"For sixty years we have had no constitution, only a patchwork of Basic Laws and many holes. A constitution would be the greatest gift the Knesset could give the state on its 60th anniversary celebrations"

Prime Minister Ehud Olmert in an address to the Knesset, 8th October 2007

When the citizens of the new State of Israel went to the polls in early 1949, only few months after the establishment of the State, they were called to select a Constituent Assembly. However, the elected members of this body soon declared themselves as members of the first Knesset (the Israeli parliament). Thus, Israel has missed what could have been its “constitutional moment” and remained one of the few democracies to date without a formal constitution. Following the fierce debate in 1950, which resulted in a compromise to gradually adopt sections of a future constitution, eleven Basic Laws were passed by the Knesset. Despite several scattered and feeble efforts to draft a whole constitution, all of them in vain, these Basic Laws still comprise the constitutional structure of the state. During the last decade, two ambitious efforts to adopt a full constitution have been made, one by the Knesset’s Constitution, Law and Justice Committee and the other by the Israel Democracy Institute (IDI). The two efforts differ in many aspects, yet share the understanding of the need to bridge societal divides in Israel by appealing to as many citizens as possible.

In this paper we aim to examine the differences of these two attempts and how they affect the politics of constitutional-building. Following a brief overview of the main
societal divides in Israel we discuss its current constitutional structure. Next, we turn to map the main issues that stand as obstacles in the constitution process. Finally, we analyze the attributes of the two constitutional attempts, focusing on the procedures, actors and solutions that stand in the core of each process.

Israel as a Diverse and Heterogenic Polity

Israel is one of the major examples of democracy in a deeply-divided society. Despite its relatively small size, its population is very heterogenic and diverse (Smooha, 1993; Lijphart et al., 2000, Yonah, 2005). Previous studies refer to several cleavages, or divides, that split the Israeli society. The first and most formidable divide it the Jewish-Arab cleavage. The establishment of Israel as a nation-state for the Jewish people is reflected in many aspects of life. The state’s symbols are Jewish, the Hebrew language has a dominant status (although Arabic is a formal state language as well) and the immigration and citizenship laws positively discriminate Jews.\(^1\) In addition, some policies explicitly, or as-applied, advantage Israeli Jews. The intensity of the cleavage makes the Arabs in Israel not only a demographic minority but also a sociological minority. Consisting about 20% of Israel’s population, Arabs are underrepresented in the country’s political and economic elites. This inevitably leads to feelings of discrimination in relation to the dominant Jewish majority (Hasisi and Pedhazur, 2000). Furthermore, the relations between the two communities are tense due to the broad Israeli-Palestinian conflict. Many Israeli Arabs often sympathize with

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\(^1\) The Law of Return, enacted by the Knesset in July 1950, allows any Jew (or a person with a defined Jew ancestry) to migrate and settle in Israel through gaining citizenship. The purpose of this law was to provide a solution to the Jewish People’s problem, by re-establishing a home for the entire Jewish population in Israel. The law is regarded by some as controversial, giving Jews superior rights over Israeli Arabs. See Carmi (2007)
the Palestinian struggle for independence. This leads some Israeli Jews to be suspicious towards the Arab citizens, sometimes even regarding them as a fifth column.

Next is the religious-secular cleavage. Secularists, who constitute the majority within Jewish society, regard Jewishness as a mainly ethno-cultural attribute rather than a religious one. They believe that Israel must be a modern society with liberal universal values and advocate the separation of religion and state. For several religious groups, on the other hand, Jewish religion is inseparable from Jewish nationality. For them, religion should be part of the public sphere and does not suffice if hidden away from view in the private domain. Their goal is to impose religious attributes in the public sphere, by advocating a close link of religion and state, including the legislation of laws regarding various private and public aspects of living.

Next is the divide over the peace process, best referred to as the hawkish-dovish cleavage. Up to the 1967 War Israel had a socio-economic right-left political divide. Following the war, this divide was replaced by the stance towards the future of the occupied territories. The right wing in Israeli politics had adopted a nationalist-hawkish position which sees negotiations with the Palestinians less favorable. The left camp is dovish and favors territorial compromise in order to achieve peace with the Palestinians.² Having a significant population living in the occupied territories with family scattered outside of the occupied territories makes this more than a political cleavage but, rather, a societal one.

² While the literature usually refers to two additional divides that split the Jewish majority – Sephardic-Ashkenazi and immigrants-Israeli born divides – they do not play a significant role in the politics of the constitutional efforts, and, therefore, were left out from this discussion.
These multiple societal divides make it difficult to come to agreement on a common ground. The divides are well reflected in the fragmented party system: there are currently three Arab parties and several (Jewish) religious parties along with occasional anti-religious or secular parties. As we will later see, the divides also pose the principal obstacles to the drafting of a constitution.

**The Development of the Current Constitutional Structure**

The Declaration of Foundation of the State (May 1948) specifically specifies that a constitution must be adopted no later than October 1 1948. Nonetheless, Israel is to date still one of only three states that lack a formal codified constitution (along with the UK and New Zealand). By failing to enact a constitution in the early stages of the statehood, Israel has missed its “constitutional moment” (Ackerman, 1991).

What were the reasons that made Israel miss its window of opportunity to complete a constitution? Gavison (2003: 58) points to four main factors. First, a concern that a constitutional process would force a collision between Jews, who saw their Jewishness as a secular form of ethno-cultural identity, and those who persisted that the only authentic mode of being Jewish is religious. Second, a perception (especially within the ruling Mapai party and Prime Minister Ben Gurion) that a constitution might interfere with the necessity of effective government that was crucial in view of the immense challenges that the young state was facing, fighting for independence and struggling to accommodate the massive immigrants entering the country. Third, during the late 1940s and early 1950s a fierce debate within the Jewish population was undergone between those who advocated free market and a leaning to the west
and those who favored socialist economy and identification with the soviet bloc. Finally, in light of the massive Jewish immigration expected to arrive, many believed that the citizens of Israel (making up less than 10 percent of the world’s Jewish population at the time) lacked the authority to determine for future generations the character of the Jewish state by enacting a constitution (Polisar, 2005).

### Table 1: Israel's Basic Laws

<table>
<thead>
<tr>
<th>Year</th>
<th>Name of Basic Law</th>
<th>Status (entrenched provisions?)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>The Knesset</td>
<td>Article 4: “Electoral System”</td>
</tr>
<tr>
<td>1960</td>
<td>Israel Lands</td>
<td></td>
</tr>
<tr>
<td>1964</td>
<td>The President</td>
<td></td>
</tr>
<tr>
<td>1968*</td>
<td>The Government</td>
<td>Starting in 2001 entrenched in full</td>
</tr>
<tr>
<td>1975</td>
<td>The Economy</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>The Army</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>Jerusalem, The Capital of Israel</td>
<td>Starting in 2001: Changing the size of the city or authority over parts of the city</td>
</tr>
<tr>
<td>1984</td>
<td>The Judiciary</td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>The State Comptroller</td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>Human Dignity and Liberty</td>
<td></td>
</tr>
<tr>
<td>1992**</td>
<td>Freedom of Occupation</td>
<td>Effect of nonconforming law</td>
</tr>
</tbody>
</table>

* The original law was replaced in 1992 by a new Basic Law: The Government that introduced a system of Direct Election of the Prime Minister. A third Basic Law, which abolished the Direct Election of the Prime Minister, was adopted in 2001. This
** This Basic Law was changed in 1994 to reflect a political need to limit the scope of the right. The new version makes it constitutional to enact a law that violates the freedom of occupation as long as it either befitting the “values of the State of Israel” or is passed by a special majority of Knesset members. This change was part of a political compromise in which a basic principles clause was added to the two civil liberties Basic Laws – Human Dignity and Liberty and Freedom of Occupation. These clauses were since a jurisprudence battleground.

Thus, instead of enacting a constitution, the legislators opted for a stage-by-stage formula. The compromise, known as the “Harari decision,” named after MK Yizhar Harari who introduced it, called for gradually drafting and adopting Basic Laws that will eventually encompass all areas of a full constitutional document. The first Basic Law, The Basic Law: The Knesset, was adopted in 1958, and up to the late 1980s eight more Basic Laws were legislated (Shamgar, 2005: 353-4). Most of these laws dealt with the structure, powers and duties of the government branches (see Table 1).
For the most part, the provisions of these Basic Laws were not entrenched and for many years the Court held that they were in fact regular laws for all intents and purposes (Gavison, 2003: 60).³

By late 1980s, most of the pillars of a constitution were included in the Basic Laws excluding a bill of rights and a clear understanding of the Basic Laws normative hierarchy. This left in limbo the legal and political meaning of the Basic Laws as a constitution. A first indicator of this tension was brought to the fore when the Knesset had passed a law that violated the only entrenched provision in the Basic Law: The Knesset which guaranteed equality in the electoral process. In Bergman the Israeli Supreme Court handed down what is considered the benchmark of the Constitutional doctrine and ruled that the Court has the power to conduct judicial review, yet avoiding the question of normative hierarchy of non-entrenched provisions.⁴ Understanding the far reaching implications of its decision and the possible constitutional drawbacks it may foster, the Court avoided the question for almost two decades when it finally recognized the supremacy of the Basic Laws, hence, the Court’s power to conduct judicial review.⁵ Treated still as only procedural judicial review (Bendor 2001), the authority of the Supreme Court to conduct judicial review was further broadened only with the adoption of the three Basic Laws of 1992. The new Basic Law dealing with the Government was entrenched in full and therefore gave way to more procedural review. The two new human rights Basic Laws – Basic

³ Until 1992, the only entrenched provision was the guarantee for democratic elections (article 4 of the Basic Law: The Knesset)

⁴ H.C. 98/69 Bergman v. Minister of Finance, 27(2) P.D. 785. In the same matter, the court discussed a clause in the Party Finance Law which conflicted with the Knesset Basic Law and was not enacted according to the required procedure. The Supreme Court ruled that a clause which conflicts with a Basic Law not according to the procedure is nullified.

⁵ H.C. 142/89 Laor v. the Knesset Speaker, 44(3) P.D. 529.
Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation – introduced constitutional rights along with a balancing clause, thus opened the door for substantive judicial review and judicial involvement. Indeed, soon after these Basic Laws were adopted the Supreme Court addressed the question of substantive judicial review and the possible court empowerment to conduct substantive judicial review of primary legislation. In the matter of *Mizrahi* the Court declared that it has the power to do so. Although it did not use this power in *Mizrahi*, the Court since had annulled three provisions of primary legislation. The impact of the Supreme Courts’ authority is greater than the statistical evidence suggests, however, as it directly

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6 The two balancing clauses are quite similar and include three limits – values of the Israeli state, a proper purpose and a right measure. A Law or regulation violating rights in the two Basic Laws has to meet these three needs.

**Basic Law: Human Dignity and Liberty**

"8. There shall be no violation of rights under this Basic Law except by a Law befitting the values of the state of Israel, designed for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such Law."

**Basic Law: Freedom of Occupation**

"4. There shall be no violation of freedom of occupation except by a Law befitting the values of the state of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law."

7 H.C. 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village et al., 49(4) P.D., 221. In *Mizrahi* the Supreme Court dealt with the constitutional meaning of the two new Human Rights Basic Laws. The issue arose whether judicial review may be conducted and statutory provisions nullified if they substantively conflict with Basic Law: Human Dignity and Liberty. The Court in *Mizrahi* did not annul the statute they yet in the extended and elaborate opinion, which is one of the most important landmark rulings in Israeli constitutional law, endorsed the exercise of substantive judicial review of legislation. Referring to the concern that there is no explicit clause assigning the court the ability to conduct judicial review, Justice Barak followed the reasoning in Marbury v. Madison and argued that the supremacy of the Basic Laws justifies the ability of the court to conduct judicial review – “by that the court fulfill democracy and separation of powers” (*Mizrahi*, 451-452).

8 H.C. 1715/97 Menahalei Hashkaot Bureau et al v. Minister of Finanace et al., 51(4) P.D., 367; H.C. 6055/95 Sagie Zemach et al. v. Minister of Defence et al., 53(3) P.D., 241; H.C. 1030/99 p.m. Haim Oron et al. v. the Knesset Speaker et al., 56(3) P.D., 640. In addition, in April 2003 the Magistrate court in Tel-Aviv annulled a law (4696/01 (Tel-Aviv-Jafa) State of Israel v. Moshe Hendleman). This ruling fueled once again the public discourse on the matter of judicial review. In a very raged dialogue between the branches of government it seems that there is a wide consent to limit judicial review to the Supreme Court. President Barak referred to the speaker of the House of Representative by suggesting him to “take the role of the speaker and pass a Basic Law dealing with legislation in which the Knesset will anchor that not every magistrate justice, or a justice of a labor court will be able to annul a law, but that only the Supreme Court will have this authority” (Haaretz, 27.5.2003).
effects litigation (Maoz, 1996), and the constitutional dialogue (Hofnung, 1997). Not surprisingly, the empowerment of the Supreme Court has been labeled by its former Head as a “constitutional revolution”. Yet,ironically, this empowerment resulted, in a dialectical way, in the Court’s increasing vulnerability (Soffer, 2006) and in recent years, it often finds itself under attack for its “hyper activism” or “judicial imperialism”. These changes are accompanied with a growing social and political unrest from both sides of the issue – those who argue that the Court has taken to itself power it was not intended to have, and those who favor a clear and more powerful Court empowerment.

**Why Now?**

Since the “missed moment” of constitutional design some 60 years ago, no less than 24 draft constitutions were prepared by parties, scholars, civic organizations and religious leaders (Polisar, 2005: 16). Until recently, the most comprehensive attempt was “Constitution for Israel” movement that emerged in the late 1980s as a reaction to the unstable political conditions of the time. The movement rode on the public unease with the political elite but despite its relatively strong public and political support, the attempt failed achieving its goal yet left us with a constitutional reform of Direct Election of the Prime Minister. This reform was later rebutted, yet the suspicion towards another constitutional reform stalled further more recent attempts.

Many scholars believe that the conditions today are favorable more than ever to enact a constitution (Shamgar, 2005). There are several arguments to support this claim. First, the clash between the big ideologies (socialism versus free market, west versus east orientation) that was salient for many years has vaporized as Israel has long ago
opted for western orientation. The long-standing tight relations with the United States were entrenched as early as the 1950s, and the collapse of the Soviet bloc made the ideology divide less relevant. A communist party still exists in some form, but is a marginal actor in the political map. Second, today Israel constitutes the biggest Jewish Diaspora, recently overtaking the Jewish Diaspora in the United States (Dror, 2006). Israeli Jews are yet to become a majority of the world Jewish population (just over 40%), but the late 1940s arguments about the illegitimacy of small Jewish community to shape the constitution of the Jewish Homeland are no longer relevant. Third, and this is an important change since the reform efforts of the 1990s, there is a recent recognition within minority groups (Arabs, Ultra-orthodox Jews) that a constitution will benefit them. These groups, who traditionally oppose the enactment of a constitution, have come to realize that it would provide them with a better protection from a sudden change stemming from random political circumstances.

Finally, the last decade saw several developments that threaten the strength and endurance of the Israeli democracy. The gradual erosion of social solidarity, the spread of political corruption, combined with reoccurring clashes between the governing branches\(^9\) and government instability resulted in a worrying decline in the public trust towards political institutions (Arian et al., 2007: 44). Where there is no consensus regarding the legitimacy of a decision, and an unwillingness to accept court judgments, the risk to the political and social fabric increases considerably. Therefore now, more than ever, a constitution is seems necessary. It seems correct to say that today there is a wide agreement that enactment of a constitution might help restore the

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\(^9\) The clashes are mainly between the Judiciary and the Legislature. The Supreme Court often finds itself under attack, as some politicians talk about “judicial imperialism”, “the judicialization of the public sphere” and of exaggerated “Court activism”. Judges have been referred to as an elite clique that threatens to usurp democracy by undermining majority rule.
trust in the democratic institutions. An agreement over a basic common ground and over acceptable rules of the game may serve as leverage for the improvement of the political process and the strengthening of the substantial foundations of the democracy. To put it simply, the enactment of a constitution may provide a much-desired fresh start to the political process in Israel. Nonetheless, in order to achieve this new beginning, several obstacles have to be overcome.

The Main Issues in the Current Constitutional Debate

In this section we will map the issues that stand in the core of the current constitutional debate. We start with two issues that although have the potential of becoming dividing issues, they currently do not constitute an acute limitation. First, the debate regarding the system of government: should Israel remain a parliamentary democracy or should it transform itself into presidential democracy. In many ways, this debate is moot as a consequence of the traumatic experience of the “Direct Election” era, which lasted for seven years, from 1996 to 2003.\[10\] The Second issue is the right-left economic cleavage. As explained above, this cleavage is not salient anymore in Israeli politics. Thus, the issue of the scope of social rights laid out in the constitution is not very divisive. Indeed, there are several political parties and civil organizations that stand for social-democratic values and vie for a broad interpretation of social rights. But they form a minority and the issue is definitely not dividing.

\[10\] The “Direct Election of Prime Minister” – which was labeled by Sartori (1998) as “the most incredibly stupid system ever designed” – combined elements of presidentialism and parliamentarism, thus creating a bizarre hybrid system (Hazan, 1996; Diskin, 1999). The Direct Election caused some serious negative consequences as the sectoralization of politics, profiled parliamentary fragmentation and government instability (Kenig et al., 2005).
We identify three main issues that stall the attempts to adopt a constitution: the character (or definition) of the state, the scope of bill of rights and the model of judicial review.

*A Jewish State*, *State of the Jewish People* or *A State of All Its Citizens*?

Along its history, the State of Israel was often torn between its definition as a nation state for the Jewish people and its functioning as a liberal and democratic state. This dual nature of the state is well reflected in the two Basic Laws that deal with civil rights (Freedom of Occupation and Human Dignity and Liberty). Both laws define the State of Israel as a “Jewish and Democratic” state. The Jewishness of the state is also manifested in the symbols of the State, in the Law of Return (see footnote 1) and in advancing the Hebrew language as the primary language. The democratic nature of the state is reflected in its democratic process and values. There is an extensive scholarly debate over the question whether Israel can be Jewish and Democratic at the same time. Some claim that like other nation-states, formed around a central “nation”, Israel has the right to bear some particularistic features. Israel is not the only state with an ethnic focus and there is no inconsistency between a state being Jewish and its being a democracy (Dowty, 1998; Gavison, 1999). Others point to discrimination in favor of the Jewish majority and claim that Israel should be categorized as “ethnic democracy” (Smooha, 1997). Still others, challenge Israel being a democratic at all, labeling it as an “ethnocracy” (Yiftachel, 1999; Ghanem et al., 1998).

The debate over the nature of the state touches the core of Israel’s existence and therefore it is of no surprise that it forms the most fundamental constitutional disagreement. The basic dilemma here is how to define the state. A vast majority of the Jewish citizens back the notion that Israel is the nation-state of the Jewish people.
As such, a constitution should explicitly anchor the Jewish attributes of the state. The Arab minority opposes this definition and vies to transform Israel to a neutral, bi-national state ("state of all its citizens" as known in the Israeli political jargon).  

But the dispute over the nature of the state is not limited to the Arab-Jewish divide. There is a dispute within the Jewish community as well. Secular Jews, who constitute the majority in the Jewish society, see the Jewishness of the state in its narrow definition – simply being a home for the Jewish people and a place where the Jews are able to realize their right for self-determination. Religious Jews, on the other hand, vie for a tighter link between the religious elements of the Jewish faith and the state. They do not see Israel merely as a state for the Jewish people but as a Jewish state, in the sense it should promote Jewish values. This, of course, poses a problem not only for Arabs, but also to secular Jews. The possible tensions are, therefore, not generated only by the colliding between Jewish national identity and a democratic system, but also by the colliding of Judaism (as a tradition of norms, demands and values) and democracy, as a system of principles and fundamental values (Ravitzki, 2003: 264).

The Bill of rights

The debate over the inclusion of a bill of rights in a constitution is not unique to Israel. Other countries that were enacting and ratifying constitutions have straggled with the issue as well.  

11 In fact, the Arab leaders present a much more radical stance in this issue than their electorate. There are polls that suggest that more than half of the Arab citizens may agree to the definition of Israel as a nation state of the Jewish people in favor for a whole and substantive bill of rights.

12 In United States the original constitution did not include a bill of rights, but the Federalists agreed to add a bill once they realized it is essential in order to garner support for its ratification; Germany’s Basic Law includes a bill of rights; France’s Constitution of the 5th Republic does not. Most of the new constitutions, however, do have a bill of rights.
constitution – that the constitution puts a stamp on the contemporary political and social order and transfers to courts the power to review future conduct and decisions. This tension will be dealt in the next section, yet it is important to note that when it comes to human and civil rights, the delegated power is significantly larger than structural provisions of government.

While this inherent tension characterizes most constitutional reforms, there are unique features of the Israeli society that make this a particularly complex issue. These are the Arab-Jewish divide and the religious-secular divide. The primary tension pertaining to the former divide is the relationship between universalistic rights in a bill of rights and the particularistic rights which stem from the definition of Israel as a Jewish state. An example of this tension was recently debated in courts when an Israeli-Arab family petitioned the Court to overturn a decision by a communal society that denied them the right to settle in an all-Jewish settlement, “Katzir”, funded by the Jewish National Fund. This dispute over land captures the tension between equality and Jewish identity in all its might. In a very controversial decision, the Court sided with the petitioners and determined that the principle of equality makes it illegal for the state to discriminate between its Jewish and Arab citizens in the allocation of land. In doing that, the Court made it clear that a future constitutional provision that would explicitly guarantee universal equality will have significant ramifications to the delicate balance between the two social groups in Israel.

Like any minority, the Arab minority, has much to gain from the incorporation of a comprehensive bill of rights to a constitutional level. Bill of rights would empower the Court and may improve the Arab level of protection against a possible majority
tyranny. However, from the Jewish perspective, at least as viewed by Jewish nationalists, such empowerment might result in an undermining their basic view of the Israel as a Jewish state. As many commentators pointed out, if the state cannot give preference to Jews in the allocation of land, what was the practical import of it being a Jewish state?

The second tension is internal to the Jewish majority and pertains to the relationship between the religious and secular groups in Israel. Unlike the Arab minority, religious minorities see in a bill of rights little protection for their interests. Traditionally, this group was able to protect their interests through the political process, thus any curb on the political process is seen as a danger to their interests. Enjoying their pivotal political role at the center of the political map, the religious parties enjoy a political power which is greater than their actual public support. This allowed them to secure their needs as a group through the political process. From this standpoint, they view a comprehensive bill of rights as an attempt by the liberal elite to empower their like-minded court. A manifestation of this opposition can be seen in the massive rally in February 1999, when some 250,000 Ultra Orthodox Jews held a religious rally and public prayer against the Supreme Court.

For religious groups there is much at stake from adopting a comprehensive bill of rights, which would include a freedom of religion and from religion. This provision would most likely change the status quo regarding the dominance of Jewish Orthodoxy in Israel, would pave the path to recognizing non-orthodox marriage, and would strip down power of the Chief Rabbinate, which gives the orthodox complete monopoly over religious services. Yet, other provisions are likely to influence
religious groups as well. Perhaps the best example for the danger religious groups see in a bill of rights is illustrated by the legal dispute over the implications of the Basic Law: Freedom of Occupation. For many years the religious parties were able to prevent any change in the regulations that made it unlawful to breed and sell pork products in Israel (few exemptions apply). Once the Basic Law was adopted in 1992, a private company petitioned to the HCJ arguing that the freedom of occupation guarantees them a constitutional right to breed pork. The Court accepted their argument. The Knesset responded by amending the Basic Law and adding the override provision which provides the Knesset the ability to pass a law that violates the freedom of occupation as long as the law or provision had passed by a majority of the members of the Knesset, and expressly stating that it shall be of effect notwithstanding the provisions of this Basic Law. This interaction between the representative branches of government and the Court illustrates the potential tensions that can arise as a consequence of adopting a bill of rights.

**Judicial review and override.**

In many ways the main tension over the adoption of a constitution is the question of judicial empowerment. The American ruling in Marbury v. Madison (1803) constituted a major milestone in juridical and political thought, in recognizing a hierarchy of juridical norms which (in the American example) puts the constitution at the apex of the normative pyramid. Justice Marshall demonstrated in his ruling that without recognition of a constitution’s supremacy, framing one is in itself utterly meaningless (Marbury v. Madison (1803), 5 U.S. 137). This reasoning had since become part of the conventional wisdom. Yet, once acknowledged, the application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than the legislative body is entrusted with the task of examining whether a
law is constitutional, what its constitutional interpretation is and, occasionally, annulling it if – according to the opinion of this organ – it is unconstitutional. It is this organ which conducts judicial review (Kelsen, 1961: 156). The difficulty in entrusting a non-majoritarian organ, which was not popularly elected and therefore is not representative, with the ability to annul a law is vastly discussed in the literature where it is referred as the counter-majoritarian paradox (Bickel, 1986). Despite this democratic unease, judicial review in democratic countries had expanded in the second half decades of the twentieth century in both scope and power. Yet, the mere recognition of the necessity for such an organ to evaluate and discuss constitutional questions implies no determination of this organ's identity, character or structure. Hans Kelsen, after recognizing the need for such an organ, pointed out that “there may be a special organ established for this purpose, for instance, a special court, a so-called ‘constitutional court’; or the control of the constitutionality of statutes, the so-called ‘Judicial Review’, may be conferred upon the ordinary courts, and especially the supreme court” (Kelsen, 1961: 157). Hence, as holds true for other political institutions, the organs performing judicial review exhibit a wide variety, in respect to both its identity and characteristics. Differences may be highly significant and bear a crucial influence on the power of judicial review and its role within the overall governmental and judicial system of any given country. In most cases these differences are largely accounted for by the socio-political conditions that prevailed in each of them when their pattern of judicial review was adopted.

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13 In few democracies, such as Canada (1982), New Zealand (1990) and South Africa (1993), judicial review was transferred to a judicial organ; in the early 1990s several new democracies, such as Hungary, Poland, the Czech Republic and Bulgaria, founded a new organ to conduct judicial review; and in some established democracies a significant expansion can be discerned in the scope and power of judicial review, such as in the states of the European Union as a result of the impact of European integration and the European Court of Justice. This universal trend is commonly interpreted as part of a wider tendency of judicial empowerment, which characterizes most modern democracies.
As the Israeli experience shows, the issue of judicial review or the identity and power of the constitutional interpreter underlies the whole debate over the adoption of a comprehensive constitution. It is not a coincidence that to date there is no Basic Law or provision that settles this issue and delivers the power to conduct judicial review to the courts. The fact that the Supreme Court in a series of active decisions had taken this power, similar to the way this was settled in other countries such as United States, only intensified the debate and to great extent stalled many attempts to continue with the process of constitutional reform.\textsuperscript{14}

The uniqueness of the Israeli court system – which is not elected and is based on professional recruitment – makes the Supreme Court highly unrepresentative. This significantly contrasts the uniquely representative political bodies of the Knesset and Government, thus bringing the counter-majoritarian paradox to the extreme. Solving this tension raises once again all of the political and social cleavages and divides in Israel. Groups that have been successful in protecting their interests through the political process, especially religious groups, oppose any empowerment of the court. Instead, they suggest that the power to review legislation should be given to a representative body such as a Constitutional Court, to change the contemporary Court to a more representative one, or to strip – completely or partially – the Court of the power to conduct judicial review. On the other hand, groups that are traditionally underrepresented and therefore unsuccessful in protecting their interests through the political process want to have a strong and professional Court.

\textsuperscript{14} Note, as a comparison, that after the important decision of Marbury v. Madison (1803), the American Supreme Court did not turn again to use the power of judicial review of primary legislation until the poor decision of Dred Scott v. Sanford (1856), which led to the break of the civil war.
Assessing the Two Contemporary Attempts

While it seems correct that the time is ripe for enacting a new and complete constitution, the failed previous attempts hold back many people who are concerned with the dangerous political and social consequences such an act might create. This had led the two existing attempts to take a different track than the one taken by “Constitution for Israel”. While “Constitution for Israel” responded to the broad public cry for change of the political system, it failed to incorporate the needs of different groups in the Israeli society. In many ways, “Constitution for Israel” was a scholarly written document which failed to portray the social and political forces in Israel. Trying to avoid this mistake and following the need to weaken the resentment from additional shocks, the two contemporary attempts go beyond the search for a good constitution, to a search for a constitution that would voice the needs and interests of the Israeli society. This involves compromises rather than relying solely on comparative constitutional theory. It requires an agreement to sit together and solve the tensions. It is a work of social and political negotiation that recognizes the inescapable fact that a constitution pictures a society rather than creates it.

The IDI’s “Constitution by Consensus” process

The Israel Democracy Institute (IDI), a Jerusalem-based think tank, was established in 1991 with the aim of strengthening and stabilizing the Israel’s parliamentary democracy. The IDI is a policy-oriented body that operates between politics and the academic world. It was a main actor in the process that led to the abolishing of the Direct Election system in 2001, and since the beginning of the 21st century it embarked on an ambitious project of drafting and lobbying for the enactment of a constitution to Israel.
The project started in the year 2000, with the establishment of a Public Council, a body including about 100 members: Ministers, Member of Parliament, ex-politicians, prominent scholars, judges, religious leaders, journalists and third sector activists. The diversity of this group reflected to large extent the composition of the Israeli society. Never before in Israel’s history have such a large and diverse group discussed constitutional matters. From July 2000 until February 2005, the IDI facilitated twelve two-days meeting of the Public Council, each of them dealing with a specific constitutional aspect (See Appendix 1). The debates’ main purposes were to map the core disagreements and to find creative solutions and compromises in order to move on with the process.

In a sense, IDI process was unique and may be regarded as a “civic” approach. It was different from previous attempts to enact a constitution by the fact that it opened the doors to public debate. The IDI has initiated an educational program in schools in order to nourish civic and democratic values among youth. It has also established unique arenas for constitutional discussions: legal council (including lawyers), a “next generation council” (including participants in their 20s) and several local councils.

But, obviously, the openness of the process had its limits. Drafting a constitution by such large groups as the Public Council and the other channels was not practical. In February 2003, after most of the Public Council meetings were held, an IDI inner group composed of about ten of the institute’s senior fellows and led by former Supreme Court President, Meir Shamgar, started an extensive process of drafting a constitution. This small group held extensive meetings, varying in length from half day to a four-day marathon, and by the summer of 2005 succeeded in completing a
constitutional draft. The inner process, based on the debates of the Public Council, was labeled “Constitution by Consensus” and was accompanied by other channels, targeted in “marketing” the urgent need for a constitution to the public.

This inner group set to draft a whole constitutional document, under the premise that real fine-tuning is needed in order to achieve wide consensus and that only a whole document is enabling this. Another preliminary decision was to avoid the “easy” way of leaving disputed issues unsettled. The premise was that the document should be read as a whole and, therefore, no loose edges are allowed. This made the process very challenging, but in the end very rewarding as it produced an agreed upon document which reflects many of the compromises and creative solutions suggested in the Public Council’s meetings.

There were certain advantages to the method of work conducted by the “Constitution by Consensus” group. First, its relatively small size and the fact that the actors have not changed during the process, created an intimate atmosphere, fostering unique dynamic that was necessary in order to ease the mutual suspicion and to come to creative compromises. Second, the group had a time advantage. It could hold extensive and profound discussions with relatively no pressure of timework. Third, the fact that the group was composed of professionals rather than politicians created an optimal setting. The members could act freely of short political considerations yet carefully followed the different considerations raised by the members of the Public Council meetings. Against these notable advantages, one main critique may be raised towards the unrepresentative composition of the group. The group was by no means representative and did not include many voices in the Israeli society. In order to
compensate on some of these limitations, the members occasionally consulted members of the Public Council and, at times, invited them to specific discussions, and extensively referred to the positions presented at the meetings of the Public Council.

As mentioned above, in February 2005 the “constitution by consensus” group completed the drafting of a constitution. A look at the proposition reveals the extensive effort made to come with a text rich of tradeoffs and compromises. Every political camp could find in the text some gains yet some concessions (See Table 2).

As the President of the IDI, Arye Carmon, put it:

“...at the conclusion of this process, not one of the fellows of the Institute is entirely satisfied with the final draft we have all signed. Nevertheless, it may be said that the drafters are satisfied with their effort of imperfection, that is, with their willingness to compromise.”

(The Israel Democracy Institute, 2007: 17)

So, what are the main solutions and compromises that the IDI constitution draft present? With regard to the character of the state the draft adopted the mainstream opinion in the Israeli society: Israel as a Jewish and Democratic State. It opposes the concept of bi-national state and elevates to a constitutional level the Jewish symbols of the state. In order to protect the rights of the Arab citizens, the draft includes a clause protecting their cultural rights as well as a significant equality clause. It also anchors the Arabic as an official language, although Hebrew has a higher status. (See Appendix 2 for the first part of the constitution draft).
Table 2: IDI’s Constitution by Consensus: Who gains what?

<table>
<thead>
<tr>
<th>Group</th>
<th>Gains</th>
<th>Concessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arabs</td>
<td>Bill of rights, cultural Rights clause, equality as a fundamental state value</td>
<td>Entrenching of Israel as the state of the Jewish people, law of return, Jewish symbols</td>
</tr>
<tr>
<td>“Liberals”</td>
<td>Bill of rights, retaining and empowerment of the High Court</td>
<td>The exclusion of certain religious aspects from judicial review</td>
</tr>
<tr>
<td>Nationalists</td>
<td>Entrenching of Israel as the state of the Jewish people, law of return, Jewish symbols</td>
<td>Equality as a fundamental state value, cultural rights to the Arab minority</td>
</tr>
<tr>
<td>Orthodox religious</td>
<td>Exclusion of certain aspects of religious affairs from judicial review</td>
<td>A constitution with a bill of rights</td>
</tr>
</tbody>
</table>

The IDI’s constitution draft also presents a complete bill of rights. This, as explained before, present a major threat to some religious Jews, fearing that constitutional values as equality and freedom from religion will collide with the existing arrangements. To overcome this problem, the draft adopts a creative solution. While it gives the Supreme Court explicit power to review legislation and to annul laws that conflict with the enumerated rights in the constitution, it also defines specific topics of social tension and declares them to be outside of the regular judicial interpretation – principle of non-justiciability. Where the Court shall interpret legislation which concerns any of these topics, it is not obligated to grant interpretive preference to the provisions of the constitution.\(^{15}\) This constitutional non-justiciability clause erases the

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\(^ {15}\) The topics are: joining a religion, belonging to a religion or renouncing it; conducting marriages and divorces according to religious law and the application of religious law to issue of personal status; the Jewish character of the Sabbath and Jewish holidays in the public domain; maintaining Jewish dietary laws in governmental institutions; and granting Israeli citizenship to relatives of one eligible to immigrate to Israel.
supremacy of the constitution on the specifically enumerated topics. By doing that the IDI proposal is offering liberals a strong and professional court at the price of leaving issues of great importance to the religious groups to the political debate as it is right now. Religious groups are able to maintain the current balance of power on these heated issues at the expense of accepting a full constitution that includes a comprehensive bill of rights and an unrepresentative Court.

The public reactions to the proposal were mixed. Polls indicate that majority of citizens support the proposal (Guttman Center, 2005), but it encountered much critique in the press. While the reluctance of Arabs and Ultra-orthodox was expected, it was surprising to find many within the Liberal camp that fiercely objected the proposal. These liberals, perceived as the Human Rights champions of the Israeli political map, argued that the proposal went too far in terms of concessions to the religious camp. Many argued that the only option worse than a state of “lack of constitution” is a bad constitution that anchors contemporary flaws in the political and legal system. Furthermore, many express the concern that given the composition of the Knesset, the final draft would have more nationalistic and religious shades.\textsuperscript{16}

These concerns did not prevent columnists representing the nationalist and religious camps to oppose the proposal on the ground it is not patriotic or Jewish enough, and opens the door for a full equality to the Arab citizens. Only few argued that by missing this window of opportunity and by rejecting compromise, they might wake up in the near future with a more secular, less national state.

\textsuperscript{16} For examples of liberal-camp objectors to the constitution see Sternhell, 2007; Avineri, 2007; Kimmerling, 2005; Raday, 2006.
The Knesset “Constitution Law and Justice” Committee process

If the IDI process could be labeled as a “civic” approach, the second process may be labeled as a “political” approach. This attempt was initiated in 2003 by the chairman of the Knesset “Constitution, Law and Justice” Committee, MK Michael Eitan. Citing the Declaration of Foundation of the State, MK Eitan explained that the attempt is a continuation of the task the Knesset gave his committee over 50 years ago.

In opposition to the tactic of the IDI’s inner group, MK Eitan had no pretension to achieve a single solution. Instead, in order to avoid intense political battles that would undermine the whole process, he ordered to present several drafting options to the Knesset. This decision was realistic due to the actors, which were political figures. The committee has held 76 meetings on the matter. Some achieved remarkable members’ attendance, but there were meetings that hosted only few members. The significant drawback, in comparison to the IDI process was the length and depth of the meetings. While the IDI inner group often dedicated long hours (and sometime days) for discussions, the parliamentarians usually held two or three hours meeting. The meetings, held in the committee chamber, were often interrupted by the day-to-day legislative, political and partisan business. In addition, the actors were influenced by the ongoing political game and their current interests. In other words, the will to compromise was not intensive. That is not to say that the political effort was less professional, less committed or less serious. Far from that, the committee’s work was supported by an impressive legal and research unit that provided it with dozens of background papers. During its meetings, the committee members heard the words of a long line of experts, including representatives from the Israel Democracy Institute.
Still, the political circumstances cast shadow on the committee’s work. The committee could not conclude its work because general elections were called to March 2006. Under tight schedule, with elections looming on the horizon, MK Eitan made considerable effort to present at least an interim report of the committee’s work prior to the end of the legislative term. The committee held a vote on a resolution approving this interim report and calling the next Knesset to build upon the effort and continue the process of constitution drafting. The resolution passed by a large margin (10 supported it and 3 objected) but the distribution of votes reveals that the suspicion of some groups toward the process still exists. All the three objectors were representatives of the religious parties. Nonetheless, they were still part of the process. The Arab representative in the committee did not vote for the resolution at all. This abstention signified the Arabs unwillingness to be a part of a constitutional process that entrench Israel as a Jewish state.¹⁷

Reading the proposal of the committee is a challenging task, due to the many loose ends that were left inside – either in the form of multiple options or in the form of “to further discussion”.¹⁸ It is therefore difficult to paint a full picture of the document, especially with regard to the core constitutional issues. Still, in general, the committee proposal took several different positions vis-à-vis the IDI’s draft. For instance, the part that outlines the fundamental principles of the State tends to be slightly more Jewish and nationalistic. It does not mention the Arab minority and includes more clauses that deal with the Jewish attributes of the State. Also, the Bill of Rights that

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¹⁷ The Arab committee member participated in the earlier meetings that dealt with the less disruptive, institutional aspects of the constitution. He retired from the process when it proceeded to the core issues of the definition of the state.

¹⁸ See the website: http://huka.gov.il/wiki/index.php/English. For an English version of the constitution draft(s) see http://experts.cfisrael.org:81/~admin/proposals.pdf
was included in the committee’s proposal lacks a clause regarding group rights. Another significant difference regards the issue of judicial review. The committee had adopted the Canadian model of override. According to this model, the constitution provides the representative bodies the power to override a protected constitutional right if it does so explicitly and with a special majority. This guarantees that in the struggle between the Court and the Knesset, the opinion of the representative body will prevail even if it counters basic human and civil rights.

A month prior to its dissolution, the Knesset also approved the interim report of the committee by a vote of 30 against 19. Seven months after the elections, the new chairman of the Constitution, Law and Justice Committee, MK Menachem Ben-Sasson, restarted the meetings on the Constitution. As to mid-March 2008, the committee held more than 40 meetings. Although relying to some extent upon the previous efforts, the new chairman actually reopened many of the issues for discussion. It is still unclear where this process will lead.

**Conclusion**

It seems correct to say that today, perhaps more than any other time since the missed constitutional moment, the conditions and incentives to ratify a constitution are ripe. Most important, the public is supportive and politicians are, to a great extent, sympathetic to the process. The two efforts described in this paper have a significant role in creating such a positive climate for change. Despite the differences in their nature, they share several common principles. They both emphasize the urgent need to enact a constitution; they both vie for the inclusion of all groups in the Israeli society and aim in achieving a wide consensus to the process by suggesting compromises.
The two efforts were also intertwined. Experts from the IDI were present in almost all of the Constitutional, Law and Committee discussions and both contributed to their discussion as well as took notes to help shape the IDI proposal. Representatives of the Committee were present in some of the meetings of IDI’s public councils and were routinely exposed to their working drafts. These unique relations fostered a genuine and fruitful cooperation, which was naturally accompanied with a slight shade of rivalry. The last year saw a gradual process of convergence of the efforts, as the Committee and the IDI held joint meetings with the aim of moving forward and agree on a common document.

In many ways the two efforts compliment each other and each presents a different type of constitutional politics. The IDI – as the “civic” channel – has succeeded in drafting a whole document that provides the Committee with a comfortable platform for discussion. Maybe more importantly, it also facilitated a much-needed public involvement in the process. The Committee, which is the actual political arena that any draft would have to go through in order to be ratified, plays a significant role in targeting the main disagreements and in interpreting the theoretical and “professional” debates into the day-to-day politics. In that way, it makes the constitutional effort more actual and enhances its prospects.

It is now clear, that Prime Minister Olmert’s hope of completing a constitution in time for Israel’s 60th anniversary will not materialize. However, the constitutional debate is very much on the current political agenda and may be completed in the next few years.
References


Appendix 1 – List of IDI’s Public Councils

<table>
<thead>
<tr>
<th>#</th>
<th>Date</th>
<th>Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>July 2000</td>
<td>System of government</td>
</tr>
<tr>
<td>II</td>
<td>November 2000</td>
<td>The legislator and electoral system</td>
</tr>
<tr>
<td>III</td>
<td>March 2001</td>
<td>Bill of Rights</td>
</tr>
<tr>
<td>IV</td>
<td>June 2001</td>
<td>Religion and State</td>
</tr>
<tr>
<td>V</td>
<td>November 2001</td>
<td>Models of Judicial Review</td>
</tr>
<tr>
<td>VI</td>
<td>December 2001</td>
<td>The nature of the State</td>
</tr>
<tr>
<td>VII</td>
<td>March 2002</td>
<td>Constitutional amendments</td>
</tr>
<tr>
<td>VIII</td>
<td>June 2002</td>
<td>Local government</td>
</tr>
<tr>
<td>IX</td>
<td>November 2002</td>
<td>Social rights</td>
</tr>
<tr>
<td>X</td>
<td>May 2003</td>
<td>The executive</td>
</tr>
<tr>
<td>XI</td>
<td>June 2003</td>
<td>The judiciary</td>
</tr>
<tr>
<td>XII</td>
<td>February 2005</td>
<td>“Constitution by Consensus” – Debate on IDI’s constitution draft</td>
</tr>
</tbody>
</table>
Appendix 2 – Excerpts from IDI’s Proposed Constitution

Part One – Principles

1. Basic Principles
   a) The State shall be called “Israel”;
   b) Israel shall be a Jewish and democratic state;
   c) The state shall act with equality towards all its citizens;
   d) The system of government shall be a parliamentary democracy.

2. Sovereignty
   The source of the government’ authority is the sovereign will of the citizens, as expressed in the Constitution and in free elections.

3. Flag, Insignia, Anthem
   a) The flag of Israel shall be white, with two light blue strips adjacent to its top and bottom margins, and a light blue Star of David at its centre;
   b) The emblem of Israel shall be a seven-branched candelabra flanked by two olive branches, with the word “Israel” at its base;
   c) The national anthem shall be “Hatikva” (“The Hope”).

4. Capital
   a) Jerusalem shall be the capital of Israel;
   b) Jerusalem shall be the seat of the President of the State, the Knesset, the government and the Supreme Court.

5. Language
   a) Hebrew shall be the language of the State;
   b) Arabic shall be an official language. The use of the Arabic language within or in the presence of State institutions shall be regulated by law or pursuant thereto.

6. Sabbath and Festivals
   The Sabbath and the Jewish holidays shall be official days of rest in the State of Israel. Non-Jews shall retain the right to days of rest on their Sabbaths and holidays.

7. Hebrew Calendar
   The Hebrew Calendar shall be the official calendar of the State of Israel.

8. Right of Return
   The following shall be entitled to immigrate to Israel:
   a) A child born to a Jewish father or mother according to Jewish law, provided he or she did not convert to another religion willingly;
   b) A convert to Judaism;
   c) An individual with a proven bond to the Jewish people, as shall be prescribed by law.

9. Citizenship
   a) Israeli citizenship shall be granted to any person who was born where his or her father or mother was a citizen of Israel and resident thereof, to a person who immigrated to Israel by virtue of the Right of Return, to [such person’s] spouse and children;
b) A law may prescribe the granting of Israeli citizenship to relatives of one eligible to immigrate to Israel;
c) Provisions regarding the granting of Israeli citizenship, renunciation, or revocation thereof shall be prescribed by law;
d) Citizenship may be revoked only by the procedures established by law and on the grounds prescribed therein, provided, however, that no person shall become totally stateless as the result of such revocation.

10. **Minorities**
The State of Israel shall guarantee the status of the Arab minority, the Druze minority, and other minorities in its midst.

11. **Religions**
a) The State of Israel shall guarantee the status and independence of all the religions therein;
b) The state of Israel may provide and finance religious services;
c) The holy sites shall be guarded from desecration, other damage, and from anything which is liable to impair the freedom of members of the religious communities to access the sites which are sacred to them or infringe upon their sensibilities toward such sites.

12. **Protecting the Heritage of the Land and its Residents**
The State shall guarantee the preservation and development of the historical and cultural heritage of the land and its residents.

13. **Protection and Development of the Land**
The State shall cultivate the value of the landscape, the environment, and natural resources and shall act to prevent their being harmed, while preserving a balance with the need to develop the land.