

Constitutional revolutions: Israel as a case-study

Gideon Sapir*

Faculty of Law, Bar-Ilan University, Ramat-Gan, Israel

Abstract

From its foundation in 1948 and until the 1990s, the State of Israel lacked a formal Bill of Rights. Although the Declaration of Independence had promised a constitution, a series of obstacles prevented its adoption. In the intervening years, several attempts to anchor a Bill of Rights in a Basic Law met with failure.

In 1992, the Knesset adopted two Basic Laws dealing with human rights. The Supreme Court used these laws as a platform for creating a full-fledged Bill of Rights, and Israeli scholars helped to expedite this process. And yet, despite extensive academic discussion of these developments, the dearth of legal literature remains conspicuous on one question: How did it happen? How is it that after forty-four years of failures and parliamentary paralysis, the Knesset suddenly voted in favour of anchoring a Bill of Rights in Basic Laws?

In this article, I examine four possible explanations. The first attributes these developments to the successful exploitation of a constitutional moment that reflected a severe erosion of public trust in politics. The second pins success on the tactics adopted by the proponents of the law. Instead of insisting on the adoption of a complete Bill of Rights, they split it into small sections and worked to enact only the consensual ones. According to the third thesis, the adoption of these laws was enabled by their proponents' failure to expose the full import of this move, thereby lulling their traditional opponents into a false sense of security. According to the fourth explanation, success resulted from two major shifts in Israeli politics. The first was the Labor Party's loss of hegemony and the ensuing uncertainty regarding the identity of future coalitions, and the second was the strengthening of sectorial elements that threatened the dominance of the secular bourgeoisie. The first shift weakened the coalition's inherent resistance to the constitutionalization of the political system, and the second neutralized the institutional interest of Knesset members representing the old elites against the constitutional project.

Finally, my conclusion points out that these explanations are not mutually exclusive, and all the elements they consider joined together to bring about the 'constitutional revolution', as it came to be known.

Scholars often characterize our times as the era of the Court. One characteristic of this era is that the Court is granted authority to review the activity of the legislature and repeal its decisions if it holds they infringe constitutional provisions.¹ Even countries such as England, which have traditionally stood firm in their adherence to the principle of legislative supremacy, have significantly strengthened the status of the Court in recent years.² Models of judicial review do differ, inter alia, in the

* Senior Lecturer, Bar-Ilan University, Faculty of Law; Rabbinic Degree, Har Etzion Yeshiva, 1989; LLB, Bar-Ilan University, 1993; LLM, Northwestern University, 1996; SJD, Northwestern University, 1998. The author is indebted to Daphne Barak-Erez, Nir Kedat, Menachem Mautner, Barak Medina and Amichai Radzyner for their valuable comments. E-mail: gsapir@mail.biu.ac.il

1 See, e.g., Hirschl (2004a), Stone Sweet (2000), Tate and Vallinder (1995).

2 See, e.g., Hiebert (2006), Feldman (1999).

degree of power they entrust to the Court,³ but these differences cannot blur the general picture – we are at the height of a constitutionalization process that entails strengthening the status of the Court at the expense of the legislature.

These changes have been discussed extensively in the literature. The strengthening of the Court has reawakened discussion on the suitability of the constitutional model to fundamental democratic principles.⁴ A second type of writing is comparative.⁵ The comparative discourse is warranted on two counts. First, states seeking to adopt a constitution require information about the range of available options, and academics enlist in the fulfillment of this task. They collect and classify the options, and present them to decision-makers along with recommendations. Second, the adoption of the constitutional democracy model in many countries enriches the available repertoire and invites updating and clarification of the various submodels. The increasing strength of the Court has also intensified interest in the Court and in the processes taking place within its walls. A third type of studies, therefore, focuses on the conduct of the court as an institution and of judges as individuals and, specifically, on factors affecting their decisions.⁶ A fourth type of writing seeks to trace the considerations driving democracies throughout the world to adopt the mechanism of a written constitution enforced by the courts. Many consider this phenomenon in a broad perspective and seek to offer comprehensive explanations.⁷

The present article belongs to the last genre, though without pretending to offer one general and wide-ranging rationale. Its aim, far more modest, is to seek understanding of the factors that led one single country, the State of Israel, to join the family of constitutional democracies. My personal concern with this question, as an Israeli, is rather obvious. A discussion of this question, however, may also prove useful to those not specifically interested in Israel. Suggesting one single explanation for the growing strength of the judiciary throughout the world may indeed not be possible, but a precise concern with particular countries is obviously a necessary stage on the way to formulating such an explanation, if at all feasible. Clarifying the elements that have brought different countries to empower the judiciary at the legislature's expense enlarges the pool of potential hypotheses explaining the general phenomenon, and questions the validity of available ones.

The Israeli case is particularly interesting. As Jon Elster pointed out more than a decade ago, states tend to adopt constitutions in crisis circumstances. Such circumstances compel discussion of basic questions and increase the readiness of competing groups to show flexibility and to compromise in order to reach agreement.⁸ As noted below, however, the circumstances that led to Israel's becoming a constitutional democracy do not fit the rule pointed out by Elster. The window of opportunity that opened up when Israel was established in 1948 closed without producing a constitution. For forty-four years, the State of Israel functioned without a written constitution and, therefore, obviously without an institution of judicial review. Only in 1992 did a process begin to unfold in Israel, which culminated in the Supreme Court stating that the legislature had granted it the power to examine and repeal legislation infringing human rights.

3 See, e.g., Gardbaum (2001).

4 See, e.g., Waldron (1999a, 1999b), Tushnet (2000).

5 See, for instance, the articles published in the *International Journal of Constitutional Law*, which started publication in 2002.

6 See, e.g., Segal and Spaeth (2002), Clayton and Gillman (1999).

7 For a review of various explanations of this phenomenon, see Hirschl (2004a).

8 See Gavison (1985, p. 152). 'The fact is that new constitutions almost always are written in the wake of a crisis or exceptional circumstance of some sort' (Elster, 1995, p. 370). 'No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup' (Russell 1993, p. 106).

This move, which came to be known as the ‘constitutional revolution’, has evoked extensive academic discussion in Israel. One important question, however, has not been adequately examined so far: How did this happen? How is it that after forty-four years of failures and avoidance of action, the Knesset decided one day to anchor a Bill of Rights in a Basic Law? What led to what many had considered impossible?⁹ The purpose of this article, as noted, is to offer a number of possible explanations for this surprising change.

The structure adopted in the article is the following. In Part 1, I briefly describe Israel’s constitutional history, from its establishment and until 1992. In Parts 2 to 5, I present four possible explanations for the surprising success of 1992. The first explanation attributes this success to the exploitation of a constitutional moment that emerged from an acute crisis of trust between the public and the political establishment. At this constitutional moment, all those involved understood the need to change the balance of power and strengthen the reviewing powers of the Court. A second explanation ascribes the move’s success to the tactic adopted by its proponents who, rather than insist on the ratification of a full-fledged Bill of Rights, chose to split it into subunits and enact only those sections on which consensus could be reached. They also adopted a conciliatory tone that managed to bridge disparities. A third explanation argues that the constitutional revolution became possible because its supporters did not clearly expose the full import of the move they had been leading, thereby lulling the traditional opponents of this move. According to this explanation, the almost total lack of public discourse on issues of constitutional theory resulted in widespread ignorance concerning the implications of legislating Basic Laws and contributed to the proponents’ error. The last explanation attributes the move’s success to two shifts in Israel’s political reality. The first was Labor’s loss of hegemony and the ensuing uncertainty about the identity of future coalitions, and the second was the growing strength of marginal elements that threatened the hegemonic group in Israeli society. The first shift weakened the resistance of the coalition parties to transfer power to the Court, whereas the second neutralized the legislature’s institutional interest in resisting a weakening of its power.

In Part 6, I will seek to identify the most persuasive of these four explanations and argue that they are not mutually contradictory but rather, all apparently joined together in one powerful vector that set the ‘constitutional revolution’ in motion.

1. A Constitution for Israel 1948—1992

On 15 May 1948, close to the termination of the British Mandate, the members of the People’s Council representing the Jewish community in the Land of Israel assembled and proclaimed the establishment of the State of Israel. The Declaration of Independence included several sections and touched on many issues. The Declaration promised, *inter alia*, a constitution for Israel:

‘We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People’s Council shall act as a Provisional Council of State, and its executive organ, the People’s Administration, shall be the Provisional Government of the Jewish State, to be called “Israel”.’¹⁰

9 In an article published soon after the passage of the Basic Laws, Claude Klein notes: ‘The paths of the Israeli democracy and its legislators are strange. Is there any serious observer who, one year ago, would have risked anticipating the passage of those laws?’ (Klein 1992).

10 Declaration of the Establishment of the State of Israel, 1 Laws of the State of Israel [L.S.I.] 3, 4 (1948).

The Declaration presented a course for the process of enacting a constitution comprising three stages. In the first, the 'Provisional Council of State' was to act as a temporary legislative branch; in the second and parallel stage, elections were to be held for a 'Constituent Assembly' charged with drafting a constitution. After accomplishing this task, the Constituent Assembly would disperse. At the third stage, elections would be held for a legislative authority according to the electoral system to be determined in the Constitution. With the election of a legislature, the Provisional Council of State would conclude its task and disperse.

How committed were the country's founders to the enactment of a constitution? The text of the Declaration of Independence corresponds to the UN decision on the partition.¹¹ This correspondence was warranted given the interest of the People's Council in enlisting the broadest possible international consent to the unilateral step they had taken in creating the State of Israel.¹² Given these circumstances, subtle doubts remain as to whether members of the People's Administration genuinely intended to draft a constitution or whether the mention of a constitution in the Declaration was only intended to attain international legitimation. This suspicion could find some confirmation in a speech that Moshe Sharet, then Minister of Foreign Affairs, delivered in July 1948 at the leading forum of Mapai, the ruling party. Sharet stated that basing the country's political system on a constitution may help to achieve the aim of gaining UN membership.¹³ Needless to say, after Israel was recognized by several countries and after it was accepted as a member of the United Nations in March 1949, the link that Sharet had pointed out between the drafting of a constitution and the State of Israel's immediate interests was no longer relevant.¹⁴

According to the Declaration of Independence, then, the Provisional Council of State was meant to officiate as the legislature until the election of the ordinary institutions determined in the Constitution. The Provisional Council of State, however, decided it would cease to exist with the convention of the Constituent Assembly, and its powers would be transferred to the Assembly.¹⁵ Uri Yadin, who at the time officiated in a senior position at the Ministry of Justice, explained the reason for this decision:

'According to the Declaration of Independence, the Provisional Council of State and the Provisional Government were to remain in office not only until the election of the Constituent Assembly but until the establishment of new government institutions according to the new constitution. The role of the Constituent Assembly would be limited to the drafting and ratification of the constitution, and ongoing legislation was to remain in the hands of the Provisional Council of State until the Constituent Assembly concluded its term of office . . . As long as this plan was linked to the 1 October 1948 date, that is, as long as the intention and the hope were to implement all the plan's stages in the course of only four and a half months . . . agreement with it was definitely possible. Now, however, after all that has taken place since the establishment of the State, it is clear that the original plan cannot be implemented. We can no longer agree to the existence of a Provisional Council of State parallel to the Constituent Assembly and, as a result, it is imperative to assign all the roles of the Provisional Council of State to the Constituent Assembly.'¹⁶

11 See Rubinstein and Medina (2005).

12 See Sherf (1959).

13 See Rozin (2002).

14 Rozin (2002, p. 32).

15 Section 1 of the Transition Law to the Constituent Assembly (1949) states: 'The Provisional Council State will remain in office until the Constituent Assembly of the State of Israel convenes; with the convention of a Constituent Assembly, the Provisional Council State will dissolve and cease to exist.'

16 Barak and Spanic (1990, p. 80).

The Transition Law, therefore, assigned to the Constituent Assembly the role of an ordinary legislature, beside its original role as a body charged with the drafting of a constitution.¹⁷

Once elected, the Constituent Assembly – which after the elections changed its name to the ‘First Knesset’¹⁸ – and the Constitution, Law and Justice Committee of the Knesset addressed a question of principle: Was it at all proper to enact a written constitution to be accepted en bloc by the First Knesset? Would it not be preferable to postpone the enactment of the constitution for several years and, in the meantime, regulate the action of government institutions through ordinary legislation? From May 1949 until June 1950, the Knesset was the scene of stormy debates between supporters and opponents of the constitution.¹⁹ Disagreements persisted, and the inability to reach consensus on the contents, the form or even the need for a constitution, finally led to the adoption of the compromise formula proposed by MK Yizhar Harari:²⁰

‘The First Knesset charges the Constitution, Law, and Justice Committee with the task of preparing a constitution for the country. The constitution will be built chapter by chapter, so that each one will in itself be a basic law. The chapters will be submitted to the Knesset as the Committee concludes its task and, together, all these chapters will become the constitution of the country.’²¹

The Harari decision, then, stated that the constitution-drafting process would evolve in stages, in the shape of Basic Laws that would be unified only at the end of the process.

But what prevented the enactment of a constitution closely after Israel’s creation? Some point to the religious camp as sharply opposed to a constitution on grounds of principle, and pin on it the blame for the failure,²² although historical evidence refutes this claim. Discussions about the constitution did point to controversies about some of its contents, and some of the controversies did touch on matters of religion and state,²³ but presenting religious people or problems related to the status of religion as what thwarted the constitution project is entirely far-fetched. Most religious politicians as well as many rabbis were not opposed in principle to the enactment of a constitution, and even agreed to such a move at various stages.²⁴ More significantly, opposition to the constitution was not exclusively religious. Many in Mapai, the ruling party, were also opposed. The fault lines more or less overlapped the coalition–opposition split.²⁵ The Mapai leader and Israel’s first Prime

17 This decision evoked misgivings on both the right and the left of the political spectrum. MK Meir Vilner of the Communist Party and MK Menachem Begin of Herut voiced the suspicion that this move was part of a plot designed to avoid meeting the obligation to draft a constitution. See Gavison (1985, p. 117).

18 Section 1 of the Transition Law, 1 L.S.I. (1949).

19 For a historical description of the different views, see Segev (2007, sec. IIB), Gavison (1985, pp. 147–150).

20 Harari later took exception to the description of his proposal as a compromise. In *Barkat Book: Debate And Discussion On The Problems Of Parliamentarism, Legislation And Government* (1977) (in Hebrew), he states: ‘Compromise? Between who and who? Let us not forget what the situation was then. The controversial question was whether the State of Israel needed a constitution. The decision explicitly states that it does. No compromise on this. I estimated that, in any event, it would be impossible to conclude this task in one Knesset. The idea that this was a compromise proposition, therefore, should not become entrenched.’

21 Knesset Protocols 1743 (1950).

22 See Shprinzak (1986, pp. 71–72), Neuberger (1997, p. 44).

23 See, e.g., Knesset Protocols 4 725–746, 766–784 (1950) (a Knesset deliberation on a report of the Constitution, Law and Justice Committee on the constitution, where the religious issue was discussed at length together with others bearing on the enactment and nature of the constitution).

24 Radzyner and Friedman (2007); see also Cohen (1998, pp. 122–123).

25 See Gavison (1997, pp. 66–67): ‘The opposition, naturally, approached the constitution as a way of protecting its rights and supported it. The coalition, naturally, did not want limitations imposed on its power to rule’; (Goldberg, 1998): ‘[T]he religious political parties did not oppose the idea of framing a constitution during

Minister, David Ben-Gurion, conveyed his view on the constitution issue several times and resolutely opposed the ratification of a constitution enjoying normative primacy. In a debate at the Constitution, Law and Justice Committee of the Knesset in the summer of 1949, Ben-Gurion spoke at length on the constitutional issue, detailing his grounds for opposing it.²⁶ Henceforth, Ben-Gurion led his party's opposition to the enactment of a constitution. Given Mapai's status and Ben-Gurion's dominance within it, his share in obstructing this project appears to have been decisive.²⁷

The Harari decision, as noted, stated as a kind of compromise that the process of enacting the constitution would unfold in stages, in the format of Basic Laws that would be joined together at the end of the process. But this decision was not fully implemented either. Usually, constitutions deal with two types of issues: the regime's structure and the system's basic values. In the years after the Harari decision, the Knesset did enact a series of Basic Laws, but these laws focused on the structural aspect and hardly dealt with fundamental values.²⁸ Many attempts were made over the years to anchor a Bill of Rights in a Basic Law, but all without success.²⁹ This failure is not really surprising once Israel did not seize the chance to draft a constitution at the time of its establishment, a crisis that, as noted, is usually helpful in promoting the required compromises between competing groups. In the years that have elapsed since, the gaps dividing different sectors within Israeli society have increasingly widened and, in these circumstances, the chances of enacting a constitution have only dwindled.³⁰

An interesting question without a clear answer touches on the genuineness of the Harari decision. Did the legislators who supported it truly mean to endorse its course and gradually proceed to enact a constitution, or did their support for the decision reflect a desire to remove the question from the agenda? Data from two sources strengthens doubts as to the sincerity of this move. First, soon after the Harari decision, the Knesset enacted several laws of 'constitutional' character – such as the Law of Return, granting every Jew an automatic right to become an Israeli citizen, and the Law of Equal Rights for Women – without referring to them as Basic Laws. The anchoring of these constitutional topics in ordinary legislation hardly fits the solemn commitment to enact a constitution chapter by chapter.³¹ Second, the Knesset has over the years enacted several Basic Laws that regulated the structural realm, but even these laws were enacted only very gradually. Eight years

the initial stage of Israeli statehood, but changed their attitude only after Ben-Gurion began to publicly express his inclination to avoid a constitution. Realizing that Ben-Gurion's opposition would block the process of framing a constitution, the religious political leaders preferred to oppose the constitutional idea so as to present a political achievement to their voters'; (Sharfman, 1993, pp. 38–45); Mandel (1999, P. 274): 'the hegemony of Labor at the helm of a strong state . . . seems to me the most convincing explanation for the lack of a constitutional Bill of Rights in the first generation of the State's existence'; Radzyner and Friedman (2007, p. 69).

26 Protocol of meetings 15-24 of the Constitution, Law and Justice Committee, First Knesset (5 November 1948–13 July 1949).

27 For a presentation and discussion of Ben-Gurion's grounds for opposing the constitutional project, see Rozin (2002, pp. 34–35, 66) and Neuberger (1997).

28 Gavison (1997).

29 For a detailed description of the various initiatives see CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Settlement*, P.D. 49(4) 221, para. 24-29 of Justice Barak's opinion (1995); Gavison (1997, pp. 75–95).

30 For a pessimistic view on the prospect of success, see Gavison (1985, pp. 153–154): '[T]oday it would seem almost strange to conduct arguments about the basic premises of the state in the midst of normal politics. It appears that the unique opportunity for a Bill of Rights has passed, at least for now . . . The power to make a Constitution has not elapsed, but the opportunity has gone. Israel needs another moment of national elation to allow agreement on the formulation of a Constitution'; Gavison (1990, p. 619): 'Both theoretically and practically, it would seem best to concentrate on what has been done in our constitutional law in the absence of a constitution, in the belief that this is the pattern of activity and development that may also be expected in the future.'

31 Gavison (1997, p. 79).

elapsed between the Harari decision and the enactment of the first Basic Law – Basic Law: The Knesset – and even after the first Basic Law was passed, legislation proceeded extremely slowly. These data support the conclusion that the Harari decision served, at least for some of those who voted for it, only as an excuse to remove the troublesome issue from the agenda.³²

The lack of a Bill of Rights did not prevent the Supreme Court from acting to protect individual rights, even without a constitution. The endeavour of the Israeli Supreme Court in this regard is particularly impressive, given that it set the foundations for it during Israel's early years, which were also its own early years. This was a period of one-party rule and centralized government, when the collective good and the good of the country stood above individual good in the public consciousness. At the time, standing up to the government to fight for human rights, all the more so without a written Bill of Rights, required great courage.³³ The extensive Supreme Court endeavour in the protection of human rights led many Israeli scholars to take pride – not without grounds – in the Israeli phenomenon of providing effective protection for human rights even without a constitution.³⁴

The Supreme Court developed various ways of protecting human rights. First, it determined that human rights have constitutional status in Israeli law, although not anchored in a written constitution or even in ordinary legislation. Second, the Court set an 'interpretive presumption' whereby legislation (both primary and secondary) should be interpreted in ways compatible with human rights. Third, the Court stated that for the executive branch to be allowed to infringe a human right, it must obtain the legislature's explicit agreement. Finally, the Court did not hesitate to criticize and annul decisions of the executive branch in cases of injury to human rights, if it concluded that the injury was unjustified.

Over the years, then, the Israeli Supreme Court built an impressive system of protections for human rights.³⁵ It recognized their existence, interpreted Knesset legislation in their light, demanded explicit legislative agreement for every infringement of these rights by the executive branch, and did not hesitate to examine the discretion exercised by the latter and to invalidate it when this injury seemed unjustified. Nevertheless, there was one step the Court refused to take, although not for lack of attempts to persuade it to do so: the Court refused to repeal primary legislation injurious to human rights, even when it found that this injury was unjustified. The Court stated that 'when there is an explicit legal instruction of the Knesset that leaves no room for doubt, it must be followed, even if it is incompatible with the principles of the Declaration of Independence'.³⁶

32 See Akzin (1966, p. 114): 'The formulation of the Knesset decision in these terms *did not take into account legal considerations* but rather the parliamentary situation, and involved an attempt to retain *maximal flexibility* in handling all aspects of the problem' [my emphases]; Klinghoffer (1993, p. 100): 'The fact that the decision does, in principle, compel the drafting of a constitution, but is supported by the proposal's opponents, and particularly by the Prime Minister [who, as noted, was opposed to a constitution], is embarrassing. When arguing for the proposal, MK Harari avoided taking a clear stand on the question of an unbending constitution. The context of his arguments, however, makes clear he did not intend the formal test of a constitution . . . revealing that the purpose of the decision is indeed the gradual enactment of Basic Laws and their assembly into a constitution at the end of the process. On the other hand, he does intend to leave open the option that the Basic Laws and, ultimately, the constitution itself, will not be bound by stringent conditions for enactment and change, and they will have no normative preference over ordinary laws.'

33 See, for instance, Mautner (1993) (the Supreme Court functioned in its first decades as a liberal institution, a deviant pattern in the Israeli collectivistic society of the time). But see also Lahav (1989, pp. 497–499) (in its early years, the Supreme Court endorsed self-restraint, that is, it abstained from examining the essence of the government's and the public administration's exercise of discretion. This restraint reflected the fact that the judges tended to identify with government policy, and particularly with the collectivistic approaches prevalent at the time).

34 See, for instance, Shapira (1974), Bracha (1982), Shapira (1983), Maoz (1988).

35 For a review of the Supreme Court's endeavour, see Kretzmer (1990, pp. 555–561).

36 CA 450/70, *Rogozinsky v. The State of Israel*, P.D. 26(1), 129, 135 (Justice Berenson) (1971). See also HCJ 80/63, *Gurfinkel v. Minister of Interior*, P.D. 17, 2048, 2069 (1963); CA 228/63, *Ezuz v. Ezer*, P.D. 17, 2541, 2547; HCJ 356/83, *Lidor v. Minister of Building and Housing*, P.D. 38(1), 602 (1984).

A momentous event took place in 1992. This, at least, was how the Supreme Court interpreted the event *ex post facto*. The Knesset enacted two Basic Laws dealing with human rights: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation (henceforth, the new Basic Laws).³⁷ As its name attests, Basic Law: Freedom of Occupation deals with one right only, freedom of occupation. Basic Law: Human Dignity and Liberty includes several rights — property, movement from and to Israel, liberty, dignity and privacy. Absent from the list of rights protected in these two laws are several important human rights, such as equality, freedom of expression and freedom of religion. The omission of these rights, as shown below, was not an unintentional mistake but a deliberate act. Beside the prohibition on the infringement of the enumerated rights, both laws include a limitation clause posing four cumulative conditions that, if met, legitimize the injury to human rights so that the injurious act will not be invalidated.³⁸

Soon after the legislation of the new Basic Laws, the Supreme Court stated that their enactment created a constitutional revolution, a revolution that grants the Court authority to repeal primary Knesset legislation. Since the enactment of the new Basic Laws and until the time of this writing, the Supreme Court has repealed five laws on the grounds that they are incompatible with constitutional provisions. The Court also uses the new Basic Laws as a platform for expanding the Constitution through interpretive tools. Academics have also helped to expedite this process. The intensive and future-oriented concern with constitutional law in Israel, however, unjustifiably dismisses an important question that has not been seriously examined so far: How did this happen? The rest of this article will be concerned with the elucidation of this question.

2. A historical moment

Bruce Ackerman proposes dividing the history of the democratic game into two types of periods.³⁹ At most times, the normal political game prevails. For brief periods, however, the public becomes sharply aware of the crucial significance attached to the constitutional issues on the agenda. At such times, voting patterns do not express the concerns of day-to-day politics but the public's judicious position on the constitutional problem. Based on this distinction, Ackerman attempts to explain a number of constitutional changes in American society that came about as a result of Supreme Court decisions, without anchor in a formal constitutional amendment. The most striking one was the Court's reversal concerning initiatives that President Roosevelt had led in the 1930s in response to the grave economic crisis. For a number of years, the American Supreme Court had curbed these initiatives, repealing a series of laws designed to implement them. Then, the Court suddenly changed its stance and ratified legislation identical to that it had repealed only a short time previously. One explanation that has been suggested for this reversal was the Court's fear of interference with its independence, given the President's attempt to expand it and appoint judges that would agree to authorize his proposed legislation. Ackerman, however, does not explain this change as judicial capitulation but as the Court's recognition of the constitutional change that had taken place in the United States.⁴⁰ Ackerman holds that the presidential elections of 1936 were conducted at a moment

37 *Hok Yesod: Hofesh Ha-Issuk* (Basic Law: Freedom of Occupation), L.S.I. 114 (1992); *Hok Yesod: Kevod Ha-Adam Ve-Heruto* (Basic Law: Human Dignity and Liberty), L.S.I. 150 (1992). For an English translation of Israel's Basic Laws see www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm

38 The limitation clause (Basic Law: Human Dignity and Liberty #8; Basic Law: Freedom of Occupation #4) forbids infringement of the declared rights 'except by a statute that befits the values of the state of Israel, for a worthy purpose, and not exceeding what is necessary'

39 Ackerman (1991). For the implementation of Ackerman's thesis in the United Kingdom, see Weill (2004; 2006).

40 For a similar description of the facts, see Baker (1995, pp. 62–71).

of 'constitutional politics', when the public was conscious of the importance attaching to the dispute between the President and the Supreme Court, and of the reasons underlying their respective conceptions. The massive public support for the President in the 1936 elections constituted a constitutional verdict. The Court honoured this constitutional decision and, therefore, changed its view.⁴¹

Ackerman's theory is descriptive, but has a normative dimension as well. It not only explains the change in the approach of the Supreme Court, but also justifies it. The Court's involvement in molding the constitution is problematic, and becomes all the more so given that the constitution sets a clear mechanism for its change.⁴² The claim that constitutional change does not result from a judicial but from a public decision, solves at least part of the problem.⁴³

Ackerman's theory does not match the facts of Israeli reality in all its details. Contrary to the American example, constitutional change in Israel was not the result of a conflict between the Court and the political system, nor did it evolve after the public expressed its view through elections. Nonetheless, the principle underlying Ackerman's theory may also provide an explanation in the Israeli context at both a factual and a normative level. We presented the factual question above: How did the Knesset succeed in overcoming all the obstacles and, against overwhelming odds, enact a constitution? The normative question pertains to the legitimacy of the constitutional move. One question the Israeli Supreme Court discussed in *United Mizrahi Bank* touched on the Knesset's authority to enact a constitution. The judges did propose several formal answers to this question,⁴⁴ but formal grounds failed to contend with the value implications. Even if, on formal grounds, the Knesset might be thought to have the power to enact a constitution, this would not seem to be the proper course to follow concerning such a momentous event.⁴⁵ Ackerman's approach, however, could help to neutralize this value-based criticism. If constitutional change turns out to have occurred in Israel as well at a moment of constitutional politics and reflecting an informed and deliberate public decision, it might answer not only the factual but also the normative question.

An explanation in the spirit of Ackerman's theory could be formulated as follows: several problematic moves at the end of the 1980s and early 1990s brought public distrust in the political system to new heights. Broad public consensus emerged concerning the need for a systemic revamping of the political system as a precondition for solving the crisis, leading to two far-reaching changes. One change affected the relationship between the legislative and executive branches, with the transition from a model of parliamentary democracy to a hybrid model that adopted features of

41 Ackerman's theoretical claim about the 1936 revolution met with strong criticism among prominent scholars of constitutional law in the United States. See, e.g., Kramer (1996), Lessig (1995), Greenawalt (1994), Nedelsky (1994).

42 Ackerman's theory attempts to settle a further difficulty, the counter-majoritarian one. As Marc Tushnet (2005, p. 263) explains, 'Ackerman's answer was that public deliberation during constitutional moments had special characteristics... that gave constitutional innovations made during such moments normative priority over later decisions during periods of regular politics'.

43 Some scholars have questioned the normative validity of Ackerman's theory. In their view, without a constitutional amendment, an interpretation inconsistent with original intent is not legitimate. See, e.g., Calabresi (2006, p. 476).

44 See the Barak and Shamgar rulings in *United Mizrahi Bank*, *supra* n.29. The thesis of constituent authority that Barak relied upon was first presented by Claude Klein. See Klein (1971; 1970; 1972). Note that Barak's reliance on this thesis is itself a deviation from the traditional position of the Court, which had already rejected previous attempts to present Klein's theory. See HCJ 60/77, *Ressler v. Chairman of Knesset Elections Committee*, P.D. 31(2), 556, 560 (1977); HCJ 148/73, *Kaniel v. Minister of Justice*, P.D. 27(1), 794 (1973); CA 107/73, *Negev v. State of Israel*, P.D. 28(1), 640 (1974). For a focused attack on this thesis, see Justice Cheshin's ruling in *United Mizrahi Bank*, *supra* n.29.

45 For a detailed argument in this spirit, see Cheshin's ruling, *supra* n.29.

the presidential model in an attempt to strengthen the standing of the government and its leader.⁴⁶ The other change related to the relationship between the legislature and the Court, with the adoption of Basic Laws that enable the Supreme Court to review the value-based decisions of the legislature. According to this line of argument, the new Basic Laws were the direct result of the crisis that beset Israel's political system and of the public recognition that change was imperative.⁴⁷

Ackerman's theory is complex, and involves more than a moment of constitutional politics. It describes a mechanism of constitutional change in four stages.⁴⁸ At the first stage, one branch of government proposes constitutional change. At the next stage, another branch of government obstructs the move. The third stage involves a decision-making procedure with the participation of the public. The public's stance will determine whether the attempt at constitutional change will succeed or fail. If the public supports the change, the government branch that opposes it will withdraw its opposition, and if the public does not support the change, the initiative will fail and the prevalent constitutional arrangement will remain in place. This complex mechanism is significant in both factual and normative terms. The frontal collision between the Court and the political system is a crucial factor in the creation of public awareness. Elections conducted in the shadow of a focused confrontation provide normative justification for constitutional change. The four-stage mechanism need not be replicated precisely in this order to attest to public involvement and justify the ensuing change but, barring such a mechanism, the existence of a constitutional moment and of public support for the process of change requires some definite indication.

Clear evidence of a constitutional moment in Israel before the adoption of the Basic Laws and of marked public support for their enactment in the spirit of Ackerman's theory is hard to find. The claim arguing that a crisis of trust prevailed between the public and the political system during the relevant period appears to be substantiated.⁴⁹ No evidence, however, supports the claim stating that the significance of the constitutional revolution was presented to, discussed and broadly supported by the public prior to the Knesset vote on the adoption of the new Basic Laws. The issue received minimal media coverage at the time, both before and after the enactment of the Basic Laws.⁵⁰ Political echelons were not involved in any special preparations that could point to special awareness of the issue's importance. Most members of the Knesset were not even present at the time of the vote on the Basic Laws.⁵¹ As Ruth Gavison notes: 'The new Basic Laws, particularly those dealing with human rights, began to acquire their high profile with a series of articles and lectures by Justice Barak, who also has a copyright on the labeling of the 1992 legislation as "the constitutional

46 Basic Law: The Government, L.S.I. 1396 (1992). This move, as we know, turned out to be a dismal failure. After several years, the Knesset voted to abandon the hybrid model and return to the parliamentary model.

47 For an explanation in this spirit, see Barak-Erez (1995, pp. 351–352).

48 Ackerman (1991, pp. 266–277).

49 See e.g. Bechor (1996).

50 As Rubinstein (2000, p. 349) notes: 'Most of the media never even reported on the legislative process, and the television entirely ignored it. When the law passed the second and third readings, journalists reported it but some editors did not consider it newsworthy. Most of the media never told their readers that the Knesset had passed a law as revolutionary as Basic Law: Human Dignity and Liberty.' In the weeks following the passage of the laws, public law experts published several articles interpreting it. See 'The Quiet Constitutional Revolution', Claude Klein, *Maariv*, 27 March 1992 (in Hebrew); 'From Rhetoric Speech to the Language of Law', Baruch Beracha, *Haaretz*, 2 April 1992 (in Hebrew); 'A Big Constitution Arrives', Amnon Rubinstein, *Haaretz*, 3 April 1992 (in Hebrew). But these articles actually point to the lack of public and media awareness concerning the far-reaching implications of the Basic Laws.

51 Basic Law: Human Dignity and Liberty, the more important of the two, was ratified in the third reading in the Knesset on 17 March 1992. Fifty-four Knesset members participated in the vote – 32 voted for it, 21 against and 1 abstained.

revolution”.⁵² Rather than pointing to a historical moment, these data suggest that this was an entirely ordinary political moment. As Aharon Barak indicates, ‘the constitutional revolution took place quietly, almost clandestinely’.⁵³ The argument about the adoption of the constitution at a ‘banal’ moment was raised in the past, in the context of the debate on the normative justification of the constitutional revolution.⁵⁴ Insofar as this is true, however, it denies the relevance of Ackerman’s theory in the factual context as well. If the enactment of the Basic Laws was not the outcome of a broad wave of public support for them during a crisis of trust in the political system, the question arises anew: How did proponents of these laws manage to overcome the obstacles that had precluded their adoption for a generation?

3. Compromise

A major obstacle on the way to enacting a constitution at the time of Israel’s establishment was that various sectors of Israeli society disagreed about its contents. The Harari decision had sought to overcome this difficulty by splitting the constitutional endeavour into segments: if reaching consensus on a comprehensive document proves impossible, an attempt could be made to proceed step by step, each time anchoring partial agreements. Some legislators involved in the process of enacting the Basic Laws argue that their reliance on this method may be one of the explanations for the 1992 success. Instead of insisting on a complete Bill of Rights, they opted for gradual progress: to anchor at the first stage the rights they had reached agreement on and to defer the continuation of the process for a later stage.⁵⁵ Less problematic rights – such as human dignity, property rights, freedom of movement, freedom of occupation and liberty – were included in the Basic Laws. Rights that were more problematic and politically contested in the Israeli context – such as freedom of religion, freedom of expression and equality – were omitted or removed from the Basic Laws during the negotiation stages. In addition to agreement on the temporary omission of some of these rights, they also point to several other elements of compromise meant to placate the religious front, which had traditionally opposed the entrenchment of human rights in a Basic Law.⁵⁶

52 Gavison (1997, p. 96, note 177). Gavison refers to an interview conducted with Barak in the legal journal *Orech Din*, where Barak said: ‘In March 1992, two Basic Laws are enacted in absolute silence. March passes, April, May and nothing, nothing at all, and I read the two Basic Laws and I say to myself: this is our Constitution. And then, in a brief lecture I gave, I spoke of a constitutional revolution.’ Barak credits Claude Klein with copyright on the term ‘constitutional revolution’. See Barak (2004): “‘Copyright’ on the public use of the phrase “constitutional revolution” apparently belongs to Claude Klein who, in an article published in *Maariv* on 27 March 1992, noted that with the enactment of two Basic Laws on human rights, a “quiet constitutional revolution” had taken place.’

53 Barak (2000, pp. 401, 415–416).

54 See mainly Cheshin’s ruling in *United Mizrahi Bank*, *supra* n.29.

55 Karp (1993, p. 338). Rubinstein (2000, p. 340): ‘How did a basic law as important as Basic Law: Human Dignity and Liberty nevertheless come into being? How did the Knesset, at a unique hour of grace, enact these laws after all the previous attempts had shattered on the rocks of political and religious opposition? Note, first of all, that had the bill not been split into four separate motions, the fate of entrenched human rights in the Twelfth Knesset would have resembled that of similar ones in previous Knessets.’

56 See Rubinstein (2000, p. 346). Commenting on this issue, some authors have questioned the sincerity of the law’s proponents concerning their willingness to compromise. See, for instance, Karp (1993, p. 358): ‘The supporters of the law may have been in favor of it because they assumed that the omission of a section on equality would be filled in by the Court through interpretation or judicial creativity, which would rely on the system’s basic principles.’ Regardless of their degree of sincerity, members of the Israeli Supreme Court have clearly rendered the compromise meaningless. The Court adopted a strategy that enables it to read the missing rights into the language of the Basic Laws. See Sommer (1997). The channel chosen for including all these rights was ‘human dignity’, and the justification for this judicial expansion was the purposive interpretation formulated by Chief Justice Barak. See Barak (2005; 1993a). For a critical discussion of this method, see Kedar (2003) and Balmer (2006).

Yet this explanation, too, raises difficulties. Even if particularly problematic rights such as freedom of religion and equality were omitted from the Basic Law, the opponents' consent to the constitutional anchoring of the rights that *were* included in the Basic Laws is still not a simple matter: Why would religious Knesset Members waive their sweeping opposition to the enactment of a Bill of Rights? Some have ascribed their consent to the inclusion of another compromise element in the Basic Laws – the anchoring of the Jewish character of the State of Israel in its dual definition as Jewish and democratic.⁵⁷ But even if we were to agree that the anchoring of Israel's Jewish character played a role in tempering religious opposition, we are still left wondering why they agreed to the law. Did they not understand that empowering the Court would boomerang on their own interests, even after the removal of a number of problematic rights? Indeed, in *ex post facto* comments, some of the opponents gave a different explanation of what had happened. It is to this explanation that we now turn.

4. Deception

According to this thesis, the success of the 1992 initiative followed from error and deception. The laws' proponents exploited the ignorance of their opponents and presented to them a misleading picture, which led them to withdraw their objections.⁵⁸ For example, MK Uriel Lynn, Chairman of the Constitution, Law and Justice Committee, said, when submitting Basic Law: Human Dignity and Liberty to the plenum for the second reading: 'We are not shifting the weight to the Supreme Court. We are not adopting what was proposed in the Basic Law: Legislation or the Basic Law: Human Rights submitted in the past. No constitutional court is being established . . . with special power to repeal laws.'⁵⁹ MK Lynn then added:

'The power has not been shifted to the judiciary. The power remains in this house. And if, heaven forbid, experience with this law were to show that we have made a mistake and that the interpretation given to this law does not overlap the legislator's genuine intention, the Knesset can change the law . . . I oppose the establishment of a constitutional court because I think that here you give extraordinary power to a limited group of judges, whose interpretation will determine the deletion of laws in Israel.'⁶⁰

57 MK Yitzhak Levi's statements in a debate that preceded the first reading on a private bill submitted by Dan Meridor and Benny Begin seeking to add an entrenchment provision to Basic Law: Human Dignity and Freedom, lend support to this explanation. Levi explained that, despite his party's support for the original legislation in 1992, his faction would now oppose this new proposal because Barak had in the interim published a paper where, clarifying his interpretation of the phrase 'Jewish and democratic state', he had excluded from it any Jewish content that was not universal as well. See Knesset Protocols 2 August 1993, at 7179–7180.

58 See, for instance, the following statements: 'One day or, more precisely, one night, in perfectly ordinary circumstances, two laws were brought to the vote with less than half of the House members present . . . Nobody mentioned that this was a constituent assembly, nobody spoke about a revolution, and nobody said that a constitutional change was under way. They voted. After a few months, the people were told: a revolution had taken place. Nu, this was the first revolution that took place without the public knowing about it. Only after the fact was it informed of the revolution . . . those Knesset members who perhaps knew that this was a far reaching step, deliberately concealed the information from the rest . . . This is how you build a constitution? Why was it necessary to deceive the members of the Knesset?' (MK Michael Eitan, Knesset Protocols, 16 January 1995). 'In the previous Knesset, very very late at night, Basic Laws that should be passed in a plenum of 120 Knesset members – enacting a constitution is reason for celebration in a democracy – late at night, deliberately deceiving the religious and ultra-Orthodox public, whose consent they had required in the previous Knesset term' (MK Aryeh Deri, Knesset Protocols, 12 February 1996).

59 Knesset Protocols 3783 (1992)

60 *Ibid.*, at 3788.

The deception thesis, unlike the compromise thesis, challenges the actual validity of the new Basic Laws. The challenge to their validity does not follow from the immoral nature of the deception, but from its consequences: What could be the validity of a document that calls itself a constitution if it was adopted when many of its supporters did not understand that they were actually voting for a constitution? To the best of my knowledge, no precedent exists in any democratic country for a move in which the Court determines *ex post facto* that a constitution was adopted, when large numbers of its supporters did not understand that the matter at hand was a constitution.⁶¹

My concerns here are the various explanations for the success of the 1992 constitutional move rather than their normative implications. From this perspective, the deception thesis is marred by a certain weakness. Even if the legislation's proponents attempted to camouflage the real meaning of this move, how could the traditional opponents fail to see through the smokescreen? Supporters of the deception thesis claim that the average Israeli politician is far busier with survival than with parliamentary work requiring knowledge and understanding. And yet, the starting point of this discussion was that previous attempts to anchor a Bill of Rights in a Basic Law had failed precisely because the opponents understood this law's far-reaching implications. The notion that the Knesset of 1992 was so unsophisticated as to 'buy' what could not be sold to its predecessors seems hardly acceptable.

In the past, I offered a partial answer to this flaw in the argument: opponents to the anchoring of a Bill of Rights in the constitution were perhaps negligent but, had they been more thorough, they still would have had reasonable grounds for accepting the claims of the legislation's backers, at least regarding Basic Law: Human Dignity and Liberty.⁶² A view that has gained increasing currency in Israel over the years is that Basic Laws do not enjoy normative supremacy, except for their entrenched components.⁶³ Moreover, the concept of 'entrenchment' was understood literally, as a requirement of form (and perhaps also of procedure), as a condition for changing the law. Basic Law: Freedom of Occupation is entrenched. Basic Law: Human Dignity and Liberty is not entrenched. Therefore, according to the constitutional doctrine that prevailed when the Basic Laws were enacted, only Basic Law: Freedom of Occupation was supposed to enjoy constitutional status and enable judicial review of primary legislation.⁶⁴ As Judith Karp noted, 'Prima facie, Basic Law: Human Dignity and Liberty lacks any accepted and recognizable sign that might attest to the legislature's intention to turn it into it a meta-law enjoying preferential constitutional status, which enables it to determine the validity of laws that contravene it.'⁶⁵ Scholars who analyzed the Basic Laws soon after their adoption from a purely academic perspective determined that Basic Law: Human Dignity and Liberty does not enable judicial review.⁶⁶ Even Chief Justice Barak, who addressed the status of Basic Law:

61 See Landau (2000, p. 254): 'The constitution depicted by Chief Justice Barak is the only one in the world to have been created by a judicial proclamation.'

62 Sapir (1999, p. 657 note 134).

63 See, for instance, the comments of Justice Elon in SHJ 14/86, *Laor v. Councillor Review of Films and Plays*, P.D. 41(1), 421 (1987): 'Unquestionably . . . as a rule, the validity of Knesset legislation is not subject to judicial review, apart from exceptional cases in which secondary legislation contravenes the "entrenchment" of a Basic Law. In the latter case, the validity of the legislation is subject to judicial review, and should it be found that it contravenes the entrenchment in the law, the Court will declare that the legislation was enacted illegally.' For an analysis of this view, see Edelman (1994, pp. 13–25).

64 See Klein (1992, p. 125): 'For instance, if we were to adopt the view that has been accepted in Israel for many years, whereby non-entrenched Basic Laws enjoy no primacy whatsoever, the inevitable conclusion would be that any future legislation infringing a provision of Basic Law: Human Dignity and Liberty would supersede it.'

65 Karp (1993, p. 361).

66 Shprinzak and Diamond (1993 p. 20, note 1): 'Although the law . . . was adopted as a basic law, in contrast to the new Basic Law: Freedom of Occupation, it was not entrenched . . . Thus, although it is called a basic law, it does not include the element that grants this appellation practical meaning.'

Human Dignity and Liberty in his academic work, left the question unresolved.⁶⁷ Whoever is familiar with Justice Barak's use of his academic work as an auxiliary tool used to substantiate controversial judicial innovations he was planning to introduce in the future could easily have anticipated what was to come.⁶⁸ Yet Barak's need for this interim period on his way to substantiating the constitutional status of the Basic Law shows that the move he was leading was indeed problematic.

The end of the story is well known. The Court changed the doctrine. It first added the idea of essential entrenchment, which granted primacy to Basic Law: Human Dignity and Liberty, and then annulled the entrenchment requirement altogether as a condition for primacy and invested all Basic Laws with constitutional status.⁶⁹ The constitutional revolution, then, did not occur in 1992 with the enactment of the Basic Laws. According to the doctrine prevalent at the time of their enactment, only Basic Law: Freedom of Occupation, which entrenches one specific right, enjoyed constitutional status. Basic Law: Human Dignity and Liberty became a constitutional law only at a later stage, in the *United Mizrachi Bank* ruling, where the Court changed constitutional doctrine.⁷⁰ If the revolution did not occur with the enactment of the Basic Laws, explaining how their proponents prevailed over the traditional opposition is no longer necessary.

The deception claim is tempting, but not free of flaws. In an article he wrote several years after the enactment of Basic Law: Human Dignity and Liberty, the MK who proposed the law, Amnon Rubinstein, adamantly refuted not only the deception claim but also the claim of mistake. Rubinstein insisted that MKs were clearly aware of its constitutional status before they voted on Basic Law: Human Dignity and Liberty, and the move's success was not preceded by deception or mistake but by compromise.⁷¹ Although Rubinstein's statements contradict those of MK Lynn quoted above, some of the evidence he adduces to support his claim cannot be easily dismissed. For instance, Rubinstein quotes MK Yitzhak Levi, then the leader of the National Religious Party (NRP),⁷² who explained in a newspaper interview that he himself had proposed including the principles of the Declaration of Independence in the Basic Laws to block the possibility of the Court repealing the Law of Return. This quote gives the impression that the NRP leader was well aware of the law's potential.⁷³ Rubinstein argues that the claim of deception is also incompatible with the persistent struggle

67 See Barak (1992), where he expresses a hope that discussions on the constitutional status of Basic Law: Human Dignity and Liberty, which contains a non-entrenched limitation clause, will become redundant when this law too is entrenched; Barak (1993b, p. 167). Note that Barak's expansive interpretation was supported by other academic scholars. See, e.g., Kretzmer (1992, p. 246) and Barak-Erez (1995, pp. 334–335).

68 See Amit (1997, p. 118): 'The theoretical text enables the option of taking a stand vis-à-vis the judicial text directly, while taking a stand and outlining a policy that has not yet been discussed in court.' In his article, Amit describes additional methods through which Barak succeeds in endowing the positions he presents with canonical status, even when they represent innovations and deviations from previous positions. One method is the recourse to *obiter dictum*, which is later quoted as part of the ruling. Awareness of Barak's uses of this technique has spread even to the United States. See 'Enlightened Despot', Richard A. Posner, *The New Republic*, 23 April 2007.

69 Regarding Basic Law: The Knesset, see EA 92/03, *Shaul Mofaz v. Central Election Committee Chairman for the Sixteenth Knesset*, P.D. 57(3), 793 (2003). Regarding Basic Law: The Judiciary, see LCA 3007/02, *Yitzhak et al v. Mozes*, P.D. 56(6), 592 (2002); HCJ 2208/02, *Salama et al v. Minister of the Interior*, P.D. 56(5) 950 (2002); HCJ 212/03, *Herut National Movement v. Chairman of Central Elections Committee to Sixteenth Knesset*, P.D. 57(1), 750 (2003); HCJ 3511/02, *Amuta for Co-Existence in the Negev v. National Infrastructures Ministry et al*, P.D. 57(2), 102 (2005); Regarding Basic Law: The Government, see HCJ 1384/98, *Avni v. Prime Minister et al*, P.D. 52(2), 206 (1998). For a description and assessment, see Bendor (2003).

70 *United Mizrachi Bank*, *supra* note 29.

71 Rubinstein (2000, p. 350): 'The claim that the Knesset was not aware of the possibility that at stake is a meta-law that would enable judicial review is groundless.'

72 On the NRP and its attitude towards the state, see Liebman and Don-Yehiya (1984, ch. 7).

73 Rubinstein (2000, p. 341).

conducted by representatives of the religious parties over the contents of the rights to be included in the law and the wording of the section on the validity of laws. If Rubinstein is correct, not only was there no deception, but not even any mistake.

The mistake/deception claim in its strong version stumbles upon certain factual difficulties, but a somewhat toned down version of it might be more persuasive. To some extent, the weakness of the mistake claim follows from a reading of the 1992 events in the perspective of today's reality. We must beware of such anachronisms, however. Things that are now obvious to any law student, and even perhaps to the general public, were unknown in 1992. As Yoav Dotan notes, until 1992:

'Israeli case-law was dominated by the principle of parliamentary supremacy, and the course on constitutional law in law faculties was essentially a general introduction to the course on public law. A cursory examination of the most famous academic textbook on Israeli constitutional law—THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL by Prof. Amnon Rubinstein—in its 1980 third edition—will attest to it. Of the book's many chapters, only one addresses the Knesset's constituent standing, and this chapter too is largely a historical survey. Judicial review of the constitutionality of laws occupies only about five pages . . . The possibility that the courts would deviate from a narrow path . . . and would systematically review Knesset legislation—even when infringing entrenched sections of Basic Laws—is mentioned as a "speculation" that negates a dominant principle: the principle of parliamentary sovereignty.'⁷⁴

The current awareness in Israel of the possibility of judicial review stems from the Court's use of the powers it had granted itself and from the broad public response to it. Had MK Levi known then what he knows today, he would probably have resolutely opposed the enactment of the Basic Laws. In that sense, MK Levi's support for the Basic Law may be defined as a mistake.⁷⁵

The deception claim, too, can be formulated in a milder version. Prior to the enactment of the Basic Laws, constitutional experts held a significant advantage over their colleagues who were not versed in the law in general and in constitutional law in particular. Jurists such as MKs Rubinstein, Meridor and Lynn knew and understood far more than others who had no legal training, such as MKs Levi, Ravitz and Halpert, who represented religious parties. Under these circumstances, declarations such as those of MK Lynn, who served then as head of the Constitution, Justice and Law Committee and set the agenda for this legislation, could be accepted at face value and trickle down into the consciousness of the law's traditional opponents. Rubinstein suggests interpreting these statements as dealing with the question of whether to choose a constitutional court or the existing judiciary as agencies of judicial review.⁷⁶ Lynn too, when he realized several years after the adoption of the Basic Laws that his statements had provided a basis for the deception claim, was quick to refute it in the spirit of Rubinstein's explanation.⁷⁷ But this contrived account, which I consider entirely

74 Dotan (1997, pp. 166–167).

75 This is the only way of understanding statements by MK Levi, such as the following one, where he relates to the meaning of the limitation clause proposed in Basic Law: Freedom of Occupation: 'The question is how one understands this section. One interpretation could be that a law is a law, and this Basic Law is not meant to limit any other law . . . Another possibility is to say that . . . here we are qualifying other laws, and saying that we will examine the laws and, insofar as they contain elements that are not in the public interest, the Basic Law will prevail. . . . My understanding is that this Basic Law does not purport to cancel any other law' (Protocol of debate in Constitution, Law and Justice Committee on 5 February 1992, at 32). None of the members of the Committee bothered to relate to these comments.

76 Rubinstein (2000, p. 350 at note 7).

77 See Lynn (2000, p. 277): 'Not one single member of the Constitution Committee who participated in the deliberations was unaware that the two Basic Laws granted the judiciary the power of judicial review over any legislation that infringes basic rights under those laws, including ordinary Knesset legislation . . . The debate did not hinge on whether the court could invalidate an ordinary law, but on whether to grant the power of judicial review only to the Supreme Court or to the judiciary as a whole. The decision was in favor

unacceptable,⁷⁸ seems even less plausible when considering that Lynn made these statements in 1992. Sophisticated constitutional discourse in Israel was just beginning then, and the question of whether to adopt a centralized or decentralized mechanism of judicial review had yet to be discussed in earnest. To assume that listeners were relating literally to Lynn's comments appears far more plausible. The milder version of the deception claim may find further support in jurists' statements after the enactment of the Basic Laws. In the *United Mizrahi Bank* landmark ruling, issued long after Chief Justice Barak and others had begun enlisting support for the constitutional revolution notion, Justice Cheshin forcefully stated that the Basic Laws lacked constitutional validity.⁷⁹ Similar views were also conveyed by the former Deputy Chief Justice of the Supreme Court, Menachem Elon,⁸⁰ by the former Chief Justice Moshe Landau⁸¹ and by Ruth Gavison.⁸² Even then Chief Justice Barak conceded that 'until the *United Mizrahi Bank* ruling it was possible to claim . . . that the Basic Laws on human rights did not trigger any constitutional revolution, neither in the parameters of existing law nor in the parameters of the desirable law'.⁸³ There are no grounds for assuming that religious MKs were aware of these jurists' positions prior to the enactment of the Basic Laws. Yet the continued adherence of these legal experts to the view that this was not a constitutional revolution lends support to the claim that, in the deliberations that preceded the enactment of Basic Laws, MKs could certainly have construed them as not empowering the Court to repeal primary legislation. This interpretation of the Basic Laws appears even more plausible given their proponents' ambiguous statements.

The milder version of the deception thesis can also rely on the pattern that characterized the reception of the Basic Laws in the Knesset itself, in the media and in the public at large. Rubinstein and Lynn assert that all the members of the Constitution, Law and Justice Committee clearly understood the far-reaching implications of the new Basic Laws. But they, too, would probably find it hard to explain the indifference that these two laws encountered in the Knesset plenum and in the media. Whatever our view on the functioning of the Knesset, it makes no sense that so few MKs

of the entire judiciary. The legislature's intention was to create protected basic rights. The limitation clause that enumerates the conditions for assessing the validity of an ordinary law would be legally meaningless without the power of judicial review.' In an article that Lynn published soon after the enactment of the Basic Laws he makes no reference to the deception claim, apparently because it had not yet been made. See Lynn (1993).

78 This conclusion is warranted by the context. Lynn first voiced his position, as quoted in the body of the text, in the deliberations of the Constitution Committee, in response to the proposal of MK Ravitz to include an explicit provision in the Basic Law stating it would not affect arrangements bearing on marriage and divorce, and on the Sabbath and festivals. Lynn replied that this motion was negotiable but 'it must be remembered that the big difference between this Basic Law and the other laws you have considered is the establishment of the Supreme Court as a Constitutional Court. In those bills, the Supreme Court was given power to repeal laws. Here we are not dealing with this subject, here we are not giving this power to the Supreme Court' (Protocols of deliberations in the Constitution, Law and Justice Committee, 9 March 1992, at 34). Through these comments Lynn is obviously attempting to appease Ravitz, and to explain why legislation dealing with the Sabbath and with personal status, whether extant or future, could not be harmed by the Court. If all that Lynn is saying is that that the Supreme Court would not be vested with exclusive authority, his comments would not have answered Ravitz's concerns.

79 See the opinion of Justice Cheshin in *United Mizrahi Bank*, *supra* n.29.

80 Elon's comments here are somewhat laconic, but they can be understood in this manner. See Elon (1996, p. 256): 'In my view, there are no grounds and no basis for the assumption that the Basic Laws have taken from the legislature in our parliamentary regime its status as the one at the head of the pyramid including the three branches: legislative, executive, and judiciary. It still preserves its status.'

81 Landau (1996a; 1996b).

82 Gavison (1997).

83 Barak (1992, p. 14).

participated in such a momentous vote.⁸⁴ Whatever our view on the Israeli media, it makes no sense that it would pass up a scoop as significant as a constitutional revolution. Even were we to accept Rubinstein's and Lynn's claim that neither of them deliberately deceived Knesset members, the data on vote participation and the silence of the media at least lend credence to the claim that neither of them made a special effort to explain the historic significance of the occasion to MKs and to the public at large. They certainly substantiate MK Shevah Weiss's definition of the move as 'a semi-clandestine, semi-legitimate smuggling of a constitution into the agenda of the State of Israel',⁸⁵ or the explanation of Claude Klein, who ascribes the success of the initiative to a 'sophisticated exploitation of the "end of season" atmosphere that prevailed in the final days of the Knesset term'.⁸⁶

The deception/mistake thesis must be tempered not only because the conduct of the religious MKs is incompatible with the extreme version, but also because of the need to consider an additional factor whose influence on the constitutional revolution I have so far mentioned only incidentally. I am referring to the Court. In an academic article, Barak claims that 'the revolutionary body that made the revolution was the Knesset itself. The revolution was made according to the rules and laws that set the rules of the revolution. This was a constitutional "constitutional revolution"'.⁸⁷ Even according to Barak, however, the Knesset undertaking was a necessary but not sufficient condition for the revolution to occur: 'the constitutional revolution became possible in 1992 by dint of the cooperation between the constituent and judicial branches. Neither one of them could have made this revolution on its own. Only by joining forces did the Knesset and the Court lead to the constitutional revolution'.⁸⁸ For our purposes, even if the fact that Rubinstein, Lynn and their colleagues did not bother to explain the full revolutionary potential of their initiative contributed to its success, they could not have reached their goal without the close cooperation of the Court. Given their professional and personal familiarity with its members, the law's proponents may have anticipated the judges' cooperation. But even they do not seem to have imagined how close this cooperation would be. Did they ever imagine that the rights they had been forced to waive would find their way into the Basic Laws through rulings of the High Court of Justice? Did they ever imagine that the enactment of the two Basic Laws would bring the Court to proclaim an upgrading of all the old Basic Laws? In short, did they ever imagine that the Court would make use of the new Basic Laws in ways that would make any further legislative activity superfluous? Presumably, the answer to these questions is negative.⁸⁹ Hence, even if the law's proponents had engaged in proper disclosure, they would only have been able to reveal a trace of what today is known to all.

5. A joint project of the old elites

We have focused thus far on the question of how the supporters of a Bill of Rights anchored in the constitution prevailed over the traditional opposition of the religious bloc. This formulation of the

84 The best proof of the link between the awareness of MKs concerning the importance of the Basic Laws and the rate of their participation in voting is the high rate of participation in later votes dealing with their amendment.

85 Knesset Protocols 124 (1992) 2596.

86 Barak (2004, p. 19).

87 Barak (1997).

88 Barak (1992, p. 19).

89 See statements of MK Haim Ramon, in a Knesset debate on 3 March 1998: 'I wish to remind the Members of the Knesset how at the end of the Twelfth Knesset's term we enacted the Basic Laws. I was then chairman of the Labor faction... even MK Amnon Rubinstein, and certainly not I, did not imagine it would be interpreted in the way the Court interpreted it... I call this constitutional revolution an incidental constitutional revolution, because the legislature did not intend it' (Knesset Protocols, 5799 [1998]).

question in these terms, however, is incorrect. Opposition to a constitution in Israel's early years was not exclusively confined to the religious, and included also the ruling party, Mapai, as noted.⁹⁰ In a parliamentary democracy, the coalition parties control the legislature. Enacting a constitution curtails the legislature's power, and the ruling parties therefore have a clear interest in not adopting a constitution. Yet this reluctance is not limited to the coalition parties and extends to the legislature as a whole. Jon Elster, who studied the processes of constitution adoption in different countries, pointed out that several types of interest may be at play in them, and one of them is the 'institutional interest'. One institution whose interest may come to play a role in the process is the legislature. The legislature has a vested interest against an entrenched bill of rights, which severely curtails its powers. As a means of neutralizing problematic interests, Elster proposes that the constitution be adopted by an ad hoc body, to be dispersed upon completion of its task. Such a body, by definition, would be free of institutional and other problematic interests.⁹¹

Elster's thesis provides a possible explanation for the failure to adopt a constitution upon the establishment of the State of Israel. The Declaration of Independence, as noted, had promised the enactment of a constitution, and had actually prescribed a procedure for its enactment. Elections would be held for the Constituent Assembly; the Assembly would then enact a constitution and, having discharged its one and only duty, would disperse; elections to the legislature would then be conducted on the basis of the arrangement established by the constitution. This scenario is consistent with Elster's proposal that the constitution should be adopted by a body established uniquely and specifically for that purpose, after which it should dissolve. Reality, however, was different. The Provisional Council of State voluntarily dispersed and transferred its powers to the Constituent Assembly. The Constituent Assembly thereby summarily became a legislature as well.⁹² According to Elster's thesis, at that moment the Constituent Assembly also became a party with an embedded structural interest against the adoption of a constitution. This factor may provide an additional and cumulative explanation for the failure of the First Knesset, as well as of subsequent ones, to enact a constitution.

Assuming that the institutional interest has not disappeared and that the division along coalition–opposition lines has not changed, the 1992 success required overcoming not only elements opposed to the project in principle but also the ingrained interests of the coalition forces and, to a certain extent, even of the Knesset as a whole, against the anchoring of a Bill of Rights in the constitution. What changed then?

The triumph over the coalition parties' built-in opposition to a constitution that would curtail their powers may be explained as a result of the change in the balance of powers in Israel from the end of the 1970s. Until then, the Israeli political system had enjoyed stability. The identity of the ruling party was known in advance and even its partners in the government coalition were more or less fixed. Since the 1977 elections to the ninth Knesset, however, the political system has been volatile. The government keeps changing hands, and no party reaching power can be sure it will be there for long.⁹³ A ruling party firmly established in power will not support the weakening of the

90 See above, footnotes 24–27 and text in between.

91 See Elster (1995, p. 395): 'To reduce the scope for institutional interest, constitutions ought to be written by especially convened assemblies and not by bodies that also serve as ordinary legislatures.'

92 See Gavison (1997, p. 75).

93 From the late 1970s, the hegemony of the Labor party that had ruled until then in the *Yishuv* and in the State began to show cracks. The 1977 elections, when the Labor party first lost its majority, marks a clear transition to the post-hegemonic era, which is characterized by the split of political power between various parties, none of which enjoyed hegemonic status. For a description of the collapse of the Labor movement's hegemony, see Mautner (2003).

parliament it controls. By contrast, a ruling party with a high probability of becoming an opposition party has no particular interest in resisting the adoption of a constitution.⁹⁴

The instability of Israeli governments largely neutralized the interests of the coalition parties against a constitution. But what of the legislature's institutional interest against a constitution that would curtail its power? This interest is not dependent on the stability of the division of powers between coalition and opposition and is common to all political parties, whatever their status. This is where the fourth explanation enters the picture. According to this explanation, the Knesset's institutional interest did not disappear, but specific circumstances which I discuss immediately below led a considerable number of MKs to act against their own institutional interest and strengthen the power of the Court.

In the past few decades, Israel's political system has been characterized not only by fluctuations in the identity of the ruling parties, but also by the erosion of the 'centre' and the growing strength of elements that had once been located at the periphery. This trend is evident in the weakening of the veteran parties and in the growth and build-up of sectorial parties.⁹⁵ The hegemony of the secular-Jewish-veteran centre, comprising moderates of the left and right, is in jeopardy. Members of this group fear the prospect of a dramatic change in the character of the country, which will occur as elements whose value systems differ from those of the secular centre take control of the political power centres. With emerging concern about an 'alien' takeover of the legislature, a conflict arises between the legislators' institutional interest and their sectorial value-based interest. If the Knesset is no longer firmly controlled by supporters of the old values, legislators wishing to ensure the continued dominance of these values must look elsewhere for protection, even at the cost of harming the interest of the Knesset to which they belong.

In Israel, such protection may be found in the Supreme Court. The mechanism for selecting judges in Israel is unique, in that it grants incumbent Supreme Court judges unparalleled power to select those who join their ranks.⁹⁶ The composition of the Supreme Court traditionally reflected the values of the old elite. For as long as the mechanism for selecting judges remains unchanged, this elite is assured of the continued hegemony of its values. From the perspective of the elite's representatives in the legislature who fear a 'hostile takeover', bolstering the Court's power and entrusting it with the authority to review the legislature's decisions has a compelling logic, even if it means harming their own institutional interest.⁹⁷

This explanation of the constitutional revolution in Israel was presented, inter alia, by Ran Hirschl, as part of a general theory aiming to explain the logic behind self-weakening acts in various

94 An interesting parallel for a politician's strategic move at a time he fears losing power is the conduct of François Mitterrand. Alec Stone notes that, in 1986, confronting growing signs of the Socialists' expected failure in the coming elections, Mitterrand prepared himself to be in the opposition by appointing his Minister of Justice as President of the Supreme Constitutional Court. See Stone Sweet (2000, p. 86).

95 Such as Shas (representing traditional Mizrahi Jews), Israel be-Aliyah and Israel Beitenu (representing immigrants from the Former Soviet Union), and various parties that represent the Arab minority.

96 See, e.g., Edelman (1994, p. 34): 'By established practice, appointments to the Supreme Court require an affirmative vote of all three justices on the panel.' Moshe Ben-Zeev, who served as Attorney General between 1963 and 1968 wrote: 'No appointment to judicial office is possible, and certainly not to the Supreme Court, if all three Supreme Court judges in the Committee are against it. I had hoped that this was the unwritten practice but, if this is not the case, my view is it [the practice] should be anchored in law' ('Politics in the Appointment of Judges', Moshe Ben-Zeev, *Orekh Din*, 27 May 1981, p. 13; in Hebrew). For additional sources see Heller (1999, pp. 61–65). Over the last few years, this practice has begun to evoke resistance and Supreme Court judges have increasingly been confronting ministers of justice unwilling to accept it.

97 For a similar argument see Mautner (2003), who argues that the loss of autonomy and the incipient struggle over the character of the State of Israel evoked anxiety among the old elites, leading them to increasing recourse to the Supreme Court and to non-critical acquiescence to the changes in Supreme Court rulings during the 1980s.

parliaments, a move that *prima facie* defies logic.⁹⁸ This explanation, as noted, is persuasive in the Israeli context because of Israel's unique and exceptional system of judicial appointments. The attempt to turn this local explanation into a general theory explaining parallel processes in other countries is less successful, partly because it ignores the mechanisms of judicial selection common in most countries. Usually, these mechanisms grant influence, if not control, to the political system over the judicial product. When the political system controls the selection mechanism, transferring authority to the Court serves the threatened elites only for a brief period and may prove extremely dangerous in the long run.⁹⁹

6. The correct explanation?

This article has presented four possible explanations for the surprising adoption of Basic Laws bearing on human rights in March 1992. Each of these explanations has strengths and weaknesses. The historical moment argument is borne out by the reality that prevailed in Israel prior to the adoption of the Basic Laws and by the public, extra-parliamentary pressure for the enactment of a constitution that crystallized at the time. Yet this explanation is incompatible with the indifference, and this is an understatement, which accompanied the adoption of the Basic Laws in the Knesset and in the public at large. The compromise argument is consistent with the wording of the Basic Laws and with the evidence of negotiations and compromises in the legislative process. Yet questions remain regarding the unexpected toning down of the resistance to these laws among their opponents, though some of them denied *ex post facto* that this was the case. The deception/mistake argument explains better than the compromise argument the surprising agreement of the traditional opponents and the total silence surrounding the adoption of the Basic Laws. Further support for this argument comes from the comments of the laws' proponents and interpreters prior to and immediately after their enactment. This argument, however, is strongly denied by the laws' proponents and is also in some tension with statements by an MK representing a religious party, Yitzhak Levi. The argument of a joint move by the old elites explains the disappearance of the coalition interests and of the legislature as a whole against the transfer of authority to the Court, but does not pretend to explain the success in overriding the contrary religious interest.

Which of these explanations is 'correct'? Although fifteen years have since elapsed, the available evidence does not allow for a conclusive answer to this question. Even if I were equipped to offer a definite opinion, I am not sure that one correct answer could be isolated, and the claim that all four elements contributed to the success of the legislation is compelling. The crisis of public faith in the political system generated public pressure on the Knesset, leading legislators themselves to appreciate the need for change. The tactics of splitting the Bill of Rights into separate components, and the willingness to negotiate, tempered the stance of its traditional opponents. The deliberate ambiguity and the ambivalent statements of the Basic Laws' proponents was aided by the vagueness of constitutional doctrines, and by the lack of awareness concerning constitutional matters then prevalent in the public in general and among MKs in particular. All of these factors blurred the revolutionary potential of the Basic Laws and lulled their opponents. Finally, the fears of the old elites for their hegemony, and the volatility that characterized the government from the end of the

98 See, e.g., Hirschl (2000a, p. 87): 'The 1992 constitutional entrenchment of rights and the establishment of judicial review in Israel were initiated and supported by politicians representing Israel's secular bourgeoisie, whose political hegemony in the majoritarian policymaking arena had become increasingly threatened'. See also Hirschl (2000b; 2000c; 2004a, pp. 21–24, 50–74; 2004b, pp. 1833–1847).

99 See Hilbink (2006, p. 17). Tushnet (2006, p. 764): '[T]he best the displaced coalition's leaders can hope for is that their partisans in the courts will be able to delay and smooth out the transition between one constitutional order and the next.'

1970s, neutralized the legislature's institutional interest and the interest of those holding the reins of power against the transfer of the power focus to the Court. They also strengthened the sense of urgency among the laws' proponents. All these elements came together and led to the legislation of the Basic Laws. And yet, all of these could not have turned the Basic Laws into what they are today – a fully fledged, constitutional Bill of Rights. To complete this task, a dominant and determined Court¹⁰⁰ paired off with a weak and hesitant legislature. This tale, however, will be told elsewhere.

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100 For a description of the Supreme Court's approach over the last few years, see Dotan (2002), describing the Israeli Supreme Court during the nineties as 'hyperactivist'. For a presentation of Aharon Barak's judicial world view, which has dominated the Israeli Supreme Court in recent decades, see Barak (2006; 1989). For various critiques of this approach, see Bork (2003, pp. 111–134); Posner, *supra* note 68: 'What Barak created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive Supreme Court justices. He puts Marshall, who did less with more, in the shade'; Sentelle (1990); Feldman (1990); Giora and Page (2005).

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