

THE POLITICAL INFEASIBILITY OF “THIN” CONSTITUTIONS: LESSONS FROM 2003-2006 ISRAELI CONSTITUTIONAL DEBATES

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This article questions the constitutional advice commonly offered to societies deeply divided over the vision of their state (e.g., Egypt, Tunisia, Turkey and Israel) to draft a “thin” constitution. According to this liberal constitutionalist approach, the constitution-making process is not expected to interfere with value-ridden conflicts (e.g., minority rights or the role of religious law) but rather to provide an institutional framework for future democratic deliberation and decision-making on divisive issues. While normatively a thin constitution is an attractive ideal, this instrument, I argue, is at odds with social, political, and institutional realities in contemporary societies driven by identity conflicts. Based on a close empirical analysis of the failed attempt to draft a thin constitution in Israel from 2003-2006, this article illustrates two central obstacles to realizing the ideal of a thin constitution: the first stems from an inherent incoherence in that ideal, since in fact thin constitutions have a strong symbolic content in representing a particular type of liberal democracy. The idea of thin constitution rests on widespread public acceptance of the principles of political liberalism, defined by John Rawls in terms of “overlapping consensus,” yet conflicts over liberal rights are usually at the heart of the constitution debate in divided societies. The second problem stems from the effects of existing institutional legacies—particularly judiciary-legislature relation—on the drafting process. The legacy of constitutional dialogue between the judiciary and the legislature hinders the separation between constitutional debates on procedural-institutional and ideational-foundational issues, during the constitution-drafting process. Thus the timing of constitution writing, whether it occurs at the state-building stage or during a transitional phase decades after independence, is of great importance. The article concludes that the difficulties of writing a thin constitution are increasing, rather than decreasing, over the years.

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I. INTRODUCTION

The language of constitution writing has become the lingua franca of twenty-first century politics. The recent wave of constitution writing, which began about two decades ago in post-Communist Eastern and Central Europe and post-Apartheid South Africa,¹ seems far from being over. Many of the constitutions written since the turn of the new millennium take place in societies that are deeply divided over the citizenry's common vision, where the constitutional debate involves intensive disputes over core ideational questions such as the state's religious and national character. This was the case with recent projects of constitution drafting in post-conflict societies such as Iraq, Kenya, South Sudan, and Burundi;² or in recent and expected constitution writing in democratizing Muslim states such as Indonesia, Turkey, Mali; or those that stemmed from the Arab spring such as in Tunisia and Egypt, where tensions between religious law and individual rights are at the core of the constitutional debate.³ Even in New Zealand and in Israel, two of the three democracies with no written constitution, the political system recently initiated endeavors to draft a formal constitution in reaction to increasing

1. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 363, 369 (1995).

2. Kirsti Samuels, *Post Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 663 (2006). See generally Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2005); ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ (Dick Howard ed., 2009); FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller ed., 2010).

3. See NADIRSYAH HOSEN, SHARI'A & CONSTITUTIONAL REFORM IN INDONESIA (2007); Nathan Brown, *Islam and Constitutionalism in the Arab World: A Puzzling End to Islamic Inflation*, Presented at the Workshop on Constitution Writing, Human Rights, and Religion, Rockefeller Foundation (July 2012).

tensions over national and religious identity issues.⁴

The advice commonly provided by constitutional experts under conditions of intense disagreement over basic norms and values is to draft a “thin” constitution.⁵ The constitution-making process, according to this approach, is not expected to interfere in value-ridden conflicts, but rather to provide a legal framework within which conflict resolution can be advanced. Thus, a constitution should be thin in the sense that it avoids making decisions on contentious identity questions and focuses on establishing democratic institutions that allow further deliberation on divisive issues.

This article criticizes this common constitutional advice and argues that a thin constitution fails to provide a relevant constitutional framework for contemporary, divided societies. While the ideal of a thin constitution may be normatively and theoretically attractive, given the social, political and institutional realities of societies riven by identity conflicts, this recommendation appears less viable and is eventually rejected by constitutional drafters.⁶ More specifically, I contend that theories that advocate for such an approach fail to take into account two obstacles to the drafting of a thin constitution: the first is concerned with the type of conflict in question. The idea of a thin constitution rests on widespread public acceptance of the principles of political liberalism, defined in Rawlsian terms as the distinction between citizens’ private identities (e.g., ethnic, cultural, and religious) and their shared public civic identity.⁷ However, in societies divided between competing visions of the state *in toto* (e.g., regarding the role of religion in the public sphere), this distinction is at the core of the constitutional debate, and thus cannot be regarded as the constitutional common denominator.

The second problem with thin constitutions relates to the temporal dimension of constitution writing and the effects of the existing institutional legacy on the drafting process. Generally,

4. See *Constitutional Review Detailed*, THE NEW ZEALAND HERALD, Dec. 8, 2010, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10692881; HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES Ch. 3 (2011).

5. The term “thin” constitution was explicitly used in the recent Israeli constitutional debates, yet it represents a wider perspective of the role constitutions play under conditions of ideational disagreements. See discussion *infra* Section II. This usage of the term differs substantially from that of Mark Tushnet, who defines a “thin” constitution as providing “fundamental guarantees of equality, freedom of expression, and liberty.” MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11 (1999). Tushnet’s discussion refers to the particular context of the U.S. constitutional debate over judicial review. See *id.* at 6-32.

6. This article analyzes the rejection of a proposal for a thin constitution in Israel. Similarly, in Turkey in 2007, a proposal to draft a thin constitution was discussed but was never adopted. I will return to the Turkish example at the concluding section of the article.

7. See JOHN RAWLS, POLITICAL LIBERALISM 134 (1993).

constitutional theory tends to perceive the moment of constitution-making as a revolutionary moment of “new beginning,” in which the political order is being reconstructed.⁸ However, most contemporary projects of constitution writing or rewriting do not occur at a foundational moment of state building but rather decades after independence.⁹ At that stage, the institutional legacy that evolved over the years—particularly the constitutional dialogue between the legislature and judiciary—hinders the separation between constitutional debates over institutional issues from disputes over the character of the state. For that reason, I will argue, the challenges of drafting a thin constitution may increase as state institutions evolve and mature over the years, and thus the adoption of a thin constitution is becoming more difficult in well-functioning states rather than at moments of “new beginning” when state institutions are in their formative stage.

The analysis presented here to substantiate and exemplify these claims draws upon a study of the recent endeavor in 2003-2006 to craft a formal constitution in Israel. The participants in this highly contentious process explicitly addressed and rejected the option of drafting a thin constitution to resolve Israel’s complex internal identity conflicts. The original empirical research of these debates is based on close reading of parliamentary constitutional committee minutes (2003-2006) and Knesset debates; interviews with Ministers, Knesset members, and additional participants in the debates; as well as Supreme Court decisions and other archival materials. It reveals the intricate mixture of institutional and ideational tensions that precluded drafters from differentiating between two aspects of the constitutional debate—institutional design or re-design (e.g., regarding procedures of legislation or questions regarding the structure of the judiciary) and the foundational debate on the definition of the state’s identity (e.g., concerning the role of religious law or the right to equality). Consequentially, parliamentary and extra-parliamentary efforts to draft a constitution ended in 2006 in ways similar to constitutional debates in the early years of the state (1948-1950): neither produced a written constitution.

The article unfolds as follows: Section II presents the theoretical idea of a thin constitution, followed by discussion of the impediments in adopting it in the context of long-lasting ideational

8. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 205 (1991); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992); Elster, *supra* note 1; TUSHNET, *supra* note 5.

9. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 *ANN. REV. L. & SOC. SCI.* 201, 209 (2009); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

and inter-institutional struggles regarding issues of national and religious identity (Section III). Section IV analyzes the most recent attempt in Israel to write a formal constitution and demonstrate how the overlap between the judiciary-legislature tension and the religious-secular conflict blocked progress in the constitution-drafting process there. The concluding section (VI) relates the Israeli case study to the broader concern for the relevance of the proposal to draft a thin constitution for contemporary constitutional debates, particularly in Turkey.

One introductory remark is required before launching the detailed discussion: One may wonder to what extent the Israeli experience is relevant to the types of divided societies that recently, or currently, are engaged in constitution making. Indeed, Israel is usually perceived as an exception in constitutional literature as it is one of very few countries in the world without a written constitution (along with the UK and New Zealand) and the only country in the world that decided, at time of independence, not to adopt a formal constitution. Israeli constitutional exceptionalism is salient when compared to liberal democracies in North America and West Europe. However, if societal schisms—rather than constitutional formalities—are the primary basis of comparison, then Israel may represent a paradigmatic case of divided societies, particularly those characterized by intense struggles over the state's identity. In contrast to many Israeli scholars who tend to perceive Israeli society as "multicultural" and who commonly compare it to Western multicultural democracies such as Canada and the United States,¹⁰ I contend that the intensity and durability of Israel's internal conflicts, in addition to the nature of its constitutional debates, align it more closely with the divided societies of non-Western states such as India, Turkey, Indonesia, and Egypt. While in liberal western democracies, such as the United States and Canada, multicultural arrangements rest on a wide societal consensus on the basic principles of political liberalism; in divided societies (e.g., Israel and Turkey), such a consensus—particularly with regard to individual rights or the distinction between private identities and public shared identities—is difficult to find. In Section III, I elaborate on the definition of divided societies. As I show in an analysis of the Israeli case, its long-lasting identity conflicts (particularly the Jewish-Palestinian national conflict and the Orthodox-secular intra-Jewish conflict) pose grave challenges to the state's democratic institutions and prospects for protecting

10. See MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 181-92 (2008); *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE: A BOOK IN MEMORY OF ARIEL ROZEN-ZVI* 25-27 (Menachem Mautner et al. eds., 1998) [Hebrew]; *THE MULTICULTURAL CHALLENGE IN ISRAEL* (Avi Sagi & Ohad Nachtomy eds., 2010).

individual rights. Understanding these potential dangers may be instructive for current societies debating their constitutions when there are deep disagreements over the shared credo of their state.

II. THE IDEA OF A THIN CONSTITUTION

Modern constitutions are by and large perceived in institutional or procedural terms. They are expected to establish the legal and political structure of governmental institutions and to regulate the balance of power. As András Sajó stated: “Constitutions—since the basic laws of the Greek city states (*polis*) until today—concern the relationship of the state’s fundamental organs and its institutions. . . . Constitutions are about power”¹¹ The institutional role of constitutions to create and define the rules according to which governments function has not only practical, but also normative, implications. By constraining governmental power, constitutions play a normative role in manifesting the principles of constitutionalism.¹² According to this view, constitutions are expected to limit governmental power by crafting an institutional system that distributes powers between various branches of the government and provides a formal basis for protection of fundamental rights.¹³ Scholars employ the principles of constitutionalism to distinguish between “proper” or “true constitutions” and “nominal” or “façade constitutions.”¹⁴

This view of the constitution’s main role—to establish the institutional structure of government and to determine the rules of future legislation—is thin in contrast to a thicker understanding of constitutions, which acknowledges an additional role played by constitution—a foundational, or symbolic role in representing the ultimate goals and shared values that underpin the state. By delineating the commonly held, core societal norms and aspirations of the people, constitutions are assumed to provide citizenry with a sense of ownership and authorship—a sense that “We the People” includes me.¹⁵ In other words, for constitutions to be popu-

11. ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 2 (Central Eur. Univ. Press ed. & trans., 1999).

12. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 26, 123 (Ginn & Co. rev. ed., 1950); see also Keith E. Whittington, *Constitutionalism*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 281, 281-99 (Keith E. Whittington et al. eds., 2008).

13. See JON ELSTER & RUNE SLAGSTAD, *CONSTITUTIONALISM AND DEMOCRACY* 2-3 (1993).

14. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *AM. POL. SCI. REV.* 853, 861-62 (1962); cf. Donald Lutz, *Toward a Theory of Constitutional Amendment*, 80 *AM. POL. SCI. REV.* 335, 365 (1994).

15. A distinction somewhat similar to the procedural versus foundational aspects of constitutions is made by Donald S. Lutz, who distinguishes between power elements (“found

larly accepted as legitimate in democratic societies, they have to express the underlying common vision of the polity. In the words of W. F. Murphy, constitutions serve “as a binding statement of a people’s aspirations for themselves as a nation. . . . If a constitutional text is not ‘congruent with’ ideals that form or will reform its people and so express the political character they have or are willing to try to put on, it will quickly fade.”¹⁶ And as Joseph Raz acknowledged, constitutions in their thick sense express a common ideology and thus serve “not only as a lawyers’ law, but as the people’s law.”¹⁷ Thick constitutions, thus, serve as a basic charter of the state’s identity.¹⁸

To be clear, an important distinction is between theories of *thin* constitutions and those of *short* constitutions. Since the early days of American constitutionalism, short, framework-oriented constitutions were the dominant mode adopted by the drafters of both States’ and the United States’ Constitution. James Madison, for example, argued that short, institutionally oriented constitutions, which merely regulate institutions and citizens’ duties, are required to guarantee constitutional longevity and thus allow for political stability, which was the main purpose of written constitutions in his view.¹⁹ In the two centuries that followed, most constitutional scholars and political scientists shared Madison’s preference for short, loosely drafted framework constitutions.²⁰ By contrast, in recent years, some empirical studies have undermined the

in institutions for decision-making”), Donald S. Lutz, *Thinking About Constitutionalism at the Start of the Twenty-First Century*, 30 PUBLIUS 115, 129 (2000), and cultural elements (“cultural mores and values”) contained in every constitution, *id.* at 128. Lutz also added the element of justice as a key ingredient of constitutionalism. *Id.* at 129.

16. Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 10 (Douglas Greenberg et al. eds., 1993). Similarly, according to Daniel J. Elazar, “Constitutions . . . also reflect, explicitly or implicitly, the moral principles underlying polities or regimes.” Daniel Elazar, *Constitution-Making: The Pre-Eminent Political Act*, in THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS: REDESIGNING THE STATE 232, 240 (Keith G. Banting & Richard Simeon eds., 1985).

17. Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 154 (Larry Alexander ed., 1998).

18. This article focuses on the relations between identity and the constitution in the sense of a formal document. A recent growing body of work analyses the relation between identity and constitutions in a broader sense, including the way constitutions are interpreted and adjudicated. For leading examples, see MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT (2007); GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010); RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).

19. See Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837 (1999).

20. Hammons, *supra* note 19, at 837-38; ELKINS ET AL., *supra* note 9, at 84; WOODROW WILSON CENTER SPECIAL STUDIES, CONSTITUTION MAKING IN EASTERN EUROPE 393 (A.E. Dick Howard ed., 1993). See generally JAMES H. HUTSON & LEONARD RAPPORT, SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1987).

assumption that short constitutions secure constitutional durability and stability. For example, in their comprehensive comparative study of 935 written constitutions, Elkins, Ginsburg, and Melton demonstrated that longer and more detailed constitutional documents endure for a greater number of years than shorter and less detailed constitutions.²¹ Similarly, Christopher Hammons showed in a study that examined 145 constitutions written in the American states that longer and more detailed design of state constitutions enhances rather than reduces their longevity.²² Both studies, however, focus on constitutional length and details in terms of number of words included in the constitution or the number of provisions or topics listed in the constitution. Both studies refrain from making a distinction between types of constitutional provisions or their content. Thus, for example, they do not distinguish between constitutional provisions that address institutional or procedural regulations, such as electoral rules or procedures regarding the head of state; and more symbolic provisions, such as colors of the flag, national language, or religious rights. Elkins, Ginsburg, and Milton, for example, examine the effect of scope of topics included in constitutional documents on their durability, yet among the ninety-two topics they examine, only three or four address identity issues, such as language or rights, while the rest address procedural issues.²³

By contrast to these studies, which focus on short constitutions and examine their length in terms of number of words or number of provisions regardless of their content, the discussion of thin constitutions rests on a classification of constitutional provisions according to their content. More particularly, it requires the differentiation between provisions that address procedural issues and those referring to identity issues and basic rights. Such classification underpins the distinction between thin and thick constitutions.

The foundational and symbolic elements found in the thick constitution are usually expressed in the preamble and in state symbols or cultural practices (e. g., the declarations of the official language, the established religion, the official day of rest, the flag, the anthem, and the definition of nationality).²⁴ Advocates of thin

21. ELKINS ET AL., *supra* note 9, at 103-04, 141.

22. Hammons, *supra* note 20, at 839.

23. ELKINS ET AL., *supra* note 9, at 222-24.

24. Whether the inclusion of a Bill of Rights serves the constitution's procedural/institutional role or also its foundational role is a question left open here. The formal expression of the foundational role of the constitution depends by and large on the type of national identity the constitution is expected to represent—for example, a unified, presumably homogenous, collectivity, resting on shared cultural, ethnic or religious background; or a plurality of “voluntaristic” individuals who do not share particular collective identity but

constitutions consider such symbolic and foundational constitutional components to be either redundant or counter-productive. Giovanni Sartori, for example, warned against over-burdening the constitution with such provisions because they would prevent constitutions from fulfilling their central function of restraining arbitrary power.²⁵ He criticized the “bad constitutions” of his time as follows:

They have come to include unrealistic promises and glamorous professions of faith on the one hand, and numberless frivolous details on the other. Some of them are by now so ‘democratic’ that either they are no longer constitutions (for a constitution limits the ‘will of the people’ concept of democracy just as much as it limits the will of the power holders), or they make the working of the machinery of government too cumbersome for government to work, or both.²⁶

Similarly, András Sajó warned against the inclusion of controversial ideological elements in constitutions, as they might undermine their ability to limit governmental power in the name of universal human rights:

It is a rather risky endeavor if a constitution tries to find and encapsulate social consensus beyond basic rights (which can be universalized) and the pragmatic conditions of social peace. Such ambitious projects are but an opportunity to impose biased points of view. Constitutional history indicates that social systems often continue to exist by *concealing* conflicts among values and not by endorsing a special orientation.²⁷

These conflicts, he argued, were either resolved over the years or generated civil war, as in the United States.²⁸ Either way, they should be resolved outside the constitution.

In general terms, the United States constitution is usually referred to as a paradigmatic case of a thin constitution. This is particularly the case if one considers the text of the constitution alone,

define their shared identity in political or civic terms. In the latter case, a liberal Bill of Rights may be seen as representing the shared liberal values of the citizenry.

25. Sartori, *supra* note 14, at 862.

26. *Id.*

27. SAJÓ, *supra* note 11, at 38.

28. *Id.*

independent of the first ten amendments that constitute the Bill of Rights.²⁹ In contrast, the 1937 Irish constitution is a good example of a thick constitution, as it includes essential elements regarding Irish national identity and religion. In practice, however, a thin constitution is an ideal type, as most of the nearly 190 constitutions in existence today contain both institutional and foundational elements. Rather than suggesting a general normative or empirical theory of thin or thick constitutions, this article focuses on a more specific question: to what extent is the ideal of a thin constitution relevant for divided societies that attempt to write a new constitution decades after independence, when the institutional legacy of the state has already evolved, particularly in regard to judiciary-legislature relations?

The argument that a thin constitution is the most appropriate tool for advancing a stable democratic order in divided societies is shared by most political and legal scholars who write on constitutions and constitution-making in the context of multinational, multi-religious, or multicultural societies.³⁰ While the idea of a thin constitution is theoretically and normatively attractive, the rest of the article will illustrate that such an instrument can be at odds with political realities. This is particularly the case when the constitution is written in the context of (1) intense ideational conflicts over the state's ultimate goals and shared values; and (2) state institutions being evolved and relatively well-functioning, and more particularly, the judiciary being relatively independent and the relationship between the various branches of government developing according to a particular institutional heritage.

These two conditions seem to be increasingly relevant to contemporary projects of constitution writing in countries such as Turkey, Egypt, Tunisia, and New Zealand, where constitutions are debated in the context of fundamental identity conflicts and in light of existing institutional legacy. My main argument is that while most constitutional theories ignore the timing dimension of constitution writing,³¹ this matter has a significant effect on the

29. By contrast, the first modern constitutions in some American states such as Virginia (1776), Pennsylvania (1776), and Massachusetts (1780) represent a thick, rather than a thin, model of constitutions, as their drafters "looked upon constitutions as social compacts which defined the principles, including the ethical values, upon which the newly formed peoples were agreed and to which they presumably committed themselves." Cecelia M. Kenyon, *Constitutionalism in Revolutionary America*, in *CONSTITUTIONALISM: NOMOS XX* 84, 119 (J. Roland Pennock & John W. Chapman eds., 1979).

30. *But see* Nathan J. Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 *PERSP. ON POLITICS* 675, 677-79 (2008); Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 *INT'L SOCIOLOGY* 7, 7-33 (2003), for rare exceptions.

31. The issue of timing of constitution-writing processes is usually discussed by constitutional theorists in the broader context of world history, and relatively to other waves of

type of considerations taken into account by the constitutional drafters. In other words, when constitution making does not represent a moment of “new beginning,” a thin constitution is not a neutral proposal to create a constitutional sphere “above” ordinary politics. Rather, as any attempt to change the rules in the middle of the game, it is seen as part of the political struggle on the character of state. Thus, when a society is divided over basic beliefs and shared goals, constitution writing is not a neutral arena of “higher lawmaking,”³² but rather it is part of the political struggle to determine the shared vision of the state.

The next section will define the type of divided societies discussed in this article and will elaborate on the inherent difficulties they pose to the ideal of a thin constitution.

What is the alternative to drafting a thin constitution? Since constitutions are not supposed to be authored by lawyers or by experts of constitutional law but rather by “the people” through their political representatives, this question will be left open in this article. Moreover, the article rests on the assumption that constitutions are designed, first and foremost, for specific societies, addressing their unique social, political, and legal problems. Accordingly, foreign constitutional documents may serve as sources of inspiration for constitutional drafters, yet ultimately, democratic constitutions should result from an internal process of consultation, deliberation, and political decision-making. Whether such a process yields a *thick* rather than a *thin* constitution is thus a question left to be decided by domestic political actors. A brief historical overview reveals that under conditions of deep internal disagreements over the identity of the state, constitutional drafters tend to either include ambiguous constitutional arrangements in a written constitution (as happened in India in 1946-1949 and in Indonesia in 1945 in issues relating to religious identity),³³ embrace contradicting constitutional provisions (e.g., Ireland in 1922),³⁴ or avoid writing a constitution altogether (as in the Israeli case). Other, less democratic alternatives include the imposition of one of the competing visions of the state as

constitution-making around the world. See Elster, *supra* note 1, at 368-73; Arjomand, *supra* note 30. By contrast, I refer here to the question of timing in the particular context of the history of the state in question, and relatively to the development of its own governmental institutions.

32. ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 8, at 266-94.

33. See GARY JEFFREY JACOBSON, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE (2006); RAJEEV BHARGAVA, THE PROMISE OF INDIA'S SECRET CONSTITUTION (2010); R. E. Elson, *Another Look at the Jakarta Charter Controversy of 1945*, 88 INDONESIA 105 (2009); DOUGLAS RAMMAGE, POLITICS IN INDONESIA: DEMOCRACY, ISLAM AND THE IDEOLOGY OF TOLERANCE (2002).

34. BILL KISSANE, NEW BEGINNINGS: CONSTITUTIONALISM AND DEMOCRACY IN MODERN IRELAND (2011); LERNER, *supra* note 4, at 172-73.

happened, for example, in the former Yugoslav republics which in 1990 adopted exclusionary constitutional nationalistic structures,³⁵ or in Turkey, where constitutional secularism and state-driven national homogeneity were imposed through authoritarian means in the 1920s as well as following military coups in 1961 and 1982.³⁶

Analyzing and evaluating these different alternatives requires a detailed conceptual and empirical work that goes beyond the scope of this article.³⁷ Rather, this article seeks to highlight the misleading expectations generally posed by constitutional theorists and experts and their view that a thin constitution is the ultimate solution for the types of conflicts and tensions that characterize many contemporary divided societies. Under such intricate conditions, replicating an ideal “Philadelphia moment” of political reconstruction is difficult to achieve. Existing tensions on both ideational and institutional levels affect the way constitutions are crafted and must be taken into account.

III. POLITICAL AND INSTITUTIONAL IMPEDIMENTS TO THE THIN CONSTITUTIONAL IDEAL

Almost all countries in the world are heterogeneous in the sense that they include members of various national, religious, or linguistic identity groups. However, not all heterogeneous and multicultural societies are divided in the same way. As a subset, the analysis here focuses on those multinational or multi-religious societies characterized by conflicts between groups with competing visions of their state *as a whole*. The conflict in these cases is not about allocation of power or redistribution of resources, but between clashing societal norms and values—most notably, issues that involve the national or religious identity of the entire state. Albert Hirschman referred to such conflicts as “either-or” or “non-divisible” since they are typically characterized by absolute unwillingness to compromise. In contrast, “divisible” or “more-or-less” conflicts are easier to settle because antagonists can agree to “split the difference” or compromise.³⁸ This is the case, for example, in

35. See Robert M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, 51 *SLAVIC REV.* 654, 661-62 (1992).

36. ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 273 (1997); see ERGUN ÖZBUDUN & ÖMER FARUK GENÇKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* 3-4 (2009); WILLIAM HALE & ERGUN ÖZBUDUN, *ISLAMISM, DEMOCRACY AND LIBERALISM IN TURKEY: THE CASE OF AKP* 55-79 (2010); Murat Akan, *The Infrastructural Politics of Laikik in the Writing of the 1961 Turkish Constitution*, 13 *INT'L J. OF POSTCOLONIAL STUD.* 190 (2011).

37. See LERNER, *supra* note 4, for some preliminary work on the topic.

38. Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 *POLITICAL THEORY* 203, 213-14 (1994).

the debate over the nature of secularism in Turkey that is symbolized by the headscarf debate. Similarly, this is the type of conflict that exists between Orthodox and secular Jews in Israel.

When such divided societies engage in drafting a constitution, the foundational aspects typically attract intense political attention and the lack of shared norms becomes one of the central obstacles to the writing of the constitution. This is because each side expects the constitution to express its aspirations and goals and seeks to impose its political vision of the entire state.

Under such divisive conditions, writing a thin constitution seems to be the most rational solution as it merely seeks to establish the institutional mechanism of a democratic government and leaves the controversial ideational conflicts to be resolved in the future. However, the proposal to draft a thin constitution in contemporary divided societies encounters two fundamental problems that are elaborated in the following pages. The first problem stems from the tendency of thin constitutions to represent a liberal-democratic world view and thus “take a side” in conflicts over a state’s fundamental values and norms, such as those that characterize deeply divided societies. The second problem is related to the timing of constitution-making and the effects of existing institutional legacies on the political inability of distinguishing between constitutional debates on institutional and foundational questions.

A. Not-So-Thin Constitutions

As we have seen above, supporters of thin constitutions criticize attempts to utilize constitution-drafting processes in order to resolve value-ridden conflicts and reject the inclusion of provisions concerning controversial identity or ideological issues. However, many of them overlook an inherent incoherence in their ideal of thin constitutions, which in fact have a strong symbolic content. Thin constitutions are usually identified with a particular form of liberal democracy and in that sense they appear to be much less thin than their advocates would acknowledge.

In the political and constitutional theory literature, the ideal of a thin constitution was often presented as a quintessential component of liberal political thinking. According to the liberal argument, constitutions should not be expected to interfere in value-ridden conflicts or to settle fundamental societal controversies, but rather provide a framework within which conflict resolution can be advanced. For that reason, constitutions should refrain from including any illiberal controversial elements such as religious or ethnic identifications. This ‘bracketing’ paradigm is shared, in var-

ious nuances, by Jurgen Habermas's understanding of *constitutional patriotism*,³⁹ John Rawls' notion of *overlapping consensus*,⁴⁰ as well as Jeremy Webber's suggestion for *constitutional reticence* in regard to all divisive questions.⁴¹ According to this liberal approach, instead of enshrining the shared values of the nation, constitutions create a "feeling of commonality" through a public "conversation"⁴² by ensuring participation of all members of society in public debates. Moreover, liberal constitutionalists oppose the introduction of illiberal elements into the constitutional discussion because this tends to distort rational arguments. Thus, they prefer to isolate the domain of constitutional deliberation from any illiberal viewpoints that might undermine the harmony of its participants.⁴³ Indeed, the desire to rid constitutional debates of contentious substantive dispute is attractive. It is difficult to object to the idealism that encourages "[c]ommunities [to] be open to their members holding a broad range of beliefs, and to revising those beliefs through discussion over time," and which holds that constitutions should "express a similar openness."⁴⁴

However, such liberal ideal is often at odds with political reality. Liberal constitutionalists tend to draw their inspiration from multicultural societies that adhere to the basic principles of political liberalism (e. g., the United States, Canada, Switzerland). Constitutions function in such pluralistic societies as neutral mechanisms of conflict resolution. Yet playing this role is extremely difficult when the constitution is written in divided societies, where there is no consensus regarding normative principles (liberal or otherwise) that should underpin the state.

39. HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 500 (William Rehg trans., 1998); Jürgen Habermas, *Why Europe Needs a Constitution*, NEW LEFT REV., Sept.-Oct. 2001, at 5, 23. Habermas' constitutional patriotism may be seen as standing between the two Rawlsian conceptions, since he seems to value constitutional agreement on democratic procedures more than Rawls does, but at the same time believes that a formal search for deeper normative consensus is not required. For a thicker conception of Constitutional Patriotism, see JAN-WERNER MÜLLER, *infra* note 41.

40. RAWLS, *supra* note 7, at 134. Rawls distinguished between constitutional and overlapping consensus. *Id.* at 133-72. He claimed that the former is a consensus regarding democratic procedures and principles, while the later expresses an agreement over the basic structure of society, and therefore includes "great values." *Id.* He viewed constitutional consensus as merely a *modus vivendi* and as a step towards what he referred to as "overlapping consensus," which he considered to be a deeper and wider form of consensus than constitutional consensus. *Id.*

41. See generally Jeremy Webber, *Constitutional Reticence*, 25 AUSTL. J. LEGAL PHIL. 125 (2000). For a thicker conception of Constitutional Patriotism, see generally JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM (2007).

42. Webber, *supra* note 41, at 131-32; cf. JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION 183-228, 316-19 (1994).

43. Webber, *supra* note 41, at 132.

44. *Id.* at 153.

Interestingly, a similar underlying liberal paradigm is also shared by scholars of comparative constitutional design who have recently published a growing number of works in an effort to identify the most appropriate democratic institutional solutions for multiethnic, multicultural, and multinational societies. This research has produced a wide range of alternative institutional mechanisms for enhancing democracy and stability in divided and post-conflict societies, including such arrangements as federalism, devolution, consociationalism, power-sharing, a variety of electoral systems, and granting special group rights.⁴⁵ Yet these works tend by and large to pay limited attention to constitutional conflicts over the overall vision of the state, such as those that characterize the deeply divided societies discussed in this article. The underlying assumption shared by these studies is that determining the correct “rules of the game” will enable divided societies to further deliberate and ultimately resolve their internal differences through political—rather than violent—means. However, many of the institutional mechanisms proposed as useful tools in mitigating conflicts between identity groups are only applicable in certain geographical or societal circumstances. For example, federal solutions and various forms of devolution may be effective when various ethnic, national, or linguistic groups are territorially concentrated, as in the case of Belgium, India, and Canada, but less useful when the populations in question are geographically dispersed.⁴⁶ Similarly, institutional solutions such as power-sharing or various models of electoral rules are relevant when the conflict is between different identity groups competing for power. These procedural mechanisms are less relevant when the disagreements are over normative principles that apply to the state *as a whole*, for example in regard to the role of religion in the state’s public life.⁴⁷ A good example of a recent failure of such

45. See SUJIT CHOUDHRY, CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES (Sujit Choudhry ed., 2008); LARRY JAY DIAMOND & MARC F. PLATTNER, ELECTORAL SYSTEMS AND DEMOCRACY (Larry Jay Diamond & Marc F. Plattner eds., 2006); Arend Lijphart, *Constitutional Design in Divided Societies*, 15 J. OF DEMOCRACY 96 (2004); FROM POWER SHARING TO DEMOCRACY: POST CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES MONTREAL (Sid Noel ed., 2005) [hereinafter POWER SHARING TO DEMOCRACY]; ANDREW REYNOLDS, THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY (2002); GOREN HYDEN & DENIS VENDER, CONSTITUTION-MAKING AND DEMOCRATIZATION IN AFRICA (2001).

46. See ALFRED STEPAN, ARGUING COMPARATIVE POLITICS 315-61 (2001); IDENTITY AND TERRITORIAL AUTONOMY IN PLURAL SOCIETIES (William Safran & Ramón Máiz eds., 2000); FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS (George Alan Tarr, et. al. eds., 2004); FEDERALISM AND POLITICAL PERFORMANCE (Ute Wachendorfer-Schmidt ed., 2000); AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES (Yash Ghai ed., 2000).

47. See AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977); Lijphart, *supra* note 45; DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT

rational institutional design is what commentators refer to as the “constitutional disaster” in Iraq.⁴⁸

In contrast to many advocates of liberal constitutionalism, this article acknowledges that not all types of disagreements can be resolved by the same means. Ideational disputes in divided societies that touch upon the citizen’s deepest beliefs and commitments cannot be “taken off the political agenda,” to use Rawls’ terminology,⁴⁹ because they are at the core of the societal divisions and constitutional debates. Competing perspectives in such societies often clash in respect to the adoption or rejection of political liberalism principles. That is, tension exists between those who distinguish between private identities and shared civic identity, on the one hand, and those who reject this distinction, on the other hand. In multicultural societies such as the United States or Canada, the fundamental principles of political liberalism are shared by the entire society, by and large. In contrast, in divided societies such as Turkey, Egypt, Indonesia and Israel, at least one of the competing groups is hostile to basic liberal principles.⁵⁰ As Nathan Brown stressed, the “hope of basing constitution writing on the higher plane of politics” is a misleading one because “distinctions between public and private interest and between passion and rationality . . . are extremely difficult to make in practice.”⁵¹

B. *The Problem of Institutional Legacy*

The second problem of drafting a thin constitution stems from the fact that the legacy of existing institutions play a significant role in constitution-making processes, and thus the timing of constitutional drafting—whether it occurs at the state-building stage or decades later—is of great importance. The underlying assumption of the thin constitution argument is that it is possible to distinguish between two aspects or functions of constitutions—the institutional/procedural and the ideational/foundational. As mentioned above, this distinction is taken for granted, first, by

(2d ed. 2000); IAN O’FLYNN ET AL., *POWER SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES* (2005); *SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS* (Philip G. Roeder & Donald S. Rothchild eds., 2005); GHAI, *AUTONOMY AND ETHNICITY*, *supra* note 46; *POWER SHARING TO DEMOCRACY*, *supra* note 45; BENJAMIN REILLY, *DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT* (2001).

48. ARATO, *supra* note 2, at 231.

49. RAWLS, *supra* note 7, at 151.

50. A somewhat similar distinction has been made by Yael Tamir between “thin” and “thick” multiculturalism. Yael Tamir, *Two Concepts of Multiculturalism*, 29 J. PHIL. EDUC. 161, 161-72 (1995).

51. Brown, *supra* note 30, at 677.

most scholars of comparative constitutional design, who focus their attention on the governmental mechanisms established by the constitution; as well as, by liberal political theorists who advocate a thin constitution in which shared constitutional procedures and democratic principles provide the basis of a common civic identity of the people.

Distinguishing between the institutional and foundational/symbolic parts of the constitution may be possible when writing a new constitution at the moment of the “new beginning” in the life of the state. At the time of independence, for example, when state institutions are being formed, constitutional drafters may separate debates regarding, on the one hand, the structure of government and democratic procedures from, on the other hand, those that address issues of national identity or religion. However, in the decades after independence, when inter-institutional relations have been established—particularly the constitutional dialogue between the judicial and legislative branches of government—it becomes increasingly more difficult to separate constitutional disputes regarding institutional issues (e. g., the Supreme Court’s authority or procedures for Judges nomination) from those regarding foundational issues (e. g., national identity or the public role of religion). As Kim Lane Scheppele observed, while new constitutions are often envisioned as “great opportunities for progress . . . [and] as platforms for launching new futures[,] . . . constitution drafters invariably look even more toward a past than they do toward a future.”⁵² Most particularly, they look toward the institutional past. Having evolved over many years, the institutional legacy impedes the isolation of institutional design from intricate ideological conflicts that divide society. For all of these reasons, I argue that the difficulties of adopting a thin constitution do not diminish but rather increase over the years.

In the remainder of this article, I demonstrate how the two problems described above—the tendency of thin constitutional to represent liberal ideology and thus “take a side” in the conflict over the vision of the state, and that of institutional legacy, in general, and the patterns of legislature-judiciary relations, in particular—hindered the adoption of a thin written constitution in Israel, six decades after independence.

IV. 2003-2006 ISRAELI CONSTITUTIONAL DEBATES

The Constitution, Law, and Justice Committee of the Israeli Knesset (the Committee) initiated the *Constitution in Broad*

52. Kim Lane Scheppele, *A Constitution between Past and Future*, 49 WILLIAM & MARY L. REV. 1377, 1379 (2008).

Consent Project in May 2003. The declared goal of the project was to consolidate a single constitutional document that would “enjoy wide support among Israelis and Jews worldwide.”⁵³ It was the most comprehensive endeavor to draft a constitution for the State of Israel since 1950, when the Israeli Knesset decided to postpone adopting a formal constitution. The Committee held over eighty meetings between 2003 and 2006. In addition to the seventeen Committee members, nearly 400 experts, advisors, public figures, and political leaders participated in the discussions. Hundreds of documents were submitted to the Committee, relating to all aspects of constitution design. In February 2006, the Committee presented the Knesset with its final report, containing a draft proposal and over 10,000 pages of detailed protocols and background material.

The report did not present a coherent constitutional draft; rather, it contained several versions and suggestions for further deliberation and decision. Instead of resolving the disputes that arose during the constitutional debates, the draft incorporated all the competing positions. The Committee charged the Knesset with the task of transforming this multi-versioned document into a comprehensive constitutional formula. At the end of one session discussion, the Knesset passed a declaratory resolution stating that after the coming elections it would “continue this effort, aiming at presenting a proposed constitution, based on broad consent, for Knesset decision and the people’s ratification.”⁵⁴ Nevertheless, the constitutional question disappeared from the political and public agenda in the years that followed.

These recent Knesset constitutional debates echoed those that took place in the formative years of the state in two important ways. First, constitutional discussion ended in both cases with a decision to defer the process of constitution writing. In 1950, following a constitutional debate of only nine sessions, the Israeli Knesset (which was initially elected as a constituent assembly) decided to avoid drafting a formal constitution. Known as “the Harari resolution” after its initiator, the decision stated that the Israeli constitution would be composed in a gradual manner through a series of individual Basic Laws.⁵⁵ The resolution did not

53. CONSTITUTION, LAW AND JUSTICE COMMITTEE, CONSTITUTION IN BROAD CONSENT: REPORT OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE REGARDING PROPOSALS FOR THE CONSTITUTION OF THE STATE OF ISRAEL (2006) [hereinafter THE COMMITTEE], available at <http://huka.gov.il/wiki/index.php>. All translations from primary sources and archival material in Hebrew (including Knesset debates, Minutes of Constitution, Law and Justice Committee meetings, Supreme Court rulings, newspaper articles, etc.) are by the author.

54. DK (2006) 70 (Isr.). This resolution was voted by a majority of thirty against nineteen (with one abstainer).

55. DK (1950) 1743 (Isr.).

specify what should be the content of the Basic Laws or the procedure for their enactment and amendment relative to ordinary legislation. In addition, the resolution did not set or propose a timetable for the consolidation of the Basic Laws into a single constitutional document.

The second similarity between the two rounds of constitutional debates was that in both cases the avoidance of drafting a formal constitution was attributed to the inability of the framers to bridge deep disagreements regarding the foundational aspect of the constitution.⁵⁶ These disagreements represent the conflict between religious and secular-national definitions of Israel's identity as a Jewish state in 1950. The core of the foundational dispute revolved around the relationship between the law of the state and laws of *Halacha*, the comprehensive system of Jewish traditional rules of conduct, which, from the perspective of the Orthodox Jew, take precedence over the law of the state whenever there is a contradiction between the two systems. Orthodox Knesset members objected to drafting a secular constitution that would define the Jewish state in national, rather than religious, terms and warned this would inflame a *Kulturkampf*.⁵⁷ Threats to destabilize the political order were not taken lightly by the political leadership given various challenges to the state's authority by pre-state paramilitary organizations and underground groups of zealous believers.⁵⁸

Similarly, the protocols of the February 2006 Knesset discussion on the *Constitution in Broad Consent Project*, as well as the extensive Committee deliberations throughout 2003-2006, reveal that intense division over religious issues remains the central axis around which the Israeli constitutional debate revolves.⁵⁹ Knesset members from both Orthodox and liberal-

56. This was not the only reason for postponement of constitution-drafting. Nevertheless, many of the other arguments related to deep disagreements over secular and religious visions of the state, LERNER, *supra* note 4, at 58-59—for example, the pragmatic argument regarding the need to address the urgent tasks of the young state rather than delve into philosophical discussions regarding the identity of the state, see *id.* at 68, and the need to await the ingathering of the future citizens of the state from Jewish diaspora to make decisions in such controversial questions, *id.* at 66. David Ben-Gurion played a central role in the decision to postpone the constitution. *Id.* at 57, 61, 69.

57. DK (1950) 744 (Isr.). Israel's first Minister of Justice, Pinchas Rosen, who was one of the fiercest advocates of a written constitution, admitted that "there is only one serious justification for the rejection of constitution writing now, which I don't ignore, and that is the danger of division." *Government Meeting Minutes*, STATE OF ISRAEL ARCHIVES, Dec. 13, 1949.

58. EHUD SPRINZAK, *BROTHER AGAINST BROTHER: VIOLENCE AND EXTREMISM IN ISRAELI POLITICS FROM ALTALENA TO THE RABIN ASSASSINATION* 17-86 (1999); MENACHEM FRIEDMAN, *THE HAREDI (ULTRA-ORTHODOX) SOCIETY: SOURCES, TRENDS AND PROCESSES* 55-65 (The Jerusalem Inst. for Israel studies ed., 1991).

59. As stressed by Abraham Ravitz, Deputy Minister of Welfare and member of the Orthodox *Yahadut Hatorah* party, during the Committee discussions: "The main reason that we could not make any progress towards a constitution for fifty years is that . . . first,

secular polar positions acknowledged the depth of their vast disagreement and admitted that no consensus could be achieved on issues such as personal law—particularly marriage and divorce, conversion to Judaism, and the “who is a Jew?” question; as well as the public preservation of Sabbath.⁶⁰

The conflict over the foundational aspect of the constitution was different in 2006 than in 1950 in one respect. The Palestinian minority, which comprised around 18% of the country’s population in 1950, did not take part in the constitutional drafting. Since the foundation of the state, the non-Jewish minority in Israel has been excluded from Israeli nationhood, which was understood in terms of “the Jewish people.”⁶¹ However, in recent years, the Israeli Palestinian minority has strengthened the demand to participate in the redefinition of the identity of the State of Israel, calling for the transformation of the state from its definition as “Jewish and democratic,” into a liberal-democratic state “for all its citizens”—one in which Palestinians will be recognized as a national minority.⁶² This position was advocated in a series of constitutional proposals published by leading Israeli-Arab intellectuals and NGOs.⁶³ While Israeli-Arab representatives participated in the discussions, by and large Palestinian efforts to increase their influence on the question of the constitution have not had a significant impact on Knesset deliberations, which remain focused on the Jewish religious-secular divide. Moreover, the Palestinian constitutional proposals were published, for the most part, as a reaction to the Knesset’s constitutional deliberations and, thus, were not discussed by the Committee.⁶⁴

the Jewish people already has a constitution and we should implement it in our daily life[.] . . . and second, we cannot compromise on the most fundamental issues that are, from our perspective, essential to our existence as a people.” THE COMMITTEE, *supra* note 53, at Protocol 658.

60. THE COMMITTEE, *supra* note 53, at Protocol 658.

61. See Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 434, 434-35 (1992); see Baruch Kimmerling & Dahlia Moore, *Collective Identity as Agency and Structuration of Society*, in BARUCH KIMMERLING, CLASH OF IDENTITIES: EXPLORATIONS IN ISRAELI AND PALESTINIAN SOCIETIES 25, 25-57 (2008); YONATHAN SHAPIRA, POLITICIANS AS A HEGEMONIC CLASS: THE CASE OF ISRAEL 33 (Sifriat Hapoalim eds., 1996).

62. GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 161 (2005); Amal Jamal, *Strategies of Minority Struggle for Equality in Ethnic States: Arab Politics in Israel*, 11 CITIZENSHIP STUD. 263, 271 (2007).

63. THE NATIONAL COMMITTEE FOR THE HEADS OF THE ARAB LOCAL AUTHORITIES IN ISREAL, THE FUTURE VISION OF THE PALESTINIAN ARABS IN ISREAL (2006), available at <http://www.adalah.org/newsletter/eng/dec06/tasawor-mostaqbali.pdf>; MADA AL-CARMEL, THE HAIFA DECLARATION (2007), available at <http://mada-research.org/en/files/2007/09/haifaenglish.pdf>; THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (ADALAH), THE DEMOCRATIC CONSTITUTION (2007), available at http://www.adalah.org/Public/files/democratic_constitution-english.pdf.

64. See Amal Jamal, *The Political Ethos of Palestinian Citizens of Israel: Critical Reading in the Future Vision Documents*, 23 ISR. STUD. F. 3, 12-15 (2008).

A. The Proposal for a Thin Constitution

Given the divisive nature of Israeli society—particularly with regard to the question of religion-state relations—a proposal to draft a thin constitution seemed most appropriate and, indeed, this view was shared by many legal experts in Israel.

The suggestion to draft a thin constitution sought to resolve three central problems in Israeli existing constitutional structure. First, it was meant to address the limited protection of basic rights under the existing constitutional conditions. A limited number of basic rights have been constitutionally entrenched in the 1992 Basic Law: Freedom of Occupation⁶⁵ and Basic Law: Human Dignity and Liberty.⁶⁶ Other rights, such as freedom of speech, freedom of press, and gay rights, have been advanced through judiciary precedents,⁶⁷ while some—such as equality for women—have been enacted in ordinary legislation.⁶⁸ Law professor Mordechai Kremnitzer argued that a minimalist liberal constitution is required in order to guarantee protection of human rights.⁶⁹ He criticized the attempt to draft a constitution based on wide consensus among the various factions of the population, arguing that such an expectation would make the process of constitution writing practically impossible: “There is no sense in overburdening the constitution with what cannot or should not be included in it, and then considering it as a reason for rejecting a constitution altogether.”⁷⁰

The second problem that a thin constitution was meant to solve was the inconsistencies and disparities in the existing Basic Laws legislated over the years.⁷¹ The shortcomings of the existing eleven Basic Laws were rooted in the vague instructions of the 1950

65. Basic Law: Freedom of Occupation, 5752-1992, SH No. 1387 p. 102 (Isr.).

66. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150 (Isr.).

67. See, e.g., HCJ 73/53 Kol Ha-am v. Minister of the Interior 7(2) PD 871 [1953] (freedom of speech); HCJ 721/94 El Al Airlines v. Danilowitz 58(5) PD 749 [1994] (gay rights).

68. For example, The Women’s Equal Rights Law, 5711-1951, SH No. 82 p. 248 (Isr.) explicitly specifies that the law is not valid with regard to matters of marriage and divorce. In 1991, Israel even added two reservations addressing this issue when it signed the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979).

69. Professor Mordechai Kremnitzer was one of the authors of the constitutional draft proposed by Israel Democracy Institute, 2005.

70. Mordechai Kremnitzer, *Between Progress towards and Regression from Constitutional Liberalism: On the Need for Liberal Constitution and Judicial Review of Knesset Legislation*, in ITZHAK ZAMIR BOOK: ON LAW, GOVERNMENT AND SOCIETY 709 (Yoav Dotan & Ariel Bendor eds., 2005) [Hebrew].

71. MORDECHAI KREMNITZER, DAVID KRETZMER & AVISHAI BENISH, BASIC LAWS AS INFRASTRUCTURE OF CONSTITUTION: REORGANIZING THE BASIC LAWS ON THE WAY FOR COMPREHENSIVE CONSTITUTIONAL DOCUMENT (Isr. Democracy Inst. ed., 2002).

Harari Resolution.⁷² Most Basic Laws, for example, were passed by a regular majority of Knesset members. They differ in level of entrenchment and style of writing, and many claim that they are too detailed; they often include directives that should be included in ordinary laws, while many ordinary laws that were enacted over the years should have been passed as Basic Laws due to their content and importance.⁷³ Some of the Basic Laws resulted from short-term political circumstances, rather than long-term constitutional vision.⁷⁴ It was time, many argued, that the various Basic Laws should be reorganized and unified into a single constitutional document.⁷⁵

The third problem was the need to clarify the allocation of authority among various branches of government (the “rules of the game”) in order to allow for better mitigation of controversies about basic rights and shared values that divide Israeli society. Law professor Eli Zalsberger argued that, given the vast ideological disagreements, it is virtually politically impossible to adopt a comprehensive constitution “by broad consent.”⁷⁶ Rather, it would be wiser to first entrench the institutional provisions in a thin constitution and then, when the institutional principles were clearer, it would be easier to decide on the controversial ideational questions.⁷⁷ Further, Zalsberger claimed that entrenching the structure of government would strengthen the stability of the Israeli regime because it would prevent “changes in the rules of the game from becoming part of the political game.”⁷⁸ A good example is the lack of a Basic Law on legislation that is required in order to clarify the allocation of authority between the various branches of government.

The perception of a thin constitution as the most appropriate model to address intricate Israeli social, political, and legal circumstances was adopted at the early stages of constitutional discussion by the Chairperson of the Constitution, Law and Justice

72. DK (1950) 1743 (Isr.).

73. *E.g.*, The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.); Nationality Law, 5712-1952, SH No. 95 p. 146 (Isr.); The Women’s Equal Rights Law, *supra* note 68.

74. A telling example of the ambivalent nature of Israeli basic laws is the enactment of Basic Law: the State Budget for the years 2009-2010 (special instructions) (ordinance), 5760-5769, SH No. 2245 p. 550 (Isr.). In June 2010, this basic law was amended to include a two year budget for the years 2011-2012. In 2011 the Supreme Court addressed the question of the constitutional status of this Basic Law, as well as the inherent difficulties in the Israeli constitutional system in the absence of Basic Law on Legislation, and given the fact that most Basic Laws are not entrenched. *See* HCJ 4908/10 MK Roni Bar-On v. The Israel Knesset [2011] (Isr.), *available at* <http://elyon1.court.gov.il/files/10/080/049/n08/10049080.n08.pdf> [Hebrew].

75. KREMNITZER ET AL., *supra* note 71.

76. THE COMMITTEE, *supra* note 53, at Protocol 320.

77. *Id.*

78. *Id.* at Protocol 189.

Committee, Michael Eitan, a Knesset member representing the Likud party. As Eitan stated during the Committee debates, his initial goal was to draft “a constitution that would be hung on the wall . . . the size of the Proclamation of Independence that students could learn by heart.”⁷⁹ However, despite its theoretical advantages, the proposal for a thin constitution did not receive much political support and Eitan admitted a year after the beginning of the discussions that a constitution for the State of Israel must include a principles chapter that would delineate the fundamental values upon which the state is founded, particularly in regard to the most controversial issues related to Israel’s definition as “Jewish and democratic.”⁸⁰

The failure of this attempt to advance a thin constitution raises a number of interesting questions. Given the presence of substantial political support for the project of constitution drafting, why did the promise to enact a formal constitution for the State of Israel fail to materialize? Why did the Committee fail to produce a comprehensive draft proposal? More precisely, why did the Committee fail to propose a thin constitution or even to reorganize the existing basic laws into a single document?

A close reading of the transcriptions/protocols of the 2003-2006 Committee debates and the Knesset constitutional discussion in February 2006, as well as interviews with committee members and other participants of the discussions, provide insights into these questions. This investigation revealed that it was practically impossible for drafters of the would-be constitution to ignore foundational and symbolic issues and to distinguish between them and the institutional aspect of constitution writing. To begin with, the existing constitutional arrangement already linked institutional and foundational elements.⁸¹ For example, the override clause included in Basic Law: Human Dignity and Liberty⁸² and in Basic Law: Freedom of Occupation⁸³ formally defined the character of the state as “Jewish and democratic.” Similarly, Israeli election law restricts political parties from negating the character of the state as both Jewish and democratic.⁸⁴

More importantly, the Knesset’s inability to separate between disputes over the foundational and institutional/procedural aspects

79. *Id.* at 30.

80. *Id.* at Protocol 464.

81. Ruth Gavison, *Constitution for Israel: Lessons from the Constitutional Process in the 16th Knesset*, in CONSTITUTION IN BROAD CONSENT: REPORT OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE REGARDING PROPOSALS FOR THE CONSTITUTION OF THE STATE OF ISRAEL 9, 9 (2006).

82. 5747-1992, SH No. 1454 p. 90 (Isr.).

83. 5754-1994, SH No. 1454 p. 289 (Isr.).

84. Basic Law: Knesset, 5747-1987, SH No. 1215 p. 120, §7 (Isr.).

of the constitution stemmed from an irresolvable disagreement that dominated the constitutional discussion regarding Supreme Court powers. Dominance of this issue in the constitutional debates should be analyzed in the context of the inter-institutional tension between the legislative and the judiciary branches of Israeli government, and its growing overlap with the religious-secular conflicts in Israeli society.

B. Roots of the Judiciary-Legislature Conflict

Some tension between the legislative and the judicial branches of government is common—even healthy—in any democratic system. However, in a situation of an incomplete constitution-making process, when there is a deep division within society over basic norms and values, as in the Israeli case, inter-institutional tension can be much more problematic and even create conflict. The absence of a written constitution makes it unclear which branch has the higher authority to decide on the state's fundamental norms and values. As the religious-secular schism in Israeli society has intensified, this issue has become the focus of the clash between the Supreme Court and the Knesset.

Following the Likud victory over the Labor party in 1977, the Israeli political setting was transformed from a dominant-party system to a competition between two similarly sized, competing blocs, divided mainly between a hawkish and a dovish perspective regarding Israeli security issues. Under these new political conditions, religious parties had large impact on the balance of power, largely determining formation of coalitional governments in Israel.⁸⁵ Given the growing parliamentary powers of the religious camp, the liberal-secular population sought support through the increasingly more activist Supreme Court,⁸⁶ and, indeed, many considered the Court to be the central arena for promotion of the liberal-secular Jewish agenda.⁸⁷ The conflict between the Knesset and the Supreme Court reached its climax during the 1990s, following Knesset legislation of two basic laws on human

85. ASHER COHEN & BERNARD SUSSER, *ISRAEL AND THE POLITICS OF JEWISH IDENTITY* 39-48 (2000).

86. Whether the Israeli Supreme Court is truly "activist" is a question intensely debated by legal academics. For a sample of leading works on the topic, see Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 *IYUNEI MISHPAT* 503, 577-78 (1993); Gad Barzilai, *Judicial Hegemony, Party Polarization and Social Change*, 2 *POLITICA* 31, 31-51 (1998). See generally RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, *JUDICIAL ACTIVISM: FOR AND AGAINST, THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY* (2000).

87. Menachem Mautner, *The 1980s: The Years of Anxiety*, 26 *TEL. AVIV. U. L. REV.* 645, 645 (2002) [Hebrew]; see HIRSCHL, *supra* note 18, at 163-63, 174, 202-05; GAD BARZILAI ET AL., *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* 141-42 (1994).

rights in 1992. On the one hand, Supreme Chief Justice Aharon Barak supported and, indeed, celebrated this legislation as evident in a series of academic articles and published speeches in which he argued that a “constitutional revolution” had taken place. While the Basic Laws included a limitation clause that did not explicitly grant the Court the power of judicial review, Barak argued that “the Supreme Court in Israel perceives the entrenched Basic Laws as constitutionally supreme—enacted by a constituent authority There is no longer any doubt that Israeli courts are authorized to overrule any statute that infringes upon an entrenched Basic Law.”⁸⁸ Barak’s constitutional revolution was firmly asserted in a Supreme Court ruling in *United Mizrahi Bank*.⁸⁹

For its part, the political system reacted harshly to the Court-declared constitutional revolution. The case that incited some parliamentarians was the Supreme Court’s ruling in the case of *Meatrael v. Prime Minister* (1994),⁹⁰ where the Court approved importation of non-Kosher meat to Israel on the basis of Basic Law: Freedom of Occupation. This ruling was perceived by religious parties to violate the religious status quo. In response, the Knesset amended the Basic Law: Freedom of Occupation by adding a clause that allowed for the enactment of laws conflicting with the Basic Law, if they include an explicit provision stating they are valid in spite of what is stated in the Basic Law.⁹¹

The *Meatrael* case reinforces the overlapping of the religious-secular dispute and clash between the political and judicial branches of government in Israel.⁹² The Orthodox sector’s attacks on the Supreme Court escalated as secular solidarity with the Supreme Court grew. In 1999, Orthodox leaders called for civil disobedience against Supreme Court decisions and organized a massive demonstration in which about 250,000 to 400,000⁹³

88. Aaron Barak, *The Constitutional Revolution: Protected Human Rights*, 1 L. & GOV’T IN ISR. 9, 16-17 (1992).

89. CA 6821/93 *United Mizrahi Bank v. Migdal Collective Vill.* 49(4) PD 221 [1995] (Isr.) [hereinafter *United Mizrahi Bank*]. The decision was approved by eight out of a rare panel of nine justices, with one minority opinion.

90. HCJ 3872/93 *Meatrael v. Prime Minister* 47(5) PD 485 [1993] (Isr.) [hereinafter *Meatrael v. Prime Minister* or *Meatrael*].

91. Basic Law: Freedom of Occupation, 5754-1994, SH. No. 1454 p. 90, §8. The amendment of the Basic Law raised a major debate among jurists and legal theorists concerning the question how “revolutionary” the constitutional revolution really was. See generally Hanna Lerner, *Democracy, Constitutionalism, and Identity: The Anomaly of the Israeli Case*, 11 CONSTELLATIONS 237 (2004).

92. There were other cases in which the Supreme Court violated the religious status quo. For example, in 1989 and 1994, the Supreme Court ruled against local authorities’ refusal to appoint women or non-Orthodox Jews to local religious councils. HCJ 699/89 *Hoffman v. Municipal Council of Jerusalem* 48(1) PD 678 [1989] (Isr.); HCJ 4733/94 *Naot v. Haifa City Council* 49(1) PD 678 [1994] (Isr.).

93. According to varying estimation, this range represents between five and eight percent of the Jewish population of the country at the time. See, e.g., Population Statistics,

members of the Orthodox community marched against the Supreme Court.⁹⁴ Orthodox attacks on Supreme Court judges included inflammatory statements by religious leaders and journalists, such as references to “judicial dictatorship,” “the fourth Reich,” “the persecutors of Israel,” and “Isra-Nazis.”⁹⁵ Rabbi Porush, one of the leaders of the Orthodox Agudat-Israel party, declared that he would be “willing to ‘sacrifice his life against Justice Barak.’”⁹⁶ For the first time in Israeli history, this demonstration united the leaders of all subgroups in the religious camp—from the religious-Zionist (including the Chief Rabbis of the State) to fanatical, anti-Zionist, ultra-Orthodox fringe factions.⁹⁷

Faced by intense political and societal reactions, the Supreme Court moderated its revolutionary rhetoric. Moreover, under Chief Justice Barak, the Supreme Court used its authority sparingly to overrule Knesset legislation.⁹⁸ Nevertheless, the so-called *constitutional revolution* was perceived by the nationalist-religious camp to be a threat to the Knesset’s sovereignty and it had a paralyzing effect on the constitution-making process. Indeed, given this

Israeli-Palestinian Conflict, <http://israelipalestinian.procon.org/view.resource.php?resourceID=000636>.

94. See Rebecca Trounson, *Ultra-Orthodox Protest Israel High Court Rulings*, L.A. TIMES, Feb. 15, 1999, <http://articles.latimes.com/1999/feb/15/news/mn-8386>.

95. See, e.g., Samuel G. Freedman, *Israel, Up Against the Wall*, SALON, June 22, 2000, http://www.salon.com/2000/06/22/israel_13/.

96. T.M. Tenenbaum, *No to a HCJ Which Contradicts the Halacha!*, HAMODIA, Jan. 22, 1999; COHEN & SUSSER, *supra* note 85, at 93-94.

97. Neri Horowitz, *The Haredim (Ultra-Orthodox) and the Supreme Court: Breaking the Tools in Historical Perspective*, 5 KIVUNIM HADASHIM 22, 66 (2001).

98. Between 1995 and 2006, the Supreme Court struck down Knesset legislation in five cases. HCJ 1715/97 Israel Investment Managers Association v. Minister of Finance 51(4) PD 367 [1997] (Isr.) (overruling the requirement of examination for investment managers who had less than seven years of professional experience); HCJ 6055/95 Tzemaeh v. Minister of Defense 53(5) PD 241 [1999] (Isr.) (overruling legislation that allowed for detention of soldiers for ninety-six hours before judicial hearing); HCJ 1030/99 Oron v. Knesset Speaker 56(3) PD 640 [2002] (Isr.) (striking down an amendment to a telecommunications law which legalized certain illegal radio stations); HCJ 8276/05 Adalah et al. v. Minister of Defense et al. [2006] (Isr.) (English translation in 2006-2 ISR. L. REP. 352, available at http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf) (overruling an amendment to Israeli Civil Tort Law that prevented Palestinians from claiming compensation from Israeli defense forces in conflict zones); HCJ 1661/05 Gaza Coast Local Council v. Knesset Israel 59(2) PD 481 [2005] (Isr.) (overruling clauses in the 2005 Disengagement Law that limited the settlers’ right for compensation). Between 2006 and 2010, under the presidency of Chief Justice Dorit Beinisch, the Supreme Court overruled Knesset legislation in three additional cases, two of them significantly more substantial: HCJ 8823/07 Anonymous v. The State of Israel [Feb. 11, 2010] (Isr.) (ruling that a suspect charged with security offenses must be allowed to attend judicial detention hearings); HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. Ministry of Finance [2009] (Isr.) (English translation available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf) (overruling the privatization of prison in Israel); HCJ 4124/00 Yekutieli et al. v. The Minister of Religious Affairs & The Minister of Finance [2010] (Isr.) (English translation available at http://elyon1.court.gov.il/files_eng/00/240/041/n43/00041240.n43.pdf) (annulling guaranteed-income allowances to Orthodox Yeshiva students).

camp's control of recent Israeli governments, the fear of future activist Supreme Court interpretation of any Basic Law has prevented the Knesset from advancing any further Basic Law legislation. In particular, religious parties' opposition has been staunch and unanimous. Knesset member David Tal of the Orthodox Shas party stated: "We will oppose the legislation even if the Ten Commandments would be proposed as Basic Laws . . . because if I accept the Ten Commandments as Basic Laws, . . . the Supreme Court may interpret them and overturn them."⁹⁹

Although since 1992 the Knesset has discussed over thirty bills for enactment of new Basic Laws, it has only succeeded in passing Basic Law: the State Budget for the Years 2009-2010, which is limited for two years.¹⁰⁰ None of the other proposals that concerned either institutional or foundational issues (e.g., Basic Law: Equality, or Basic Law: Legislation) have been passed.

The recent attempt to draft a constitution through the *Constitution in Broad Consent Project* referred to above must be seen as an attempt to break this impasse.¹⁰¹ However, the desire to keep constitutional deliberations "above" politics and to use the constitution as a neutral mechanism of conflict-resolution by taking controversial issues "off the agenda" was bound to fail. The attempt to focus on the institutional aspect of the constitution, leaving aside the grave disagreements on the character of the state, failed due to the drafters' difficulties in disconnecting between the two overlapping conflicts: the religious-secular foundational conflict on the one hand, and the legislative-judiciary inter-institutional conflict on the other.

As the next section demonstrates, this interlink between the ideational conflict regarding the identity of the state and the institutional conflict regarding power allocation between the judiciary and the legislature underpinned the Committee's discussions on the *Constitution in Broad Consent Project*.

99. DK (1999) 537 (Isr.).

100. See Basic Law: the State Budget for the years 2009-2010, *supra* note 74.

101. Not only was the Knesset motivated: Several NGOs led campaigns for the promotion of constitutional drafting. The most influential of those was the Israel Democracy Institution (IDI), which assembled a public council chaired by former Supreme Court Chief Justice Meir Shamgar and drafted a constitutional proposal, titled 'Constitution by Consensus'. THE ISRAEL DEMOCRACY INSTITUTION, CONSTITUTION BY CONSENSUS (2005). Another attempt of a consensual constitutional draft was sponsored by the "Rabin Center" and is known as the "Kineret Contract." THE GAVISON-MEDAN COVENANT, <http://www.gavison-medan.org.il/english> (last visited Jan. 23, 2012).

C. Entangled Debates: Institutions and Identity

A close reading of the Committee's minutes reveals that questions regarding Supreme Court authority, judicial appointment procedures, and Israel's definition as a Jewish state were discussed, by and large, in tandem during Committee sessions,¹⁰² as acknowledged in this statement by Knesset member, Yitzhak Klein:

For two years I have been participating in this process [of constitutional drafting], and I am convinced that it is impossible to distinguish between the governmental and the normative parts of the constitution. . . . Even if we decide on the values, the question remains who is authorized to enforce these values and in what level of entrenchment.¹⁰³

During the Committee sessions, any discussion that touched upon judicial authority ignited harsh debates regarding controversial religion-state issues, such as Orthodox monopoly on family law and on conversion to Judaism or the prohibition of public transportation on Shabbat. At the same time, sessions devoted to foundational provisions in the draft constitution raised intense disputes regarding, for example, the procedure for justices' appointment, as well as, the role of the Supreme Court as the chief interpreter of the constitution.¹⁰⁴ A good example of this interlinkage was the dispute over the question of which constitutional article should include the provision regarding the authorities of religious courts: Should it appear in the article on the judiciary or in the article on family values to be included in the Principles Chapter?¹⁰⁵

Predictably, representatives of the religious camp were most wary of judicial constitutional interpretation. In light of the secular-liberal approach reflected in the Supreme Court's rulings during the past decade, they explicitly expressed their opposition to Court intervention in issues that concern the Jewish character

102. To name few examples, see THE COMMITTEE, *supra* note 53, at Protocols 180, 271 (discussing Basic Law: Judicature); THE COMMITTEE, *supra* note 53, at Protocols 320, 464 (discussing issues of religion and state).

103. THE COMMITTEE, *supra* note 53, at Protocol 320.

104. *Id.* at Protocols 189, 199, 320, 464.

105. *Id.* at Protocol 199.

of the state.¹⁰⁶ MK Avraham Ravitz openly stated the Orthodox camp's political reservations:

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 court, 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.¹⁰⁷

Religious parties were not alone in expressing their concerns regarding an activist Supreme Court led by Chief Justice Barak. Right-wing Likud representative Gidon Sa'ar voiced criticism against the Supreme Court's liberal decisions in issues concerning the Arab minority: "The Court does not have a heterogeneous enough range of world views . . . and does not include representatives of the Right-wing worldview."¹⁰⁸

Eventually, the Committee did not endorse the procedural approach to constitution-making manifest in the proposal for a thin constitution. At the same time, it also refrained from adopting a thick constitution that would have incorporated decisive declarations on the character of the state. While the final report, entitled *The Constitution in Broad Consent Project*, did include a proposed Bill of Rights and a basic Principles Chapter containing the foundational provisions of the constitution (such as the national language, symbols of the state, provisions related to state-religion relations), the constitution proposed included several alternatives for constitutional arrangements that reflected the competing perspectives of all participants in the constitutional deliberations regarding both foundational and institutional issues.¹⁰⁹

During the Knesset plenum discussion on the Committee's final report religious representatives explicitly expressed their

106. Religious National Party representative Yitzchak Levi admitted in concluding the Committee's discussion that writing a constitution "is a little bit frightening . . . because eventually it will entail choices. . . . A constitution cannot exist without choices, . . . and the power of a constitution is enormous. . . . As we have seen in the 1992 Basic Laws, one can always use Basic Laws as constitutional documents and influence other issues." *Id.* at Protocol 658. Similar comments were made by Moshe Gafni, *id.* at Protocol 658, as well as during Knesset discussion. DK (2006) 59 (Isr.).

107. THE COMMITTEE, *supra* note 53, at Protocol 320.

108. *Id.* at Protocol 271. Sa'ar referred to several cases, including HCJ 6698/95 Kaadan v. Israeli Land Administration 54(1) PD 258 [2000] (Isr.), HCJ 316/03 Bakri v. Israel Fil Council 58(1) PD 249 [2003] (Isr.), and HCJ 4112/99 Adalah v. Tel Aviv Municipality 56(5) PD 393 [2002] (Isr.).

109. For detailed analysis of the constitutional proposals and the ways they limited future reform of the religious status quo by the Supreme Court, see generally Hanna Lerner, *Entrenching the Status Quo: Religion and State in Israeli Constitutional Proposal*, 16 CONSTITUTIONS 445 (2009).

opposition to the enactment of a written constitution that would empower the Supreme Court. For example, MK Yizhak Levi from the National Religious Party bluntly stated:

We will object, as forcefully as we can, the enactment of a constitution at one stage. First we would like to regulate the relationship between the Knesset and the Court, because this, in our view, is the key to any further constitutional drafting. Many of the speakers expressed their concerns regarding judicial interpretation, judicial activism. . . . Some of these concerns may be unjustified, but the concern exists.¹¹⁰

The effect of the interlink between, on the one hand, the ideational-foundational debate over the character of the state and, on the other hand, the institutional tension between the legislature and the judiciary, on the constitution writing processes was recently recognized by the Supreme Court. In a recent ruling Justice Elyakim Rubinstein explained the Israeli failure to adopt a complete formal constitution in these terms:

I concur with my colleague the Supreme Court Chief Justice with regard to the completion of the constitutional project. I will state it somewhat bluntly and unequivocally: the main reason for the incompleteness [of the constitution] so far, in my view—and we should recall that in the past two decades not a single basic law had been enacted, despite attempts to do so—is not the content of the constitution but rather the issue of who should interpret it. The last basic laws were created in 1992, yet in 1995 the constitutional authority was established in the *United Mizrahi Bank* case and since then, while various proposals for Basic Laws have been presented, a “constitutional silence” has existed in the practical sense. It seems that some sectors in the Knesset are not happy with the constitutional authority of this court, and are concerned that additional constitutional texts would increase its powers.¹¹¹

Eventually, the Knesset reaffirmed the incrementalist constitutional approach adopted by the first Knesset in 1950. The perpetuation of the incrementalist approach was supported by

110. *Plenum Discussion of Feb. 13, 2006*, THE KNESSET 45, available at <http://www.knesset.gov.il/plenum/data/00469106.doc> [hereinafter *Plenum Discussion*].

111. HCJ 4908/10 MK Roni Bar-On v. The Israel Knesset [2011] (Isr.), available at <http://elyon1.court.gov.il/files/10/080/049/n08/10049080.n08.pdf> [Hebrew].

religious, secular, as well as, Arab Knesset representatives. Recognizing the lack of consensus regarding the foundational aspects of the constitution, Knesset members across the political spectrum called for preservation of the existing, ambiguous, informal constitutional arrangements, rather than enact a constitution reflecting the worldview of one sector of the population.

This position was expressed by religious representatives such as MK Meir Porush of Orthodox Agudat Israel Party, who declared during the Knesset discussions: "A constitution under circumstances of disagreement is a recipe for deepening divisions. Therefore, Israeli society should be allowed a few more years of internal discussions until a general consensus crystallizes that may be anchored in a constitution."¹¹² MK Zehava Galon, representative of secular-left wing Meretz, reached a similar conclusion: "In light of the current political forces in the country and in the Knesset, I fear that enactment of a constitution would not fortify the fragile protection of human rights in Israel, but rather fracture it and create large and dangerous breaches that will deepen the rotten compromise. Hence, it is better to leave us without a constitution, rather than use the term constitution in vain."¹¹³

A similar position was taken by MK Abed el-Malech Dahamsha of the Arab party Ra'am: "We have lived for fifty-seven years without a constitution. It is better to wait for better days when a constitution will be enacted that guarantees entrenched rights of minority groups."¹¹⁴

As was the case in the 1950 Knesset decision, the 2006 Knesset resolution left Israel's future constitution in doubt. It did not specify what provisions should be included in the constitution or what would be the procedure for its adoption. As with the 1950 resolution, the 2006 Knesset's declaratory resolution had no legal significance, but only symbolic meaning "which hopefully will lead to practical implications."¹¹⁵

D. Israeli Constitutional Impasse

Israeli constitutional politics involves a paradoxical situation. On the one hand, the severe disagreements in Israeli society regarding the most fundamental norms and shared values that underpin the state require a clear and entrenched constitution,

112. *Plenum Discussion*, *supra* note 110, at 38.

113. *Id.* at 22.

114. *Id.* at 54.

115. Michael Eitan, Chair of the Constitution, Law and Justice Committee, during the Committee's final discussion on the *Constitution in Broad Consent Project*. THE COMMITTEE, *supra* note 53, at Protocol 658.

which would allow the distinction between ordinary political debates and constitutional disputes that challenge “the rules of the game.” On the other hand, these same intense conflicts over the character of the state are what prevent adoption of a complete constitutional document and motivate many political actors to prefer existing ambiguous arrangements over unequivocal foundational choices.¹¹⁶ The adoption of a thin constitution—which would merely delineate the balance of power between branches of government while remaining silent on controversial foundational issues—is difficult to achieve because legislature-judiciary relations in Israel are associated with ideational tensions that revolve not only on questions of power but also on foundational issues that touch upon the most fundamental values and goals of the state. This paradoxical situation pushed Israeli leaders to maintain the incrementalist constitutional approach that was adopted at the early years of the state.¹¹⁷

While the incrementalist constitutional approach has many advantages, particularly in enhancing political stability and by circumventing potentially explosive conflicts at the fragile moment of state-building, this approach involves great risks. These risks are apparent in the Israeli case, and I will very briefly mention two of them here.¹¹⁸ To begin with, incrementalist constitutional arrangements tend to preserve conservative principles, particularly in the area of religion. They thus allow for the infringements of basic rights, especially of women who tend to be discriminated against by religiously-based personal law. In the Israeli case, the Orthodox monopoly on marriage and divorce violates individual rights for women,¹¹⁹ but also for non-Orthodox religious Jewish groups, such as Reforms and Conservatives, and

116. See RUTH GAVISON, *THE CONSTITUTIONAL REVOLUTION: A REALITY OR A SELF-FULFILLING PROPHECY?* 93 (Isr. Democracy Inst. ed., 1998) [Hebrew].

117. Incrementalist constitutional arrangements may also be included in a written constitution, in a form of ambiguous, ambivalent or even contradictory provisions. See LERNER, *supra* note 4, at 30-46.

118. For an elaborated discussion, see *id.* at 208-29.

119. According to Jewish religious law, husbands are granted veto power over divorce. For a recent report women's rights violations in the area of marriage and divorce, see Orit Lotan, 'Mesoravot Get' (*Denied of Divorce*) in *Israel*, Report Presented to the KNESSET COMMITTEE ON THE STATUS OF WOMEN (2005); see also WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 21 (Frances Raday et. al. eds., 1995) [Hebrew]; Barbara Swirsky & Marilyn P. Safir, *Living in a Jewish State: National, Ethnic and Religious Implications*, in *CALLING THE EQUALITY BLUFF* 7, 13-14 (Barbara Swirski & Marilyn P. Safir eds., 1991); Yuksel Sezgin, *The Israeli Millet System: Examining Legal Pluralism Through Lenses of Nation-Building and Human Rights*, 43 *ISR. L. REV.* 631, 644-47 (2010); RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 227-62 (2004); PINCHAS SHIFFMAN, *CIVIL OR SACRED: MARRIAGE AND DIVORCE ALTERNATIVES IN ISRAEL—A NECESSARY AND FEASIBLE CHALLENGE* (Ass'n of Civil Rights in Isr. ed., 2001) [Hebrew].

for non-believers.¹²⁰ The right to marry is limited, for example, for an estimated 300,000 immigrants from former Soviet Union, who are not recognized as Jews by the orthodox authorities, yet are not associated with any other religion.¹²¹ Second, in the absence of clear foundational constitutional principles, a long-lasting debate over the character of the state may overburden the democratic institutions and may weaken their legitimacy and public support. In Israel, the overlap between the religious-secular ideological conflict on the one hand, and the judiciary-legislature institutional tension on the other hand, had affected the level of public trust in both institutions. On the one hand, the Supreme Court's identification with one particular normative viewpoint in the struggle over the character of the State of Israel has undermined its legitimacy in the eyes of the groups holding different views. On the other hand, the constitutionally passive Knesset is perceived to be too weak to promote the interests of the secular majority of Israeli citizenry.¹²² According to on-going polls, trust in the Supreme Court dropped from seventy percent of respondents in 2003 to forty-nine percent in 2008.¹²³ Trust in the Knesset dropped during these years from fifty-two percent of respondents to twenty-nine percent.¹²⁴

V. CONCLUSION: LESSONS FOR TURKEY AND OTHER CONSTITUTION-DRAFTING PROJECTS

The adoption of a thin constitution is inherently difficult in societies characterized by long-lasting controversies over fundamental norms and values or over national identity. Constitutional drafters tend to refrain from adopting a thin liberal constitution at the formative stage of the state and prefer enactment of ambiguous constitutional formulations that enhance political stability.¹²⁵

120. See MICHAEL CORINALDI, STATUS, FAMILY AND SUCCESSION: LAW BETWEEN STATE AND RELIGION 25 (2004).

121. SHIFFMAN, *supra* note 119, at 7. A political attempt to introduce a civil marriage bill failed in 2010 due to coalitional considerations. Hanna Lerner, *Consociationalism v. Twin Tolerations: Religion and State in Israel*, in INSTITUTIONS AND DEMOCRACY: ESSAYS IN HONOR OF ALFRED STEPAN (Charles Chalmers & Scott Mainwaring eds., 2012).

122. See BARZILAI ET AL., *supra* note 87; GAVISON, *supra* note 116, at 99.

123. ASHER ARIAN ET AL., AUDITING ISRAELI DEMOCRACY—2009: TWENTY YEARS OF IMMIGRATION FROM THE SOVIET UNION 71-72 (Isr. Democracy Inst. ed., Batya Stein, trans., 2009), available at <http://en.idi.org.il/media/1354408/Index2009-Eng.pdf>.

124. *Id.*

125. In addition to Israel, this was also the case in India (1950) and Indonesia (1945) with regard to issues of religious identity. For example, the *Pancasila* in Indonesia was designed as ambiguous constitutional formula that defines Indonesia's religious identity. For discussion on Indonesia, see generally Elson, *supra* note 33; RAMMAGE, *supra* note 33; Mirjam Künkler, Constitutionalism, Islamic Law and Religious Freedom in Post-independent Indonesia, Presented at the Workshop on Constitution Writing, Human Rights,

Yet, as the Israeli constitutional trajectory illustrates, if a thin constitution is not adopted in the early years of the state, when governmental institutions are shaped, the ability to enact one in later decades diminishes over time as debates over procedural-institutional issues (e.g., power relations between various branches of government) become more difficult to separate from foundational and identity issues (e.g., religion-state relations).

This lesson, drawn from a close analysis of the Israeli case, may be instructive for explaining other cases of constitutional impasses in societies divided over the identity of the state. For example, the political infeasibility of drafting a thin constitution in Turkey was evident in the dispute over the draft civilian constitution in 2007. Following an electoral victory in the fall of 2007, the AKP initiated the drafting of a civilian constitution intended to replace the 1982 military-written authoritarian constitution. Prime Minister Erdoğan appointed a five-member committee of the country's leading constitutional law scholars headed by Ergun Özbudun. The committee presented the draft constitution to AKP ministers and parliament members in August 2007. In accordance with the AKP electoral manifesto, the draft provided a democratic constitution that retained the basic principles of Kamelism while strengthening individual freedoms and minority rights, eliminated the tutelary prerogatives of the military-bureaucracy, reduced the powers of the presidency while empowered the legislature, and liberalized rules of party closure. All of these proposals were in conformity with the European Convention of Human Rights and other international human rights convention.¹²⁶ Already before a finalized draft was officially presented for public debate, the proposed thin constitution evoked a major public, political, and legal dispute and soon, the project was "silently shelved."¹²⁷

As in the Israeli case, the Turkish dispute and the final elimination of the constitutional draft¹²⁸ reflect the grave difficulties involved in separating the institutional and foundational aspects of constitutional debate. The objections to the new constitution voiced by the opposition to the AKP included criticism for alleged undermining of secularism and Atatürk's

and Religion, Bellagio Center (July 2012). For discussion on India, *see generally* BHARGAVA, *supra* note 33; GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1999).

126. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 104-05; Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235, 291-92 (2011).

127. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 105.

128. Nevertheless, it is argued that parts of the constitutional draft proposed by the Özbudun committee were introduced, as have been passed, as part of the 2010 constitutional referendum. *See generally* Bali, *supra* note 126.

principles, as well as the accusation that it was intended to weaken judicial independence and politicize the judiciary, thus creating a system of majority rule that would allow for the strengthening of an Islamic government.¹²⁹ Similarly, the constitutional crises that erupted in the next months, following the AKP attempt to break off the amendment regarding the headscarf ban (Articles 10 and 42) from the broader package of constitutional reforms, illustrate the inseparability between, on the one hand, the debate over Turkey's governmental institutions and the power relations between the various branches and, on the other hand, deep ideological divisions regarding the religious identity of the state.¹³⁰ In 2008, the Constitutional Court of Turkey overturned the constitutional amendments meant to permit religiously observant university students to wear headscarves on campus,¹³¹ which was passed in the parliament by an overwhelming majority of eighty percent.¹³² Moreover, in its ruling the Court held that certain constitutional provisions that are related to a particular conception of secularism foreclosed the possibility of attaining broad constitutional reform through the elected branches of government.¹³³ The constitutional impasse created by the overly activist Constitutional Court led the AKP to introduce a package of twenty-six constitutional amendments in 2010 that was supported by a majority of the voters in a public referendum, including a significant reform of the judiciary.¹³⁴

Despite the different constitutional trajectories of Israel and

129. ÖZBUDUN & GENÇKAYA, *supra* note 36, at 105.

130. Ergun Özbudun, Op-Ed., *New Constitution is Now a Must*, TODAY'S ZAMAN, Oct. 26, 2008, http://www.todayszaman.com/news-156932-reasoning-for-headscarf-decisionnew-constitution-is-now-a-must-by-ergun-ozbudun*.html; Levent Köker, *Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court*, 7 CONSTELLATION 328, 328 (2010); Bali, *supra* note 126, at 239-62.

131. Judgment of June 5, 2008, E:2008/16, K:2008/116, Anayasa Mahkemesi [Constitutional Court] (Turk.); see also Sabrina Tavernise, *Turkey's High Court Overrules Government on Head Scarves*, N.Y. TIMES, June 5, 2008, http://www.nytimes.com/2008/06/05/world/europe/05iht-turkey.4.13505875.html?_r=0.

132. Law No. 5735 of Feb. 9, 2008, Resmî Gazete [R.G.] No. 26796 (Feb. 23, 2008) (Turk.); see also Selcan Hacaoglu, *Turkish Lawmakers End Head Scarf Ban*, USA TODAY, Feb. 9, 2008, http://usatoday30.usatoday.com/news/world/2008-02-09-3972140132_x.htm. The amendment passed by the required procedural majority. *Id.* Four hundred and eleven members voted in favor, while 103 opposed. *Id.*

133. Judgment of June 5, 2008, *supra* note 131. During October 2008, the Constitutional Court of Turkey published its ruling in a second, related case, which discussed the possible closure of the ruling AKP party on the grounds that it had become a "focal point" for anti-secular political activities in Turkey. Judgment of July 30, 2008, E:2008/1(SPK), K:2008/2, Anayasa Mahkemesi [Constitutional Court] Resmî Gazete [R.G.] No. 27034 (Oct. 24, 2008) (Turk.). The court ruled against party closure. *Id.*

134. See generally OZAN ERÖZDEN ET AL., A JUDICIAL CONUNDRUM: OPINIONS AND RECOMMENDATIONS ON CONSTITUTIONAL REFORM IN TURKEY (Serap Yazici ed., 2010), available at http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/ENG/EngYargi1WEB.pdf; Bali, *supra* note 126.

Turkey, there is a growing recognition in both countries in recent years of the need to draft a new formal constitution in order to advance liberal and democratic principles.¹³⁵ The AKP victory in the June 2011 elections generated high expectations for a constitution-making process that would replace the existing 1982 military-written authoritarian constitution. Similar to Israel in 2003, calls for crafting a thin constitution, clear of any illiberal nationalistic or religious elements, have been voiced by leading Turkish legal scholars.¹³⁶ However, as the analysis of the Israeli case counsels, such proceduralist constitutional proposals are not viewed by their opponents as neutral grounds aimed for allowing future political deliberation, but rather as representing a particular liberal-secular vision of the state's identity.¹³⁷ Given the intense divisions within Turkish society over the role of religion in public life, as well as debate over national identity and Kurdish minority rights, it seems that the expectation that a thin constitution would bracket these foundational issues from the allegedly more urgent institutional issues of power allocation between governmental branches would be difficult to fulfill.

The inability to separate between issues of institutional design and foundational question of religious and national identity characterizes other recent and current constitutional debates. This was evident, for example, during the writing of the new constitution in post-Mubarak democratizing Egypt, where intense disputes over the role of Islam concerned both symbolic issues (whether Sharia should be mentioned in the constitution) and institutional questions (e.g. who will interpret Islamic law).¹³⁸ Similarly, in New Zealand, tensions concerning the Maori minority may hinder the enactment of a thin constitution.¹³⁹ Nevertheless,

135. In recent poll, 69.4 percent of the respondents stated that Turkey needs a new constitution. *Poll Shows Huge Public Support for New Constitution*, TODAY'S ZAMAN, Apr. 26, 2011, <http://www.todayszaman.com/news-242059-poll-shows-huge-public-support-for-new-constitution.html>. In a similar Israeli poll, sixty-five percent of the respondents claimed that it was important for them that Israel will have a written constitution. ARIAN ASHER & TAMAR HERMANN, *AUDITING ISRAELI DEMOCRACY—2010: DEMOCRATIC VALUES IN PRACTICE* 97, 114 (Isr. Democracy Inst. ed., Karen Gold trans., 2010).

136. See Köker, *supra* note 130, at 341-42; OZAN ERÖZDEN ET AL., *supra* note 134.

137. Such criticism was voiced by representatives of various NGOs currently involved in drafting constitutional proposals at the Conference on Justice at Times of Democratic Transition: Constitution Making, Judicial Reform and Confronting the Past, TESEV, Ankara, Turkey (Apr. 2011).

138. In the final constitution, Article 2 defines the principles of Sharia as the main source of legislation, while Article 4 gives an interpretive role to Al-Azhar. Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POLICY (Dec. 13, 2012), http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

139. In December 2010, the New Zealand Cabinet initiated a three-year process of constitutional review in reaction to growing Maori-Crown tensions and increasing Supreme Court intervention in Maori property rights issues. See Pita Sharples, *Announcement of Constitutional Review*, THE BEEHIVE (Dec. 8, 2010), <http://www.beehive.govt.nz/release/>

the infeasibility of a thin constitution should not discourage us from searching for alternative feasible constitutional solutions. Indeed, this article was not meant to generate a pessimistic conclusion, but rather to re-direct our attention to the importance of politics rather than abstract legal theory in processes of constitution writing that define the state's ultimate goals and shared vision. When not only institutional reconstruction but also ideological and symbolic issues are at stake, a rational constitutional procedure is inherently difficult to achieve. When the struggle is between competing norms and values, the right solution cannot be defined a priori, but may surface through a long and constant process of political discussions and negotiations.¹⁴⁰ Under such complex circumstances, perhaps there is no right "thin" constitutional solution but rather a set of reasonable "thick" constitutional options. Greater conceptual and empirical work is still very much required in order to allow political scientists and constitutional theorists to support such processes and to enrich politicians' understanding and skills in their search for workable solutions under conditions of deep disagreements over the identity of their state.

announcement-constitutional-review; Bill English & Pita Sharples, *Govt Begins Cross-Party Constitutional Review*, THE BEEHIVE (Dec. 8, 2010), <http://www.beehive.govt.nz/release/govt-begins-cross-party-constitutional-review>. The New Zealand Cabinet listed among its objectives both institutional and foundational goals: revisit of governmental arrangements such as the size of parliament or length of electoral term, alongside consideration of Maori representation and the role of the Treaty of Waitangi within New Zealand's constitutional arrangements. CABINET PAPER AND MINUTE: CONSIDERATION OF CONSTITUTIONAL ISSUES para. 8 (2010) (N.Z.), available at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/d/Cabinet> paper and minute 6 Dec 2010.pdf; see also NEW ZEALAND HERALD, *supra* note 4, at 5.

140. Tamir, *supra* note 50, at 171.