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978-1-107-05457-8 - The Anatomy of Human Rights in Israel: Constitutional Rhetoric and State Practice

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Excerpt

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Introduction

The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

The Declaration of the Establishment of the State of Israel, Provisional Government of Israel, *Official Gazette*: Number 1; Tel Aviv, 5 Iyar 5708, 14.5.1948, page 1.

Why there is such a large gap between the declarations that countries make about human rights and their imperfect implementation of them? Why do states that have enacted

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laws about human rights and signed treaties about them choose not to enforce these laws in daily life? Why have activists failed to achieve the goals of ensuring human rights domestically and internationally? Such questions are at the heart of the human rights literature as well as at the core of this book.

Human rights are commonly understood as fundamental, inalienable rights to which a person is inherently entitled simply because she or he is a human being (Donnelly, 1998, 2003; Sepúlveda et al., 2004). Thus, they are regarded as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights in both national and international law (Forsythe, 2000; Nickel, 2010). Nevertheless, the strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature, and justifications of human rights to this day. Indeed, the question of what is meant by a “right” is itself controversial and the subject of continued philosophical debate (Barsh, 1993; Dershowitz, 2005; Shaw, 2008; Beitz, 2009).

Philosophers and political theorists tend to regard human rights as political, rather than as universal ideals grounded in comprehensive moral doctrines. Human rights theory has taken to following human rights practice, which has always been noncommittal on the issue of justification (Cranston, 1983; Sened, 1997; Forst, 1999; Ignatieff, 2001; Rawls, 2001; Simmons, 2001; Cohen, 2004; Williams, 2005;

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Raz, 2007; Ackerly, 2008; Cohen, 2008; Baynes, 2009; Madsen and Verschraegen, 2013). Many researchers focus on intrastate research, based on the understanding that the promotion of human rights cannot be achieved by international means only, and that both political pressure on leaders and the creation of a local culture that respects human rights are essential as supplemental and perhaps even preliminary measures. Furthermore, human rights require the state to act positively to remove barriers and facilitate the exercise of these freedoms (see, for example, Risse, Ropp, and Sikink, 1999; Falk, 2000; Freeman, 2002; Halliday and Schmidt, 2004; Fredman, 2008; Oomen, 2011).

Most of the current studies dealing with the domestic arena emphasize the following: the normative evolution of the promotion and protection of human rights (see, for example, Donnelly, 1998; Alston and Crawford, 2000; Twining, 2009a), the notion that human rights are grounded in human needs (Miller, 2007), and the concept of human rights as rooted in the understanding of the social function of such norms (Galligan and Sandler, 2004; Twining, 2009b). By highlighting the institutional and sociocultural context of human rights (Madsen and Verschraegen, 2013), these studies also underscore the link between democracy and human rights (Fredman, 2008). Other studies have used a detailed anthropological perspective (Slyomovics, 2005), focusing on the attempts to rebuild human rights through public accountability, compensation, educational policy, constitutional reform, and debates about national history and

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collective memory (Roniger and Sznajder, 1999). They have also established between the denial of human rights and violent conflict (Azar, 1990; Bunch, 2000), the impact of bureaucracy (Barak-Erez, 2002), and the limitations of concepts about human rights in a complex domestic context (Harvey, 2005; McCrudden, 2007). Finally, these studies have focused on the activities of nongovernmental organizations (NGOs), their effect on the political culture and on the legal arrangements in the state, and their strategies and identities (for example, see McCann, 1994; Cmiel, 1999; Risse, Ropp, and Sikkink, 1999; Freeman, 2002; Keith, 2002; Maimon, 2004; Morris, 2006; Pinto-Duschinsky, 2011; Vanhala, 2011).

This book, too, focuses on the domestic arena. However, it analyzes the politics and strategies of defending human rights by integrating tools from public choice theory with a unique institutionalist and learning perspective that is both formal and informal, local and international. As Todd Landman (2006: 1) argues, “While the Social Sciences have not eclipsed law in the field of human rights, there is now more than ever an increasing space and need for systematic social scientific research and analysis to expand our knowledge about the social, economic, and political conditions within which the promotion and protection of human rights is made possible and over which significant struggles for human rights are fought.”

Denis Galligan and Deborah Sandler (2004: 2) share similar notions:

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The charge of neglect may be made also against socio-legal analysis . . . although there is little in the socio-legal literature specifically about human rights,¹ it should have much to offer: in understanding the process by which social issues become human rights issues for incorporation into legal standards; in identifying the factors influencing the interpretation of those standards; and in their compliance, implementation, and enforcement at the international and national levels.

This book seeks to fill this gap in the sociocultural and sociolegal analysis of the protection of human rights. Although its focus is on Israel, its theoretical framework can be applied to other democratic countries. As Galligan and Sandler argue (2004: 24),

Protection [of human rights] depends ultimately on the actions of states and their governments, and is closely connected to other aspects of a country's stage of development, in such matters as economic structure, governance and law, and civil society. Countries that are stable, peaceful, democratic, and tolerant are likely to offer better levels of protection than those lacking these qualities.²

¹ See, for example, A. An-Naim, *Human Rights in Cross-Cultural Perspectives – A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992); M. L. Bartolomei and H. Hyden (Eds.), *The Implementation of Human Rights in a Global World* (Lund: Lund Studies in Sociology of Law, 1999).

² The best known empirical study of the correlation between democratic governance and human rights protection is S. C. Poe and

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In his book *The Political Institutions of Private Property*, Itai Sened (1997: 183) concludes, “If we accept the premise that our most basic property and human rights are the result of a political process, maybe it is time to reconsider the institutional designs that protect these rights, and spend more time studying them.”

This book describes the systemic crisis in Israeli society as expressed in the problem of nongovernability and analyzes its causes and results. Israeli society and its political system have experienced a deepening crisis in recent years, which has been expressed in widening divisions in society and in the inability of the political system to formulate and implement systematic policy plans. This phenomenon, which is often termed nongovernability, intensifies the Israeli Jewish and, to a greater extent, the Israel Arab public’s dissatisfaction with the political system (Dror, 2001; Arian, Nachmias, and Amir, 2002; Doron, 2006; Vigoda-Gadot and Mizrahi, 2010) and even with the democratic system (Smoocha, 1992; Rouhana, 1997; Peleg and Waxman, 2011). Under these conditions of constant instability and uncertainty, players adopt strategies that

C. N. Tate, “Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis,” *American Political Science Review* **88** (1994): 853–872. See also C. W. Henderson, “Conditions Affecting the Use of Political Repression,” *Journal of Conflict Resolution* **31** (1991): 120–142 and UNDP, *Human Development Report 2002*. The last cite illustrates the link between democracy and economic development and the alleviation of poverty.

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will maximize their self-interests. One result is the harm done to human rights, even though, ironically, the main strategy used by NGOs is litigation with the expectation that the High Court of Justice will provide policy decisions about human rights. NGOs turn to the Court because it has traditionally enjoyed high levels of trust and legitimacy due to its image as a stable and objective entity. This process positions the Supreme Court as a central player in the political scene with significant influence both on policy-making processes and the way that Israel chooses to state its human rights policy (Meydani, 2011; Ben-Porat, 2012). The dual issues of security and nationality inhibit the creation of an atmosphere that makes human rights a priority (Barak-Erez, 1999). The activity of NGOs in Israel is not an isolated case. Rather, it is part of a global process that has been at work since the 1970s in which NGOs have been shaping human rights as a legal, political, and social product (Steinberg, Herzberg, and Berman, 2012).

My analysis is novel in two important aspects. First, the book presents a theoretical framework based on studies in institutional theory and social choice that explains the political aspect of human rights policies, as well as the functions of several players in the political arena, particularly politicians, bureaucrats, interest groups, and the public (Robins, 2009). Second, I examine how these political players operate amid three structural variables – *nongovernability*, *a nonliberal political culture*, and the *judicialization of politics*. Nongovernability arises from a sectarian electoral system that is

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restricted to a particular group, and it results in the inability to design and implement quality public policies, goods, and services (Doron and Harris, 2000; Arian, Nachmias, and Amir, 2002; Rosenthal, 2012). It also leads to the entrenchment of traditional public management systems that are not oriented toward outcomes and efficiency through improved management of the public budget and do not focus on the role of public agencies in working with citizens (Galnoor, 2011). In addition, Israel is plagued by a *nonliberal political culture*, which prompts people to find ways around bureaucratic obstacles. Such a situation results in an alternative political cultural characterized by semi-legal, do-it-yourself behavior. The focus of such behavior is on achieving outcomes, rather than on the process of achieving these goals. The third factor I examine is the *judicialization of politics* – the situation in which the legal system partially replaces the other authorities in a state (Holland, 1991; Shamir, 1991; Barzilai, 1999; Hofnung, 1999). This analysis also explains the processes through which Israel is struggling to promote human rights within a specific institutional environment in general, thus determining the scope of human rights in particular. From this twofold analysis I draw conclusions about the future of Israeli democracy and its attitude toward human rights.

1.1 The Structure of the Book

The book is comprised of eleven chapters. Chapter 2 reviews the major approaches to human rights and the place

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of positivist theories in both determining and defending human rights. This discussion provides the basis for the book's theoretical framework – the application of public choice theory to the analysis of policy making and the involvement of the Supreme Court in human rights issues. This chapter presents the models and tools that public choice theory provides for the analysis of public policy on human rights. Although most models have significant mathematical aspects, this book concentrates on their main insights. In this way it bridges the economic, political, and sociological approaches to policy analysis, which are often regarded as antithetical. In other words, public choice theory offers us the ability to integrate the political, economic, and sociological aspects of human reality without needing to master the mathematical factors that often create barriers for many researchers from other disciplines and narrow the applications of the theory.

The theoretical framework explains how certain players such as the Supreme Court or other bureaucratic departments can be viewed as powerful bureaucratic entities with strong organizational interests. It also explains how the power and influence of a given organizational or political player should be measured relative to that of other players. In other words, if we want to promote human rights, we should think in terms of equilibrium and a balance of power between organizational and bureaucratic players, as well between other political players such as group interests and politicians. This model emphasizes the need to understand

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both political reality and political procedures if we want to design a policy that actually defines and defends human rights. It follows that, although human rights is a natural concept, democracy must create the right atmosphere for promoting and defending those rights.

Chapter 3 elaborates on the legal environment of human rights in Israel. It shows that human rights norms in Israel strike a balance between democracy and religion, between the lack of a clear constitution and incomplete statements about human rights, and between political instability and judicial activism. This chapter describes the constitutionality of primary legislation in Israel, emphasizing the development of human rights norms through the process of judicial review. Although not explicitly defined in the basic laws of the country, judicial review has developed in Israel on the basis of the Supreme Court's interpretation of constitutional documents. It is through this process that rights such as freedom of expression, freedom of election, and freedom of protest have been established.

Chapter 4 analyzes several characteristics of Israeli culture: its nongovernability, nonliberal political culture, emphasis on outcomes versus process, the effects of the culture and institutions on the behavior of individuals in a nonliberal polity, and the use of judicialization as a strategy for human rights NGOs. This chapter claims that all of these characteristics impose short-term considerations on political players, considerations that make it easy to ignore