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## Under the Shadow of the Constitutional Revolution?

### *Revisiting Israel's Founding Moments*

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#### I. Introduction

The dramatic events surrounding the establishment of the State of Israel in May 1948 had the unmistakable trappings of founding moments, as expounded by Ming-Sung Kuo's chapter in this volume. Israel emerged as an independent state in the midst of multinational, terrible armed conflict. Moreover, it was established following a contested colonial (Mandatory) rule. True, the exact timeframe of Israel's founding moment may be disputed. Still, it seems defensible to include within its ambit events stretching from the decision to adopt a formal constitution upon the state's foundation until it became known – already in 1950, if not sooner – that a different route would be pursued.

But the Israeli case has its complexities, certainly when considering Kou's observation that 'the founding moment of a constitutional order points to the series of historical events *that lead to the adoption of the constitution*' (emphasis added). Israel's constitutional history presents an anomaly in this respect, even compared to the two exceptions of Britain and Taiwan cited by Kuo. For, contrary to Britain, Israel *did* eventually (albeit belatedly) produce a codified constitution of sorts. Likewise, as discussed later in this book by Chien-Chi Lin, it may be said that Taiwan had had a formal constitution before it emerged as a distinct political entity. Contrarily, although it obviously took further time for it to more fully materialise, a distinct Israeli constitutional order – but no comprehensive, formal constitution – emerged only *following* the tumultuous events accompanying its establishment. Israel, it appears, had a clear founding moment, yet it did not produce a formal constitution.

To make things even more complicated, about four decades after the foundation, the Israeli ‘Constitutional Revolution’<sup>1</sup> took place, following the adoption of two basic laws in 1992 enumerating a short list of human rights.<sup>2</sup> In the epoch-defining 1995 *United Mizrahi Bank* case,<sup>3</sup> the Supreme Court pronounced the latter two – as well as all other – basic laws the supreme law of the land. Israel, Chief Justice Barak declared, relinquished in 1992 the British constitutional tradition and finally embraced the US-style constitutional framework. To many, a circle was thus closed, however imperfectly. The founding generation’s failure to draft a formal constitution (including a bill of rights) upon the state’s foundation moment – even though it had promised to do so in the Declaration of the Establishment of the State of Israel<sup>4</sup> – was at long last rectified.

The time lag between Israel’s founding moment and the emergence of its formal constitution in the 1990s raises deep questions: could a persuasive link – more than 40 years long – be drawn between the two? Had the constitutional model entrenched at the founding moment indeed been fundamentally defective? Was it still flawed in the 1990s, so that a constitutional revolution – the Revolution – was called for? The first question occupied central stage in the *United Mizrahi Bank* case. The latter two questions are a potent gravitational point in a new string of legal history of Israel. This new literature is the subject of this chapter.

The chapter examines three books in particular, all published recently in Israel (in Hebrew) and authored by three distinguished Israeli legal scholars: Nathan Brun, *Law, Passions and Politics: Judges and Lawyers Between the British Mandate and the State of Israel*;<sup>5</sup> Nir Kedar, *Ben-Gurion and the Constitution*;<sup>6</sup> and Daniel Friedmann, *Before the Revolution: Law and Politics in the Age of Innocence*.<sup>7</sup> Ron Harris’ *The Israeli Law – The Formative Years: 1948–1977*<sup>8</sup> will also repeatedly figure in the chapter, although it is only a ‘stepbrother’ to the other three manuscripts. While its theses do not necessarily comply with the key *normative* propositions advanced in the three other books, on a *descriptive* level, it is their fellow-traveller for its analyses have clear traces of, and contribute greatly to, this literature’s re-engagement with Israel’s founding moment.

<sup>1</sup> eg, R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) 21–24; G Sapir, *Constitutional Revolution in Israel: Past Present Future* (Bar-Ilan University Press, 2010) (Hebrew); B Medina and A Rubinstein, *The Constitutional Law of The State of Israel*, 6th edn (Schocken Publishing House, 2005) 221, 225–26 (Hebrew).

<sup>2</sup> Basic Law: Freedom of Occupation 1994, LSI 1454 p 90 (Isr); Basic Law: Human Dignity and Liberty 1992, LSI 1391 p 150 (Isr).

<sup>3</sup> CA 6821/93 *United Mizrahi Bank v Migdal* 49 (4) PD 221 [1995] (Isr).

<sup>4</sup> The State of Israel Declaration of Independence 14 May 1948 (Hebrew).

<sup>5</sup> N Brun, *Law, Passions and Politics: Judges and Lawyers between the British Mandate and the State of Israel* (Steimatzky, 2014) (Hebrew).

<sup>6</sup> N Kedar, *Ben-Gurion and the Constitution* (Kinneret, Zmora-Bitan, Dvir 2015) (Hebrew).

<sup>7</sup> D Friedmann, *Before the Revolution: Law and Politics in the Age of Innocence* (Miskal, 2015) (Hebrew).

<sup>8</sup> R Harris, *The Israeli Law – The Formative Years: 1948–1977* (Hakkibbutz Hameuchad, 2014) (Hebrew).

In critically surveying the three books, this chapter highlights common threads running through them and collages them into a distinct appraisal of Israel's founding generation that is embedded in them. The resultant collage is surprising and important. In fact, the chapter suggests that it signifies the emergence of a novel generational reassessment of Israel's founding moment and its time. On this reading, the fact that Big-C, formal constitution, was not delivered upon foundation should not be regarded as a deplorable failure, but rather as a boon and the constitutional framework of those days as a cause for admiration. The chapter will not only identify the rise of this new original historiography, but will also trace its origins. It will argue that this new appraisal of Israel's founding moment cannot be understood detachedly from the Constitutional Revolution. In fact, it is suggested that it is best understood as an unfavourable reaction to the 1990s Revolution.

One does not have to share this literature's judgement of the 1950s (or of the 1990s) to appreciate its great contributions to extant scholarship. As illustrated below, the three books – here, with Harris' forceful assistance – deepen our understanding of the 1950s in three major respects: first, they insightfully straddle the legal and political history of early statehood; second, their (re)reading of early Israeli law is particularly detailed and colourful largely because they line up an extraordinarily long list of legal and political figures as a vital part of their discussions; and, third, this new literature employs an impressive array of methodologies, ranging from personal history to empirical legal studies.

The chapter's historiographical explorations add a vital layer to this collection's analysis. Notably, it joins the insightful dialogue between Kuo and Simon Gilhooley, where they highlight the potential of founding moments to reinvigorate, but also narrow, later generations' 'democratic horizons', depending on the manners in which those generations (re)construct their past. The chapter goes in the same direction, emphasising that founding moments – or, more accurately, present reconstructions thereof – may certainly become battlegrounds where the very definition of a state's democratic nature – at present – is fought over. For, in order to say whether a particular invocation of a founding moment limits or expands democratic horizons, it should be made clear what 'democracy' means for the specific polity in question (eg, are judicial review of legislation and codified constitution vital components thereof?). This chapter illustrates that the founding moment may be relied upon for that exact purpose.

The chapter proceeds as follows. Section II will outline a standard rendition of the history of constitution-making and the constitutional tradition in Israel. Next, section III will introduce the main theses of the three books. Section IV will examine how the new literature relates to previous legal historiographies of the jurisprudence of the 1950s Supreme Court. Section V will examine the new corpus' understanding of the interface between the Mandatory era and early statehood, a topic of great relevance to our discussion, as Israel's foundation was decidedly cast, *inter alia*, in the shadow of the Mandatory regime. In section VI, I will offer several critical observations regarding this literature's historiography,

as well as highlighting its presentist orientation and its nostalgic and revisionist approach. I will also assess its treatment of the interplay between law and politics. Section VII concludes.

## II. A Brief History of Israel's Quest for a Bill of Rights

We begin with a shorthand, standard explanation of why, to this day, Israel does not have a unitary, formal, comprehensive, human rights-upholding, US-like constitution.<sup>9</sup>

The State of Israel was founded following three decades of British Mandatory rule over Palestine. As the Mandate drew to a close, the establishment of an independent Jewish state (alongside an Arab state) was envisaged in the United Nations General Assembly Resolution 181 of 29 November 1947.<sup>10</sup> Resolution 181 specifically ordained the writing of the constitutions of the two states to be composed by their respective constituent assemblies, whose elections had been also contemplated in the Resolution. The political leadership of the *Yishuv*, the organised Jewish population in Palestine, embraced the Resolution.<sup>11</sup> It seemed at first to follow it to the letter, at least as far as the writing of a constitution for the Jewish state was concerned. The *Yishuv's* adherence to the roadmap drawn up in Resolution 181 for constitution-drafting was writ large in the Declaration on the Establishment of the State of Israel. The latter outlined a tight schedule for the election of a constituent assembly and the writing of a constitution. Taking another step in the same direction, the Constituent Assembly was indeed elected, albeit later than prescribed in the Declaration.<sup>12</sup>

It did not take long to realise that the Israeli Constituent Assembly balked at the task of writing a constitution for the State of Israel. Soon after its inaugural convention, the Assembly made known its refusal to write a unified document comprising the constitution of the newborn state by proclaiming itself a 'regular' parliament of Israel (a 'regular' Knesset), rather than the constitutive, idiosyncratic Constituent Assembly of the State.<sup>13</sup> Further, in 1950, it went for a new course of action with respect to the drafting of the state's constitution. In the famous Harari Resolution of that year, it reformulated its constitutional mission.<sup>14</sup> Rather

<sup>9</sup>eg, I Zamir and A Zysblat, *Public Law in Israel* (Oxford University Press, 1996); D Barak-Erez, 'Form an Unwritten Constitution to a Written Constitution: The Israeli Challenge in American Perspective' (1995) 26 *Columbia Human Rights Law Review* 309.

<sup>10</sup>United Nation, General Assembly Resolution 181 (Partition Plan of Palestine) 1947.

<sup>11</sup>Anita Shapira, *Israel: A History* (Brandeis University Press, 2012) 155; Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Hart Publishing, 2014) 4–5.

<sup>12</sup>Medina and Rubinstein (n 1) 34–36.

<sup>13</sup>See Navot (n 11) 8–9; The Transition to the Second Knesset Act, 5713-1951, LSI 73 104 (Isr).

<sup>14</sup>5th Knesset Protocol 1717, 1743; Amos Shapira, 'Judicial Review without a Constitution: The Israeli Paradox' (1983) 56 *Temple Law Quarterly* 405, 408–10.

than drawing up a unitary, comprehensive constitution, as had been initially contemplated, it chose to pursue a piecemeal process, whereby a series of 'basic laws' would be gradually enacted. Probably chastened by its failure to compose a constitution, the Resolution did not even set a timetable for the constitutional enterprise.

The First Knesset – again, originally known as the Constituent Assembly – essentially sufficed itself with adopting the Harari Resolution, failing to enact any basic law. It took the Knesset an additional eight years to actually embark on the road charted in the Harari Resolution. Only in 1958 did the Knesset adopt the first basic law – Basic Law: The Knesset. Subsequently, in a protracted progression, a total of nine basic laws were put on the books from 1958 up until 1988.<sup>15</sup> What united this first string of constitutional legislation was its distinctly institutional character. The nine basic laws focused on the three major branches of government and were mostly confined to these and other state institutions, such as the President of the State, and the State's General Comptroller.

How were basic law treated by the courts? Before the Revolution, Israeli constitutional jurisprudence had a clear dominant orientation: the British-Diceyan framework (or the Westminster model).<sup>16</sup> The fulcrum of the Diceyan orthodoxy rested on the supremacy of parliament. As parliament reigned supreme, there was no place for a formal constitution restricting its powers. Nor was there room for judicial meddling in the business of parliament. Therefore, while British courts could develop human rights (and gained great fame for so doing), they were allowed to do so only between the cracks of parliamentary legislation.<sup>17</sup> Likewise in Israel, where as a rule (although with a limited exception), pre-Revolution courts did certainly not pass judgment on legislative acts of the Knesset.<sup>18</sup> Just as important was the role taken by Israeli courts, under the dominance of the Supreme Court, in constituting a judicial bill of rights in a common law fashion.<sup>19</sup> Still, as part of the orthodox doctrine, there was a clear limit to the Court's frolicking with the development of an Israeli common law of human rights: legislative edicts. Faced with the acts of the Knesset, the courts had to bow and comply.<sup>20</sup>

<sup>15</sup> Basic Law: The Knesset 1958, LSI 244 69 (Isr); Basic law: The Government 1968, LSI 540 226 (Isr); Basic Law: The President of The State 1969, LSI 428 116 (Isr); Basic Law: Israel Lands 1960, LSI 312 56 (Isr); Basic Law: The State Economy 1975, LSI 777 206 (Isr); Basic Law: The Military 1976, LSI 806 154 (Isr); Basic Law: Jerusalem, The Capital of Israel 1980, LSI 980 186 (Isr); Basic Law: The Judiciary 1984, LSI 1110 78 (Isr).

<sup>16</sup> S Aharonson, 'Constitution to Israel: David Ben Gurion British Model' (1998) 2 *Politics* 9 (Hebrew); Z Segal, 'A Constitution without a Constitution: The Israeli Experience and the American Impact' (1992) 21 *Capital University Law Review* 1.

<sup>17</sup> M Bevir, 'The Westminster Model, Governance and Judicial Reform' (2008) 61 *Parliamentary Affairs* 559; D Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 *OJLS* 751.

<sup>18</sup> JM Albert, 'Constitutional Adjudication without a Constitution: The Case of Israel' (1969) 82 *Harvard Law Review* 1245; E Likhovski, 'The Courts and the Legislative Supremacy of the Knesset' (1968) 3 *Israel Law Review* 345.

<sup>19</sup> MB Nimmer, 'The Uses of Judicial Review in Israel's Quest for a Constitution' (1970) 70 *Columbia Law Review* 1217.

<sup>20</sup> eg, HCJ 188/63 *Bezul v The Minister of Home Affairs* 19(1) PD 337 [1965] (Isr).

Yet, also in this context, Israel had its complexities, for Israeli parliaments occasionally challenged Dicey. First, as noted, several Knessets adopted a series of ‘basic laws’, thus seemingly introducing a pyramidal structure of legal norms in which some laws were normatively superior to other, ordinary forms of legislation. However, it must be noted at once that, prior to the Constitutional Revolution, the Court was adamant that as a rule, basic laws were just like any other laws.<sup>21</sup> There was an exception to that rule, which concerned the next, second Knesset’s contra-Dicey step. Occasionally, the Knesset included entrenched provisions in basic laws, whose contravention required the support of a special majority of Knesset Members.<sup>22</sup> In so doing, the Knesset appeared to disrupt the Diceyan model’s article of faith that the plenary power of the current parliament could not be checked – surely, not by courts, and not even by previous parliaments. However, in the 1969 landmark case of *Bergman v Minister of Finance*, the Supreme Court ruled that formally entrenched provisions *would* be bidding upon later Knessets, as long as the Knesset decided to leave them in place.<sup>23</sup>

The resultant constitutional framework, going both with and against the grain of Dicey, was convoluted. More troubling to many, before and after *Bergman*, was the lingering conviction that the Israeli constitutional framework, which to a large extent stayed in the rut of its founding moment, was fundamentally deficient. Indeed, laments for Israel’s lack of a comprehensive (formal) constitution also persisted as the list of (‘institutional’) basic laws grew longer. Notably, the absence of two items from the unfolding list was steadfastly and increasingly noted along the way: one dealing with fundamental human rights, and the other laying out the procedure for the adoption and amendment of basic laws, which were – and are – enacted just like any other legislation, as well as setting the terms for judicial review of legislation based on them.<sup>24</sup> However, this perception of the founding moment’s legacy and its constitutional offspring was never accepted across the board. Over the years, a duo of opposing camps locked horns, disputing the founding generation’s constitutional legacy and correspondingly the preferable constitutional model to be pursued by Israelis.

According to the first camp, the 1950s certainly left a mark of Cain on Israeli constitutionalism.<sup>25</sup> And, to many, Israel’s exceptionalism in the field of constitutional law, throughout the bulk of its history, served as a painful reminder of that mark.<sup>26</sup> Hence, according to members of the Israeli pro-Constitution

<sup>21</sup> eg, HCJ 148/73 *Kniel v The Minister of Justice* 27(1) PD 794 [1973] (Isr).

<sup>22</sup> See especially Basic Law: The Knesset (n 15) §§ 4, 45, 46.

<sup>23</sup> HCJ 98/69 *Bergman v The Minister of Treasury* 23(1) PD 693 [1969] (Isr).

<sup>24</sup> M Shamgar, ‘On the Written Constitution’ (1974) 9 *Israel Law Review* 467.

<sup>25</sup> eg, M Ben-Porat, ‘Symposium: An Israeli Constitutions Whether and When’ (1986) 11 *Tel-Aviv University Law Review* 19 (Hebrew); A Shapira, ‘Why Israel Has No Constitution, But Should and Likely Will, Have One’ (1992–93) 37 *St Louis Law Review* 283.

<sup>26</sup> M Tushnet, ‘Constitution’ in Michel Rosenfeld and Andras Sajó (eds), *Comparative Constitutional Law* (Oxford University Press, 2012) 221.

camp, even *if* the founding generation of Israelis had good reasons to disown its constitutional undertaking, due to security and economic considerations, they had still condemned Israelis to live in a profoundly flawed legal system.<sup>27</sup> Members of the latter camp were obviously emboldened by the fact that over time, Dicey was increasingly challenged not only in Israel, of course. Most tellingly, even its motherland cast aside its shibboleth and introduced its version of judicial review of legislation with the closing of the twentieth century, thus finally succumbing to the global, post-Second World War trend of adopting US-style constitutionalism.<sup>28</sup>

Still, not all Israelis were willing to embrace the US constitutional tradition, not even in the wake of Britain's about-face. Notably, Chief Justice Moshe Landau remained a staunch supporter of the British model throughout.<sup>29</sup> Landau persisted in his opposition even as additional ('institutional') basic laws were enacted and as the terms of the debate narrowed down, centring on the desirability of providing the state with a formal bill of rights to be judicially guarded.<sup>30</sup> Landau (who retired from the bench in 1982) kept his running quarrel with the Americanised version of constitutionalism before and after the Israeli Constitutional Revolution. He and others raised the spectre of a politicised judiciary should it be drawn into polemics concerning controversial matters of principle and personal faith.<sup>31</sup> According to this approach, human rights legislation is fraught with such divisive, toxic issues. Therefore, judicial review of a piece of legislation arguably infringing on human rights would readily implicate courts in political strife. The costs of importing such a practice to Israel – above all, in terms of the judiciary's popular standing and its constitutional independence – might be devastating. In any event, it was also argued, the protection offered by Israeli courts to human rights, under the orthodox legal framework, was commendable.<sup>32</sup>

*United Mizrahi Bank* evidently stands for a contrary approach. It made it abundantly clear that, by the 1990s, the Court unabashedly joined those calling for placing constitutional checks on the Knesset and a departure from the British orthodoxy.<sup>33</sup> It seems that with the Court's new credo came a greater willingness

<sup>27</sup> eg, Y Dinstein, 'Human Rights in Israel' (1973) *Tel-Aviv University Law Review* 619 (Hebrew); Amnon Rubinstein, 'Israel's Partial Constitution: The Basic Laws' in Mitchell G Bard and David Nachmias (eds), *Israel Studies: An Anthology* (American-Israeli Cooperative Enterprise, 2012).

<sup>28</sup> Tushnet (n 26) 221; P Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart Publishing, 2012) 192–96.

<sup>29</sup> M Landau, 'The Constitution as the Supreme Law of the State?' (1971) 28 *Israel Bar Law Review* 30 (Hebrew).

<sup>30</sup> A Shapira and B Bracha, 'The Constitutional Status of Individual Freedoms' (1972) 2 *Tel-Aviv University Law Review* 20 (Hebrew).

<sup>31</sup> M Landau, 'The Supreme Court as a Constitution Maker for Israel' (1996) 3 *Haifa University Law Review* 697 (Hebrew).

<sup>32</sup> M Elon, 'Basic Laws: Methods of Enactment and Interpretation Form Where to and Where' (1995) 12 *Bar-Ilan University Law Review* 253, 256–57 (Hebrew).

<sup>33</sup> But see R Weil, 'United Mizrahi Bank's Twentieth Anniversary: On the Piquant Story of the Hybrid Israeli Constitution' (2016) 38 *Tel-Aviv University Law Review* 510 (Hebrew).

on its part to publicly depict the pre-revolutionary age as flawed.<sup>34</sup> To the justices and scholars subscribing to this vision of the 1950s, the dramatic events of 1992–95 were long overdue. Only once the Revolution took place were key fundamentals of a true liberal-democratic constitutional order finally installed on Israeli soil. Significantly, under such a progressive rendition of the history of Israel constitutional law, the old Court's efforts to put in place the essentials of a liberal-democratic human rights regime – commendable as they were – could not have been anything other than a stepping stone – essential as it was – towards a more complete constitutional arrangement.<sup>35</sup> Finally, on this understanding, only with the Revolution could the Court, unencumbered by Dicey's orthodoxy, finally lend a hand where the old Court could not.<sup>36</sup>

### III. Overview of the New Literature

This section introduces the three books and indicates their contribution to our understanding of the processes and debates outlined in the previous section. The following sketches surely do not do justice to the books. They will not encompass their richness, but merely point to their relevance to the chapter's overall theses. Following a review of the books, I will introduce themes running through them and the overall perception of the 1950s – essentially, Israel's founding decade – that emerges from bringing them together.

#### A. The Books

*Law, Passions and Politics* was published in 2014 following Nathan Brun's earlier tome (of 2008) dedicated to the history of the judiciary in the territory known as 'Palestine'.<sup>37</sup> The first book canvassed the Ottoman judiciary in the land and related the transition from Ottoman-run to British-run legal system at the end of the First World War. Brun's latest manuscript, which occupies us here, explores a chain of episodes, some (in)famous, others thus-far unknown, concerning courts and judges in the late Mandate and early statehood eras. For the most part, judges are the focal points of the book. It presents a gallery of Mandatory and Israeli judges. The different chapters describe various judges' personal background and ideological predilections before and after nomination, difficulties they encountered as

<sup>34</sup> Y Sagy, 'A Case That Made History: A Historiographical Inquiry into *The United Mizrahi Case*' (2018) 19 *Haifa University Law Review* 325 (Hebrew).

<sup>35</sup> *ibid.*

<sup>36</sup> Medina and Rubinstein (n 1) 54–57, 255–59; Aharon Barak, 'The Rule of Law and the Supremacy of the Constitution' (2000) 5 *Haifa University Law Review* 375, 377–78, 382–83 (Hebrew).

<sup>37</sup> N Brun, *Judges and Jurists in Erez-Israel: Between Constantinople and Jerusalem 1900–1930* (Hebrew University Magnes Press, 2008) (Hebrew).



their appointment to judicial positions (as judges, justices or chiefs of courts) was at issue, and noteworthy cases they handled. It is clearly to Brun's credit that he showcases myriad legal players; not only Justices but also other judges, as well as attorneys and their clients, occupy central stage in the book's chapters.

Nir Kedar's aspiration in writing *Ben-Gurion and the Constitution*, which revolves around the founding father and the first Prime Minister of Israel, is quite straightforward. Kedar writes against the pervasive conception that Ben-Gurion shunned – thus effectively nipping in the bud – the campaign to write a formal constitution for Israel for ephemeral, even small-time political considerations. There are two interlocking prongs to Kedar's effort to rationalise the Ben-Gurion position. First, Ben-Gurion's campaign against the vogue of constitution-making was based on solid, principled and justifiable arguments. Second, Ben-Gurion did indeed rebuke the drive toward a Big-C Constitution, but he was just as relentless in putting in place a lasting Small-C Israeli (Jewish) liberal-democratic constitution. Kedar sympathetically portrays Ben-Gurion as well as several questionable actions taken by him as the reverberations of a deep commitment to liberal democracy.

Taken together, the two prongs assert that Ben-Gurion was driven by an overarching, coherent vision: Israel must be founded on established liberal-democratic principles (such as the rule of law and general free elections), yet these principles would not gain traction among the public by codifying them in a written constitution. Rather, they would have to be won, by each generation anew, through the dynamic, on-the-ground practice of state organs and the citizenry pursuing such principles. Kedar makes the case that Ben-Gurion got it right in the constitutional debate of early statehood. According to Kedar, it simply did not make sense to dedicate the required time and energy and face the political turmoil involved in drafting a constitution for the embattled state.<sup>38</sup>

In an impressive feat, Daniel Friedmann – a former Minister of Justice and an eminent legal scholar – has recently published two tomes covering the past five centuries(!) in the history of the territory stretching to the west of the Jordan River: first came *The Purse and the Sword: The Trials of the Israeli Legal Revolution* (2013),<sup>39</sup> which spans the period from the late 1970s to the near present, and then *Before the Revolution*, which is dedicated to the lengthy period from the fifteenth century to the mid-twentieth century. The two relate momentous events that took place during Ottoman, Mandatory and Israeli rule over that piece of land, although Friedmann's two-volume enterprise devotes much more attention to post-Israeli independence events than to pre-independence affairs.

As indicated in the title of the second book, which is more pertinent to the present discussion, there are two focal points to Friedmann's discussions: the legal

<sup>38</sup> See also O Rozin, 'Forming a Collective Identity: The Debate over the Proposed Constitution, 1948–1950' (2007) 26 *Journal of Israeli History* 251.

<sup>39</sup> D Friedmann, *The Purse and the Sword: The Trials of the Israeli Legal Revolution* (Miskal, 2013) (Hebrew). An English translation of a revised version of this book was published by Oxford University Press in 2016.

sphere and the political sphere. Around the first focal point, Friedmann canvasses major developments in the law of the land during the relevant eras, whether they took the form of legislation, the constitution of novel legal institutions or epoch-defining litigation and courts' rulings. The second focal point revolves in the main around policies and ideologies advanced by dominant (mostly Jewish) political organisations, the Knesset and, even more so, Israeli governments. Friedmann's scathing rebuke of the new, post-1970s Court cuts across the analyses in both books. His theses will resurface time and again in the ensuing discussion.

## B. Connecting the Dots

Taking a bird's-eye view over the historiography encapsulated in the three manuscripts, an overarching theme emerges: a reassessment of the Israeli-Diceyan constitutional model. Specifically, in revisiting the 1950s, the books buttress both sides of the Diceyan model as applied in the Israeli context: they applaud both the absence of a formal constitution and the 'old' Court's protection of human rights in the young state. Intertwined in these two counter-arguments is the proposition that constitution-making is hardly a cost-free endeavour. It is far from clear that the benefits that might have resulted from the adoption of a constitution in fledgling Israel would have outweighed the costs incurred in the process by Israeli society and the courts of that time.<sup>40</sup>

Further, it appears that, according to the account provided in this literature, Israeli constitutional law of the 1950s was in quite good shape. An impressive line of judges and justices, the political elite of the day, and a dedicated state apparatus made sure that nascent Israel would have a decent, well-functioning legal system; moreover, they made sure that human rights would be protected in Israel. Miraculously, all this was done in the face of enormous security, economic and social challenges that beset the young state.

As part of this reassessment of the pre- and post-Constitutional Revolution eras, the books revisit the 1950s judiciary and especially the Supreme Court – their composition, jurisprudence and interplay with the other branches of government. In so doing, they implicitly and even explicitly draw comparisons with the latter-day Court. All in all, the authors describe the courts of the 1950s as highly competent, entirely respected, reasonably efficient, dutifully modest and appropriately deferential to the other branches of government. In fact, several sections in their analyses suggest that the courts of the 1950s better served their callings – the protection of human rights included – than do contemporary courts.<sup>41</sup>

Friedmann in particular suggests that the old Court fared better than the new Court because the former did its best to distance itself from ideologically charged

<sup>40</sup> Kedar (n 6) 225–27.

<sup>41</sup> Friedmann (n 7) 486–87, 506; Friedmann (n 39) 595.

issues and plain politics, and even more so from any engagement with the divisive business of legislation.<sup>42</sup> Friedmann harkens back to the Landau-Dicey approach and embraces Landau in more than one way. First, on a personal level, according to Friedmann, ‘in many respects Landau was an ideal judge.’<sup>43</sup> Friedmann commends in particular the fact that Landau’s judgmanship was ‘totally objective, as it was founded on legal principles and detached from personal and political views.’<sup>44</sup> Also laudable, to Friedmann, was Landau’s unwavering – allegedly, as opposed to the new Court’s faltering – commitment to the preservation of the State of Israel and a robust Zionist vision thereof.<sup>45</sup> Likewise, Landau’s deference to the government’s security considerations, and his general conservatism and penchant for judicial restraint are explicitly and favourably contrasted by Friedmann with the activism of the new Court.<sup>46</sup> Finally, not only does Landau’s judicial ideology fare better in Friedmann’s account, but so too does his style of judging, especially Landau’s (and his brethren’s) clear tendency of writing short opinions.<sup>47</sup> Clearly, Friedmann wholeheartedly sides with Landau in the debate surrounding the Constitutional Revolution. Echoing familiar arguments put against the practice of judicial review of legislation, Friedmann too holds that it is democratically undefendable, as it subverts the will of the people and is injurious to the courts, which are thereby drawn into the political arena.<sup>48</sup>

Now, taking a panoramic view over the three books, I wish to argue that, taken together, they construct the following argument regarding 1950s Israeli constitutionalism:

- (a) *since* – as demonstrated mainly by Friedmann and Brun – *even without a formal constitution, human rights were generally preserved in Israel during early statehood thanks to the robust, yet balanced, efforts of the courts*; and
- (b) *since* – as forcefully argued by Friedmann – *courts should not be implicated in political processes typifying legislation*;<sup>49</sup> and
- (c) *since* – as illustrated by Kedar – *the writing of a constitution would have been a costly, maybe even a dangerous, enterprise*;

*therefore, the founding generation set in place the right constitutional framework for that time and age – and maybe even for our age.*

<sup>42</sup>Friedmann (n 7) 319, 347, 455–58, 523. See also Brun (n 5) 531.

<sup>43</sup>Friedmann (n 7) 457.

<sup>44</sup>ibid. See also Brun (n 5) 420–40.

<sup>45</sup>ibid 333–34; M Landau, ‘On Zionism in Our Days’ in Aharon Barak (ed), *The Shamgar Book: A Life Story* (Israel Bar Press, 2003) (Hebrew).

<sup>46</sup>Friedmann (n 7) 424–25, 459, 495.

<sup>47</sup>ibid 250, 473.

<sup>48</sup>Friedmann (n 7) 209, 470–74, 495–502, 525–26, 595; Friedmann (n 39) 559–69, 582–84; D Friedmann, ‘Does Israel Have a Constitution and Who Wrote it?’ (2012) 14 *IDC Law Review* 117 (Hebrew). It goes beyond the purvey of this article to assess these arguments.

<sup>49</sup>Friedmann (n 7) 470–74, 495–502, 525–26; Friedmann (n 39) 114–15, 559–69.

No doubt, especially in light of the discussion in the previous section, this argument is plainly critical of the Constitutional Revolution and thus of the revolutionary Court that made it a reality.

#### IV. The Old and New Courts: Three Generations of Scholarship

As we have just seen, according to Friedmann, the old Court – Landau’s Court – was a better court than the new Court, pure and simple, and the former also proceeded on a sounder constitutional theory. This section positions this estimation within the general sweep of the Court’s historiography. It argues that the new literature signals the dawn of a new, third approach in the historiography of the 1950s Court, which follows a first generation’s hagiography of the Court as well as a second generation’s more critical approach that emerged around the late 1980s. In short, this third generation regards with favour the Court’s performance during the 1950s, thus rekindling the hagiographical tradition. The following discussion will chart the course of this triad of generations.

Over the years, several characterisations of the Court’s jurisprudence during the formative 1950s were put forward. As insightfully suggested by Harris, the various characterisations could be organised along three axes: ideological (potentially relevant options include the socialist, collectivist-nationalist and individualist categorisations); institutional (namely, how deferential was the Court to the other branches of government? Was it conservative or activist in this respect?); and its style of decision-making (in Menachem Mautner’s influential description, was it ‘formalistic’ or ‘value-laden’?).<sup>50</sup> The resultant matrix is complex. Consequently – and this is one of Harris’ fine emphases – the general tenor of that jurisprudence escapes bright-line characterisations. There are simply sufficient major cases, in which the three axes point to contrary orientations, to ruffle the now-familiar collectivist, conservative and formalistic portrayal of the 1950s.

The new literature reminds us that beneath the various attempts to neatly depict the 1950s Court lies a seemingly simple question – namely, to what extent was the Court in fact the bastion of human rights in Israel of the 1950s? For years, justices – on and off the bench – prided themselves in championing the cause of human rights. Numerous scholars followed suit, highlighting the Court’s achievements against a backdrop of the immense challenges faced by the fledgling state, the lingering legacy of Mandatory legislation, which predominated post-independence Israeli law, the absence of a formal constitution, as well as the harsh ideological

<sup>50</sup>Harris (n 8) 73–75; M Mauntner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Ma’agalay Da’at Publishing House, 1993) (Hebrew).

environment surrounding the Court of early statehood.<sup>51</sup> This environment was, or so the story went, collectivist and thus averse to human rights that smacked of liberal individualism.

As a general matter, as far as the Court's history was concerned, for decades the literature treated it with much favour. The important 1980 book of (future Justice) Elyakim Rubinstein on the history of the Court<sup>52</sup> was a significant high point of that generous approach, which subsequently almost petered out. Pnina Lahav, Yoram Shachar, Menachem Mautner and others played a decisive role in ushering in a new generation of scholarship, stirring the Court's historiography to more balanced and critical grounds.<sup>53</sup> Thus, for example, Lahav opines that the 1950s Court's record 'was far from uniform'. She writes that: 'In a number of cases, [it] allowed the suppression of the rights ... because of national security considerations applied by the executive branch.'<sup>54</sup> Several scholars followed suit, thus supplementing the extant hagiography with novel and rich historiography.<sup>55</sup> Especially following Mautner, it became commonplace to generally regard the 1950s Court as formalistic and its days as the days of judicial restraint.<sup>56</sup>

It is therefore only to be expected that, in revisiting the 1950s jurisprudence, the new literature critically explores the breadth of public law issues the Court handled throughout its history. 'Standing' and 'justiciability' are two particularly relevant legal categories here, and it is commonly accepted that the more expansive the Court's interpretations thereof is, the wider the range of public law disputes engaged with by the Court is. Also undisputed is the fact that the Shamgar and Barak Courts (of 1983–95 and 1995–2006, respectively) adopted a sprawling approach on both counts.<sup>57</sup>

The transformation of standing and justiciability doctrine in Israeli law during the 1980s met with some opposition among justices and scholars,<sup>58</sup> yet this opposition did not derail it. Consequently, an increasing number of cases, which had

<sup>51</sup> A Maoz, 'Defending Civil Liberties without a Constitution: The Israeli Experience' (1988) 16 *Melbourne University Law Review* 815.

<sup>52</sup> E Rubinstein, *Judges of the Land* (Schocken, 1981) (Hebrew).

<sup>53</sup> eg, Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, 1997); Y Shachar, 'The History of the Supreme Court' (2003) 19 *Bar-Ilan University Law Review* 397 (Hebrew).

<sup>54</sup> P Lahav, 'Rights and Democracy: The Court's Performance' in E Spinzak and L Diamond (eds), *Israeli Democracy Under Stress* (Lynn Reinner, 1993) 125, 138.

<sup>55</sup> eg, G Forman and A Kedar, 'From Arab Land to Israel Lands: The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948' (2004) 22 *Environment and Planning D: Society and Space* 809; I Saban, 'Theorising and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948–1978)' (2011) *Emory International Law Review* 29.

<sup>56</sup> M Mautner, *Law and Culture in Israel* (Oxford University Press, 2011). cf D Friedmann, 'Formalism and Values: Legal Certainty and Judicial Activism' (2007) 11 *College of Management Law Review* 9 (Hebrew).

<sup>57</sup> HCJ 910/86 *Ressler v Minister of Defense* 42(2) PD 441 [1988] (Isr).

<sup>58</sup> R Gavison, M Kremnitzer and Y Dotan, *Judicial Activism in the Israeli High Court of Justice* (Hebrew University Magnes Press, 2000) (Hebrew).

been traditionally barred from the Court due to their 'political' nature, were now regularly dealt with by the Court. While Friedmann's rhetoric is particularly sharp in this case, he is certainly not alone in observing that during the past generation, most, if not all, political controversies – controversies concerning political parties, intra-coalition rifts, appointments of high-ranking governmental officials etc – found their way to, and subsequently were reviewed by, the Court.<sup>59</sup>

Friedmann maintains in this context that, contrary to the new Court, the founding Court kept to its own. It was much more careful not to overstep its 'proper' authority, circumspectly shunning away from political, grand public-policy issues. When it was forced into a political affair, the former Court only reluctantly entered the fray – in stark contrast to the Court of the later generation, which revelled in dealing with such issues.<sup>60</sup>

This line of attack censures the latter Court for patronising over the old-fashioned, 'simple' adjudication – adjudication done between the cracks of legislation – and for thinking it is capable of resolving complicated public policy issues. It is actually argued that the Court invests in policy-making *at the expense* of good old adjudication, since policy-making detracts from the Court's limited resources.<sup>61</sup> These accusations amount to faulting the new Court with damaging the old Court's Herculean undertaking of putting in place and entrenching human rights in the young and vulnerable State of Israel.

Furthermore, according to its detractors, the new Court's appetite for what they regard as essentially political controversies is damaging to the Court's institutional legitimacy among Israelis. An equation is drawn between the degree to which the Court has minded its own business and its 'approval rating', so to speak.<sup>62</sup> Under this approach, the old Court, although immersed in rights-averse environment, was widely respected *because* it kept to itself. In a mirror image, the new Court faces frontal opposition from large segments of the Israeli population *because* it routinely meddles in daily politics. Thus viewed, as Landau had foreseen, in the final analysis, the new Court's activist stance has made it less effective in performing its duties – the duties it has taken upon itself to tend to under the banner of activism (above all, political disputes), but also and more damagingly, its traditional judicial duties.

In light of all of the above, it may come as no surprise that one current in the new literature goes so far as to claim that the old Court was more effective than the new Court in actually promoting human rights in Israel.<sup>63</sup> Although no empirical findings are provided in support of such claims, they are certainly not insignificant. They evidence how sceptical the new literature is of the new Court's

<sup>59</sup> Friedmann (n 7) 236, 346–47, 396, 408, 443, 495–502, 526; Friedmann (n 39) 445–59. See also Harris (n 8) ch 6.

<sup>60</sup> Friedmann (n 7) 455–58, 473–74; Friedmann (n 39) 343–47.

<sup>61</sup> Friedmann (n 7) 526; Friedmann (n 39) 343, 347.

<sup>62</sup> Friedmann (n 39) 344–48. See also Brun (n 5) 531.

<sup>63</sup> See also, eg, J Segev, 'Rights Talk after the Constitutional Revolution: Did the Constitutional Revolution Improve the Protection of Rights in Israel?' (2013) 17 *IDC Law Review* 235 (Hebrew).

overall performance. This scepticism is particularly poignant when it comes to the Court's foremost project of advancing a constitutional revolution in the cause of safeguarding human rights in Israel.

To conclude, the recent wave of denouncing the new Court carries with it a revived adulation of the older Court, in the vein of the literature of the Elyakim Rubenstein generation. Thus, the Court of the 1950s become today a benchmark against which the new Court may be attacked for various reasons: for its activism, alleged arrogance, style of reasoning, missing the mark on human rights protection, and even justices' persona and professional mien. However observers attack the new, and from whatever angle, they universally give the impression that the old Court was a superb – nay, a superior – court of law.

## V. The Mandate's Legacy

The Jewish population in the young State of Israel was generally highly hostile to the British Mandatory regime. Simply put, the British colonial rulers were seen as oppressors.<sup>64</sup> This unfavourable impression of the Mandate epoch found its way into Israeli case law, as justices had the occasion to reflect on the age preceding the establishment of the sovereign State of Israel or, indeed, on the auspicious event of its very foundation.<sup>65</sup>

With all their repugnance for the Mandatory rulers, Israeli (Jewish) jurists could not have denied the fact that upon independence – and for an extended period thereafter – the Israeli legal system was in many respects a direct extension of the Mandatory legal system. Almost all sources of law that had been valid on the eve of the British parting of Palestine remained in place in the sovereign state.<sup>66</sup>

At the same time, while the contribution of the Mandate to the Israeli legal system could not be denied, the degree to which the latter lived, for decades following independence, in the shadow of the former could be toned down. As a general matter, it seems that for a long while, Israeli judges and legal scholars were inclined to downplay the continuities between pre- and post-independence periods, arguing for a chasm lying between the colonial and the sovereign entities.<sup>67</sup>

The new literature pushes in the other direction. It is not the first to highlight continuities stretching from the Mandatory to the Israeli legal system, even in the area of human rights, which had traditionally been regarded as antithetical to the colonial-Mandatory legal framework.<sup>68</sup> Still, the new literature's espousal of

<sup>64</sup> C Shenhav, *The British Mandate A Shattered Dream* (Am Oved Publishers, 2007) 48–59 (Hebrew).

<sup>65</sup> D Barak-Erez, 'And Thou Shalt Tell Thy Son: History and Memory in the Court' (2002) 26 *Tel-Aviv University Law Review* 773 (Hebrew).

<sup>66</sup> eg, *Navot* (n 11) 57.

<sup>67</sup> A Barak, 'Fifty Years of Justice in Israel' (2001) 1 *Eli-Mishpat* 9 (Hebrew).

<sup>68</sup> A Likhovski, 'Between Mandate and State: Re-thinking the Periodization of Israeli Legal History' (1998) 19 *Journal of Israeli History* 39.

the Mandate-Israel continuity thesis is surprising. After all, this thesis is mainly identified with critical legal historiography. The orthodoxy in this case too adulates the founding Israeli Court. Revealing how indebted embryonic Israeli law was to the Mandate seemed to detract, as it were, from the achievements of the Israeli founders.

It is thus interesting that a few chapters in the new literature argue for quite a strong version of the continuity thesis. The root of the argument is that both Mandatory and Israeli courts share the most fundamental, most basic feature: they were both run by human beings who, as all human beings – British or Israelis – were naturally driven by similar human sentiments and desires. To Brun, who epitomises this approach, the life of law is cast in the shape of the particular life of the particular law officer. On his approach, both in Palestine and Israel, judges ruled in accordance with their personal conviction. Before we proceed, it should be noted that one implication of this approach is self-evident: the new Court's jurisprudence and the Constitutional Revolution must be of its very own doing.

## VI. Critical Assessment

Before concluding, I wish to make a few general observations on this literature's historiography and the exchange between law and politics.

The new literature as a whole challenges a progressive narrative of Israeli law that, as noted, was advanced by the Court and others as part of an effort to legitimise the Constitutional Revolution. This narrative charted the trajectory of Israeli constitutionalism as moving from the rights-denying Mandate to the rights-upholding Court cases of the early statehood era, culminating with the rights constitutionalisation of the 1990s. Contrarily, the novel literature signals an emerging revisionist historiography of Israel's founding moment. It is revisionist as it questions the concept that the 1950s was a *lost* constitutional moment. After all, it is now maintained, the 1950s laid the foundations for a working democracy, sustained by a state apparatus respectful of the rule of law and supported by a competent and effective judiciary. Viewed through the prism of this scholarship, it appears that the 1950s encapsulated a *realised* constitutional moment, even though – or perhaps because – they had not produced a formal constitutional document.

But isn't the latter perception overly nostalgic and exaggeratedly tainted by present concerns? After all, the books reconsider the country's founding moment of the 1950s in the wake of the 1990s Constitutional Revolution. It may come as no surprise, then, that this literature has a clear presentist orientation.<sup>69</sup>

<sup>69</sup>This is especially conspicuous in the case of the Friedmann project, as indicated even by the sequence in which the two works were published: the second volume, focusing on the Supreme Court's jurisprudence from the 1970s to the present, was published prior to the second volume (ie, *Before the Revolution*), which covers earlier epochs.



As we have seen, its analyses attest to a discomfort with the role assigned to the courts – by the Court – in the post-revolutionary constitutional configuration and/or with the heated – and to the authors, unnecessary and unconstructive – debate within Israeli polity which was unleashed by the Revolution.<sup>70</sup> Consequently, whether it openly acknowledged this or not, it may be characterised as post-Revolution afterthoughts – maybe even second thoughts – on the post- and pre-Revolution times in Israel.

While a certain amount of presentism is unavoidable in the writing of history,<sup>71</sup> it may still be questioned whether the books' assessment of the 1950s is not overly skewed by their unfavourable assessment of the Constitutional Revolution. Specifically, it seems that part of their portrayal of Israeli law of the 1950s is excessively charitable. Notably, this scholarship appears to downplay patent instances of human rights violations in the nascent Israel, especially with respect to the Arab minority, which was placed under martial law well into the 1960s.<sup>72</sup> Moreover, with respect to Friedmann's manuscript in particular, I wonder whether its nostalgic tenor allows for a truly balanced appraisal of the 1950s in general, and the 1950s Court's jurisprudence and disposition in particular, especially considering the all-powerful executive branch of the time.<sup>73</sup>

At the same time, this literature should be commended for advancing our grasp of Israeli law. It broadens our perception of it in more than one way. First, as I have noted especially apropos Brun's manuscript, it persuasively makes the case that a longer-than-usual list of players – justices and Ministers of Justice but also lower-court judges, law clerks, politicians, court administrators, Ministry of Justice officials, parties to litigation<sup>74</sup> and so on – should be incorporated into a portrayal of the (1950s) Israeli law in action. This emphasis surely adds important layers to the existing literature. In addition, this literature, with the vital companion of Harris, makes great strides in deploying an exciting selection of historical methodologies.<sup>75</sup>

Another contribution of this literature lies in its engagement with politics.<sup>76</sup> To begin with, a running theme throughout the books is the conception that law has come to occupy exceedingly more volume in Israeli polity throughout the decades, and the contrast between the 1950s and the 1980s and 1990s is said to be striking.<sup>77</sup> More generally, this group of books openly entertains the

<sup>70</sup> Kedar (n 6) 225–27.

<sup>71</sup> DH Fisher, *Historian Fallacies: Toward a Logic of Historical Thought* (Harper Perennial, 1970) 135–37; cf L Fendler, 'The Upside of Presentism' (2008) 44 *Pedagogica Historica* 677.

<sup>72</sup> Shapira (n 11) 196–98. See, eg, Saban (n 55); Forman and Kedar (n 55).

<sup>73</sup> eg, B Kimerling, 'Legislation and Jurisdiction in an Immigrant-Settler Society' (2000) 16 *Bar Ilan University Law Review* 18 (Hebrew).

<sup>74</sup> See also Harris (n 8) ch 4.

<sup>75</sup> See Orit Rozin, 'Israeli Legal History: A Methodological Analysis' (2018) 168 *Cathedra* 155 (Hebrew).

<sup>76</sup> Indeed, particularly to Friedmann, the category of the 'political' consists mainly, if not solely, of those issues that occupy parliamentary parties. This view, however, relies on a very narrow concept of 'politics'. cf, eg, MJ Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History* 275.

<sup>77</sup> See also Harris (n 8) ch 6.

conception that ideological rifts, personal convictions and plain politics shape the law to a considerable extent. Their analyses demonstrate how such ‘non-legal’ forces bore on law-making in the young State of Israel and even on courts’ decisions. This in itself is not new in the existing Israeli legal history.<sup>78</sup> Rather, the novelty lies in the degree to which this literature makes politics and *political figures* an integral part of Israeli *legal* history, thus further bridging the gap between the legal and political histories of Israel.

It seems fair to say that thus far, the Israeli legal history gave the impression that it was first and foremost a series of jurists who gave shape, before and after independence, to Israeli law. Traditionally, the first Israeli Justices and high-ranking legal officials in the Ministry of Justice were quite exclusively designated as the founding fathers of Israel’s legal system, and their decisions and policies direct that historiography. The new literature supplements the extant legal history by bringing to the fore several legal and political protagonists, whose role as law-makers – as personas that had a role in the design of Israel law – was hardly noted in that historiography. First among them is Ben-Gurion, whose influence on Israeli law is slowly becoming more fully acknowledged in the literature. The advent of a Ben-Gurion revival in the legal-history literature is important for it thickens, and more fully integrates between, the Ben-Gurion and the general sweep of political-social-cultural Israeli historiographies, on the one hand, and the legal history of early statehood, on the other.

Furthermore, the literature under review not only incorporates politics into law but also law into politics. For it could certainly also be read as revealing how intertwined law-making, broadly defined, was with politics-making, just as broadly defined. Thus, notably, Kedar’s is a narrative about Ben-Gurion, the founding father of Israel, who must also be credited as a founding brother of the Israeli legal system. Namely, in assessing Ben-Gurion’s overall achievements, failures and vision, his actions and views with respect to legal issues must be made part of the analysis and must be evaluated together with closely related reforms he sought to advance. Kedar’s study does exactly that, as he examines Ben-Gurion’s standing on the constitution dilemma and the re-establishment of the Israeli judiciary alongside other reforms he advanced.

However, there are problematic sides to the literature’s bridging the politics-law divide. At times, it seems that its treatment of politics is somewhat idealistic, as if only lofty principles – as opposed to tit-for-tat or even ‘petty’ personal motives – drive it. For example, Kedar leaves little room to such motives in accounting for Ben-Gurion’s actions. On the other hand, Brun seems to go to the other extreme, giving the impression that politics and public policy is solely about personal and ideological issues, and has also certainly been so during Mandatory times

<sup>78</sup> See, eg. A Shapira, ‘The Supreme Court Self-Restraint and Ensuring Civil Rights’ (1973) 3 *Tel-Aviv University Law Review* 640 (Hebrew); P Lahav, ‘The Supreme Court of Israel: Formative Years’ (1989) 14 *Tel-Aviv University Law Review* 479 (Hebrew).

and the 1950s. Yet, this latter perception does not account for the structural dimensions in politics (and law): procedures, practices and constitutional conventions (which had been so dear to Dicey). As new institutionalism taught us, such structures may constrain and enable, channel and obstruct political – and legal – actions. Indeed, new institutionalism appears to offer a middle ground between Kedar's vision of politics on the one hand and Brun's on the other. I therefore believe that the 1950s legal historiography may substantially benefit from consulting new institutionalist historiography.<sup>79</sup>

## VII. Conclusion

It is only natural that an event of the magnitude of the Constitutional Revolution will have an effect on the future of Israeli law. Even more remarkably, as this chapter demonstrates, the Revolution may even have an effect on its *history*. Having reviewed a recent body of literature studying law and politics in 1950s Israel, this chapter has argued that it heralds a new approach to the legal historiography of that foundational era. It has illustrated that this literature is bi-focal, having one eye on the Israel's founding moment and the other on its Constitutional Revolution and the controversy surrounding it. Bluntly put, the literature takes the 1950s' side *against* that of the 1990s. It favours the constitutional framework and the Court's jurisprudence of the former over those of the latter. The new literature's grasp of the 1950s legal legacy is undoubtedly rich and perceptive. Nevertheless, as illustrated in this chapter, one may wonder whether its depiction of that eventful era is not overly generous and forgiving.

<sup>79</sup> cf ED Mazo, ch 7 in this volume; and see also Y Sagy, 'The Missing Link: Legal Historical Institutionalism & the Israeli High Court of Justice' (2015) 31 *Arizona Journal of International & Comparative Law* 1.

