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Constitutional Conventions – Are They, In Fact, Constitutional?

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This paper examines the issue of constitutional conventions and the recent attempt to grant them independent status and warns of the dangers inherent in accepting this doctrine in administrative and constitutional law.

The **first chapter** details the various ways it is possible to understand the term "constitutional convention" and **the second** reviews the allusions to it in Israeli case law.

The **third chapter** reviews the issue in comparative law, and the **fourth chapter** explains its inherent normative difficulties.

Summary:

In recent years, there are those who wish to promote an approach that grants independent legal status to "constitutional conventions" in Israel. The term "constitutional conventions" originates from common law tradition and serves to signify conventions in institutional rules governing the relations between branches of government. The Israeli Supreme Court has long refrained from recognizing the existence of binding constitutional conventions (and has even expressed explicit aversion to the idea), but supporters of the move still voice their position from time to time in local academic-judicial discourse.

Legal scholars who grappled with this issue, as well as Justices who addressed it in obiter dictum erred in conceptual ambiguity regarding the different legal senses that can be attributed to the term "constitutional convention" and chose to obscure its meaning as well as its judicial implications. This ambiguity led some of them to – mistakenly - rely on foreign jurisprudence and case law and erroneously apply them to Israeli law. It is therefore imperative to first present the term in an orderly manner and clarify its meanings.

A few different interpretations of the term "constitutional convention" are: (1) a non-binding institutional convention by a government agency that has no normative

implications; (2) an institutional convention anchored in legislation and thus binding; (3) an institutional convention with voluntary normative implications unenforceable by the Court; (4) a binding and legally enforceable institutional convention; (5) an institutional convention with indirect legal implications (as part of statutory interpretation or of the review of the reasoning behind an administrative decision).

Our review of case-law demonstrates that aside from a few solitary invocations, the use of the concept of "constitutional convention" in Israeli public law started in the 2000s and was restricted up till now to obiter dictum alone. Various judges expressed different opinions on constitutional conventions' normative status: some saw it as a source for filling lacunas, and most others mentioned it as a consideration in statutory interpretation. Some relied on foreign case law and discerned three conditions for identifying a convention: (1) the existence of repeated practice; (2) added to the executive actor's awareness of its binding nature; (3) and based on a clear rationale. Justice Hendel in *Aviram*, went so far as to note (in an obiter dictum as well) that as far as he was concerned, judges may identify a convention even without a single unequivocal factual indication, so long as the convention is, in their view, proper. Despite all this, the Court has hitherto refrained from recognizing conventions as an independent judicial source. Recently, it even clarified that its position stems from principle as such a move creates a route to establish normative, enforceable rules that circumvents the democratically elected representatives. Indeed, recognizing the existence of an independent convention as grounds for review and enforcement is contradictory to the principles of majority rule and rule of law, as well as the principle of separation of powers.

The term "constitutional convention" in several foreign judicial systems serves as a (mistaken) source of inspiration for supporters of granting conventions independent legal status in Israeli public law. The attempt to rely on the case law of those judiciaries is inherently mistaken and relies on the aforementioned lack of conceptual clarity. Courts in Western states do not grant constitutional conventions an independent normative and enforceable legal status. In England, the US and Australia, it was clarified that the violation of constitutional conventions was not enforceable, and their legal utility was only interpretive – so long as they were not anchored in legislation. Although in Canada the Court can grant declarative relief declaring a violation of constitutional convention, there is also no possibility of obtaining injunctive relief for such. This is true for the Indian system as well: claims have been made that the Indian Court enforces constitutional conventions, but close examination shows that such a violation has never been enforced on its own.

Transforming constitutional convention into a legitimate legal source in modern systems of law carries inherent flaws. Radical ideas to attribute an independent legal status to conventions contravene both Kelsen's "pure theory of law" and Hart's "rule of

recognition" and represent a severe violation of the foundations of democratic rule: the principles of majority rule, the rule of law and the separation of powers. The difficulties born of the attempt to attribute an independent legal status to conventions are emphasized when there is disagreement about the existence of standards for identifying the existence of a convention.

These difficulties did not escape the attention of Israeli Justices and they clarified, recently as well as in the past, that it is not possible to grant a convention normative status that supersedes legislation. The attempt to fabricate new powerful grounds for judicial review is not only a conceptually erroneous idea that violates foundational principles of democracy but can also substantially harm the Court's status. The state of Israel has been undergoing a constitutional crisis in recent years, and the degree of public trust in the Israeli judiciary has decreased dramatically. It is clear, therefore, that academic attempts to introduce globally unaccepted, special grounds for judicial review that circumvent the Knesset will only exacerbate the situation – and will certainly not restore the balance between the branches of government. The Justices did well to block the breach and clarify the doctrine's boundaries.

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