ARTICLES

WHO NEEDS A CONSTITUTION? IN DEFENSE OF THE NON-DECISION CONSTITUTION-MAKING TACTIC IN ISRAEL

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> What ought to be the heads, the hearts, the dispositions, that are qualified, or that dare, not only to make laws under a fixed constitution, but at one heat to strike out a totally new constitution for a great kingdom, and in every part of it, from the monarch on the throne to the vestry of a parish? But—*"fools rush in where angels fear to tread."*
> – Edmund Burke[1]

I. INTRODUCTION

People in Israel disagree. They disagreed *in* the past; they have disagreed *about* the past. They disagree *about* the future; they will probably disagree *in* the future. This Article will visit Israel's near and far constitutional history, focusing on disagreements, controversies, and disputes as the central feature of Israel's

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† Editor's note: citations to foreign language sources are translated and interpreted by the author.

[1] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 57–58 (Dolphin Books 1961) (1790).

constitution-making. This feature, I will argue, stands behind Israel's failure to enact a formal constitution in the formative years. Furthermore, I will argue that Israel still does not have a formal constitution, notwithstanding the conventional wisdom in Israel's legal community that since the "Constitutional Revolution" such a formal constitution exists.[2] Disagreements and disputes prevent Israel from acknowledging and making real and substantial progress in constitution-making. This Article, however, argues that one should not shed tears over Israel's lack of a formal constitution. The constitutional tactic chosen by Israel's founding fathers was the "decision not to decide," which fulfilled the goals and needs that impel nations toward formal constitution-making in the first place. Continuing to fulfill those same goals and needs has been endangered by attempts over the past decade by political and judicial entities in Israel to establish a formal constitution.

In order to substantiate my claim, this Article will focus on two landmark periods of Israel's constitution-making process. They are considered by many to have had crucial consequences for Israel's constitutional arrangements. Part I examines disagreements and constitution-making in the formative period of the state of Israel. First, it describes the political landscape of the Zionist movement before the establishment of the State and the disagreements and controversies that characterized it. This Article argues that Israel's failure to enact a constitution was the direct consequence of these and other disagreements that can be divided into two categories: substantive disagreements and institutional disagreements. Often these two categories of disagreements are intertwined. The founders of the State of Israel transcended the problem posed by this Gordian knot of disagreements by adopting the constitutional tactic of "deciding not to decide."[3] This tactic fulfilled two main

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[2] *See* Aharon Barak, *The Economic Constitution of Israel*, 4 MISHPAT UMIMSHAL 357, 358 (1998) [hereinafter Barak, *The Economic Constitution of Israel*]; Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1333 (1999); Amnon Rubinstein & Barak Medina, *The Constitution of the State of Israel*, 8 HAMISHPAT 291, 355 (2003) [hereinafter Rubinstein & Medina, *The Constitution of the State of Isreal*]. The claim that Israel has a formal constitution is based mainly on CA 6821/93 United Mizrahi Bank v. Migdal Communal Village [1995] IsrSC 49(4) 221, 264–65. *But see* Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-fulfilling Prophecy*, 28 MISHPATIM 21 (1997) [hereinafter Gavison, *Self-fulfilling Prophecy*].

[3] The tactic of "'the decision not to decide'" was articulated by Dan Horowitz. Philippa Strum, *The Road Not Taken: Constitutional Non-Decision Making in 1948–1950 and Its Impact on Civil Liberties in the Israeli Political Culture*, *in* ISRAEL: THE FIRST DECADE OF INDEPENDENCE 83, 83 (S. Ilan Troen & Noah Lucas eds., 1995).

goals: fair and stable cooperation based on democratic foundation and the protection of human rights. Part II examines disagreements regarding and attempts at constitution-making since the 1980s. First, it describes Israel's politics in the 1980s, which were characterized by continued moral, political, and cultural disagreements. Israel's constitution-making was shaped by these disagreements, and public representatives continued clinging to the tactic of deciding not to decide basic constitutional issues. In addition, this Article argues that the enactment of the two new Basic Laws not only did not constitute a deviation from the tactic of deciding not to decide foundational disagreements about Israel's constitutional structure, but rather constituted a direct implementation of this tactic. Later on, I will examine how the decisions of the Israeli Supreme Court declaring that Israel has a formal constitution in the conventional sense and the efforts by different political entities to establish a constitutional regime in its American version points to the adoption of a new constitutional tactic: "the decision to decide." This Article argues that the new constitutional tactic thwarts the fair social cooperation among Israel's political factions and impedes the protection of human rights. Finally, this Article argues that the attempt to push the Israeli society to acknowledge the existence of a formal constitutional regime has failed. This failure should be traced to those disputes that keep us from agreeing that a formal constitution exists and that point to the conclusion that deciding not to decide is still the best interpretation of Israel's constitutional arrangements.

Before discussing all these issues, it should be noted that the scope of topics analyzed in this Article is vast and the number of academic writings and judicial decisions having to do with Israel's constitutional arrangements after what was called the "Constitutional Revolution" are immense and continue to grow apace. The need to keep this Article within reasonable bounds, on the one hand, and the desire to present an overall picture of the nature of Israel's constitution-making and its constitutional arrangements, on the other, caused me to organize my argument around two periods: the formative period and the period since the 1980s.

II. DISAGREEMENTS AND ISRAEL'S CONSTITUTION-MAKING IN THE FORMATIVE PERIOD

A. Disagreements as Central Features of Jewish Politics in Israel and Abroad

In fact, it seems that disagreement has always been the "natural" condition of the Jewish people.[4] "The most characteristic feature of Talmudic law," wrote the late Haim Cohn, Supreme Court Judge, "is the divergence of opinion: there is hardly any legal problem on which the opinions of scholars are not divided."[5] Most notable among the disputes in the Talmud are the controversies of *Beth Hillel* (the House of Hillel) and *Beth Shamai* (the House of Shammai). The Talmud speaks of the conflicting views of *Beth Hillel* and *Beth Shamai*: "both are the words of the living God," honoring their fruitful contributions to the development of Jewish law.[6] However, equally well-known in the Jewish heritage are the negative consequences of disagreements, controversies, and disputes. Such is the lesson taught in the Talmud regarding the destruction of the Second Temple. According to the Talmud, the reason for the destruction of the Temple, in the year 70 by the Roman legions, was that the Jewish People were guilty of harboring baseless hatred towards one another while constantly engaging in meaningless and trivial disputes.[7]

The destruction of the Second Temple and the displacement of the Jewish People in the "*Galut*" (exile) were not the end of the Jewish people and by no means the end of inner disagreements and controversies. Although they all share a faith in their eventual redemption and the hope to return to *Eretz Israel* (the land of Israel), controversies have only grown while living in the diaspora. First, in the absence of any superior and final authority—civil, religious, or otherwise—that could have unified the Jewish People, every Jewish center adopted its own Jewish customs, its own Jewish

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[4] *See* CHAIM SHINE, THE JEWISH STATE—CONCLUDING SUMMARY 201 (2003).

[5] Haim Cohn, *The Spirit of Israel Law*, *in* INTERNATIONAL LAWYERS CONVENTION IN ISRAEL 1958, at 13, 15 (1958); *see also* Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 CAL. L. REV. 337, 338–39 (1988) (stating that "[c]ontroversy is a fact of Jewish law" and is derived from the origins of Jewish law).

[6] THE BABYLONIAN TALMUD, 'ERUBIN 13b (W. Slotki trans., 1938).

[7] THE BABYLONIAN TALMUD, YOMA 9b (Leo Jung trans., 1938) ("But why was the second Sanctuary destroyed . . . ? Because therein prevailed hatred without cause.").

practices, and its own interpretations of the *Torah* and the *Halacha*.[8] Second, although many Jews have experienced self-government in many foreign territories by managing their own self-contained political systems, the fact was that there was no obligatory final authority even within every Jewish community.[9] This state of affairs was the result of the plural social, ideological, and religious composition of the Jewish communities in the *Galut*.[10] Hence, leaders in the traditional Jewish communities have always been subject to challenge, and no authority was final.

Zionists, the proponents of a Jewish state in *Eretz Israel*, have revolted against age-old patterns of Jewish existence and aspired to establish "normal" social, political, cultural, and occupational patterns that would make Israel more like other nations.[11] They have found Jewish traditional politics to be powerless, passive, and divisive, infected with attitudes of disrespect towards authority.[12] The leaders of the Zionist movement have recognized the need for unity and the need to overcome disagreements and controversies among the different factions, while despising the fact that even during national emergencies, the Jewish People were incapable of uniting.[13] However, although one common denominator exists among all Zionists—"the claim to *Eretz Israel* as a national homeland of the Jews and as the legitimate focus for the national self-determination of the Jews"—and although the leaders of the Zionist movement recognized the need for unity, there was no uniform Zionist ideology.[14] Rather, one finds "a plethora of

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[8] Alan Dowty, *Zionism's Greatest Conceit*, 3 ISR. STUD. 1, 4 (1998).

[9] *Id.* at 2–3.

[10] *Id.* at 3–4.

[11] *See* Pnina LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY xiii (1997) [hereinafter LAHAV, JUDGMENT IN JERUSALEM]; Dowty, *supra* note 8, at 4.

[12] Dowty, *supra* note 8, at 6–7.

[13] *See, e.g.*, LAHAV, JUDGMENT IN JERUSALEM, *supra* note 11, at xiii ("Zionism was an ideology fed by enormous reserves of both utopian and nationalist energy and passion, which splintered into numerous points of view about where and how the movement should proceed. At the same time, Zionists widely recognized that unity was essential to the movement's success."); Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 ISR. STUD. 193, 193 (1998) (arguing that Ben-Gurion "abhorred the Jews' inability to control themselves in heated ideological debate and their incapacity to unite even during national emergencies").

[14] ISAIAH FRIEDMAN, GIDEON SHIMONI—THE ZIONIST IDEOLOGY (Brandeis Univ. Press 1995), *reprinted in* 3 ISR. STUD. 251, 251 (1998) (emphasis added); *see also* Ephraim Ya'ar & Ze'ev Shavit, *An Historical Background to a Discussion Regarding Israeli Society*, *in* TRENDS IN ISRAELI SOCIETY 1, 9 (Ephraim Ya'ar & Ze'ev Shavit eds., 2001) [hereinafter Ya'ar & Shavait, *Historical Background*].

ideologies: General Zionism, National-Religious Zionism, Labor Zionism, [and] Revisionist Zionism."[15] The struggles between the different worldviews, the different varieties of stands, and the different prescriptions of Zionism were over the character of Israel—the new state to be—in terms of its most fundamental values and aspirations. It is commonplace to describe the rift within the different parties of Zionism as motivated by a tension between opposing forces inherent to the Zionist idea. For example,

> There were some inherent contradictions among the basic elements of Zionist ideology, the most blatant of these being between the value of Jewish particularism entailed in the aspiration of creating a Jewish nation-state and universal values related to the humanist and liberal traditions, which inspired the founding fathers of Zionism.[16]

While the compatibility between the democratic and Jewish nature of the State has been and is a cornerstone in the Zionist ideology of all the Zionist political factions, these factions barely agree on the values, principles, and goals that should constitute the new society.[17] Furthermore, the different factions disagreed also over the appropriate path, the means, and the rate of advancement toward the goal of establishing a Jewish state in *Eretz Israel*.[18] On the eve of the establishment of Israel, it was clear to all that the Zionist movement did not cure Jewish politics of divisions, factions,

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[15] FRIEDMAN, *supra* note 14, at 251; *see* Ya'ar & Shavit, *Historical Background*, *supra* note 14, at 10–21.

[16] DAN HOROWITZ & MOSHE LISSAK, TROUBLE IN UTOPIA: THE OVERBURDENED POLITY OF ISRAEL 114 (1989); *see also* GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 4–9 (1993) (examining the complex constitutional issues that stem from "a significant division on the principles that should underlie [Zionism]"); LAHAV, JUDGMENT IN JERUSALEM, *supra* note 11, at xii (explaining that universalism and particularism were competing for "Israel's soul"); Erik Cohen, *The Changing Legitimations of the State of Israel*, 5 STUD. IN CONTEMP. JEWRY 148, 148 (1989) (emphasizing that "Israel was based on contrasting principles"); Orit Kamir, *The Declaration Has Two Faces: The Interesting Story of the "Zionist Declaration of Independence" and the "Democratic Declaration of Independence,"* 23 TEL AVIV U. L. REV. 473 (2000); Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1330–41 (2000) (book review) (reviewing LAHAV, JUDGMENT IN JERUSALEM, *supra* note 11).

[17] *See* HOROWITZ & LISSAK, *supra* note 16, at 114–15.

[18] *Id.* at 102 ("In the pre-state period, opinions were divided between advocates of an incremental approach to the goals of Zionism aimed at building up a Jewish presence in Palestine step by step, and the advocates of a radical approach aimed at rapid realization of these goals, in one fell swoop if possible. Adherents of the first approach included the Labor movement and its partners in the World Zionist Organization . . . , while the latter approach was upheld by the Revisionists and the underground organizations of the IZL (Irgun Zvai Leumi) and LHI (Lohamei Herut Israel) which were ideological offshoots of Revisionism."); Ya'ar & Shavit, *Historical Background*, *supra* note 14, at 9–10.

controversies, and disputes, and new controversies were created over the nature, character, goals, aspirations, and ends of the new State.[19] Moral, political, and cultural disagreements remained the prominent feature of the Jewish people, even as they returned to claim their historic homeland.

B. Israel's Constitution-making in the Formative Era

Despite the wide range of ideologies, worldviews, and political and religious perspectives in the Zionist movement, enough unity was found to make the Zionist enterprise a living reality by proclaiming The Establishment of the State of Israel (Declaration of Independence).[20] This is what makes the Declaration of Independence such a major achievement. "It seems probable that the founders of the [S]tate and the [architects] of the document did not exactly know if or how the Declaration of Independence would become part of the [S]tate's legal foundation,"[21] and if and how it would be used by the Supreme Court to defend human rights and civil liberties.[22] "[I]t is . . . doubtful whether they even considered the matter."[23] It was a major achievement because it was made in

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[19] Ephraim Ya'ar & Ze'ev Shavit, *The Collective Identity of the Yeshuv*, *in* TRENDS IN ISRAELI SOCIETY 127, 130–35 (Ephraim Ya'ar & Ze'ev Shavit eds., 2001).

[20] In recent years, a wave of academic writings have examined the nature of the Declaration of Independence. *See generally* Kamir, *supra* note 16; Elyakim Rubinstein, *The Declaration of Independence as a Basic Document of the State of Israel*, 3 ISR. STUD. 195, 195 (1998) (examining "[the Declaration] of Independence as a basic document of the State of Israel"); Yoram Shachar, *The Early Drafts of the Declaration of Independence of the State of Israel*, 26 TEL AVIV U. L. REV. 523 (2002).

[21] Rubinstein, *supra* note 20, at 195. Over the years, a controversy emerged among scholars regarding the part one should attribute to the Declaration of Independence in Israel's legal foundation. Some argue that Israel attributes only a declarative nature to the Declaration of Independence. *See* Shlomo Perles, *The Validity of Mandatory Legislation in Israel*, 6 HAPRAKLIT 207 (1950). Others argue that a constitutive nature should be attributed to the Declaration of Independence. *See* Itzhak Hans Klinghoffer, *The Establishment of the State of Israel: Constitutional History*, *in* KLINGHOFFER BOOK ON PUBLIC LAW 53, 75 (Itzhak Zamir ed., 1993) [hereinafter Klinghoffer, *Establishment*]; Moshe Sternberg, *The Basic Norm of the Israeli Legal System*, 9 HAPRAKLIT 129, 137 (1953). *But cf.* Benjamin Akzin, *The Declaration of Establishing the State of Israel*, *in* THE PINCHAS ROSEN JUBILEE YEAR BOOK 57 (1962) (arguing that the Declaration of Independence derived its legal foundational standing only after it was proved to be effective and the citizenry showed willingness to abide by its letter and spirit).

[22] Rubinstein, *supra* note 20, at 195. For landmark Supreme Court decisions grounding the protection of human rights and civil liberties in the Declaration of Independence, see HCJ 262/62 Perez v. Kfar-Shmaryahu [1963] IsrSC 16 2101, 2116, HCJ 73/53 Kol Ha'am v. Minister of Interior [1953] IsrSC 7 871, and HCJ 95/49 El-Khori v. IDF Chief of Staff [1949] IsrSC 4 34A.

[23] Rubinstein, *supra* note 20, at 195.

the midst of the battle for Israel's existence[24] and the Declaration of Independence put an end to the disputes over the appropriate path and the rate of advancement toward the goal of a Jewish sovereign state. The Declaration of Independence was a major achievement because it enabled disagreements, accommodated them, and even facilitated their existence; it tried to contain those disagreements by incorporating them into an overall political framework of the new State. This was a significant accomplishment since it formed the State's provisional institutions, not on the suppression of disagreements, but rather by recognizing the existence of these disagreements. In what manner? First, the Declaration of Independence recognized and enabled disagreements by asserting, on the one hand, the "natural and historic right" of the Jewish People and by embracing, on the other hand, humanistic and universal values such as "freedom, justice and . . . equality of social and political rights."[25] Second, it provided for the establishment of provisional institutions (i.e., the Provisional Council of State and the Elected Constituent Assembly) that were meant to house and contain the different factions of the Zionist movement.[26] In this manner unity was achieved. Despite the existence of disagreements and in light of these disagreements, one premise was accepted by all—a consensus for independence.

The true colors of the Declaration of Independence's accomplishment can be better understood in light of Israel's failure to adopt a constitution. The Declaration of Independence did not pretend to be a constitution. It states that a constitution will be designed by the Constituent Assembly.[27] However, disagreements, once again, took center stage in Israeli politics and prevented the enactment of a written constitution. Religious factions, comprised of the National-Zionists and the Ultra-Orthodox Non-Zionists, did not totally reject the idea of a constitution, but felt that it should be based on the principles of the Torah, should secure the superiority of the Jewish law in marriage and divorce issues, should mandate kosher food in state-funded institutions, and should recognize the Sabbath and the religious holidays as national holidays.[28] Mapai,

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[24] Tuvia Friling & S. Ilan Troen, *Proclaiming Independence: Five Days in May from Ben-Gurion's Diary*, 3 ISR. STUD. 170, 172–73 (1998).

[25] The Declaration of the Establishment of the State of Israel, 5708-1958, 1 LSI 3, 4 (1948) (Isr.).

[26] *Id.*

[27] *Id.*

[28] Over the years, a controversy emerged among public representatives and scholars as to

the strongest of all political parties at that time, "generally favor[ed] a secular state," although the party was "not . . . averse to the introduction of the jurisprudence of historic Judaism as the basis of the legal order."[29] Other left-wing parties, like Mapam, "wanted a completely secular state," including the establishment of "civil marriage and divorce for Jews and non-Jews."[30]

With regard to social and economic rights, socialist factions sought to entrench them in the constitution, and some factions, like Mapam, wanted the constitution to fully describe these rights and to require their implementation.[31] Furthermore, the socialist factions, even beyond the Communist Party, demanded that "cooperative enterprise should be favored in both agriculture and industry, and the nationalization of land, water, electricity, minerals, [oil, and other national means of production] should be set forth as ultimate goals."[32] Nationalist factions and centrist parties, such as the General Zionists, however, "favor[ed] constitutional guarantees with regard to the private ownership of property and free enterprise."[33] They recognized the decisive role of capital in developing the new economy and felt that "since Israel ha[d] no . . . vast accumulations of wealth[,] there [was] no need for a socialist revolution."[34]

Nationalist factions, such as the Revisionists and Herut, "propagated a nationalist ideology which called for conquest and

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whether the failure to enact a constitution in the formative years should be attributed to the positions of the religious parties. The popular position was that the religious parties took advantage of their political power and thwarted the enactment of a constitution. *See* Dowty, *supra* note 8, at 11. In recent years, many scholars, however, argue that the failure to enact a constitution in the formative period "cannot be directly attributable to opposition from the religious political parties, but [it] was mainly the result of the opposition of Prime Minister David Ben-Gurion and the majority of his party (Mapai)." Giora Goldberg, *Religious Zionism and the Framing of a Constitution for Israel*, 3 ISR. STUD. 211, 212 (1998); *see also* EMANUEL RACKMAN, ISRAEL'S EMERGING CONSTITUTION 1948–51, at 15–17 (1955) (describing how the issue of a written constitution divided the most powerful political party in Israel); Strum, *supra* note 3, at 90–94 (examining the role that Ben-Gurian and his political party had on the constitutional process); Ilan Peleg, *Israel's Constitutional Order and* Kulturkampf*: The Role of Ben-Gurion*, 3 ISR. STUD. 230, 236 (1998) (acknowledging that a written constitution could have been achieved with Ben-Gurian's support).

[29] RACKMAN, *supra* note 28, at 17.

[30] *Id.* at 20.

[31] *See* DK (1950) 802 (Knesset member Meir Vilner); DK (1950) 779 (Knesset member Yizhar Harari); Guy Mundlak, *Social-Economic Rights in the New Constitutional Dialog: From Social Rights to the Social Dimension of Human Rights*, 7 ISR. Y.B. ON LAB. L. 65, 72–73 (1999).

[32] RACKMAN, *supra* note 28, at 20–21; *see* DK (1950) 803 (Knesset member Meir Vilner).

[33] RACKMAN, *supra* note 28, at 26; *see* DK (1950) 739 (Knesset member Menahem Begin).

[34] RACKMAN, *supra* note 28, at 26.

territorial expansion."[35] Hence, "[t]hey . . . want[ed] the constitution to avoid any implied waiver of [rights to] any part . . . of historic Palestine, notwithstanding the United Nations General Assembly resolution."[36] However, "[t]he Communist party . . . want[ed] the Constitution to fulfill every provision of the United Nations General Assembly resolution" and "favor[ed] greater protection for the Arab minority—including the granting of citizenship to Arabs who were inhabitants of Israel as of the date that the British mandate terminated."[37]

These are only a few of the disagreements that encumbered all efforts to enact a constitution. Most of the disagreements and controversies described above fall under the category of, what I call, "substantive disagreement." Namely, these were disagreements regarding substantive policies, substantive conceptions of the good, substantive principles of justice, and substantive rights that should be advanced, promoted, and enshrined by the new constitution. These disagreements, however, were not the only type of disagreements that led to the inability to adopt a written constitution. Disputes and controversies emerged among the different factions about structural issues and about the proper overall constitutional arrangements that should be established (I will call this category of disagreements "structural disagreement" or "institutional disagreement").[38]

It seems safe to say that the consensus among the different political parties was the wish to establish a democratic form of government, which meant a form of government decision-making that guaranteed each political party equal rights of participation and influence in procedures that determine laws and social policies[39] and in which a central role is given to the principle of

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[35] *Id.* at 32.

[36] *Id.* at 34.

[37] *Id.* at 35.

[38] For a somewhat similar distinction between disagreements about goals and disagreements about procedures, see generally JEREMY WALDRON, LAW AND DISAGREEMENT 151–63 (1999).

[39] It should be noted that some scholars and public representatives have expressed objection to the use of the term a "democratic system of government" in regard to Israel's future system of government. *See* Paltiel Daykan, *Basic Constitution for the State of Israel*, 6 HAPRAKLIT 2, 3 (1949). To see the fate of the term "democracy" in the early drafts of the Declaration of Independence, which in the end was omitted from the Declaration of Independence altogether, see generally Shachar, *supra* note 20, at 559–71. While these objections to the term "democracy" could be mainly interpreted as semantic, some factions objected substantively to a democratic system of government. These were the orthodox religious non-Zionist parties like Agudat Yisrael. Goldberg, *supra* note 28, at 213–14. As one

majority rule.[40] This consensus, however, was very narrow. The different factions disagreed on what such a decision-making process requires other than majority rule.

The different factions disagreed on the need to enact a written, formal constitution as part of this democratic form of government. The proponents of a written formal constitution argued that it would protect individual rights by establishing limits on governmental powers,[41] that the promulgation of a constitution was necessary to achieve international legitimacy,[42] that it would stand as a symbol of Israel's independence,[43] and that a written constitution would serve the pedagogical purpose of educating a diverse population in the political principles of a democratic regime.[44] The sheer variety of arguments put forward to support the enactment of a written formal constitution shows that, even among the supporters of a written constitution, there is a divergence of opinions and, at times, intense disagreement on the proper function of the future constitution. Most notable are the arguments that the constitution could provide for international legitimacy and that the constitution would stand as a symbol of Israel's independence.[45] Promulgating a constitution to comply with the United Nations Resolution as a condition for the international legitimacy of the new State could be thought as an abridgment of

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example of the undemocratic nature of Agudat Yisrael, one may mention that the party called for the ineligibility of any person to hold public office unless he was an observing Jew. *See* RACKMAN, *supra* note 28, at 559–71.

[40] It should be noted that some political science scholars question whether the political culture of the *Yeshuv* was truly committed to a democratic form of government. *See, e.g.*, DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL 33 (1993). According to these scholars, the convergence on a democratic form of government was due to convenience and *realpolitik*. *See id.* (arguing that the "adoption of democratic rules of the game [by the Labor and Revisionist movements] was the result of realpolitik rather than their own world view").

[41] DK (1950) 740 (Knesset member Menahem Begin); *see also* DK (1950) 745 (Knesset member Yaakov Gil).

[42] The Resolution on the Future Government of Palestine, which was adopted by the General Assembly of the United Nations on November 29, 1947 and provided for termination of the British Mandate, required that the new state "shall draft a democratic constitution." G.A. Res. 181 (II), at 135, U.N. Doc. A/519 (Nov. 29, 1947). Thus, some viewed the promulgation of a constitution as part of the necessity of compliance with the United Nations Resolution as a condition for achieving international legitimacy. *See* DK (1950) 715 (Knesset member Nahum Nir). *But see* DK (1950) 729–30 (Knesset member Zerach Warhaftig); DK (1950) 727 (Knesset member David Bar-Rav-Hay).

[43] DK (1950) 745 (Knesset member Yaakov Gil).

[44] *See* DK (1950) 734–35 (Knesset member David Bar-Rav-Hay); DK (1950) 719 (Knesset member Nahum Nir). *But see* DK (1950) 731 (Knesset member Zerach Warhaftig) (arguing that Israel should not enact a constitution in order to educate future generations).

[45] *See supra* text accompanying notes 42–43.

Israel's natural right to sovereignty and independence.

Ben-Gurion and other members of the governing Mapai party, although they favored a written constitution in 1948, opposed it in 1950 and offered a fourfold argument to support their position.[46] First, they "maintained that a constitution would limit the power of elected politicians;" hence, they perceived an entrenched formal constitution as undemocratic in nature.[47] Second, they argued that the adoption of a constitution "would give too much power to minorities and would not enable the government to take action," while the government was engaged in nation-building—a goal of utmost importance.[48] Third, they feared the threat of a *kulturkampf*—a clash between orthodox and secular—that would destroy or seriously jeopardize the State.[49] Fourth, there was the "in-gathering of the exiles" argument, according to which a constitution should be adopted only after the in-gathering of the exiles.[50] This argument, while less concerned with the propriety of a written constitution as an ultimate goal, was very much concerned with the process by which the constitution itself should be adopted.[51] Arguably, the adoption of a constitution should follow a

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[46] RACKMAN, *supra* note 28, at 16–17.

[47] Peleg, *supra* note 28, at 236; *see* DK (1950) 817–18 (Knesset member David Ben-Gurion); *see also* Dowty, *supra* note 8, at 11 (noting that "[t]he failure to adopt a written constitution . . . [was consistent] with the traditional power-sharing style of Jewish politics").

[48] Peleg, *supra* note 28, at 236.

[49] *See* DK (1950) 774 (Knesset member Ephraim Taburi). *But see* DK (1950) 767 (Knesset member Meir Yaari) (questioning this argument and arguing that the unwillingness of the governing coalition should not be traced to the possibility of a *kulturkampf* but rather is based on political convenience).

[50] *See* DK (1950) 726–27 (Knesset member David Bar-Rav-Hay).

[51] Professor Gavison notes that the in-gathering of the exiles argument was, of course, embedded in Zionist ideology, which viewed the State of Israel as a state of the Jewish People for the Jewish People: The in-gathering of the exiles argument is an "argument [that] would be inconceivable and clearly objectionable in almost any other country and it reveals one of the unique features of Israel." Ruth Gavison, *The Controversy Over Israel's Bill of Rights*, 15 ISR. Y.B. ON HUM. RTS. 113, 135 (1985) [hereinafter Gavison, *Controversy Over Israel's Bill of Rights*]. Professor Gavison is correct to the extent that the in-gathering of the exiles argument is deeply rooted in Zionist ideology. It, however, should be noted that her argument is in fact a version of a general argument questioning the legitimacy of a formal entrenched constitution, which is designed to bind future generations or people who did not participate in its enactment. The roots of this argument can be traced to the eighteenth century in the writings of David Hume that objected to the tradition of the social contract. *See* DAVID HUME, OF THE ORIGINAL CONTRACT (1748), *reprinted in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 147, 151 (Greenwood Press 1980) (1947). Hume identified two problems with the social contract tradition. The first is that it is based on historical consent or contract although facts and historical evidence do not support the claim that modern societies are based on such a contract. *Id.* at 150–51. The second problem, which is important to our discussion, is that clinging to such an original contract "supposes the consent of the fathers to bind the children, even to the most remote generations (which republican writers will never

process that gives fair opportunity to "the entire potential population" to participate.[52] Usually, a constitution is created for the population living within the borders of the state.[53] Israel's situation, however, was different; its population was fluid at that time and some Zionist leaders demanded that the enactment of the constitution should commence only after the in-gathering of the exiles.[54] It was an argument about the political legitimacy of the process of adopting a new constitution. Needless to say, these arguments did not dissuade the proponents of a written constitution and attributed an ulterior motive to Ben-Gurion and the Mapai party based on the desire not to be restricted by a constitution.[55]

But structural and institutional disagreements were not focused entirely on the need for a constitution or the manner in which it should be adopted.[56] Other structural and institutional disagreements also occurred. For example, there were structural disagreements about the composition of the legislature. "The General Zionists and Progressives both prefer[red] a bicameral legislature, feeling that a second house helps to avoid errors in

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allow)." *Id.* at 151. The implications of Hume's argument for constitutional arrangements are enormously important since constitutions are often designed to bind future generations. Thus, scholars like Thomas Paine and Thomas Jefferson, who perceived the United States Constitution as a basic contract and pushed for its approval, maintained that every generation should enact a constitution for its own. *See* THOMAS PAINE, THE RIGHTS OF MAN 267, 277–78 (Dolphin Books 1961). See also, in this regard, Knesset member Nahum Nir's proposal to enact a constitution which would bind only one generation and would be open to revisions every twenty years. DK (1950) 718. Understanding the in-gathering of the exiles argument through Hume's objection to the social contract theory is an argument that questions the legitimacy of formal constitution-making.

[52] Amos Shapira, *Why Israel Has No Constitution, But Should, and Likely Will, Have One*, 37 ST. LOUIS U. L.J. 283, 285 (1993).

[53] *Id.*

[54] *Id.*

[55] *See* DK (1950) 739 (Knesset member Menahem Begin).

[56] Another controversy that emerged regarding the device of a written constitution was about its formulation. The socialist parties, like Mapam, demanded that the constitution should not only fully describe social and economic rights, but also prescribe the ways and arrangements by which their implementation could be achieved. RACKMAN, *supra* note 28, at 20. Other political parties, however, like the General Zionists and the Progressives, suggested "a brief constitution that would set forth only general principles" in order for it to last as long as possible. *Id.* at 24. It is worth noting that the General Zionists' and the Progressives' objections to a specific constitution were based on the fear that it would "give[] rise to many unintended inferences" since "omissions can then become the subject of extensive interpretation." *Id.* Today, many legal scholars believe that a vague constitution poses a greater danger in regard to unintended consequences. *See, e.g.*, Mario J. Rizzo & Douglas Glen Whitman, *The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 590 (2003) (arguing that vague terms in any constitution will lead to debates about their meanings and different interpretations).

legislation."[57] Mapai and other parties, on the other hand, generally preferred a unicameral legislature.[58]

In addition, disagreement existed over "the issue of general national elections versus district or area representation."[59] Some parties, like Herut, favored district representation.[60] The Communists "favor[ed] proportional representation on a national basis."[61] Mapai was divided on this issue because "[w]hile its platform for the 1949 elections favored [national elections]," many members held the opposing view as well.[62] Some scholars even attributed Ben-Gurion's objection to a formal constitution to his unwillingness to constitutionally entrench the general election system, which would lower the chances of changing it in the future.[63]

Moreover, disagreement also existed over the structure of the government and the head of the State, the president. "Mapai favor[ed] the election of the president by the legislature" with the president being assigned only minor powers.[64] Herut preferred that the president be elected in popular national elections.[65] The General Zionists and Progressives wanted the president to "have powers comparable to those of the president of France" and the head of the government to have the power to dissolve the legislature and call for new elections.[66]

Furthermore, one should especially note the disagreements about the propriety of judicial review as an enforcement mechanism. Some argued that entrusting the courts with powers of judicial review might introduce a preserving, hindering force into the Israeli political system that would prefer property rights over human rights and progress.[67] Others suggested that a special tribunal in

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[57] RACKMAN, *supra* note 28, at 25 (footnote omitted).

[58] *Id.* at 17.

[59] *Id.*

[60] *Id.* at 34.

[61] *Id.* at 35.

[62] *Id.* at 17.

[63] *See, e.g.*, Giora Goldberg, *"You Don't Need a Constitution to Plant Trees": On State-Building and Constitution-Framing*, 38 ST. GOV'T & INT'L REL. 29, 44 (1993).

[64] RACKMAN, *supra* note 28, at 18.

[65] *Id.* at 34.

[66] *Id.* at 25.

[67] Ben-Gurion, for example, argued that judicial review was not only undemocratic, but also might lead to injustice.

> [In] the United States, . . . the Supreme Court took upon itself the right, despite the fact that it was not exactly so authorized in the Constitution, to determine whether a law made by the people's representatives in the Congress suits or contradicts the

special proceedings should conduct the review,[68] or that judicial review should be limited to "a [certain] period after the law ha[d] been passed," or that the constitution should enable "the Legislature [to] override judicial determination of unconstitutionality by a special majority."[69]

Hence, it was disagreement from top to bottom that prevented the adoption of a constitution. At times it seemed that every two Knesset members had three opinions. Good examples in this regard are Prime Minister Ben-Gurion and the chairman of the Constitution Committee of the Provisional State Council (1948–49), Knesset member Zerach Warhaftig; at first, they supported the enactment of a constitution, but, later on, they strongly opposed its enactment and finally argued that it was already enacted.[70]

The founders of the State of Israel disagreed about the values, aspirations, and goals that the constitution should advance. They disagreed about the institutional structure that the written constitution should establish and whether a written constitution was needed at all. They disagreed about structure and institutional schemes, as well as principles, aspirations, and goals. All these disagreements led to the failure to adopt a constitution. Some of these disagreements, to be sure, were bridgeable, while others were not. Some believe that the leadership of the *Yeshuv*—the Jewish community in *Eretz Israel*—feared a *kulturkampf* between secular and religious circles that could have arisen from a confrontation with the religious parties, jeopardizing the nation-building project at that time.[71] Others believe that Ben-Gurion concluded that he

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> Constitution, and it has the power to void a law, even if the large majority of the people and their representatives support it, on the ground that it violates the Constitution and so the [United States] Supreme Court turned into a preserving, hindering force, which prefers property rights over human rights. And when it was decided, in the United States, to impose income tax, the rich came to argue before the Supreme Court that the law contradicts the Constitution, and the Supreme Court voided the inheritance law [sic], making it necessary, eventually to amend the Constitution . . . . There was a second case where Congress regulated child labor, and the Supreme Court . . . voided this law on constitutional grounds. And so it is a bit strange that here [in Israel], parties in favor of 'progress' and proponents of the 'power of tomorrow' enthusiastically seek such a regime.

DK (1950) 816. Some scholars attributed Ben-Gurion's objection to a constitution to his fear that a constitutional system would establish a strong judiciary. Strum, *supra* note 3, at 92–93 (referring to Claude Klein's belief that Ben-Gurion feared a strong judiciary).

[68] *See, e.g.*, DK (1950) 717 (Knesset member Nahum Nir).

[69] Gavison, *Controversy Over Israel's Bill of Rights*, *supra* note 51, at 140 n.83.

[70] For Ben-Gurion's positions, see RACKMAN, *supra* note 28, at 16–17. For Knesset member Zerach Warhaftig's positions, see DK (1950) 729–30.

[71] *See* DK (1950) 774 (Knesset member Ephraim Taburi).

would have more flexibility without a constitution.[72] In any event, it was a fundamental disagreement that prevented the enactment of a written constitution in the formative era of the State. Every faction interpreted the conditions of legitimacy of a Jewish democratic state in its own way.[73] Hence, Israel's failure to adopt a constitution in the formative years is frequently portrayed in a similar light, where considerations of partisan advantage received ample attention and prevented the enactment of a constitution. Every faction sought to advance its own good over the good of the community as a whole. A commitment to certain partisan aspirations, goals, and values led one to a commitment to a certain structure or to a certain institutional scheme.

C. Disagreements Around the Harari Resolution

Unable to adopt a constitution, the political parties devised a political compromise, later to be known as the "Harari Resolution."[74] According to the Harari Resolution, the Knesset would enact the constitution gradually in incremental steps, which would eventually be harmonized to form a complete constitution.[75] However, as is often the case with political compromises, the Resolution was far from clear about the process it required and vague about core constitutional issues. First, it is not at all clear according to what procedure the constitution was to be accepted and ratified.[76]

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[72] *See* Strum, *supra* note 3, at 92–93.

[73] *See* TOM SEGEV, 1949: THE FIRST ISRAELIS 285 (Arlen Neil Weinstein ed., 1986) (arguing that Ben-Gurion and Mapai leaders had "a genuine commitment to the restrictions of democracy and the rule of law, but they often interpreted them in their own way—'for the good of the state,' 'for security reasons,' or even 'for the good of the party'").

[74] The "Harari Resolution," named after its author, was accepted at June 13, 1950 and held:

> The First Knesset charges the Constitutional, Legislative, and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of individual chapters so that each chapter will constitute a basic law in itself. The chapters shall be brought before the Knesset to the extent which the Committee will terminate its work and all the chapters together will form the State's Constitution.

DK (1950) 1743 (author's translation).

[75] *Id.*

[76] Benjamin Akzin, *Basic Laws and Entrenched Laws in Israel*, 17 HAPRAKLIT 230, 232–33 (1961); Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMPLE L.Q. 405, 410 (1983) [hereinafter Shapira, *Judicial Review*]. Shapira notes that the Harari Resolution neither set a timetable for the adoption of individual Basic Laws or to their ultimate grouping into a single constitutional instrument nor was it clear whether this process was confined to the First Knesset or whether it imposed upon succeeding Knessets the legal duty to enact a constitution. Shapira, *Judicial Review*, *supra*, at 410. In addition, it is unclear whether, upon the completion of each chapter (each Basic Law) and its affirmation

Second, not addressed at all were the core constitutional issues, such as the normative status of Basic Laws vis-à-vis ordinary legislation,[77] their legal source,[78] and the potential enforceability of the various Basic Laws.[79] For some, like Ben-Gurion, the Harari Resolution signified the adoption of the British constitutional model of parliament sovereignty—in the form of an unqualified majority rule.[80] For them, even limitations that originated in the Knesset itself had no validity because the present Knesset could not bind its successors.[81] For others, the resolution signified a gradual process by which it would be possible to adopt the American constitutional model.[82] For them, the present Knesset could bind its successors by

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by the Knesset, the new Basic Law is constitutionally enforceable or whether the new Basic Law will be applicable only after the enactment of the last chapter and the affirmation of the constitution as a whole. *Id.* at 429.

[77] One of the questions left open by the Harari Resolution, and to which Israeli constitutional law has been tormented over, was about the significance of the fact that a law is labeled or designated as "Basic." It is far from clear if this renders it a higher form of law than other enactments of the same or succeeding Knessets. *See* Shapira, *Judicial Review*, *supra* note 76, at 410. In addition, a question arose over what is the normative status of other laws not designated "Basic" that may be regarded as "constitutional" by virtue of their substance (i.e., the Equal Rights to Women Law of 1951) or due to the process of their enactment and their entrenchment (i.e., the Public Investments Protection Law of 1984).

[78] The Harari Resolution did not provide whether the ultimate legal source of Basic Laws was the constituent authority to establish the "supreme law of the land" (similar to the American model) or the doctrine of the "sovereignty of the Knesset" (like the English model).

[79] There is neither any mention of the mechanism by which constitutional review will be made possible by judicial review or other tribunal nor a clue about the nature of such review, whether such review will enjoy ultimate supremacy or will enjoy only partial supremacy that could be overridden by a special procedure. *See id.* There were a number of mechanisms that were considered as an alternative to "classic" judicial review. Gavison, *Controversy Over Israel's Bill of Rights*, *supra* note 51, at 140 n.83; *see supra* notes 76–77 and accompanying text.

[80] *See* Aronson, *supra* note 13, at 208. For Ben-Gurion, the adoption of Basic Laws did not mean the adoption of a constitution, but rather a set of laws that did not differ from other laws. *Id. But see* T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 201 (2001) (arguing that the British constitutional model is not based solely on the sovereignty of the parliament, but rather on dual sovereignty—the sovereignty of the parliament and the sovereignty of the courts); Sir Stephen Sedley, *The Common Law and the Constitution*, *in* THE MAKING AND REMAKING OF THE BRITISH CONSTITUTION 19, 26 (1997) (discussing that the sovereignty of the British Parliament and British Courts, as opposed to the British Executive).

[81] The proponents of this view believed that Israel's constitutional framework was based on "[t]he orthodox English view . . . that Parliament is not bound by acts of its predecessors, and that this rule, unlike all other rules of the common law, cannot itself be changed by statute." Eliahu Likhovski, *The Courts and the Legislative Supremacy of the Knesset*, 3 ISR. L. REV. 345, 362 (1968) (footnote omitted) [hereinafter Likhovski, *Legislative Supremacy*]. According to this view, the rule that parliament cannot bind itself "is one of the ultimate legal principles forming the basis of the system of government." *Id.*

[82] *See* Eliahu Likhovski, *Can the Knesset Adopt a Constitution Which Will Be the "Supreme Law of the Land"?*, 4 ISR. L. REV. 61, 63–64 (1969) [hereinafter Likhovski, *Supreme Law of the Land*].

enacting Basic Laws.

Although the Harari Resolution "provided [some] political and normative framework for the gradual adoption of basic laws by the Knesset,"[83] their nature and character as well as the Harari Resolution itself were open to various interpretations.[84] In fact, the Harari Resolution did not resolve the disagreements, controversies, and disputes about Israel's constitutional arrangements, but rather incorporated them into its vague wording that left the field open to numerous constitutional choices.

Later occurrences raised further doubts with regard to the Harari Resolution as a framework for the gradual adoption of a formal constitution. First, "[n]othing further was done [about the adoption of a constitution beyond the acceptance of the Harari Resolution] during the remaining term of the First Knesset."[85] The First Knesset did not adopt any Basic Law, let alone a complete constitution.[86] Second, toward the end of its term, the First Knesset enacted the Second Knesset (Transition) Law (1951) that pretended to pass the authority granted to the First Knesset to enact a constitution to subsequent elected Knessets.[87] Many scholars, who reject the thesis regarding the Knesset's continuing constituent authority, single out the Second Knesset (Transition) Law as a weak link in Israel's chain of continual constitutional authority.[88] Some

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> Since nothing was clearly said on the subject [of Knesset supremacy as the ultimate of the law of the Constitution], it must be assumed that those voting for the [Harari] Resolution were notionally divided into two major groups. The first group must be taken to have assumed that the ultimate basis of the Constitution would remain the doctrine of the "sovereignty of the Knesset". [sic] They must be taken to have assumed that "all Chapters together" would become a Constitution, amendable from time to time by the same "legislative process" as any other statute.
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> Others voting for the Resolution must be taken to have assumed that the enactment of each individual "Basic Law" would be a step taken in the direction of the gradual development . . . of a written rigid Constitution. Those so voting must have been moved by the belief that the existing legal system was capable of producing a Constitution which would become "the supreme law of the land". [sic]

Id. (footnotes omitted).

[83] Shapira, *Judicial Review*, *supra* note 76, at 410.

[84] *See, e.g.*, Likhovski, *Supreme Law of the Land*, *supra* note 82, at 64–65.

[85] Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1220 (1970).

[86] *Id.*

[87] Second Knesset (Transition) Law, 1951, S.H. 104 § 5 ("The Second Knesset and its members shall have all the powers, rights, and duties of the First Knesset and its members."). And section 10 states that this law is applicable "to the third and any subsequent Knesset, unless otherwise is enacted in this regard by the Knesset." *Id.* § 10.

[88] *See, e.g.*, Likhovski, *Legislative Supremacy*, *supra* note 81, at 358; Nimmer, *supra* note 85, at 1239–40; M. Steinberg, *Another Act or a Supreme Legal Form*, 16 MOLAD 284 (1958); *see also* CA 6821/93 United Mizrahi Bank v. Migdal Communal Vill. [1995] IsrSC 49(4) 221,

questioned the use of an ordinary law as a means to transfer the constituent powers from the First Knesset to succeeding Knessets. Others questioned the intent to transfer the constituent powers by the Second Knesset (Transition) Law. But the most damaging critique in respect to the Knesset's continuing constituent authority was raised by Professor Melville Nimmer. According to Nimmer, even if one accepts the proposition that the First Knesset intended to transfer the constituent authority to succeeding Knessets, one must ask whether it had the power to do so.[89] Nimmer notes that "[i]t would be strange, indeed, to view [the constituent] authority as a kind of property right which the owner can freely transfer to others."[90] The First Knesset was given the authority to adopt a constitution, but transferring that duty to others could hardly be seen as legally appropriate.[91]

Not only did the legal legitimacy of the Harari Resolution come under attack but also its political propriety and legitimacy was questioned. According to Professor Mark V. Tushnet, the constitutional process set forth by the Harari Resolution lacks political legitimacy because the Basic Laws were enacted by the same authority that was elected to carry out the programs of ordinary politics.[92] The political justification for the powers of constituent assemblies to bind the ordinary legislature is based on the presupposition that constituent assemblies are created and operate at times in which the people show a "high degree of attentiveness to [and involvement in] fundamental matters."[93] Accordingly, a formal constitution is the product of "constitutional politics," which enjoys wide popular support and is meant to create the framework and basic rules for ordinary politics.[94] Tushnet

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483–85.

[89] Nimmer, *supra* note 85, at 1239.

[90] *Id.*

[91] Nimmer claims:

> [T]he [constituent] authority may be said to arise from something more in the nature of a trust relationship established between the electorate and the particular men whom they elected for the avowed purpose of writing a constitution. Nothing in the creation of the trust implied that the trustees might transfer this power to others who had not been elected for this purpose. Only in the first election was the electorate properly put on notice that their representatives would engage in constitution-making.

Id.

[92] Tushnet, *supra* note 16, at 1331–32.

[93] *Id.* In this regard, Tushnet follows Bruce Ackerman. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 173–86 (1991).

[94] Ruth Gavison, *The Lessons of the Federalist and the Constitutional Process in Israel*, 11 TEHELET 21 (2002).

argues that since constitution-making in Israel does not correspond to the ideal of popular sovereignty and is not based on the distinction between constitutional norms (the product of constitutional politics) and ordinary norms (the product of ordinary politics), it lacks political legitimacy to limit ordinary politics.[95] Similar to Tushnet, Professor Eli Salzberger attacked the political legitimacy of the Harari Resolution and the gradual adoption of Basic Laws by the Knesset.[96] According to Salzberger, Basic Laws cannot be perceived as part of a constitution because they are enacted by the same authority they are meant to limit.[97] Decisions reached by the People's representatives in constituent assemblies enjoy political legitimacy because they often incorporate norms that benefit the People as a whole. The political legitimacy of the constitution is based on the fact that its prescriptions and arrangements are accepted in circumstances similar to John Rawls's veil of ignorance.[98] These circumstances prevent the incorporation of narrow and selfish interests into the basic rules and principles that govern ordinary politics. The gradual adoption of a constitution and its infusion with ordinary politics does not satisfy these requirements and cannot provide us with such neutral prescriptions.

D. Disagreements and the "Decision Not to Decide" as a Constitutional Tactic to Achieve Social Cooperation

After surveying the different positions of the political parties concerning the constitution in the formative years, Professor Rackman in his book *Israel's Emerging Constitution 1948–51* concluded that "[n]o new insight on political institutions or human rights was forthcoming" from the Israeli experience in constitution-making.[99] Rackman hoped that "[p]erhaps in the future Israel's political literature will be written by persons who are not professional party politicians, and then it will command more

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[95] Tushnet, *supra* note 16, at 1331–32.

[96] *See* Eli Salzberger, *The Emergency Regulations of the British Mandatory Government—*Leon v. Gubernik *and* Zeev v. Gubernik, *in* REFLECTIONS UPON DECISIONS OF THE ISRAELI SUPREME COURT DURING THE FIRST YEAR OF ISRAEL'S INDEPENDENCE 41, 46–47 (Daphne Barak-Erez ed., 1999).

[97] *Id.* at 46.

[98] *See generally* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999) [hereinafter RAWLS, THEORY OF JUSTICE].

[99] RACKMAN, *supra* note 28, at 36.

universal interest."[100] But there was something universal, on the one hand, and unique, on the other, in the Israeli experience in constitution-making. The founders of Israel were confronted with a fundamental disagreement about the conditions of legitimacy upon which the new State and its institutions should rest. They, like many founders of new states before them, were faced with the problem that people disagreed about what a just, good, and democratic regime presupposes and what are the conditions for its legitimacy. In Israel's particular case, the problem was made even more acute because of the unique background of the Jewish People and the Jewish State. Israel is not unique in having fundamental disagreements at its founding and seeking compromises to accommodate them. Other western democratic states have had the same experience; it is an almost universal feature of constitution-making in modern societies.[101] Unlike many other states, however, that concluded their foundation by accepting a written constitution, Israel failed to do so. Very often disagreements become intertwined. For example, Ben-Gurion's objection to a written constitution was partly motivated by his fear of an independent judiciary capable of striking down laws.[102] When disagreement about one constitutional structure (e.g., judicial review) leads to disagreement about another (e.g., written constitution), they become intertwined internally. But disagreements may also intertwine externally. A disagreement over substance leads to a disagreement over structure and vice-versa. People disagree about what the common good is, about which rights they have, and about which social policies the State should advance. In the absence of an agreement about which values, goals, aspirations, and rights should be promoted, a political community cannot devise a political structure to further these ends or to sustain these values. At the same time, even when one tries to resolve these disagreements by appealing to some procedural process, as in the Harari Resolution, disagreements over the propriety of the new process also emerge and take center stage. It is not the existence of disagreement that is unique in Israel's constitutional history but the failure to adopt a constitution as a

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[100] *Id.*

[101] *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (emphasizing disagreements in American constitution-making by stating that "[i]t is in vain to say that enlightened statesmen will be able to adjust [their] clashing interests, and render them all subservient to the public good").

[102] *See* Strum, *supra* note 3, at 92–93.

direct result of this disagreement.

Today, many philosophers and constitutional scholars reflect time and again on the significance of disagreements, disputes, diversity, and pluralism as a defining feature of modern western democracies[103] and on the ways constitutional structures should accommodate these disagreements.[104] They argue that modern constitutional democracies attempt to accommodate disagreements by adopting constitutions, which incorporate fair terms of cooperation,[105] secure political and legal stability,[106] enhance public discourse between different factions,[107] and enable democratic reflection and decision.[108] Israel's constitutional experience is unique in the sense that it attempts to accommodate disagreements over the conditions of legitimacy (disagreements of substance and structure) by postponing the adoption of a constitution.

The ultimate constitutional strategy taken by the founders of the State of Israel, as expressed by the Harari Resolution, was the decision not to decide. While this resolution called for the gradual adoption of a constitution, as noted by Professor Daphne Barak-Erez, the gradual adoption of a constitution "proved to be an abstention from doing" that very thing.[109] The founding fathers decided to leave open the questions of if, when, and how Israel should adopt a constitution. They decided not to resolve divisive fundamental questions of values, principles, and structures as they concern the Jewish nature of the State, the democratic nature of the State (specifically, the relation of the new State to the Arab

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[103] *See* JOHN RAWLS, POLITICAL LIBERALISM 339 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; *see also* WALDRON, *supra* note 38, at 294–95 (discussing the inapplicability of the "results-driven test" for constitutional choice).

[104] On the forces and mechanisms in the enactment of a formal written constitution, see generally Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000).

[105] *See* 2 BRIAN BARRY, JUSTICE AS IMPARTIALITY 93–99 (1995); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 46 (Erin Kelly ed., 2001); RAWLS, THEORY OF JUSTICE, *supra* note 98, at 6; RAWLS, POLITICAL LIBERALISM, *supra* note 103, at 339.

[106] *See* HANNAH ARENDT, ON REVOLUTION 174 (1965); WALDRON, *supra* note 38, at 75–77; Jeremy Waldron, *Bruce Ackerman:* We the People: Volume I, Foundations, 90 J. PHIL. 149, 151–52 (1993) (book review). On the fear from instability in countries lacking a formal constitution, see Benjamin Akzin, *Problems of Constitutional and Administrative Law, in* INTERNATIONAL LAWYERS CONVENTION IN ISRAEL 1958, at 161, 168 (1958); Benjamin Akzin, *On the Stability and Reality of Constitutions*, 3 SCRIPTA HIEROSOLYMITANA 313 (1956).

[107] STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 169–72 (1995).

[108] *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 98–99 (2001).

[109] Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 314 (1995).

minority), and the State's relationship with the neighboring Arab states (the question of borders, for example). Instead, they opted for a parliamentary decision-making procedure embodied in the Knesset and its proceedings.[110] The founders of the State did not specify the theoretical ground behind this process of decision-making—whether it was based on the unqualified supremacy of the legislature, as in the British constitutional model, or on the powers of the Constituent Assembly, which might lead to the American constitutional model.[111] Nor did they specify the fundamental values animating the Israeli system of government—whether they were thinking about these fundamental values only in majoritarian and procedural terms or whether they also sought to protect minority and individual rights as part and parcel of these fundamental values. Thus, the founders of the State of Israel failed to adopt a written constitution (including a bill of rights) not because they did not consider it, but because they were intensely divided over the issue of what it should contain.

All these aspects, and many others described above, were matters of intense controversy. Their solution was the adoption of a gradual, piecemeal, and incremental process, which enabled avoidance of matters that could endanger the establishment of the new State. However, taking into account Israel's background of disagreements, it should not be surprising that disagreements and controversies arose about the Harari Resolution itself, and not only about its specific meaning and the procedures it established, but also about its legal and political legitimacy—whether the Knesset had acquired legal and political authority to enact a constitution by this resolution.

Professor Gavison argues that Israel is unique because it exhibits a certain type of disagreement, one that could not be found in other western democracies:

> [E]ven if there are disagreements in a certain legal system about the meaning of a specific constitutional arrangement . . . there is no system apart from Israel that shows continuing disagreements in regard to whether a certain organ is authorized to accept a constitution, whether

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[110] In fact, at that time, many scholars argued that Israel's parliamentary democracy should not be interpreted in majoritarian and procedural terms alone, but rather as being committed to agreements and compromises that acknowledge the legitimate interests of minorities. *See, e.g.*, Daykan, *supra* note 39, at 4.

[111] *See* Likhovski, *Supreme Law of the Land*, *supra* note 82, at 63–64.

> this authority was used so Israel already has a constitution and if so what are its nature and characteristics. Part of Israel's constitutional uniqueness is based on the fact that these questions have lingered since Israel's formation.[112]

Unfortunately, I cannot wholly agree with Professor Gavison's analysis. While Israel is certainly unique in having these particular disagreements, they do not differ in kind from disagreements that exist in the United States or in the United Kingdom about present constitutional arrangements. Disagreements about such questions as "what is the form of government constituted by the American Constitution"[113] or "whether the British system is based on the unqualified authority of the parliament"[114] are, in my opinion, of the same quality as the constitutional disagreements in Israel—substantive and structural disagreements about the nature of constitutional regimes. The circumstances of disagreements in the light and heat in which Israel was established and operates exist to some degree in other modern democratic states. Israel is unique because the tactic chosen at its foundation was the decision not to decide. The process of adopting a constitution for the State of Israel—a constitution that was meant to regulate the normal operation of the new State and its institutions—was prolonged for over half a century, and there is no end in sight. Hence, the abnormal state of affairs of forming a constitutional framework became the normal state of affairs of Israeli politics. While other western democracies achieved social cooperation among factions mostly by adopting a constitution, Israel achieved it by not deciding on adopting a constitution. Israel's constitution-making history shows not only that a constitution is sometimes unnecessary for social cooperation, but also that social cooperation sometimes depends on not deciding about the adoption of a constitution.

To make my argument about the practice of non-decision constitution-making clearer, it should be pointed out that founders or legislatures who choose to "decide not to decide" are able to make

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[112] Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 73 (author's translation).

[113] Compare the different accounts put forward by American scholars of the American constitutional form of government. *See generally* ACKERMAN, *supra* note 93 (arguing for a "dualist democracy"—a system of democratic lawmaking made by the people and their government); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (supporting a moral reading of constitutions); RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE] (discussing a moral reading reading of constitutions); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing for strict interpretation of constitutions).

[114] *See supra* text accompanying note 111.

such a decision because of two operating conditions. First, there are some profound disagreements over structure and substance; these are respected by leaving them undecided. Second, there exists broad consensus about a whole range of other substantive and structural constitutional issues and that consensus makes it possible to craft pragmatic solutions to arising problems.[115] That the founding fathers of Israel decided not to decide on a formal written constitution and other constitutional issues does not mean that Israel never had a material constitution (as opposed to a formal constitution).[116] The actual practical arrangements reveal the broad rules and principles at the core of the Israeli form of government: the national resurrection of the Jewish People in Israel; a regime of one person, one vote embodied in the legislature; the independence of the judiciary; and the common law principle of the rule of law (also known as government under the law).[117] Some of these rules and principles, underlying Israel's material constitution, are those of every free regime and every liberal democracy.[118] In addition, Israel's material constitution embodied concrete arrangements, such as the formula of status quo for conflict resolution in matters of religion and state[119] and the Law of Return, which granted every Jew the right to acquire citizenship.[120]

A second important feature of my argument for the legitimacy of

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[115] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 62–72 (1999) (discussing that a well-functioning constitutional democracy has an essential set of commitments which comprise the core of the government).

[116] *See* Shapira, *Judicial Review*, *supra* note 76, at 417.

[117] Asher Maoz, *Constitutional Law*, *in* THE LAW OF ISRAEL: GENERAL SURVEYS 5, 30 (Itzhak Zamir & Sylviane Colombo eds., 1995); Shimon Shetreet, *Developments in Constitutional Law: Selected Topics*, 24 ISR. L. REV. 368 (1990); *see also* Shapira, *Judicial Review*, *supra* note 76, at 418.

[118] *See* SUNSTEIN, *supra* note 115, at 64–67 (listing commitments that are "essential safeguards of a free people" and found in the United States Constitution).

[119] Rather than consisting of a set of principles, the status quo was a collection of arrangements on the relationship between religion and the State. *See* Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 619 (1999). Sapir identifies the following elements as constituting the status quo: first, "an understanding of the legal status of religious courts and their exclusive jurisdiction over matters of personal status;" second, the existence of publicly funded religious councils and other administrative bodies in each locality that provide religious services; third, an educational system divided by law between state schools and religious schools, both of which are funded by the state; fourth, "observance of the Sabbath and religious holidays;" fifth, the "observance of Jewish dietary laws" and restrictions on the production of pork to certain areas; and sixth, "*de facto* exemption from army service [of] Orthodox *yeshiva* students." *Id.* at 620–24.

[120] On the Law of Return as part of Israel's constitutional order, see EA 2/88 Ben-Shalom v. Central Election Commission to the 12th Knesset [1988] IsrSC 43(4) 221, 259 (holding that the Law of Return is one of Israel's most fundamental laws).

"deciding not to decide" in order to achieve social cooperation is that I do not portray the Israeli society and system of government in bright colors alone. There were, and, in fact, there are still, laws, regulations, orders, and judicial decisions in the Israeli legal system that are tainted by injustice, discrimination, and blatant violations of rights. My argument is that the tactic of deciding not to decide on a formal constitution and the basic structure constituted by this tactic was morally and politically legitimate. One may find here an echo of an approach presented by Rawls and other philosophers on different ways by which we can assess laws, judicial decisions, practices, and directives.[121] The first way to assess laws, regulations, orders, and judicial decisions is by directly appealing to the concept of justice.[122] According to this way of assessment, any given law, regulation, order, or judicial decision may be considered unjust if it violates the requirements of the proper conception of justice. The second way to assess laws, regulations, orders, and judicial decisions is by appealing to "their pedigree." "[They] are legitimate, not because they are just but because they are legitimately enacted in accordance with an accepted legitimate democratic procedure."[123] My claim for the legitimacy of the constitution-making tactic of deciding not to decide does not mean that every law, regulation, order, or judicial decision in Israel of the formative years was just or moral. Rather, I argue that the basic structure established by this constitution-making tactic was legitimate largely because it achieved social cooperation based on democratic foundations. Hence, while some laws, regulations, orders, and judicial decisions in the formative era would probably fail the first test of legitimacy, they would pass the second test of legitimacy that was enacted in accordance with an accepted and legitimate democratic procedure.

E. Disagreements, the Failure to Enact a Constitution, and the Protection of Human Rights

As we saw above, one of the arguments in favor of a written constitution was the need to protect human rights.[124] So, we must ask whether the protection of human rights was, like a written

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[121] RAWLS, POLITICAL LIBERALISM, *supra* note 103, at 428.

[122] *Id.*

[123] *Id.*

[124] *See supra* text accompanying note 41.

constitution, sacrificed on the altar of social cooperation. Many scholars of political science seriously question whether Israel's parliamentary democracy was founded on a true commitment to liberal democratic ideals.[125] They argue that the political culture of the *Yeshuv* did not truly respect civil rights and liberties.[126] In fact, they view the First Knesset's failure to adopt a constitution and a bill of rights as conclusive evidence to that effect. Accordingly, the constitution-making tactic of deciding not to decide is portrayed as antagonistic to civil rights and liberties.

Refuting this claim requires a detailed discussion and examination. I will start by saying that not only do I not think that disagreements and the tactic of deciding not to decide were antagonistic to the adoption of a discourse of rights, I believe that they provide a fertile ground for its growth and enabled the Israeli Supreme Court to take the role of providing and protecting human rights. Ronald Dworkin, in a well-known article *The Original Position*, classifies political theories as right-based, duty-based, or goal-based.[127] In his view, it is possible to identify some judgments that are more basic than others and to ascertain some overriding goals, fundamental rights, or transcendent duties as fundamental to all other judgments.[128] A goal-based theory would take some goals, such as the survival of the State of Israel, as fundamental. A right-based theory would take some rights, such as the right to equal concern, as fundamental. A duty-based theory would take some duties, such as the duty to obey God's will, as fundamental. Goal-based and duty-based theories are "especially compatible with homogeneous societies" and with those "united by an urgent, overriding goal [or duty]" (for instance, self-defense and the duty to obey God's will).[129]

Accordingly, the political culture of the *Yeshuv* would seem to be best characterized as a goal-based or duty-based political culture. Israel in the 1950s was a state born in war that remained under emergency conditions for a long period of time.[130] For this reason,

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[125] *See, e.g.*, HOROWITZ & LISSAK, *supra* note 16, at 145; Peleg, *supra* note 28, at 242; Strum, *supra* note 3, at 95–96.

[126] *See, e.g.*, HOROWITZ & LISSAK, *supra* note 16, at 145; Peleg, *supra* note 28, at 242; Strum, *supra* note 3, at 95–96.

[127] Ronald Dworkin, *The Original Position*, *in* READING RAWLS: CRITICAL STUDIES ON RAWLS' *A THEORY OF JUSTICE* 16, 40 (Norman Daniels ed., 1989).

[128] *Id.*

[129] *Id.* at 41–42.

[130] Baruch Bracha, *The Protection of Human Rights in Israel*, 12 ISR. Y.B. ON HUM. RTS. 110, 110 (1982).

the political culture of the *Yeshuv* embraced the goal of survival of the state and of the duty of self-sacrifice. So, much is plainly true of the political culture of the *Yeshuv* in the formative years. The analysis, however, becomes more complicated when one tries to draw inferences about the practical constitutional and legal arrangements needed to implement such a theory. A goal-based or duty-based theory does not require duties and goals all the way up.[131] For instance, the best way to achieve a specific goal might be by providing rights to individuals.[132] In such cases, the theory is committed to rights at one level and to goals only at a deeper level. Some of the dominant forces in the political culture of the *Yeshuv* in the formative years fit this description. Ben-Gurion and other founders always used the terminology of rights and liberties when speaking about the new order of the State of Israel.[133] This did not make their political theory right-based since these rights were generally secondary to the overall goal of establishing a Jewish State.

So far, we have considered only the relation between the basic and derivative positions within the dominant political theory of the *Yeshuv*. Political science scholars infer from the unwillingness or failure to adopt a constitution and a bill of rights that the political culture of the *Yeshuv* was not committed to rights.[134] The preceding analysis shows that this assertion is simplistic; that some of the dominant factions in the *Yeshuv* followed a goal-based or duty-based theory does not mean that they objected to the concept of legal rights or constitutional rights. This was the case with the Revisionists who "required personal sacrifice only when it came to the issue of the struggle for statehood, and they tended to hold liberal views in other areas of life."[135] After the establishment of the State, the Revisionists supported the enactment of a constitution and a bill of rights.[136] Hence, my discussion shows that the Labor and Revisionist movements—the two major political forces in the formative period, while being committed to goal-based or duty-based political theory—adopted, at some level, the discourse of civil rights and liberties. Thus, the failure to adopt a bill of rights should be

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131 *See* WALDRON, *supra* note 38, at 216.
132 Dworkin, *supra* note 127, at 44.
133 Aronson, *supra* note 13, at 203–04.
134 SHARFMAN, *supra* note 40, at 33.
135 *Id.*
136 *See supra* text accompanying notes 35–36.

traced to disagreements about rights and their implementation, rather than a supposed objection to the concept of rights.

However, the question about the way by which disagreements and not enacting a constitution helped to protect human rights is still open. Andrei Marmor, in recent articles, observes that a discourse of rights characterizes pluralistic societies in which deep disagreements exist over the conceptions of the good and the proper way of life.[137] Homogeneous societies lack such discourse.[138] Marmor argues that this state of affairs can be explained by the unique content of the concept of rights, which differentiates it from the concept of duty.[139] Contrary to duties, rights do not constitute reasons for actions. An agreement on the existence of a duty would necessarily require an agreement that there are reasons for a certain action in a certain situation. In the absence of an agreement about the proper conception of the good, citizens are not likely to agree about a comprehensive set of proper duties. Unlike duties, Marmor argues, it is easy to agree on rights.[140] Rights are a set of interests that justify the imposition of duties on the public to protect these interests.[141] Hence, "rights are typically intermediate conclusions in [complex] arguments."[142] The argument starts by presupposing that there are special interests worthy of protection and ends in the imposition of certain duties on certain people. This unique feature of rights is very appealing in pluralistic societies.[143] Even people, who disagree about the proper interests worthy of protection and about the means of protecting them, can agree on the existence of the relevant right.[144] In other words, as people move from abstract discussions about the interests to be protected to concrete recommendations, they find intermediate conclusions that they can all agree upon.

As discussed earlier, the circumstances of constitution-making in Israel involved a wide range of disagreements over the efforts to

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[137] Andrei Marmor, *Judicial Review in Israel*, 4 MISHPAT UMIMSHAL 133, 156 (1997) [hereinafter Marmor, *Judicial Review*]; *see also* Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1, 15–16 (1997) [hereinafter Marmor, *On the Limits of Rights*] (stating that "rights discourse is particularly fit for pluralistic societies").

[138] *See* Marmor, *On the Limits of Rights*, *supra* note 137, at 16.

[139] Marmor, *Judicial Review*, *supra* note 137, at 156.

[140] *Id.*

[141] JOSEPH RAZ, THE MORALITY OF FREEDOM 183 (1986).

[142] *Id.* at 181; *see also* Marmor, *On the Limits of Rights*, *supra* note 137, at 14–15 (discussing Joseph Raz and the concept of "intermediary conclusions in arguments").

[143] Marmor, *Judicial Review*, *supra* note 137, at 156.

[144] *Id.*

promulgate a constitution. These disagreements persisted even though the dominant forces in the *Yeshuv* held collective ideologies. Hence, the political culture of the *Yeshuv* was fertile ground for a discourse of rights. There, however, was also a disagreement about rights, or at least disagreements about certain rights (i.e., equality), that led to the failure to adopt a comprehensive bill of rights.[145] People in the *Yeshuv* disagreed not only about the goals, visions, and principles to be protected, but also about intermediate conclusions and, in particular, about rights. This led the founders of the State to the decision not to decide and to continue deliberating about what rights Israelis have. The circumstances (disagreements) that made necessary a discourse of rights (agreement on intermediary conclusions) prevented the enactment of a bill of rights by the Constituent Assembly. Nevertheless, the High Court of Justice still adopted a discourse of rights in spite of the lack of a bill of rights.[146] How did it overcome disagreement about rights and succeed where others failed?

The reasons for the Israeli Supreme Court's success lay partly in its institutional characteristics and partly in the judicial decision-making methods it adopted to overcome these difficulties and to develop the discourse of rights. It is true that disagreements prevented the enactment of a comprehensive bill of rights by the Knesset. The Supreme Court of the formative years, however, did not try to establish a comprehensive bill of rights all at once. Rather, the Supreme Court, historically speaking, was mostly a forum for promoting justice by resolving disputes between individuals and governmental agencies.[147] Individuals who were harmed by government actions asked the Court for remedy.[148] They asked the Court to recognize their interests as legitimate, and since there was no bill of rights, their claims were not confined to the infringement of positive legal rights.[149] When the Court needed to

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[145] *See supra* notes 21–26 and accompanying text.

[146] Pnina Lahav, *Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy*, 16 TEL AVIV U. L. REV. 475, 482, 487 (1991); Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 TEL AVIV U. L. REV. 503, 572 (1993) [hereinafter Mautner, *Decline of Formalism*].

[147] On the judicial approach taken by the Supreme Court in the formative years, see Joshua Segev, *The Changing Role of the Israeli Supreme Court and the Question of Legitimacy*, 20 TEMP. INT'L & COMP. L.J. 1 (2006).

[148] *See id.* at 11 (explaining that the Court took the responsibility of defending individuals' rights).

[149] For example, Judge Witkon stated:

I do not postulate that the rights must be statutory, inscribed by law. This court has

decide a case, the judges often disagreed over the reasons for providing a remedy to the petitioner[150] and over the wider application of these reasons in other cases. The Supreme Court lived among its People, and the same disagreements that characterized the People and their representatives did not spare its judges. However, as Marmor explains, this made a discourse of legal rights very appealing.[151] The unwritten bill of rights established by the judiciary was a byproduct of deciding specific disputes. It developed these rights one case at a time as a form of "Israeli Common Law." The common saying that the existence of the right was inferred from a remedy provided to the petitioner by the High Court of Justice and the fact that there was no clear coherent theory as to the relation between the right and the legitimate interest testified to the nature of rights.[152] They are intermediate conclusions,[153] which could be agreed upon, although no agreement could be found as to the reasons for having rights or the way they are created. This method and its institutional tools made the Supreme Court more suitable for reaching an agreement than the Knesset, which sought, at that time, to promulgate a comprehensive bill of rights. The tactic of deciding not to decide enabled and, in fact, even encouraged the Supreme Court to assume this role. The fact, which I pointed out earlier, that the political culture of the major forces in the *Yeshuv* was not antagonistic to a discourse of rights explains how the Court succeeded in defending

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> more than once recognized rights which have no mention in any provision of law and these, once they have received judicial warrant, take form and are assimilated to rights recognized in law. Things that are customary and fall within the notion of natural justice, which only yesterday still lacked shape and were undefined, pass in this manner along the royal road and attain the rank of rights. Such is judicial development that proceeds alongside but does not intrude upon the bounds of legislative activity and I would not wish to restrict its march. This power is a guarantee of the freedom of the individual.

HCJ 29/62 Cohen v. Minister of Def. [1962] 16 IsrSC 1023, 1027 (author's translation); *see also* HCJ 73/53 Kol Ha'am Co. v. Minister of the Interior [1953] IsrSC 7 871; HCJ 144/50 Sheib v. Minister of Def. [1951] IsrSC 5 399; HCJ 1/49 Bejerano v. Minister of Police [1949] IsrSC 2 80.

[150] *See* Adi Parush, *Moral Considerations in the High Court of Justice Jurisprudence*, 13 TEL AVIV U. L. REV. 453, 477 (1988).

[151] Marmor, *Judicial Review*, *supra* note 137, at 156.

[152] Parush, *supra* note 150, at 477; Alfred Witkon, *The Substantive Right in Administrative Law*, 9 TEL AVIV U. L. REV. 5, 16–17 (1983).

[153] Abraham E. Shapira, *Self-Restraint of the Supreme Court and the Preservation of Civil Liberties*, 3 TEL AVIV U. L. REV. 640, 640 (1973) [hereinafter Shapira, *Self-Restraint of the Supreme Court*]; *see supra* notes 141–44 and accompanying text (providing an explanation of intermediate conclusions). According to Shapira, the Supreme Court relied heavily on the national and social consensus in defending civil rights and liberties. Shapira, *supra*, at 640.

rights without a hostile response from political forces. In the development of the judicial bill of rights, the Supreme Court did not clash with the political culture, but rather acted in accordance to it.

III. DISAGREEMENTS AND ISRAEL'S CONSTITUTION-MAKING SINCE THE 1980S

A. Israeli Politics: Continued Moral, Political, and Cultural Disagreements

Israel is made up mainly of immigrants from many different cultural, political, and ideological backgrounds, and many Israelis perceive their society as a "melting pot" aimed at creating and shaping a dominant cultural and political identity.[154] However, three decades after the establishment of the State of Israel and after achieving an independent and sovereign state in *Eretz Israel*, the Israeli polity was still marked by intense disagreements, controversies, and disputes.[155] Ideological, political, and cultural disagreements remained the prominent feature of Israeli politics through the years since its creation.[156] The 1980s were no different from previous decades. Looking back, one must acknowledge that many economic, social, and political changes transpired. Furthermore, Israeli history is dense with historical events possessing national and international significance. All of these events influenced, changed, and shaped the political debate over the pressing problems of the Nation. It seems, however, that little changed in regard to the disagreements and controversies concerning the conditions of legitimacy upon which Israel is founded and according to which it should operate. In particular, little changed regarding the proper way to reconcile "value[s] of Jewish particularism entailed in the aspiration of creating a Jewish nation-state and universal values related to the humanist and liberal traditions, which inspired the founding fathers of Zionism."[157]

Among the most important historical events is the 1967 war, also known as the Six Day War, which led to the incorporation of a large Palestinian population in the West Bank and the Gaza Strip (the

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[154] *See* HOROWITZ & LISSAK, *supra* note 16, at 98.

[155] *Id.* at 109–10.

[156] *Id.* at 113–16.

[157] *Id.* at 114; *see supra* notes 4–7 and accompanying text.

territories).[158] The 1967 war proved to be a turning point in ideological conflicts over the conditions of legitimacy upon which Israel was founded. The war required practical political discourse to take into account the new reality of Israel's control over the territories and to assimilate it into the political debate over the territorial integrity of the State.[159] Throughout the 1970s and until the late 1990s, a considerable portion of the Israeli public showed a desire to annex all or part of the territories permanently to Israel.[160] These factions "ground[ed] the territorial claims of Zionism," in general, and "the ideal of Greater Israel," in particular, on religious, traditional, and historical discourse and the rhetoric of "the Divine promise and land[s] of our forefathers."[161] On the other side, other factions warned against the dangers inherent in annexation of the territories ("the impossibility of striving for peace"), while rejecting any territorial compromise and the inability "to preserve Israel as a democratic state with a Jewish majority."[162] These factions "rejected [the ideal of a Greater Israel] on historical, pragmatic, and humanistic grounds," arguing that the end of Zionism is to "liberat[e] a people" rather than a territory and "emphasiz[ing] the immorality of imposing foreign rule by force over an unwilling population."[163]

Another historical event with significant implications on political and ideological disagreements in Israel was the rise to power of the Likud party in the 1977 elections, which also symbolized the loss of hegemony of Labor Zionism.[164] The Likud Leader, Menachem Begin, advocated a populist social position designed "'to make things better for the people,'" which stood "[i]n contrast to the [social] constructivist ideology of the Labor movement which stressed economic growth and development and the need to give preference to investments over consumption."[165] The economic policy of the Likud, throughout the late 1970s and the early 1980s, considerably increased the inequality in wealth and even led the country into an

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158 HOROWITZ & LISSAK, *supra* note 16, at 44–45.

159 *See id.* at 45–46.

160 *Id.* at 45.

161 *Id.* at 63, 110 (internal quotation marks omitted).

162 *Id.* at 110.

163 *Id.* at 119–20 (internal quotation marks omitted).

164 For an extensive analysis of this event and its implications on the jurisprudence of the Israeli Supreme Court, see Menachem Mautner, *The 1980s—Years of Anxiety*, 26 TEL AVIV U. L. REV. 645, 660–70 (2002) [hereinafter Mautner, *Years of Anxiety*].

165 HOROWITZ & LISSAK, *supra* note 16, at 137.

economic crisis.[166] The 1980s, however, signified the decline in consciousness of class difference and class politics.[167] Thus, the debate over the creation of a just society, in the form of a socialist cooperative or in the form of "free" economic arrangements, lost its prominence and intensity.

Contrary to the ideological conflict over social issues, beginning in the late 1970s, conflicts and tensions between religious and non-religious factions increased.[168] During the formative years of Israel, "the tendency was to maintain the secular character of [the] collective ceremonies," but following the 1967 war, the use of religious symbols in ceremonies of a national and governmental nature increased.[169] As long as the religious factions tried only to provide some religious embellishment to the secular national ethos, they did not intensify the conflict between religious and secular elements in society. However, since then, various religious factions tried to use their political power to advance their own religious interests by demanding extensive allocations of resources to the religious sector, requiring the expansion of the exemption of *Yeshiva* students from military conscription, and seeking to impose religious observance on the public generally.[170] This brought in its wake a renewal of the ideological conflict over the place of religion in public life, which were largely dormant during the 1960s and 1970s. There were numerous occasions when this conflict resulted in demonstrations, and even violence, especially where the status quo in matters of religion was violated.

B. Israel's Constitution-making Preceding the Constitutional Revolution

When one examines Israeli politics in the 1980s, one can identify some changes from the situation in the formative years that prevented the enactment of a comprehensive constitution. Nevertheless, it is safe to conclude that the overall circumstances of

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166 *See id.*

167 The political explanation for the decline of the social-economic conflict in Israel was the perception that the Labor movement was responsible for the inequality of distribution. *See id.* at 136–37. The Labor movement paid the price for being the ruling party when the economic and class structure in Israel was shaped, while *Herut*, which had been cast out by the establishment, became a convenient rallying point for those who felt that they were being treated as social and economic outcasts. *Id.* at 137–38.

168 *Id.* at 63–64; Mautner, *Decline of Formalism*, *supra* note 146, at 577.

169 HOROWITZ & LISSAK, *supra* note 16, at 140.

170 *Id.*

disagreement within society and the desire to leave things undecided by following the chapter-by-chapter tradition of gradual constitutional adoption have remained the same. This tendency manifested itself primarily in the failure to resolve three major constitutional issues: (1) the constitutional protection and regulation of human rights and civil liberties; (2) the enactment of Basic Law through legislation; and (3) the necessity of special proceedings by which to adopt and affirm the future constitution.

In 1974, the bill of Basic Law: Rights of the Individual and of the Citizen was submitted to the Knesset on behalf of the Knesset Constitutional, Legislative, and Judicial Committee.[171] The proposed bill encompassed the classical liberal freedoms, including freedom of the person, equality before the law, the right to life, freedom of movement, the right to privacy, the right to property, freedom of expression, freedom of association, freedom of religion, access to the judicial system, and due process.[172] Contrary to previous bills and proposals regarding the constitutional protection of basic human rights, the proposed bill did not include social and economic human rights, such as the right to work, the right to strike, the right to an education, the right to health services, or the right to social security.[173] The reason for omitting social and economic rights from the proposed bill is not clear. Professor Ruth Ben-Israel mentions an ideological crisis that occurred in the last few decades and took hold especially in the upper levels of Israeli society and manifested itself as a conversion from the Zionist socialist ideology to a free-market or free-enterprise ideology.[174]

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[171] Basic Law: Right of the Individual, 1974, HH, 448. The bill was published in August 1973 but was submitted to the first phase of legislation in August 1974. *Id.*

[172] *Id.*

[173] Even before the failure of the First Knesset to enact a constitution, which led to the Harari Resolution, efforts were made to enshrine social and economic rights as part of the constitutional protection of human rights. With the adoption of the Harari Resolution, the debate regarding the constitutional protection of social and economic rights shifted to the content of a Basic Law protecting human rights (classic liberal rights as well as social and economic rights). In 1964, a private Knesset member's bill was initiated by Itzhak Klinghoffer and was put on the Knesset agenda. Itzhak Hans Klinghoffer, *The Bill of Rights – The Legislative Freeze*, *in* KLINGHOFFER BOOK ON PUBLIC LAW 137, 138 (Itzhak Zamir ed., 1993). The bill included social and economic rights (as well as classic liberal rights) such as the right to work, the right to strike, the right to education, the right to health services, and the right to social security. *Id.* at 146–47. The bill, however, was rejected by the Knesset because of the opposition by the government. *Id.* at 138.

[174] Ruth Ben-Israel, *The Implications of the Enactment of the Basic Laws on Labor Law and the Employment Relations*, 4 ISR. Y.B. ON LAB. L. 29, 31–33 (1994); *see* Mautner, *Years of Anxiety*, *supra* note 164, at 571. According to Ben-Israel, during the formative years, Israel adopted, as part of its basic values and perceptions, a Zionist-socialist ideology, which was

According to Ben-Israel, at least some members of the Knesset who served on the Constitutional, Legislative, and Judicial Committees maintained this worldview that assigned lesser value to social and economic rights and led to their exclusion from the proposed bill.[175] At that time, the exclusion was not controversial mainly because of the decline of class-consciousness among lawyers, judges, and journalists. Unions and other workers' organizations were also unaware of the possible negative effects of excluding such rights from constitutional protection.

Unsurprisingly, the major area of disagreement related to the Jewish nature of the State. Although the late 1970s and the 1980s were marked by the further division of the religious bloc and the emergence of new religious parties, the religious bloc was united on three overriding concerns. First, the religious parties were worried that the enactment of the bill would upset the status quo.[176] As noted above, the status quo was adopted by the founding fathers as "the basic formula for conflict resolution in matters of religion and state."[177] Rather than consisting of a set of principles, the status quo was "a collection of arrangements [on] . . . the relationship between religion and state."[178] The proposed bill decreed: "[T]his Basic Law does not diminish the force of any law which was passed before it comes into force" and, hence, would have immunized all

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essentially collectivist and sought to promote equality and social solidarity. Ben-Israel, *supra*, at 31–33. Israel's labor law legislation, in the formative years, required state intervention in the free market economy to achieve proper social balance. *Id.* According to Ben-Israel, the last few decades were characterized by an ideological crisis. While most of the working public still adheres to the ideology which supports government intervention to correct the distortions of free market and free competition, the social elite of Israeli society supports the ideology of free market and free competition and rejects any involvement of the state in labor relations. *Id.*

[175] Ben-Israel, *supra* note 174, at 33. It should be noted that when the proposed bill was submitted to the Knesset, "the sub-committee for Basic Laws was chaired at that time by a Likud Knesset Member, Dr. Binyamin Halevi, formerly a member [of] the Supreme Court." Goldberg, *supra* note 28, at 221. Herut, which was the leading component of the Likud, advocated a free enterprise economy with more autonomy to be granted to market forces. HOROWITZ & LISSAK, *supra* note 16, at 136–37. Hence, the decrease in the status of social and economic rights can be traced directly to the rise of the Likud to power. *Id.* Herut's ideological positions, however, remained on paper only and were not implemented by the Likud when it came to power. *Id.* There are numerous reasons for the Likud's unwillingness to implement Herut's ideology. *Id.* In any case, the ideological crisis, which Ben-Israel refers to, transcended traditional party lines and cannot be traced to an increase in the power of a specific political party.

[176] *See* Shapira, *Judicial Review*, *supra* note 76, at 410, 437–38 (referring to antagonists who believed that the enactment of the bill would "impede the expedient functioning of the governmental apparatus").

[177] Sapir, *supra* note 119, at 619; *see supra* note 119 and accompanying text.

[178] *See* Sapir, *supra* note 119, at 620.

religious statutory arrangements preceding the Basic Law.[179] It did not, however, address customary arrangements.[180] Second, the religious parties were concerned that providing constitutional protection for classic liberal rights and, especially, for equality across the board without any qualifications might put at risk many of the arrangements—formal and informal—that established the Jewish nature of the State.[181] Accordingly, members belonging to the religious-Zionist factions harshly criticized the bill, arguing that it was too abstract and "lack[ed] any Jewish content."[182] Third, the religious parties were especially concerned by the clause that empowered the Supreme Court to review the constitutionality of future legislation.[183] They did not oppose the idea of a bill of rights in principle as much as they resented the idea that judges, whom they did not trust and could not control, would be empowered to interpret and enforce the proposed bill.[184]

In light of these concerns, the religious parties voted in the plenum against the proposed bill, but the majority voted in favor of "passing the bill to the next legislative phase."[185] The approval of the bill on the First Reading intensified the criticism of lawyers, scholars, and public representatives of the bill.[186] They criticized the general authorization of the legislature to restrict human rights and liberties by law.[187] Such a blanket and unqualified authorization jeopardized the whole point of constitutionally

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[179] Shapira, *Judicial Review*, *supra* note 76, at 440 (internal quotation marks omitted).

[180] *See* DK (1974) 2738 (Knesset member Zerach Warhaftig); DK (1974) 1584–85 (Knesset member Menachem Parush).

[181] *See* DK (1974) 2738 (Knesset member Zerach Warhaftig); DK (1974) 1584–85 (Knesset member Menachem Parush).

[182] Goldberg, *supra* note 28, at 221; *see* DK (1974) 2732 (Knesset member Pinchas Shinman); DK (1974) 1584 (Knesset member Menachem Parush); DK (1973) 4443 (Knesset member Shlomo Lorence).

[183] Goldberg, *supra* note 28, at 221. This concern remained throughout the 1980s. *See* Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 29 (1992).

[184] DK (1974) 2738–39 (Knesset member Zerach Warhaftig); DK (1974) 1585 (Knesset member Menachem Parush).

[185] Goldberg, *supra* note 28, at 221. "At that time, all the religious parties [were] part of the parliamentary opposition [to the Rabin Government]." *Id.* at 220.

[186] *See* AMNON RUBINSTEIN & BARAK MEDINA, ISRAELI CONSTITUTIONAL LAW 911–12 (5th ed. 1996) [hereinafter RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW]; Bracha, *supra* note 130, at 124–25 (noting that since 1973, no "serious" attempts have been made to enact the Basic Law: Human and Civil Rights); *see also* Shapira, *Judicial Review*, *supra* note 76, at 437–38 (suggesting that "the prospect of the proposed Bill of Rights becoming binding law continues to be slim" since it was submitted in 1973).

[187] *See* Shapira, *Judicial Review*, *supra* note 76, at 439.

protecting human rights.[188] They also criticized the qualifications placed on the principle of equality. One of the drafts of the proposed bill prescribed that the principle of equality would not affect laws that constituted Israel as a Jewish state, implying that there is a conflict between a Jewish state and the "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex," as provided in the Declaration of Independence.[189] Such a constitutional norm, they believed, would have had "destructive and radical consequences."[190]

The proposed bill eventually was "'buried'" in the Constitutional, Legislative, and Judicial Committee of the Knesset for numerous reasons.[191] First, the religious parties returned to the governing coalition and exerted their influence on the chairman of the Constitutional, Legislative, and Judicial Committee to prevent the legislation from advancing.[192] Second, members of the committee could not resolve their differences over the desired norm of equality.[193] Third, disagreements emerged over an entrenchment clause. Some Knesset members favored the insertion of a special entrenchment provision for the entire Basic Law (special entrenchment provisions in previous Basic Laws applied only to specified portions of the law).[194] Such a provision was supposed to immunize the bill from further revisions, amendments, and repeals by a mere majority of the legislature.[195] Other Knesset members, however, differed on whether such entrenchment was desirable and what majority was necessary to override it.[196] Fourth,

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[188] *Id.*

[189] The Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, 4 (1948) (Isr.).

[190] RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 912 (author's translation).

[191] Goldberg, *supra* note 28, at 221.

[192] *See id.*

[193] RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 912.

[194] *See* Basic Law: The Knesset, Amendment, 1992, S.H. 162 § 9A; Basic Law: The Knesset, 1958, S.H. 69 §§ 4, 34, 44–45.

[195] RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 912.

[196] Some Knesset members, like Dr. Binyamin Halevi, believed that the proposed bill of rights should not be entrenched as long as the process of enacting Basic Laws continued. *See* DK (1974) 1568 (Knesset member Benjamin Halevi). Only after the enactment of the last chapter of the constitution and the affirmation of the constitution as a whole should a bill of rights be entrenched. *See id.* This procedure would enable the Knesset to revise, amend, and repeal Basic Laws to reach a comprehensive, consistent, and cohesive constitution. *See id.* Other Knesset members believed that an immediate entrenchment of the proposed bill was necessary to protect basic human rights and to make the bill viable. *See* DK (1974) 1587 (Knesset member Yoram Aridor); DK (1974) 1583 (Knesset member Leon Dycian). In addition, a disagreement emerged over the need for the prescribed majority to revise, amend,

disagreements also emerged about the enforcement mechanism of rights inscribed by the proposed basic law—namely, disagreement about the legitimacy of judicial review.[197] With these disagreements and controversies in view, the proposed bill did not even reach the second and third phases of the legislative process.

Several proposed bills of rights were submitted to the Knesset during the 1980s; none of which succeeded in becoming a law.[198] The inability of the Knesset to proceed was evident, especially in the period from 1984 to 1990. In these years, Israel was governed by a national unity government, constituted by the Likud and Labor parties.[199] The Likud and Labor might have combined their powers and presented a unified front to promote the passage of a bill of rights despite the persistent opposition of the religious bloc, but they did not.[200] Neither the Likud nor the Labor party was willing to compromise their relations with the religious bloc whose support was necessary to form a narrower governing coalition.[201] Moreover, many Likud members felt that the grievances of the religious bloc were not addressed properly and that the proposed abstract bill of rights did not sufficiently protect the Jewish nature of the State.[202]

The first version of Basic Law: Legislation Bill was presented to the Knesset in 1975.[203] Other versions were submitted to the Knesset since that time, but none of them reached the final phase of the legislative process, and the most recent proposal, although still pending before the Knesset, has a very slim prospect of becoming

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or repeal the bill. While some Knesset members believed that the entrenchment required an absolute majority of the Knesset's total members (sixty-one Knesset members), others believed that such a requirement was too weak since the government usually has the ability to command a majority of sixty-one Knesset members. DK (1974) 1754 (Knesset member Amnon Linn). Thus, the Knesset should have opted for a two-thirds majority requirement (eighty Knesset members) for any revisions, amendments, or repeals of the proposed bill. DK (1974) 1587 (Knesset member Yoram Aridor); DK (1974) 1583 (Knesset member Leon Dycian).

197 Among the supporters of entrusting the Supreme Court with the authority to review primary legislation was Knesset member Binyamin Halevi. DK (1974) 1570. Some Knesset members, however, suggested establishing a special tribunal that would include distinguished scholars. *See* DK (1974) 1757 (Knesset member Amnon Linn).

198 *See* Basic Law: The Fundamental Bill of Human Rights Bill, 1983, HH, 111; Basic Law: Declaration of Independence Bill, DK (1981) 1064; Basic Law: Equal Rights to Religious Factions Bill, DK (1981) 992.

199 *See* Goldberg, *supra* note 28, at 223.

200 *See id.* (stating that "Labor and the Likud could have promoted [the creation of a constitution] without the danger of dissolving the governing coalition").

201 *See id.*

202 *See, e.g.*, DK (1974) 1580 (Knesset member Zalman Shoval).

203 Basic Law: Legislation Bill, 1975, HH, 133.

law.[204] Basic Law: Legislation Bill, in all its versions, was designed, among other things, to regulate the enactment, repeal, and amendment of Basic Laws and to determine their normative relation to ordinary laws.[205] Accordingly, it determined the supremacy of Basic Laws over ordinary laws and prescribed that Basic Laws may only be adopted by the Knesset by a special majority.[206] Similarly, a law revising a Basic Law, explicitly or implicitly, may only be adopted by a special majority unless the Basic Law in question provides otherwise.[207] Some versions of Basic Law: Legislation Bill declare that the Knesset operates as a constituent assembly in the enactment, amendment, and repeal of Basic Laws and that the Supreme Court, sitting in a panel of nine or more judges, is a constitutional court vested with limited powers of judicial review.

The enactment of Basic Law: Legislation Bill would have clarified Israel's constitutional framework, the supremacy of Basic Laws over ordinary legislation, and the role of the courts in judicial review, especially the Supreme Court.[208] The proponents of the bill noted that it is the "Law of Laws" that would create a constitutional framework for all future legislation;[209] that it would have established an explicit constitutional hierarchy and prevent anarchy;[210] that it would have contributed to the legitimacy of the process of gradually adopting Basic Laws;[211] that it would have been a significant step toward creating a formal constitution for Israel;[212]

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[204] The recent Legislation Bill was published in Basic Law: Legislation Bill, 2000, HH, 341. Four Legislative Bills preceded the recent proposed bill.

[205] *See* Basic Law: Legislation Bill, 2000, HH, 341 §§ 3–4; Basic Law: Legislation Bill, 1993, HH, 89 §§ 4–5; Basic Law: Legislation Bill, 1992, HH, 147 § 5; Basic Law: Legislation Bill, 1978, HH, 326 § 5; Basic Law: Legislation Bill, 1975, HH, 133 § 5.

[206] Ordinary laws are adopted by a simple majority of voting Knesset members present at the plenum. Basic Law: Legislation Bill, 2000, HH, 341 §§ 3–4. The recent Legislative Bill requires a majority of seventy Knesset members in the last phase of the legislative process to revise, amend, or repeal Basic Laws. *Id.* Previous Legislative Bills required a majority of two-thirds of the Knesset members (eighty members) in all stages of the legislative process for revising, amending, or repealing Basic Laws. Basic Law: Legislation Bill, 1993, HH, 89 §§ 4–5.

[207] *See supra* note 206.

[208] Provided, of course, that the courts would have given full legal force to the prescriptions of the Legislative Bill.

[209] *See* DK (1978) 3975 (Minister of Justice Shmuel Tamir); DK (1977) 10 (Knesset member Eliezer Ronen); DK (1976) 1704 (Minister of Justice Haim Joseph Zadok).

[210] *See* DK (2000) 3542 (Knesset member Amnon Rubinstein); DK (1993) 4303 (Minister of Justice David Libai).

[211] *See* DK (2000) 3554 (Knesset member Dan Meridor).

[212] *See* DK (1993) 4303 (Minister of Justice David Libai); DK (1977) 959 (Knesset member Moshe Shahal); DK (1976) 1710 (Knesset member Moshe Nissim).

and that it would have authorized the Israeli Supreme Court to strike down legislation deleterious to both human and minority rights.[213] Basic Law: Legislation Bill, however, was never enacted precesily because it would have answered many of the most fundamental questions and controversies regarding Israel's constitutional framework. The two major stumbling blocks were the general entrenchment clause and the empowerment of the Supreme Court to engage in judicial review.

Since the enactment of Basic Law: The Knesset, the Knesset included entrenchment clauses requiring special majorities for amending or repealing specific provisions included in Basic Laws.[214] This was done in spite of the intense moral, political, and legal controversy over the competency of the Knesset to entrench these provisions. A whirlwind of questions arose. Was it proper for a simple majority of Knesset members to entrench provisions that would require a special majority for amendment in the future? The question whether the Knesset can entrench specific provisions and, thus, bind its successors was intertwined with other fundamental questions. Does the Knesset possess a constituent authority? Is the Knesset's authority premised on the doctrine of parliament sovereignty which prevents such entrenchment? There were more constitutional questions of the first order.

Since the *Bergman v. Minister of Finance*[215] decision of 1969 and subsequent decisions of the Supreme Court,[216] there has been full legal recognition of some of the entrenched provisions included in Basic Law: The Knesset, particularly those that require a majority of sixty-one Knesset members for an amendment. That recognition from the Supreme Court, however, was given without resolving disputes over the constituent powers of the Knesset or providing a general theory of entrenchment. Hence, some Knesset members

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[213] *See* DK (1993) 4305 (Knesset member David Zucker); DK (1993) 4307 (Knesset member Avraham Poraz); DK (1993) 4312 (Knesset member Dan Meridor); DK (1977) 959 (Knesset member Moshe Shahal); DK (1977) 5 (Knesset member Leon Dycian); DK (1977) 4 (Knesset member Eliezer Ronnen); DK (1977) 4 (Knesset member Shmuel Tamir); DK (1976) 1710 (Knesset member Yoram Aridor); DK (1976) 1705 (Minister of Justice Haim Joseph Zadok).

[214] For example, section 4 of Basic Law: The Knesset states: "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset." Basic Law: The Knesset, 1958, S.H. 69.

[215] HCJ 98/69 Bergman v. Minister of Finance [1969] IsrSC 23(1) 693.

[216] HCJ 141/82 Rubinstein v. Knesset Speaker [1982] IsrSC 27(3) 141; HJC 246/81 Derech Eretz Assoc. v. Broad. Auth. [1981] IsrSC 35(4) 1; HCJ 60/77 Ressler v. Chairman of Cent. Elec. Comm. [1977] IsrSC 31(2) 556; HCJ 148/73 Kaniel v. Minister of Justice [1973] IsrSC 27(1) 794.

believed that the *Bergman* decision did not end the debate over the legal and political legitimacy of entrenched provisions.[217]

In the deliberation over the proposed Basic Law: Legislation these controversies have been reanimated. Some Knesset members questioned the democratic legitimacy of entrenched provisions;[218] some argued against the legal and political legitimacy of a simple majority requiring in the future a special majority for amending entrenched provisions;[219] some Knesset members have questioned the need to extend the entrenchment beyond the requirement of special majority of sixty-one Knesset members;[220] and some Knesset members fear that providing entrenchment to all existing Basic Laws may result in entrenching provisions that the Knesset never considered worthy of entrenchment.[221] Several Knesset members also fear that some might interpret the act of providing general entrenchment as completing the task of enacting a constitution, although much remains to be done before that task is complete.[222] These disagreements are another version of the traditional debate over the Knesset's constituent powers and the doctrine of the Knesset's supremacy or sovereignty. The position that the Knesset possesses either constituent authority or parliamentary sovereignty does not *necessarily* determine the nature or extent to which the present Knesset can bind its successors.[223] Nevertheless, the

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[217] DK (1977) 955–57 (Knesset member Benjamin Halevi).

[218] *See* DK (2000) 7041 (Knesset member Nissim Zeev); DK (1977) 6 (Knesset member Mordechai Ben-Porat); DK (1976) 1709 (Knesset member Ari Ankorin).

[219] *See* DK (2001) 3557 (Knesset member Yigal Bibi); DK (1993) 4306 (Knesset member Michael Eitan); DK (1977) 955–57 (Knesset member Benjamin Halevi); DK (1977) 6 (Knesset member Mordechai Ben-Porat); DK (1976) 1710 (Knesset member Moshe Nissim).

[220] Some of the versions of Basic Law: Legislation require a two-thirds majority (eighty members), while the recent version requires a majority of seventy members. *See* Basic Law: Legislation Bill 2000, HH, 342 §§ 3–4. The proponents of the bill opted for these provisions to limit governments that usually can command a majority of sixty-one Knesset members as part of a governing coalition. *See* Klinghoffer, *supra* note 173, at 143–44; *see also* DK (1977) 18 (Knesset member Ehud Olmert); DK (1976) 1706 (Knesset member Yoram Aridor); DK (1977) 4 (Knesset member Lion Dizian). Many Knesset members, however, questioned this logic and asked what makes a majority based on seventy Knesset members superior to a majority based on sixty-one or sixty-two Knesset members. DK (2000) 7041 (Knesset member Nissim Zeev); DK (1977) 8 (Knesset member Simha Freedman).

[221] The recent Legislation Bill postpones the entrenchment of all Basic Laws for a period of five years from the time the bill comes into force (section 17). Basic Law: Legislation Bill, 2000, HH, 341. During this period, a simple majority will suffice for enacting, amending, or repealing a Basic Law. The draftsmen of the bill believe that this period should be utilized for identifying Basic Laws that should not be entrenched. *Id.*

[222] DK (2001) 3543 (Knesset member Benjamin Elon).

[223] For example, this is evident from the judges' position in CA 6821/93 United Mizrahi Bank v. Migdal Communal Village [1995] IsrSC 221, 264–65.

Knesset's inability to proceed with the enactment of Basic Law: Legislation Bill was, at least in part, due to disagreements over these fundamental questions. The provisions declaring that the Knesset possesses constituent powers in accordance with the Harari Resolution, which were included in previous Basic Law: Legislation Bills, were omitted from the recent version of Basic Law: Legislation Bill.[224] Yet, this bill was not passed because the disagreement was not confined to the fundamental question whether the Knesset possesses constituent powers, but concerned the legitimacy of preventing a majority of sixty-one Knesset members from amending Basic Laws.

The second major stumbling block that prevented the enactment of Basic Law: Legislation Bill concerned the role of the Supreme Court. Some versions of the Legislation Bill envisioned the Supreme Court, sitting in an extended panel, as a constitutional court entrusted with the task of judicial review.[225] While some Knesset members objected to the idea of judicial review as a whole,[226] most Knesset members did not object to it as such. They objected to giving this power to the Supreme Court as currently composed, which they viewed as unrepresentative, and to the Court under its current system of appointment, which they viewed as unfair.[227] Like the provisions relating to the constituent powers of the Knesset, the Constitutional, Legislative, and Judicial Committee omitted the provisions dealing with the role of the Supreme Court, promising to discuss these issues when the whole issue of completing the constitution would be brought before the Knesset for deliberations.[228] This, again, did not result in the passage of the bill. Many Knesset members believed that enacting Basic Law: Legislation Bill without resolving these questions would

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[224] *See* DK (2000) 7037 (Knesset member Amnon Rubinstein).

[225] *See* Basic Law: Legislation Bill, 1992, HH, 147 § 15 (amending Basic Law: The Judiciary, 1984, S.H. 78); Basic Law: Legislation Bill, 1978, HH, 326 §§ 13–14; Basic Law: Legislation Bill, 1975, HH, 133 § 12.

[226] *See* DK (1992) 4305–06 (Knesset member Michael Eitan); DK (1977) 13–14 (Knesset member Meir Pa'il); DK (1977) 9 (Knesset member Shlomo-Jacob Gross); DK (1977) 8–9 (Knesset member Simcha Freedman); DK (1977) 7 (Knesset member Avraham Levenbraun); DK (1976) 1710–11 (Knesset member Moshe Nissim); DK (1976) 1710 (Knesset member Ari Ankorin).

[227] *See* DK (2001) 3558 (Knesset member Ahmad Tibi); DK (2001) 3560 (Knesset member Michael Eitan); DK (2001) 3556 (Knesset member Yigal Bibi); DK (2001) 3552 (Knesset member Moshe Gafni); DK (2001) 3549 (Knesset member Yuval Steinitz); DK (2001) 3546 (Knesset member Zevulun Orlev); DK (1977) 961–63 (Knesset member Zerach Warhaftig).

[228] *See* Basic Law: Legislation Bill, 2000, HH, 341; Basic Law: Legislation Bill, 1993, HH, 89; *see also* DK (2000) 7037 (Knesset member Amnon Rubinstein).

have harmful consequences and they did not trust the President of the Supreme Court, Aharon Barak, in particular, to restrain the Court from changing the constitutional status quo.[229]

The tendency to leave things undecided also manifested itself in the third persistent issue in framing the Israeli Constitution—the need for a special proceeding to adopt and affirm the future constitution. The constitution is commonly treated as the manifestation of the will of the people as a whole.[230] Hannah Arendt, for example, argued that the truly revolutionary element in modern constitutions was that they were adopted, not by the government, but by the people constituting themselves.[231] The American and French constitutions were characterized not only by the formation of a limited government but also by the action of constituent assemblies and special conventions whose sole task was to draft a constitution to be approved by the people.[232] Framing a modern constitution does not merely limit the powers of government; rather, it is a positive expression of the people's values, goals, and aspirations. Lawyers and judges in Israel sometimes tend to dismiss or overlook this aspect of a constitution, perhaps because of Israel's unique constitutional circumstances. Israel never adopted a complete constitution that was the true manifestation of its People as a whole through a constitutional assembly. The role of lawyers and judges, instead, focused on the identification of constitutional norms and their implementation.[233] This aspect of constitution-making, however, was not entirely forgotten. Throughout the 1970s and the 1980s and even after the Constitutional Revolution of 1992, many scholars, while acknowledging that the Knesset possessed authority to enact a constitution, believed that it would be better to use special procedures for the final approval of the constitution.[234] These

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[229] On the fear from unintended consequences by the Supreme Court's interpretation of Basic Law: Legislation Bill, see DK (2001) 3552 (Knesset member Moshe Gafni); DK (2001) 3543 (Knesset member Benyamin Elon).

[230] *See, e.g.*, ACKERMAN, *supra* note 93, at 6–7 (discussing the United States Constitution); LAHAV, JUDGMENT IN JERUSALEM, *supra* note 11, at 92 (same).

[231] ARENDT, *supra* note 106, at 143.

[232] *Id.*

[233] Even when lawyers and judges recognize that they create constitutional norms, they argue, at most, that this creation follows the People's will. Their institutional role prevents them from drafting constitutional norms and bringing them to the People for genuine deliberation and approval. The active and real participation of the People in creating constitutional norms necessarily diminishes the role of the judge in this process.

[234] *See, e.g.*, Shapira, *Judicial Review*, *supra* note 76, at 441.

scholars and public representatives as well viewed the ordinary legislative process of gradual adoption of Basic Laws, which has been prolonged beyond five decades now, as insufficient. Several procedures were proposed for the adoption of a constitution. Some scholars suggested that a draft constitution passed by the Knesset could be submitted to a public referendum or similar means of popular ratification.[235] Other scholars and some public representatives offered to enact the complete constitution by a special majority of the Knesset.[236] Another proposal was for the adoption of a complete constitution by the Knesset "acting [explicitly] as a constituent assembly."[237]

The fact that, to date, no method has ultimately been selected reflects the absence of a broad consensus either about fundamental constitutional questions or about practical methods for resolving these issues. The wide range of proposals shows that there is only a slim chance of solving the problem of the legitimacy of the Knesset to approve a complete constitution. On the one hand, ordering a referendum on the constitution would create a new avenue of legitimization. On the other hand, the adoption of a complete constitution by the Knesset declaring that it operates as a constitutional assembly would endorse the theory that the Knesset operates in two capacities: constituent and legislative. According to this proposal, the need for popular ratification would be satisfied by the Knesset acting to express the will of the People.

Although the overall constitutional circumstances in Israel did not change since the 1980s, some major developments in the promulgation of Basic Laws occurred. In August 1980, Basic Law: Jerusalem, Capital of Israel was introduced by Geula Cohen, a Knesset member from the Tehiya party, and enacted by the Ninth Knesset.[238] Basic Law: Jerusalem, the Capital of Israel secured the status of unified Jerusalem as the capital of the State and as "the seat of the President of the State, the Knesset, the Government and

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[235] BENJAMIN AKZIN, SUGYOT BE-MISPHAT UVI-MEDINAWUT 168–69 (1966); ELIAHU S. LIKHOVSKI, ISRAEL'S PARLIAMENT: THE LAW OF THE KNESSET 219 (1971); RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 370; Nimmer, *supra* note 85, at 1253; Shapira, *Judicial Review*, *supra* note 76, at 441.

[236] Shlomo Goberman, *The Authority of the Court to Void Laws*, *in* CONSTITUTIONAL REFORM IN ISRAEL—SYMPOSIUM JUNE 1994, at 76, 79 (1994); Klinghoffer, *Establishment*, *supra* note 21, at 141.

[237] Shapira, *Judicial Review*, *supra* note 76, at 441; *accord* Claude Klein, *A New Era in Israel's Constitutional Law*, 6 ISR. L. REV. 376, 391 (1971).

[238] Goldberg, *supra* note 28, at 222; *see* Basic Law: Jerusalem, the Capital of Israel, 5740-1980, 34 LSI 209 (1980) (Isr.).

the Supreme Court."[239] It further states that "[t]he Holy Places shall be protected, [and that t]he Government shall provide for the development and prosperity of Jerusalem."[240] This Basic Law did not contain any innovation apart from declaring that "Jerusalem, complete and united, is the capital of Israel."[241] The "adoption [of this Basic Law created] resentment in the international community," who feared that the Basic Law was meant to strengthen Israeli control over the entire city and prevent future negotiations and compromise over Jerusalem with the neighboring Arab states.[242] Some scholars viewed this Basic Law as the formal manifestation of the desire to base the territorial claims of Zionism on religious, traditional, and historical grounds that belonged to Jewish particularism, as opposed to the universal elements of Zionism.[243] This "was the first Basic Law whose source was a private [Knesset m]ember's [b]ill,"[244] and the first Basic Law to be endorsed enthusiastically by the religious factions in the Knesset.[245] In spite of the divisive nature of the new Basic Law, however, it neither resolved old controversies nor created new ones over the conditions of legitimacy of the gradual enactment of Basic Laws. There were three reasons for the marginal effect of this Basic Law. First, it was not accompanied by any entrenchment provision or mechanism and was perceived by many as the product of ordinary politics, if not political manipulation.[246] Second, many scholars and statesmen agreed that this law would "not prevent the government from negotiating on the status of the Holy Places, nor on municipal arrangements."[247] Third, at the time the Basic Law was enacted, the prospect of a peaceful resolution of the Arab-Israeli conflict, which would include the future of Jerusalem, seemed very

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[239] Basic Law: Jerusalem, the Capital of Israel, 5740-1980, 34 LSI 209 (1980) (Isr.).

[240] *Id.*

[241] *Id.*; *see* Ruth Lapidoth, *Jerusalem—Some Jurisprudential Aspects*, 45 CATH. U. L. REV. 661, 670 (1996) (stating that "the contents of the [Basic Law: Jerusalem, the Capital of Israel] does not include any innovation").

[242] Lapidoth, *supra* note 241, at 670 (discussing the resentment of the international community to Basic Law: Jerusalem, the Capital of Israel).

[243] *See* HOROWITZ & LISSAK, *supra* note 16, at 113–14, 139.

[244] Goldberg, *supra* note 28, at 222. It should be noted that the government, which was then led by Prime Minister Menahem Begin, supported the proposed bill. *Id.*

[245] *Id.*

[246] DK (1980) 4062 (Knesset member Meir Talmi); DK (1980) 4054 (Knesset member Yossi Sarid); DK (1980) 4051 (Knesset member Chyka Grossman-Orkin); DK (1980) 4040 (Knesset member Uri Avnery).

[247] Lapidoth, *supra* note 241, at 678 (footnote omitted).

remote.[248] In light of this expectation, there was a very broad consensus among the Jewish public that a unified Jerusalem must be the capital of Israel.[249]

Another major development was the enactment, by the Tenth Knesset, of Basic Law: Adjudication in February 1984.[250] Basic Law: Adjudication recognized the judicial authorities of the State and established their independence, jurisdictions, and interrelations.[251] This Basic Law dealt with three major issues with potentially far-reaching constitutional consequences: the role of the Supreme Court,[252] the system of appointment of judges,[253] and the authority of religious courts.[254] The enactment of this Basic Law was only made possible by a compromise and a set-aside. The compromise had to do with the authority of religious courts vis-à-vis the Supreme Court. The original bill did not include any provisions on religious courts; this prompted the opposition of the religious parties and caused a delay in its enactment for several years.[255] The enactment of the bill was made possible after a compromise giving jurisdiction to the religious courts was included in the Basic Law.[256] The set-aside had to do with the question of explicitly

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[248] *See id.* at 676–78.

[249] It should be noted, however, that Basic Law: Jerusalem, the Capital of Israel could still influence the process of framing an Israeli constitution. If Basic Law: Legislation Bill is enacted, it will probably entrench, explicitly or implicitly, all existing Basic Laws, including Basic Law: Jerusalem, the Capital of Israel. Some constitutional scholars already doubt the ability of the Knesset to entrench Basic Laws that do not concern the basic values, principles, rights, and institutions of the State. *See* RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 395.

[250] Basic Law: Adjudication, 1984, S.H. 78.

[251] *See* SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 88 (1994).

[252] Some Knesset members argue that there is a need for a redivision of jurisdictions and that some matters (like child custody and matters concerning local governments and municipalities) should be transferred to the district courts. *See id.* at 89–90. Others argue against the overall trend of the judicialization of Israel's public and social life and suggest limiting the citizens' ability to petition the Supreme Court sitting as a High Court of Justice. *See* DK (1980) 788 (Knesset member Uri Avnery); DK (1980) 786–88 (Knesset member Amnon Rubinstien); DK (1980) 785 (Knesset member Gideon Hausner); DK (1980) 784 (Knesset member Zerach Warhaftig).

[253] A major part of the changes recommended by Knesset members in the system of appointment of judges was meant to reduce the political influence of the Judges Appointment Committee. Some suggested assigning law school deans to the committee, while others recommended reducing the number of politicians in the committee or appointing the President of the Supreme Court as the committee's chairman. *See* DK (1984) 1736 (Knesset member Shulamit Aloni); DK (1980) 789 (Knesset member Uri Avnery); DK (1980) 789 (Knesset member Mordechai Virshubski).

[254] *See* SHETREET, *supra* note 251, at 89.

[255] *See* DK (1980) 784 (Knesset member Zerach Warhaftig).

[256] *See* DK (1980) 1309 (Minister of Justice Shmuel Tamir).

granting the Supreme Court the power of judicial review over primary legislation. Instead, section 15(c) of Basic Law: Adjudication embraced section 7 of the Courts Law of 1957 and established a very wide jurisdiction providing that the "Supreme Court sitting as a High Court of Justice shall deal with matters in which it deems necessary to grant relief in the interest of justice, and which are not within the jurisdiction of any other court or tribunal."[257] All of the political parties, including the religious parties, accepted this wording because it left the question of judicial review over primary legislation undecided. On the one hand, it did not give the Supreme Court the power of judicial review. On the other hand, it did allow the Court to continue to develop the institution of judicial review, as set forth in the *Bergman* decision and other decisions in the 1970s and 1980s.[258] This Basic Law was also not entrenched, which made it possible for the Knesset to amend or revise it by a simple majority. Thus, while the enactment of Basic Law: Adjudication was a significant addition to the evergrowing arrangement of Basic Laws, the Knesset clung to the constitutional status quo of deciding not to decide.

C. The Enactment of the New Basic Laws, the Constitutional Revolution, and Israel's Constitution-Making at the Present Time

The most significant development in the gradual adoption of Basic Laws in the course of the last twenty years was the enactment in March 1992, during the last session of the Twelfth Knesset, of two new Basic Laws—Basic Law: Freedom of Occupation[259] and Basic Law: Human Dignity and Liberty.[260] They enshrined several human rights in Basic Laws, among them: dignity, liberty, property, freedom of occupation, mobility, and privacy.[261] Since the adoption of these two Basic Laws, many legal scholars argue that Israel's constitutional circumstances have fundamentally changed and that Israel has undergone a "Constitutional Revolution,"[262] which

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[257] Basic Law: Adjudication, 1984, S.H. 78 (author's translation).

[258] Under this compromise, the Knesset created a system of appointment of judges that would preserve the independence of the judicial branch and the professional nature of the courts. *See* SHETREET, *supra* note 251, at 87.

[259] *See* Basic Law: Freedom of Occupation, 1992, S.H. 114, *repealed by* Basic Law: Freedom of Occupation, 1994, S.H. 90.

[260] *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

[261] *See* Basic Law: Freedom of Occupation, 1994, S.H. 90; Basic Law: Human Dignity and Liberty, 1992, S.H. 150, *amended by* Basic Law: Freedom of Occupation, 1994, S.H. 90.

[262] Aharon Barak, *The Constitutional Revolution: Protected Basic Rights*, 1 MISHPAT

resulted in a formal constitution.[263] The real question, however, is whether these new Basic Laws signified a fundamental change in the constitutional tactic of deciding not to decide. The argument I will try to substantiate in this chapter is that the enactment of these two new Basic Laws, although definitely advancing the project of gradual adoption of Basic Laws, did not change Israel's overall constitutional circumstances. The enactment of the new Basic Laws did not signify a deviation from the constitutional tactic of non-decision and, in fact, was the direct implementation of this tactic.

The enactment of the new Basic Laws was made possible after Knesset member Amnon Rubinstein, a prominent constitutional law professor, proposed the gradual implementation of human rights provisions.[264] Hence, instead of putting forward the comprehensive Basic Law: Rights of the Individual and of the Citizen Bill, which had been repeatedly proposed in the 1970s and the 1980s, Rubinstein decided to "atomize" the enactment of basic human rights and civil liberties.[265] His premise was that only certain rights were controversial and that a broad consensus could be reached on the less controversial rights.[266] This strategy postponed the enactment of controversial rights (i.e., the right to equality, freedom of speech, freedom of association, freedom of and from religion, social rights, and economic rights) to a later date. In that sense, Rubinstein's approach dovetailed perfectly with the tradition, which was followed since the founding of the State of gradual adoption of Basic Laws and "deciding not to decide." Since no agreement could be reached in the formative years as to a complete constitution, it was decided not to decide and to establish Israel's constitutional

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UMIMSHAL 9 (1992) [hereinafter Barak, *Constitutional Revolution*]; Asher Maoz, *Constitutional Law: The Constitutional Revolution, in* THE ISRAEL LEGAL YEARBOOK, 1996, at 215 (Ariel Rozen-Zvi ed., 1997). *But see* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238, 242 (1992) (describing it as as "mini-revolution"). For a critical assessment of the use of the term Constitutional Revolution in conjunction with the enactment of the new Basic Laws, see Gary Jeffrey Jacobsohn, *After the Revolution*, 34 ISR. L. REV. 139 (2000).

[263] Barak, *The Economic Consitution*, supra note 2, at 358; Rubinstein & Medina, *The Constitution of the State of Israel*, *supra* note 2, at 355.

[264] *See* DK (1991) 1235 (Knesset member Amnon Rubinstein).

[265] Yehudit Karpe, *Basic Law: Human Dignity and Liberty—A Biography of Power Struggles*, 1 MISHPAT UMIMSHAL 324, 338 (1993).

[266] DK (1992) 1532 (Knesset member Amnon Rubinstein); *see* RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 919; Barak-Erez, *supra* note 109, at 314–15; Karpe, *supra* note 265, at 338; Kretzmer, *supra* note 262, at 238–39. In regard to the positive approach of the religious parties in response to the atomization of the bill of rights, see Goldberg, *supra* note 28, at 224.

arrangements gradually. Now, in light of disagreements in regard to a complete bill of rights, it was decided in the first phase to enact only rights that enjoyed a broad consensus.[267]

The deliberate atomization of human rights was strongly criticized by public representatives[268] and legal scholars[269] who viewed the new Basic Laws as enshrining a questionable worldview while ignoring the interest and welfare of considerable segments of Israeli society. Some public representatives even questioned the democratic legitimacy of the new Basic Laws and argued that their enactment amounted to usurpation of Knesset powers and the crowning of the Supreme Court instead.[270] Postponing the enactment of important basic human rights was not the only issue left undecided. The new Basic Laws did not contain any provisions establishing a constitutional court entrusted with the role of safeguarding the enumerated rights. Furthermore, the Basic Laws neither declared themselves to be part of Israel's constitution nor did they mention the Knesset's constituent power or any alternative constitutional framework under which they came into force. Rather, their declared purpose was to "protect a person's dignity and liberty to anchor in a Basic Law the values of the State of Israel

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[267] *See* DK (1992) 3782 (Knesset member Uriel Lynn); DK (1992) 1532 (Knesset member Amnon Rubinstein). One, however, should not conclude that the new Basic Laws have been enacted by a broad consensus that usually characterizes constitution-making. *See infra* text accompanying notes 275–77; *see also* DK (1992) 3783 (Knesset member Michael Eitan) ("You have not reached a general agreement. You are a minority, and want to impose a statute that could be amended only by a majority of Knesset members. Are you speaking about democracy? A minority of the Knesset members seeks to legislate a statute that would deprive the Knesset of its authority." (author's translation)).

[268] For criticism in regard to the worldview enshrined by Basic Law: Human Dignity and Liberty, see DK (1992) 1529 (Knesset member Geula Cohen); DK (1991) 1245 (Knesset member Mohamad Naffa); DK (1991) 1244 (Knesset member Moshe Shahal); DK (1991) 1242 (Knesset member Mordechai Virshubski); DK (1991) 1240–41 (Knesset member Shulamit Aloni). For criticism in regard to the worldview enshrined by Basic Law: Freedom of Occupation, see DK (1992) 2605 (Knesset member Yael Dayan); DK (1992) 2604 (Knesset member Yaakov Zore); DK (1992) 2602 (Knesset member Ra'anan Cohen).

[269] The first to question the legitimacy of the new Basic Laws was Professor Ruth Ben-Israel. She argued that the Knesset members serving in the Constitutional, Legislative, and Judicial Committee that drafted the new Basic Laws did not take into account the legitimate interest of the working class. Ben-Israel, *supra* note 174, at 32–33; *see* Marmor, *Judicial Review*, *supra* note 137, at 140. *But see* Eli Salzberger & Sandy Kedar, *The Quiet Revolution—More on Judicial Review in Accordance to the New Basic Laws*, 4 MISHPAT UMIMSHAL 489, 502 (1998).

[270] "How could it be that we would enact such a law in the Knesset without being aware that the idea in the background is usurpation, taking the powers of the Knesset and the legislature and granting them to the Supreme Court." DK (1991) 1247 (Knesset member Michael Etan) (author's translation); *see also* DK (1992) 1528, 2606 (Knesset member Elyakim Ahetzni); DK (1992) 2607–08 (Knesset member Moshe Gafni).

as a Jewish and democratic state."[271] Since the new Basic Laws were enacted by a very small majority,[272] they did not engage the positive aspect of constitution-making. No special procedures were followed and no special majority was formed that could have overcome past disagreements about how to achieve popular ratification or how to symbolize the formation of a broad consensus.[273] Additionally, Basic Law: Human Dignity and Liberty did not even contain an expressed entrenchment provision that would make it open to further amendments and revisions by any future majority of the Knesset.[274] These flaws marked traditional points of disagreement, and the avoidance of any clear statement over such issues was compatible with the tradition of deciding not to decide.

Many scholars and public representatives consider the "Jewish and democratic" formula, embraced by the new Basic Laws,[275] as a substantive breakthrough that enabled these Basic Laws to be

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[271] Menachem Elon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Personal Freedom*, 17 TEL AVIV U. L. REV. 659, 663 (1993) (author's translation); *see* Karpe, *supra* note 265, at 343–44.

[272] Basic Law: Human Dignity and Liberty was enacted by a majority of thirty-two supporters while twenty-nine opposed it, and Basic Law: Freedom of Occupation was enacted unanimously, but only by twenty-three Knesset members. RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 918.

[273] *See id.* at 918 ("The effort that led to the compromise, which included a substantive concession, brought about intense criticism . . . . Although they made the enactment of the new Basic Laws possible, it is hard to argue that their enactment was based on a broad consensus." (author's translation)); *see also* Salzberger & Kedar, *supra* note 269, at 499 ("It should be noted, that in regard to the manner in which constitutional norms or entrenched rights should be adopted, the acceptance of our line of argument rejects completely the manner in which Basic Laws are enacted in Israel. The main idea of this line of argument is that a constitution or entrenched rights should represent a consensual decision-making procedure which is isolated from everyday political struggle." (author's translation)).

[274] *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150, *amended by* Basic Law: Freedom of Occupation, 1994, S.H. 90. Such a provision was included in the Bill but was dropped at the second voting stage. RUBINSTEIN & MEDINA, ISRAELI CONSTITUTIONAL LAW, *supra* note 186, at 921–22. This omission was not accidental. Knesset members who opposed this provision based their position on the opposition to a written constitution, the opposition to judicial review, and the illegitimacy of requiring a special majority to amend a statute enacted by a simple majority. *See* DK (1992) 3789 (Knesset member Michael Eitan); DK (1992) 3787 (Knesset member Avraham Ravitz); DK (1992) 1236 (Knesset member Yitzhak Levy). On the legal significance of the entrenchment provision, see DK (1991) 1236 (Knesset member Amnon Rubinstein) ("It should be noted . . . without section 10 [the entrenchment provision of Basic Law: Human Dignity and Liberty], which is actually not an entrenchment since requiring [sixty-one] Knesset members is not entrenchment, . . . this law does not bear any meaning." (author's translation)).

[275] Section 1A of Basic Law: Human Dignity and Liberty states: "[T]his Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." Basic Law: Human Dignity and Liberty, 1992, S.H. 150, *amended by* Basic Law: Freedom of Occupation, 1994, S.H. 90.

enacted.[276] The adoption of this formula, however, did not amount to a substantive normative resolution on either of the issues that led to the failure to adopt a constitution. According to this formula, Jewish and democratic values give rise to the enumerated rights and freedoms that can be infringed upon only to protect these values. The real question has always been not only what each of these values requires but also how to reconcile the tension between these two values. The new Basic Laws do little to resolve this tension. The term "Jewish values" has many senses and meanings, some of which contradict one another. Are "Jewish values" equivalent to Jewish religious values? To Jewish secular values? To Jewish national values? Or maybe they are equivalent to Jewish universal values? The new Basic Law does not provide any explanation. The term "democratic values" also has more than one meaning. Are democratic values defined purely in terms of formal electoral arrangements (i.e., majority rule and equal suffrage)? Or in terms of substantive arrangements (i.e., protecting minorities and basic human rights)? Are democratic values interpreted according to the perception of a liberal democracy or in accord with the worldview of republican democracy? How to reconcile Jewish values and democratic values has also been the source of intense controversy. Some scholars perceive this formula as an attempt to square the circle and argue that it consists of an inherent contradiction.[277] Other scholars argue that the two concepts can be reconciled and offer different models that combine Jewish values with democratic values.[278]

While not wishing to portray these terms as meaningless or as empty slogans, it is clear that invoking the values of a "Jewish and

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[276] Karpe, *supra* note 265, at 341–42.

[277] *See* Avigdor Levontin, *"Jewish and Democratic" – Personal Reflections*, 19 TEL AVIV U. L. REV. 521 (1995); Yoav Peled, *Will Israel Be a State of Its Citizens on Its 100th Anniversary?*, 17 BAR-ILAN STUD. 73 (2002).

[278] The volume of academic writings that attempt to reconcile the Jewish foundation and the democratic foundation of Israel's legal system is monumental. I will note a few sources only to demonstrate the vast variety of positions, perceptions, approaches, and formulas to reconcile Jewish values and democratic values. *See generally* AHARON BARAK, THE JUDGE IN A DEMOCRACY 87–93 (2004) [hereinafter BARAK, JUDGE IN A DEMOCRACY]; Ruth Gavison, *Jewish and Democratic State—Political Identity, Ideology and Law*, *in* JEWISH AND DEMOCRATIC STATE 171 (Daphne Barak-Erez ed., 1996); Asa Kasher, *Jewish and Democratic State: Philosophical Outline*, *in* A JEWISH AND DEMOCRATIC STATE 277 (Daphne Barak-Erez ed., 1996); Elon, *supra* note 271; Asher Maoz, *The Values of a Jewish and Democratic State*, 19 TEL AVIV U. L. REV. 547 (1995); Ariel Rozen-Zvi, *"A Jewish and Democratic State": Spiritual Parenthood, Alienations and Symbiosis—Can We Square the Circle?*, 19 TEL AVIV U. L. REV. 479 (1995).

democratic state" would inevitably involve endless disputes about their proper sense and meaning. Since the rift within the different factions of Zionism is motivated by the tension between Jewish particular elements and democratic universal elements[279] and because the compatibility between the democratic and the Jewish nature of the State has been and is a cornerstone of all factions and parties, it is easy to understand why this formula gained support. However, the adoption of the "Jewish and democratic" formula by the new Basic Laws does not amount to a substantive constitutional resolution of how to reconcile Jewish and democratic values. This fundamental dispute prevented the enactment of a constitution in the formative years. The enactment of the new Basic Laws did not resolve it, but rather left things undecided in accordance with the well-founded tradition of Israeli constitutional formation.

Despite these flaws, Judge Barak, in a series of articles and in his book *Interpretation in Law*, argues that by enacting the two new Basic Laws, Israel underwent a "Constitutional Revolution"[280] and that human rights acquired a "constitutional force above the regular statutes."[281] In 1995, following the enactment of the two new Basic

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[279] *See supra* notes 14–15 and accompanying text.

[280] 3 AHARON BARAK, INTERPRETATION IN LAW 355 (1994) [hereinafter BARAK, INTERPRETATION IN LAW]; Barak, *Constitutional Revolution*, *supra* note 262, at 12.

[281] Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3, 3 (1997) [hereinafter Barak, *Constitutionalization of the Israeli Legal System*]; *accord* Aharon Barak, *Protected Human Rights: Extension and Limitations*, *in* KLINGHOFER'S BOOK ON PUBLIC LAW 163 (Itzhak Zamir ed., 1993). In regard to the scope of rights protected by the new Basic Laws, Judge Barak argued that the fact that some rights were not explicitly mentioned in the text of the new Basic Laws does not necessarily exclude them from constitutional protection. *See* Barak, *Constitutionalization of the Israeli Legal System*, *supra*, at 3 (stating that "most were protected by the case law of the Supreme Court" and "were already protected, prior to the constitutionalization"). According to Judge Barak, a constitution, like any other normative text, should be interpreted according to its overall purpose. *See id.* at 5. Under this approach, the term "human dignity," mentioned in Section 1A of Basic Law: Human Dignity and Liberty, encompasses, among other values, equality, freedom of speech, freedom of religion, and freedom of association. *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150, *amended by* Basic Law: Freedom of Occupation, 1994, S.H. 90. For an extensive analysis of the scope of rights protected by the new Basic Laws, see Hillel Sommer, *The Non-Enumerated Rights: On the Scope of the Constitutional Revolution*, 28 MISHPATIM 257 (1997). Furthermore, in regard to the second flaw, Judge Barak dismissed the claim that Basic Law: Human Dignity and Liberty does not possess normative superiority due to the absence of an explicit entrenchment provision. Barak, *Constitutional Revolution*, *supra* note 262, at 21. Judge Barak based his conclusion on the existence of section 8, also known as "the limitation provision," which states that legislation enacted after the Basic Law came into effect will have to meet certain requirements stipulated there. *Id.* The purpose of the limitation provision, according to Judge Barak, is to limit the legislative authority of the Knesset. *Id.* This purpose will not be promoted if a later ordinary law could harm a human right enshrined by the Basic Law without satisfying the requirements of the limitation

Laws and these academic deliberations, the Court was called to decide *United Mizrahi Bank v. Migdal Communal Village*.[282] Many fundamental constitutional questions were raised, discussed, and determined, necessarily and unnecessarily, by a bench of nine Supreme Court Judges. To make a 367-page story short, the Supreme Court determined that the statute, which was accused of being unconstitutional, did not clash with Basic Law: Human Dignity and Liberty since it survived the requirements of the limitation clause.[283] The *Migdal* decision, however, is important, not because of its operative result, but because of the constitutional theory it encompasses. Judge Barak, joined by a majority of the Court, outlined a theory that since Israel achieved, since 1992, full-fledged constitutional review and that Basic Law: Human Dignity and Liberty enjoys normative superiority; hence, new legislation that infringes upon rights protected by the Basic Law must satisfy the requirement of the limitation provision.[284] Since the *Migdal* decision, opposition in the Supreme Court to the Constitutional Revolution faded away, and in a few cases, legislation that infringed upon rights protected by the new Basic Law was invalidated.[285] In addition, some decisions of the Supreme Court declared that all Basic Laws enjoy normative superiority to ordinary legislation.[286]

The reactions to the *Migdal* decision and to the Constitutional Revolution came quickly. From one side, the traditional supporters of the idea of a written constitution[287] welcomed the *Migdal* decision with open arms and, while noting few remarks and suggestions,[288] applauded the Supreme Court for carrying the Constitutional Revolution to its promised destiny—a formal constitutional

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provision.

[282] CA 6821/93 United Mizrahi Bank v. Migdal Communal Vill. [1995] IsrSC 49(4) 221.

[283] *Id.* at 349.

[284] *Id.* at 294, 351–52, 447–48. Judge Cheshin was the only judge who dissented. *See id.* at 551–63 (Chesin, J., dissenting).

[285] *See, e.g.*, HCJ 1030/99 Knesset Member Oron v. Knesset Speaker [1999] IsrSC 56(3) 640; HCJ 1715/97 Bureau for Inv. Advisors v. Minister of Fin. [1997] IsrSC 51(4) 367; HCJ 6055/95 Zemah v. Minister of Def. [1995] IsrSC 53(3) 241.

[286] HCJ 212/03 Herut v. Chairman of the Election Comm. to the 16th Knesset [2003] IsrSC 57(1) 750; HCJ 3434/96 Hofnung v. Knesset Speaker [1996] IsrSC 50(3) 57.

[287] The *Migdal* decision in fact adopted Professor Klein's thesis, as presented in Klein, *supra* note 237, and overruled the decisions in HCJ 148/73 Kaniel v. Minister of Justice [1973] IsrSC 27(1) 794 and HCJ 60/77 Ressler v. Chairman of Cent. Elections Comm. [1977] IsrSC 31(2) 556. For an extensive examination of the traditional positions of the supporters of the constitutional phase, see Claude Klein, *How Did Everything Start? The Bergman Decision: First Reactions*, 3 ALEI MISHPAT 391 (1994).

[288] *See, e.g.*, Claude Klein, *After the Bank Hamizrahi Case – The Constituent Power as Seen by the Supreme Court*, 28 MISHPATIM 341 (1997).

regime.[289] From the other side, scholars criticized the *Migdal* decision and the Constitutional Revolution. Moshe Landau, the retired President Judge of the Supreme Court, called the *Migdal* decision an "academic seminar"[290] and argued that in light of the Supreme Court's final ruling, the fundamental questions that were raised, discussed, and determined should have been left for further consideration.[291] In addition, Landau argued the *Migdal* decision is an attempt to construct a constitution by the jurisprudence of the Court.[292] Professor Ruth Gavison wrote that the Constitutional Revolution is a self-fulfilling prediction and explained how the discourse about a constitutional revolution obscured the fact that the political questions about a constitution for Israel were not systematically determined.[293] Professor Yoseph M. Adrey claimed that this revolution stands on flimsy foundations[294] and concluded that there is no evidence to support the claim that the Knesset operates as both a constituent and a legislative body ("the two hats theory").[295] Many writers note the shortcomings and dangers inherent in the Supreme Court's Constitutional Revolution and the difficulties of adopting a full-fledged form of judicial review under Israel's constitutional circumstances.[296] Nonetheless, these and other critical writings[297] fail to thrust a spoke in the wheel of the Constitutional Revolution and to influence the Court to overturn its

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[289] David Kretzmer, *The Path to Judicial Review in Human Rights Cases: From* Bergman *and* Kol Ha'am *to* Mizrahi Bank, 28 MISHPATIM 359, 385 (1997) ("We should thank the majority of the Supreme Court for choosing to adopt [in *Migdal*] a theory which provides the legitimacy to judicial review of statutes that infringe upon human rights." (author's translation)); *see also* Uriel Lynn, *The Basic Laws as Part of the Israeli Written Constitution*, 5 HAMISHPAT 267 (2000); Hillel Sommer, *From Childhood to Maturity: Outstanding Issues in Implementation of the Constitutional Revolution*, 1 L. & BUS. 59, 60 (2004) ("With regard to these fundamental constitutional matters [that have not yet been clearly addressed by the Supreme Court in the Constitutional Revolution], the approach should not be one of incremental progress. Rather, the Supreme Court must clarify these issues once and for all, and in doing so, clarify the principle of the Israeli constitutional order." (author's translation)).

[290] Moshe Landau, *Judicial Enactment of a Constitution to Israel*, 3 MISHPAT UMIMSHAL 697 (1996).

[291] *Id.*

[292] *Id.*

[293] Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 31.

[294] Yoseph M. Adrey, *Constitutional Revolution: Indeed?*, 3 MISHPAT UMIMSHAL 453, 454 (1996).

[295] *Id.* at 468.

[296] Yoav Dotan, *Constitution to Israel?—The Constitutional Dialog After "The Constitutional Revolution,"* 28 MISHPATIM 149, 209 (1997); Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 120–22.

[297] *See, e.g.*, Assaf Bram, *Judicial Review of Legislation: In Need of a Convincing Story*, 5 HAMISHPAT 149 (2000).

Migdal decision.

It is interesting to note the reaction of the political system to the *Migdal* decision and the Constitutional Revolution. At first, it seemed as if no one perceived any significant change, as if these events were just another phase in the endless constitutional dialog between different branches of government. But as time went on, different political sectors slowly came to grasp the dangers this revolution posed to various pre-existing legal arrangements and pressed the Knesset to protect the legislation that made them possible. As early as 1994, the Knesset tried to narrow the scope of the Constitutional Revolution; it amended Basic Law: Freedom of Occupation by inserting an "overriding clause."[298] Professor Barak called this amendment a "post-revolutionary" development and even a "counter-revolution."[299] The clause enabled the Knesset to infringe upon the right to freedom of occupation not in accord with the limitation clause if the legislation was enacted by a majority of the Knesset's members and if it explicitly stated that it was valid in spite of Basic Law: Freedom of Occupation.[300] The overriding clause was meant to pave the way for enactment of the Importing Frozen Meat Law—1994 and to forestall potential judicial scrutiny of it.[301] The move was successful. The Importing Frozen Meat Law survived judicial review. This success, however, was only partial. The Supreme Court's ruling made it clear that while the overriding clause has an effect on the substantive constitutional scrutiny employed by the Court, it does not provide an absolute judicial immunity to legislation enacted in accordance with it.[302] Another attempt to block the Supreme Court from fulfilling its constitutional revolutionary vision was the proposal to establish a constitutional court and the demand made by political factions to change the system for appointing judges to the Supreme Court.[303] This proposal was in line with the saying: "If you can't beat them, join

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[298] Basic Law: Freedom of Occupation, 1994, S.H. 90 § 8.

[299] BARAK, INTERPRETATION IN LAW, *supra* note 280, at 580.

[300] Basic Law: Freedom of Occupation, 1994, S.H. 90 § 8.

[301] *See id.*

[302] *See* HCJ 4676/94 Meatrael v. Knesset [1994] IsrSC 50(5) 15. For an extensive analysis of the amendment of Basic Law: Freedom of Occupation and the response from the Supreme Court, see Gershon Gontovnik, *Constitutional Law: Development in the Wake of the Constitutional Revolution*, 22 TEL AVIV U. L. REV. 129, 157–70 (1999).

[303] For a profound analysis of the different proposals to change the judges' system of appointment and the dilemmas faced by Israeli society in this regard, see Menachem Mautner, *Appointment of Judges to the Supreme Court in a Multicultural Society*, 19 BAR-ILAN L. STUD. 423 (2003).

them." From a historical point of view, it is this kind of response one might expect from radical judicial constitutional activity.[304] Since the values and political identity of the State of Israel are determined by the Supreme Court, political factions seek representation there so that their perceptions and worldviews will be taken into account. The academic legal community has been ambivalent about the constitutional court proposal and the demand for changes in the system of appointment to the Supreme Court; the judiciary community strongly opposed them.[305] To date, neither the proposal nor the demand resulted in a formal constitutional effect, and it is hard to conclude that they affected the jurisprudence of the Supreme Court or changed the foreseen course of the Constitutional Revolution.

Another interesting response to the *Migdal* decision by the political system could be characterized as an inflation of the Basic Law Bills. As was previously mentioned, the enactment of the new Basic Laws was not meant to end the gradual enactment of Basic Laws and the accretion of the Israeli Constitution.[306] Therefore, Basic Law: Legal Rights Bill,[307] Basic Law: Freedom of Speech and Association Bill,[308] Basic Law: Social and Economic Rights Bill,[309] and Basic Law: Legislation Bill were submitted to the Knesset.[310] Many other bills, however, appeared. Most notable were Basic Law: Special Majority Legislation Bill,[311] Basic Law: The Law in Religious Issues Bill,[312] Basic Law: Agriculture Bill,[313] Basic Law: Equal Opportunity in Education Bill,[314] Basic Law: Equal Rights to

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[304] The required analogy in this context is to the "court-packing" plan of United States President Franklin D. Roosevelt. *Compare* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 196–99 (1974) (characterizing Roosevelt's court-packing plan as the "handwriting on the wall" that motivated the United States Supreme Court's ideological shift), *with* ELY, *supra* note 113, at 46 (implying that Roosevelt's efforts were not the impetus for the Court's shift).

[305] Aharon Barak, *The Supreme Court as a Constitutional Court*, 6 MISHPAT UMIMSHAL 315 (2006).

[306] *See supra* note 75 and accompanying text.

[307] 1994, HH, 99.

[308] *Id.*

[309] For an elaborated discussion on Basic Law: Social Rights Bill, see Anat Maor, *A Lacuna in the Legal Corpus: Basic Law Social and Economic Rights Bill, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL 195 (Yoram Rabin & Yuval Shany eds., 2004).

[310] DK (2000) 3542; DK (1994) 1015.

[311] DK (1995) 5877.

[312] DK (1996) 3721.

[313] DK (1996) 3980.

[314] DK (1998) 5699.

Women Bill,[315] Basic Law: The Proclamation of the Establishment of the State of Israel Bill,[316] Basic Law: Constitution to Israel Bill,[317] Basic Law: Property Rights Bill,[318] Basic Law: Education to All Bill,[319] Basic Law: Freedom of Religion and Conscience Bill,[320] Basic Law: Right to Environmental Quality Bill,[321] Basic Law: The Return Bill,[322] Basic Law: Constitutional Court Bill,[323] Basic Law: The State of Israel Bill,[324] Basic Law: The State of Israel the State of the Jewish People Bill (Knesset member Limor Livnat's proposal),[325] Basic Law: The State of Israel the as the State of the Jewish People Bill (proposed by a group of Knesset members),[326] Basic Law: Civil Equality Bill,[327] Basic Law: Equality to the Arab Population Bill,[328] Basic Law: Limitations on the Right to Silence of Public Representative Bill,[329] Basic Law: The Right to Housing Bill,[330] and Basic Law: Referendum Bill.[331] All of these proposed new Basic Laws, however, were blocked and rejected; none succeeded in becoming law. This was, in fact, the decisive reaction of the political system to the *Migdal* decision and what was an ongoing process of gradual adoption of Basic Laws came to a grinding halt. As I wrote earlier, the major stumbling block to enacting Basic Laws and crafting a constitution was the existence of profound disagreement on substantive and structural matters.[332] Basic Laws were usually enacted by sidestepping traditional areas of constitutional disagreement. However, proposals to enact Basic Laws that enjoyed wide political support were blocked. A good example was Basic Law: Social and Economic Rights Bill. In recent years many argued

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315 DK (1998) 6036.

316 DK (1998) 6519.

317 DK (1998) 9354.

318 Submitted to the Knesset by Knesset member Roni Milue on March 29, 2000. *See* Knesset Homepage, http://www.knesset.gov.il (on file with author).

319 Submitted to the Knesset on June 5, 2000. *See* Knesset Homepage, http://www.knesset.gov.il (on file with author).

320 DK (1999) 3046.

321 DK (2000) 4736.

322 DK (2000) 8248.

323 DK (2000) 665.

324 DK (2000) 1879.

325 DK (2001) 1873.

326 DK (2001) 1873.

327 DK (2001) 3745.

328 DK (2001) 3743.

329 DK (2004) 9328, 9332.

330 DK (2004) 10540.

331 Submitted to the Knesset on March 28, 2005. *See* Knesset Homepage, http://www.knesset.gov.il (on file with author).

332 *See supra* Part III.B.

that a wide agreement could be reached on this Bill.[333] However, fears of constitutional manipulation and activist interpretation in the future by the Supreme Court prevented any advancement in the bill's enactment.[334] Even parties known for their social agenda opposed this bill. Israel was witnessing the expansion of structural disagreement over the role of the Supreme Court vis-à-vis the Knesset in any future constitution-making. Today, religious parties often cynically claim that they would oppose even the enactment of the Ten Commandments as Basic Law.[335] In other words, even if they had the opportunity to enshrine their worldview in Basic Laws, they would nevertheless decline because of the structural disagreement about the constitutional role and status of the Supreme Court.

Many of the opponents of the Constitutional Revolution acknowledged that it would be impossible to turn the wheel back by conventional means and that harsh criticism and minor amendments of Basic Laws would not deflect the State of Israel from its constitutional course. Hence, on the one hand, they decided to block any future enactment of new Basic Laws that might worsen the constitutional state of affairs (according to their worldview). On the other hand, they hoped to enact a completely new constitution that will enjoy wide support. They believed that such a constitution could repair the present faults of Israel's constitutional arrangement and check the Supreme Court. These attempts have yet to bear any actual constitutional fruits.

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[333] *See* DK (2004) 7595 (Knesset member Chaim Oron); DK (2003) 3588–89 (Knesset member Ahmad Tibi); DK (2003) 3585 (Knesset member Mohammad Barakeh); DK (2002) 4688 (Knesset member Anat Maor); DK (2002) 4687 (Knesset member Ophir Pines-Paz); DK (1997) 7568 (Knesset member Amir Peretz).

[334] *See* DK (2003) 3585 (Yair Peretz); DK (2002) 4691 (Knesset member Moshe Gafni); DK (2002) 4696 (Knesset member Nissim Zeev); DK (2002) 4689 (Knesset member Zevulun Orlev); DK (2001) 1762 (Knesset member Shaul Yahalom).

[335] For example, Knesset member David Tal observed:

> The current situation is in fact that all the religious parties have decided to oppose the enactment of Basic Laws, and even if they would propose to enact the Ten Commandments as Basic Law we would oppose . . . . If I will adopt the Ten Commandments as Basic Law and it will reach the Supreme Court, the court would interpret this Basic Law as it pleases.

DK (1999) 537 (author's translation); *see also* DK (2001) 2234 (Knesset member Areih Gamliel). This approach is different from the approach taken by religious parties in the formative period of the State—totally rejecting the idea of a constitution but feeling that it should be based on the principles of the Torah. *See supra* note 28 and accompanying text.

D. The Constitutional Dialogue, the "Decision to Decide," and Social Cooperation

Professor Yoav Dotan, in his article, *Constitution to Israel?—The Constitutional Dialog After "The Constitutional Revolution,"* examined the ways in which the *Migdal* decision and the Constitutional Revolution fit the "constitutional dialogue" between the Supreme Court and the legislative and executive branches.[336] Dotan's conclusion was that while the Constitutional Revolution has granted every participant in the constitutional dialogue "unconventional" tools to attack the decisions of other participants, the Revolution does not signify a substantial shift in the balance of powers between the different branches.[337] Doctor Gershon Gontovnik joined Dotan in the dialogue paradigm and analyzed the amendment of Basic Law: Freedom of Occupation, which was meant to narrow the extent of the Constitutional Revolution and the narrow interpretation given by the Supreme Court to this amendment as part of a continued dialogue between the different branches.[338] Gontovnik notes that "the constitutional dialog[ue] . . . of course will not end" and hopes that in the future both the Supreme Court and the Knesset will use their weapons—legislation and interpretation—wisely and with great care.[339] In my opinion, in the wake of the *Migdal* decision and the Constitutional Revolution, the constitutional dialogue paradigm between these two major branches of government does not fit Israeli constitutional law. To the contrary, it is the absence of a dialogue and the metaphors of disconnection and "breaking the rules" that best characterizes the constitution-making since the *Migdal* decision.

Until the 1980s, the Supreme Court attempted to refrain as much as possible from resolving constitutional questions of the first order.[340] This judicial decision-making approach corresponded

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[336] Dotan, *supra* note 296, at 188. For a comprehensive analysis of the relationships between the different branches of government in the United States as a constitutional dialogue, see LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

[337] Dotan, *supra* note 296, at 209.

[338] Gontovnik, *supra* note 302, at 157–70; *see also* Aharon Barak, *Partnership and Dialog Between the Legislative and Executive Branches and the Judicial Branch*, 4 NETANYA ACAD. C. L. REV. 51 (2005) [hereinafter Barak, *Parntership and Dialog*] (discussing the constitutional dialogue between the different branches of government in Israel).

[339] Gontovnik, *supra* note 302, at 169.

[340] The tactic of avoiding the resolution of important constitutional questions can be detected in a long line of precedents. *See* HCJ 141/82 Rubinstein v. Knesset Speaker [1982]

perfectly with the constitution-making tactic chosen by Israel's public representatives. Because there was a good fit between the judicial approach taken by the Supreme Court and the constitution-making tactic chosen by Israel's public representatives, the goals of fair and stable social cooperation and the protection of human rights were achieved. Furthermore, the Supreme Court's approach of contributing slowly and gradually to Israel's constitutional arrangements enabled the Knesset and the political system to examine the Court's rulings, adjust to them, and respond accordingly. This approach not only enabled a dialogue between the Supreme Court and the Knesset, but also fostered democratic deliberation and dialogue between the different factions that constitute Israeli society.[341] This deliberation concerned the constitutional arrangements that should be adopted by Israeli polity.

The enactment of the new Basic Laws corresponds perfectly with this overall tactic and tradition of deciding not to decide. However, the *Migdal* decision and the Constitutional Revolution by the Supreme Court are clear attempts to achieve a constitutional resolution and manifest the adoption of a new and foreign approach in Israeli constitutional law—"a decision to decide." In fact, in some of the Court's dissenting opinions, even prior to the enactment of the new Basic Laws, one can detect this new approach of deciding to decide and the attempt to strive towards a constitutional regime accompanied by an American-style judicial review.[342] The enactment of the new Basic Laws gave the Supreme Court the opportunity (maybe even the excuse) to almost unanimously abandon the tradition of deciding not to decide. Professor Yitzhak Zamir explains that the "decision to decide" is one of the obvious features of judicial activism.[343] It is only to be expected that the Israeli Supreme Court, which is considered one of the most activist courts in the world today, would implement an activist approach to constitutional law—the decision to decide on a clear and defined

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IsrSC 27(3) 141; HCJ 246/81 Derech Eretz Ass'n v. Broad. Auth. [1981] IsrSC 35(4) 1; HCJ 60/77 Ressler v. Chairman of Cent. Elec. Comm. [1977] IsrSC 31(2) 556; HCJ 148/73 Kaniel v. Minister of Justice [1973] IsrSC 27(1) 794; HCJ 98/69 Bergman v. Minister of Fin. [1969] IsrSC 23(1) 693.

[341] *See* Moshe Landau, *Constitution as Supreme Law for the State of Israel*, 27 HAPRAKLIT 30 (1971).

[342] *See, e.g.*, HCJ 124/89 Le'or Movement v. Knesset Speaker [1989] IsrSC 44(3) 529 (Barak, J., dissenting).

[343] Yitzhak Zamir, *Judicial Activism: The Decision to Decide*, 17 TEL AVIV U. L. REV. 647, 650 (1993).

constitutional framework for the State of Israel. Landau justly noted that the *Migdal* decision amounts to a judicial enactment of a constitution.[344] While, until the *Migdal* decision, Israeli constitution-making was characterized by the decision not to decide, in the *Migdal* decision, the Supreme Court decided to decide for Israel on a defined constitutional framework, which includes the institution of judicial review.

Professor Mautner writes that the significant changes in the jurisprudence of the Supreme Court since the 1980s, including the increased activism, should be viewed as a reaction to the collapse of the political, social, and cultural hegemony of labor Zionism.[345] Following these changes, Mautner explains, the Supreme Court took sides in the political and cultural struggle for Israel's identity in favor of the "Jewish-secular-liberal" group and transformed itself into an important device for promoting its political and cultural goals.[346] The change in the Supreme Court's approach to constitutional issues should be perceived in light of these insights. The "decision to decide" approach by the Supreme Court is an attempt to resolve the question about the nature and character of the State of Israel in favor of the Jewish-secular-liberal group. The ultimate goal the Court is trying to achieve is the establishment of a constitutional liberal democracy that grants normative superiority to human rights and authorizes the Court to review primary legislation.

It is not surprising that many people in the political system felt (and still feel) betrayed. The struggle over the nature and character of the State of Israel is not new. This struggle shaped Israel's constitution-making and led to the failure to enact a constitution. Most of the Supreme Court's prestige and status was achieved by its

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[344] Landau, *supra* note 290; *see also* Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 22. Professor Gavison notes:

> The rhetoric of Constitutional Revolution, at least as employed by President Judge Barak, is not solely a description. It is meant to enable the completion of the process, to enact a complete constitution, entrenched and superior, that includes a comprehensive bill of rights, and that grants the Supreme Court the powers of judicial review.

Id. (author's translation). Hence, I cannot agree with Professor Bendor that the *Migdal* decision "is no more judicial enactment of a constitution than is the former interpretation the judicial prevention of a constitution from the state of Israel." Ariel L. Bendor, *The Legal Status of Basic Laws*, *in* 2 BERENZON BOOK 119, 128 (2000) (author's translation). According to my approach, the activity of constitution-making is not a binary game of having a constitution or abstaining from having a formal constitution. In the middle stands the option of deciding not to decide if a constitution is necessary.

[345] Mautner, *Years of Anxiety*, *supra* note 164, at 649.

[346] *Id.*

ability to transcend party politics.[347] The *Migdal* decision, however, was justly perceived by politicians as a stepping down from the judge's bench and participating in the debate as an interested party. The Court was viewed as politically motivated even when implementing first-order constitutional norms. The Harari Resolution, which is the source of all constitutional norms, established a state of affairs in which Basic Laws are mostly the product of ordinary politics and not constitutional politics.[348] The claims about the Court's political bias gained support following Supreme Court decisions and rulings that struck down or called into question a variety of arrangements concerning state and religion.[349] Today, some political parties and factions view the Supreme Court as a political rival and are increasingly resentful of its powers.[350] Their resentment is not reserved for the Supreme Court; many felt that other political entities lured them with false promises to gain their consent to the enactment of the new Basic Laws.[351]

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[347] *See* Shapira, *Self-Restraint of the Supreme Court*, *supra* note 153, at 640. According to Shapira, in the formative years of the State, the Supreme Court consciously shaped its apolitical image by not deciding sensitive and controversial disputes. *Id.* at 640–41. This has been accomplished, Shapira explains, "through the prudential employment of a variety of avoidance devices." *Id.* at 640. On the apolitical approach taken by the Supreme Court, see Itzhak Olshan, *On the Supreme Court*, 1 MISHPATIM 287 (1969). Olshan explained that one of the first aims adopted by the Supreme Court, since its inauguration, was to earn the public trust. *Id.* at 288. Since, at that time, the judges were known to have a political background, they decided to disconnect themselves from any political activity. *Id.* The Supreme Court's image as a bipartisan and unbiased institution was strengthened when the Court gave remedy to those who have been discriminated against based on their political affiliation. *Id.*

[348] *See supra* notes 74–75 and accompanying text.

[349] The claims that one should view the Supreme Court's activity in the constitutional field as a political activity have also earned some academic foundation. *See* Gidon Sapir, *The Constitutional Judicial Proceeding as a Political Proceeding*, 19 BAR-ILAN L. STUD. 461 (2003). Sapir, however, argues that the constitutional judicial proceeding might be useful despite its substantively subjective aspect. *Id.* at 471–93.

[350] As an example of a manifestation of the perception that views the Supreme Court as a political opponent of the religious group in the struggle for Israel's political identity, Knesset member David Tal said:

> In fact, the implementation of the Constitutional Revolution is no different from the implementation of any other revolution. We are in the midst of a fearless straggle on the nature of the State of Israel, whether it sustains its Jewish character as intended by its founders or become a democratic state absent any uniqueness to the Jewish people. The question is who will decide the matter? Who will lead and shape the nature of the State of Israel in the modern age? Will it be a democratically elected body or a unelected limited oligarchy, which has been appointed by a committee? I think that at the core of the disagreement lay the will of an elitist minority to dictate to the majority of the Israeli public 'proper patterns of behavior' or as it called the rule of law.

Knesset Homepage, http://www.knesset.gov.il (on file with author) (author's translation); *see also* DK (2004) 8833 (Knesset member Yuri Shtern); DK (2004) 8830 (Knesset member Meir Porush).

[351] *See, e.g.*, DK (2002) 4691 (Knesset member Moshe Gafni).

Thus, the *Migdal* decision led to a shift in the constitution-making tactic employed by public representatives—the decision to decide. One should view the inflation of Basic Law proposals in light of this background. Political groups and factions from all across the political spectrum are doing their best to promote their narrow political agenda by enshrining it in constitutional arrangements. By attempting to enact Basic Laws that mirror their worldview, they are attempting to sway the battle over the nature of the State of Israel in their favor. Similarly, the attempt to enact a new constitution that enjoys broad support from political and public entities is an attempt to resolve and shape by a wide agreement the nature and character of the State of Israel for years to come. Nevertheless, the adoption of the new constitution-making tactic of deciding to decide by political entities and factions is not the result of a partnership in ways or goals with the Supreme Court. To the contrary, these new patterns of constitution-making could be portrayed as a protest reaction to the constitutional process led by the Supreme Court since the *Migdal* decision. In other words, the goal of the new constitution-making tactic of deciding to decide, by at least part of our public representatives, is to block the Supreme Court. It is not a constitutional "dialogue" that Israel is witnessing; rather, it is a fight—or even a war—between the Supreme Court and the Knesset over Israel's constitutional arrangements. Therefore, it is not surprising that the judiciary did not welcome these attempts by politicians to adopt the tactic of deciding to decide.[352]

This attempt by politicians to adjust to the Supreme Court's approach after the *Migdal* decision and to implement a tactic of deciding to decide ended in bitter disappointment for our public representatives. These representatives failed to shift to the tactic of

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[352] *See* Barak, *Partnership and Dialog*, *supra* note 338, at 413 ("I am convinced that the dialog between the Knesset and the court will continue. However, the signs that come from the Knesset are not good. Legislation bills are submitted, which give the feeling that their dominant goal is to contest against the courts and to undermine the public trust in them." (author's translation)). President Judge Barak in the deliberations about the enactment of a new constitution by the Israeli Democracy Institute stated:

> The question before us today is not whether to enact a constitution and judicial review over primary legislation . . . . The question before us is much narrower: is there a reason to deviate from the Migdal decision and to establish a different arrangement as to judicial review over primary legislation . . . . In essence the situation today is good and proper, and the different suggestions made here today are not; in any event they are not good enough to have us change the Migdal precedent.

Aharon Barak, *The Supreme Court as a Model of Judicial Review*, *in* MODELS OF JUDICIAL REVIEW 23 (2001) (author's translation).

deciding to decide to create a constitution. They failed because there exists in Israeli society today the same deep ideological disagreement that characterized it in the formative years. This factor prevented the enactment of a constitution and the adoption of a new constitution-making tactic, even in the post-*Migdal* decision era. Furthermore, disagreement as to the proper role and status of the Supreme Court and fear of its power to interpret constitutional texts in ways contrary to the framer's intent effectively ended the enactment of Basic Laws, closing off that process of gradually adopting a constitution.

Striving for an American-style constitutional regime dismantled not only the previously-existing political cooperation in the enactment of Basic Laws, but also the social cooperation between the various factions in general. In the past, President Judge Barak argued that the Constitutional Revolution could lead to the unification of Israeli society and to a social revolution that would make Israel a more just society.[353] But striving for a constitutional resolution led us away from the important ideal of a democratic society based on fair social cooperation. According to Rawls, a well-ordered society is characterized by social cooperation that exhibits a certain structure where "everyone [in the society] accepts and knows that the others accept the same principles" and rules according to which society operates and disputes are resolved.[354]

The Constitutional Revolution took Israel away from this political ideal. Major portions of Israeli society are alienated from both the political system and the legal system. The machinery for the peaceful resolution of disputes broke down, and people no longer agree upon the rules to be observed. It is no wonder that the enactment of ordinary legislation became very difficult and that every faction suspects the worst for itself when any change occurs in the constitutional status quo. Hence, even legislation unrelated to state-religion arrangements is hampered.[355]

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[353] Aharon Barak, *The Constitutional Revolution*, *in* 1 SELECTED ESSAYS 349, 374 (Haim H. Cohn & Itzhak Zamir eds., 2000) [hereinafter Barak, *Constitutional Revolution II*].

[354] RAWLS, POLITICAL LIBERALISM, *supra* note 103, at 4.

[355] See remarks made by Knesset member Professor Yuli Tamir in a symposium about the Israeli Supreme Court held at Netanya Academic School of Law on March 4, 2005. *See* http://www.netanya.ac.il/content/_Events/Event.asp?CategoryID=22&ArticleID=24&CatTitle= (last visited Dec. 22, 2006).

E. Striving for a Constitutional Regime and the Protection of Human Rights

Following the enactment of the new Basic Laws, President Judge Barak argued in a series of articles and books that the normative status of human rights changed and that it acquired constitutional recognition superior to ordinary legislation.[356] Similarly, President Judge Barak and other scholars often argue that striving for a constitutional regime and the Constitutional Revolution contributed positively to the status of human rights in Israeli society.[357] Often, it seems that the chief justification offered for the Constitutional Revolution and the adoption of judicial review over primary legislation is that they make stronger protections of human rights possible.

If these claims are true, then criticizing efforts to achieve a formal constitutional regime amounts to an attack on the discourse of rights. If striving for a formal constitutional regime in the past decade was improper, it is because adopting a discourse of constitutional rights either hampers the ability to achieve social cooperation between the different political factions or that the discourse of constitutional rights infringes upon basic values and valuable interests.[358] This critique, as it concerns the primacy or priority of the discourse of rights, is problematic. It argues that in order to achieve and promote certain goals and values (i.e., social cooperation and generosity), one should infringe upon rights and prevent justice. Such an argument is commonly taken to be improper, and the critique of the discourse of rights would fail if it could not be refined or restricted. Thus, in order to succeed in a critique of the Constitutional Revolution, one must show how striving for a formal constitutional regime thwarts or hampers the

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[356] *See* BARAK, INTERPRETATION IN LAW, *supra* note 280, at 355; Barak, *Constitutional Revolution*, *supra* note 262, at 12.

[357] Aharon Barak, *The Constitutional Revolution—12th Anniversary*, *in* 1 L. & BUS. 3, 23 (2004); Barak, *Constitutional Revolution II*, *supra* note 353, at 367; *see also* Or Bassok, *A Decade to the "Constitutional Revolution": Israel's Constitutional Process from a Historical-Comparative Perspective*, 6 MISHPAT UMIMSHAL 451, 495 (2003).

[358] For a critique of the liberal discourse of rights, see MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 15–65 (2d ed., 1998), and MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (tracing and critiquing the United States' discourse of rights). For a critique of the utopian universalism of the discourse of rights and the need to replace it with pragmatic constitutional arrangements, see Irving Kristol, *On the Political Foolishness of the Jews*, *in* NEO-CONSERVATISM 329, 343–45 (2004). For a critique of the constitutional discourse of rights in Israel, see Avi Sagi, *Law and Society: Rights Discourse and Identity Discourse in Israel*, 16 BAR-ILAN L. STUD. 37 (2000).

protection of human rights in Israel.

I cannot provide here a detailed argument showing how the attempt to strive for a formal constitutional regime contributed very little to the protection of human rights in Israel, and may even hampered such protection. Arriving at such a value judgment may prove to be very complex. First, it requires the adoption of a normative standard to judge the degree of protection of human rights existing in a given society. Second, it requires adopting hypothetical presuppositions to compare the actual protection given to human rights since the Constitutional Revolution to an imaginary situation in which the Supreme Court continued to follow the traditional constitutional rules and doctrines. This value judgment may prove to be very difficult to make since human rights were protected even before the Constitutional Revolution. Third, trying to arrive at such a value judgment might require the aggregation of rights since some scholars argue that the mere fact of providing protection to rights by judicial review over primary legislation conflicts with the right to participate in political decisions, which some argue is the "'right of rights."'[359]

I, however, base my conclusion that the Constitutional Revolution contributed very little, if anything, to the protection of human rights in Israel on insights worth noting here. First, even the proponents of the Constitutional Revolution are forced to admit that the Supreme Court's decisions giving normative superiority to basic rights over primary legislation are few in number and minor in their importance for the protection of human rights.[360] Second, many scholars argue that the Constitutional Revolution actually served to protect the stronger factions in Israeli society rather than the weaker factions and minority groups needing and deserving protection.[361] Third, Supreme Court decisions in the past decade,

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[359] WALDRON, *supra* note 38, at 232. *But see* Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 L. & PHIL. 247, 255 (2003) (arguing that "it is justified to infringe the right to participation in order to guarantee the protection of . . . other rights").

[360] *See* HCJ 212/03 Herut v. Chairman of the Election Comm. to the 16th Knesset [2003] IsrSC 57(1) 750; HCJ 1030/99 Knesset Member Oron v. Knesset Speaker [1999] 56(5) 640; HCJ 1715/97 Bureau for Inv. Advisors v. Minister of Fin. [1997] IsrSC 51(4) 376; HCJ 6055/95 Zemach v. Minister of Def. [1995] IsrSC 53(5) 245.

[361] *See* Ben-Israel, *supra* note 174; Aeyal M. Gross, *How Did "Free Competition" Become a Constitutional Value? – Changes in the Meaning of the Right to Freedom of Occupation*, 23 TEL AVIV U. L. REV. 229 (2000); Ran Hirschl, *The "Constitutional Revolution" and the Emergence of a New Economic Order in Israel*, 2 ISR. STUD. 136, 137 (1997) (noting that the Constitutional Revolution has supported the power of the dominant neo-liberal worldview that is held by many in Israel); Marmor, *Judicial Review*, *supra* note 137, at 137–42.

which are perceived by many as central to the protection of human and civil rights, were based not on the normative constitutional supremacy of rights but rather on their centrality in the Israeli legal system.[362] That centrality of rights in the Israeli legal system was continuously acknowledged since the Supreme Court's inauguration in the formative period and was not the result of the Constitutional Revolution.[363]

I wish to pause on this third insight since it may hold the key for a better understanding of the effects of the tactic of deciding to decide for the protection of rights. There are probably a variety of reasons why the Supreme Court chose not to base the protection of human rights in landmark cases on the Constitutional Revolution or on the normative supremacy of rights. I speculate that one of the reasons is the fear that the Court's rulings in controversial cases on the Constitutional Revolution would hamper the protection of human rights instead of assisting it. How is that possible? A major part of the criticism leveled against the Supreme Court when it protected rights in the last decade was directed not at the concrete results of the Court's decisions but rather at the vision they reflect—the constitutional neutral state.[364] Hence, it could be reasonably supposed that the lack of will to base the protection of human rights on the Constitutional Revolution in controversial cases is the result of the fear that such legal reasoning would endanger the protection of rights and the Constitutional Revolution itself. If this proposition is true, then the Constitutional Revolution and the alleged constitution undermines, instead of legimitizes, the protection of rights.[365] If the protection of rights prior to the Constitutional Revolution was achieved by the Court acting in accord with the political sphere, the protection of rights in the post-Constitutional Revolution era is achieved through a clash between the Court and the Knesset. This battle revolves around who will have the final and ultimate authority to decide the nature,

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[362] HCJ 5100/94 Pub. Comm. Against Torture v. Israel [1999] IsrSC 53(4) 817; HCJ 6698/95 Kaadan v. Isr. Land Admin. [1999] IsrSC 54(1) 285; HCJ 4541/94 Miller v. Minister of Def. [1995] IsrSc 49(4) 94; HCJ 721/94 El-Al v. Danilovitz [1994] IsrSc 48(5) 749.

[363] But see the disagreement between the judges in CA 537/95 Ganimat v. Israel [1995] IsrSC 39(3) 355 and HCJ 2316/95 Ganimat v. Israel [1995] IsrSC 39(4) 589.

[364] *See e.g.*, SHINE, *supra* note 4, at 155–77 (discussing the constitutional vision manifested in the Supreme Court's rulings); DK (2004) 8831 (Knesset member Meir Porush); DK (2004) 8822, 8828 (Knesset speaker Reuven Rivlin); DK (1995) 3240 (Knesset member Avraham Ravitz).

[365] *See* ELI SALZBERGER, CONSTITUTION, BASIC LAWS, BILL OF RIGHTS 53 (2001) (explaining the danger that is inherent in the Constitutional Revolution for the protection of rights).

character, and extent of legal rights and norms in the Israeli legal system. Needless to say, no matter which body wins this struggle, the citizens and their rights will be the main losers.

F. Does Israel Have a Constitution?

There is intense disagreement as to whether Israel has a constitution. On the one hand, the proponents of the Constitutional Revolution in the political arena, the academic community, and the judiciary argue that a decision was made and Israel joined the club of enlightened nations that possess formal constitutions.[366] On the other hand, others in the political arena, the academic community, and the judiciary question this unequivocal conclusion. They argue that no substantial change occurred in Israel's constitutional framework and that Israel still has no formal constitution in a conventional sense.[367]

The extent of this disagreement, however, is not as wide as it might seem at first. While everyone agrees that Israel has Basic Laws, the disagreement is about the nature and essence of them. Some praise these Basic Laws and argue that they constitute an actual constitution, while others argue that their essence and nature are far from clear and deny them the title of a constitution.[368] Everyone agrees that the Basic Laws are the product of the Knesset, whose 120 members are elected in a periodic general election.[369] The disagreement is about the nature and

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[366] Barak, *The Economic Constitution of Isreal*, *supra* note 2, at 358–60; Rubinstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 356.

[367] *See* DK (2000) 4770 (Knesset member Reuven Rivlin); SHINE, *supra* note 4, at 136; Adrey, *supra* note 294, at 460; Dotan, *supra* note 296, at 209 ("In fact, the 1992 Revolution has not led Israel to a state of constitutional democracy in the known and conventional sense, and it is doubtful if in its present framework it would lead to it in the future. We did not have in the past, and we do not have in the future, an entrenched constitutional framework by an entrenched constitutional text, which provide the court the power of a final verdict." (author's translation)); Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 32; Yoash Meisler, *"The Constitutional Revolution" Just Over a Decade Later – Law and Disorder*, 7 DEMOCRATIC CULTURE 131 (2003).

[368] *See* Adrey, *supra* note 294, at 460 ("Basic Laws do not constitute a constitution, but rather reflect the legislature's perception to assume certain limitation." (author's translation)); Meisler, *supra* note 367, at 177 ("The allegedly objective normative claim, that Basic Laws are supreme as constitutional law, which restrict the Knesset authority, are nothing but a sacred fictitious fairy tale . . . ." (author's translation)); *see also* DK (2000) 4770 (Knesset member Reuven Rivlin) ("Basic Laws do not constitute a complete and continuous material of superior norms." (author's translation)).

[369] *See* Basic Law: The Knesset, 1958, S.H. 69 §§ 3, 4, 8, 9.

essence of the Knesset's activity when enacting Basic Laws. Some adopt the theory of constituent authority and argue that the Knesset operates as a constituent authority when enacting Basic Laws,[370] while others reject this theory and argue that this activity is not substantially different from any other activity of the Knesset—such as enacting primary legislation.[371] Everyone agrees that the Supreme Court sustains judicial review over primary legislation and that on a few occasions it even ordered the nullification of primary legislation. The disagreement is about whether, from the mere existence of judicial review, a conclusion can be drawn as to the existence of a formal constitution. The proponents of the constitution argue that judicial review is a sign pointing to the existence of an entrenched constitution enforced by judicial review,[372] while others point to the fact that the mere existence of judicial review does not necessarily show that Israel has a formal constitution.[373] Everyone agrees that the current Basic Laws have various flaws, defects, and weaknesses—in the ways by which they were enacted, in their nature, and in their character.[374] The disagreement is about the normative consequence inferred from these faults. Some argue that these flaws show that Israel's constitution, while imperfect and sometimes poorly functioning, is still a constitution.[375] Others argue that these flaws prevent us from classifying Basic Laws as an actual constitution. Everyone agrees that the Knesset is often not deterred from amending Basic Laws and that these amendments sometimes arise from narrow and

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[370] *See infra* notes 391–417 and accompanying text (examining the theory regarding the Knesset's constituent authority).

[371] *See* CA 6821/93 United Mizrahi Bank v. Migdal Communal Vill. [1995] IsrSC 49(4) 221, 471–526 (Chesin, J.).

[372] Rubinstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 356.

[373] The reason for this position is twofold. First, judicial review is neither necessary nor sufficient to conclude the existence of a constitution. *See* LAURENCE H. TRIBE, FIVE REIGNING MYTHS ABOUT CONSTITUTIONALISM AND JUDICIAL REVIEW 12 (1994). Second, a limited judicial review over primary legislation existed even prior to the Constitutional Revolution when everyone agreed that Israel did not have a constitution. *See* HCJ 98/69 Bergman v. Minister of Fin. [1969] IsrSC 23(1) 693; Meisler, *supra* note 367, at 131 ("Since the establishment of the state and until 1992, no one argued that Israel's regime is a constitutional regime." (author's translation)).

[374] *See* DK (2000) 4770 (Knesset member Reuven Rivlin); BARAK, JUDGE IN A DEMOCRACY, *supra* note 278, at 79; Adrey, *supra* note 294, at 460; Bendor, *supra* note 344, at 139–40; Rubinstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 314.

[375] *See* Rubenstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 356 (calling this constitution a "'lesser evil': an incomplete constitution, but a constitution that provides a complete protection to the most important human rights"); *see also* BARAK, JUDGE IN A DEMOCRACY, *supra* note 278, at 79; Barak, *The Economic Constitution of Isreal*, *supra* note 2, at 357–60.

short-sighted political interests.[376] The disagreement is about the upshot of this phenomenon. Some view it as a problem that needs to be addressed but does not affect the conclusion that Israel has a constitution,[377] while others believe that it undercuts the essence of having a constitution and prevents the conclusion that Israel has a constitution.[378] Everyone agrees that some fundamental constitutional matters about Basic Laws were not yet addressed by the Supreme Court. The disagreement is about the extent of these matters and their effect. Some believe that the Supreme Court must clarify these issues once and for all in order to clarify the principle of the Israeli constitutional order.[379] Others believe it is not the role of the Court to decide these issues and that the mere existence of these undetermined fundamental constitutional questions testifies to the fact that Israel has yet to decide on the establishment of a formal constitution.[380] Everyone agrees that many public entities operate in these days with the goal of enacting a complete and new constitution.[381] The disagreement is about the nature and essence of this activity. Some perceive it as an attempt to amend and improve our current formal constitution, while others view it as an attempt to enact the first real formal constitution.[382]

It may look at first as if the disagreement here is semantic. If the correct meaning of the term "constitution" is a document or a system of documents that limit the powers of the legislature and by which legislation may be invalidated, then Israel has a constitution. This constitution was not adopted or affirmed in a special proceeding by the People manifesting popular sovereignty but was enacted and enforced by judicial means. One may argue against the political legitimacy of this constitution but cannot deny its existence.[383] However, if the true meaning of the term

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[376] *See* Ariel L. Bendor, *Flaws in the Enactments of Basic Laws*, 2 MISHPAT UMIMSHAL 443, 447 (1995).

[377] *See* BARAK, JUDGE IN A DEMOCRACY, *supra* note 278, at 79; Rubinstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 314.

[378] Dotan, *supra* note 296, at 209; Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 32; Meisler, *supra* note 367, at 177.

[379] Sommer, *supra* note 289, at 77–79.

[380] Gavison, *Self-fulfilling Prophecy*, *supra* note 2, at 31; Landau, *supra* note 290, at 697.

[381] *Compare* Constitutional, Legislative, and Judicial Committee, http://www.knesset.gov.il/huka (last visited Dec. 22, 2006), *with* Israeli Democracy Institute, http://www.idi.org.il/hebrew/article.asp?id=2351 (last visited Dec. 22, 2005).

[382] Meisler, *supra* note 367, at 195.

[383] Like the Constitution of the Weimar Republic, which was forced upon the German people after the First World War and makes it hard to say that the people adopted it, the Israeli Constitution was forced upon the Israeli People and was not created by the People.

"constitution" is a document created and approved by the people constituting themselves in a special popular procedure, then Israel does not have a constitution. The fact that a limiting system of legal documents exists (i.e., Basic Laws) is immaterial since the correct meaning of a constitution is a document that is a manifestation of the will of the people as a whole.

Nevertheless, the issue here is not semantic. The disagreement is not about the true meaning of the term "constitution." Rather, Israel is in a situation in which social, political, and legal institutions and arrangements are under intense and deep controversy.[384] In this state of affairs, Israel already has Knesset, Basic Laws, and judicial review, but it disagrees about their nature, essence, and extent. The question regarding the Basic Laws' nature is not wholly factual but requires a substantive value judgment as to the ways they should operate and function. As examined in this Article, this is not a new situation but is the product of the origin of Israeli constitutional law and the constitution-making decision of deciding not to decide.[385]

The fact that disagreements exist does not mean that the existence or absence of a constitution is purely subjective and reflects personal attitudes and preferences. A constitution is not person-relative. The existence or absence of a constitution is independent of personal preferences, convictions, and beliefs of scholars, judges, and public representatives. A proposition about the existence or absence of a constitution must correspond to the

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See MARIAN D. IRISH & ELKE FRANK, INTRODUCTION TO COMPARATIVE POLITICS: THIRTEEN NATION-STATES 28 (2d ed. 1978).

[384] *See* Ruth Gavison, *The Absence of Judicial Review*, *in* MODELS OF JUDICIAL REVIEW 39 (2001) ("We are in a very complex situation, in which we already have institutions and these institutions are under intense and deep disagreements . . . ." (author's translation)). Even Rubinstein and Medina, who argue that Israel has a constitution, admit the existence of deep disagreement about our social institutions. Rubinstein & Medina, *The Constitution of the State of Isreal*, *supra* note 2, at 355 ("The intense disagreements in the 15th Knesset, which have prevented the enactment of additional Basic Laws, were about the question who should be authorized to interpret the constitution and review Knesset Legislation—the Supreme Court or a special constitutional court . . . ."). Rubinstein and Medina, however, restrict the extent of these disagreements and argue that "these disagreements are no longer about the necessity of a formal constitution or about the Knesset's authority to enact a constitution." *Id.* (author's translation). *But see* Shlomo Avineri, *First Session: A Fundamental Discussion on the Need to Establish a Constitution for Israel*, *in* CONSTITUTION, BASIC LAW, BILL OF RIGHTS 15, 15 (2002) ("If I had to answer with one word the question whether Israel needs a constitution, I would have answered that it 'needs'. If I had to answer it with two words, I would have answered 'doesn't need.'" (author's translation)).

[385] *See* Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271, 271–73 (Larry Alexander ed., 1998) (noting that even nations who turn to formal constitution-making cannot, in the end, avoid this state of affairs).

nature of Israel's political and legal phenomenon.[386] In fact, personal preferences and judgments are totally "immaterial."[387] Whether there is a formal constitution in Israel is one thing and what people believe in this regard is another. If two people hold contradictory views about the existence of a constitution in Israel, then at least one of them is wrong. But how will we know who is wrong and who is right? To answer these questions we can turn to the majority rule. The proponents of the Constitutional Revolution and the constitution may argue that their position is accepted by most of Israel's constitutional scholars while those who reject the existence of a constitution only comprise a small minority. The problem of such an argument is obvious even beyond its questionable empirical supposition (since no survey was ever made among scholars in this regard). First, why should Israel follow the majority of constitutional scholars and not the majority of legal scholars or the majority of jurists or maybe even the majority of Israel's citizenry? Second, why should Israel favor the majority view over the minority view in the first place? It is well known that a majority view does not hold a special moral, political, or legal weight to resolve such disagreements.[388] In fact, two options are possible, both of which do not get us any closer to the resolution of the disagreement. Either the majority is right and the minority is wrong and Israel has a constitution or the majority is wrong and the minority is right and Israel does not have a constitution. Again, how can Israel resolve the disagreement?

According to some scholars and judges, at this stage of deliberations one should turn to constitutional theory to provide one with the answer as to who is right or wrong. In fact, according to the proponents of the constitution, this is precisely the role of the theory that the Knesset has a continuing constituent authority.[389] In the *Migdal* decision, Judge Barak offered three models to ground the proposition that the Knesset possesses a continuing constituent authority and to support the conclusion that Israel has a

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[386] Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 283 (1992) [hereinafter Raz, *Relevance of Coherence*].

[387] *See id.*

[388] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[389] *See* CA 6821/93 United Mizrahi Bank v. Migdal Communal Vill. [1995] IsrSC 49(4) 221, 355–91 (appealing to theoretical models); *see also* Rubinstein & Medina, *The Constitution of the State of Israel*, *supra* note 2, at 315–29 (assessing the claim that Israel has a constitution by numerous theoretical tests).

constitution. The first model based the continuity of the Knesset's constituent authority on what Hans Kelsen called "the basic norm."[390] On this model, the basic norm of the State of Israel is the People's Council—the Provisional Parliament created with the establishment of the State. The People's Council commanded in the Israeli Declaration of Independence that a constitution be drawn up by an elected Constituent Assembly.[391] With the election of the Constituent Assembly and the abdication of the People's Council's legislative powers, the Constituent Assembly enjoyed both constituent and legislative authority. With the enactment of the Transition Law 1949, redesignating the Constituent Assembly as the First Knesset, the adoption of the Harari Resolution, and the enactment of the Second Knesset (Transition) Law 1951, all succeeding Knessets have continued to possess constituent authority. The second model follows the positivist theory of H.L.A. Hart.[392] According to this model, the "rule of recognition" of the State of Israel gives the Knesset both constituent and legislative authority.[393] This conclusion, Judge Barak wrote, does not reflect a subjective judicial view but expresses an objective fact about the State of Israel.[394] The third model was based on the writings of Ronald Dworkin. This model sought to construct the best interpretation of the whole legal system at a given time.[395] According to this model, the parliament possesses the authority to promulgate a constitution if this conclusion follows from the best interpretation of the legal system.[396] The best interpretation of Israeli constitutional law, according to Judge Barak, is not that the Knesset wasted its time in enacting Basic Laws, or that the entrenchment provisions in the Basic Laws are not valid, or that decisions on the constitutional status of Basic Laws simply "missed the target."[397] Instead, the best interpretation is that from the

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[390] *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY xxxi–xxxii (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

[391] *See* The Declaration of the Establishment of the State of Israel, 5708-1958, 1 LSI 3, 4 (1948) (Isr.).

[392] *See* H.L.A. HART, THE CONCEPT OF LAW 94–95 (2d ed. 1994).

[393] *See id.* at 94; *Migdal*, [1995] IsrSC 49(4) at 357–58.

[394] *Migdal*, [1995] IsrSC 49(4) at 357 ("The fundamental perceptions of the Israeli society today—which constitute an expression of our whole national experience—is that the Knesset is perceived in the national recognition as a body competent to promulgate a constitution." (author's translation)).

[395] *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 113.

[396] *Migdal*, [1995] IsrSC 49(4) at 358.

[397] *Id.*

inception of the State of Israel, the Knesset possesses constituent authority.

Does Judge Barak succeed in providing a theory that transcends the circumstances of judicial review in Israel? His appeal to Hans Kelsen, H.L.A. Hart, and Ronald Dworkin seems promising. Indeed, what better argument could one find in favor of the constituent powers of the Knesset than in the theories of these three distinguished legal philosophers? Nonetheless, a second look is more troubling. First, although the theories of Kelsen, Hart, and Dworkin are the most widely discussed in the academic community, they are not free from doubts. Supporters of each theory still debate one another, as well as the supporters of rival theories.[398] Judge Barak himself was not content to rely on only one of these theories, and he tacitly acknowledged how controversial each of them was. Second, even if we presuppose the truthfulness of these theories, these theories are incapable of conclusively resolving the dispute over the constituent authority of the Knesset in light of the circumstances of judicial review in Israel. To appreciate why this is so, one must consider each theory in the context of the tradition it addresses as well as in the context of Israel's constitutional circumstances and the tradition of deciding not to decide.

The theories of Kelsen and Hart share a common denominator, which makes them arguably suitable to resolve the disputes at hand. Both Kelsen and Hart present a positivist approach to law. According to this tradition, "the existence of law can be . . . [identified] by reference to social facts" alone and without resorting to any evaluative argument of its content.[399] Since "the existence of law can be objectively ascertained by reference to social facts," both "agree, that legal statements are either true or false and that their truth conditions are their relations to complex social practices."[400] Accordingly, arguing that the Knesset possesses constituent powers or that Israel has a constitution are legal propositions about the Israeli legal system that could be true or false. The answer may be discovered by examining the proposition in relation to complex social practices. Furthermore, the positivist approach to law offers us a way to overcome moral disagreements that exist in a given

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[398] *See generally* BRIAN BIX, JURISPRUDENCE THEORY AND CONTEXT 33–64, 87–99 (3d ed. 2004).

[399] Joseph Raz, *The Purity of the Pure Theory*, *in* ESSAYS ON KELSEN 79, 86 (Richard Tur & William Twining eds., 1986).

[400] *Id.*

society by separating legal judgments from substantive moral and political considerations. Thus, the existence of moral and political disagreements about the propriety of a formal constitution or the moral or political legitimacy of the process of gradually adopting Basic Laws by the same organ they are meant to limit are irrelevant.[401] The answer to the question whether Israel has a constitution will be determined, according to the positivist approach, by social facts and not by moral considerations on which we might disagree. However, a deeper look into the models of Kelsen and Hart reveals a weakness and failure to resolve the disagreements about the Knesset as a constituent authority and the existence of a constitution.

Kelsen advances a cognitivist approach to law.[402] For him, a legal statement expresses a practical attitude only in that it expresses a belief in the existence of a valid norm.[403] Hence, the normative aspect of legal statements has to be explained by the fact that such statements state or presuppose the existence of a value or a norm—that is, a normatively binding standard and not merely a social practice. Accordingly, "the validity of a legal norm is established by appeal to the appropriate higher-level norm, whose own validity is established, in turn, by appeal to its higher-level norm, and so on, until the highest level of norms in the legal system is reached."[404] This is the "basic norm," and it is an "ultimate basis of validity."[405] The validity of this norm cannot be ensured by appeal to anything higher but must simply be assumed.[406] It is crucial to note that in making this transcendental argument about the basic norm, Kelsen is not asking whether one cognizes legal materials but rather whether one knows certain legal propositions to be true. Rather, he assumes that one has such knowledge, and he asks how one can have it.

Judge Barak's first model relies on the continuity of constituent authority.[407] However, as examined above, this constitutional continuality was often attacked. The First Knesset was authorized to promulgate a constitution, and when it failed to do so, it forfeited

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401 *See supra* text accompanying notes 93–98.

402 KELSEN, *supra* note 390, at xxxi.

403 *Id.* at xxxi–xxxii.

404 *Id.* at xxxii.

405 *Id.* at 55.

406 *Id.* at xxxiii.

407 CA 6821/93 United Mizrahi Bank v. Migdal Communal Vill. [1995] IsrSC 49(4) 221, 356.

its constituent authority. If one takes this disagreement into account, the appeal to Kelsen's positivist theory of law cannot assist in resolving the dispute. The controversy is not over whether the Israeli legal system has a basic norm but over whether the chain of constituent authorities was broken. A belief in the constitutional validity of Basic Laws, as opposed to a belief in their legal validity, presupposes the existence of a higher constituent norm according to which they were created. This, however, is precisely what is missing. Israel disagrees about its legal beliefs regarding the constitutional nature of Basic Law. Hence, Israel cannot presuppose the existence of a constituent authority or that this authority was used to enact a constitution.

Hart's ultimate criterion of validity is the "rule of recognition" by which the validity of other rules of the system is assessed.[408] Like Kelsen's basic norm, there is no rule providing criteria for the assessment of the rule of recognition's own legal validity. The rule of recognition is a social rule among officials, a combination of a convergent practice accompanied by a critical attitude towards that practice. The officials accept the rule of recognition as a guiding rule for themselves and for others and as a basis for assessment of their conduct as well as the conduct of others.[409] Hart, it should be noted, does not agree with Kelsen that the ultimate criteria for legal validity is presupposed, assumed, or postulated, but rather that it "could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications."[410] Judge Barak's second model relies on Hart's rule of recognition, and it could succeed if he could show that public officials took or accepted the Knesset's constituent authority as an ultimate criterion of validity as a standard for assessing their behavior as well as the behavior of others. But, ever since the Harari Resolution, scholars, judges, lawyers, and officials questioned the ability of the Knesset to promulgate a constitution. In fact, because of these disagreements, the Supreme Court always avoided deciding the issue. Even in the *Migdal* decision, this question was not resolved (since it was not supported by a majority of the bench and because most of the *Migdal* decision should be considered to be an obiter). If the court never resolved this question, Hart's theory cannot support the

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[408] HART, *supra* note 392, at 105.

[409] *See id.* at 104–10 (examining how a rule of recognition operates in a legal system).

[410] *Id.* at 108.

constituent powers of the Knesset as part of the rule of recognition.

Dworkin's theory also possesses characteristics that may make it arguably suitable to resolve the disputes at hand. Under Dworkin's approach, "every time a judge is confronted with a legal problem, he or she should construct a theory of what the law is."[411] This theory would "combine backward- and forward-looking elements" that "interpret contemporary legal practice . . . as an unfolding political narrative."[412] The questions whether the Knesset possesses constituent authority and whether Israel has a constitution will be determined by an appeal to legal theory about Israeli constitutional law. Furthermore, Dworkin's writings can be seen as a response to disagreements that emerge between law's subjects about the most basic rules and principles according to which the legal system operates and not just over peripheral matters.[413] According to Dworkin, legal statements and propositions are true if they are derived from principles of justice and fairness and provide the best constructive interpretation of the given community's legal practices.[414] Thus, the judge is asked to adopt, even in hard cases, the most coherent system of principles that is the best interpretation of the political structure and legal doctrine of the community. Therefore, Dworkin's theory offers us a way to reconcile contradictory data about the nature of Israel's constitution-making. It does not present a problem that it is possible to identify, on the one hand, activity that could be interpreted as an attempt to adopt a constitution and, on the other hand, activity that could be interpreted as deliberate abstention from doing just that. The important question is which one of these interpretations is the best interpretation and the best fit with our current practices. In this course, Dworkin follows Rawls's writing on reflective equilibrium. According to this method, certain legal practices and judgments could be ignored and discarded because they do not fit with the best coherent system of principle.[415]

Why should we believe that the best interpretation of Israel's constitutional history should be based on the Knesset's constituent

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411 BIX, *supra* note 398, at 89; *accord* DWORKIN, LAW'S EMPIRE, *supra* note 113, at 225–27, 245–58.

412 DWORKIN, LAW'S EMPIRE, *supra* note 113, at 225.

413 WALDRON, *supra* note 38, at 188–91.

414 DWORKIN, LAW'S EMPIRE, *supra* note 113, at 225, 255; *see also* BIX, *supra* note 398, at 90.

415 *See* RAWLS, THEORY OF JUSTICE, *supra* note 98, at 18–19; RAWLS, POLITICAL LIBERALISM, *supra* note 103, at 28; Raz, *Relevance of Coherence*, *supra* note 386, at 285.

authority theory? This Article argues that the best interpretation of Israel's constitutional history is that Israel adopted non-decision constitution-making because of its intractable disagreements. Why should Israel favor the interpretation, based on the Knesset constituent powers, that Israel has a constitution over the interpretation of deciding not to decide? In my opinion, the interpretation regarding the Knesset constituent powers is preferable to any other interpretation only if one presupposes that a formal constitution is morally and politically required in order to achieve fair and decent social life.[416] Only by adopting such a normative proposition would one be justified in ignoring and discarding all the constitutional data that shows that the Knesset deliberately decided not to decide on a formal constitution and left open fundamental constitutional questions. However, this proposition, that a formal constitution is morally and politically required, is precisely the subject of intense disagreement among scholars and politicians.[417] In fact, I would even argue that Israel's constitutional history shows for the most part that the existence of a constitution is neither required nor sufficient for the establishment of fair, decent, just, or proper social life.

In the end, Judge Barak's attempt to resolve the disagreement about the Knesset constituent powers and the existence of a constitution is reduced to a list of controversial theories supplemented by three controversial and inconclusive models. In fact, any attempt to establish the existence of a constitution in Israel by an appeal to theory is doomed to failure. This is because Israel's constitution-making and constitutional arrangements resulted from the activities of a multitude of people and entities and the interactions among them over the course of more than five decades. It is not realistic to try and provide a coherent theory that reconciles the constitution-making of the first Knesset and the twelfth Knesset or the constitutional activity of Ben-Gurion, Israel's first prime minister, and that of Dan Meridor, Israel's former Minister of Justice. That would idealize and falsify Israel's constitution-making history by ignoring the concrete politics of

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[416] *See* BARRY, *supra* note 105, at 95; RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 14 (1990).

[417] For a critique of the claim that a formal constitution enforced by judicial review is necessary or required in order to promote justice, fairness, and democracy or in order to protect rights, see WALDRON, *supra* note 38, at 219–21, 287–89. *But see* Richard A. Posner, *Review of Jeremy Waldron, Law and Disagreement*, 100 COLUM. L. REV. 582, 588–92 (2000) (providing a critique of Waldron's theory).

which it is made up of. Israel's political reality left the constitution-making process untidy, split, and even problematic. The theory regarding the Knesset constituent authority and the existence of a constitution euphemized it, and this could be achieved only by ignoring and reducing the ramifications of the disagreements and compromises, which comprised Israel's constitution-making. The existence of a formal constitution, however, is not a complicated issue that needs to be resolved by theory. The mere fact that one tries to establish its existence by theory calls its existence into question. The fact that Israel has no constitution is not derived from the weaknesses of the potential theory Israel adopted but rather from Israel's complicated, fractional, and incomplete constitutional reality—a reality of deciding not to decide over most of our fundamental constitutional disagreements. The decision not to decide is simply the default rule of our constitution-making history.

IV. CONCLUSION

There has never been a coherent, uniform, and clear Israeli ideology. Instead, there has always been a plethora of ideologies with a common denominator. An examination of the founders's failure to adopt a constitution shows that the ideological disagreements, so characteristic of both the Zionist Movement and the Jewish People as a whole, prevented its enactment. Every faction sought to advance its own good over that of the community as a whole. These disagreements, which could be categorized as substantive disagreements, were supplemented by structural and institutional disagreements. Most notable among these disagreements was the need to enact a formal constitution and the propriety of judicial review over primary legislation.

Israel is not unique in having to overcome disagreements about substantive and structural constitutional matters in its founding moments. Israel is unique because the tactic that was chosen to surmount these disagreements in its moments of foundation was the decision not to decide. While other western democracies facing disagreements in their foundation achieved social cooperation by adopting a constitution, Israel achieved it by not deciding on the adoption of a constitution. By embracing the tactic of non-decision constitution-making, two main goals were fulfilled: fair and stable cooperation based on democratic foundations and the protection of human rights by the Supreme Court.

Israel's constitution-making preceding the Constitutional Revolution was also shaped by disagreements and the desire to leave fundamental constitutional matters undecided. The enactments of the new Basic Laws did not change Israel's constitutional circumstances; did not signify a deviation from the constitutional tactic of non-decision; and, in fact, were direct implementations of this tactic. This tactic, however, was abandoned by the Supreme Court in the *Migdal* decision, according to which Israel has a formal constitution, and by public and political entities that strive for an American-style constitutional regime. These actions are the manifestation of a new constitution-making tactic—a decision to decide. This Article argues that this new tactic thwarts social cooperation among the various political factions and hampers the protection of human rights. In the end, the attempt to push the Israeli society towards a constitutional regime, so far, failed because disagreements prevent Israel from acknowledging the existence of a formal constitution. The decision not to decide is still the best interpretation of Israel's constitution-making history. In fact, it is the only game in town.

Thus, it is safe to conclude that Israel does not need a constitution. The tactic of deciding not to decide fulfilled the same goals that drive nations to adopt a constitution. This Article does not argue that the Israeli regime is perfect or flawless. Rather, it argues that Israel must not fall under the spell of believing that a formal constitution would be the solution to our pressing everyday problems. A constitution is not a solution to problems and difficulties in the life of a nation; it is a framework for dealing with them. A constitutional framework, however, already exists in Israel. Israel's flaws and faults should be remedied by concrete and pragmatic governmental reforms and not by deciding and resolving fundamental ideological disputes.