

Entrenching the Status-Quo:

Religion and State in Israel's Constitutional Proposals

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Introduction

Israel is among the few countries in the world that decided, at time of independence, to refrain from drafting a formal constitution. Instead, Israel's founding fathers preferred to enact its constitution gradually, through a series of Basic Laws which would be adopted over the years.² There are various explanations for this decision.³ One of the central explanations links the avoidance of writing a constitution to the deep disagreement in Israeli society between secular and religious perspectives of the Jewish state.⁴ Sixty years later, the conflict over the appropriate relationship between Jewish religious law – the Halacha – and state institutions and regulations, is still considered one of the major obstacles to the adoption of a written constitution in Israel.

In recent years, the debate over Israel's constitution has returned to the public agenda. Since 2003, the Knesset Constitution, Law and Justice Committee has been working intensively on a proposal for a formal constitution, as numerous think-tanks, advocacy groups and organizations have produced constitutional drafts, covenants and future vision documents aiming at contributing their standpoint to the public deliberation over the emerging constitution. In 2007, former Israeli Prime Minister Ehud Olmert announced his intention to promote the enactment of a formal constitution by the end of Israel's sixtieth year.⁵

The prospect of writing a new constitution was viewed by many secular Israelis as an opportunity for reforming the inegalitarian religious regulations that have evolved – partly

formally partly informally – since the beginning of the state. However, a close reading of the proposed constitutional drafts that are currently on the table – written by parliamentary as well as extra-parliamentary bodies – reveals that the contemporary constitutional debate is not likely to yield a “constitutional moment” of revolutionary transformation. Rather, the attempts to base the new constitution on compromise solutions to controversial issues in the religious-secular debate seem to be leading to the entrenchment of the existing religious arrangements, known as “the status quo.”

This article aims at analyzing the proposed constitutional solutions for the most disputed issues in the religious-secular conflict.⁶ It will focus on the three complete constitutional drafts that were published in Israel between 2005-2006. Various other covenants and vision statements have been published in recent years by political activists and intellectual groups aiming at influencing the public debate over the constitution⁷. However, only three comprehensive constitutional drafts were presented in this period. The *Israel Democracy Institute's Proposal for a Constitution by Consensus* (hereafter IDI proposal), published in 2005, was drafted by a group of twelve intellectuals headed by former Supreme Court President Meir Shamgar. Its declared goal was to draft a consensual constitution based on the existing Basic Laws and governmental practices in Israel.⁸ The *Constitution of the State of Israel Proposed by the Institute of Zionist Strategies* (here after IZS proposal), published in 2006, associated with Israeli right political wing, was written as a “counter proposal” for constitutional submissions of IDI and Arab NGOs to the Knesset constitutional deliberations.⁹ Lastly, the *Constitution by Broad Consent Report* was submitted to the Knesset by its Constitution, Law and Justice Committee in February 2006 (hereafter: Constitution Committee Report). The latter differs from the first two proposals in that it does not provide with a coherent constitutional draft but rather summarizes the Committee's

debates and represents the conflicting suggestions of its members. It was left for the Knesset to transform this multi-versioned document into a comprehensive coherent constitution.¹⁰

The three draft constitutional documents all make an attempt to address religious-secular controversies driving the debate over an Israeli constitution. Taken together, the drafts give insight into the likely constitutional provisions regarding the relationship between religion and state, should a constitution be adopted in the foreseeable future. The three drafts also address the institutional balance of power between the legislature and the judiciary. These provisions as well will be analyzed in this study, as, in the Israeli context, where the locus of power resides to decide issues of religion and state is likely to determine how those issues will be resolved.

This article will seek to show how the three constitutional proposals not only refrained from reforming the existing religious arrangements in the three most disputed religious-secular controversies in Israel – namely in the issues of personal law, observance of Sabbath, and the question of conversion or “who is a Jew?” In addition, it will demonstrate how, all three proposals limit potential future reforms of the religious status quo by the Supreme Court, which is perceived as representing a liberal-secular worldview. While the proposed constitutions vest the Court with the authority to overrule Knesset legislation if it conflicts with basic human rights, this authority is substantially limited in all three constitutional drafts through various constitutional tools – such as override directives, the principle of non-justiciability, or reservation of all existing laws. These constitutional apparatuses all are geared to maintaining parliamentary supremacy in regulating controversial issues of religion-state relations.

The debate over the future of the constitutional arrangements in the religious sphere is a conflict not only between two opposing views of the appropriate relationship between religion and state institutions, but also involves a clash between fundamentally different views of the role

of constitutions and constitutional law under conditions of deep societal disagreement. Advocates of Israel's secularization wished to take advantage of the writing of a new constitution to bring about a fundamental reform of the inegalitarian religious arrangements in Israel. This expectation rests on a liberal understanding of the role of constitutions as vehicles for the introduction of principles of constitutionalism, i.e., restricting governmental powers and protecting human rights.¹¹ According to this perspective, a constitution that allows the infringement of basic individual rights (such as by permitting the application of discriminatory personal law) is seriously flawed. However, the three draft constitutions analyzed in this article represent a different understanding of the role of constitutions. For the authors of these drafts, constitutions are not only instruments for establishing the structure of government and regulating the balance of power; they represent the identity of "the people" and its particular history, values and traditions. In this light, the new Israeli constitution is supposed to serve as the basic charter of the state's identity, and therefore must rest on a broad consensus that reflects the common vision and shared basic norms of society as a whole. As this article will show, at present the broad consensus of Israeli society seems to prefer the preservation of the religious status quo.

Before getting into the detailed analysis of the contemporary constitutional proposals, let me introduce a brief background on the evolvement of religious status-quo in Israel and the role the Court had taken in it.

The Religious Status Quo

In the absence of a written constitution, the relationship between religious and secular camps in Israel has been governed by a political compromise known as "the religious status quo." The origin of the "status quo" arrangements is commonly attributed to a letter, dated June 1947,

which was sent by David Ben-Gurion and other leaders of the Jewish Agency, the pre-state Israeli government, to the non-Zionist Orthodox “Agudat Israel” group. The letter was intended to gain the religious leaders’ support in the Zionist cause, by reassuring them that the emerging state would not threaten the values and way of life of religious Jews.¹² The letter, phrased in a very broad manner, included guarantees in four main areas: Saturday would be a day of rest, governmental institutions would serve Kosher food, Orthodox courts would have jurisdiction in issues of personal law (particularly matters of marriage and divorce), and religious educational institutions would have autonomy.¹³

The term “status quo” was first introduced in the government coalition agreements of 1950 and since then has been included in most coalition agreements of Israeli governments. As a manifestation of the delicate balance between religious and secular demands, the “status quo” represented Israeli consociationalism in the religious sphere.¹⁴ Nevertheless, the term "status quo" has never been clearly and formally defined by the Israeli government, and its content has become the subject of intense secular-religious debate. During the formative years of the state, the “status quo” arrangements were crystallized, partly by formal regulations and partly by informal customs and practices.

With independence, Israel’s Provisional Council decided to incorporate the legal framework which existed under Ottoman rule and then under British Mandate. In practice, this decision implied the preservation of all authorities of the religious institutions in areas of religious status.¹⁵ In addition, various aspects of the “status quo” were formally regulated by law. For example, Sabbath as the day of rest,¹⁶ Kosher dietary observance in military facilities.¹⁷ restrictions on the production of pork,¹⁸ exclusive Orthodox jurisdiction over marriage and divorce of Jews,¹⁹ an independent Orthodox educational system,²⁰ among others.²¹

Although the “status quo” was recognized as a political principle for accommodating religious-secular divide, it was never anchored as a legal imperative by Court rulings. To the contrary, over the years, the Israeli Court has attempted to alter the “status quo” arrangements in its rulings, as some of the arrangements conflicted with basic human rights stated in Israel’s Declaration of Independence or in Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. For example, a 1994 Court ruling which allowed the importation of non-Kosher meat,²² or a 1989 and 1994 Supreme Court decisions against municipal refusal to appoint women or non-Orthodox Jews to their local religious councils.²³

The Supreme Court’s activist role in the religious-secular conflict grew in tandem with the weakening of the consociational arrangements in Israeli religious sphere in the past thirty years. With the growing liberalization and Westernization of secular Israeli society, the religious and secular communities have become progressively more strident in their opposing positions, and thus less willing to accept the accommodational arrangements between the two sectors.²⁴ In addition, the ideological division inflicted upon the relationship between the legislature and judiciary.

Following the Likud victory over the Labor party in 1977, the Israeli political system was transformed from a dominant-party system to one of two similarly sized, competing blocs. Under the new political conditions, the religious parties enjoyed the balance of power, largely determining the formation of coalitional governments in Israel.²⁵ In face of the growing parliamentary powers of the religious camp, the liberal-secular population found support in the increasingly more activist Supreme Court.²⁶ Many considered the Court as the central arena for the promotion of the liberal-secular Jewish agenda.²⁷

The growing overlap between the religious-secular divide and the institutional tension between the Supreme Court and the Knesset became even more apparent after the legislation of two Basic Laws on human rights in 1992. Although the Basic Laws did not explicitly grant the Court the power of judicial review, Chief Justice Barak celebrated the new legislation as a “constitutional revolution”, arguing that:

The Supreme Court in Israel perceives the entrenched Basic Laws as constitutionally supreme – enacted by a constituent authority... There is no doubt any more that the Israeli courts are authorized to overrule any statute which infringes upon an entrenched Basic Law²⁸.

In 1995, this doctrine was affirmed by a Supreme Court ruling in the case of *Ha'mizrachi Bank v. Migdal*. Since then, the Supreme Court has used its power of judicial review on the legislature in only a few marginal.²⁹ Nevertheless, this ostensible constitutional revolution had a paralyzing effect on the process of constitution-making in Israel. The fear of future activist interpretation by the Supreme Court prevented any further legislation of Basic Laws. In particular, the opposition of religious parties was staunch and unanimous. In the words of Knesset member David Tal, a representative of the religious *Shas* party:

Even if the Ten Commandments would be proposed as Basic Laws we will oppose the legislation... because if I accept the Ten Commandments as Basic Laws... the Supreme Court may interpret them and overturn them.³⁰

Thus, although since 1992, the Knesset discussed over twenty-five bills for new Basic Laws, it did not succeed in passing a single one.³¹

The growing conflict between the legislature and the judiciary, as well as the impasse in the enactment of additional Basic Laws on human rights were among the main reasons for the growing public and political support for a formal constitution that would determine the balance

of power between the branches of government and would protect basic human rights. This support has led to the initiation of the most concerted attempt, since the beginning of the state, to draft a constitution for the State of Israel. Intensive deliberations over Israel's future constitution have been taking place in various think-thanks and advocacy groups, as well as, since 2003, in the Knesset Constitution, Law and Justice Committee. The three most comprehensive constitutional documents produced so far by these various initiatives are analyzed in the following sections.

The Proposals

Aiming at crafting a constitutional document on the basis of wide societal consensus, the three constitutional proposals written by the Knesset Constitution, Law and Justice Committee (2006), the Israel Democracy Institute (2005) and the Institution for Zionist Strategy (2006) all concur in their embracing of Israel's dual character as a "Jewish" and "democratic" state.³² All constitutional proposals recognize the Jewish character of the state of Israel and endorse various traditional Jewish symbols such as the Star of David on the flag, the seven-branched menorah as state emblem and the Hatikva as the national anthem.³³ They all agree that Israel should use the Jewish calendar,³⁴ and incorporate a "right of return" to Israel for Jews, specifying special citizenship procedures for Jews.³⁵

The "democratic" nature of the state is manifested in all constitutional proposals by the institutions and procedures of representative democracy, as well as by detailed lists of basic human rights protected by the constitution, including for example the freedom of religion, freedom of conscience, human dignity, freedom of expression and of association, freedom of assembly and demonstration, freedom of movement, right to property and to privacy, and so on.

One may argue that the inclusion of a detailed list of basic human rights in the constitution is enough to advance a liberal approach to religion-state relations, since it enables the Court to strike down Knesset legislation that contradicts the constitutional rights. However, the proposed constitutional drafts did not adopt this minimalist approach of writing a “thin” liberal constitution. Instead, the various proposals explicitly address some of the most intensely disputed issues in the religious-secular conflict in order to limit the Court’s power on these issues. The next sections will focus on three of them: the regulation of marriage and divorce, Sabbath observance and the definition of “who is a Jew?” The main difference between the three proposals lies not on the substantive but on the procedural level, that is, the extent to which they entrench the existing religious arrangements – whether in the constitution itself, in ordinary legislation or only informally. The differences between the degrees of entrenchment determine, first, the degree of flexibility, or rigidity, of possible future alterations of the existing institutions and regulations. And second, they determine whether the legislature or the judiciary would hold the supreme power for amending these arrangements in the future.

Personal Law

The issue of personal law – particularly the regulation of marriage and divorce – is considered among the most divisive issues in the religious-secular schism. The Orthodox monopoly on personal law – one of the cornerstones of the religious status quo – is based on the Provisional Council’s decision, four days after the establishment of the state, to preserve all authorities of the religious institutions in the area of personal law as they existed prior to the foundation of the state.³⁶ In 1953, this reality was reinforced by the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law which provides that “matters of marriage and divorce of Jews in Israel, being

nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical courts” and that “marriage and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.” Consequently, the institution of civil marriage does not exist in Israel. Anyone who wishes to marry or divorce must do so in a religious ceremony, even if they are atheists.³⁷ Women in particular are discriminated against by the patriarchal religious legal system, since Jewish law enables men the power to deny their wives a divorce.³⁸ Israel’s Women Equal Rights Law (1951) explicitly specifies that the law is not valid with regard to matters of marriage and divorce. Israel even included two reservations when signing the UN Convention on the Elimination of All Forms of Discrimination against Women in 1991.³⁹

In addition, the status quo regarding personal law does not allow formal state recognition in the marriage of non-Orthodox religious Jews (such as Reform and Conservative Jews), of inter-faith couples, and of people who are defined by the rabbinical authorities as “barred from marriage” (*psuley chitun*) for various of reasons.⁴⁰ Amongst those that cannot marry in Israel are around three hundred thousand immigrants from the former Soviet Union, who are not considered Jews by the Halacha yet are not associated with any other religion.⁴¹

Over the years, the Israeli legal system developed several legal alternatives to circumvent limitations set by formal religious marriage, such as the institution of ‘common-law relationships’ (*yeduim betzibur*). Additionally, many Israelis travel abroad to get married in civil ceremony. Nevertheless, while mitigating some of the effects of basic rights violations caused by religious law, these alternative arrangements have not resolved all difficulties resulted from Orthodox monopoly over formal marriage in Israel.⁴² Moreover, the separation between a religious and a secular court entails an inherent clash of authorities within the judicial system, when the Rabbinical Court refuses to accept the authoritative ruling of the Supreme Court.⁴³

Despite personal law being one of the most vehemently disputed issues in the religious-secular conflict, none of the constitutional drafts proposed a genuine reform of personal law regulations in Israel. Rather, aiming at achieving consensus that would allow the enactment of a new constitution, the main variation between the three proposals concerns their degree of entrenchment of the existing status quo arrangements in the constitution.

The IZS proposal presents the most conservative approach, and the only one that suggests elevating the reservation of Women's Equal Rights Law in personal law issues to a constitutional level, thus entrenching women's discrimination by the religious patriarchal court system in the constitution. Its proposed Article 68 states:

Religious courts are authorized to adjudicate matters of marriage and divorce of those who married in accordance with the prescriptions of the court's religion; this authority is exclusive regarding the validity of the marriage and divorce.

In addition, the proposal confirms the superiority of this Article 68 over the principle of equality before the law, declaring that the latter "does not apply to matters adjudicated before religious courts."⁴⁴

The IDI proposal, by contrast, suggested that matters of marriage and divorce will be regulated by the legislature on the level of ordinary legislation. In addition to the draft constitution, IDI published a detailed proposal for a Spousal Registry Law, as a supplemental regulation to the formal constitution. According to the proposed Bill, marriage and divorce in Israel will continue to be performed exclusively under religious law. Simultaneously, the draft Bill introduced an alternative route for institutionalizing relationships between couples who are either not interested in marrying, or cannot marry, according to religious law, through a special procedure of marriage registration, which will allow these couples all rights and obligations enjoyed by married couples. In other words, the Spousal Registry Law proposes the legalization

and formalization of family life without considering the couple “married.” Thus, the proposed institution of Spousal Registry does not violate the existing regulation concerning religious marriage and divorce, but merely adds a parallel non-religious route for establishing families in Israel, legally and formally recognized by the state.

The Knesset Constitution Committee Report included three alternative proposals for resolving the dispute on the question of personal law, reflecting the intense debates around this topic during the committee sessions. The Constitution, Law and Justice Committee thus left the Knesset the task of deciding between these competing alternatives.

Despite a wide agreement among Committee members that the existing marriage and divorce laws in Israel must be changed,⁴⁵ none of the proposed alternatives included in the Report represents a genuine liberal reform that prevents infringement of basic human rights in the area of personal law. The three alternative suggestions presented in the Constitution Committee Report include: first, avoidance of any explicit reference to personal law in the constitution;⁴⁶ second, state recognition that it should “respect the family lives of its residents” while legislating marriage and divorce matters by ordinary Knesset procedures;⁴⁷ and third, entrenching the status quo by allowing religious authorities to determine who can be married in Israel.⁴⁸

The first two alternatives could, in theory, allow the Court to overrule Knesset legislation that conflicts with basic rights found in the Basic Human Rights chapter of the constitutional draft, such as the principle of equality before the law, freedom of consciousness or freedom of religion. However, such judicial interpretation would be restricted by another part of the constitutional draft – by a “reservation of laws” provision unlimited by time, which preserves the existing legislation even if it contradicts constitutional principles.⁴⁹ Thus in practice, all

alternative versions presented by the Knesset Constitution Committee Report limit the possibility of liberal judicial intervention in personal law arrangements. They leave the decision regarding the reform of existing marriage and divorce arrangements – whether by constitutional amendment or by ordinary legislation – in the hands of the legislators.

In sum, the three proposed constitutional formulations regarding personal law, all of which refrain from suggesting a comprehensive reform of the area of personal law in Israel, reflect the conservative approach of their drafters – both within and outside of the legislature. All three proposals put forward compromise solutions that sustain most of the existing inegalitarian arrangements. In addition, all proposals limit the Court's power to decide in controversial issues that touch upon the fundamental values and basic norms underpinning the state.

A similar approach was also apparent in the proposals regarding the nature of Sabbath.

Sabbath

When Israel was founded, Saturday and Jewish holidays were declared as the official days of rest.⁵⁰ However, what would be the character of the Sabbath in the public sphere was among the most heated issues in the religious-secular conflict. The Orthodox demanded the closing down of all workday activity, including public transportation and places of public entertainment such as movie theatres and restaurants. The secular population found Halachic prohibition and rites related to Sabbath as intrusive and anachronistic.⁵¹

The accommodational status quo concerning Sabbath observance has evolved and altered over the years. In 1951, the Knesset passed the Working Hours and Rest Law, prohibiting employment on Sabbath.⁵² However this legislation includes permission (section 12) for employment on Sabbath in cases of vital services to the public or when the security or economy

of the state would be endangered.⁵³ Conflict continued over the interpretation of the law, particularly with regard to recreational facilities. In 1991, the Knesset transferred the decision from the national to the local level and to auxiliary municipal regulation. Each municipality was authorized to regulate the functioning of recreational facilities on Sabbath in accordance with the character of its local population.⁵⁴

During the 1990s, a new status quo has emerged regarding commercial activity on Sabbath in malls and shopping centers located outside of municipal territory or within the territory of Kibutzim, enabling Saturday commerce at these locales.⁵⁵ So far, legislative attempts on the part of orthodox parties to change this reality have all been rejected by majority members of the Knesset.⁵⁶

The constitutional debates over Sabbath observance did not only involve cultural considerations but also touched upon the social issues such as workers right for a weekly day of rest. A strong argument was made for the preservation of employment restrictions on the Sabbath based not on religious reasons but on the wish to create a common Israeli life style that distinguishes between everyday work and a restful pause in the weekend. This view was expressed by the Supreme Court in the case of *Design 22* (2004), where the court upheld the legality of the law and declared that it fulfills two worthy causes – social and religious-national.⁵⁷

Nevertheless, many view the existing practices that constitute the status quo on Saturday as “religious coercion” – particularly the prohibition on public transportation and the fines imposed on businesses that are open on Saturday.⁵⁸

The character of Sabbath in Israel is another area – like that of personal law – in which the proposed constitutional drafts refrain from presenting a practical reform of the existing status quo. Once again, what difference exists between the proposals concerns the level of

entrenchment of the existing arrangements. In addition, all proposed that the authority to alter these arrangements be limited to the legislature rather than held by the judiciary.

The Knesset Constitution Committee proposed including a restriction on employment on days of rest in the constitution. According to the Knesset proposal, supported by all Committee members, "On days of rest no one shall be employed, and there shall be no commerce or production, except under conditions to be specified by law" (Article 8b). A similar provision was included in the IZS proposal (article 24). Both proposed provisions elevate employment restrictions to a constitutional level thus making them less open for future alteration.

By contrast, the IDI draft suggests that details regarding the character of Sabbath as a day of rest will be regulated by ordinary legislation. IDI constitutional draft included a proposal for an accompanying Sabbath (and Jewish Holidays) Law, suggesting to restrict commercial, industrial and governmental activity, while allowing cultural and entertainment activities within limits of noise and distance from objecting neighborhoods. IDI proposal does not differ from the other two constitutional proposals in the substance of Sabbath observance rules. Similar to the other proposals, it maintains political, rather than judicial, control over any future alteration of the existing arrangements. Although IDI's proposal specified employment restrictions be legislated in ordinary legislation rather than in constitutional provisions, it defined the issue of Sabbath observance as non-justiciable, that is, exempted from judicial review.⁵⁹ Thus, any future reform of the status quo arrangements regarding Sabbath must be achieved in the political rather than the judicial arena.

Conversion and Definition of "Who is a Jew?"

When the Law of Return was enacted in 1950, it did not clearly define who is considered as Jewish and hence entitled to automatic citizenship upon arrival to Israel. Nevertheless, soon the question of “who is a Jew?” – whether Judaism should be defined in national-cultural or religious-Orthodox terms – became a matter of public debate in Israeli society, and continues to storm the political and judicial systems until today. For the sake of population registry, the Israeli government adopted a religious-Orthodox definition of Jewishness. In 1970, following two decades of intense debate, the Knesset amended the Law of Return, formally defining a Jew as “one who was born to a Jewish mother or was converted and is not a member of another religion.”⁶⁰ Nevertheless, this definition left much ambiguity concerning what would be count as a proper conversion.

The controversy over conversion touches upon the conflict between Orthodox and non-Orthodox Jewish movements – the Conservative and Reform movements – both of whom were excluded from the consociational arrangements that regulated religion-state relationship during the first decades of the state.⁶¹ While there is no law granting Orthodox exclusiveness in conversion (as opposed to matters of marriage and divorce), the status quo has become that the state would recognize any type of conversion made abroad – even Reform and Conservative – while conversion in Israel would be recognized only if it were Orthodox. Since the 1990s, the Reform and Conservative movements have turned to the courts, demanding recognition for their conversions. In a series of rulings, the Supreme Court deviated from the status quo, determining that for the purpose of population registration, the state should recognize a non-Orthodox conversion whether it was undergone in Israel or abroad.⁶²

The issue of conversion is particularly acute with regard to estimated three hundred thousand immigrants from former Soviet Union who are not recognized as Jews by the rabbinical

establishment and hence have been deprived of various basic rights. For example, they cannot marry or divorce in Israel. The controversy over the proper conversion is far from being resolved, as is evident by a recent crisis regarding a Great Rabbinical Court decision to invalidate retroactively conversions made by a National Zionist Rabbi in the past fifteen years.⁶³

The various constitutional proposals present a cautious attempt not to break away entirely from the existing, albeit ambiguous, status quo. They refrain from entrenching the existing Orthodox definition of a Jew and avoid any clear criterion for conversion, thus leaving these issues to further political deliberation. However, some of the proposals did suggest minor deviations from the status quo regarding the definition of “who is a Jew?”

The Knesset Constitutional Committee Report proposed two versions for the provision regarding the right of return:

Article 5: Return

(A) The State of Israel will encourage the ingathering of the exiles, and the settlement of Jews in the Land. [**Version B:** “Jewish settlement in the Land.”]

(B) Every Jew [**Version B:** “Every member of the Jewish nation”] has the right to immigrate to Israel, unless there is a high probability that such an individual will endanger the public peace, health or safety, or will work to undermine the State or the Jewish nation.

[**Version B:** For this matter the definition of “a member of the Jewish nation” is:

- (1) The child of a person considered to be a Jew
- (2) One who joined the Jewish nation -
 - (a) by conversion recognized by Jewish communities;
 - (b) by other means recognized in the law or according to it; and maintains a

Jewish lifestyle;

(3) One who was persecuted for being considered a Jew.]

(C) One who makes “Aliyah” (immigrates to Israel under this section) has the right to bring his spouse and minor children.

Version A in this proposal does not specify any definition for a Jew. While it does not reform the existing status quo it also does not constitutionally entrench the existing definition under to Law of Return. Version B, by contrast, proposes the definition of “a member of the Jewish nation,” which deviates from the strict Orthodox criteria. This version aims at providing a criteria for entitlement for immigration to Israel on the basis of membership in the Jewish nation without offering an unequivocal resolution to the question “who is a Jew?” According to this proposal, entitlement for immigration to Israel – and automatic citizenship – will be given not on religious basis alone but also on the basis of some link to the Jewish nation. The nature of this link will be defined by ordinary law.

IZS and IDI proposals closely resemble each other. Both specify criteria for entitlement to immigration to Israel as a person who is either (1) a child of a person (mother or father) who is Jewish according to Jewish Law, or (2) has a demonstrable link to the Jewish people (IZS addition: “and its heritage”) as determined by statute.⁶⁴ IDI added a third vague criterion: “a person who converted.” The IDI proposal also goes further than the other two drafts to ensure that the decision will be made in the political, rather than the judicial arena, by suggesting including the issue of conversion in the non-justiciable section of the constitution, thus exempting it from judicial review by the Supreme Court.⁶⁵

Both these proposals deviate from the status quo in several ways. First, unlike the rule of Halacha, they consider as Jewish not only children of a Jewish *mother*. Second, the proposed provision allows for a national-cultural definition of membership in the Jewish people, rather

than merely an Orthodox religious criterion. Nevertheless, the provision does not specify what “a demonstrable link to the Jewish people” means.

In sum, all proposals attempt to open the door for a future reform of the status quo regarding definition of “who is a Jew?” and the rules of conversion by refraining from entrenching the existing Orthodox criteria in the constitution. At the same time, they fail to entrench a clear deviation from the Orthodox criteria, leaving it to future political decision.

Who Interprets the Constitution?

So far, the comparison between the proposed constitutional formulations reveals that none of them introduces a revolutionary transformation of the religious status quo. None of the proposed constitutions advance a major reform towards a greater separation between religion and state. With the exception of IZS proposal on the issue of personal law, the suggested provisions concerning controversial issues of religion-state relations are ambiguous and vague in their nature, and leave much room for future definitions and decision-making. This is the case, for example, regarding the question what would count as a valid conversion or what type of work is permitted on Sabbath.

This ambiguity raises the issue of future alteration of the status quo. In light of the increasing overlap between the religious-secular dispute and the legislature-judiciary tension characterizing Israeli politics, the balance of power between the Knesset and the Supreme Court becomes of central importance. The main question is thus who is recognized by the various proposed constitutions as holding the supreme authority to interpret the constitution.

The three proposed constitutions – whether written by Knesset members or drafted by extra-parliamentary organizations – accord the power to review Knesset legislation and to strike

down laws that contradict constitutional principles to the Supreme Court.⁶⁶ In that sense, the proposed constitutions recognize the “constitutional revolution” initiated by the Supreme Court in 1995. However, all proposed constitutions deploy various devices to curb judicial activism in general and in issues related to religion-state relations in particular. Thus, in fact, the contemporary constitutional drafts seem to propose a counter-revolution that shifts the balance of power back to the hands of the political system.

To begin with, all proposals include a version of the “restriction of laws provision” stating that

It is forbidden to violate the rights stated in this section except in a law which befits the values of the State of Israel [Version B: as a Jewish and democratic state], which is intended for a fitting purpose and to no greater an extent than is required, or in accordance with a law as aforesaid by virtue of explicit empowerment therein.⁶⁷

Furthermore, all constitutional proposals include a “reservation of laws” clause, that preserves the validity of all laws existing prior to the enactment of the constitution, unless otherwise is stated in the constitution.⁶⁸

In addition, the three constitutional proposals include supplementary constitutional tools to restrict the scope of judicial intervention in disputed issues.

IDI proposed to limit judicial review by listing particular issues as non-justiciable - that is, constitutional principles which conflict with legislation in these issues cannot be enforced by the court. These issues include: (1) conversion to or from any religion; (2) the authorities of religious courts to marry and divorce, as they exist on the day the constitution was enacted; (3) the Jewish character of Shabbat and Jewish holidays in the public sphere; (4) preservation of Kashrut in state institutions; (5) providing citizenship to family members of whoever is entitled to immigrate to Israel.⁶⁹

This provision is meant to allow for a national compromise that will enable the passing of the constitution. It assumes that controversial questions listed in the provision will be determined by the political system and will be reviewed from time to time. The drafters of the IDI proposal expressed their belief that the unique nature of these issues required that any decision be made by the legislature alone. Thus, they proposed to eliminate the possibility of court overruling legislation in these issues. “The representative body – the Knesset – should have the final say in these issues,” they asserted.⁷⁰

The Knesset Constitutional Committee proposed a different tool: the override directive, which allows the Knesset to override Supreme Court’s rulings on constitutional issues.⁷¹ This proposal is based on the override directive included in the Basic Law: Freedom of Occupation (section 8), and is influenced by the Canadian “Notwithstanding Clause.”⁷² According to the Constitution Committee proposal, the override directive is valid with regard to all basic human rights. However, the exact scope of this tool is yet to be crystallized. Some Committee members suggested that it should be valid to only part of the human rights listed in the constitution.⁷³ It is also still under debate whether the override should be limited by time, whether it should be renewable, and what should be the exact procedure of Knesset decision.⁷⁴

IZS proposal is the most detailed in its restriction of the court system. It includes various provisions intended to “define the appropriate boundaries for judicial action” and to confine the court to its “traditional role of adjudicator of real controversies between real parties in strict accordance with law.”⁷⁵ The proposal’s restriction of the scope of the principle of equality was mentioned above (Article 15). It also specified limitations on court jurisdiction to cases “brought by a person with a direct nexus to the grievance of the petition” (Article 70); restricts it from

directing Israel's foreign policy, policies of security or fundamentals of the budget (Article 71); and delineates principles of interpretation for the court (Article 73).

In addition to the above restrictions on judicial powers, two of the proposals (IZS and one of the alternatives in the Knesset report) suggested altering the method of appointing Supreme Court justices as a further means of ensuring Knesset supremacy over the Court. Intending to provide for a system of choosing judges who will be "more representative of the citizenry rather than the current system of ideological self replication,"⁷⁶ IZS proposed that Supreme Court justices be nominated by a special panel of experts appointed by the Knesset and that nominees to the Court be confirmed by the Knesset plenary (Article 76).⁷⁷ The Knesset Constitution Committee also proposed to add one member of Knesset to the committee, thus equalizing the number of professional members (Justices and lawyers) and political members (Knesset Members and Ministers) of the Justices Appointment Committee.⁷⁸

Conclusion

The constitutional debate in Israel reflects the overlap between the religious-secular divide in Israeli society and the institutional tension between the legislature and the judiciary. The religious parties play a prominent role in the Knesset, and the Supreme Court is identified with the secular-liberal camp. The drafters of the current constitutional proposals avoided proposing changes to the status quo, and used various constitutional provisions to prevent any institution but the Knesset from regulating contentious religious issues. Each of the three drafts thus presents a possible compromise between the religious and the secular camps. Each of them also proposes a delicate balance of power between the legislature and the judiciary: the draft

constitutions institutionalize judicial review, but carve out controversial religious issues that are to be decided not by the courts but by parliament.

From the perspective of liberal constitutionalists, the political compromise embodied in the three proposals misses the opportunity to create a “constitutional moment,” as all three drafts avoid attempting to bring about revolutionary change in Israeli society. Proponents of a secular vision of the State of Israel, who advocated the introduction of liberal constitutional principles (including the supremacy of the judiciary in religious issues) viewed the drafting of a new constitution in revolutionary terms. This is in line with the Western imagination of constitution-making. Since the eighteenth century, the writing of new constitutions has been linked to revolutions: constitutions either formally incorporated the substantive achievements of successful revolutions or else they provided opportunities for radical change and clean breaks with the past.⁷⁹ Seen from this perspective, preserving the religious status quo in a constitutional proposal represents an act of consensus-building rather than a constitutional moment of revolutionary transformation. Furthermore, the constitution that emerges from the three drafts does not advance the protection of individual rights, one of the main principles of liberal constitutionalism. By preserving the status quo, particularly in the area of personal law, all three proposals conserve the regulatory and institutional framework that infringes the basic rights of women and other minority groups in Israel.⁸⁰

However, if the constitutional debate in Israel is viewed not from a strictly liberal constitutionalist point of view but rather from a consensual constitutional perspective, in which constitutions are expected to reflect the identity of “the people,” then the refraining from a radical transformation of the status quo is understandable. According to Bruce Ackerman, a revolutionary constitutional moment is a moment in history in which “a mobilized majority of

the citizenry give their considered support to the principles that one or another revolutionary movement would pronounce in the people's name."⁸¹ As recent polls have shown, Israeli Jewish society is deeply divided along religious-secular lines. In 2004, only 44 percent of Israeli Jews defined themselves as "secular," compared to 8 percent who defined themselves as "Orthodox," 9 percent as "religious," 12 percent as "religious-traditional" and 27 percent as "traditional."⁸² In a 2007 poll, 59% of the Jewish respondents agreed that the "Israeli government should make sure that life be managed according to Jewish religious tradition."⁸³ At the same time, 54% agreed that couples should "marry any way they like."⁸⁴ Finally, in 2008, 61% of respondents claimed that relations between religious and non-religious are "not good" or "not good at all,"⁸⁵ compared to the 80% who held this view in 2000.⁸⁶ These numbers illustrate that there is no clear support of a "majority of the citizenry" for a secular revolutionary movement in Israel. Under current conditions, therefore, it would be misleading to expect that a liberal-secular constitution could represent the common vision and ultimate values of the people of Israel.

In short, the three constitutional drafts, each in its own way, adopts an evolutionary, rather than a revolutionary, approach to constitution-writing. All three leave most arrangements concerning the institutional status of religion to the realm of Israel's material constitution, rather than entrenching them formally as constitutional principles.⁸⁷

Whether this constitutional approach will facilitate or impede the future liberalization and secularization of religion-state relations in Israel is difficult to foresee. On the one hand, it could be argued that leaving these issues to be determined by ordinary legislation allows for greater flexibility than would be possible if there were entrenched constitutional principles, and it perhaps increases the chances of reform down the road. Amending ordinary legislation requires a simple majority vote in the Knesset, whereas the draft constitutions would require special

majorities to amend constitutional provisions.⁸⁸ Therefore, a sufficiently ambiguous constitution may allow for liberal modifications of the religious arrangements in the future even if it avoids explicit reform of the status quo today. On the other hand, granting the Knesset sole authority to determine the religious character of the state could be viewed as preserving the political domination of the religious sector over the definition of religion-state relations in Israel. Indeed, curbing the extent of the judiciary's intervention in religion-state issues was an explicit goal of the religious parties.⁸⁹

To conclude, given the deep disagreements that characterize Israeli society, it is doubtful whether any formal constitution could be passed by majority vote in the Knesset. Liberal and feminist activists and organizations have criticized harshly the compromise approach that is represented by the constitutional drafts and which maintains most aspects of the religious status quo. Many in the liberal-secular camp believe that it is better to remain without a written constitution than to adopt a "bad" constitution.⁹⁰ Similarly, many in the religious camp are unsure of the advisability of making clear-cut decisions, and they too prefer to maintain the existing constitutional ambiguity.⁹¹ Thus, in the absence of a societal consensus regarding the most fundamental elements of the state's identity, it is far from clear whether a new constitution – even one that seeks to maintain the existing arrangements – is likely to be adopted in Israel any time soon.

Notes

¹ The author would like to thank Aliza Belman Inbal, Faina Milman-Sivan, Gila Stopler and the anonymous reviewer for their helpful comments, and to Adi Shoham and Keren Cohen for their research assistance.

² This decision, known as the "Harari Resolution" (after its initiator) was adopted by the first Knesset, which originally was elected to function as a constituent assembly. *Knesset Records* 5 (2 May 1950), 1743.

³ For example, the wish to limit the civic rights of the Palestinian minority in Israel, the waiting for the ingathering of Israel's future citizenry from Jewish Diaspora, or Ben-Gurion's preference of the British parliamentary model. Y. Shapira, *Politicians as a Hegemonic Class: the Case of Israel* (Tel Aviv: Sifriat Poalim, 1996), 33; S. Aaronson, "Constitution for Israel: The British Model of David Ben-Gurion," *Politica: An Israeli Journal for Political Science and International Relations* 2 (1998) (both in Hebrew).

⁴ Z. Vahrhaftig, *A Constitution for Israel: Religion and State* (Jerusalem: Mesilot 1988) (in Hebrew); P. Strum, "The Road Not Taken: Constitutional Non-Decision Making in 1948-1950 and Its Impact on Civil Liberties in the Israeli Political Culture," in S. Troen and N. Lucas, eds., *Israel: The First Decade of Independence* (Albany, N.Y.: State University of New York Press, 1995).

⁵ S. Ilan, "Olmert: Constitution Draft to the Knesset," *Haaretz* (8 October 2007).

⁶ This article focuses on the religious-secular divide in the Israeli Jewish society and thus will not address other constitutional controversies, such as regarding the rights of the non-Jewish minority in Israel and the debate over constitutional social rights. These issues deserve a separate discussion.

⁷ For the Jewish covenants focusing on the religious-secular divide see: T. Ilan and B. Kahana-Dror, *Covenants in Israel* (Jerusalem: Moetzet Yahad, 2004) (in Hebrew). On the Palestinian future vision documents see: A. Jamal, "Future Visions and Current Dilemmas: On the Political Ethos of Palestinian Citizens in Israel," *Israel Studies Forum* 23, no. 2 (2008).

⁸ The work on the proposal started in 2000 with a vast campaign and a series of Public Council meetings initiated by IDI. The drafters of the IDI proposal included: IDI President Professor Arik Karmon, Constitution by Consensus CEO Amir Abramovitz, IDI chief editor Uri Dromi; two lawyers: former Minister of Justice Adv. Dan Meridor Adv. Shlomo Goverman; as well as several academics: professors Yaron Ezrachi, Asher Arian, Avi Ben-Basat, Baruch Nevo, Mordechai Kremnitzer, Aviezer Rvitzky, and Yedidiah Stern. The complete proposal, in Hebrew, could be found on-line at: <http://www.idi.org.il/PublicationsCatalog/Pages/Const/index.htm>. The fact that no women and no Arabs were amongst the drafters of this constitutional proposal was criticized by many. For example, see: F. Radai, "No Women, No Arabs," *Haaretz* (12 February 2006).

⁹ It was written by a groups of mostly right-wing intellectuals, including: Prof. Avraham Diskin, Prof. Moshe Koppel, Prof. Berachyahu Lifshitz, Judge (Ret.) Uri Shtruzman, Rabbi Dan Beeri, Dr. Yitzhak Klein, directors of IZS Att. Joel Golovensky and Israel Harel. For Hebrew and English version see: www.izs.org.il/page.

¹⁰ This report summarized over two years of intensive discussions in the Committee, headed by Michael Eitan. Instead of presenting a coherent constitutional draft, the report contains several versions and alternative suggestions for further deliberation and decision by the Knesset. In addition to the seventeen Committee members, representing ten political parties, hundreds of experts and political activists participated in the over 80 Committee sessions, held between 2003-2006. English translation of the constitutional proposal can be found at: www.cfisrael.org.

¹¹ C. J. Friedrich, *Constitutional Government and Democracy; Theory and Practice in Europe and America* (Boston.; Little, Brown and company, 1941), 5-36.

¹² M. Friedman, "These are the Chronicles of the Status-Quo: Religion and State in Israel," in *Brethren Dwelling Together. Orthodoxy and Non-Orthodoxy in Israel: Positions, Propositions and Accords*, ed. U. Dromi (Jerusalem: Israel Democracy Institute, 2005), 57-89 (in Hebrew).

¹³ The full version of the letter (in Hebrew) can be found in *Ibid*, p. 82-83. Some aspects of the "status quo" are not included in the letter, for example the exemption of Orthodox students and religious women from military service.

¹⁴ E. Don-Yehiya, *Religion and Political Accommodation in Israel* (Jerusalem: Floersheimer Institute for Policy Studies, 1999), 44-45.

¹⁵ These authorities were based on the Ottoman *Millet* system, which recognized the legal autonomy of all religious traditions in the area of personal law.

¹⁶ P'kudat Sidrei Ha'shilton ve'hamishpat (Law and Administration Ordinance) (1948) and Working Hours and Rest Law (1951).

¹⁷ Kosher Food for Soldiers Ordinance (1948).

¹⁸ Pig Raising Prohibition (1962).

¹⁹ Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (1953).

²⁰ Compulsory Education Law (1949) and National Education Law (1953).

²¹ For a comprehensive overview of religious legislation see: A. Rubinstein and B. Medina, *The State of Israel's Constitutional Law*, vol. 1 (Jerusalem: Shocken, 2005), chapter 6 (in Hebrew).

²² HJC 4676/94 Mitrael v. Israeli Knesset PD 50(5). For the political controversy over this decision see: H. Lerner, "Democracy, Constitutionalism, and Identity: The Anomaly of the Israeli Case," *Constellations* 11, no. 2, (2004): 237-257.

²³ HJC 699/89 Anat Hofman v. Jerusalem City Council 48(1); HJC 4733/94 Yehudit Naot v. Haifa City Council 59(5). For more on the developments in the "status quo" arrangements in both court rulings and legislation

see: M. Corinaldi, "Freedom of Religion in Israel: What Changed in the 'Status Quo'?" *Sha'arey Mishpat* 3, no. 2 (2003) (in Hebrew).

²⁴ A. Cohen and B. Susser, *Israel and the Politics of Jewish Identity: The Secular-religious Impasse* (Baltimore and London: The Johns Hopkins University Press, 2000), 48-57.

²⁵ *Ibid.*, p. 39-48.

²⁶ Whether Israeli Supreme Court is truly "activist" is a question intensely debated by legal academics. For prominent scholars writing on this issue see: M. Mautner, "The Decline of Formalism and the Rise of Values in Israeli Law", *Iyunei Mishpat* 13, no. 3 (1993); G. Barzilai, "Judicial Hegemony, Party Polarization and Social Change", *Politica*, 2 (1998): p. 31-51; R. Gavison, M. Kremnitzer and Y. Dotan: *Judicial Activism: For and Against, The Role of the High Court of Justice in Israeli Society* (Jerusalem: Magnes, 2000) (in Hebrew); A. Barak, *The Judge in a Democracy*, (Princeton: Princeton University Press, 2006); Y. Zamir, "Judicial Activism: a Decision to Decide", *Iyunei Mishpat* 17, no. 3 (1993): p. 647-658 (in Hebrew).

²⁷ G. Barzilai, E. Yuchtman-Yaar and Z. Segal, *The Israeli Supreme Court and the Israeli Public* (Tel Aviv: Papyrus, Tel Aviv University Press, 1994); M. Mautner, "The 1980s: The Years of Anxiety", *Iyunei Mishpat* 26, no. 2 (2002).

²⁸ A. Barak, "The Constitutional Revolution: Protected Human Rights," *Mishpat Umimshal: Law and Government in Israel* 1, no. 1 (1992): 16-17. See also A. Barak, "The Role of the Supreme Court in Democratic Society", *Tel-Aviv University Law Review* 21, no. 1 (1997): 13-19 (in Hebrew). The literature on the constitutional revolution in Israel is immense. For discussion of its political implications see: H. Lerner, "Democracy, Constitutionalism, and Identity: The Anomaly of the Israeli Case," *Constellations* 11, no. 2, (2004): 237-257.

²⁹ Since 1992, the Supreme Court overruled Knesset legislation in only five cases: HCJ 1715/97 Bureau of Investment Managers in Israel v. Minister of Finance; HJC 6055/95 Tzemach v. Minister of Defense; HJC 1030/99 Oron v. Chairman of the Knesset; HJC 8276/05 Adalah v. Defense Minister; HJC 1661/05 The Gaza Coast Regional Council v. The Knesset.

³⁰ *Knesset Records* 184 (14 July 1999), 537

³¹ Y. Segev, "Why Israel does not have and will not have (at least in the close future) a Constitution? On the Advantages of "the Decision not to Decide," *Moznei Mishpat* 5 (2006): 174-5 (in Hebrew).

³² Compare between Articles 1 in Constitution Committee proposal's chapter 2: Basic Principles; Article 29 in IZS proposal, and Articles 1 in IDI proposal. The variations between the different constitutional proposals – emphasizing either "the equality of all citizens" or the importance of "the Jewish heritage" – mostly reflect differing viewpoints on the relationship between the Jewish majority and the non-Jewish minority among Israel's citizenry. Hence, their analysis lies beyond the scope of this article, which focuses on the Jewish internal religious-secular dispute.

³³ Article 3 in IDI proposal, Article 26 in IZS proposal, Article 6 in Constitution Committee Report. The Knesset proposal includes two additional versions: the first stating that "The State may adopt [additional] common civil symbols", and the second proposes to omit any reference to state symbols from the constitutional document.

³⁴ Article 7 in IDI proposal, Article 23 in IZS proposal, Article 9 in Constitution Committee Report (which includes a version proposing not to include this section in the constitution).

³⁵ Constitution Committee Report, chapter 1: Basic Principles, Article 5; IDI proposal, Article 8; IZS proposal Article 28.

³⁶ Based on the Palestine Order in Council 1922, Paragraph 83 in: Drayton, *Laws of Palestine*, vol. III, p. 2587.

³⁷ The state does recognize civil marriage outside of Israel. HJC 143/62 Schlezinger v. Minister of Internal Affairs.

³⁸ According to recent estimates, around 100,000 women in Israel have been either denied a divorce or have had to comply with conditions set by the husband in order to get a divorce. See: O. Lotan, '*Mesoravot Get*' (denied of divorce) in Israel (Report Presented to the Knesset Committee on the Status of Women, 29 November 2005), www.knesset.gov.il/MMM/data/docs/m01242.doc (last accessed 13 May 2009). See also M. Korinaldi, *Personal, Family and Inheritance Law - between Religion and State: New Trends* (Jerusalem: Nevo, 2004) p.173-209 (in Hebrew). F. Raday, C. Shalev and M. Liban-Kooby, eds., *Women's Status in Israeli Society and Law* (Jerusalem: Shoken, 1995) (in Hebrew); B. Swirski and M. P. Safir, *Calling the Equality Bluff: Woman in Israel* (New-York: Pergamon Press, 1991).

³⁹ See: <http://www2.ohchr.org/english/bodies/ratification/8.htm>

⁴⁰ For example, the Rabbinical court does not recognize marriage of children who were born to unmarried women, or a marriage between a Cohen and a divorced women.

⁴¹ According to 2008 report of the Israeli Central Bureau of Statistics, 319,000 people in Israel (4.3% of the population) are defined as “others”. The definition includes “immigrants who are not registered as Jews by the Ministry of Internal Affairs (non-Arab Christians and residents whose religion is not defined).”

⁴² For a comprehensive discussion of the various alternative solutions see: S. Lifschitz, “Spousal Registration – Preliminary Design,” in A. Barak and D. Friedman, eds., *Book In Memory of Prof. Shava* (Tel Aviv: Ramot-Tel Aviv University Press, 2006).

⁴³ A. Scolnicov, “Religious Law, Religious Courts and Human Rights within Israeli Constitutional Structure”, *International Journal of Constitutional Law* 4, no.4 (2006).

⁴⁴ According to IZS proposal, the principle of equality before the law is restricted also for security reasons. See: Articles 15 and 16 in proposed constitution.

⁴⁵ The report stated that “it is inconceivable that people who cannot marry by religious law cannot marry in Israel at all” Constitutional Report, 16.

⁴⁶ Constitution Committee Report, Chapter 1: Basic Principles, Article 12: Family Law, alternative A.

⁴⁷ Article 12: Family Life, state: “(A) The State shall respect the family lives of its residents. (B) Details regarding family arrangements shall be specified by law.”

⁴⁸ Version B for Article 12 includes a proposed section (C): “No one shall be married in Israel, unless he is single, according to both civil law and his religious law.”

⁴⁹ The proposed “Reservation of Laws” states: “Nothing in the Constitution shall impinge on the validity of a law that was in existence immediately before its passing, unless otherwise stated therein, [Version B: however the interpretation of a law as aforesaid shall be done in the spirit of the provisions of the Constitution.]” The Sixteenth Knesset Constitution, Law, and Justice Committee Sitting as The Committee for the Preparation of a Constitution by Broad Consensus, *Proposals for a Constitution*, 73. see: <http://experts.cfisrael.org:81/~admin/proposals.pdf>.

⁵⁰ P’kudat Sidrei Ha’shilton ve’hamispat (1948).

⁵¹ A. Cohen and B. Susser, *Israel and the Politics of Jewish Identity: The Secular-religious Impasse*, 27-30. for the evolvement of the status quo regarding Sabbath see: M. Corinaldi, “Freedom of Religion in Israel: What Changed in the ‘Status Quo’?”

⁵² Non-Jews are allowed to rest either on their holidays or during the Jewish holidays.

⁵³ According to the Working Hours and Rest Law (1951), Section 12, the Minister of Labor is authorized to permit employment on Sabbath if “ceasing work...is liable to inflict major damage on the economy, on an ongoing work project or on the provision of vital services to the public or to a part of it.”

⁵⁴ Pekudat Ha’Iriot (amendment), (1990).

⁵⁵ In 1998 the opening of stores in these areas was approved by the Jerusalem Regional Labor Court in the case of State of Israel v. Kibbutz Tsoraa, aguda shitufit (cooperative society).

⁵⁶ M. Corinaldi, “Freedom of Religion in Israel,” 314.

⁵⁷ The court ruled that the prohibition against work on the Sabbath according to the Working Hours and Rest Law does not conflict with Basic Law: Freedom of Occupation (due to its restriction provision). HJC 5026/04 Design 22 v. Rozentzvaig Zvi (was not publicized).

⁵⁸ H. Cohen, “Religious Coercion in Israel,” in *Bernson Book*, Vol. 2 (Jerusalem: Keter, 2000), 315 – 317 (in Hebrew).

⁵⁹ Article 164 in IDI’s Proposal for a Constitution by Consensus.

⁶⁰ The 1970 amendment to the Law of Return also expanded the number of family members entitled to immigrate to Israel to include grandchildren of Jews and their spouses to include grandchildren and their spouses.

⁶¹ Don-Yehiya, *Religion and Political Accommodation in Israel*, 45

⁶² HCJ 1031\93 case of Pasero (Goldstein) 49 (4) PD 661; H CJ 5070\95 case of Naamat 56 (2) PD 721; and HCJ 2597\99 case of Toshbeim (was not publicized). See also: A. Rubinstein and B. Medina, *The State of Israel’s Constitutional Law*, vol. 1.

⁶³ Y. Etinger, “Internal Conflict in Rabbinical Court”, *Haaretz* (4 May 2008); R. Gavison, “Conversion and Membership”, *Haaretz* (13 June 2008).

⁶⁴ Article 8 in IDI proposal and Article 28 in IZS proposal. IZS proposal also determines that the spouse and children of a Jew are entitled to reside in Israel. The question of which family members of a Jew are entitled for the right of return, which is an important aspect of the Law of Return, is beyond the scope of the article.

⁶⁵ IDI proposal, Article 164

⁶⁶ IDI Article 163; Knesset Report Article 13 in chapter on the judiciary; IZS Article 90.

⁶⁷ Knesset proposal, Chapter 2: Basic Human Rights, Article 2(b). This provision, which intended to limit the activist Supreme Court, was included originally in the Basic Law: Freedom of Occupation (1992). Similar

provision – without the reference to “jewish and democratic” – is included in the IDI proposal (Article 39) and in IZS proposal (Article 90). IZS proposal includes much broader restrictions on judicial review.

⁶⁸ Constitution Committee Report, Chapter 14: Various Provisions, Article 1; IDI proposal limit the preservation of laws contradicting the constitution for only ten years (Article 193); IZS proposal, Article 91.

⁶⁹ IDI proposal, Article 164. The principle of non-justiciability was first used by the 1937 Irish constitution and than by the 1950 Indian Constitution in its Directive Principles for Social Policy section.

⁷⁰ Explanation to proposed constitution, IDI, p. 230-1.

⁷¹ Knesset proposal Chapter 8: Legislation, Article 6.

⁷² Article 33 in Canadian Charter.

⁷³ Constitution Committee Report – explanation to chapter 8: Legislation, 3. www.huka.gov.il.

⁷⁴ Ibid.

⁷⁵ “Comparison between the IDI and IZS proposals”, IZS website:

<http://www.izs.org.il/documents/ConstitutionsComparison.pdf>.

⁷⁶ Ibid.

⁷⁷ For discussion on the problems with the existing procedure: M. Mautner, “Justice Appointment to the Supreme Court in a Multicultural Society,” *Mechkarei Mishpat 19* (2003): 423-460.

⁷⁸ The version was proposed by the Chair of the Constitution, Law and Justice Committee, Michael Eitan. It was not discussed at the Committee sessions. Other proposals which the committee discussed include adding two representatives of academia, replacing one of the Supreme Court Justices by District Court Justice, limiting the involvement of Supreme Court Justices, entrenching representation for the opposition (among the two member of Knesset), etc. see: annotation for constitutional draft, chapter 6, p. 4.

⁷⁹ On the link between constitutions and revolutions see, for example: H. Arendt, *On Revolution* (New York: Viking Press 1965); B. Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992); U. K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Atlantic Highlands, N.J.: Humanities Press, 1995).

⁸⁰ See: H. Cohen, “Religious Coercion in Israel.”

⁸¹ B. Ackerman, *The Future of Liberal Revolution*, 14.

⁸² “Religions in Israel 2002-2004,” *Central Bureau of Statistics* (Jerusalem, 2006).

⁸³ A. Arian, N. Atmor, Y. Hadar, *Auditing Israeli Democracy 2007: Cohesion in a Divided Society* (Jerusalem: The Israel Democracy Institute, 2007), 66.

⁸⁴ Ibid.

⁸⁵ A. Arian, T. Hermann, *Auditing Israeli Democracy 2008: Between the State and Civil Society*, (Jerusalem: The Israel Democracy Institute, 2007), 51. All respondents were Jewish, but the poll did not include those who define themselves as “traditional” or “Orthodox.” Interestingly, while 68% of the secular respondents stated that secular-religious relations are “not good/not good at all,” only 45% of religious respondents agreed to this statement.

⁸⁶ A. Arian, et al., *Auditing Israeli Democracy 2007*, 67.

⁸⁷ For more on the distinction between formal and material constitutions see H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), 22.

⁸⁸ The Constitution Committee Report proposed a special majority of 70 out of 120 Knesset members (Chapter 13, Article 3); IDI proposed a two-thirds majority for passing constitutional amendments (Article 181).

⁸⁹ As stated, for example, by MK Avraham Ravitz of the Orthodox Agudat Israel party during the Constitution, Law and Justice Committee discussions: “I would like to tell you what the Orthodox fear stems from... Our problem is where do we have a greater chance to promote our agenda. Since our experience shows that it is not done in the courts, we prefer to leave these issues to the Knesset. For us, the rules of the game are much easier in the Knesset because we are present there.” *Constitution, Law and Justice Committee: Protocol 320* (8 November 2004), 39.

⁹⁰ B. Kimerling, “Constitution: A Task for Future Generations,” *Haaretz* (19 April 2005); F. Radai, “A Constitution Only for Men?” *Haaretz* (27 March 2006). Z. Galon, “Better without a Constitution,” *Haaretz* (14 November 2007).

⁹¹ MK Yizchak Levi and MK Meir Porush (Orthodox Agudat Israel party) *Knesset Record* (13 February 2007), 53-54.

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