

LEGISLATURES AND THE QUEST FOR A CONSTITUTION: THE CASE OF ISRAEL

Ruth Gavison*

Israel is a country where constitutional debates center not on the questions whether it should have a constitution and what should be in it but on whether it has one. This undesirable and anomalous situation results from the fact that constitutional reality in Israel has been the result of a long process characterized in recent decades by legislative ambivalence and by a resolute constitution-making drive by the judiciary.

Israël est un pays où les débats constitutionnels ne tournent pas autour de questions à savoir si le pays devrait avoir une constitution ou ce qu'elle devrait contenir, mais plutôt si la pays en a une. Cette situation indésirable et anormale découle du fait que la réalité constitutionnelle d'Israël est le résultat d'un long processus caractérisé, au cours des dernières décennies, par une ambivalence législative et par un désir énergique de rédaction d'une constitution par le corps judiciaire.

In most constitutional regimes, legislatures as well as other constitutional powers operate under and within an agreed-upon constitution. Often, they are established by it and, to a large extent, gain their legitimacy and stability from it. The constitution is taken as a given. In rare cases it may itself be amended, but the idea is that the constitution sets the framework of activity of the other organs of government, including the legislature itself. This situation permits intense discussions of the roles of the various powers under the constitution,

* Haim H. Cohn Professor of Human Rights, Faculty of Law, Hebrew University in Jerusalem. I thank Or Bassok, Yoel Cheshin, and Allan E. Shapiro for illuminating discussions and research assistance. Tsvi Kahana triggered the writing of this paper by inviting me to the conference dedicated to the role of legislatures in constitutionalism and provided excellent comments on a previous draft. Unless otherwise indicated, all translations are the author's. I dedicate this essay to President (emeritus) of the Israeli Supreme Court, Moshe Landau, who has not tired of insisting that constitutions and deep ideological divides are the responsibility of the legislature, while vigilance concerning the protection of human rights within the state's legal framework is the special realm of courts. Judge Landau is also unique in combining strong review of administrative action to protect human rights, while at the same time holding that it is inadvisable for courts to have the power to review primary legislation in matters of human rights and basic values. He believes it is important that the Supreme Court has review over primary legislation in matters pertaining to the structure and powers of political organs, within the constraints of the "political question" doctrine. See Moshe Landau, "The Constitution as a Supreme Law of the State?" (1971) 27 *Hapraklit* 30 (Hebrew).

Portions of this article are based on Ruth Gavison, "Legislatures and the Phases and Components of Constitutionalism," in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 198. Republished with permission.

and systems may have constitutional crises when one or another of these powers challenges the limits of the power of the other. But these discussions all take place within the constitutional framework. Indeed, one of its main functions is to make such debates more structured and “safer” than they would be if all the rules of the game were vulnerable to “normal” political exigencies. This explains why stable constitutional regimes can usually contain heated and persistent debates about constitutionalism and its implications. In some systems, however, Israel included, the status and the basic contours of the constitutional regime itself are quite controversial, weakening the legitimacy and stability of constitutional arrangements. In this essay, I argue that the roots of the controversy in Israel as to the legitimacy of the constitutional arrangements stems from the fact that the Israeli legislature has not taken – for a variety of reasons – a clear and firm position on constitutional issues, letting the court be the driving agent of the process.

All constitutions seek to enable governments, structure their powers, and limit them. To do this effectively, constitutions must enjoy a legitimacy that is broader and deeper than that enjoyed by any specific organ of government or any specific policy or piece of legislation. The fundamental nature of the constitution is supposed to provide elements of the “civil religion” that binds all members of society and all major groups within it to the constitutional system. Obtaining the legitimacy needed for fulfilling such a major role in any society depends, to a large extent, on the different roles various organs play in framing and adopting constitutional regimes, and on the roles they play within these regimes.

In Part I of this article I argue that legislatures and courts have different roles in phases of constitutionalism. The role played by legislatures (or, more accurately, by the people’s representatives) is almost exclusive during the *constitution-making* phase, central when *amending* the constitution, and diminishes during the *application/interpretation* of the constitution. The role played by courts is marginal in constitution-making, small when amending the constitution, and central during application/interpretation of the constitution. In addition, when courts participate in the enforcement of the constitution, they should be careful not to replace legislatures in questions relating to the authoritative elaborations of matters relating to ideological and political controversies which are best decided by the political branches. This division of labor follows from the features necessary for constitutions to be able to perform their unique functions. Usually, the legitimacy of the constitution is enhanced if these guidelines as to the roles of legislatures and courts are followed.

Part II describes the constitutional history of Israel, pointing to the main highlights reflected in legislation and adjudication, and sketching the political background and the forces working for and against the constitution at the various points. I give special attention to the roles played in this history by the Knesset – Israel’s legislature – and its Supreme Court. For years, the Knesset’s reluctance to enact a constitution resulted only in criticism by those supporting it. In recent decades the courts, and especially the President of the Israeli Supreme Court of Israel, Professor Aharon Barak, have become central players in constitutional discussions and in creating constitutional realities. The passage of two human rights Basic Laws in 1992, dubbed by Barak as a “constitutional revolution,”¹ meant that the constitutional debate is in part over the question of whether Israel already has a constitution.

Part III analyzes the Israeli history in light of the discussion of Part I. Clearly, the ideal division of labour in constitution-making has not been followed in Israel’s recent constitutional history. Lack of conformity with these guidelines concerning the three phases of constitutionalism is not necessarily bad. Legitimacy for a constitutional regime can at times be gained without broad discussion and ratification by either the public or the legislature. But this has not happened in Israel to date. The persistence of the debate does reflect serious issues concerning the legitimacy of the constitutional process itself. This debate is real and should not be ignored. It is not a good idea for Israel to continue to entrench a constitutional regime through judicial interpretations without an explicit, broad discussion of that regime’s desirability and features. Developments until now suggest that the current constitutional arrangements are not likely to be able to provide legitimacy and stability to the deeply divided Israeli society.

This discussion, in turn, provides the basis for a few normative and predictive statements concerning Israel’s quest for a constitution in the concluding Part IV. Israel now has limited judicial review over legislation, which has developed mainly by the Supreme Court, despite the fact that its legislature has never made a deliberate decision on whether or not Israel should have a formal and entrenched constitution and how it will be enforced. If the legislature continues to shirk its legislative or even constituent responsibilities, the constitutional ambiguity and uncertainty will continue. The persisting political controversy over this issue, combined with the deep ideological divides that have made the adoption of the constitution so hard to begin with, now further hinders Israel’s ability to in fact complete its constitutional

1 Aharon Barak, “The Constitutional Revolution: Protected Human Rights” (1992) 1 *Mishpat u-Mimshal* 9 (Hebrew).

process and adopt a full and entrenched constitution. The complicated, piecemeal constitutional process until now makes the adoption of a coherent constitution even more difficult than it might have been without the 1992 “revolution.” Furthermore, the meandering process of constitution-making may well lead to suboptimal constitutional arrangements, ones that cannot provide Israel with the stable, effective and accountable government that it so badly needs.

I. INSTITUTIONAL IMPLICATIONS OF PHASES OF CONSTITUTION-MAKING AND OF COMPONENTS OF CONSTITUTIONS

A prime function of a constitution is to structure and legitimate the political system it regulates. Legitimacy may come from the process through which the constitution was made and is implemented (formal legitimacy), from the content of its arrangements (material legitimacy), or from both. I will argue in this Part that there should be a distinction in institutional competence between three phases in constitutionalism – initial constitution-making, amendment of constitutions, and their routine application and interpretation. During the stage of interpretation and application, the relative role of courts and legislatures depends on the parts of the constitution they deal with – rules of the game, credos, or bills of rights. These differences in institutional competence follow from the features that guarantee the ability of constitutions to perform their special functions.

The Uniqueness of Constitutions

Constitutions are meta-laws in the sense that they structure law-making itself, as well as the general contours of government and its constraints. This structuring and entrenchment of the framework rules creates a special legitimacy for the constitutional order and its actors, so that it increases the stability of government in its broad sense. The legitimacy of the constitutional order is supposed to be sufficient to command obedience to laws and authorized decisions that would have otherwise lacked this legitimacy because they do not enjoy majority support on their merits. This legitimacy and stability is of special importance in divided societies, where there is a deep controversy about the good life and the identity of the state. Agreement about policies is likely to be fragile or non-existent. In such societies, the stability and legitimacy of the constitutional order may be critical to the ability to negotiate serious political crises, which without that stability and legitimacy

might have led to the collapse of the regime itself.² The health and robustness of society thus may depend on the commitment of all members and groups to the shared framework rules included in the constitution. These framework rules provide the secure realm within which each of the groups can fight for its vision of the good life knowing that the framework will hold the joint enterprise together. The groups cannot realize their full visions every time, but the system will guarantee that the most important constraints of each of the groups are maintained. In divided societies, the rules of the game are of special importance, because often it is clear that no substantive compromise can be reached, and the only shared element may be the willingness to adhere to a fair process.³ Under such circumstances, the question of the identity of those deciding sensitive issues may be crucial. This may affect both the rules of the game and the arrangements themselves. Indeed, deep rifts within a society are likely to be reflected in all components of the constitution, including election systems and in the structure of state organs. They may result in a lot of emphasis on the identity of law-makers and law-interpreters, and on a stronger interests in representation of the various groups and interests. The rifts may also mean that credos will be especially hard to agree on. In divided societies, therefore, constitutions may have the additional function of making otherwise disparate groups, with very different aspirations, members of the “demos” that is the source of legitimacy of the state. Equal citizenship under the constitution may be a way to bridge, in the political context, the gaps between the various groups.

The need to cater to different interests and conceptions of the good means that constitutional schemes often involve “great compromises,” which permit each of the groups to subscribe to the shared framework despite the fact that it does not meet everyone’s ideal of governance. These great compromises need to be protected from regular partisan politics, because they are the basis for the willingness of the groups to join in that game and to see themselves as a

2 The French Fourth Republic created a constitutional structure that could not have handled the Algerian crisis. De Gaulle indeed succeeded in getting France out of Algeria based on the new constitution he demanded, which established the Fifth Republic. In part, his success was based on the fact that he could have presented his policies as required to save the republic, not simply to implement his (deeply resisted) policy – see Jean Foyer’s “The Drafting of the French Constitution of 1958,” the following “Commentary” by François Luchaire, and the “Discussion” afterwards, in Robert A. Goldwin & Art Kaufman, eds., *Constitution Makers on Constitution Making* (Washington, D.C.: American Enterprise Institute, 1988) 7, at 10-15, 47-49, 56-62.

3 The relationships of process and substance in constitutional regimes in general, and in divided societies in particular, are very complex. They are sometimes described as the relationships between rules of the game, or formal democracy, and human rights. But this in itself may be misleading. Democracy in the thinnest meaning does entail the need to protect some rights. For a sensitive discussion see Peter Jones, *Rights* (London: Macmillan, 1994).

part of the civic nation to begin with. It will undermine the agreement if the legislature or anyone else starts to erode the compromise once the moment of constitution-making is over. This is true for all societies, but especially for deeply divided societies and for federal nations. In the latter, the member states would not give up any of their power if the compromise is not entrenched against unilateral actions by the central government.⁴

Moreover, as the constitution sets up the rules of the game, it should include an elaborate structure of checks and balances. It is important to conceive of these as a whole, because the effectiveness of the system may depend on the full range of constitutional arrangements. Constitutional players should see these as interrelated and avoid an extensive use of piecemeal changes that may endanger the overall balance. Naturally, it is much easier to design that kind of a system in a comprehensive enactment and not in a series of piecemeal statutes or arrangements, each enacted within a background of constraints.⁵ Thus, the leeway for flexibility and negotiation is greater if more of the basic arrangements are negotiable all at once.

Three Phases of Constitutionalism

These features of constitutions and their special functions within political societies suggest that the distinction between constitutional politics and regular politics that constitutions embody will be reflected in the roles played in the different stages in the life of constitutions. Making of the constitution should be different from amending it and from the regular activities of maintaining and enforcing it through application and interpretation.

The need to reach great compromises and to uphold them suggests that it is good for constitution-making processes to involve both broad participation and

4 The enactment of the U.S. constitution involved two such great compromises. One was on the structure of the Senate (two representatives to each state, irrespective of size), which was entrenched indefinitely, the other on slavery, which gave the controversial institution of slave importation a period of grace until 1808. Stylianos-Ioannis G. Koutnatzis, "Social Rights as a Constitutional Compromise: Lessons from Comparative Experience" (2005) 44 *Columbia J. of Transnational Law* 74 at 78; and Samuel Eliot Morison, Henry Steele Commager & William E. Leuchtenburg, *A concise history of the American Republic*, Vol. I (New York, Oxford University Press, 1977) at 304-308. It is quite clear that without both compromises, the "miracle in Philadelphia" would not have happened; the Union would have collapsed had Congress undermined the provisional delay in prohibiting the slave trade.

5 A person who is apprehensive about judicial review of social and economic policy may agree to judicial review only if a bill of rights explicitly excludes social and economic rights. Conversely, he or she may agree to an expansive bill of rights if courts are denied the power of judicial review over all primary legislation (or if judicial review is administered by a constitutional court whose judges are appointed by the political branches for a limited term).

some entrenchment against simple political change. Although usual legislation may pass on the basis of a simple and even narrow parliamentary majority, constitutions should be acceptable to all major sectors of the population, with a special sensitivity to “chronic” minorities. It is for the minorities that issues of legitimacy of the system loom large. Majorities usually can rely on their political power to protect their interests.

In sum, these desiderata will usually be met by making the constitutional design comprehensive, so that the system of checks and balances is coherent, and so that the room for compromise and configuration is maximal. It is hard to change one element of government without touching on others. A comprehensive change may enable us to design institutions that can fit together and suit the powers and functions they are given. It is also healthy for constitutions to be made in a process of public debate, and to require a broad participation in their enactment in the form of constitutional assemblies, ratification, or referenda. All these features, which are not required for regular legislation, support the special legitimacy we hope the constitution will enjoy, which will in turn devolve upon elected governments and authorized organs acting within the constitution. It is almost impossible to achieve such a comprehensive set of checks and balances and “big compromises” without a deliberate, transparent, and deliberative process of both drafting and ratification. Constitution-making is thus an enterprise very different from regular politics.

Similarly, the phases of constitutional amendment and normal life under the constitution and within it should be distinct. Usually, constitutional amendment is much less dramatic than making a constitution, as it is aimed at a particular aspect of the constitution, leaving most of it intact. It thus may lack the elements of comprehensiveness and major compromises required by constitution-making.⁶ Nonetheless it is a deliberate change of the framework rules themselves. The change will enjoy the supremacy and the entrenchment levels of the constitution itself; it will share in the special symbolic and legitimating functions of the constitution. It seems reasonable to expect that the process of constitutional amendment will be more formal and special, and may allow and even require more public participation, than that of the regular legislative process. The functions of the constitution may also suggest a theory of when constitutional amendments are proper and how they should

6 There are notable exceptions to this rule. The post-Civil War amendments to the U.S. Constitution and the amendments of the Hungarian Constitution after the collapse of the Soviet Union are two cases in point. For the Hungarian example, see Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham: Rowman & Littlefield, 2000) [Arato].

be made. Thus, stability is always a virtue in the law, but its weight is higher when the arrangement to be modified belongs to the constitution. It is hard to generalize on amendments to constitutions because their background may be so varied. However, it is almost inevitable that with changing circumstances or with experience a society may realize that a constitutional arrangement does not serve its purpose and an amendment is needed. Other amendments may be the simple result of the fact that a constitution originally included material that should not have acquired a constitutional status to begin with.⁷ However, in all of these cases, at times, the entrenchment may mean that an amendment deemed desirable by a majority cannot in fact be enacted.⁸

Once a constitutional regime is established, its test lies in the way it is applied and interpreted. No text speaks for itself. In some senses, the activity of interpretation is the same for all legal materials. The functions of the constitution, however, affect the way it should be interpreted. In a democracy, this is especially true if the interpretation involves the invalidation of a law enacted by a majority of legislators in the legislature. For all practical purposes, the law is what the authoritative interpreters say it is. So the identity of interpreters and the canons of interpretation they use are of cardinal importance. It is also crucial who has the last word. It is therefore not surprising that issues of review of the constitution, and especially of the power to invalidate primary legislation and the question of its finality, are central in all constitutional designs. Again, this is of special importance in divided societies, where individuals and groups have radically different interests and visions of the good life.

The phases of constitutionalism are clearest when constitution-making is a deliberate, conscious process, resulting in a constitutional document that specifies how it should be amended and implemented. But reality is rarely very clear. We can find debates about the characterization of moments in the constitutional history of many countries. The fuzziness of the distinctions may generate, not surprisingly, both theoretical and practical controversies. The U.S. federal constitution provides a dramatic illustration of such fuzziness with the decision to regard the Bill of Rights as the first ten amendments and not as a stage of the ratification of the Constitution itself. More often, it is hard to

7 For example, even if one supports the policy of Prohibition, the idea that it should have been included in the constitution itself is dubious.

8 Many constitutional scholars feel that the Electoral College system of U.S. presidential elections is obsolete. This idea gained some momentum after President George W. Bush won the 2000 electoral vote but did not get a majority of the popular vote. Two other American examples of failures in trying to overrule judicial decisions through constitutional amendments are the abortion controversy and the school prayer dispute.

distinguish (informal) amendment and interpretation. Indeed, even if initial constitution-making itself is clear, the distinction between the latter phases of amendment and interpretation/application may be hard to make. Most “new” states use the constitution literally – the document constitutes the polity and defines it.⁹ In most of these countries, a constitution is the reflection of a great transformation, sometimes even a revolution.¹⁰ Nonetheless, a constitution can never be enacted without a society and some political structure in place. Someone must have the power and the authority to prepare the document and supervise the process of its enactment and possible ratification. Even the most radical constitution-making involves some social and political continuity.

In addition, some countries use a new constitution to achieve a major change in government, without a great social transformation preceding it and thus not as a reflection of a “constitutional moment.” It follows that the identification of a constitution-making process (as distinct from an amendment or creative interpretation of an existing constitution) is not necessarily connected to the establishment of a new state or even to a serious political transformation.¹¹ Rather, the test of a process of constitution-making is its product. A constitution-making process is completed when a country that did not have an entrenched constitution has one. Once we can say that the country does have a formal entrenched constitution, the phase of constitution-making itself is ended.¹²

Once a country has a constitution, the usual processes are application/interpretation and amendment. All this takes place within the constitutional order. In rare cases, a country with a functioning constitution chooses to

-
- 9 The United States was a new state in this sense, because the Constitution replaced the loose union under the Articles of Confederation with a much stronger federal state. More recent examples are Poland and Czechoslovakia after World War I. For the Polish example see Daniel H. Cole, “Symposium on the Constitution Of The Republic of Poland - Part II - Poland’s 1997 Constitution in its Historical Context” (1998) 1998 St. Louis-Warsaw Transatlantic Law J. 1, 21-23; for Czechoslovakia see Lloyd Cutler and Herman Schwartz, “Constitutional Reform in Czechoslovakia: *E Duobus Unum?*” (1991) 58 Univ. of Chicago Law Rev. 511, 513-16.
 - 10 Both Jon Elster, “Forces and Mechanisms in the Constitution Making Process” (1995) 45 Duke Law J. 364 [Elster, “Forces and Mechanisms”], and Bruce Ackerman, *The Future of Liberal Revolutions* (New Haven: Yale University Press, 1992), mention the usual strong connection between transformations and new constitutions, and explain how such moments create the rare incentive structure that may facilitate constitution-making. See also Ruth Gavison, “Constitutions and Political Reconstruction: Israel’s Quest for a Constitution” (2003) 18 International Sociology 5.
 - 11 A notable example of a constitution without a serious transformation is that of Sweden. See Olof Ruin, “Sweden: the New Constitution (1974), and the Tradition of Consensual Politics” in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (London: Gower, 1988) 309.
 - 12 Clearly, this is an ideal-type sort of analysis of social realities. Often there are many contingent facts about constitution-making. Canada and Israel are described by some as having an evolving constitution, with a permanent power of constitution-making (and not of simple amendment).

deliberately replace (rather than amend) it, without a revolution. The change is a process of constitution-making (even if a lot of the old constitution's content has remained unchanged).¹³

These observations have obvious implications for issues of institutional competence. Surely, the differences between these phases are not always clear and distinctions between them may be hard to make. Nonetheless, I will argue that there are good theoretical and practical reasons for maintaining the distinctions, and for evaluating constitutional processes in specific countries according to the extent to which adhere to the institutional implications of the phases.

In the initial stage of constitution-making, the main contenders for the job are special constituent assemblies or regular legislatures, with a clear preference for the former.¹⁴ Special assemblies can concentrate on the constitution without the need to work at the same time on current political issues. The main options and the great compromises can be negotiated without the "noise" created by regular politics. If the members of the assembly are people who are not directly involved in day-to-day politics, it is likely that their judgment will be less clouded by their own immediate political interests. This is especially true if a major purpose of the constitution is to limit the powers of the legislature. Nonetheless, at times it is impossible or undesirable to let constituent assemblies enact constitutions, for example, when a delay in constitution-making is needed for learning new social conditions and responding to them gradually.¹⁵

The second-best candidates for constitution-making are legislatures. What these two bodies have in common, however, is crucial for the task: they are representative bodies, structured to include all or most of the major interests and views in the society to be regulated by the constitution. Furthermore,

13 Thus, for example, the change in France's constitution in 1958 is seen as a process of constitution-making generating the Fifth Republic. It is not a mere amendment, leaving the Fourth Republic in place. Elster provides a catalogue of circumstances in which constitution-making is likely and describes this case as one of making a constitution under the threat of a regime collapse. See Elster, "Forces and Mechanisms," *supra* note 10 at 371.

14 This question is discussed in depth by Jon Elster, "Legislatures as Constituent Assemblies" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 181 [Bauman & Kahana]. See also his systematic analysis in Elster, "Forces and Mechanisms," *ibid.* at 395, in which he concludes that "constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures." This is a view widely shared in the literature, almost to the point of consensus.

15 For the evolutionary constitutional process in Hungary, for example, see Arato, *supra* note 6, 254-55.

their mode of work is built on understanding political constraints and on negotiating compromises. They do not work on the basis of articulating principles set out elsewhere. They are the ones who set the rules and make the social compact. And they set the rules because they have the mandate to do so, given to them by those who have elected them for the job of creating a constitution (in the case of constituent assemblies) or representing their constituents (in the case of legislatures).

To make sure the product of their processes of deliberation enjoys the broad support of the people, it is often required that the constitution will not only be enacted in a celebratory way and with a special majority, but also be subjected to a broad public debate and possible ratification by a referendum. These processes may be based on presentations prepared by the government or by civil society groups, but the actual process of enactment and ratification should be conducted in a way that involves representatives of the people and thus at least indirectly the people themselves.¹⁶ The courts as such should not have a role at the stage of constitution-making. In fact, some may suggest that it is best for them to stay out of these negotiations as far as possible.¹⁷ We do not have to go into the fascinating question whether constitutions stem from “We the People” directly (as distinct from regular legislation that is generated by the political game of representatives of various sorts). There is a consensus that this is an exercise of the powers of citizens. Courts, with their professionalism and their relative independence from government and the preferences of the majority, should not be – as such – primary players in these constitution-making stages.¹⁸

-
- 16 Indeed, some argue that the constitutional process leading to the U.S. federal constitution as well as the constitutional process in Hungary and Poland did not really involve the peoples concerned. The Hungarian example is of special interest because “whatever legitimacy the Hungarian constitutional settlement has been able to slowly acquire was through the ritualized and traditionalized ministry of the constitution through court interpretations.” Arato, *supra* note 6, 227-28. Nonetheless, in all these cases, constitution-making involved expansive public discussion. Thus, we can see the importance of visibility and transparency that permit broad participation and can rarely be attained when courts serve as major players in the process.
- 17 Some claim that courts should stay away from a close involvement even with the regular legislative process, especially where the courts themselves are the subject of the legislation. See Evan Tsen Lee, “Deconstitutionalizing Justiciability: The Example of Mootness” (1992) 105 *Harvard Law Rev.* 605, 643-47. Comparative analyses of constitution-making do not usually disclose involvement by courts, for example in the East European context. Elster, “Forces and Mechanisms,” *supra* note 10 at 382. Moreover, in most deliberate processes of constitution-making, the constitution itself empowers and creates the constitutional court that is supposed to enforce it, so that institution does not even exist prior to the constitution.
- 18 One might object that this expectation is itself unfair because the constitution will decide the limits of the power of the court, and it should be able to participate and protect its “interests” just as the legislature does. This is indeed one of the arguments in favor of making constitutions by

Some systems require, or at least permit, the use of special assemblies for amendments as well. But, mostly, amendments to the constitution move on a spectrum between full flexibility (same procedure as regular legislation) and very high levels of entrenchment, using “regular” modes such as special majorities, additional vote, requirement of two consecutive parliaments, or referenda. Usually, the mode of amendment is different from, and more relaxed than, the mode of comprehensive constitution-making. But in terms of the choice between citizens, via their representatives, or the courts as the primary agents – the choice of formal procedures is clearly the former. This is as it should be.

Constitutional amendments raise fascinating problems. If a constitutional amendment threatens to undermine the complex system of checks and balances or an element of a “big compromise,” it may be reasonable to either make it impossible or at least require the same procedure of constitution-making itself.¹⁹ The picture can get more complicated, however, if courts have the power to review the constitutionality of constitutional amendments as well that of regular legislation.

Once a constitution is in place, the constitution itself governs the ways the constitutional regime should operate. Through empowering the different organs, the constitution awards them public legitimacy. Courts are seen as the authoritative interpreters of law when a provision of the law – including the constitution – comes to them. Their decision is final for the parties. The broader legal and social forces of their decision depend on the status of the constitution itself, the rules of *stare decisis*, and future acts by the other constitutional players.²⁰ The constitutional design also governs, formally or informally, the limit of the jurisdiction of courts and the nature of cases they can (and cannot) decide. Inevitably, these constitutional limitations will also be interpreted by the courts themselves, as the U.S. Supreme Court did in *Marbury v. Madison*.²¹ But courts do need legitimacy, and they cannot persist over time if their decisions lack a solid basis of support in society and the legal community.

constituent assemblies and not by legislatures. But it seems that courts fare well in constitutions even in their absence. Elster, *ibid.* at 382.

19 This was in fact done in the U.S. Constitution concerning representation in the Senate and in the German Constitution concerning the commitment to human dignity. For a comprehensive discussion see Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995).

20 The decision may result in a constitutional amendment, or a legislative override, or by a practice of ignoring the decision altogether. Any student of the fifty years of literature about the famous *Brown* decision of 1954 knows that judicial victories are not the end. They may not even be a beginning. See James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (New York: Oxford University Press, 2001).

21 5 U.S. 137 (1803).

There is no question that the role of the courts in the application and the interpretation of the constitution is pervasive and central, whatever the status and nature of the constitutional regime. But while there are some constitutions that explicitly grant courts the power to invalidate primary legislation, there are others in which the power is inferred by courts from the supremacy of the constitution,²² and still others that explicitly deny courts that power.²³ Even when there is a judicial power to review primary legislation and invalidate it for inconsistency with the constitution, there is a variety of such institutions and regimes.²⁴ Be this as it may, most constitutions provide for legal enforcement of their provisions, and most see the judicial institutions as the ones best suited to enforce them. Often, this tendency is based on a deep reluctance to place full trust in legislatures and a wish to add an effective constraint on their legislative power. There are a variety of ways of dealing with the counter-majoritarian difficulty that may then emerge.

One can discuss these questions abstractly or study the way the relationships between courts and the other powers develop in various legal systems. Both approaches seem to yield similar results. Judicial review of primary legislation has been the norm in a growing number of jurisdictions. It is especially salient in societies that emerge from dictatorial regimes and seek to entrench the hard-won commitment to democracy and freedom. Although there are serious political limits of various sorts to the effectiveness of courts as defenders of rights or as movers of social change,²⁵ judicial review over primary legislation has in general provided an important avenue to check local excesses within political systems. Against this background, countries that have struggled with these questions in recent times and decided against such judicial review

22 This is the situation in the U.S.

23 This is the situation in the Netherlands, New Zealand, and the United Kingdom. See the Netherlands Constitution, 1989, Article 120; the U.K. *Human Rights Act*, 1998, c. 42, s. 4 [*U.K. Human Rights Act*]; and the New Zealand *Bill of Rights Act*, s. 4 (1990). (The U.K. model is a novel model in that it allows only judicial *declarations* of constitutional inconsistencies, thus implicitly denying judicial power to invalidate legislation, whereas the other two explicitly deny the power of judicial review).

24 See Vicky Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999) at 455-91 [Jackson & Tushnet]. The main differences are between regular courts (as in the U.S. and Canada) performing all such review and constitutional courts (as in most of the European continent and South Africa); between systems allowing only pre-legislative review (as in France) and those allowing only post-legislative review (as in the U.S.); and finally, between systems allowing only incidental review (as in Australia) and those allowing also abstract review and advisory opinions (as in Italy).

25 See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Harry Arthurs, "Constitutional Courage" (2004) 49 McGill Law J. 1 at 8-10; and William N. Eskridge, Jr. & John Ferejohn, "Super-Statutes: The New American Constitutionalism" in Bauman & Kahana, *supra* note 14, 320.

are of special interest.²⁶ They point to the fact that although there are many powerful reasons for giving courts such powers over primary legislation, there are also reasons against this. These reasons are tied, among other things, to the distinction between different components of constitutions.

Of course, as I noted above, the dividing lines between the phases are often not very bright and clear. The distinction between regular or normal politics and constitutional debate may well be a matter of degree. Regular politics constantly challenge constitutional limits. One does not have to endorse Ackerman's theory of constitutional moments to claim that the United States' constitution has in effect been amended many times without invoking the formal process of constitutional amendment.²⁷ In such amendments, which are closer to constitution-making than to application and interpretation, courts naturally take an important part. At times, they may be the movers or the consolidators of such processes. At others, they may well undermine, by their interpretation, the practical effects of enacted constitutional amendments.²⁸ Moreover, due to the finality of adjudication and to the prestige of courts as defenders of the rule of law, it is often politically quite difficult to use legislation to change a law or a practice or an interpretation ruled by courts as inconsistent with constitutional values.²⁹

26 One may say that European countries are less relevant here because they are subject to the jurisdiction of the European Court. The main non-European examples are Australia and New Zealand.

27 Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991) at 6-7 ("The Basic Idea"). See also Adrian Vermeule, "Constitutional Amendments and the Constitutional Common Law," in Bauman & Kahana, *supra* note 14, 229.

28 Indeed, some argue that courts can declare constitutional amendments themselves unconstitutional! For example, President Aharon Barak introduced, in both judicial opinions and in his scholarly writings, the notion of the "unconstitutional constitutional amendment." According to this notion a constitutional amendment, that complies with the provisions relating to amendments in the constitution, will be declared unconstitutional due to its contradiction to the "supra constitutional" fundamental principles of a legal system. Barak discusses this notion as a hypothetical possibility in his "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harvard Law Rev.* 16 at 89-90 and especially note 262. Under this theory, courts are the ultimate interpreters of the constitutions not only in the sense that they can invalidate laws which they hold to be inconsistent with the constitution. They can also undermine attempts to overrule their decisions by an amendment to the constitution itself.

29 A dramatic illustration of these difficulties is the fact that some senior Canadian officials have declared that they see the use of the famous override clause in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 at s. 33) as improper. For example, former Canadian Prime Minister Paul Martin said that he would "never use the [override] clause to take away a right that had been enshrined in the Charter." Quoted in Les Whittington & Richard Brennan, "Martin aims at Tories' Achilles heel" *The Toronto Star* (June 16, 2004) A6. This declaration may itself be an instance of a constitutional moment, because it is quite plausible that the *Charter* would not have been enacted in the absence of the override, so that its inclusion can be seen as a "big compromise" in the system of checks and balances.

Nonetheless, with all this inevitable and immanent ambiguity, the field in constitution-making and amending constitutions should mainly belong to representatives of the people. By contrast, in processes of interpretation and application of constitutions and their amendments, courts should be serious and central players, and are indeed seen by some as supreme. This division of responsibilities is not merely a universal description of the realities in legal systems. It is a natural outcome of the different bases of the legitimacy of the various organs of government and the different functions of constitutional frameworks, normal politics, and adjudication.

Components of Constitutions

In addition to constitutional phases, there is also a difference in institutional roles within the phase of application and interpretation, as state organs live under the constitution and invoke the three main parts of constitutions – rules of the game, credos, and bills of rights. These parts have somewhat different functions within the constitutional regime, and the difference may affect plausible and desirable institutional roles related to them.

All constitutions must have a *rules-of-the-game* part, which structures, legitimates, and facilitates all organs of government. Furthermore, constitutions build systems of checks and balances by using some powers to check others. Seen in this way, all empowered organs are the guardians of the constitution, and all are legitimated by it. Effective government is not less important than an independent and courageous judiciary or than a conscientious and productive legislature. Concerning the rules of the game, therefore, each of the powers may and should act according to its own interpretation of the law and the constitution. No organ of government may act in a way that it itself concedes is unconstitutional.

Rules of procedure and justiciability will determine which actions by the legislature and the executive may be subject to judicial review and in what form. The legislature and the executive are considered strong branches, and the courts are often granted powers to check their activities. The fact that a supreme court's decisions are not subject to review by any other legal authority is often justified by saying that the court is "the least dangerous branch."³⁰ This may be so, but it is no reason to give up on the basic insight that no power should come without some accountability. The accountability of supreme courts should thus

30 Alexander Hamilton, *Federalist 78*, in Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961).

be achieved through other forms of checks and balances.³¹ More important, the centrality of courts as interpreters should not lead us to belittle the role of other organs in the interpretation and enforcement of the constitution.³²

What is special about the rules-of-the-game part is that most of its provisions are neutral. They talk of structures and powers and decision-making procedures and about elections and terms and age limits. Interpretation of these laws does not seem to be bound to any specific ideology besides the fairness of a general law. Majority rule is a decision rule that gives legitimacy to those decisions made by the majority irrespective of their content. Similarly, a principle allocating power to decide between states and central government may be neutral in respect to the actual content of the decisions made by the parties.

The neutrality of the rules of the game is, of course, not accidental. It is what makes them a strong source of legitimacy, especially in divided societies. Dividing labour and entrusting most of the power to the representative body is the best way of guaranteeing that we will have government of the people, by the people, and for the people. Moreover, it is easier to accept a decision that runs against one's convictions if it comes from an authorized body of the whole community (which includes those who do not share one's convictions) than to accept the decision as an alleged interpretation of one's convictions themselves.

Constitutions must include rules of the game, but they do not have to have either credos or bills of rights. Divided societies may be attracted by "thin" constitutions, consisting of rules of the game only; and at least some believe that a wisely designed system of rules-of-the-game gives all the required protection to minorities and factions.³³ Thin constitutions permit agreement on procedures that are necessary and neutral, without talking about controversial conceptions

31 The need to supervise judicial power is naturally greater the more power the Supreme Court has under law or convention. The usual ways to check judicial power, given the need to protect judicial independence from government, is via methods of appointment of judges and via ways of ending judicial term by either short terms or impeachments. Judge Landau argued against giving the courts the power of judicial review over values and rights because he was certain this would lead to an increased involvement of politicians in the appointments process. *Supra* note 1. For a general discussion of the tensions between judicial independence and accountability see Ruth Gavison, "The Implications of Jurisprudential Theories for Judicial Election, Selection and Accountability" (1988) 61 *Univ. of Southern California Law Rev.* 2701. In some countries, judges serve until retirement. In others, they serve without a limit. In yet others, judges (especially in constitutional courts) serve for a limited term of years.

32 For a systematic argument in this direction, see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

33 Some think that this was the view of James Madison, elaborated most fully in the celebrated *Federalist* 10, *supra* note 30. However, Madison did wholeheartedly work for including the Bill of Rights in the Constitution, after ratification.

of the good or values. Unified societies may enjoy lofty *credos* which contribute a sense of nation building and cohesiveness. For divided societies, the choice is between a universalistic credo that might do this at the cost of blandness, or a more particularistic credo very critical to some but that may well alienate others.³⁴

The picture becomes even more complicated for *bills of rights*. On the one hand, one could well argue that every well-ordered state, and especially deeply divided societies, should have a bill of rights with independent, effective enforcement, since this is where democracy in the sense of majority rule must give way to the substantive values of human rights which should constrain all governments. These rights are universal and do not depend on the preferences of majorities. Their function is to protect minorities and individuals from majorities. Indeed, in the case of human rights, the basis of the court's mandate to protect those rights even against the majority is stronger than it is in the case of most credos, because it is the essence of human rights that they have pre-legal force. Constitutional status for such rights and full judicial review may thus seem natural.³⁵ On the other hand, human rights rhetoric tends to become very expansive so that everything that one wants very badly is translated into a right. Most of the current debates within democracies may easily be reformulated in terms of rights.³⁶ And once the courts protect rights that have not been clearly incorporated into laws, and whose scope is deeply controversial, they are likely to be seen by those whose views are different as organs imposing their own values on the majority of society.³⁷ Thus, it might mean that human rights are invoked to undermine the ability of the majority to enact its preferences where reasonable people may disagree whether a core human right was violated. In such circumstances, a bill of rights may in itself become a divisive element, generating a crisis in the legitimacy of those who enforce it (if such enforcement is not left to the representative branches themselves). So the question again becomes not "what are one's rights?" but "who decides?"

34 This is clearly the case in Israel, where some insist that the state is defined as the home of the Jewish people while others advocate a thin constitution in order not to alienate the Arab minority. But the same may happen in a society divided along the lines of commitment to free markets *versus* a welfare state.

35 Indeed, this was a statement often made in the ratifying conventions in the U.S. states, and it did lead Madison himself to champion the addition to the Constitution of the Bill of Rights.

36 For a critical analysis of this feature of rights-discourse by a person with a strong commitment to human rights, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, Macmillan, 1991).

37 For elaboration of these themes see Ruth Gavison, "The Role of Courts in Rifted Democracies" (1998) 33 *Israel Law Rev.* 216.

It is to be expected that bills of rights are vague and will require interpretation. Hence the real question to be decided is that of the structure of the commitment to rights in a particular society and the identity of the final authoritative interpreter and decision-maker. This question in itself may be seen as a part of the rules of the game, because it goes to the supremacy and the enforceability of the constitution, and to the powers of courts *vis-à-vis* the government and the legislature. It follows that even where there is no debate about the existence of judicial review over primary legislation, courts should beware of "legislating" where the issue is not a clear violation of a core right of an individual or of a group.

In terms of constitutional design, credos and bills of rights are particularly tricky when interpreted and enforced by a court that has the power to invalidate statutes. The inevitable ideological and abstract nature of these parts of constitutions means that decisions by unelected courts may be, and appear to be, not sufficiently responsive to self-government. The fact that courts are seen as "the forum of principle,"³⁸ and thus reach their decisions without engaging in negotiation and compromise as the political branches always do may mean that important social and political debates will be resolved without the give-and-take needed when a complex society works out its positions. The results may be either loss of legitimacy by the courts, and of the constitution they purport to invoke, or pressure to politicize them, or both.³⁹

Divided societies may be tempted to use credos in order to give a special symbolic force to the vision of the enacting powers and remove their vision from the contingencies of future controversy. This, of course, may be very problematic for the groups whose visions are excluded or silenced. It may well reduce the legitimacy of the constitution for them (as it may appear not to include them fully). Indeed, the privileging of particularistic credos in an entrenched constitution governing a divided society is problematic. Judicial interpretation of this credo may run one of two risks, both of which may weaken the court's standing. The first is that the court echoes the sentiments and aspirations of the majority that had entrenched the credo, and can be challenged for preferring

38 Ronald Dworkin, *A Matter of Principle* (Cambridge, Harvard University Press, 1985) at 69-71.

39 This fear is the basis of the judicial doctrine of self restraint advocated by some judges, and the spirit of Holmes' famous dissent in *Lochner v. New York*, 198 U.S. 45 (1905). Holmes warned (at 75-76) against judicial invalidation of laws on the basis of vague ideas like property or freedom of contract, arguing such decisions were in fact judges enforcing their own system of values. He noted that while federalism required that there would be a final arbiter on constitutional matters between states and the central government, the Court could have endured well enough without the power to overrule laws of Congress on the basis of the Bill of Rights. See Ruth Gavison, "Holmes' Heritage: Living Greatly in the Law" (1998) 78 Boston Univ. Law Rev. 843.

that vision of the good life to a neutral commitment to the welfare of all citizens. The second is that the court will indeed prefer the universalist interpretation and seek to define away the controversial credo. In that case the court may risk being perceived as an organ seeking to undermine the constitutional consensus.⁴⁰

A further guideline follows: because judicial review, particularly over legislation, is a subject of great controversy, it is best that the issue be explicitly addressed in all its aspects in the process of constitution-making itself. A decision to give a judicial body the power of review over an abstract bill of rights is known to transfer a lot of political power from the legislature to courts. This decision should therefore be made by the legislature itself, with some broad public ratification, and the nature of the judicial body and the scope of its powers of review should ideally be decided within the same phase of constitution-making in which the power is conferred.⁴¹ The court should be extra careful not to advocate legislation expanding its own powers to review primary legislation, and not to expand its own powers to do so through adjudication. Such caution should be seen as a part of the “package deal” that gives courts independence, finality and limited accountability. A court that does not heed these limitations may overstep its own legitimacy.

Indeed, as with constitutional phases, here too the dividing lines are not always clear. Are political rights a part of the rules of the game, or are they parts of the bill of rights? Is a commitment to democracy a part of the rules of the game or of the credo of society? Yet here too, these guidelines, although not mandatory, suggest important lessons, supported by both historical experience and normative insight. In the normative dimension, these guidelines suggest that the roles played in the “life cycle” of a constitution and in relation to the different parts of the constitution should be such that the functions of structuring and legitimating government in its broad sense are primarily

40 For a sensitive discussion of the predicament of abolitionist federal judges who were asked to enforce the fugitive slaves laws before the Civil War in the U.S., see Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975). The Israeli Supreme Court is attacked on both sides of this dilemma. Some complain that it is too “Zionist” and some Jews see it as undermining the Jewishness of the state.

41 One may argue that this guideline was not met by the U.S. Constitution, and that this did not harm the legitimacy and importance of judicial review. True, *Marbury*, *supra* note 21, went beyond the constitutional text. True, the fact of judicial review (as against its proper scope) is hardly challenged in the U.S. But the pervasiveness of the debates over its scope suggests that this vulnerability exists in the U.S. as well. Besides, we do learn from experience. In current debates about enacting bills of rights into constitutions, these themes are central and often lead to decisions not to endorse judicial review (as in Australia and New Zealand) or to reach compromises (as in the United Kingdom and Canada). Furthermore, when the power to invalidate laws is granted, it is often relegated to special organs, with specific modes of appointment, limited terms, and serious limitations on access.

entrusted to the people and representatives directly accountable to it. In the empirical dimension, they suggest that a constitution is more likely to gain legitimacy if made and amended through broad participation.

Those who believe that liberal constitutions are critical for the health of good societies may prefer that such constitutions be enacted even if this cannot be achieved through an open public debate and a ratification indicating broad participation and endorsement. They think that it is better that a liberal constitution is enacted by courts if the legislature does not want to enact it. They believe that if the public comes to see that a liberal constitution is good for it, better than the rule of the political branches without the constitution, legitimacy will follow. This may be so. The presumption is, however, that broad participation and big compromises by authentic representatives of all segments is a more promising route for a constitution than imposing it from above by a small elite. This is especially true when the society is deeply divided and when the small elite proposing the constitution is anything but representative of the many segments of the country's population.

It has become very fashionable to see courts as the central players and custodians of a democratic constitution. Courts are indeed crucial partners in the maintenance of a robust constitutional regime. Yet, it is misleading to present them as the ultimate guardians of democracy and constitutionalism. It is even misleading to present them as that power most clearly identified with the protection of constitutional human rights. Legislatures and government are central constitutional actors, as important as are courts, each in its own sphere of activity and responsibility. They all share responsibility for the continued existence of the constitutional order. Furthermore, in the critical stages of initial constitution making and of constitutional amendments, the legislature (or other bodies and processes representing the public at large) is and should be the prime actor.

A constitutional democracy is a democracy. Its most basic characteristic is that the power of government is justified by the consent of the people. No stable government can act without legitimacy. There is no substitute for the legitimacy stemming from the fact that the basic arrangements of political power are ones designed taking into consideration the actual preferences while wishes and attitudes of the people living under the constitution.

Courts have a vital role in limiting the powers of the executive and legislative branches. Indeed, power corrupts and absolute power corrupts absolutely. At the same time, nothing much can be done without effective

power. We therefore need complex systems of checks and balances to structure power, divide it, and minimize its abuses. It makes sense to anchor these systems in an entrenched constitution. This constitution limits the powers of the legislature itself. No other law could have done this. This is as it should be. But this desirable limitation of the power of the legislature should not be taken to mean that it has lost its status as the best reflection within government of the source of political power – the people.

II. A HISTORY OF THE ISRAELI CONSTITUTIONAL PROCESS⁴²

In May 2003, in a public event, the then-Speaker of the Knesset, Reuven Rivlin, charged that Israel did not have a constitution, and that the state was the victim of a judicial constitutional putsch that needed to be redressed by the legislature. The President of the Israeli Supreme Court, Aharon Barak, replied by repeating his oft-made assertion that Israel had joined the family of constitutional regimes in 1992, and he affirmed that the purpose of that move was to protect the citizens from the legislature itself.⁴³ In the next two Parts of this article I seek to explain how these two statements came about to be made by such key figures in Israel's public life.

When Jews were getting ready to declare the Israeli state at the end of the British Mandate over Palestine and following the United Nations General Assembly Resolution 181 of 29 November 1947⁴⁴ (holding that the area

42 The uniqueness of the Israeli case is reflected in the fact that, in addition to many detailed analyses by Israelis in both English and Hebrew, it is discussed by many non-Israelis in a variety of comparative contexts. For a sample of descriptions see e.g. Robert A. Burt (1981) "Inventing Judicial Review: Israel and America" 10 *Cardozo Law R.* 2013; Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton: Princeton University Press, 1993; Gavison, *supra* note 10; Jackson & Tushnet, *supra* note 24 at 566-605; Emanuel Gutmann, "Israel: Democracy Without a Constitution" in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (London: Gower, 1988) 290; Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" (1995) 26 *Columbia Human Rights Law Rev.* 309; Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (American Enterprise Institute: Washington D.C., 2003) 112-34; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); and Yoseph M. Edrey, "The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements" (2005) 53 *American J. of Comparative Law* 77.

43 Rivlin's speech was made in Aharon Barak's presence on 22 May 2003, during a conference on Democracy in Israel held at the State President's mansion. President Barak's reply speech was delivered at the opening of the Bar annual retreat on 26 May 2003. For the (Hebrew) texts of both speeches, see online: <<http://www.nfc.co.il/Articles>>.

44 UN GAOR, 2d. sess., UN Doc. A/519 (1948).

between the sea and the river be partitioned into a Jewish state and an Arab state) it was quite clear that the Jewish state would enact a constitution as the basic norm of its legal and political system. Preparatory work was done, and a draft constitution was adopted.⁴⁵ The *Declaration on the Foundation of the State*⁴⁶ of 15 May expressly provided that matters would be run temporarily by the organs of the Jewish community, elections for a constituent assembly would be held, and the first parliament would be elected under the provisions of the newly enacted constitution.

Matters have not developed as planned. Upon the ending of the Mandate a war erupted that sought to undermine the emerging Jewish state. By the time elections were held in 1949, the temporary organs were quick to transfer to the constituent assembly all powers of regular legislation. The elected body thus became endowed with both legislative and constitutional authority. The Constituent Assembly was elected on 25 January 1949, and it met for the first time on 14 February 1949. Two days later it passed the *Transition Act 1949*,⁴⁷ providing that the legislature be called the Knesset and the Constituent Assembly the First Knesset. In 1950, a long debate was held on the issue of whether or not to enact a constitution. The governing coalition, headed by Prime Minister David Ben Gurion, and including the religious parties, mostly opposed the enactment of a constitution.⁴⁸ The opposition parties

45 For different suggested drafts for a constitution see the Knesset Constitutional Committee's web site, online: <<http://huka.gov.il/wiki/index.php>>. Dr. P. Cohen's draft was adopted by the first Knesset Constitutional Committee. See Amnon Rubinstein, *Constitutional Law of the State of Israel*, 4th ed. (Jerusalem and Tel-Aviv: Schocken, 1991) at 44. It is far from certain whether this was not a response to "force majeure" in the person of the UN General Assembly, rather than the expression of the policy preference of the political leadership of the Jewish state. The General Assembly resolution called for constitutions in the Jewish and Arab states, prescribed fundamental guarantees of minority rights, and set the date by which the respective constitutions would be adopted. Since this resolution was the source of legitimacy of independence under international law, the *Declaration on the Foundation of the State* carefully incorporated all the prescribed provisions of the resolution relating to the proposed constitution, including the prescribed date (according to the Gregorian calendar, unaccompanied by its Hebrew equivalent) for the adoption of the constitution.

46 Laws of the State of Israel 5708/1948, vol. 1, 3 [Official English Translation of Israeli Statutes] [L.S.I.].

47 L.S.I. 5709/1949 vol. 3, 3.

48 For this debate see Ruth Gavison, "The Controversy over Israel's Bill of Rights" (1985) 15 *Israel Yearbook on Human Rights* 113. Prime Minister Ben Gurion's main reasons for opposing an entrenched constitution were fear of limits on the powers of government and the legislature, fear of judicial review over laws, and a wish to change the system of government which he saw as untenable. He thought that a proportional representation election system that generated many small parties did not permit effective government, and wanted to move in the direction of the British Westminster system. See Shlomo Aharonson, "A Constitution for Israel – Ben Gurion's British Model" (1998) 2 *Politica* 9 (Hebrew).

wanted one to protect democracy and human rights. The compromise, known as the *Harari Resolution*,⁴⁹ was a decision to enact a series of Basic Laws, which together would form a constitution. Neither the status of the Basic Laws nor the process and the timetable of their enactment were specified. In the same year – 1950 – a few very fundamental laws were enacted, among them the *Law of Return*.⁵⁰ When some suggested that the law be entrenched, Prime Minister David Ben Gurion responded that abolishing the law was unthinkable, but that Israel had decided against entrenchment of legislation.

In the very early years of the state some petitioners sought to invalidate laws that were, they claimed, inconsistent with the foundation of the state. The Supreme Court consistently rejected these petitions, saying that Israel did not have a constitution and that the *Declaration* was not a legal document. At the same time, the High Court of Justice, which is the Israeli Supreme Court sitting as an administrative court of first (and last) instance, developed a stance of interpreting laws and practices from a prism of human rights. Violations of human rights would only be validated if explicitly authorized by a law. It thus created an impressive unwritten bill of rights.⁵¹

The first Basic Law was enacted in 1958 and dealt with the Knesset itself. It was a very detailed law, not confined to the level of principle usually seen in constitutional documents. Only one section of that law – the section holding that elections in Israel will be general, national, proportional, and equal – was entrenched,⁵² and it required a special majority of sixty-one (out of 120) in the Knesset for its amendment.⁵³ The process of legislation of the Basic Law was not unique – that is, it was not different from the process of ordinary

49 The *Harari Resolution* [D.K. (1950) 1743] states: “The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State’s constitution.”

50 *The Law of Return*, 1950, 4 L.S.I. 114, (1950).

51 H.C.J. 10/48, *Ziv v. Governick*, 1 P.D. 33 (1948); H.C.J. 1/49, *Bejerano v. Minister of Police*, 2 P.D. 80 (1949). See the detailed discussion by Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, Berkeley, 1997), of the *Kol Ha’am* decision of 1953, in which freedom of expression was protected against administrative discretion through this interpretive stance H.C.J. 73/53, “*Kol Ha’am*” Co. Ltd. v. Minister of Interior, 7 P.D. 871, 874 (1953).

52 *Basic Law: The Knesset*, 12 L.S.I. 85 (1958), s. 4 (for the entrenchment see s. 46). The full texts of the Basic Laws are available in unofficial English translations on the Knesset website, online: <http://www.knesset.gov.il/description/eng/eng_mimshal_yesold1.htm>.

53 The need for entrenchment did not stem from the wish to protect equality, but from the wish of the small parties to make it harder to change the system of national, proportional representation elections. Ben Gurion and others have thought this system created too many small parties and made coalition forming and government too difficult.

legislation – but the law enjoyed a very broad consensus. In 1969 (very soon after the 1967 Arab-Israeli war), the Court for the first time ruled, in *Bergman v. Ministry of Finance*,⁵⁴ that a law violating the equality of the elections (by not funding new parties) could only be enacted with the special majority; since it did not enjoy that majority it was invalidated. As a result, the Knesset modified the law a bit, gave some funding to new parties, and re-enacted all election laws with the required majority.

From then on, the courts invoked the power to review laws that violated *entrenched* provisions not enacted with the proper majority, in the context of election laws. Courts also insisted that non-entrenched Basic Laws were regular laws. While many suggested that this introduced judicial review in some form to the Israeli legal system, no one argued that *Bergman*, in itself, meant that Israel now already had a constitution.

Attempts to enact Basic Laws and complete the constitution continued throughout the 1970's. Slowly, Basic Laws covered most of the central organs of government. These laws mostly reflected the existing structure of government organs and their relations, so they did not change much in the law and consequently they enjoyed large parliamentary majorities. Later, Basic Laws were shorter and less detailed. None of the provisions of these Basic Laws was entrenched. All agreed they did not add up to a constitution. It became apparent that there were two main, related stumbling blocks to the completion of a constitution: the enactment of a bill of rights and of a *Basic Law: Legislation*, dealing with the issues of entrenchment and supremacy, presumably involving judicial review by the courts.⁵⁵

Starting in the mid-1980s, both the drive for a constitution and opposition to it grew. These trends reflect important changes in Israel's political and social reality.⁵⁶ The forces founding Israel were all Zionists, mostly European

54 H.C.J. 98/69 *Bergman v. Minister of Finance* 23(1) P.D. 693 (1969) (Hebrew) [*Bergman*]. The decision, notably, was given by Judge Moshe Landau, who expressly held that invalidation of the law did not decide the issue of judicial review (since the Attorney General was willing to argue the law on the merits while also saying he did not think the court had the power to review primary legislation). For a detailed analysis of the case and its meaning see Melville Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution" (1970) 70 *Columbia Law Rev.* 1217.

55 One can find two detailed and at times contradictory descriptions of the history of attempts to complete the constitution in the opinions of Barak and Cheshin in C.A. 6821/93 *Bank Hamizrachi v. Migdal Communal Village* 49(4) P.D. 221 (1995) (Hebrew) [*Bank Hamizrachi*].

56 For descriptions of Israeli society see Samuel Eisenstadt, *The Transformation of Israeli Society – An Essay in Interpretation* (Boulder: Westview Press, 1985); Dan Horowitz & Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (Albany: State University of New York Press, 1989); B. Kimmerling, *The Invention and Decline of Israeliness – State, Society, and the Military* (Berkeley: University of California Press, 2001); B. Kimmerling, *The End of Ashkenazi Hegemony* (Jerusalem:

and secular. The early, Labor-led governments controlled matters of security, immigration, and foreign policy. The religious parties tried to protect their freedom to maintain a religious way of life and to get financial support for their schools. The Arab minority within Israel was small, demoralized, and politically weak. Israel was seen by most people in it and in the world as the secular nation-state of Jews. The 1950s brought waves of immigration of Jews from Muslim countries. These people were often either observant or at least traditional. In 1967, a debate about the future of the territories occupied by Israel and their population was reopened, and it grew in intensity after 1973. In 1977, Labor lost control of the government and the left-right divide has been very central to Israeli politics ever since.⁵⁷ Unity governments were usually paralyzed, narrow governments often depending on the religious parties. This dependence on the religious parties led to arrangements that produced a growing resentment among some of the secular groups. In addition, a huge wave of Jewish immigrants from the former Soviet Union, combined with a growing sense of strength by the Arab citizens of Israel, have made the basic divides in Israel more pronounced.

As political authority weakened and as political power started changing hands, the Court has become a much more central player in Israeli public life. Issues that used to be resolved in Parliament started reaching the Court. The latter expanded its jurisdiction by letting go of all requirements of standing, by abolishing in fact the political question doctrine, and by adding unreasonableness to the list of reasons justifying intervening in the actions of government. While all agreed the Court was becoming more activist, some celebrated the fact while others criticized it.⁵⁸ The Supreme Court has also

Keter, 2001) (Hebrew); and Yossi Yonah, "Israel's "Constitutional Revolution": The Liberal/Communitarian Debate and Legitimate Stability" (2001) 27:4 *Philosophy and Social Criticism* 41.

- 57 The present left-right divide in Israel relates to the issue of the future of the territories and not to social and economic policy. In the early 1950s, the debate over whether the state should be free market or socialist was one of the controversies making a thick constitution difficult to attain. At the turn of the twenty-first century, most of the political elites support a free-market economy. Differences of emphases on the social and economic issues are used as election boosts by most parties. Ironically, the Right enjoys the support of most of the weak groups, while the Left is supported by the rich. Before 1977, the Labor Party formed the stable centre of the political map, acting with parties to its right and left as coalition members. Between 1977 and 2006 there developed a two-bloc political map. The 2006 elections may have changed this by re-introducing a centre governing party – Kadimah. However, it is not large enough to change the political map in a serious way.
- 58 See discussion in Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, *Judicial Activism For and Against: The Role of the High Court in Israeli Society* (Jerusalem: Magnes, 2000) (Hebrew), and Evelyn Gordon's review of this book, "Center Court" (2002) 13 *Azure*, online: <<http://www.jafi.org.il/education/azure/13/13-gordon.html>>.

started to indicate that judicial review over primary legislation itself was a matter of convention. Judge Barak conceded that *at that time* the convention did not allow such review, but he indicated very clearly that this was an empirical question, and that it was quite possible that even without any legislative authorization judges *could in the future* acquire a power to invalidate laws inconsistent with the basic and fundamental values of the system.⁵⁹

In 1992, supporters of the constitution and the bill of rights from within the Knesset realized that their chances were very slim to complete legislation of both *Basic Law: Legislation* and a bill of rights, and declare the whole set the Israeli constitution, all entrenched and supreme. They decided to divide the bill of rights into separate laws, seeking to enact those that enjoyed a broad consensus, and hoping that once the basic structure was in place the rest would follow. At the same time, a group of professors from the law school at Tel Aviv University, headed by then-Dean Uriel Reichman, was pushing hard for a constitution involving not only a completion of the existing set of Basic Laws and enactment of a bill of rights, but a more ambitious comprehensive document, proposing, among other things, that Israel switch to a presidential system of government and change its election system.⁶⁰

Just after a date for elections was set, both initiatives bore fruit. The Knesset passed the *Basic Law: The Government*⁶¹, determining that the Prime Minister will be elected directly by the people (starting from the elections following those of 1992). Two Basic Laws on human rights – *Basic Law: Freedom of Occupation*,⁶² and *Basic Law: Human Dignity and Liberty*⁶³ – were also enacted. *Basic Law: The Government* was fully entrenched (requiring a supermajority of sixty-one votes in the Knesset to change it) as was *Basic Law: Freedom of Occupation*.⁶⁴ *Basic Law: Human Dignity and Liberty* was not entrenched, and it contained a provision granting all existing legislation immunity from judicial review. The human rights laws did not specify

59 See his judgment in H.C.J. 142/89 *Laor Movement v. Speaker of the Knesset* 44 (3) P.D. 529 (Hebrew). Indeed, in a *Basic Law: Legislation* bill proposed at that time, the laws were supposed to be consistent not only with the Basic Laws but also with the “basic values of the system.” See *Basic Law: Legislation*, draft law (1992) at 147, s. 35(e).

60 For a detailed analysis of this movement, called “A Constitution for Israel,” see Guy Bechor, *Constitution for Israel* (Or-Yehuda: Maariv, 1996) (Hebrew).

61 *Basic Law: The Government*, 1992, S.H. 1396.

62 *Basic Law: Freedom of Occupation*, 1992, S.H. 114, replaced in 1994 by *Basic Law: Freedom of Occupation*, 1994, 1454 S.H. 90.

63 *Basic Law: Human Dignity and Liberty*, 1992, 1391 S.H. 150.

64 The direct election was hotly debated, and participation in the vote was massive. It passed by a 55-32 vote. The human rights laws were enacted very late at night, and the votes were 23-0 for *Basic Law: Freedom of Occupation*, *ibid.*, and 32-21 for *Basic Law: Human Dignity and Liberty*, *ibid.*

judicial review, but they did contain a section saying that all authorities must protect the rights enumerated, and that these rights could only be infringed according to law and in a proportionate manner (a limitation clause).⁶⁵ They also declared that human rights were to be protected according to the values of "Israel as a Jewish and democratic state."⁶⁶

Soon after the enactment of these laws, scholars started talking of the "constitutional revolution." Notable among them was the then-Supreme Court Judge Aharon Barak (who became President in 1995). Contrary to the expectations of the religious parties, who had thought these two laws did not really change the legal *status quo*, the court found that *Basic Law: Freedom of Occupation* could be invoked to invalidate the practice of prohibiting wholesale importation of non-Kosher meat. In 1994 the Basic Laws were re-enacted, adding a legislative override to the *Basic Law: Freedom of Occupation*, and an explicit law prohibiting the importation of non-Kosher meat was enacted.⁶⁷

In 1995 the Supreme Court affirmed, in a very long decision, that these laws do confer on the Court the power to invalidate laws inconsistent with the Basic Laws.⁶⁸ Moreover, a majority of the Court added that the 1992 legislation created a constitutional gradation so that *all* previous basic law should now be seen as higher laws.⁶⁹ In that decision, the Court reached the

65 *Basic Law: Human Dignity and Liberty*, *supra* note 64, ss. 8, 10. For a description of the laws and their meaning see David Kretzmer, "The New Basic Laws on Human Rights: A Mini Revolution in Israeli Constitutional Law?" (1992) 26 *Israel Law Rev.* 238; and Barak-Erez, *supra* note 42.

66 *Basic Law: Human Dignity and Liberty*, *ibid.* s. 1A; *Basic Law: Freedom of Occupation*, *supra* note 64, s. 2. This limitation clause was copied from the Canadian *Charter*, *supra* note 29. The fact that "Jewish" was added to "democratic" – and even preceded it – was the main reason the National Religious Party (NRP) supported the deal, and the ultrareligious parties did not seek to block it.

67 The religious parties supported it because it was a part of the deal that the override was added and that the notwithstanding law prohibiting the importation of non-Kosher meat (which requires 61 votes) was enacted. Some have claimed that this re-enactment gave the Basic Laws the legitimacy they needed. Others disagree. For details of the 1994 legislation see Barak-Erez, *supra* note 42.

68 *Bank Hamizrachi*, *supra* note 55. There was disagreement among the judges concerning the jurisprudential basis of this conclusion. Some argued the Knesset had the immanent power to limit itself, while others reasoned that the Knesset had two distinct powers, one legislative and one constituent. This interpretation of the 1992 laws was plausible but not inevitable. For the various ways to read the relevant clauses see Barak-Erez, *ibid.* (writing before *Bank Hamizrachi*). Most scholars did not challenge this interpretation, but Moshe Landau, as well as Supreme Court Judge (emeritus) Menachem Elon, did. (Elon wrote before *Bank Hamizrachi*, but he criticizes the interpretation reached there on the basis of its endorsement by Barak in his pre-*Hamizrachi* articles). See Moshe Landau, "Granting Israel a Constitution Through Court Decisions" (1996) 3 *Mishpat u-mimshal* 697-712 (Hebrew); Menachem Elon, "The Basic Laws: Their Enactment, Interpretation and Expectations" (1995) 12 *Bar-Ilan Law Studies* 253 at 255-57 (Hebrew).

69 The legal significance of granting all Basic Laws constitutional status was not clear when the original decision had been made. The old laws (and *Basic Law: Human Dignity and Freedom*) are not entrenched. A majority of the judges seem to hold that the old Basic Laws can now only

conclusion that the statute met the requirements of the limitation clause. A controversy developed among the judges on the nature of the 1992 laws. Judge Barak repeated his statement that the 1992 Basic Laws should be seen as a “constitutional revolution,” making Israel a full constitutional democracy with judicial review. Judge Mishael Cheshin argued that the first Knesset could not have transferred its constituent powers, and that the Basic Laws could not be regarded as a constitutional revolution since there had been no celebratory features to their enactment and no sense of special meaning in the deliberation over them.

Since 1992, the Supreme Court has invalidated parts of law only four times,⁷⁰ but arguments that laws are unconstitutional have been frequently made.⁷¹ These cases have resulted in a growing jurisprudence interpreting the *Basic Laws*. Naturally, interpretations of these provisions and their meaning were also undertaken by legal scholars. Again, prominent among them is the President of the Supreme Court himself, who has published a large numbers of articles and a comprehensive treatise on the subject. His thesis, repeated in judicial opinions, public lectures and scholarly writings, is that the 1992 Basic Laws amounted to a “constitutional revolution.” Since 1992, then, Israel has

be amended by a basic law. But since Basic Laws are enacted as regular laws, the implication is not clear. Others hold that the principle that later laws override earlier ones still applies even to amendment of non-entrenched Basic Laws by regular later legislation. In the meantime, as a part of the move to say that all of Israel's Basic Laws constitute Israel's constitution, a series of judicial decisions gave increasing significance to the status of all Basic Laws, irrespective of different levels of entrenchment. On this development see below.

70 The first decision involved a transition provision in a law introducing the licensing of securities advisers. The law exempted people who had worked in the field for some time from examinations, and the court held that the period specified was too long. The legislature amended the period. At the same time the court upheld all the substantive provisions against a challenge that the whole law violated the right to freedom of occupation. See H.C.J. 1715/97 *Bureau of Investment Managers in Israel v. Minister of Finance* 51(4) P.D. 221 (1997) (Hebrew) [*Bureau of Investment Managers Case*]. The second decision required that the period of detention for soldiers be shortened (this was a case of abstract review, and the Israeli Defense Force did not really object): H.C.J. 6055/95 *Tzemach v. Minister of Defense* 53(5) P.D. 241 (Hebrew) (1999) [*Tzemach*]. The third case invalidated a law legitimating some unauthorized radio stations, with the active support of the Attorney General who had fought against the law. See H.C.J. 1030/99 *Oron (MK) v. The Chairman of the Knesset*, 56(3) P.D. 640 (2002). For the background of the latter decision see Iddo Porat & Issachar Rosen-Zvi, “Who's Afraid of Channel 7?: Ideological Radio and Freedom of Speech in Israel” (2002) 38 *Stanford J. of International Law* 79. The fourth case invalidated a few sections of the law that dealt with the compensation given to the settlers evacuated from the Gaza Strip during the disengagement plan, while upholding the legality of the plan itself against the challenge that it violated the settlers' right to property. See H.C.J. 1661/05 *Regional Council of Gaza Beach v. Knesset* 59(2) P.D. 481 (2005) [*Regional Council of Gaza Beach*].

71 *Bank Hamizrachi*, *supra* note 55, was an appeal on a decision by the district court that had invalidated the law in question. The Speaker's angry speech resulted from the fact that a law was declared unconstitutional by a judge of the Magistrate Court.

had a formal constitution – the whole body of the Basic Laws enacted since 1958. This constitution empowers the courts to review primary legislation. This development is desirable since human rights, separation of powers and democracy itself cannot flourish without such judicial power. True, says Barak, the constitution is not complete, and it will be good if the Knesset does complete it. However, no further legislative step is needed in order for Israel to operate as a state with a formal constitution.⁷²

Following his own description of the legal situation, Judge Barak kept developing the meaning of the “constitutional revolution.” In *obiter dicta* in a number of judicial opinions, as well as in articles and public lectures, he expanded on the meaning of the 1992 legislation. In *Ganimat* he decided that despite the fact that *Basic Law: Human Dignity and Liberty* grants explicit immunity from review to old legislation – the old laws should be interpreted according to the new Basic Laws.⁷³ In *Rubinstein* he asserted that the 1992 laws, with their constitutional revolution, now required that all primary arrangements be regulated by the legislature itself, with no delegation.⁷⁴ Later Supreme Court judgments established a distinction between regular laws that “change” (amend or even modify implicitly) an old, un-entrenched basic law and regular laws that “injure” (derogate) an arrangement set in an old, un-entrenched basic law. It is now pretty much established that a “change” in all Basic Laws can be made only by a basic law. As for “derogating” from arrangements set in an old basic law, the Court has suggested that the regular law will need to pass the test of a “judicial limitation clause.”⁷⁵

72 See “The Constitutional Revolution: Protected Human Rights” (1992) 1 *Mishpat u-Mimshal* 9 (Hebrew), his seminal article in which the expression “constitutional revolution” to describe the enactment of the 1992 human rights law was initiated into the scholarly debate. See also his lengthy decision in *Bank Hamizrachi*, *ibid.* translated in full in A. Gambaro & A.M. Rabello, *Towards a New European Ius Commune* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 1999) 381.

73 Cr.F.H. 2136/95 *Ganimat v. The State of Israel* 49(4) P.D. 589 (1995) (Hebrew) [*Ganimat*]. On this basis, Judge Barak reasoned that the “old” balancing that had been struck between public safety and the rights of suspects not to be detained should be changed in favor of suspects. Judge Cheshin argued forcefully against him that the Basic Laws did not change interpretation, and the balancing between these interests should not be changed in this way. Legislators bring *Ganimat* as their reason for refusing to continue to legislate Basic Laws so long as Barak is their interpreter.

74 H.C.J. 3267/97 *Rubinstein v. Minister of Defense*, 52(5) P.D. 481 (1998) [*Rubinstein*]. The issue was the legality of a sweeping decision by the Minister of Defense to exempt from military service all ultrareligious youngsters who studied Torah. In a previous decision (H.C.J. 910/86 *Ressler v. Minister of Defense*, 42(2) P.D. 441 [*Ressler*]) in 1988, Barak had held this decision was reasonable. This time the Court unanimously held the decision was illegal. Barak explained the difference between the decisions by invoking, among other reasons, the constitutional revolution. (However, the decision challenged here was not a Knesset law, so it could have been invalidated even without judicial review of legislation.) For an extended discussion on this topic see *infra* note 100.

75 Amnon Rubinstein & Barak Medina, *Constitutional Law of the State of Israel*, 6th ed. Jerusalem

Barak also elaborated on the way he interpreted the expression a “Jewish and democratic state” in the limitation clause. As far as he was concerned, the values of Israel as a Jewish state should be taken in such a high level of abstractness that they would coincide with the values of democracy.⁷⁶ He also gave a very expansive interpretation to *Basic Law: Human Dignity and Liberty*, saying that most classic human rights, including even basic welfare rights, can be derived from these commitments to dignity and freedom. However, scholars had initially accused the court of developing a neo-liberal constitution, hostile to labor and the poor.⁷⁷ Slowly, after Scholars had developed the thesis that some social and economic rights can be derived from human dignity,⁷⁸ Barak’s extrajudicial interpretations were endorsed in judicial opinions, often led by President Barak himself. Thus in *Gamzu*, the court held that *Basic Law: Human Dignity and Liberty* covers basic welfare rights.⁷⁹ At a certain point, a Supreme Court panel demanded that the state justify its statutory reduction of welfare payments by providing a criterion to determine when such cuts may violate people’s dignity. The judge who chaired this panel retired and a new, expanded panel headed by President Barak, re-framed the issue. When the court ultimately held that rights to welfare are contained in the right to dignity, but rejected the petition saying that it was not advisable for the court to

and Tel Aviv: Schocken, 2005) 98-108 (Hebrew). This may be the most dramatic judicial expansion of the “revolution” so far. Many have challenged the legitimacy of changing the status of the old, un-entrenched Basic Laws. For instance, in *Bank Hamizrachi*, *supra* note 55, Judge Cheshin argued that these laws, and even *Basic Law: Human Dignity and Liberty*, could be changed or modified by later simple legislation. At most they needed to specify that they consider the law valid notwithstanding the basic law. Barak and a majority of the court held that one could only change a basic law by a basic law (an unfortunate decision since many of the old Basic Laws are very detailed, and that would mean that even minor changes should have the status of Basic Laws). One scholar called this another revolution (Ariel Bendor, “Four Constitutional Revolutions?” (2003) 6 *Mishpat u-Mimshal* 305), while others disagreed (Rubinstein & Medina, *ibid.* at 107) or argued that this was not the way a constitution should be made (A. Reichman, “This is Not How a Constitution is Made,” (2002) 35 *The Lawyer* 42 (Hebrew); Hillel Sommer, “From Childhood to Maturity: Open Issues in the Application of the Constitutional Revolution” (2004) 1 *Law and Business* 59 (Hebrew)).

76 For his position see the texts provided in Michael Walzer, Menachem Lorberbaum & Noam J. Zohar, eds., *The Jewish Political Tradition* (New Haven: Yale University Press, 2000) Vol. I, 502-23.

77 Ran Hirschl, “Israel’s Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in and Emerging Neo-Liberal Economic Order” (1998) 46 *American J. of Comparative Law* 427; and Michael Mandel, “Democracy and the New Constitutionalism in Israel” (1999) 33 *Israel Law Rev.* 259.

78 See the articles in the second part of the collection edited by Yoram Rabin & Yuval Shany, *Economic, Social and Cultural Rights in Israel* (Tel Aviv: Ramot, 2004) (Hebrew). For a critical review of the Supreme Court’s role as the protector of social rights see Yoav Dotan’s chapter in the collection, “The Supreme Court as the Protector of Social Rights” 69 and especially at 99-101.

79 L.C.A. 4905/98 *Gamzu v. Yashayahu et. al.*, 55(3) P.D. 360, 376 (2001).

review a major piece of social and economic policy, and that no concrete loss of dignity was proven, the decision was strongly criticized by advocates of the welfare state.⁸⁰

In May 2006, a majority of the court decided that a right to equality is included in the right to human dignity in the Basic Law in two different cases. First was the challenge of a law exempting yeshiva students from the draft.⁸¹ A few days later, in a controversial 6-5 decision upholding a provisional law limiting the ability of people from the Palestinian occupied territories to acquire status in Israel during periods of hostility, President Barak (in dissent) and some other judges ruled that the right to equality enjoyed constitutional status in Israel.⁸²

While the jurisprudence of constitutionalism and rights has flourished among lawyers and in the courts, further constitutional legislation came to a total standstill. Furthermore, an internal struggle within the Knesset started *vis-à-vis* the Court. Some of the parties regard the Court as the defender of values, decency, and human rights, and thus as a great asset to Israel. Others think that the Court is super-activist and antidemocratic and needs to be made more accountable and constrained. A proposed reform in the structure of the court system that would have relieved the Supreme Court of most of its mandatory case load of civil and criminal appeals was slowed down considerably. Persistent proposals to establish a constitutional court have been raised. Finally, in the beginning of 2004, the Knesset tried to pack the Court by increasing the number of judges from twelve to fifteen; however, the judge-controlled appointment procedure worked, and the new appointees were the ones the Court itself had favored. In all these developments in the Knesset, the Court, usually represented by President Barak, was a very visible and central player. He came out extremely forcefully against the idea of establishing a constitutional court, saying this would be the end of democracy. In addition, he was involved in the details of the 1992 legislation and presented special comments on the 1994 amendments. While he concedes that the Knesset

80 H.C.J. 366/03 *Association for Commitment to Peace and Social Justice v. Minister of Finance* (not yet published) (2005). In a narrower decision concerning old age allowances that had been reduced, the Court upheld the legislation as meeting the limitation clause. H.C.J. 5578/02 *Rachel Manor v. The Minister of Finance*, 59(1) P.D. 729 (2004). The decision was followed by the usual divided responses. Some applauded the Court's self-restraint in matters of economic and social policy while others criticized the fact that the Court did not protect the weak and the disenfranchised.

81 H.C.J. 6427/02 *The Movement for quality of the Government v. Knesset* (2006) (not yet published) [*Movement v. Knesset*]. See *infra* note 100 for a detailed discussion of this case.

82 H.C.J. 7052/03 *Adalah, et. al. v. The Interior Minister, et. al.* (2006) (not yet published) [*Abalah*]. See *infra* note 100 for a detailed discussion of this case.

has the power to change the Basic Laws, he has introduced, in both judicial opinions and in his scholarly writings, the notion of the “unconstitutional constitutional amendment,” indicating that the powers of the Knesset may be limited even if it legislates within the formal constraints of a special majority.

It is not easy to assess the present situation regarding the constitutional process and the status of the Supreme Court. While the Court still enjoys a high level of support among Israelis, its level of support is declining.⁸³ Most of the criticism is not related to constitutional matters or judicial review of legislation, but to its general activism in reviewing governmental actions; however, the two are often connected in public debates. The Court is aware of its vulnerability and it moves cautiously.

At the same time, social forces as well as Members of Knesset (MKs) continue to take more and more of the pressing political and military issues to the court. The result is that the Court systematically reviewed political matters usually kept off the docket of the court in other countries (such as the power of the Prime Minister to fire ministers) and military actions in the occupied territories, and at times it reviewed these actions in real time. (It stopped military actions in real time in Jenin in 2002, and regulated the siege on the Church of the Nativity in Beit Lehem. It again reviewed military actions in real time during an operation in Gaza in 2004.⁸⁴ It also intervened in sensitive matters connected to state and religion. Thus, the Court ordered local authorities that enacted bylaws limiting the sale of pork in their jurisdiction to review the legislation and permit such sales in zones where residents did not object to them,⁸⁵ and suggested that the Orthodox monopoly over conversion to Judaism in Israel was illegal.⁸⁶ The Court also declared that large parts of the route of the security fence around Jerusalem were illegal because they did not balance

83 Compare Gad Barzilai, Ephraim Yuchtman-Yaar & Zeev Segal, *The Israeli Supreme Court and the Israeli Public* (Tel Aviv: Papiros, 1994) (Hebrew). One of the conclusions of a comprehensive public opinion survey, done by the Israel Democracy Institute in 2003, was that “the Jewish public has currently more criticism on the Supreme Court than before.” The comparison is made to a Barzilai, Yuchtman & Segal survey from 1991. The level of public confidence in the Supreme Court measured in the annual survey was 70% (2003), 79% (2004), 72% (2005), and 76% (2006). In the 1990s the public confidence in the court was above 90%. It should be stressed that the level of public confidence in the Court is much higher than that enjoyed by the Knesset or by political parties. Asher Arian, David Nachmias, Doron Navor & Danielle Shani, *Auditing Israeli Democracy 2003* (Jerusalem: Israel Democracy Institute, 2003) at 132, 185; Asher Arian, Nir Atmor & Yael Hadar, *The 2006 Democracy Index* (Jerusalem: Israel Democracy Institute, 2006) at 88.

84 H.C.J. 3451/04 *Almadani v. Minister of Defense*, 56(3) P.D. 30 (2004).

85 H.C.J. 953/01 *Solodkin v. City of Beit Shemesh*, 58(5) P.D. 595 (2004).

86 H.C.J. 2597/99 *Toshbeim v. The Minister of Interior*, 58(5) P.D. 412 (2005).

properly between security needs and the welfare of the Palestinian population.⁸⁷ In 2005, the Court upheld, on the merits, the laws implementing the highly controversial disengagement from Gaza.⁸⁸

Another area of controversy is the Court's interference in prosecutorial discretion, which is broader than levels of review in other countries. The Court hears petitions by NGOs arguing that decisions not to investigate or prosecute (usually public figures) are not reasonable. While in most cases the Court does not invalidate prosecutorial decisions, there is a constant stream of such petitions. Occasionally, these petitions and decisions have serious effects on Israel's political system. Thus in 2004 the Court has dismissed a number of petitions challenging the decision of the Attorney General to not prosecute then-Prime Minister Ariel Sharon for bribe-taking, and seeking to make a minister resign for alleged corruption despite the fact he has not been indicted and convicted.⁸⁹

These controversial decisions are not related to the *constitutional* revolution, strictly speaking; however, they add to the apprehensions of those who criticize the Court's activism. All the decisions mentioned above were *not* based in Knesset legislation. Judicial review of *administrative action* is an undisputed element of the rule of law. In principle, when the legislature is unhappy with the way the Court uses its power to review administrative action, it can remedy the situation by legislating in a way that will empower

87 H.C.J 2056/04 *Beit Sourik Village Council v. The Government of Israel* 58(5) P.D. 807 (2004) (a translation of the judgment can be found in (2005) 38 *Israel Law Rev.* 83).

88 *Regional Council of Gaza Beach, supra* note 70. At the same time, the Court invalidated a few sections dealing with compensation as not proportional.

89 H.C.J 5675/04 *The Movement for Quality of the Government v. The Attorney General*, 59(1) P.D. 199 (2004); H.C.J 1400/06 *The Movement for Quality of the Government v. Stand-In Prime Minister* (2006) (not yet published). These decisions illustrate what has been said before regarding the absence of rules on standing and political question. The court ruled that it has the power to hear popular petitions against decisions of the prosecution not to indict public figures. In a dramatic case, the Court ordered that a minister be fired by the Prime Minister when the prosecution decided to prosecute although the law does not require suspension before the person is in fact indicted of an offence with moral turpitude. Consequently, many people turn to the Court in such matters. The pattern creates criticism that the court is over-activist on the one hand, and criticism that the court is not courageous enough in fighting corruption on the other. It seems that the army has accepted the court's jurisdiction as a constraint and even considered inviting the President of the court to the field to make him a partner in decisions before they are made. I will not explore here the fascinating question why the Knesset and the government do not respond more vigorously to this judicial activism. At times it seems as if they do not know how to use their powers effectively. At others, it seems that there is in fact an alliance here, known from public choice literature, between the powers of government, and that the government is quite willing to take some judicial limitation if it receives legitimacy in return. The judicial decision over the fence may be a dramatic case in point.

or permit the challenged administrative action. Clearly, the situation is much more complicated if the Court can review primary legislation as well. The critics thus wish to limit the power of the Court to review primary legislation and find ways to limit its practices of review over administrative action as well. Naturally, they resist President Barak's assertion that this situation of judicial review over Knesset legislation is already the *status quo*. The "Court Party," on the other hand, is very pleased.⁹⁰ Its members endorse its interpretations of the law, discourage attempts to legislate to override judicial opinions in the name of the rule of law and censure the critics for attacking the Court, helping its enemies, and weakening its legitimacy and independence.

In the last few years, this situation has generated a variety of initiatives to change the constitutional *status quo* in Israel. The former government appointed an expert committee to complete the constitutional process, headed by veteran lawyer and ex-Minister of Justice Yaacov Neeman. The committee included representatives of all the parties in the original Sharon government. The committee proposed a *Basic Law: Legislation* that would entrench all existing Basic Laws, would make them supreme and would explicitly grant the power of judicial review solely to a special extended panel of the Supreme Court. The entrenchment of the Basic Laws would be gradual, and it would be accompanied by a temporary general override provision.⁹¹ The proposals seemed to have lost their political basis when the original Sharon government disintegrated due to the 2005 disengagement, but a very similar proposal has now been endorsed by the new Minister of Justice Haim Ramon, who claims it is also endorsed by President Barak.⁹²

At the same time, the Law, Constitution and Justice Committee of the outgoing Sixteenth Knesset, headed by Likud MK Michael Eitan, had worked very hard on a comprehensive "constitution by broad agreement." The

90 This apt phrase is taken from the book by Morton and Knopff, who present the constitutional situation in Canada as very similar to this description of the situation in Israel. Canada, however, did enact the *Charter*, *supra* note 29, after a deliberate and explicit political process which did involve some great compromises. F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

91 The override was a compromise between supporters of judicial review and those who objected to it. Barak in fact told the Eitan committee that ideally he would like to have full entrenchment without an override, but he sees this as an acceptable compromise. It should be noted that the proposed override requires the same majority required for amendment of the *Basic Law*, and it can be used only once (as distinct from the Canadian override, which requires a regular majority within Parliament (or a provincial legislature) and can be renewed).

92 Yoav Yoaz, "PM, Ramon working on new basic law; lawmakers to draft Israel's constitution" *Haaretz* (22 June 2006). It should be noted that Israeli law requires that judges retire at the age of seventy, and President Barak is accordingly going to retire in September 2006, after eleven years as President.

committee held over a hundred meetings, discussing all present Basic Laws as well as the principles of a bill of rights and a credo. Just before the elections to the Seventeenth Knesset, on 8 February 2006, Eitan has submitted the fruits of this labor to the Knesset, which endorsed the initiative to consider completing the constitutional process. In addition to thousands of pages of background materials and proceedings of meetings, the Eitan committee produced a proposal for a comprehensive constitution mapping the present arrangements and identifying alternative formulations. It is unclear whether these materials can indeed be the basis for a comprehensive design with the necessary "great compromises."⁹³ The Seventeenth Knesset and the new government have not yet clarified their plans on the constitutional drive and its place in their political commitments.

At the same time, the Israel Democracy Institute (IDI), a private think tank, is promoting "A Constitution by Consensus," chaired by the previous President of the Supreme Court, Meir Shamgar. After a major effort, the IDI produced in 2005 a coherent constitutional document, including the required "big compromises." The IDI seeks to convince the public and the MKs that Israel does need a complete constitution, and that their proposed deal is the best one that can be achieved. The IDI's constitution, the first new comprehensive proposal on the table, has been attacked from all sides. National and religious critics find that it does not give enough weight to the Jewishness of the state, and that it grants too much power to the Supreme

93 Eitan wanted all major segments of Israeli society to participate in the discussions. He did succeed in drawing into the discussions broad circles and many experts. There are some features of this participation which may be very instructive. Most of the secular Jewish parties indeed participated in the discussions, as did the National Religious Party (NRP), which had been a member of the coalition until the original Sharon government fell apart on the disengagement plan in 2005. So did the Ashkenazi ultrareligious MKs, who felt that if there is a constitution – they wanted to influence it. They were very concerned about the issue of judicial review, especially if the power was exercised by the court as presently constituted. The MK representing the left-wing Meretz Party declared at the outset that she was against the move because it would not grant sufficient protection to human rights and will weaken the court. Two other segments of the population chose to stay aside. One is the Sephardic ultrareligious Shas Party (at the time, eleven MKs) and the other was the Arabs (17% of the population, at the time eight MKs in Arab parties). Both parties seemed to think that they would be better off by not appearing to give the process legitimacy through their participation. Shas clearly thought that the constitution effort was driven by those whose interests conflicted with theirs. They preferred not to pass political power from the political system to the courts. In the Seventeenth Knesset they form a part of the coalition, and they added a specific section to the coalition agreement giving them veto right on the legislation of any further Basic Laws. The Arab position is that they can indeed benefit from a constitution with a bill of rights enforced by the present Supreme Court, but that they prefer to let the Jewish Left negotiate for it without their conceding the self-description of Israel as a Jewish state, which they challenge. The proceedings of the committee can be found in their entirety in the committee's website, online: <<http://huka.gov.il/wiki/index.php/>> (Hebrew).

Court. Spokespersons from the radical left and the Arab sector complain that it does maintain the definition of Israel as a Jewish nation-state, and that it grants law-and-religion arrangements as well as other subjects “immunity” from judicial review, thus not giving enough protection to the human rights violated by these arrangements.⁹⁴

The IDI and the Eitan processes generated yet more civil society activity, with many groups trying to influence the constitutional debates. On 6 July 2006, the Institute for Zionist Strategy (IZS) presented a proposal for a constitution for Israel to the President of the State.⁹⁵ The main differences between the IDI and the IZS drafts relate to the powers of the Court (the IZS draft includes a general override section), judicial appointments (the IDI entrenches the present arrangement while the IZS seeks to increase political input into appointments of Supreme Court judges), and the meaning of the Jewishness of the state (The IZS draft expands on cultural aspects, and strengthens symbolic elements, of the Jewishness of the state).

Unlike the Neeman-Ramon proposal, seeking to entrench existing Basic Laws in their entirety, the Eitan, IDI and IZS proposals are all based on “sifting” the existing Basic Laws to identify the provisions that need to be “elevated” into the constitutional level, leaving the rest as regular laws. All three take the existing situation as a given and have a general presumption for the *status quo*. Thus, while most people concede that the rules of the game in Israel are not good, and that there is an urgent need to strengthen the powers of the Knesset and increase government stability and effectiveness, all these proposals make only minor constitutional changes, while relegating most of the issues to the level of regular law, thus suggesting that needed changes should be made by regular legislation.⁹⁶ Consequently, none of the three initiatives tackles the serious structural issues that have made Israeli

94 In 2006 the IDI came out with an English version of its proposal. Details about the document and its rationale can be found online: <<http://www.idi.org.il>>. For criticism from the Arab perspective see Nadim N. Rouhana, “Constitution by Consensus: By Whose Consensus?” (2004) 7 *Adalah's Newsletter*, online: <<http://www.adalah.org/newsletter/eng/nov04/ar1.pdf>>; and Nadim N. Rouhana, “The Jewish Institute for Ethnic Democracy” (2005) 9 *Adalah's Newsletter*, online: <<http://www.adalah.org/newsletter/eng/jan05/ar3.pdf>>. For criticism from the right see Moshe Koppel, “Consensus Constitution? I dissent” *Jerusalem Post* (19 May 2006) 4.

95 IZS, “Constitution of the State of Israel: Proposal by the Institute of Zionist Strategy,” English version, online: <<http://www.izs.org/il/documents/Constitution.pdf>>.

96 It seems that in this sense, the IZS proposal is the most consistent. On most issues, the constitution only includes broad principles with explicit authorization of regular laws to fill in the details. Under this structure, it makes some sense not to include in the constitution the principles of elections to the Knesset itself. The choice seems less plausible for the IDI draft, which details the way the president and judges are elected or appointed but does not specify the way the Knesset is elected.

government so unstable over the last two decades.⁹⁷ They are interested in completing the process of enacting an entrenched constitution, yet they need to overcome the reasons that have previously prevented Israel from completing the process.

The fate of all these initiatives is unclear. Many feel that the intense internal debate within Israel concerning the disengagement from the Gaza Strip in the summer of 2005 could have been made easier had Israel had in place a widely shared entrenched constitution. Yet the controversial decision was effectively implemented without one. The stability and directions of the Seventeenth Knesset and the present Ehud Olmert government are not yet clear. Even the direction the Supreme Court is not clear with the impending retirement of President Barak in September 2006. What is clear is that constitutional discourse is now very prevalent. That there is much more awareness of the issues than there had been. And that the present situation of uncertainty about the scope and legitimacy of judicial review as well as unhappiness with the structure of government and growing criticism of the role of the Court mean that the situation is very unstable and undesirable.

In the meantime, the Court continues to hear petitions against major pieces of legislation, which allegedly violate basic rights to dignity and freedom. The idea of judicial review over such matters has definitely taken root. Still, despite the fact that the Court has been delaying some very troublesome constitutional cases, the areas of friction between legislature and the courts continue to grow.⁹⁸ By the summer of 2006, a few months before the retirement of President Barak, some of these controversial cases are still undecided,⁹⁹ but many more have been decided, contributing to the controversy around the Court's activity.¹⁰⁰ Their span is now such that the

97 The Eitan committee had a meeting with three ex-prime ministers to ask them about their constitutional lessons. All three said the situation was untenable and did not allow effective government. Ehud Barak argued for a presidential system, Benyamin Netanyahu thought a presidential system was the right solution but that it was not feasible at the moment, so compromises should be made. Shimon Peres argued for a bipartisan system. Since 1988, not a single government and Knesset has served its full four years.

98 For a discussion of the debate following the Supreme Court decision in *Qa-adan*, which ruled that the state and the Jewish agency could not ordinarily exclude Arabs from Jewish settlements, H.C.J. 6698/95 *Qa-adan v. Israel Land Administration* 54(1) PD 258 (2000), see Jacobsohn, *supra* note 42 at 1780-87.

99 Two key decisions, from very different spheres, relate to the legality of targeted killings and to the wish of same-sex couples married in Canada that their status as married be registered in Israel. The cases are, respectively, H.C.J. 769/02 *Public Committee Against Torture in Israel v. The Government of Israel et al.* and H.C.J. 3045/05 *Ben-Ari, Schuman and the Association for Civil Rights in Israel (ACRI) v. Director of Registrar, Ministry of Interior*.

100 Three decisions deserve mention here. The first to be decided but the last to be raised was a petition

controversy is not only about state and religion issues. The level of support

charging that forcing the Gaza Strip settlers to leave their homes as part of the disengagement plan was an unconstitutional violation of their rights. In a decision of over 300 pages the Supreme Court held 10-1, led by President Barak, that the plan did infringe their rights but that the infringement met the conditions of the limitation clause. A lone judge in dissent held that the law and the plan were indeed unconstitutional. In addition, the court improved the settlers' compensation plan, saying it was not proportional. The decision was applauded by the government and condemned by those opposing disengagement. But some scholars pointed out that this case was truly the incarnation of the abolition of the political question doctrine. The court justified the plan on the merits instead of just stating that the government and the Knesset had the power to enact it. *Regional Council of Gaza Beach, supra* note 70.

The second decision concerned the charged issue of the (non-)conscription of the ultrareligious youngsters who study Torah. From very early on, since the establishment of the state of Israel, the Minister of Defense exempted these students from military service. When the numbers grew to the thousands, people started going to the Court to invalidate this policy. Initially, in the 1970's the Court rejected these petitions for lack of standing and non-justiciability. In 1988, after both threshold mechanisms were weakened to the point of disappearance, the Court held that the arrangement was problematic but reasonable. *Resler, supra* note 74. After an attempt to legislate their conscription failed, some MKs went back to the Court. This time, an expanded panel ruled that after 1992 it was no longer permissible to base this questionable policy on an executive decision. Two of the judges expressed the opinion that the problem was substantive and not merely formal, and that even a law could not remedy the violation of equal treatment involved in the exemption. *Rubinstein, supra* note 74. The Knesset had a hard time reaching an acceptable solution. A public committee was formed. Eventually, after many delays, a law was enacted that in fact maintained the no conscription rule for those who chose to study after a year of deliberation. Those who would choose to not devote all their lives to studies will do a reduced military service and can join the labour force. The day after the law was enacted a number of petitions challenging its constitutionality were filed. In May 2006, just before the retirement of Judge Cheshin, one of the lone concurring in *Rubinstein*, the Court published its decision. Again, it upheld the law 8-1 (with Cheshin opining passionately that not even the Knesset can infringe the basic equal duties of citizenship). The majority, however, equivocated and was ill at ease. Most of the judges did state that a right to equal treatment is now of constitutional status. Yet they reasoned that the fact that the government has not really implemented the law suggests that more time should be given to see how it is implemented. Not surprisingly, the Court was both applauded and criticized. *Movement v. Knesset, supra* note 81.

The third, and most controversial, is a provisional amendment to the *Citizenship Law*, which seriously limits the power of Israeli authorities to give Palestinian residents of the Occupied Territories (OT) legal status within Israel. The law was passed against the background of the armed conflict between Israel and the Palestinians since October 2000, and the fact that many Israeli citizens, especially Arabs, marry Palestinians who reside in the OT and seek to become Israeli residents and citizens. A small number of the Palestinians who have thus acquired Israeli papers and freedom of movement within Israel were involved in terrorist activities. Israeli human rights and international NGOs labeled this law racist. The Court heard arguments and indicated that the law seemed very problematic. The state responded by amending the law and limiting its severity. Finally, the decision was handed down on 14 May 2006: *Adalah, supra* note 82. It was a 6-5 decision, with the majority, led by Cheshin, upholding the law and Barak leading the dissenting five. The public uproar resulting from the decision and the fact it was decided by one vote was huge. While the public debate centered on the bottom line, the opinions reflect very different attitudes to the scope of human rights and judicial review. The Knesset extended the law by yet another six months. The new Minister of Justice has declared that within this period, the government will enact a comprehensive immigration law which will be accorded the status of a Basic Law so that the Court cannot review its provisions.

for the Court on the one hand and deep distrust of the way it is functioning on the other hand affect the core of the debate over the constitution and its enforcement.

III. LESSONS FROM THE ISRAELI CONSTITUTIONAL PROCESS

We can return to the debate between the President of the Court and the former Speaker of the Knesset described at the beginning of Part II. It may now be clearer how two people in these positions can see the same legal situation so differently. There is no real difference in their understanding of the facts of positive law in Israel; the difference in their viewpoints concerns the framing and the characterization of the present legal arrangements and how we got there. In part, the debate is about the fact that the constitutional process in Israel, especially after 1992, did not conform to the guidelines we presented in Part I. As noted in Part II, the deviations were many and profound, and they were the subject from the outset of critical comments from politicians, scholars, and even judges. We can now redescribe Israel's constitutional history and the issue of legitimacy against the background of the institutional roles in phases of constitutionalism and concerning different components of constitutions.

Clearly, Israel is not a country in which constitution-making was undertaken upon the foundation of the state. The first great constitutional moment was missed. Some lament this fact,¹⁰¹ while others argue that this was the wise and proper way to proceed.¹⁰² In 1950 it was clear that Israel had decided not to enact a constitution at that time. After that, it neither decided to have a constitution nor decided not to have one. It never exercised deliberate and comprehensive constitution-making powers. The import of the festive Knesset decision of February 2006 is unclear. It did recognize the huge effort made by the Eitan committee and called upon the Constitution, Law and Justice committee to pursue the preparation of a constitution, but the vote was not a strong one. While the leaders of the largest three parties endorsed the effort, it was not clear that what they wanted the constitution to be did in fact converge.¹⁰³ Naturally, the choice of constitutional assemblies

101 Moshe Negbi, *Above the Law: The Constitutional Crisis in Israel* (Tel Aviv: Am Oved, 1987) 27 (Hebrew).

102 Giora Goldberg, "You Don't Need a Constitution to Plant Trees: On State-Building and Constitution-Framing" (1993) 38 *State, Government & International Relations* 29 (Hebrew).

103 The committee's decision proposal is available at the Constitution, Law and Justice Committee's

versus the regular legislature as the originator of the constitution was never discussed. Indeed, had the Harari process been completed, it is reasonable to expect that the work of making a constitution from the Basic Laws creating the formal document could have been done by a Knesset committee. The Knesset could then have decided on the process of enactment or ratification of the constitution of Israel. The resulting constitution would have reflected the political agreement on the constitutional arrangements themselves. The transition to constitutionalism would have required semitechnical adaptations (taking the details now in the Basic Laws out of the constitutional text) and major decisions on supremacy, entrenchment, and enforcement. However, as Part II shows, the process could not have been completed in this way. This being the case, what should have been done? And what is the status of what has in fact been done? How should we think of what has been done?

It seems that the root of the problem is that many in the Knesset do not, even now, strongly desire an entrenched constitution. In 1950 the constitution was rejected to avoid a culture war and to retain flexibility in regime structure. Both are still relevant. A thin constitution, dealing just with regime structure, does not seem desirable or feasible. Many do not want to entrench the present regime structure. Moreover, people are apprehensive about giving the Supreme Court the power to review legislation, especially after the 1992 "revolution." A "thick" constitution would call for declarations and precommitments (or their absence) that are significant and deeply controversial. The broad agreement on issues that should be removed from regular politics may be even more elusive now than it was in 1950. Clearly, the self-definition of the Israeli polity is much more controversial now. In 1950, for example, an argument against a constitution was that it would decide that "Jewish" is national and cultural and not religious. Not enacting a constitution left the question open. The *Declaration* was not seen as a legally binding document. At this stage, and especially after the 1992 Basic Laws, the definition of Israel as both Jewish and democratic is the source of a major controversy that, if it can be resolved at all, many people think cannot and should not be resolved in the courts as they interpret the constitution. This is true for both the internal Jewish debate about whether Jewishness is religious or national and cultural and for the deep and unresolved challenge by the Arabs of the legitimacy of Israel as a Jewish nation-state. Many also think that the balancing between emergency situations and human rights as well as issues of social and economic policy and labor relations should be resolved within the political branches. They think that the political branches should carry on a constructive dialogue with

website, online: <<http://huka.gov.il/wiki/index.php/>>.

the courts, but not be subject to judicial supremacy.¹⁰⁴ They enlist the help of those who think that bills of rights and charters that transferred these powers to courts did not promote the well-being of their societies or even the protection of human rights within them.¹⁰⁵

Nonetheless, before 1992 and after it, the Knesset is being “dragged” into enacting a constitution by some political forces that increasingly want one. The pulling is being done by different groups with different agendas. The most effective one so far is the “old elites” – the people most identified with a Western-modern-liberal-secular outlook – who want a Western-modern-liberal-secular constitution with judicial review by the Supreme Court as presently constituted and chosen. They see such a constitution as their last guarantee in an increasingly difficult struggle against theocratic and nationalistic tendencies in Israel’s political branches, reflecting as they do deep demographic and cultural changes within Israeli society. The IDI initiative is the closest to this group. The IZS initiative reflects a stream among Zionists who believe that because of the 1992 “revolution” Israel must enact a constitution now to stop the erosion in the legitimacy of Israel as a Jewish nation state, and to reign in the expanded jurisdiction of the courts over such matters. The drive for a constitution is also a central element in the platform of a right-wing party which wants to use the constitution as a major vehicle of change. This group wants a presidential system of government, and a constitutional weakening of the power of the Supreme Court as presently constituted. It thus advocates that Israel adopt judicial review with a continental-like constitutional court elected by the political branches for limited terms. Its economic policy is neo-liberal, and it will give civil equality to Arabs only if they plead total allegiance to Israel as a Jewish state. This complex of views command limited support within the Knesset, but some of these elements may be introduced if the constitution is indeed based on “big compromises.”

Not surprisingly, the IDI perception of the constitution and its role raises suspicion and resentment among the political forces that it seeks to restrain. They do not see the proposed constitution as a “big compromise” required in a divided society, but as a device by those who have become a minority in the Knesset to control the self-conception of Israeli society and transfer the power to maintain it to the unelected court.¹⁰⁶ The supporters of the liberal-secular

104 For a criticism of the transfer of decision of these issues to the courts in the Basic Laws see Dan Avnon, “The Israeli Basic Laws’ (Potentially) Fatal Flaw” (1998) 32 *Israel Law Rev.* 535.

105 For Canada and Israel, see Mandel, *supra* note 77; for Canada see Arthurs, *supra* note 25.

106 It used to be the case that the main forces against the constitution were the religious parties. Now

constitution, however, claim that the Knesset refuses to enact a constitution and to limit its own powers only because it is self-serving and corrupt. Under these circumstances, they maintain that progressive powers should do all they can to “force” the needed constitution on the polity, so that the “deep values” of society will flourish.¹⁰⁷

The Rivlin-Barak debate can be illuminated by this discussion. On the face of it, it concerns a relatively unimportant question: How did Israel get the constitutional arrangements it has? What is the best way to describe its constitutional reality? In fact, the debate is about the legitimacy of Israel's constitutional arrangements, including the power of judicial review.

When President Barak asserts that there was in 1992 a “constitutional revolution” and that Israel changed from being a country without a constitution to one with a constitution, he states that Israel has passed from the constitution-making phase into the phase of interpretation, application and possible amendment. It is only natural that courts are now the main players. Indeed, Barak concedes that the constitution is “lame” and urges the Knesset to complete the process,¹⁰⁸ but he insists that Israel has already moved from the initial stage of constitution-making, which lasted forty-five years, into the stage of living under a constitution. Moreover, for him the issues of judicial review and the enforceability of the constitution are presently settled in the only way they can be settled in a democracy. There is no democracy and no rule of law, according to him, unless the Court has the power to invalidate unconstitutional legislation. There is no real protection of human rights if the citizens are not also protected by such review against the legislature itself.

the picture has become more complex. Arabs usually support a liberal secular view that will give them equal rights vis-à-vis the Jewish nation-state, but their own attitude is sometimes nationalist and fundamentalist. They want civil rights but they are reluctant to accept the legitimacy of the Jewish state. The Jewish majority that supports a secular conception of the state is divided along a number of lines. A majority are Zionists, affirming the legitimacy of Israel as a Jewish nation-state but a vocal minority are post-Zionists, holding that once the state was founded, there is no further need to maintain its Jewish nature. The elites seem to be for a neo-liberal economy, while other sectors are for solidarity and a welfare state; a majority of Jews wants a stable two-state solution, with a Palestinian state alongside Israel, but many of those doubt what is the best way to get there.

107 This position, inevitably, presents the controversies listed above as superficial and secondary to the shared context of values the constitution should endorse and protect. This is precisely why so many critics see this move as within the “guardian” conception of government, which may be disguised as democratic but is indeed a perfectionist philosopher-king conception. On the “guardian” conception of government and its nature see Robert A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989).

108 Gideon Alon, “The constitution is crippled and fragmentary; There is a need to complete the enactment of the Basic Laws” *Haaretz* (12 December 1999) 12A.

This is precisely the move that is challenged by the Knesset's former Speaker. Rivlin concedes that the 1992 legislation, as interpreted by the Court, has created judicial review over legislation in some cases; however, he argues that neither the Knesset nor any other authorized body has made a decision concerning the adoption of a constitution. This principled decision, including the consideration of the form and scope of judicial review, still needs to be made. Indeed, he concedes – as he must – that courts must interpret the 1992 Basic Laws and apply them when it is proper to do so, but the debate over the constitution has not ended. It has not even really started. For Rivlin, Israel is still in the preliminary stage of deciding whether it wants a comprehensive entrenched constitution, including a bill of rights and judicial review. It has not really started on serious constitution-making at all. Naturally, the organ with responsibility for this process is the legislature. Possibly, it is best for the legislature to appoint a constitutive assembly to do the job.

But the complex reality influences Rivlin's position. Rivlin's rhetoric may have suggested that he would be against all forms of judicial review before a constitutional decision has been made. Instead, while he has harsh things to say about the process of the past, he was apparently willing to compromise and change only the mode of operation of judicial review. Allegedly, Rivlin had supported a bill that would have granted the power to invalidate laws only to the Supreme Court in an extended panel, with a special majority. At least, he says, the process of overruling a Knesset law will be respectable. It should not be possible for a justice of the peace, sitting alone in the first instance, to declare a Knesset law unconstitutional.¹⁰⁹ Many had commented that had Rivlin's initiative been enacted, it would have strengthened judicial review by giving it the very legitimacy that Rivlin himself had challenged. Indeed, the new Minister of Justice Ramon is pushing a basic law that will achieve, among other things, this centralization of the power of judicial review in the hands of an extended panel of the Supreme Court.

109 Gideon Alon, "Rivlin Promotes Legislation That Will Anchor the Supreme Court's Power to Annul Laws" *Haaretz* (15 June 2003) 1A. Barak's response is ingenious. He points out the ambiguity in Rivlin's challenge between the objection to the principle of judicial review and the fact it was introduced with stealth, and the specific form it took, allowing all courts to invalidate legislation. Barak plays down the first challenge and urges Rivlin to complete the move – that is, to explicitly provide that judicial review would only be performed by an extended panel (no less than nine judges) of the Supreme Court alone. Reuven Rivlin, "Who is Sovereign? A Constitutional Revolution or a Regime Putsch?" *News First Class* (22 May 2003), online: <<http://www.nfc.co.il/archive/003-D-2694-00.html?tag=13-04-08>> (Hebrew).

In the meantime, the question of which reading is the correct or even the better one has not been fully and authoritatively resolved. Since this in itself is not a legal question, there is no authoritative mechanism which *can* resolve it once and for all. The ambiguity and the debate will persist until the legal and the political communities agree on a reading of the situation and act accordingly. Judicial decisions, Knesset enactments, and public pronouncements by legal and political actors will all contribute to the way the issue is resolved. All we can say at the moment is that the debate is still with us showing no serious signs of abating. This is not exactly what one hopes to get from a constitution. It is striking to note that there is a clear difference between the reactions of the courts and those of the legislature. Scores of judgments include references, even if they are *obiter*, to the “constitutional” aspects of the case, thus developing the “constitutional revolution.” The Knesset’s contribution is the “success” of critics to prevent legislation of further Basic Laws, and occasional complaints about the constitutional *status quo* without any indication that the Knesset itself has the responsibility to clarify or amend it. The constitutional process in the Eitan committee, and the February 2006 proposal and resolution, while aimed at correcting this situation, in fact added to the uncertainty. On the one hand, the process presupposes that Israel needs a comprehensive constitution and that it does not yet have one. On the other hand, the proposal mainly reflects and even strengthens the structural decisions made in the 1992 laws. Yet many of the dissenting voices pointed out to this fact as their reasons for objecting to the process. Scholars mostly join Barak in celebrating the first decade to the constitutional revolution. They do point out difficulties and unresolved issues as well as the very high level of uncertainty in the constitutional regime, but on the whole the feeling is that the constitutionalization of the system and judicial review are here to stay.¹¹⁰ It is hard to say how these issues will develop in the Seventeenth Knesset.

The actions by the Eitan committee and the IDI and the IZS proposals all support Rivlin’s reading of the legal situation. They all propose a comprehensive constitution that is a “package deal” and an exercise in constitution-making. Accordingly, they think of processes of seeking consensus and of putting the proposal to public debate and possible ratification. They are also similar in that they all include a bill of rights and seek to elaborate on Israel as a Jewish and democratic state. The differences between them are instructive. The IDI proposal suggests full judicial review over all matters. To make it politically feasible to enact the constitution and not give the Court power over sensitive

¹¹⁰ See Sommer, *supra* note 75, Barak, “The Constitutional Revolution at Bat Mitzvah” (2004) 1 Law and Business 3 (Hebrew).

state and religion issues, the proposal does give a “constitutional immunity” to such issues, specifying that on these matters the Court will not have the *obligation* to review existing legislation. This compromise seems insufficient to religious circles and secular liberal alike. The IDI therefore suggests that key issues like the religious monopoly over marriage a divorce will be enacted in a new compromise statute that will not raise serious issues of judicial review. The IZS draft, on the other hand, seeks to overcome the same political difficulties by granting immunity from judicial review to all existing legislation and by adding a general override provision. All three initiatives aim for a situation in which there will be a clear distinction between constitutional matters, included in the text which will be enacted and ratified, and details which are today found together in the early Basic Laws and will be removed to regular laws.¹¹¹ They also want to gain the legitimacy and educational benefits of a shared constitution by a process that will itself contribute to this legitimacy. Under all these initiatives, the goal is a constitutional document created deliberately as a constitution. If a process like the one suggested by these initiatives come to fruition, no one will doubt that Israel has a constitution and what is included in it.

However, these processes operate within an ongoing political system. Neither of them proposes a radical change of the structure of the political system, as was the case in the transition in France between the Fourth and Fifth Republics.¹¹² The main constitutional choices to be made relate to the supremacy, the entrenchment and enforcement of the constitution. As we noted above, these issues are especially troubling in Israel because of the deep ideological rifts within it concerning tensions between the Jewishness of the state and its democratic nature. These difficulties find special expression in the credo and the bill of rights, and a major concern is who will have the last word on the interpretation of these sensitive matters – courts or legislatures. What these processes share is the understanding that the choices at the constitution-making stage, which has not been completed, must be made by the *legislature*, aided by civil society. They differ greatly in the proposals they advocate concerning the relationships between legislature and courts in the stages of interpretation and application of the constitution.

Yet, in terms of our analysis, there is a huge difference between the Eitan and the IDI and IZS processes. The first comes from within the Knesset,

111 This is a major difference among these initiatives and the Neeman and Ramon proposals. The latter seek to entrench all existing Basic Laws, including the very detailed arrangements included in them when Basic Laws were seen as regular laws.

112 This is quite amazing when we recall the consensus, noted above, that Israel has very serious problems of governability and stability.

seeking to have the legislature itself fulfill the promise of a constitution through negotiations and compromises. While the IDI or the IZS initiative will have to be endorsed by the Knesset if it is to be enacted, the drafting and the major compromises have been debated and formed by a small group consisting mainly of a homogenous group. The IDI group is identified with the "old elites." The IZS group organized to produce a counter effort to the IDI and is identified with the Zionist, centre-right parts of the population.

The Neeman committee's recommendations – now incorporated into the Ramon Bill – on the other hand, are more in the vein and spirit of President Barak's reading of the situation. If the *Basic Law: Legislation* it proposes is adopted, the Knesset itself will have endorsed by legislation the special status of all the old Basic Laws, granting them entrenchment and explicitly providing for judicial review. Notably, the proposed bill says nothing about the way in which it will be enacted or debated! This move accepts the fact that the "revolution" is already done, legitimates judicial expansion, and lets the courts complete the work.¹¹³

In institutional terms, the question is the role of the legislature versus that of the Supreme Court in the present stage of the constitutional process in Israel. As we saw, critics point out that the absence of broad public debate and awareness of the special nature of the 1992 Basic Laws harmed their legitimacy. The difficulty is accentuated by the deep involvement of judges and especially Barak himself in legislative processes on this point. These critics argue, persuasively, that the courts always warn power holders against using power for their own advantage. Indeed, one of the justifications of constitutional constraints on legislation is the wish to prevent the legislature from acting to promote its own interests.¹¹⁴ Yet the judicial eagerness to impose constraints and limitations on the legislature often takes the form of acting very forcefully to promote the courts' own power. While Barak often declares that if there is no effective legal enforcement on all power holders the rule of law cannot be maintained, he seems to forget this important rule when it comes to constraining the powers of the courts themselves.¹¹⁵

113 Indeed, some scholars who fear the legislature is going to stall call on the courts to continue with its expansion and clarification of the implications of the 1992 legislation. See Sommer, *supra* note 69.

114 This is one of the central elements of the constitutional theory of judge Mishael Cheshin, who is the only judge on the Supreme Court who, in a lengthy decision in *Bank Hamizrachi*, *supra* note 55, expresses doubts about describing the legislation as a constitutional revolution, and proposes a much more cautious and limited justification of judicial review. See the essence of Cheshin's opinion in *Gambaro & Rabello*, *supra* note 72 at 379-80. For the uniqueness of Cheshin's constitutional positions see *Jacobsohn*, *supra* note 33 at 1785, note 107.

115 This "blind spot" of judges when their interests are at stake is not unique to Israel or to constitutional issues. In Israel, Canada, and the United States, courts have decided that freedom of speech and

The resentment expressed by some of the legislators concerning this judicial constitution-making is understandable. What is surprising is that legislators do not seek to exercise their right and duty to present an alternative Constitutional process, possibly leading to an alternative constitutional set of arrangements. It seems that the Eitan process was motivated by a wish to change this reality, but it was not completed and it is not clear that it will be. The critics among legislators do not accept responsibility for the enactment of the 1992 laws. More importantly, if indeed they think these laws did not create a revolution, and if the alleged revolution is not desirable – the critics in the Knesset hardly create an initiative to address these issues through legislative constitution-making or through a legislative decision, similar to the one taken in 1950, that Israel at the moment was better off without an entrenched constitution with judicial review.¹¹⁶

Against this background, the nature of Barak's public involvement in constitutional issues stands out. His strong objections, coupled with his prestige, were very important in "silencing" the voices that challenged the suitability of an entrenched constitution and judicial review to present-day Israel. Many feel that it would have been better if public debate on this central issue would not have been controlled so strongly by his views. After all, Israel is not the only country in which such debates are taking place. Constitutional legitimacy requires broad consensus. It can be more easily reached if the discussion is broad and open.

It seems, therefore, that it is better to regard the phase of constitutionalism in Israel as still that of constitution-making, not one of application and interpretation. What about amendments? If there is no constitution, there is no need for a special procedure to amend it. Barak is

protest does not cover the courts themselves. In Israel see Cr.A 696/81 *Azolai v. The State of Israel* 37(2) P.D. 565 1981 (Hebrew), in which the *sub judice* law was applied against a journalist by a court that knows hardly any other limits to speech. In the United States it was Justice Black, the absolutist in protection of freedom of speech that upheld a law limiting demonstrations near courts in the name of the right to a fair trial. For Canada see Arthurs, *supra* note 25 at 18. The pervasiveness of this phenomenon again raises the question why important parts of the political branches usually participate in "protecting" the independence of the courts against their critics. It seems that, on balance, the existence of a government body seeming to be independent and usually legitimating government, plus the many cases in which the court in fact helps the political branches do what they want to do while permitting them to blame the courts is seen as worth the occasional cases where the courts truly seek to undermine government. We go back to the courts as being "the least dangerous branch."

- 116 There was one such attempt to initiate a Knesset-driven constitutional process including a constitutional court. At the height of the criticism of the court the constitutional court won massive support in the Fifteenth Knesset. It was narrowly defeated with the strong involvement of Barak, and it seems to have disappeared since then from the Knesset's horizon.

consistent in arguing that the “revolution” implies new modes of amendment. However, he adds that there may be formal amendments that are nonetheless unconstitutional. True, there are constitutions that impose substantive limits on powers of amendment, but they discuss these matters in the context of an established constitution with specific amendment procedures.¹¹⁷ Again, Barak’s rhetoric seems to presuppose a constitutional reality that is not there. By presupposing it so often, he may well contribute to making it real.

On this issue the silence from the Knesset may be understandable since these speculations have not yet been translated into a judicial decision that has really limited the freedom of government and legislators. But this is precisely why constitutional arrangements are best dealt with by a constituent assembly and not by a regular legislature preoccupied with normal politics. Clearly, MKs do not find constitutional pronouncements of great importance or urgency. They prefer to spend their time improving their chances of re-election.

In other words, I share the view of those who think that *if* there is a constitution in Israel, it is primarily a judge-made constitution. The decision to confer supremacy on the courts was never really and deliberately made by any popular organ acting as either a regular legislature or a constituent assembly. The decision has never been ratified by the people themselves. It has been made by judges, conferring power on the judges, and placing that power beyond the reach of both legislation and constitutional amendment itself! The critics thus draw the conclusion that these facts undermine, or at least seriously weaken, the legitimacy of the constitutional process so far.¹¹⁸

True, the constitutional process in Israel violated the guidelines on institutional competence. Yet, we had seen that this is not necessarily fatal for the success of a constitution. There are cases in which a process that lacked legitimacy at the outset gained it as time went by.¹¹⁹ On the other hand, processes that had enjoyed full legitimacy may prove to be unviable. The persistence of the debate in Israel suggests that it would have increased the health of the Israeli constitutional process if it did generate a feeling that the constitution is a document that seeks to take into account the visions and the perceptions of all major segments of Israeli society, and that they should all be partners in the “big compromises” that are required. Yet in Israel, the

117 See e.g. Walter Murphy, “Merlin’s Memory,” in Levinson, *supra* note 19, 169.

118 Again, the critics do not come only from politicians who resent limitations on their power. One of them is emeritus President of the Court Moshe Landau. See “The Constitution as a Supreme Law of the State?” (1971) 27 *Hapraklit* 30 at 61 (Hebrew).

119 See Or Bassok, “A Decade to the ‘Constitutional Revolution’: Israel’s Constitutional Process from a Historical-Comparative Perspective” (2003) 6 *Mishpat u-Mimshal* 451 (Hebrew).

problem does not seem to be simply one of the legitimacy of the process of constitution-making. Rather, it seems to run deeper into the legitimacy of the emerging product as well.

I think the Court was indeed over-eager to expand its own powers. However, it is likely this was no exercise of power-grabbing for its own sake, and that the Court did that mainly because it shared the values of those legislators and segments of the public who wanted it to do so, and because other legislators did not either stop the court or offered an alternative constitutional arrangement. I am not advocating a total absence of limitation of legislative powers. In many cases, legislatures have been willing to limit their own powers due to a public demand and because the political powers themselves wanted the protection of the constitution and the courts.¹²⁰ The anomaly in Israel is that the legislature lets the judiciary develop the constitution for the country, without resisting the fact that this judicial constitution-making imposes serious limitations on the powers of the legislature even in contexts which may be detrimental to broad social interests. A constitutional system structures powers and limits them by separating them, so that the powers check each other. In a democracy, the legislature should be the strongest power. It is one of its tasks to initiate the creation of the constitutional framework itself. In Israel, the legislature seems to have given up its constitution-making powers. It accepted the secondary task of commenting on the constitutional arrangements developed and created by the Court.¹²¹ It is thus not surprising that the main issues in Israel's constitutional debate are judicial review and human rights – the realm of courts – and not the essential features of the structure of government and the effectiveness and quality of both legislature and executive.

IV. SOME CONCLUDING COMMENTS

It is hard to know where the constitutional process in Israel is heading. The present situation is clearly unstable. It contains many anomalies and asymmetries. The powers of the major organs of government are not clear. The newer Basic Laws look in part like chapters in a constitution, but the older ones are full of details that should not be in a constitution and should

120 Ran Hirschl, "Globalization, Courts, and Judicial Power: The Political Origins of the New Constitutionalism," (2004) 11 *Indiana J. of Global Legal Studies* 71.

121 The combination of the Eitan process and the two civil society initiatives may suggest this is changing. It is too early to say if the Knesset decision of February 2006 signifies a commitment among political players to accept responsibility for the continuation and the possible completion of the constitution-making process by deliberate legislative decisions.

not be entrenched because if they are the system of government will not have the flexibility it needs.¹²² Moreover, the present arrangements do not fit together in one coherent system of checks and balances because of the piecemeal way they have developed. One major area of incoherence of special relevance to our concerns here is the mode of judicial appointments, which has not responded at all to the radical change in the conception of judicial power over the last three decades.¹²³ It is also very unfortunate that the Basic Laws have different levels of supremacy and entrenchment and that the scope of the 1992 Basic Laws is as yet so open and controversial. Other obstacles to constitutional effectiveness and coherence are also present. Both the legislature and the government are too weak and too unaccountable. Knessets as well as governments do not serve whole terms. Long term planning is thus made harder. The balance between national and local government is not healthy, and has generated huge differences in levels of welfare in different local authorities as well as instability and insolvency of the weaker local authorities. Some people feel that Israel is losing the level of civic cohesiveness that is critical to the flourishing of states and societies. But all these elements, interesting and important as they are for Israeli society, may not be directly connected to the constitutional process. While effective government may depend in part on constitutional design, Israel had known periods of different effectiveness under the same constitutional arrangements. If and when Israel has a good set of *rules of the game*, it may make sense – as President emeritus of the Israeli Supreme Court Moshe Landau has argued – to entrench them and enforce them by judicial review.

Credo is another matter. True, the issue of the identity of the state has emerged in constitutional debates. Many now want a constitution in order to entrench in it the Jewishness of the state that now seems vulnerable. It is not

122 For an argument against entrenchment of rules-of-the-game before the experimentation period is over, see Stephen Holmes & Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe" in Levinson, *supra* note 19, 275.

123 Judges in Israel are elected by a committee whose membership is as follows: three judges of the Supreme Court headed by the President; two ministers, one of them the Minister of Justice, who chairs the committee; two MKs, the convention being that one is from the coalition and one from the opposition; and two representatives of the bar. The judges often vote as one block after internal consultations. In fact they have virtual control of the appointments process. Judges are elected until they retire at age seventy. This may have been an adequate process when judges stressed their professionalism and did not decide so many controversial political issues. It seems much less adequate now, when every political question finds its way to the Supreme Court in real time. A related problem Israel has is that administrative and now constitutional adjudication goes directly to the Supreme Court as a first and last instance. This pattern was started under the British Mandate and has survived in Israel. It means that major constitutional issues are often decided by courts, sometimes in a panel of three, without any possibility of appeal. Both elements need to be modified seriously if the courts are to be granted systemic powers of judicial review.

clear that a decision about the constitution or its text will make an immediate difference to the realities and contingencies of the Jewish state. Yet it is quite clear that the wish to deal with the credo of the state in the constitution raises both strong opposition and a great apprehension about judicial review. It is indeed very contested what the "Jewishness" of the state means. Many prefer that these issues be settled by the political branches and not by unaccountable courts. Yet the option of not referring to the Jewishness of the state in the constitution seems less feasible now, after it has been in the basic laws since 1992.

Finally, we get to *bills of rights*. While many, including President Aharon Barak, argue for the necessity of a constitution with judicial review in order to enhance the protection of human rights, the case is not conclusive. We saw that human rights may require constitutional protection against oppressive legislation. However, the relationships between an entrenched constitution including a bill of rights and judicial review and the actual level of human rights protection in a society are notoriously complex and indirect. First, the record of Israeli *legislation* on human rights issues is so far between very good and acceptable. Most of the inhibitions against unacceptable legislation have been purely political. It is not clear that the gains for human rights in judicial review of legislation are worth the inevitable alienation from the Court that will be felt by those whose deep principles will be rejected by the Court's judgments. It may well be that the additional tool of judicial review over legislation may bring with it an excessive timidity in reviewing unacceptable practices maintained under the umbrella of acceptable laws.

To decide what needs to be done to improve this situation we must make normative choices as well as assessments of feasibility. Put bluntly, the normative question at the center of the debate is whether the refusal to enact a constitution and pass power to courts is only based on the reluctance of legislators and political groups to give up their power, or whether it is based on a valid conception of the public interest which suggests that this transfer of power to courts may not be justified or wise. The question is not really about the *motivation* of the legislators, which may at best be mixed, but about our own assessment, based on experience and analysis. I would add the question that is surprisingly absent from the debate: which structure of government is suitable for Israel? Are we sufficiently happy with our set of regime arrangements to add entrenchment to the political inertia and vested interests that have prevented change?

I do not want to take a stand on these issues here.¹²⁴ Suffice it to repeat that this argument has taken place in many countries recently, and these have not all reached the same conclusions. The debate is not between those who want legislatures to have unbridled powers and those who want to promote the protection of human rights. There are many supporters of human rights who think that powers of judicial review and supremacy should be limited. Many of their arguments do not have the hollow ring of excuses, and they are not themselves legislators.¹²⁵ Similarly, the debate is not between those who want to weaken the legitimacy of the Supreme Court by revoking judicial review and those who want to defend the rule of law and judicial independence. The Supreme Court acquired most of its legitimacy when it had only a very narrow power to invalidate laws (a power that was established in *Bergman*¹²⁶ in 1969). It is critical to see that the debate is on very important and central issues of constitutional design, and it must be joined on its merits, without *ad hominem* arguments suggesting that advocates of the different positions are motivated by self interest.

On the other hand, it is true that most of the countries of the world do go in the direction of entrenched constitutions coupled with some judicial review. If this route is taken in Israel, one should look very seriously at the scope and procedure of judicial review, as well as at the procedures by which those passing the review will be chosen and their terms in office. Even if one decides to accept more or less all the existing rules of the game, these issues should be re-evaluated because entrenchment and especially judicial review change the conception of the role and the office of those who are granted this power, and should affect their mode of appointment. The balance of independence and accountability for these judges should not be the same as it is for judges whose main task is to resolve disputes according to the law. Mainly, however, the Israeli legislature should accept the responsibility for initiating a serious discussion of all constitutional issues.

That the instability of the present situation is not good is conceded by all. However, there are three main ways to make the present constitutional situation

124 Since January 2005 I have served as senior advisor to the Eitan process. I have led discussions regarding the credo chapter of the constitution. For an overall assessment of the process and its challenges see my "A Constitution for Israel – Lessons from the Constitutional Process in the 16th Knesset" (Hebrew) available at the Constitution, Law and Justice Committee's web site, online: <<http://huka.gov.il/wiki/index.php/>>.

125 Jeremy Waldron is a consistent advocate of human rights. See *Law and Disagreement* (Oxford: Oxford University Press, 1999) See also Jeremy Webber, "Constitutional Reticence" (2000) 25 *Australian J. of Legal Philosophy* 125.

126 *Supra* note 54.

more coherent. The first is to decide that Israel wants to remain without an entrenched and supreme constitution, or at least that there will be no judicial review over legislation. Basic Laws will remain regular laws. The 1992 Basic Laws will be clarified in a way that will prohibit judicial review of Knesset legislation. Laws will then change piecemeal, when the political contingencies and various pressures will create the conditions for reform. The Supreme Court will continue to protect human rights as it did until 1992, by using them as principles that serve to interpret laws in ways consistent with human rights. Most of the important (and controversial) decisions of the court to-date, in any case, have not involved invalidation of primary legislation. I believe this is a plausible choice for Israel at present, although its plausibility diminishes the longer the practice of judicial review is exercised by the Supreme Court.¹²⁷ The second is to move ahead and complete the constitutional process by taking the Basic Laws as they are and entrenching them – that is the Neeman-Ramon route. Third is the most ambitious plan, which involves a re-evaluation of the basic arrangements and seeks to make them coherent and based on “big compromise.” This is the route taken by the Eitan and the IDI and IZS processes.

In another paper I have suggested that if Israel wants to enact a constitution at this stage of its existence, it should take the third route. The Knesset should accept that it cannot do the job itself.¹²⁸ It should appoint an advisory committee (it does not have to be a constituent assembly), whose task would be to devote the necessary time, consult with all relevant groups, and make the necessary “big compromises,” away from the constant surveillance of the media and commentators. This document will then be presented to the Knesset, which will, more or less, have to take it or leave it, without re-opening the deals. The text approved by the Knesset will then be ratified by the public. Between the vote in the Knesset and the ratification, a serious public discussion should take place in as many fora as possible.¹²⁹

127 The plausibility of this route is based on the fears that completing a constitution may create a situation that is worse than the one we have now. A divided society will be better off with a good constitution than without one. But since there is a deep debate about what constitution will be a good one – the likelihood of ending up with a decent constitution are not good. For an analysis of possible constitutional routes for Israel see Yonah, *supra* note 56. Yonah argues that the only viable constitution for Israel is neither liberal-neutral nor communitarian-republican but multi-cultural. However, the chances of getting this kind of a constitution in Israel at present are nil. It is interesting to note, however, that even when the political system responded with great determination to the threat that the court would have invalidated the provisional citizenship law, the most radical offers did not involve abolishing judicial review.

128 For the reasons elaborated in Part I, it is always better that constitutional arrangements are not made only by active MKs. This is especially true now since the political system is extremely unstable, and it is unlikely that active politicians can transcend their partisan politics.

129 Ruth Gavison, “A Constitution for Israel: Lessons from the American Experiment” (2002) *Azure*

My expectation is that the big compromises will include at least three elements: First, the enactment of a full bill of rights including a firm commitment to civil and political equality to all, and specifying both civil and political rights as well as social and economic ones,¹³⁰ combined with protected autonomy of groups, and with the recognition that Israel is the nation-state in which Jews exercise their right to self determination. Secondly, a decision about a system of government that will strike a better balance than the existing one between effectiveness and governability on the one hand and accountability to the Knesset and to the rule of law on the other. Thirdly, I believe a constitution of this content can only be entrenched and supreme if it is stated explicitly that courts will *not* have the power to invalidate primary legislation.¹³¹ This outcome is similar in line to a combination of the first and the third solutions advocated above, but it has the extra benefit of the legitimating and educational force of an entrenched constitution. This model will allow the political branches and public debate to work out slowly, via mechanisms of negotiations and compromises, the ways Israel should tackle state and religion issues, the implications of the Jewish nature of the state and the way it should be combined with equal rights to all, and its social and economic policy. But under this route, these processes will take place within a shared framework of constitutional arrangements, maintaining enough constructive ambiguity to facilitate a shared citizenship in addition to recognized affiliations with different religious, national, and ethnic groups.

It may be the irony of the “constitutional revolution” that its substantial successes may mean that legislators will not have the power to create a coherent system by taking from the court the limited power of judicial review granted to it under the 1992 laws. At the same time, they

133. The Eitan process is Knesset-based, but it is not – and cannot be – effective enough because the commitment of the members of the committee is not stable enough, and because there is no real representation. Besides, the Knesset does not have enough constitutional expertise to help it with the task. The IDI process has more professional support, but the identity of the body generating the draft cannot give it the initial legitimacy required for the move. The IZS initiative shares the IDI weakness without having access to the expertise and process it had enjoyed.

130 On the relationships between CP and SE rights see Ruth Gavison, “On the Relationships between Civil and Political Rights and Social and Economic Rights” in Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner, eds. *The Globalization of Human Rights* (New York: United Nations University Press, 2003) 23.

131 This recommendation may permit Israel to have a constitution and not to change radically the nature of its Supreme Court, as I think will have to happen if a court is given the power of judicial review over ideological questions like the tension between Jewishness and democracy or social and economic policy. I have argued at length that it is not wise to let courts decide such issues. See Ruth Gavison, “A Jewish and Democratic State – Political Identity, Ideology and Law” (1995) 19 Tel Aviv Univ. Law Rev. 631 (Hebrew). See also Avnon, *supra* note 104.

may be unwilling to complete it by entrenching the whole document and legitimating judicial review in a general way. Israel may thus be stuck with this interim situation, until the political background permits further change.¹³²

The first achievement of the constitutional discourse – the belief that a constitution is desirable and that its completion is now inevitable—may be solid. While there were many political factions that had conceded openly in the past that they thought Israel was better off without a constitution, this voice is not audible among politicians at the moment. The political *bon ton* is to be for a constitution but to argue about some of its proposed arrangements.¹³³ It remains to be seen if this support for a constitution is just façade, or if it can indeed be translated into support of a constitution that will give these people some of what they want.

A more significant but troublesome achievement of the supporters of a constitution is that the courts already have some powers of judicial review over legislation and that the political system seems to have become used to judicial review over legislation to an extent that most political factions accept it.¹³⁴ Again, it is not clear how much of this is lip service, but a proposal to not give courts the power of judicial review over legislation is abolishing or narrowing a power the court already has. True, some say it is a power the Court delegated to itself, but nonetheless the rhetoric that legislative power should not be left without some legal constraints has made gains. It will take a serious effort of persuasion to make this “deal” stick. Especially since it seems the supporters of the constitution believe that with some hard work they can have the Knesset affirm judicial review

132 When I suggest a constitution without judicial review I do not mean a system where constitutional limitations are totally unenforceable. There are other possible mechanisms such as the French constitutional committee, examining laws in a limited period between legislation and promulgation; or the 1998 U.K. *Human Rights Act*, *supra* note 23, which combines legislative control over legislation with a judicial power to declare the incompatibility of laws with the *European Convention on Human Rights*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953). At least, it has created a parliamentary mechanism for securing compatibility, similar to the situation in Holland. A regular and general override would have also been an option, but the version suggested in Israel is too limiting of the legislature, and the Canadian precedent suggests that it is not effective in limiting the supremacy of the judiciary.

133 Skepticism about the constitution is still heard among academics, especially non-lawyers. In the first meetings of the Eitan process, some MKs declared that their enthusiasm for the process was limited.

134 This is a political gain but it has been achieved without a serious public debate of the question and of its institutional implications. While many social scientists still believe that Israel may be better off without a constitution and judicial review, it seems that politicians have not done the homework necessary to enable them to argue persuasively in support of this position.

by the Supreme Court as presently constituted and appointed. Clarity and consistency on these issues, which against the constitutional background now requires clear legislative action whatever the choices made, is needed.

The jury is still out, then, on the constitutional revolution and judicial review in Israel. The country does have some judicial review, but does not yet have a constitution. While desiderata of institutional roles are not conclusive, they do provide important guidelines. The main function of a constitution is to build a nation and to legitimate and structure government. In a democracy, the best way to gain this legitimacy is by showing individuals and groups that the constitution is in their interest as well. Moreover, democracy is also about participation. When we limit the powers of the citizens and their representatives, it is good that they feel that they have had a serious input into the process of establishing the limits. It is best if the legislature initiates the process, and the decisions are presented clearly, including real choices such as a decision (not) to have a constitution, (not) to entrench it, or not to enforce it through full judicial review by the court as presently constituted. If this is done, we are more likely to establish a government – in the broad sense – that will be, and will be seen to be, legitimate. In this way, the constitution may in fact give Israel the benefits of a constitution that she so badly needs.