personality</b>   | 11. Every person has the capacity for obligations, rights, and undertaking legal actions.   |
| <b>Right to Property</b>   | 12. A person's property may not be interfered with.   |
| <b>Freedom of Occupation</b>                                     | 13. Every citizen or resident of the State has the freedom to engage in any occupation, trade or business.  |
| <b>Freedom of Assembly</b>                                       | 14. Every citizen or resident of the State has the right to have assemblies, marches and demonstrations.  |
| <b>Freedom to Unionize</b>                                       | 15. Every citizen or resident of the State has the freedom to join a union.   |
| <b>Right to Apply to Judicial Authorities</b>                    | 16. Every person has the right to apply to the judicial authorities.  |
| <b>Presumption of Innocence</b>                                  | 17. Every person is presumed innocent until found guilty in a judicial proceeding.  |

**Not to Punish without a Caution** 18. A person is not criminally guilty for an act or omission that was not a crime according to a statute at the time of action or omission, and a person may not receive a more severe punishment that was applicable by law at the time of the commission of the crime; but the fixing of the amounts of fines is not to be considered an increase in severity of punishment.

**Fair Judicial Proceeding** 18a. Every person accused of a criminal offence has the right to a fair trial.

### **Chapter 3: Miscellaneous**

**Application** 19. Every governmental organ or person acting on its behalf is obligated to honour fundamental human rights.

**Obligation of Governmental Bodies** **Possibility 1**  
19a. Every governmental body or person acting on its behalf is obligated to act fairly and justly.

**Possibility 2**  
19a. Legal authorities affecting human rights may operate only in a fair proceeding, without bias or irrelevant considerations.

**Possibility 3**  
Add to the end of section 19: ... to act fairly and to come to a just verdict.

**Restriction relating to the Defence Forces** [-]

**Non-application to Marriage and Divorce Laws** 21. The Basic Law does not apply to laws prohibiting and permitting marriages and divorces.

**Exercise of Fundamental Rights for a Bad Purpose** 22. No fundamental human right may be exercised in a way that will damage the existence of the State or its democratic government or in order to suppress the human rights.

**Stability of the Law** 23. Emergency decrees do not have the force to alter this Basic Law, to suspend it temporarily or to add conditions to it. Nevertheless, when there exists in the State a state of emergency by force of a declaration pursuant to section 9 of the Proclamation of the Governmental and Judicial Authorities, 1948, it is permissible to make emergency decrees pursuant to the above cited section which have the power to derogate from or to limit the fundamental rights according to sections 5, 6(a)-(c), 8, 10, and 12-15, as long as the derogations or limitations do not exceed the time or extent required.

**Force of Law** 24. There is nothing in this Basic Law that affects the force of a law that existed prior to the adoption of the Basic Law; however, the law shall be interpreted in the spirit of this Basic Law.

**Inflexibility of the [Basic] Law** 25. This Basic Law may only be altered explicitly, directed or by a Basic Law which states that it has force despite what is stated in this Basic Law, and that is approved in a plenary sitting of the Knesset by a two thirds majority of the Members on first, second, and third readings.

There are proposed amendments concerning the rights of soldiers, police, prisoners and public servants. Each states that their fundamental rights may be denied or limited to the extent necessitated by the nature and character of their service.

### **Ministry of the Attorney General**

#### **Proposed Basic Law: Fundamental Human Rights / Proposal on Social Rights (6.12.92)**

**Social Rights** 18b. Every resident has the right to live in human dignity, and included in this is the right to work and to fair working conditions and salary, the right to elementary education and the right to enjoy an appropriate level of health and material well-being. The rights in this section will be realized according to law and subject to reasonable limitations determined by the financial capacity of the State.

**Right of Workers to Unionize** 15a. Workers have the right to join unions for the purpose of defending their rights and for the purpose of adhering to collective agreements.

**Right to Strike** 15b. Workers have the right to strike.