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**THE ISRAELI CONSTITUTIONAL
PROCESS: LEGISLATIVE AMBIVALENCE
AND JUDICIAL RESOLUTE DRIVE**

by

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The Israeli Constitutional Process: Legislative Ambivalence and Judicial Resolute Drive²

In most constitutional regimes, legislatures as well as other constitutional powers operate **under and within** an agreed-upon constitution. Often, they are established by it and gain their legitimacy and stability, to a large extent, from it. The constitution is taken as a given. In rare cases it may itself be amended, but the idea is that the constitution sets the framework of activity of the other organs of government, including the legislature itself. This situation permits intense discussions of the roles of the various powers under the constitution, and systems may have constitutional crises when one or another of these powers challenges the limits of the power of the other. But these discussions all take place within the constitutional framework. Indeed, one of its main functions is to make such debates more structured and 'safer' than they would have been had all the rules of the game been vulnerable to 'normal' political exigencies. In some systems, however, Israel included, the status and the basic contours of constitutional regime itself are quite controversial. I argue that this fact does weaken the legitimacy and stability of Israel's constitutional arrangements, and that it stems from the fact that the Israeli legislature has not taken – for a variety of reasons - a clear and firm position on constitutional issues, letting the court be the driving agent of the process.

All constitutions seek to enable government, structure its powers and limit them. To do this effectively, constitutions must enjoy a legitimacy which is broader and deeper than that enjoyed by any specific organ of government or any specific policy or piece of legislation. Their fundamental nature is supposed to provide elements of the 'civil religion' that binds all members of society and all major groups within it to the constitutional system. This basic fact has important implications to the roles various organs should play within constitutional regimes, and to the roles they should play in framing and adopting these regimes to begin with.

¹ Haim H. Cohn Professor of human rights, Faculty of Law, Hebrew University in Jerusalem. I thank Or Bassok, Yoel Cheshin and Allan E. Shapiro for illuminating discussions and research assistance. Tsvi Kahana triggered the writing of this paper by inviting me to the conference and provided excellent comments on a previous draft.

² I dedicate this essay to President (emeritus) of the Israeli SC Moshe Landau, who has not tired of insisting that constitutions and deep ideological divides are the responsibility of the legislature, while vigilance concerning the protection of human rights within the state's legal framework is the special realm of courts. Judge Landau is also unique in combining strong review of **administrative action** to protect human rights, while at the same time holding that it is inadvisable for courts to have the power to review **primary legislation** in matters of human rights and basic values. Landau believes it is important that the SC has review over primary legislation in matters pertaining to the structure and powers of political organs, within the constraints of the 'political question' doctrine. See Landau (1971) (Hebrew).

Part I provides some theoretical background and deals with the institutional implications of three different phases in constitutional regimes. All three phases - processes of constitution-making, amending constitutions and their application/interpretation - should be such that the functions of structuring and legitimating government in its broad sense are achieved in the best way. It is best that the central features of the constitutional framework be decided at the initial constitution-making stage, which will be comprehensive and provide a coherent system of checks and balances, and that will be negotiated and adopted with broad consensus. The natural candidates for performing these tasks are constituent assemblies or legislatures. Application and interpretation of the constitution are routine activities, in which all powers partake, with a special role is granted to an independent judiciary. Constitutional amendment should be more celebratory and broadly discussed change than regular legislation, but it does not have to have the features of constitution-making itself. The prime organ in amendments is the legislature itself, using a special mode of legislation, and possibly aided by built-in guarantees of popular involvement. Usually, the legitimacy of the constitution is enhanced if the institutional implications of these distinctions are adhered to.

Part II describes the constitutional history of Israel. In it I provide the legal highlights reflected in legislation and adjudication, but also sketch the political background and the forces working for and against the constitution at the various points. In particular, I show how in recent decades the courts, and especially the president of the Israeli Supreme Court of Israel, Professor Aharon Barak, have become central players in constitutional discussions and in creating constitutional realities. This growing involvement is connected to the rhetoric of the 'constitutional revolution' which states that the phase of constitution-making has been completed, and that it already was decided that Israel grants the SC as presently constituted the power to review primary legislation. This activity is all the more striking against the background of hesitant and ambivalent legislative moves, coupled with surprising legislative passivity in response to judicial constitution-making. While critics resist both the claim that there had been a revolution and the claim that the question of judicial review had been settled, the legislature does not rise to clarify the situation. This is the present reality of the constitutional process in Israel. An element of this reality is that the constitutional debate is in part over the question whether Israel already has a constitution. Consequently, the discussion whether it should have one, and what constitutional arrangements should be adopted, is not undertaken in a serious way.

Part III analyzes the Israeli history in light of the discussion of Part I. 'Non-conformity' with the institutional implications of the three phases of constitutionalism is not necessarily bad. Legitimacy for a constitutional regime can be gained without broad discussion and ratification. But this did not happen in Israel as of now. The debate over the 'constitutional revolution' and judicial review is still open and the issues are controversial. In terms of the phases of constitutionalism, this is a debate on whether Israel is now at the constitution-making phase or at the interpretation/amendment phase, and on the institutional implications of the answer to this question. The persistence of the debate does reflect serious issues of the legitimacy of the constitutional process itself. This debate is real and should not be ignored. Before we can seriously argue over the form and scope of judicial review of legislation, the legislature needs to settle the underlying ambiguities of the

constitutional background against which this question is debated. It is not a good idea for Israel to continue to entrench a constitutional regime through judicial interpretations, without an explicit broad discussion of its desirability and features. Developments until now suggest that the product is not likely to be able to provide legitimacy and stability to the deeply divided Israeli society.

This discussion in turn provides the basis for a few normative and predictive statements concerning Israel's quest for a constitution in the concluding Part IV. Israel now has limited judicial review over legislation, which has developed mainly by the SC, despite the fact that its legislature has never made a deliberate decision on whether or not it should have a formal and entrenched constitution and how it will be enforced. If the legislature continues to shirk its legislative or even constituent responsibilities – the constitutional ambiguity and uncertainty will continue. The persisting political controversy over this issue, combined with the deep ideological divides that have made the adoption of the constitution so hard to begin with, now further hinders Israel's ability to in fact complete its constitutional process and adopt a full and entrenched constitution. The complicated piecemeal constitutional process till now makes the adoption of a coherent constitution even more difficult than it might have been without the 1992 'revolution'. Furthermore, the meandering process of constitution-making may well lead to sub-optimal constitutional arrangements, ones that cannot provide Israel with the stable, effective and accountable government that it so badly needs.

Part I: Institutional Implications of Phases of Constitution-Making and of Components of Constitutions

A prime function of constitutions is to structure and legitimate the political system it regulates. Legitimacy may come from either the process through which the constitution was made and is implemented (formal legitimacy) or from the content of its arrangements (material legitimacy) or from both. I will argue in this Part that there are important institutional implications to these aspects of gaining legitimacy. There should be a distinction in institutional competence between three phases in constitutionalism – initial constitution-making; amendment of constitutions; and their routine application and interpretation. Similarly, the competence of different institutions depends on the parts of the constitution they deal with – rules-of-the-game, credos or Bills of Rights.

Constitutions are meta-laws in the sense that they structure law making itself, as well as the general contours of government and its constraints. This structuring and entrenchment of the framework rules create a special legitimacy for the constitutional order and its actors, so that it increases the stability of government in its broad sense. This legitimacy and stability is of special importance in societies which are divided, and in which there is a deep controversy about the good life and the purpose of the state. Agreement about policies is likely to be fragile or non-existent. The health and robustness of society then may depend of the commitment of all members and groups to the shared framework rules included in the constitution. These framework rules provide the security realm within which each of the groups

can fight for its vision of the good life knowing that the framework will hold the joint enterprise together. The groups may not realize their full visions every time, but the system will guarantee that their constraints, as well as those of the others, are maintained. In divided societies, the rules of the game are of special importance since often it will be clear that no substantive compromise can be reached, and the only shared element may be the willingness to adhere to a fair process. Under such circumstances, the question of the identity of those deciding sensitive issues may be crucial. This may affect both the rules of the game and the arrangements themselves.³ In divided societies, therefore, constitutions may have the additional function of making otherwise disparate groups, with very different aspirations, members of the 'demos' which is the source of legitimacy of the state. Equal citizenship under the constitution may be a way to bridge, in the political context, the gaps between the various groups.

The need to cater to different interests and conceptions of the good means that constitutional schemes often involve 'great compromises', which permit each of the groups to subscribe to the shared framework despite the fact that it does not meet one's ideal of governance. These great compromises need to be protected from regular partisan politics, because they are the basis for the willingness of the groups to join in that game and to see themselves as a part of the civic nation to begin with. It will undermine the agreement if the legislature or anyone else starts to erode the compromise once the moment of constitution-making is over.⁴

Moreover, since the constitution sets up the rules of the game, it should include an elaborate structure of checks and balances. It is important to see these as a whole, because the effectiveness of the system may depend on the full range of constitutional arrangements. These should be seen as inter-related, so that piecemeal changes may endanger the overall balance. Naturally, it is much easier to design that kind of a system in a comprehensive enactment and not in a series of piecemeal statutes or arrangements, each enacted within a background of constraints.⁵ The leeway for flexibility and negotiation is greater if more of the basic arrangements are negotiable.

The need to reach great compromises and to uphold them suggests that it is good for constitution-making processes to involve broad participation. While usual legislation may pass on the basis of a simple and even narrow parliamentary majority,

³ Deep rifts within a society are likely to be reflected in election systems and in the structure of state organs. They may mean that credos will be especially hard to agree on. They may result in a lot of emphasis on the identity of law-makers and law interpreters, and on stronger interests in representation of the various groups and interests.

⁴ The enactment of the US constitution involved two such great compromises. One was on the structure of the senate (2 representative to each state irrespective of size), which was entrenched indefinitely, the other on slavery, which gave the controversial institution a period of grace. Attacks on slavery started in congress from the very beginning, but the political system upheld the compromise. It is quite clear that without both compromises, the miracle in Philadelphia would not have happened. It seems quite clear that the Union would have collapsed had Congress undermined the provisional delay in prohibiting the slave trade. In fact, the constitution has even survived the civil war....

⁵ A person who is apprehensive about judicial review of social and economic policy may agree to judicial review only if the Bill of Rights explicitly excludes social and economic rights. He may agree to an expansive Bill of Rights if courts are denied the power of judicial review over all primary legislation. Or if judicial review is administered by a constitutional court whose judges are appointed by the political branches for a limited term.

constitutions should be acceptable to all major sectors of the population, with a special sensitivity to 'chronic' minorities. It is for them that issues of legitimacy of the system loom large. Majorities usually can rely on their political power to protect their interests.

These desiderata will usually be met by making the constitutional design comprehensive, so that the system of checks and balances is coherent, and so that the room for compromise and configuration is maximal. It is hard to change one element of government without touching on others. A comprehensive change may enable us to design institutions that can fit together and suit the powers and functions they are given. It is also healthy for constitutions to be made in a process of public debate, and to require a broad participation in their enactment in the form of constitutional assemblies, ratification, or referenda. All these features, which are not required for regular legislation, support the special legitimacy we hope the constitution will enjoy, which will in turn devolve upon elected governments and authorized organs acting within the constitution.

Similarly, the phases of constitutional amendment and normal life under the constitution and within it should be distinct. Constitutional amendment is much less dramatic than making a constitution, since it is aimed at a particular aspect of the constitution, leaving most of it intact. It thus may lack the elements of comprehensiveness and major compromises required by constitution-making. Nonetheless it is a deliberate change of the framework rules themselves. It will enjoy the supremacy and the entrenchment levels of the constitution itself. It will share in the special symbolic and legitimating functions of the constitution. It seems reasonable to expect that the process of constitutional amendment will be more formal and celebratory, and allow and even require more public participation, than that of regular legislation. The functions of the constitution may also suggest a theory of when constitutional amendments are proper. Stability is always a virtue in the law, but its weight is higher when the arrangement to be modified belongs to the constitution.

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

The phases of constitutionalism are clearest when constitution-making is a deliberate, conscious process. Even if initial constitution-making itself is clear, the distinction between the latter phases of amendment and interpretation/application may

be hard to make.⁶ Most 'new' states use the constitution 'literally' – the document constitutes the polity and defines it.⁷ In most of these countries, a constitution is the reflection of a great transformation, sometimes even a revolution.⁸ Nonetheless, a constitution can never be enacted without a society and some political structure in place. Someone must have the power and the authority to prepare the document and supervise the process of its enactment and possible ratification. In addition, some countries use a new constitution to achieve a serious change in government and not to reflect a 'constitutional moment'. It follows that the identification of a constitution-making process (as distinct from an amendment of an existing constitution or creative interpretation of an existing one) is not necessarily connected to the establishment of a new state or even to a serious political transformation.⁹ Rather, the test of a process of constitution-making is its product, intended or real: A constitution-making process is completed when a country that did not have an entrenched constitution has one. Once a country has a constitution, the usual processes are application, interpretation and amendment. All these take place within the constitutional order. In rare cases, a country with a functioning constitution chooses to deliberately change it (rather than amend it) without a revolution. The change is a process of constitution-making (even if a lot of the old constitution has remained unchanged).¹⁰

There are obvious institutional implications to these observations. Surely, the differences between these phases are not always clear and distinctions between them may be hard to make. I will argue, nonetheless, that there are good analytical and political reasons for maintaining the distinctions, and for checking constitutional processes in specific countries according to them.

In the initial stage of constitution-making, the main contenders for the job are special constituent assemblies or regular legislature, with a clear preference for the former.¹¹ They can concentrate on the constitution without the need to work at the same time on current political issues. The main options and the great compromises can be negotiated without the 'noise' created by regular politics. If the members of the assembly are people who are not directly involved in day-to-day politics, it is likely that their judgment will be less clouded by their own immediate political interests. This is especially true if a major purpose of the constitution is to limit the powers of the legislature. At times it is impossible or undesirable to let constituent assemblies enact constitutions, and the second-best candidate is the legislature. What these two bodies have in common, however, is crucial for the task: they are representative bodies, structured to include all or most of the major interests and views in the society

⁶ The US federal constitution provides a dramatic illustration with the decision to regard the Bill of Rights as the first ten amendments and not as a stage of the ratification of the constitution itself.

⁷ The USA was a new state in this sense, because the constitution replaced the loose union under the Articles of Confederation with a much stronger federal state. More recent examples are Poland and Czechoslovakia after WW1.

⁸ Both Elster 1995 and Ackerman 2002 mention the usual strong connection between transformations and new constitutions, and explain how such moments create the rare incentive structure that may facilitate constitution-making. See also Gavison 2002b.

⁹ A notable example of a constitution without a serious transformation is that of Sweden. See Ruin.

¹⁰ Thus the change in France's constitution in 1958 is seen as a process of constitution-making generating the 5th republic. It is not a mere amendment, leaving the 4th republic in place. Elster (1995) provides a catalogue of circumstances in which constitution-making is likely and describes this case as one of making a constitution under the threat of a regime collapse.

¹¹ This question is discussed in depth by the Jon Elster's paper in this volume. See also his systematic analysis in 1995. This is a view widely shared in the literature, almost to the point of triviality.

to be regulated by the constitution. Furthermore, their mode of work is built on understanding political constraints and on negotiating compromises. They do not work on the basis of articulating principles set out elsewhere. They are the ones who set the rules and make the social compact. And they set the rules because they have the mandate to do so, given to them by those who have elected them for the job.

To make sure the product of their processes of deliberation enjoys the broad support of the people, it is often required that the constitution will not only be enacted in a celebratory way and with a special majority, but also be subjected to a broad public debate and possible ratification by a referendum. These processes may be based on presentations prepared by the government or by civil society groups, but the actual process of enactment and ratification should be conducted in ways that involve representatives of the people and the people themselves.¹² The courts as such should not have a role in this process. In fact, some may suggest that it is best for them to stay out of these negotiations as far as possible.¹³ We do not have to go into the fascinating question whether constitutions stem from 'We the People' directly (as distinct from regular legislation that is generated by the political game of representatives of various sorts). There is a consensus that this is an exercise of the powers of citizens. Courts, with their professionalism and their relative independence from government and the preferences of the majority, are not – as such – primary players in these constitution-making stages.¹⁴

Once a constitution is in place, the constitution itself (either formally or informally) governs the ways the constitutional regime should operate. Courts are seen as the authoritative interpreters of law when a provision of the law comes to them. Their decision is final for the parties. The broader legal force of their decision depends on the status of the constitution itself, the rules of *stare decisis* and on future acts by the other constitutional players. The constitutional design may also govern, formally or informally, the limit of the jurisdiction of courts and the nature of cases they can (and cannot) decide. Naturally, these constitutional limitations will be interpreted by the courts themselves.

There is no question that the role of the courts in the application and the interpretation of the constitution is pervasive and central, whatever the status and nature of the constitutional regime. But while there are constitutions that explicitly grant courts the power to invalidate primary legislation, there are those in which the power was inferred by courts from the supremacy of the constitution,¹⁵ and there are

¹² The most obvious way of going to the people is ratification by a referendum. Indeed, some argue that The US federal constitution as well as the round table talks generating the East Europeans constitutions did not really involve the peoples concerned. That may be true, but the process did enjoy visibility and transparency that permitted broad participation.

¹³ Some claim that courts should even stay away from a close involvement even with regular legislation, especially one that concerns the courts themselves. Comparative analyses of constitution-making do not usually disclose involvement by courts. Moreover, in most deliberate processes of constitution-making, the constitution itself empowers and creates the constitutional court that is supposed to enforce it.

¹⁴ One might object that this expectation is itself unfair since the constitution will decide the limits of the power of the court, and it should be able to participate and protect its 'interests' just as the legislature does. This is indeed one of the arguments in favor of making constitutions by constituent assemblies and not by legislatures. But it seems that courts fare well in constitutions even in their absence: Elster, 1995, at 380-382.

¹⁵ This is the case in the US.

those that explicitly denied courts that power.¹⁶ Even when there is a judicial power to review primary legislation and invalidate it for inconsistency with the constitution, there is a variety of such institutions and regimes.¹⁷ Be this as it may, most constitutions provide for legal enforcement of constitutions, and most see judicial institutions as the ones best suited to enforce them. Often, this is based on a deep reluctance to place full trust in legislatures and a wish to add an effective constraint on their power. There is a variety of ways of dealing with the counter-majoritarian difficulty which may then emerge.

One can discuss these questions analytically or study the way the relationships between legislatures, executives and courts develop in various legal systems. Both approaches yield similar results. Judicial review of primary legislation has been the norm in a growing number of jurisdictions. It is especially salient in societies which emerge from dictatorial regimes and seek to entrench the hard-won commitment to democracy and freedom. While there are serious political limits of various sorts to the effectiveness of courts as defenders of rights or as movers of social change,¹⁸ judicial review over primary legislation has in general provided an important avenue to check local excesses within political systems. Against this background, countries that have struggled with these questions in recent times and decided against such judicial review are of special interest.¹⁹

Of course, as I noted above, the dividing lines between the phases are often not very bright and clear. The distinction between regular or normal politics and constitutional debate may well be a matter of degree. Regular politics constantly challenge constitutional limits. One does not have to endorse Ackerman's theory of constitutional moments to claim that the US constitution has in effect been amended many times without invoking the formal process of constitutional amendment.²⁰ In such amendments, which are instances of constitution-making, courts naturally take an important part. At times, they may be the movers or the consolidators of such processes. At others, they may well undermine, by their interpretation, the practical effects of proposed constitutional amendments. Moreover, due to the finality of adjudication and to the prestige of courts as defenders of the rule of law, it is often politically quite difficult to use legislation to change a law or a practice or an interpretation ruled by courts as inconsistent with constitutional values.²¹

Nonetheless, with all this inevitable and immanent ambiguity, the field in processes of constitution-making and in amending constitutions should mainly belong to representatives of the people. In processes of interpretation and application of constitutions and their amendments – courts are serious and central players, seen by some as supreme. This division of responsibilities is not merely a universal

¹⁶ Netherlands, New Zealand, the British Human Rights Act.

¹⁷ See Jackson and Tushnet at 455-491. The main differences are between regular courts (as in the US and Canada) performing all such review and constitutional courts (as in most of the continent and SA). Between systems allowing only pre-legislative review (as in France) and those allowing only or also post-legislative one. Between systems allowing only incidental review and those allowing also abstract review and advisory opinions.

¹⁸ See Rosenberg (1991) and Arthurs, at 8-10.

¹⁹ One may say that European countries are less relevant here because they are subject to the jurisdiction of the European Court. The main non-European examples are Australia and New Zealand.

²⁰ Ackerman (1991)

²¹ A dramatic illustration of these difficulties is the famous override clause in the Canadian Charter.

description of the realities in legal systems. It is a natural outcome of the different bases of the legitimacy of the various organs of government and the different functions of constitutional frameworks, normal politics and adjudication.

In addition to constitutional phases, there is a difference in institutional roles as state organs live under the constitution and invoke the three main parts of constitutions – rules of the game, credos and bills of rights. All constitutions must have a rules-of-the-game part, in which they structure, legitimate and facilitate all organs of government. Furthermore, constitutions build a system of checks and balances by using some powers to check others. Seen in this way, all empowered organs are the guardians of the constitution, and all are legitimated by it. Effective government is not less important than an independent and courageous judiciary or from a conscientious and productive legislature. Concerning the rules of the game, therefore, each of the powers may and should act according to its own interpretation of the law and the constitution. No organ of government may act in a way that it itself concedes is unconstitutional. Rules of procedure and justiciability will determine which of these actions by the legislature and the executive may be subject to judicial review and in what form. The legislature and the executive are considered strong branches, and the courts are often granted powers to check their activities. The fact that the SC has no legal authority that may subject its final decisions to legal review is often justified by saying that the court is 'the least dangerous branch'. This may be so, but it is no reason to give up on the basic insight that no power should come without some accountability. The accountability of supreme courts should thus be achieved through other forms of checks and balances.²² More important, the centrality of courts as interpreters should not lead us to belittle the role of other organs in the interpretation and enforcement of the constitution.²³

Constitutions do not have to have either credos or bills of rights. Divided societies may be attracted by 'thin' constitutions, and at least some believe that a wisely designed system gives all the required protection to minorities and factions.²⁴ Thin constitutions permit agreement on procedures which are necessary and neutral, without talking about controversial conceptions of the good or values. On the other hand, one could well argue that deep chasms in a society are in fact a strong reason for a bill of rights with judicial review, since this is where democracy in the sense of majority rule must give way to the substantive values of human rights which should constrain all governments. These rights are universal and do not depend on the preferences of majorities. Their function is to protect minorities and individuals from majorities. And judicial independence is given so that protection is more effective.²⁵

This is indeed a strong argument. However, human rights talk tends to become very expansive with some people and groups, so that everything that one wants very badly is translated into a right. Most of the democratic discourse and debate may

²² Mainly, these should take the indirect form of control over appointments and short terms. The need to supervise judicial power is naturally greater the more power the SC has. Judge Landau argued against giving the courts the power of judicial review over values and rights because he was certain this would lead to an increased involvement of politicians in the appointments process.

²³ For a systematic argument in this direction see Tushnet (1999).

²⁴ Some think that this was the view of Madison, elaborated most fully in the celebrated Federalist #10.

²⁵ Indeed, this was a statement often made in the ratifying conventions in the US and it did lead to the addition of the US Bill of Rights by Madison himself.

easily be reformulated in terms of rights.²⁶ So the question again becomes not 'what are one's rights?' but 'who decides?' It is to be expected that bills of rights are vague and will require interpretation. The real question to be decided here is that of the structure of the commitment to rights and its institutional implications. This question in itself may be seen as a part of the rules-of-the-game, because it goes to the supremacy and the enforceability of the constitution, and to the powers of courts vis-à-vis the government and the legislature.

Divided societies may be tempted to use credos in order to give celebratory force to the vision of the enacting powers and remove it from the contingencies of future controversy. This of course may be very problematic for the groups whose visions are excluded or silenced. It may well reduce the legitimacy of the constitution for them since it may appear not to include them fully. In terms of constitutional design, credos and human rights are particularly tricky when interpreted and enforced by a court which has the power to invalidate statutes. The inevitable ideological and abstract nature of these parts of constitutions means that decisions by unelected courts may be, and appear to be, not sufficiently responsive to self-government. The fact that courts are seen as 'the forum of principle', and do not engage in negotiation and compromise may mean that important social and political debates will be resolved without the give-and-take needed when a complex society works out its positions. The results may be either loss of legitimacy by the courts, and of the constitution they purport to invoke, or pressure to politicize them, or both.²⁷

Since judicial review, particularly that over legislation, is a subject of known great controversy, it is best that the question is explicitly addressed in all its aspects in the process of constitution-making itself. A decision to give a judicial body the power of judicial review over an abstract bill of rights is known to transfer a lot of political power from the legislature to courts. This decision should therefore be made by the legislature itself, with some broad public ratification, and the nature of the judicial body and the scope of its powers of review should ideally be decided within the same phase of constitution-making in which the power is conferred.²⁸

These guidelines are not always seen as mandatory, however. The guidelines have both empirical and normative dimensions. They suggest that a constitution is

²⁶ For a critical analysis of this feature of rights-discourse by a person with a strong commitment to human rights see Glendon.

²⁷ This fear is the basis of the judicial doctrine of self-restraint advocated by some judges, and the spirit of Holmes' famous dissent in *Lochner*. Holmes warned against judicial invalidation of laws on the basis of vague ideas like property or freedom of contract which was in fact judges enforcing their own system of values. He in fact noted that while federalism required that there would be a final arbiter on constitutional matters between states and central government, the court could have endured well enough without the power to overrule laws of congress on the basis of the Bill of Rights. See Gavison (1995).

²⁸ One may argue that this guideline was not met by the US constitution, and that this did not harm the legitimacy and importance of judicial review. True, *Marbury v. Madison* went beyond the constitutional text. True, the fact of judicial review (as against its proper scope) is not challenged by anyone in the US. But the pervasiveness of the debates over its scope suggests that this vulnerability exists in the US as well. Besides, we do learn from experience. In current debates about enacting bills of rights into constitutions, these themes are central and often lead to decisions not to endorse judicial review (as in Australia and NZ) or to reach compromises (as in UK and Canada). Furthermore, when the power to invalidate laws is granted, it is often relegated to special organs, with specific modes of appointment, limited terms, and serious limitations on access.

more likely to gain legitimacy if made and amended through broad participation, and that there are good reasons of political morality to take this route. But those who believe that liberal constitutions are critical for the health of good societies may prefer that such constitutions are enacted by whatever means available to giving them up just because legislatures will not provide them. And if the public feels that a liberal constitution is good for it, better than the rule of the political branches without the constitution, legitimacy will follow. The presumption is, however, that broad participation and big compromises by authentic representatives of all segments is a more promising route for a constitution than imposing one from above by a small elite. This is especially true when the society is deeply divided and when the small elite is anything but representative.

Part Two: A history of the Israeli Constitutional Process²⁹

In this section I explain how it was possible that in May 2003 the speaker of the Knesset, Reuven Rivlin, charged that, in fact, Israel did not have a constitution, and was the victim of a judicial constitutional putsch, which needed to be redressed by the legislature, while the president of the Israeli Supreme Court of Israel, Professor Aharon Barak, replied by repeating his oft-made assertion that Israel has joined the family of constitutional regimes in 1992, and affirmed that the purpose of that move was to protect the citizen from the legislature itself.³⁰

When Jews got ready to declare their state at the end of the British Mandate over Palestine and following UNGA resolution 181 of November 1947 (holding that the area between the sea and the river be partitioned into a Jewish state and an Arab State) it was quite clear that the Jewish state would be constituted by a constitution. Preparatory work was done, and a draft constitution was adopted.³¹ In the Declaration on the Foundation of the State of May 15, it is expressly provided that matters will be run temporarily by the organs of the Jewish community, elections for a constituent assembly will be held, and the first parliament will be elected under the provisions of the newly enacted constitution.

Matters have not developed as planned. Upon the ending of the Mandate a war erupted, seeking to undermine the emerging Jewish state. By the time elections were held in 1949, the temporary organs were quick to transfer to the constituent

²⁹ The uniqueness of the Israeli case is reflected in the fact that, in addition to many detailed analyses in Hebrew, it is discussed by many non-Israelis in a variety of comparative contexts. For a sample of descriptions see e.g. Burt 1981, Jacobsohn 2004, Gavison 2003, Jackson and Tushnet at 566-605, E. Guttman, Dafna Barak-Erez, Hirschl (2004), and Murphy.

³⁰ Rivlin's speech was made on May 22, 2003, in a conference at the President's mansion on Democracy in Israel, in Barak's presence. Barak's reply speech was delivered at the opening of the Bar annual retreat on May 26, 2003. For the (Hebrew) texts of both speeches see www.nfc.org.il/Articles.

³¹ It is far from certain whether this was not a response to "force majeure" in the person of the UN General Assembly, rather than the expression of the policy preference of the political leadership of the Jewish state. The General Assembly resolution called for constitutions in the Jewish and Arab states, prescribed fundamental guarantees of minority rights, and set the date by which the respective constitutions would be adopted. Since this resolution was the source of legitimacy of independence under international law, the Declaration on the Foundation of the State carefully incorporated all the prescribed provisions of the resolution relating to the proposed constitution, including the prescribed date (according to the Gregorian calendar, unaccompanied by its Hebrew equivalent) for the adoption of the constitution.

assembly all powers of regular legislation. The elected body thus became endowed with both legislative and constitutional authority. The Constituent Assembly was elected on January 25, 1949, and it met for the first time on February 14, 1949. Two days later it passed the Transition Act, 1949, providing that the legislature be called the Knesset and the Constituent Assembly the First Knesset. In 1950 a long debate was held on the issue of whether or not to enact a constitution. The opposition wanted one to protect democracy and human rights. The coalition, headed by Ben-Gurion, and including the religious parties, mostly opposed.³² The compromise was a decision to enact a series of basic laws, which together would form a constitution. The status of the basic laws or the process and the timetable of their legislation were not specified. In the same year – 1950 – a few very fundamental laws were enacted, among them the Law of Return. When some suggested that the law be entrenched, Ben Gurion responded that abolishing the law was unthinkable, but that Israel had decided against entrenchment of legislation.

In the very early years of the state some petitioners sought to invalidate laws that were, they claimed, inconsistent with the foundation of the state. The Court consistently rejected these petitions, saying that Israel did not have a constitution and that the Declaration was not a legal document. At the same time, the High Court of Justice, which is the Israeli Supreme court sitting as an administrative court of first (and last) instance, developed a stance of interpreting laws and practices from a prism of human rights, so that violations would be validated only if explicitly authorized by a law. It thus created an impressive unwritten Bill of Rights.³³

The first basic law was enacted in 1958 and dealt with the Knesset itself. It was a very detailed law, not confined to the level of principle usually seen in constitutional documents. Only one section of that law was entrenched, and required a special majority of 61 (out of 120) for its amendment – the section holding that elections in Israel will be general, national, proportional and equal.³⁴ The process of legislation was not unique, that is, it did not deviate from the process of ordinary legislation; but the law enjoyed a very broad consensus. In 1968 (one year after the 1967 war) the court for the first time ruled that a law violating the equality of the elections (by not funding new parties) could only be enacted with the special majority and since it did not enjoy that majority – it was invalidated.³⁵ As a result the Knesset modified the law a bit, gave some funding to new parties, and re-enacted all election laws with the required majority.

³² For this debate see Gavison (1985). Ben Gurion's main reasons to oppose an entrenched constitution were fear of limits on the powers of government and the legislatures, fear of judicial review over laws, and a wish to change the system of government which he saw as untenable. Ben-Gurion thought that a PR election system which generated many small parties did not permit effective government, and wanted to move in the direction of the British Westminster system. See Ahronson (1995).

³³ See the detailed discussion of Lahav of the Kol Haam decision of 1953 in which freedom of expression was protected against administrative discretion through this interpretive stance.

³⁴ The need for entrenchment did not stem from the wish to protect equality, but from the wish of the small parties to make it harder to change the system of national, PR elections. Ben Gurion and others have thought this system created too many small parties and made coalition forming and government too difficult.

³⁵ Bergman. The decision, notably, was given by Judge Moshe Landau, who expressly held that invalidation of the law did not decide the issue of judicial review (since the AG was willing to argue the law on the merits while also saying he did not think the court had the power). For a detailed analysis of the case and its meaning see Nimmer.

From 1968 on, the courts invoked the power to review laws that violated entrenched provisions which were not enacted with the proper majority in the context of elections. They also insisted that non-entrenched basic laws were regular laws. While many suggested that this started the introduction of judicial review in some form to the Israeli legal system, no one argued that *Bergman*, in itself, meant that Israel now already had a constitution.

Attempts to enact basic laws and complete the constitution continued throughout the 70's. Slowly, basic laws covered most of the central organs of government. Mostly these laws reflected the existing structure of government organs and their relations, so they did not change much in the law and consequently they enjoyed large majorities. Later basic laws were shorter and less detailed. But none of their provisions was entrenched. And it was clear they did not yet add up to a constitution. It became apparent that there were two related main stumbling blocs to the completion of a constitution: the enactment of a Bill of Rights and the issues of entrenchment and supremacy, presumably involving judicial review by the courts.³⁶

Starting in the mid 1980s, both the drive(s) for a constitution and opposition to it have grown. This reflected important changes in Israel's political and social reality.³⁷ The forces founding Israel were all Zionists and mostly European and secular. Labor-led governments controlled matters of security, immigration and foreign policy. The religious parties tried mainly to protect their freedom to maintain a religious way of life and to get financial support for their schools. The Arab minority within Israel was small and demoralized and of no political import. Israel was seen by most as the secular nation-state of Jews. The 1950s brought waves of immigration from Moslem countries. These people were often either observant or at least traditional. 1967 opened an old-new debate about the future of the territories occupied by Israel and their population, which grew in intensity after 1973. In 1977 the Labor lost control of the government, and the Left-Right divide has been very central to Israeli politics ever since.³⁸ Unity governments were usually paralyzed, narrow governments often depending on the religious parties. This led to arrangements that produced a growing resentment among some of the secular groups. In addition, a huge immigration wave from the FSU, combined with a growing sense of strength by the Arab citizens of Israel, have made the basic divides in Israel more pronounced. As political authority weakened, and as political power started changing hands, the court has become a much more central player in Israeli public life. Issues that used to be resolved in Parliament started reaching the court. The latter expanded its jurisdiction by letting go of all requirements of standing, by abolishing in fact the political question doctrine, and by adding unreasonableness to the list of reasons justifying intervening in the actions of government. While all agreed the court was

³⁶ One can find two detailed and at times contradictory descriptions of the history of attempts to complete the constitution in the opinions of Barak and Cheshin in *Bank Hamizrahi*.

³⁷ For descriptions of Israeli society see Eisenstadt; Lissak and Horowitz (1989-למחורק); Kimmerling (2001a, 2001b), Yonah..

³⁸ The present Left-Right divide in Israel relates to the issue of the future of the territories and not to social and economic policy. In the early 1950s, the debate over whether the state should be free market or socialist was one of the controversies making a thick constitution difficult to attain. At the turn of the century, most of the political elites support a free-market economy. Differences of emphases on the social and economic issues are used as election boosts by both parties. Ironically, the 'Right' enjoys the support of most of the weak groups, while the 'Left' is supported by the rich.

becoming activist, some celebrated the fact while others criticized it.³⁹ The Supreme Court has also started to indicate that judicial review over primary legislation itself was a matter of convention. Judge Aharon Barak conceded that **at that time** the convention did not allow such review but indicated very clearly that this was an empirical question, and that it was quite possible that even without any legislative authorization judges could acquire a power to invalidate laws which were inconsistent with the basic and fundamental values of the system.⁴⁰

In 1992, supporters of the constitution and the bill of rights from within the Knesset realized that their chances to complete legislation of the two missing basic laws and declare the whole set the Israeli constitution, all entrenched and supreme, were very slim. They decided to divide the bill of rights into separate laws, seeking to enact those that enjoyed a broad consensus, and hoping that once the basic structure was in place – the rest would follow. At the same time, a civil society group from outside the Knesset was pushing hard for a constitution involving not only a completion of the existing arrangement and a Bill of Rights but a more ambitious comprehensive document, proposing – among other things - that Israel switch to a presidential system of government and change its election system.

Just after a date for elections was set, both initiatives bore fruit. The Knesset passed a new Basic Law: The Government, determining that the PM will be elected directly by the people (starting from the elections following those of 1992). Two basic laws on human rights - Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty – were also enacted. Basic Law: The Government was fully entrenched (requiring a supermajority of 61 to change it) as was Basic Law: Freedom of Occupation.⁴¹ Basic Law: Human Dignity and Freedom was not entrenched, and it contained a provision granting all existing legislation immunity from judicial review. The human rights laws did not specify judicial review, but they did contain a section saying that all authorities must protect the rights enumerated, and that these rights could only be infringed according to law and in a proportionate manner (a limitation clause).⁴² They also declared that human rights were to be protected according to the values of "Israel as a Jewish and democratic state".⁴³

Soon after the enactment of these laws, scholars started talking of the 'constitutional revolution'. Notable among them was the then Judge on the Supreme Court Professor Aharon Barak, who became its president in 1995. Against the expectations of the religious parties, who thought these two laws did not really change the legal status quo, the court found that Basic Law: Freedom of Occupation interfered with the practice of prohibiting wholesale importation of non-Kosher meat. In 1994 the Basic laws were re-enacted, adding a legislative override to the basic law:

³⁹ See discussion in Gavison et al (2000) and the book review of Gordon.

⁴⁰ See his judgment in Laor. Indeed, in a Basic Law: Legislation Bill proposed at that time, the laws were supposed to be consistent not only with the basic laws but also with the 'basic values of the system'.

⁴¹ The direct election was hotly debated, and participation in the vote was massive. It passed by a 55-32. The human rights laws were enacted very late at night, and the votes were respectively.

⁴² For a description of the laws and their meaning see Kretzmer and Barak-Erez.

⁴³ This limitation clause was copied from the Canadian Charter, and the fact that Jewish was added to democratic and even preceded it was the main reason the national religious party (NRP) supported the deal, and the ultra religious parties did not seek to block it.

Freedom of Occupation, and an explicit law prohibiting the importation of non Kosher meat.⁴⁴

In 1995 the Supreme Court has affirmed, in a very long decision, that these laws do confer on the court the power to invalidate laws inconsistent with the basic laws.⁴⁵ Moreover, a majority of the court added that the 1992 legislation created a constitutional gradation so that all previous basic law should now be seen as constitutional.⁴⁶ In that decision the court has reached the conclusion that the statute met the requirements of the limitation clause. A controversy developed among the judges on the nature of the 1992 laws. Barak repeated his statement that they consisted a 'constitutional revolution', making Israel a full constitutional democracy with judicial review. Judge Cheshin argued that the first Knesset could not have transferred its constituent powers, and that the basic laws could not be regarded a constitutional revolution since there had been no celebratory features to their enactment and no festive sense of special meaning in the deliberation over them.

Since 1992, the Supreme Court has invalidated legislation only 3 times.⁴⁷ But arguments that laws are unconstitutional have been frequently made in all legal instances.⁴⁸ They resulted in a growing jurisprudence interpreting the basic laws. Naturally, interpretations of these provisions and their meaning were also undertaken by legal scholars. Again, prominent among them is the President of the Supreme Court himself, who has published a large numbers of articles and a comprehensive treatise on the subject. His thesis, repeated in judicial opinions, public lectures and

⁴⁴ The amendment of the Basic Law: Freedom of Occupation required a 61 majority. The religious parties supported it because it was a part of the deal that the override was added and that the notwithstanding law prohibiting the importation of non-Kosher meat (which also requires a 61 majority) was enacted. Some have claimed that this re-enactment gave the Basic Law the legitimacy they needed. Others disagree. For details of the 1994 legislation see Barak-Erez.

⁴⁵ *Bank Hamizrachi*. There was disagreement among the judges concerning the jurisprudential basis of this conclusion. Some argued the Knesset had the immanent power to limit itself, while others reasoned that the Knesset had two distinct powers, one legislative and one constituent. This interpretation of the 1992 laws was plausible but not inevitable. For the various ways to read the relevant clauses see Barak-Erez (writing before *Bank Hamizrachi*). Most scholars did not challenge this interpretation, but Landau (1996a), as well as SC Judge (emeritus) M. Elon, 255-257, did. (Elon wrote before *Bank Hamizrachi*, but he criticizes the interpretation reached there on the basis of its endorsement by Barak in his pre-Mizrachi articles).

⁴⁶ The meaning of this is not clear. The old laws (and Basic Law: Human Dignity and Freedom) are not entrenched. A majority of the judges seem to hold that the old basic laws can now only be amended by a basic law. But since basic laws are enacted as regular laws, the implication is not clear. Others hold that the principle of later laws override earlier ones still applies even to amendment of non entrenched basic laws by regular later legislation.

⁴⁷ The first decision involved a transition provision in a law introducing the licensing of securities advisers. The law exempted people who had worked in the field for some time from examinations, and the court held that the period specified was too long. The legislature amended the period. At the same time the court upheld all the substantive provisions against a challenge that the whole law violated the right to freedom of occupation. (HCJ 1715/97, Bureau of Investment Managers Case). The second decision required that the period of detention for soldiers be shortened (this was a case of abstract review, and the IDF did not really object: HCJ 6055/95, Tzemach). The third case invalidated a law legitimating some unauthorized radio stations, with the active support of the AG who had fought against the law.

For the background of the latter decision see Porat & Rosen-Zvi.

⁴⁸ The *Bank Hamizrachi* decision was an appeal on a decision by the district court, that had invalidated the law in question. The speaker's angry speech resulted from the fact that a law was declared unconstitutional by a judge of the magistrate court.

scholarly writings, is that the 1992 amounted to a 'constitutional revolution'. Following 1992 Israel does have a formal constitution – the body of the basic laws. This constitution empowers the courts to review primary legislation. This development is desirable since human rights, separation of powers and democracy itself cannot flourish without such judicial power. True, says Barak, the constitution is not complete, and it will be good if the Knesset does complete it. But no further legislative step is needed in order for Israel to operate as a state with a formal constitution.⁴⁹

Following his own description of the legal situation, Barak kept developing the meaning of the 'constitutional revolution'. In *obiter dicta* in a number of judicial opinions, as well as in articles and public lectures Barak expanded on the meaning of the 1992 legislation. In *Ganimat* he decided that despite the fact that Basic Law: Human Dignity and Freedom grants explicit immunity from review to old legislation – the old laws should be interpreted according to the new laws.⁵⁰ In *Rubinstein* he decided that the 1992 laws, with their constitutional revolution, now required that all primary arrangements be regulated by the legislature itself, with no delegation;⁵¹ and in *Herut*, Barak wrote in an *obiter* that is now cited as law that it is impossible to amend or even modify implicitly an old, un-entrenched basic law by regular legislation.⁵²

⁴⁹ See his seminal 1992 article in which the expression 'constitutional revolution' to describe the enactment of the 1992 human rights law was initiated into the scholarly debate. See also his lengthy decision in *Bank Hamizrachi*, translated in full in Gambaro and Rabello, 381.

⁵⁰ *Ganimat*. On this basis, Barak reasoned that the 'old' balancing that had been done between public safety and the rights of suspects not to be detained should be changed in favor of suspects. Judge Cheshin argued forcefully against him that the basic laws did not change interpretation, and the balancing between these interests should not be changed in this way. Legislators bring *Ganimat* as their reason for refusing to continue to legislate basic laws so long as Barak is their interpreter.

⁵¹ The issue was the legality of a sweeping decision by the minister of defense to exempt from military service all ultra religious youngsters who studied Torah. In a previous decision in 1986 Barak had held this decision was reasonable. This time the court unanimously held the decision was illegal. Barak explained the difference between the decisions by invoking the constitutional revolution. The decision challenged here was not a Knesset law, so it could have been invalidated even without judicial review of legislation, however. For an extended discussion on this topic see below note 67.

⁵² *Herut*. Petitioner appealed the decision of the chair of the elections committee, and the state argued that the court had no authority to hear the case because section 137 of the election law grants the decision of the chair of the committee finality. Barak rejected this argument saying that the court's jurisdiction was based on section 15 of the (old, un-entrenched) Basic law: Adjudication, and no regular law could derogate or modify it. This may be the most dramatic judicial expansion of the 'revolution' so far. Many had challenged the legitimacy of changing the status of the old, un-entrenched basic laws in *Bank Hamizrachi*. Judge Cheshin for instance argued there that these laws, and even Basic law: Human Dignity and Freedom could be changed or modified by later simple legislation. At most they needed to specify that they consider the law valid notwithstanding the basic law. Barak and a majority of the court held that one could only change a basic law by a basic law (an unfortunate decision since many of the old basic laws are very detailed, and that would mean that even minor changes should have the status of basic laws). Barak later developed a thesis that 'substantive entrenchment' by a limitation clause was in fact stronger than formal entrenchment requiring a special majority and that all subsequent laws modifying Basic Law: Human Dignity and Freedom must pass the test of the limitation clause. This could not be remedied by simple legislation whatever its majority. In *Herut* Barak suggested that this now applied to all basic laws, including the old ones which had neither entrenchment nor a limitation clause. In an 2004 article on a decade to the revolution and in his statement before the Constitution, and Law committee Barak affirmed that this was the present legal situation. One scholar called this another revolution (Bendor 2003), while others argued that this was not the way a constitution should be made (Reichmann 2002, Sommer, 2004).

Barak also elaborated on the way he interpreted the expression 'Jewish and democratic state' in the limitation clause. As far as he was concerned, the values of Israel as a Jewish state should be taken in such a high level of abstractness that they would coincide with the values of democracy.⁵³ He also gave a very expansive interpretation to Basic Law: Human Rights and Dignity, saying that most classic human rights, including even basic welfare rights, can be derived from these commitments to dignity and freedom.⁵⁴

While the jurisprudence of constitutionalism and rights among lawyers and in the courts has flourished, further constitutional legislation came to a total standstill. Furthermore, an internal struggle within the Knesset started vis-à-vis the court, with some of the parties regard the court as the defender of values, decency and human rights, and thus a great asset to Israel, while others think that it is super-activist and anti-democratic and needs to be made more accountable and constrained. A proposed reform in the structure of the court system which would relieve the Supreme Court of most of its mandatory case load of civil and criminal appeals was slowed down considerably. Persistent proposals to establish a constitutional court have been raised. Finally, in the beginning of 2004 the Knesset tried to pack the court by increasing the number of judges from 12 to 15. However, the judges-controlled appointment procedure worked, and the new appointees were the ones the court itself had favored. In all these processes in the Knesset, the Court, usually represented by President Barak, was a very visible and central player. Barak came out extremely forcefully against the idea to establish a constitutional court, saying this would be the end of democracy. He was involved in the details of the 1992 legislation and presented special comments on the 1994 amendments. While he concedes that the Knesset has the power to change the Basic Laws, he has introduced, in both judicial opinions and in his scholarly writings, the notion of the 'unconstitutional constitutional amendment', indicating that the powers of the Knesset may be limited even if it legislates within the formal constraints of a special majority.

It is not easy to assess the present situation re the constitutional process and the status of the SC. While the court still enjoys a high level of support among Israelis, its level of support is declining.⁵⁵ Most of the criticism leveled at the court is not related to constitutional matters and to judicial review over legislation but to its general activism in reviewing government, but the two are often connected in public debates. The court is aware of its vulnerability, and it moves cautiously. At the same time, social forces as well as MKs continued to take more and more of the pressing political issues to the court. In the last two years the court systematically reviewed closely military actions in the occupied territories. It stopped military actions in real time in Jenin in 2002, and regulated the siege on the Church of the Nativity in Beit

⁵³ For his position see the texts provided in Walzer et al (eds.)

⁵⁴ Naturally, interpretations rendered by the President of the SC, even if they are expressed in his capacity as a legal scholar, are very influential. There are many *obiter dicta* in judicial opinions endorsing these interpretations. Yet to date the SC has not clearly decided whether the right to equality, which was explicitly excluded from the Basic Law because it was too controversial, has indeed risen to a constitutional status barring explicit Knesset legislation which seeks to create differences between individuals and groups.

⁵⁵ Compare Barzilai, Yuchtman-Yaar Segal to the recent studies by IDI. It should be stressed that the level of public support of the court is much higher than that enjoyed by the Knesset or by political parties.

Lehem. It ordered local authorities that enacted bylaws limiting the sale of pork in their jurisdiction to review the legislation and permit such sales in zones where residents did not object to them. It suggested that the orthodox monopoly over conversion in Israel was illegal. It declared that large parts of the route of the security fence around Jerusalem were illegal because they did not balance properly between security needs and the welfare of the Palestinian population. Another area of controversy is the court's involvement in petitions against prosecutorial discretion. Recently, the court has dismissed a number of petitions requiring that the Prime minister be indicted or that ministers who were suspected of crimes be suspended. A few weeks later it issued an order-nisi demanding that a minister under investigation resign from his office rather than be temporarily suspended and replaced.⁵⁶

These controversial decisions are not related to the constitutional revolution strictly speaking. However, they add to the apprehensions of those who criticize the court's activism. They fear it is bad enough when the Knesset can at least legislate to override an interpretation held undesirable. They do not want a situation when the power to legislate itself will be subjected to judicial limitation clauses. Naturally, they resist the fact that Barak tells them this is the present *status quo* anyway. The 'court party', on the other hand, is very pleased.⁵⁷ Its members endorse Barak's interpretations of the law, discourage attempts to legislate to override judicial opinions in the name of the rule of law, and censure the critics for attacking the court and weakening its independence.

There are a variety of initiatives to change the constitutional *status quo* in Israel. The government appointed an experts committee to complete the constitutional process headed by veteran lawyer and ex-minister of Justice Yaacov Neeman. That committee proposed a Basic Law: Legislation which will give all existing basic laws entrenchment and supremacy, and explicitly grant the power of judicial review to the Supreme Court alone in a special extended panel. The entrenchment will be gradual, and it will be accompanied by a temporary general override provision.⁵⁸

⁵⁶ These decisions illustrate what has been said before re the absence of rules on standing and political question. The court ruled that it has the power to hear popular petitions against decisions of the prosecution not to indict public figures. In rare cases the court has ordered that a minister be indicted or that he be fired by the prime minister when the prosecution decided to prosecute despite the fact that the law does not require suspension before the person is in fact indicted of an offence with moral turpitude. Consequently, many people turn to the court in such matters. The pattern creates criticism that the court is over-activist on the one hand, and criticism that the court is not courageous enough in fighting corruption on the other. It seems that the army has accepted the court's jurisdiction as a constraint and it now considers to invite the President of the court to the field to make him a partner in decisions before they are made... I will not go here into the fascinating question why the Knesset and the government do not respond more vigorously to this judicial activism. At times it seems as if they do not know how to use their powers effectively. At others, it seems that there is in fact an alliance here, known from public choice literature, between the powers of government, and that the government is quite willing to take some judicial limitation if it gets in return a lot of legitimacy. The judicial decision over the fence may be a dramatic case in point.

⁵⁷ This apt phrase is taken from the book by Morton and Knopff, who present the constitutional situation in Canada as very similar to this description of the situation in Israel. Canada, however, did enact the Charter after a deliberate and explicit political process which did involve some great compromises.

⁵⁸ Mr. Neeman is an observant Jew. However, the committee was appointed by the present government in Israel which does not include any of the ultra religious parties and which explicitly wanted to use this opportunity to promote principles that the ultra religious parties had resisted. The constitution and judicial review is one of these subjects. Barak told the Eitan committee that ideally he would like to

At the same time, the Law and Constitution Committee, headed by Likud MK Michael Eitan, is working very hard on a comprehensive constitution by broad agreement. This committee has been discussing the rules-of-the-game part of the constitution and has started to discuss the Bill of Rights part. No proposed document has yet emerged. Eitan thinks Israel needs a constitution but insists that it must have one that enjoys a broad consensus. It is unclear whether the MKs who participate in the discussions can really converge on a comprehensive design with the necessary 'great compromises'.⁵⁹

Finally, the Israel Democracy Institute (IDI), a private think tank, is promoting 'A Constitution by Agreement', chaired by the outgoing President of the Supreme Court, Meir Shamgar. The IDI seeks to present a coherent constitutional document, including the required 'big compromises', which it hopes will gain the support of major segments in the Knesset and the public. While conversations are held with representatives of all major segments, the membership in the group actually drafting the proposed document is narrow.

The Eitan and IDI processes both work on 'sifting' the existing basic laws to identify the provisions that need to be 'elevated' into the constitutional level, leaving the rest as regular laws. Both take the existing situation as given and have a general presumption for the *status quo*. None of the three initiatives tackles the serious structural issues that have made Israeli government so unstable over the last two decades.⁶⁰ The change they are interested in is enacting a completing the process of enacting an entrenched constitution. Yet they need to overcome the reasons that prevented Israel from completing the process till now.

However, the fate of all these initiatives is unclear. Israel's government is not very stable, since the governing coalition is deeply divided on the issue of the proposed disengagement from the Gaza strip initiated by Prime Minister Sharon. This is precisely the kind of moment in which a clear and stable constitution specifying

have full entrenchment without an override, but he sees this as an acceptable compromise. It should be noted that the proposed override requires the same majority required for amendment and it can be used only once (as distinct from the Canadian override that requires a regular majority and can be extended).

⁵⁹ Eitan wanted all major segments of Israeli society to participate in the discussions. The secular parties indeed participate, as does the NRP. So do the Ashkenazi ultra religious, who feel that if there is a constitution – they want to influence it. They are very concerned about the issue of judicial review, especially if the power is exercised by the court as presently constituted. Two other segments of the population chose to stay aside. One is the Sephardic ultra religious (shas, 11 MKs) and the other is the Arabs (17% of the population, 8 MKs in Arab parties). Both parties seem to think that they will be better off by not appearing to give the process legitimacy through their participation. Shas clearly thinks that the constitution effort is driven by those whose interests conflict with theirs. They prefer not to pass political power from the political system to the courts. The Arab's position is that they can indeed benefit from a constitution with a Bill of Rights enforced by the present SC, but that they prefer to let the Jewish Left negotiate for it without their conceding the self-description of Israel as a Jewish state, which they challenge. The proceedings of the committee can be found in their entirety in the committee's internet site (in Hebrew).

⁶⁰ The Eitan committee had a meeting with three ex-prime ministers to ask them about their constitutional lessons. All three said the situation was untenable and did not allow effective government. Barak argued for a presidential system, Netanyahu thought that was indeed the right solution but that it was not feasible at the moment, so compromises should be made, while Peres argued for a bi-partisan system. Since 1988, not a single government and Knesset served their full 4 years.

decision-making rules would have been extremely helpful. However, in the absence of such a framework, Sharon is pushing his proposal in the face of heavy opposition from his own party. He is not helped by the fact that he has been the subject of police investigation for the last four years, raising serious suspicions of bribery and corruption. It is hard to see how this government and this Knesset can initiate a constitutional process at this time.

In the meantime, the Court continues to hear petitions against major pieces of legislation which some people allege violate basic rights to dignity and freedom. The idea of judicial review over such matters has definitely taken root. Initially scholars had accused the court for developing a neo-liberal constitution, hostile to labor and the poor.⁶¹ Now Barak and others have developed the thesis that some social and economic rights can be derived from human dignity. At a certain point, a SC panel demanded that the State justify its statutory reduction of welfare payments by providing a criterion to determine when such cuts may violate people's dignity. The Judge who chaired this panel retired, and a new expanded panel, now headed by President Barak, re-framed the issue. The decision is now pending.⁶² Despite the caution of the court, and despite the fact that it has been delaying some very troublesome constitutional cases, the areas of friction between legislature and the courts build up.⁶³

The Court has shown great ability in avoiding decisions which might create a serious confrontation with the legislature. Yet there are a number of serious mines waiting on its docket. It seems almost impossible to predict how they will be handled, and what the reaction of the political system might be.⁶⁴

⁶¹ Hirschl 1998, Mandel.

⁶² In a narrower decision concerning old age allowances which had been reduced, the court upheld the legislation as meeting the limitation clause. The decision was followed by the usual divided responses. Some applauded the court's self restraint in matters of economic and social policy while others criticized the fact that the court did not protect the weak and the disenfranchised.

⁶³ For a discussion of the debate following the Supreme Court decision in *Qa-adan*, which ruled that The state and the Jewish agency could not ordinarily exclude Arabs from Jewish settlements, see Jacobsohn 2004 at 1780-1787.

⁶⁴ Two such issues deserve mention here. The first is the charged issue of the conscription (or absence thereof) of the ultra religious youngsters who study Torah. From very early on the Minister of defense exempted these students from military service. When the numbers grew to the thousands, people started going to the court to invalidate this policy. Initially, in the 1970's the court rejected these petition for lack of standing and justiciability. In 1986, after both threshold mechanisms were weakened to the point of disappearance, the court held that the arrangement was problematic but reasonable. After an attempt to legislate their conscription failed, some MKs went back to the court. This time, an expanded panel ruled, in *Rubinstein*, that after 1992 it was no longer permissible to base this questionable policy on an executive decision. Two of the judges expressed the opinion that the problem was substantive and not merely formal, and that even a law could not remedy the violation of equal treatment involved in the exemption. The Knesset had a hard time reaching an acceptable solution. A public committee was formed. Eventually, after many delays, a law was enacted that in fact maintained the no conscription rule for those who chose to study after a year of deliberation. Those who would choose to not devote all their lives to studies will do a reduced military service and can join the labor force. The day after the law was enacted a number of petitions challenging its constitutionality were filed. The SC has not ruled yet. The case creates a problem for the court on various grounds. It may force it to decide whether equal treatment is indeed constitutional now. A positive answer is clearly contra to legislative intent. Also, the stakes are extremely high here. Critics of the law will be extremely disappointed if the court validates the law on the merits. If the law is declared unconstitutional, however, the reaction of parts of the political system may be very strong. The second is a provisional amendment to the Citizenship Law which seriously limits the power of

Part III: Lessons from the Israeli Constitutional Process: Legislature's Ambivalence and Judicial Creativity

Clearly, Israel is not a country in which constitution-making was undertaken upon the foundation of the state. The first great constitutional moment was missed. Some lament this fact,⁶⁵ while others argue that this was in fact wise and proper, the only way to have gone.⁶⁶ In 1950 it was clear that Israel's legislature, the Knesset, decided not to enact a constitution at that point. After that, it neither decided to have a constitution nor did it decide not to have one. Naturally, the choice of constitutional assemblies vs. regular legislature as originators of the constitution was never discussed. Indeed, had the Harari process been completed, it is reasonable to expect that the work of making a constitution from the basic laws and creating the formal document could have been done by a Knesset committee, and the Knesset could then have decided of the process of the celebratory enactment of the constitution of Israel. After all, the laws would have reflected the political agreement on the political arrangements themselves. The transition to constitutionalism would have required only semi- technical adaptations (taking the details now in the basic laws out of the constitutional text) and the major decisions on supremacy, entrenchment, and enforcement.

But it seems the Knesset, as such, does not have an urge for an entrenched constitution. Such a document would call for declarations and pre-commitments (or their absence) which are significant and deeply controversial. The broad agreement on issues which should be removed from regular politics may be even more elusive now than it had been in 1950. Clearly, the self-definition of the Israeli polity is much more controversial now than it had been. In 1950, for example, people had agreed not to agree on what was meant by 'a Jewish state', and the Declaration, where this term had appeared, was not seen as a binding document. At this stage, and especially after the 1992 basic laws, this seems a major controversy which cannot be resolved and that many think cannot and should not be resolved in the courts. This is true for both the internal Jewish debate whether this Jewishness is religious or national and cultural, and for the deep and unresolved challenge by the Arabs of the legitimacy of Israel as a Jewish state. Many also think that the balancing between emergency situations and human rights as well as issues of social and economic policy and labor relations

authorities to give Palestinian residents of the OT legal status within Israel. The law was passed against the background of the armed conflict between Israel and the Palestinians and the fact that many Israeli citizens, especially Arabs, marry Palestinians who reside in the OT and seek to become Israeli residents and citizens. A small number of the Palestinians who have thus acquired Israeli papers and freedom of movement within Israel were involved in terrorist activities. Israeli human rights and international NGOs labeled this law racist. The Court heard arguments but has not decided. The law was recently extended for an additional 6 months, and the AG had declared his intention to introduce changes in it.

⁶⁵ Negbi, 27

⁶⁶ Goldberg.

should be resolved within the political branches, with a constructive dialogue between them and the courts, but without judicial supremacy.⁶⁷ They enlist to their help the critical views of those who think Bills of Rights and Charters that transferred these powers to courts did not promote the wellbeing of their societies or even the protection of human rights within them.⁶⁸

Nonetheless, the Knesset is 'dragged' into enacting a constitution by some political forces that increasingly want one. However the pulling is done by groups with different agendas. The most effective one so far is the 'old elites' who want a western-liberal-secular constitution with judicial review by the Supreme Court as presently constituted and chosen. They see such a constitution as their last guarantee in an increasingly difficult struggle against theocratic and nationalistic tendencies in Israel's political branches, reflecting as they do deep demographic and cultural changes within Israeli society.⁶⁹

Not surprising, this perception of the constitution and its role raises suspicion and resentment among the political forces that it seeks to restrain. They do not see the constitution as a 'big compromise' required in a divided society, but as a device by those who have become a minority in the Knesset to control the self-conception of Israeli society and transfer the power to maintain it to the un-elected court.⁷⁰

The supporters of the constitution, however, claim that the Knesset refuses to enact a constitution and to limit its own powers only because it is self-serving and corrupt. Under these circumstances, they maintain, progressive powers should do all they can to 'force' the needed constitution on the polity, so that the 'deep values' of society will flourish.⁷¹

⁶⁷ For a criticism of the transfer of decision of these issues to the courts in the basic laws see e.g. Avnon.

⁶⁸ For Canada and Israel see e.g. Mandel.

⁶⁹ The drive for a constitution is also a central element in the platform of a right wing party which wants to use the constitution as a major vehicle of change. This group wants a presidential system of government, and a constitutional weakening of the power of the SC as presently constituted. It thus advocates that Israel adopt judicial review with a continental-like constitutional court elected by the political branches for limited terms. Its economic policy is neo-liberal, and it will give civil equality to Arabs only if they plead total allegiance to Israel as a Jewish state. This complex of views command limited support within the Knesset, but some of these elements may be introduced if the constitution is indeed based on 'big compromises'.

⁷⁰ It used to be the case that the main forces against the constitution were the religious parties. Now the picture has become more complex. Arabs usually support a liberal secular view which will give them equal rights vis-à-vis the Jewish nation state, but their own attitude is sometimes nationalist and fundamentalist. They want civil rights but they are reluctant to accept the legitimacy of the Jewish state. The Jewish majority which supports a secular conception of the state is divided along a number of dividing lines. A majority are Zionists but a vocal minority are post-Zionists; the elites seem to be for a neo-liberal economy while other sectors are for solidarity and welfare state; a majority of Jews wants a stable two states solution, with a Palestinian state alongside Israel, but many of those doubt what is the best way to get there.

⁷¹ This position, inevitably, presents the controversies listed above as superficial and secondary to the shared context of values the constitution should endorse and protect. This is precisely why so many critics see this move as within the 'guardian' conception of government, which may be disguised as democratic but is indeed a perfectionist philosopher-king conception. On the 'guardian' conception of government and its nature see Dahl, ch.

We can return to the debate between the President of the Court and the Knesset's speaker. It may now be clearer how two people in these positions can see the same legal situation so differently. There is no real difference between them about the facts of positive law in Israel. The question concerns the framing and the characterization of the legal arrangements. In part, the debate is about the fact that the constitutional process from 1992 on did not 'conform' to the guidelines presented in Part I. As we noted in Part II, the deviations were many and profound, and were the subject of critical comments from politicians, scholars and even judges from the outset.

When President Barak asserts that there had been in 1992 a 'constitutional revolution' and that in that day Israel changed from being a country without a constitution to one with a constitution, he in fact states that Israel has passed from the constitution-making phase into the phase of interpretation, application and possible amendment. Indeed Barak concedes that the constitution is 'lame' and should be completed. He urges the Knesset to do that. But he insists that Israel has already moved from the initial stage of constitution-making, which lasted 45 years, into the stage of living under a constitution. Moreover, for him the issues of judicial review and the enforceability of the constitution are settled in the only way they can be settled in a democracy. There is no democracy and no rule of law, according to him, unless the court has the power to overrule unconstitutional legislation. And there is no real protection of human rights if the citizens are not also protected against the legislature itself.

This is precisely the move that is challenged by The Knesset Speaker. He of course concedes that the 1992 legislation, as interpreted by the court, has created judicial review over legislation in some cases. However, he argues that neither the Knesset nor any other authorized body has made a decision concerning the adoption of a constitution. This principled decision, including the consideration of the form and scope of judicial review, still needs to be made. Sure, courts must interpret the 1992 basic laws and apply them when it is proper to do so. But the debate over the constitution has not ended. It has not even started for real. Moreover, Rivlin is very unhappy with at least some aspects of the arrangement that has developed.

Here we can see that the record of the process is mixed. Rivlin's rhetoric may have suggested that he would be against all forms of judicial review. Instead, while he has harsh things to say about the process of the past, it seems that he is now willing to live with some elements of the present situation. For now, Rivlin wishes to structure the power of judicial review in a way that will grant the power only to the SC in an extended panel, with a special majority. At least, he says, the process of overruling a Knesset law will be respectable. It should not be possible for a justice of the peace, sitting alone in the first instance, to declare a Knesset law unconstitutional...⁷²

⁷² Barak's response is ingenious. He points out the ambiguity in Rivlin's challenge between the objection to the principle of judicial review and the fact it was introduced with stealth, and the specific form it took, allowing all courts to invalidate legislation. Barak plays down the first challenge, and urges Rivlin to complete the move, and explicitly provide for judicial review by a panel of the SC alone.

In the meantime, the question of which reading is the correct or even the better one has not been fully and authoritatively resolved. Since this in itself is not a legal question, there is no authoritative mechanism which **can** resolve it once and for all. The ambiguity and the debate will persist until the legal and the political communities agree on a reading of the situation and will act accordingly. Knesset enactments, judicial decisions, and public pronouncements by legal and political actors will all contribute to the way the issue is resolved. All we can say at the moment is that the debate is still with us showing no serious signs of abating. This is not exactly what one hopes to get from a Constitution. It is striking to note that there is a clear difference between the reactions of the courts and those of the legislature. Scores of judgments include references, even if they are obiter, to the 'constitutional' aspects of the case, thus developing the 'constitutional revolution'. The Knesset's contribution is the 'success' of critics to prevent legislation of further basic laws, and occasional complaints about the constitutional status quo without any indication that the Knesset itself has the responsibility to clarify or amend it.

One might argue that this is not an important question, and in some senses it is true. But the persistence of the debate is, since it clouds the picture and makes it more difficult to move on and remove the ambiguities.

The actions by the Eitan committee and the IDI support Rivlin's reading of the legal situation. They see the laws of 1992 as an important stage, but one that still leaves Israel without an entrenched constitution. Consequently, the Eitan and IDI processes both think in terms of a celebratory adoption of a constitutional document which will be presented to the public for debate and possible ratification, including possible major changes from the *status quo* under the existing laws, to overcome the political and ideological difficulties in the way of a constitution. Both of them aim at a situation in which there will be a clear distinction between constitutional matters, included in the text which will be enacted and ratified, and details which are today found together in the early basic laws. They also want to gain the legitimacy and educational benefits of a shared constitution by a process that will itself contribute to this legitimacy. When they are done, they believe, no one will doubt that Israel does have a constitution. However, both these processes operate within an ongoing political system. This is not a case of an awareness that the regime structure needs to be changed, as was the case in the transition in France between the 4th and 5th republics.⁷³ The constitutional choices to be made concern the entrenchment and enforcement of the constitution, and especially the Bill of Rights, and the basic ideological rifts related to the internal tensions between democracy and the Jewishness of Israel. Both processes seek to reach some compromises on these issues. The center of their work is the **legislature**, aided by civil society.

Yet, in terms of our analysis, there is a huge difference between the Eitan and the IDI processes. The first comes from within the Knesset, seeking to have the legislature itself fulfill the promise of a constitution through negotiations and compromises. While the IDI initiative will have to be endorsed by the Knesset if it is

⁷³ This is quite amazing when we recall that Israel has been almost paralyzed in its foreign policy concerning the Palestinian conflict in the last two decades. Forming coalitions in Israel is extremely difficult, and with trends toward populism in the big parties the effectiveness of government has been seriously reduced.

to be enacted, the drafting and the major compromises have been debated and formed by a small group consisting mainly of the 'old elites'.

The Neeman committee's recommendations, on the other hand, are more in the vein and spirit of Barak's reading of the situation. If the Basic Law: Legislation it proposes is adopted, the Knesset itself will have endorsed by legislation the special status of all the old basic laws, granting them entrenchment and explicitly providing for judicial review. Notably, the proposed bill says nothing about the way in which it will be enacted or debated! This move accepts the fact that the 'revolution' was already done, legitimates judicial expansion, and lets the **courts** complete the work.⁷⁴

In institutional terms, the question is the role of the legislature vs. that of the SC. There is a serious issue here. As we saw, critics talk about the absence of celebratory debate and broad participation in the enactment of the 1992 laws.⁷⁵ In addition, some critics voiced concern at the fact that the courts in general, and the President of the SC Aharon Barak in particular, were deeply involved in both the 1992 enactment and the 1994 amendment of these laws and in seeking to present them as clearly creating a constitution and firmly establishing the power of judicial review. These critics argue, persuasively, that the courts always warn power holders against using power for their own advantage. Indeed, one of the justifications of constitutional constraints on legislation is the wish to prevent the legislature from acting to promote its own interests.⁷⁶ Yet the judicial eagerness to impose constraints and limitations on the legislature often takes the form of acting very forcefully to promote their own power. While Barak often declares that if there is no effective legal enforcement on all power holders the rule of law cannot be maintained, he seems to forget this important rule when we come to constraining the powers of the courts themselves.⁷⁷

The resentment expressed by some of the legislators concerning this judicial constitution-making is understandable. What is surprising is that legislators do not

⁷⁴ Indeed, some scholars who fear the legislature is going to stall call on the courts to continue with its expansion and clarification of the implications of the 1992 legislation. See Sommer .

⁷⁵ It is worth repeating that these criticisms do not come only from groups who attack the courts and act against the emerging liberal constitution. Notable among them is Judge M. Cheshin, who is among the activist judges and among the most outspoken advocates of secular liberal values.

⁷⁶ This is one of the central elements of the constitutional theory of judge Mishael Cheshin, who is the only judge on the SC who in a lengthy decision in *Bank Hamizrachi* expresses doubts about describing the legislation as a constitutional revolution, and proposes a much more cautious and limited justification of judicial review. See the essence of Cheshin's opinion in Gambaro and Rabello (ed). Pp. 379-380 . For the uniqueness of Cheshin's constitutional positions see Jacobsohn 2004, at p. 1785, note 107.

⁷⁷ This 'blind spot' of judges when their interests are at stake is not unique to Israel or to constitutional issues. In Israel, Canada and the US courts have decided that freedom of speech and protest does not cover the courts themselves. In Israel see Cr. App Azolai, in which the *sub judice* law was applied against a journalist by a court that knows hardly any other limits to speech. In the US it was Justice Black, the absolutists in protection of freedom of speech, that upheld a law limiting demonstrations near courts in the name of the right to a fair trial. For Canada See Arthurs , p. 18. The pervasiveness of this phenomenon again raises the question why important parts of the political branches usually participate in 'protecting' the independence of the courts against their critics. It seems that, on balance. The existence of a government body seeming to be independent and usually legitimating government, plus the many cases in which the court in fact helps the political branches do what they want to do while imposing responsibility on the independence of the courts is seen as worth the occasional cases where the courts truly seek to undermine government. We go back to the courts as being 'the least dangerous branch'.

seek to exercise their right and duty to present an alternative Constitutional process, possibly leading to an alternative constitutional set of arrangements. The critics do not accept responsibility for the enactment of the 1992 laws. More importantly, if indeed they think these laws did not create a revolution, and if the alleged revolution is not desirable – the critics in the Knesset hardly create an initiative to address these issue through legislative constitution-making or through a legislative decision, similar to the one taken in 1950, that Israel at the moment was better off without an entrenched constitution with judicial review.⁷⁸

Another unique aspect of the Israeli process is the nature of Barak's public involvement. In judicial opinions, scholarly writings and public lectures Barak has expressed the view that democracy and separation of powers cannot function without an entrenched constitution and judicial review. He described the idea of a special constitutional court as a disaster to democracy. It is clear that his strong objection, coupled with his prestige, were very important in 'silencing' the voices that challenged the suitability of an entrenched constitution and judicial review to present-day Israel. Many felt that these moves on his part constituted a deviation from accepted norms of the separation of powers and functions. Many felt it was unfortunate that such claims contributed to a situation that the Israeli legislators and public were 'invited' to disregard the fact that there are some democracies without entrenched constitutions at all; that most new democracies who institute judicial review grant the power to special constitutional courts; that some democracies with a well established constitution explicitly reject judicial review and find other ways to hold the legislature accountable; and that quite a number of countries who have debated these issues recently have decided against an entrenched Bill of rights with judicial review precisely for the reasons made by some of Barak's critics in Israel.⁷⁹ The arguments of critics are by no means conclusive, but they are serious enough to have an open debate which should not be silenced by the prestige of the President of the SC.⁸⁰ Again, what is surprising and disturbing is the fact that those MKs who doubt the wisdom or the legitimacy of the constitutional process and its product have not been able to voice their position in a systematic and serious way that can command respect and open up the needed debate.

Some also point out the significance of Barak's suggestions that there are changes that no legislation, by whatever majority, can make. In this way, it is charged, Barak is not only claiming that Israel has reached the stage of a full fledged constitutional regime which may now only be amended, but he is denying 'the people' even the power to decide on how to amend that constitution. True, there is a serious debate about explicit and implicit limits on constitutional amendments. Some do argue that the power to amend the constitution should be limited by basic values such as human

⁷⁸ There was one such attempt to initiate a Knesset-driven constitutional process including a constitutional court. At the height of the criticism of the court the constitutional court won massive support in the 15th Knesset. It was narrowly defeated with the strong involvement of Barak, and it seems to have disappeared since then from the Knesset's horizon.

⁷⁹ In addition to sources cited in note 21 *supra*, see the reasoned argument against relegating to courts the power to be final arbiters of the protection of rights in Waldron

⁸⁰ It is quite true that often the statements of Barak's critics are confused. He often responds by saying that they do not really understand the nature of adjudication. But the very same arguments have been made, in Israel and abroad, by many who cannot be described as not knowing or not understanding. Barak does not seriously discuss any of these arguments.

dignity.⁸¹ But they discuss these matters in the context of an established constitution with specific amendment procedures. Even under such circumstances, I think the argument against such implicit limits is very powerful.⁸² There may be implicit limits on the power to legislate even in the absence of an entrenched constitution.⁸³ But for a judge to speculate on such matters *ex cathedra* and impose limits on the power to amend in the name of 'deep values', democracy, the separation of powers and the wish to protect citizens does seem imprudent.

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

In other words, the feeling is that if there is a constitution in Israel, it is a judge-made constitution. The decision to confer supremacy on the courts was never really made by any popular organ in either regular legislation or constituent assembly. The decision has never been ratified by the people themselves. It has been made by judges, conferring power on the judges, and placing that power beyond the reach of both legislation and constitutional amendment itself! The critics thus draw the conclusion that these facts undermine or at least weaken seriously the legitimacy of the constitutional process so far.⁸⁴

However, it may be wrong to concentrate on the massive judicial involvement in the constitution-making process in Israel. When we look at constitutional processes, the question of legitimacy is both normative and empirical. There are cases in which a process that lacked legitimacy at the outset gained it as time went by.⁸⁵ On the other hand, processes that had enjoyed full legitimacy may prove to be unviable. The fact that the constitutional process in Israel has not 'conformed' to the institutional implications of the constitutional phases is not sufficient to condemn it. But it will help the Israeli constitutional process if it does communicate a feeling that the constitution is a document that seeks to take into account the visions and the perceptions of all major segments of Israeli society, and that they should all be partners in the 'big compromises' that are required. In Israel, the problem does not seem to be simply one of the legitimacy of process. It seems to run deeper into the legitimacy of the emerging product as well.

I think the court was indeed over-eager to expand its own powers. But it did that only because some legislators and segments of the public wanted it to do so, and other legislators did not either stop the court or offered an alternative constitutional arrangement. It is sometimes feared that constitutional assemblies and legislatures

⁸¹ See eg Murphy in Levinson,

⁸² See Vile in Levinson (ed).

⁸³ The known example is the English court that is expected to find a way to invalidate a law made by Parliament to abolish all future elections. See Cheshin's discussion in Bank Hamizrahi.

⁸⁴ Again, the critics do not come only from politicians who resent limitations on their power. One of them is emeritus President of the court Moshe Landau (1996a).

⁸⁵ Bassok.

will not give courts – who are usually not represented in the negotiations - the powers required to reign the legislature in. In many cases, legislatures have been willing to limit their own powers due to a public demand and because the political powers themselves wanted the protection of the constitution and the courts.⁸⁶ The anomaly in Israel is that the legislature lets the judiciary develop the constitution for the country, without resisting the fact that this judicial constitution-making imposes serious limitations on the powers of the legislature.

A system of constitutional system structures powers and limits them by separating them, so that the powers check each other. In a democracy, the legislature should be the strongest power. It is one of its tasks to initiate the creation of the constitutional framework itself. In Israel, the legislature seems to have given up its constitution-making powers. It accepted the secondary task of commenting on the constitutional arrangements suggested by the Court.

It is thus not surprising that the main issues in Israel's constitutional debate are judicial review and human rights – the realm of courts – and not the essential features of the structure of government and the effectiveness and quality of both legislature and executive.

Part IV: **Some Concluding Comments**

It is hard to know where the constitutional process in Israel is heading. The present situation is clearly unstable. It contains many anomalies and asymmetries. The powers of the major organs of government are not clear. The newer basic laws look in part like chapters in a constitution, but the older ones are full of details which should not be in a constitution and should not be entrenched because if they are the system of government will not have the flexibility it needs.⁸⁷ Moreover, the present arrangements do not fit together in one coherent system of checks and balances because of the piecemeal way they have developed.⁸⁸ One major area of incoherence of special relevance to our concerns here is that of the mode of judicial appointments which has not responded at all to the radical change in the conception of judicial power over the last three decades.⁸⁹ It is also very unfortunate that these laws have

⁸⁶ Elster, 1995, at

⁸⁷ For an argument against entrenchment of rules-of-the-game before the experimentation period is over see Sunstein and Holmes .

⁸⁸ One central example may suffice. The basic institutional design for the state of Israel was taken from the Jewish pre-state Yishuv. This was a voluntary set of institutions built on full proportional representation and broad consensus. One cannot expect the same sort of consensus mechanisms and indeed they do not exist among Jews and Arabs and are increasingly weakening even among Jews. The strength of the government in Israel had been built on the existence of one large party which could be the anchor of governments so coalition building was not trivial but generated effective government. This situation was irrevocably lost in 1977, and has created a situation in which it is increasingly more difficult to formulate coherent policies and implement them.

⁸⁹ Judges in Israel are elected by a committee whose membership is as follows: three judges of the SC headed by the president; two ministers, one of them the minister of justice, who chairs the committee; two MKs, the convention being that one is from the coalition and one from the opposition; and two representatives of the bar. The judges often vote as one block after internal consultations. In fact they have virtual control of the appointments process. Judges are elected until they retire (at age 70). This may have been an adequate process when judges stressed their professionalism and did not decide so many controversial political issues. It seems much less adequate now, when every political question

different levels of supremacy and entrenchment, and that the scope of the 1992 basic laws is as yet so open and controversial. To these consequences of the 1992 legislation we need to add the general structural issue of the weakness of Israel's political branches due to a combination of reasons, leading to serious issues of effectiveness; a crisis in the relationships between central and local government; and an acute sense that the country may lose its cohesiveness due to the deepening rifts between Jews and Arabs, religious and secular, Right and Left and haves and have-nots; and a distrust of the good faith of politicians, which has led to over legalization in many areas and to a very central role for the SC in Israel's public life. Many of these are now played out in the debate about the legitimacy of Sharon's disengagement plan.

While many, including Barak, argue for the necessity of a constitution in order to enhance the protection of human rights, I want to be careful. First, we need to distinguish between an entrenched constitution and judicial review. We may want one without the other. Secondly, the record of Israeli **legislation** on human rights issues is so far between very good and acceptable. For most of the time, the inhibitions against unacceptable legislation have been purely political. I am not sure the gains for human rights in judicial review of legislation are worth the inevitable alienation from the court that will be felt by those whose deep principles will be rejected by the court's judgments. It may well be that the additional tool of judicial review over legislation may bring with it an excessive timidity in reviewing unacceptable practices maintained under the umbrella of acceptable laws.

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

I do not want to take a stand on these issues here. Suffice it to repeat that this argument has taken place in many countries recently, and these have not all reached the same conclusions. The debate is not between those who want legislatures to have unbridled powers and those who want to promote the protection of human rights. There are many supporters of human rights who think that powers of judicial review and supremacy should be limited. Many of their arguments do not have the hollow

finds its way to the SC in real time. A related problem Israel has is that administrative and now constitutional adjudication goes directly to the SC as a first and last instance. This pattern was started under the British Mandate and has survived in Israel. It means that major constitutional issues are often decided by courts, sometimes in a panel of three, without any possibility of appeal. Both elements need to be modified seriously if the courts are to be granted systemic powers of judicial review.

ring of excuses, and they are not themselves legislators.⁹⁰ The debate is not between those who want to weaken the legitimacy of the SC by revoking judicial review and those who want to defend the rule of law and judicial independence. The SC acquired most of its legitimacy when it had only a very narrow power to invalidate laws (power established in *Bergman*).

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

Mainly, however, the Israeli legislature should accept the responsibility for initiating a serious discussion of all constitutional issues.

The instability of the present situation is not good. There are two main ways to make the present constitutional situation more coherent. The first is to decide that Israel wants to remain without an entrenched and supreme constitution, or at least that there will be no judicial review over legislation. Basic laws will remain regular laws. The 1992 basic laws will be clarified in a way that will prohibit judicial review of Knesset legislation. Laws will then change piecemeal, when the political contingencies and various pressures will create the conditions for reform. The court will continue to protect human rights as it has done till now. Most of the important (and controversial) decisions of the court to-date anyway did not involve invalidation of primary legislation. I believe this is a very plausible choice for Israel at present.⁹¹

The second is to move ahead and complete the constitutional process. That alternative, too, has two variations. The first is the Neeman route – that is, taking the basic laws as they are and entrenching them. The second is the more ambitious one which involves a re-evaluation of the basic arrangements and seeks to make them coherent and based on 'big compromises'. This is the route taken by both the Eitan and the IDI processes.

In another paper I have suggested that if Israel wants to enact a constitution at this stage of its existence, it should take the second route. The Knesset should accept

⁹⁰ See Waldron, a consistent advocate of human rights, in *Law and Disagreement*; See also Webber, and the NZ paper in this volume.

⁹¹ The plausibility of this route is based on the fears that completing a constitution may create a situation that is worse than the one we have without one. A divided society will be better off with a good constitution than without one. But since there is a deep debate about what constitution will be a good one – the likelihood of ending up with a decent constitution are not good. For an analysis of possible constitutional routes for Israel see Yonah . Yonah argues that the only viable constitution for Israel is neither liberal-neutral nor communitarian-republican but multi-cultural. However, the chances of getting this kind of a constitution in Israel at present are nil.

that it cannot do the job itself.⁹² It should appoint an advisory committee (it does not have to be a constituent assembly), whose task would be to devote the necessary time, consult with all relevant groups, and make the necessary 'big compromises', away from the constant surveillance of the media and commentators. This document will then be presented to the Knesset, which will have to take it, more or less, on a take it or leave it basis, without re-opening the deals. The text approved by the Knesset will then be ratified by the public. Between the vote in the Knesset and the ratification, a serious public discussion should take place in as many fora as possible.⁹³

My expectation is that the big compromises will include at least three elements: First, the enactment of a full bill of rights including a firm commitment to civil and political equality to all, and specifying both civil and political rights as well as social and economic ones⁹⁴, combined with protected autonomy of groups, with the recognition that Israel is the nation-state in which Jews exercise their right to self determination. Secondly, a decision about a system of government that will strike a better balance than the existing one between effectiveness and governability on the one hand and accountability to the Knesset and to the Rule of Law on the other. Thirdly, I believe a constitution of this content can only be entrenched and supreme if it is stated explicitly that courts will NOT have the power to invalidate primary legislation.⁹⁵ This product is similar in line to the first solution advocated above, but it has the extra benefit of the legitimating and educational force of an entrenched constitution. This model will allow the political branches and public debate to work out slowly, via mechanisms of negotiations and compromises, the ways Israel should tackle state and religion issues, the implications of the Jewish nature of the state and the way it should be combined with equal rights to all, and its social and economic policy. But under this route, these processes will take place within a shared framework of constitutional arrangements, maintaining enough constructive ambiguity to facilitate a shared citizenship in addition to recognized affiliations with different religious, national and ethnic groups.

But it may be the irony of the 'constitutional revolution' that its substantial successes may mean that legislators will not have the power to create a coherent system by taking from the court the limited power of judicial review granted to it under the 1992 laws. At the same time, they may be unwilling to complete it by entrenching the whole document and legitimating judicial review in a general way.

⁹² It is always better that constitutional arrangements are not made only by active MKs. This is especially true now since the political system is extremely unstable, and it is unlikely that active politicians can transcend their partisan politics.

⁹³ Gavison (Azure). The Eitan process is Knesset-based, but it is not – and cannot be – effective enough because the commitment of the members of the committee is not stable enough, and because there is no real representation. Besides, the Knesset does not have enough constitutional expertise to help it with the task. The IDI process has more professional support, but the identity of the body generating the draft cannot give it the initial legitimacy required for the move.

⁹⁴ On the relationships between CP and SE rights see Gavison (2003b)

⁹⁵ This recommendation may permit Israel to have a constitution and not to change radically the nature of its SC, as I think will have to happen if a court is given the power of judicial review over ideological questions like the tension between Jewishness and democracy or social and economic policy. I have argued at length that it is not wise to let courts decide such issues. See Gavison (1995) See also Avnon .

Israel may thus be 'stuck' with this interim situation, until the political background permits further change.⁹⁶

The first achievement of the constitutional discourse – the belief that a constitution desirable and that its completion is now inevitable - may not be hard to deal with. While there were many political factions who had conceded openly in the past that they thought Israel was better off without a constitution – this voice is not a visible one among politicians at the moment. The political *bon ton* is to be for a constitution but to argue about some of its proposed arrangements.⁹⁷ It remains to be seen if this is just façade, or if this may indeed be translated into support of a constitution that will give these people some of what they want.

A more significant but troublesome achievement of the supporters of a constitution is that the courts already have some powers of judicial review over legislation, and that the political system seems to have become used to judicial review over legislation to an extent that most political factions accept it.⁹⁸ Again, it is not clear how much of this is lip service, but declaring that there is no judicial review over legislation is abolishing or narrowing a power the court already has. True, some say it is a power the court arrogated to itself, but nonetheless the rhetoric that legislative power should not be left without some legal constraints has made gains. It will take a serious effort of persuasion to make this 'deal' stick. Especially since it seems the supporters of the constitution believe that with some hard work they can have the Knesset affirm judicial review by the supreme court as presently constituted and appointed.

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

⁹⁶ When I suggest a constitution without judicial review I do not mean a system where constitutional limitations are totally unenforceable. There are other possible mechanisms such as the French constitutional committee, examining laws in a limited period between legislation and promulgation; or the new English design of legislative control over legislation with a judicial power to declare the incompatibility of laws with the European Convention of Human Rights. At least, it has created a parliamentary mechanism for securing compatibility, similar to the situation in Holland. A regular and general override would have also been an option, but the version suggested in Israel is too limiting of the legislature, and the Canadian precedent suggests that it is not effective in limiting the supremacy of the judiciary.

⁹⁷ Skepticism about the constitution is still heard among academics, especially non-lawyers. In the first meetings of the Eitan process, some MKs declared that their enthusiasm for the process was limited.

⁹⁸ This is a political gain but it has been achieved without a serious public debate of the question and of its institutional implications. While many social scientists still believe that Israel may be better off without a constitution and judicial review, it seems that politicians have not done the homework that enable them to argue persuasively in support of this position.

to establish a government that will be, and will be seen to be, a government of the people, by the people and for the people.

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