The Israeli Constitutional Revolution - How did it Happen?

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A. INTRODUCTION

Since its foundation in 1948 until the 1990’s, the State of Israel lacked a formal Bill of Rights. Despite the promise of a constitution that was included in the Declaration of Independence,1 two years of public and Knesset debate on the matter made it clear to all that the adoption of a constitution was not feasible at the time. A plethora of obstacles prevented the adoption of a constitution, foremost among them was the failure to find common ground that could bridge over profound ideological and value based disputes, such as that over the appropriate relationship between religion and state, and the reservations of the ruling party, headed by David Ben-Gurion, regarding the adoption of a rigid constitution that would limit its power.2 The result was the adoption of a compromise framework, proposed by M.K. Yizhar Harrari, according to which the constituent process would be carried out in stages, in the form of Basic Laws which would ultimately be amalgamated into a single document with the completion of the process.3 However, this decision too was not fully implemented. Though the Knesset succeeded in adopting a series of Basic Laws, they all dealt with structural issues, totally ignoring the dimension of human rights. Nor was the status of the Basic Laws themselves entirely clear. As noted by Ruth Gavison, "The question of the rigidity and constitutional supremacy remained open and its solution was deferred, and it was not clear whether this would be until the Basic Laws were unified into a constitution, or in the framework of various arrangements in the Basic Laws in the course of time."4 During the

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1 Declaration of the Establishment of the State of Israel, 1 LAWS OF THE STATE OF ISRAEL [L.S.I.] 3, 4 (1948). The declaration refers to “the establishment of the elected, regular authorities of the State in accordance with the Constitution, which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.”


3 Knesset Protocols 1743 (1950). The Resolution states: “The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State’s constitution.”

intervening years, attempts were made to anchor a bill of rights in a Basic Law, but these met with failure.\(^5\)

The failure of the efforts to constitutionally anchor human rights is hardly surprising. Constitutions are usually adopted in crisis situations that compel discussion of fundamental issues and which increase the willingness of rival parties to show flexibility and a spirit of compromise that are the price of consensus.\(^6\) The unique and opportune moment of crisis occurred when the State was established. That moment passed without agreement being reached. In the intervening years, the chasms dividing the sectors of Israeli society deepened rather narrowed, and under these circumstances the prospects for framing a consensual constitution gradually dwindled.\(^7\)

In this context, 1992 was a momentous year in Israeli constitutional history, at least in terms of the Israeli Supreme Court's interpretation of the events post factum. The Knesset, adopted two Basic Laws dealing with human rights: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.\(^8\) Since the adoption of these two Basic Laws, and until the time of this writing, the State of Israel has not had a dull moment. The Court has utilized the Basic Laws as a platform and lever for creating a full-fledged Bill of Rights. A few years after its initial muted and hesitant response to the Supreme Court's initiative, the Israeli legislature too took up the challenge cast down by the Supreme Court. Over the past three years, the Knesset Constitution committee has been working on a draft constitution in an attempt to complete the constitutional process. The Israeli academia too has contributed to this expedited process. Academic discourse originally focused on the fundamental issues of


\(^6\) See Gavison *id. at 152; Jon Elster, *Forces and Mechanisms in the Constitution Making Process*, 45 DUKE L. J. 364, 370 (1995) (“The fact is that new constitutions almost always are written in the wake of a crisis or exceptional circumstance of some sort”); PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 106 (2d ed., 1993), (“No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup”).

\(^7\) Ruth Gavison, a leading Israeli constitutional scholar, expressed such pessimism in 1985. She stated, “[t]oday it would seem almost strange to conduct arguments about the basic premises of the state in the midst of normal politics. It appears that the unique opportunity for a Bill of Rights has passed, at least for now . . . .The power to make a Constitution has not elapsed, but the opportunity has gone. Israel needs another moment of national elation to allow agreement on the formulation of a Constitution.” Gavison, *id. at 153-54.

the legitimacy of the initiative,\(^9\) or the import of defining the state as "a Jewish and democratic state".\(^10\) However, the academic world quickly redirected its focus, now concentrating on the specific constitutional innovations, and their influence on Israeli law in various areas.\(^11\)

Notwithstanding the broad academic discourse of the process that merited the appellation "constitutional revolution", one niggling question remains conspicuous in view of the dearth of legal literature dealing with it: how did it happen? How is it that after 44 years of failures and parliamentary paralysis, one bright morning the *Knesset* suddenly rose to the occasion and anchored a bill of rights in Basic Laws? What were the circumstances that combined to make possible that which had long been regarded as impossible?\(^12\)

In this article I examine four possible explanations of the phenomenon. The first thesis attributes it to the successful exploitation of a constitutional moment that transpired as a result of a severe erosion of public trust in the political branches. At that constitutional moment all those involved internalized the pressing need for a change in the balance of powers and the necessity to fortify the supervisory powers of the court. The second thesis pins the success to the tactics adopted by the initiators of the law. Instead of insisting on the adoption of a full-fledged bill of human rights, they broke down the charter into smaller units and enacted only those parts on which there was consensus. In addition, in general the initiators adopted a conciliatory approach that bridged the ideological chasms among the various parties. According to the third thesis, adoption of these laws was enabled by the fact that the initiators of the procedure were less than entirely candid, and failed to expose the full import of the proceeding they had led, thereby lulling the traditional opponents of the process into a false sense of security. According to this explanation the mistake was compounded by the almost total absence of meaningful constitutional discussion in Israel, which translated into general ignorance regarding the implications of the adoption of a constitutional bill of rights. According to the fourth, and final, explanation the success of the initiative stemmed from two transitions in the Israeli political reality. The first was the Labor party's loss of

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\(^9\) See *e.g.*, Eli Salzberger, *Constituent Authority – “Two Notes on Incidental Comments, or an Invitation for Renewed Discussion, 3 LAW AND GOVT IN ISRAEL 679 (1996) [Hebrew].*

\(^10\) See *e.g.*, the collection of articles in 19 TEL-AVIV U. L. REV.

\(^11\) There is no point to name all the many articles. For A compilation of the articles dealing with the effect of the Basic Laws on the various areas of Israeli Law see Aharon Barak, *The Constitutional Revolution – Bat Mitzvah, 1 MISHPAT VE-ASAKIM 3 fns. 151-157 (2004) [Hebrew] (hereinafter: *Barak – Constitutional Revolution*).

\(^12\) In an article published soon after the passage of the Basic Laws, Claude Klein notes that "The paths of the Israeli democracy and its legislators are strange. Is there any serious observer who one year ago, would have risked anticipating the passage of those laws?" Claude Klein, *Basic Law: Human Dignity and Liberty – An Initial Normative Assessment, 1 HAMISHPAT 123 [Hebrew].
hegemony and the uncertainty regarding the future identity of the coalition; the second was a strengthening of sectorial factors that threatened the secular-bourgeoisie hegemony. The first change weakened the coalition's inherent resistance to the constitutionalization of the political system and the second change neutralized the institutional interest of the Knesset members representing the old—elites against the constitutional project. 

A close examination of the four abovementioned theses leads to the conclusion that none of them on its own may adequately account for what occurred in Israel, yet there is compelling logic in the claim that each of the four explanations made its contribution to the success of the Israeli Constitutional Revolution.

B. A HISTORICAL MOMENT

Bruce Ackerman proposed dividing the history of the democratic process into two temporal categories.  

Most political epochs are characterized by ongoing regular democratic process, but some of them feature a sharpened public awareness of the decisive importance of the burning constitutional issues of the day. During the latter, the public's voting patterns do not express their concerns relating to everyday politics but rather its intelligent assessment of the constitutional issues at the forefront of public attention. Ackerman uses this distinction *inter alia* to explain and justify, from a democratic perspective, several constitutional changes, experienced by the United States as a result of Supreme Court decisions, which were not anchored in a formal constitutional amendment.

The most striking among these changes was the Court's reversal of attitude to initiatives led by President Roosevelt in the thirties of the twentieth century in response to the grave economic crisis that beset the United States. For a number of years the Court had blocked these initiatives, systematically overturning a series of laws intended to give them effect. At a certain point in time though, the Court suddenly changed its tune, and began to validate laws that it had struck down just a short time earlier. One of the explanations for this reversal was the Court's fear of a possible assault on its independence. Ackerman claims that the reason for the change lies elsewhere, not in judicial surrender, but rather in the Court's awareness of and response to a constitutional change that had overtaken the United States.  

Ackerman asserts that the Presidential elections of 1936 were conducted during a time of "constitutional

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politics”, in an atmosphere of enhanced, acute public awareness of the importance attaching to the ideological dispute between the President and the Supreme Court, and the underlying ideologies motivating their respective conceptions. The massive public support for the President in the 1936 elections expressed a constitutional verdict. The Court honored the public's verdict and hence the metamorphosis in its approach.\(^{15}\)

Ackerman's theory is primarily descriptive, but it also contains a normative aspect. It does not only explain the change in the approach of the Supreme Court, but also justifies it. The Court's amendment of the constitution is problematic, and becomes all the more so in view of the fact that the constitution establishes a clear and different mechanism for its change.\(^{16}\) The claim that the constitutional change was not the result of a judicial resolution but was rather a public decision, resolves at least part of the problem.\(^{17}\)

The factual details of Ackerman's theory do not fully square with the Israeli reality. In contrast to the American example, in Israel the constitutional change was not the result of a conflict between the court and the political system, nor did it originate after the public expressed its view in the elections. Nonetheless the principle underlying Ackerman's theory may also shed light on the Israeli process on two planes: the factual and the normative. We presented the factual question above – How did the Knesset succeed in overcoming the obstacles, and against overwhelming odds enacted a constitution? The normative question pertains to the legitimacy of the constitutional initiative. A core question dealt with by the Israeli Supreme Court in a foundational judgment, handed down some time after the Basic Laws of 1992, concerned the source of the Knesset's authority to enact a constitution. The justices proposed a number of formal answers to the question,\(^{18}\) but did not succeed, nor even


\(^{16}\) Ackerman's theory attempts to resolve an additional difficulty, the counter-majoritarian one. As explained by Marc Tushnet, "Ackerman's answer was that public deliberation during constitutional moments had special characteristics . . . that gave constitutional innovations made during such moments normative priority over later decisions during periods of regular politics.” Mark Tushnet, *Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm*, 3 INT'L J. CON. L. 262, 263 (2005)

\(^{17}\) The normative validity of Ackerman's thesis has been criticized. According to this critique, in the absence of a constitutional amendment, an interpretation that is inconsistent with the original intent is not legitimate. See e.g. Steven Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469, 476 (2006).

attempt to deal with the attendant value based conundrum. For even if various formalistic
theories conferred the Knesset with the authority to enact a constitution, by way of regular
legislation devoid of any distinguishing features, this is hardly an appropriate method of
adopting a decision of such vast political significance.\textsuperscript{19} Ackerman's approach may remove
the sting from the value-based criticism. If it transpires that in Israel too, the constitutional
change occurred during a period of constitutional politics, reflecting an informed and
intentional public choice, it would provide an answer to not only to the factual question, but
to the normative problem as well.

Implementation of Ackerman's theory in the Israeli context might take the following path:
During the eighties and the early nineties, a series of morally and politically problematic
issues triggered extensive and intensive public distrust, if not to say disgust with the entire
political system. The result was the emergence of broad public consensus in support of a deep
and systemic revamping of the political system as a precondition for solving the crisis. This
engendered two profound and far-reaching changes. The first change was in the relationship
between the legislature and the executive branch, with the transition from the model of
parliamentary democracy to a hybrid model comprising features of the presidential model,
which intended to strengthen the standing of the government and its leader.\textsuperscript{20} The second
innovation related to the relationship between the legislature and the Court, expressing itself
in the adoption of the Basic Laws that enable Supreme Court supervision of value based,
legislative decisions. According to this line of argument, the new Basic Laws were the direct
result of the crisis that beset the Israeli political system, and the public recognition of the dire
need for change.\textsuperscript{21}

Ackerman's theory is complex, and involves more than just the moment of constitutional
politics. In fact it comprises a four tiered system of constitutional change.\textsuperscript{22} At the first stage,
a branch of government proposes a constitutional change. The next stage is the blocking of

\textsuperscript{19} A detailed version of this claim appears in Cheshin's judgment, \textit{id.}

\textsuperscript{20} Basic Law: The Government, S.H. 1396 (1992). This venture turned out to be a dismal failure and a few years
later the Knesset decided to abandon the hybrid model, and to return to the parliamentary model.

\textsuperscript{21} This type of explanation is given by Daphne Barak-Erez, \textit{From an Unwritten to a Written Constitution: Israeli Challenge in American Perspective}, 26 COLUM. H. R. L. REV. 309, 351-352 (1995)

\textsuperscript{22} Ackerman, \textit{supra}, n. 13, pp. 266-277
that same initiative by another branch of government. The third stage is the decision making stage, which is accompanied by public discussion. The public’s position will determine whether initiative for constitutional change is to be crowned with success or doomed to failure. Where the change merits public support, the particular branch of government opposing it will withdraw its opposition, and if it does not support the change, the initiative will fail and the existing constitutional regime will remain unchanged. This complex system is of importance both in the descriptive and the normative sense. The head on collision between the court and the political system is a decisive factor in the creation and stimulation of public awareness. Conducting elections in the shadow of a focused debate provides normative justification for constitutional change. Concededly, this process need not be precisely replicated in order to testify to public involvement and thereby justify the constitutional change in its wake, but absent that kind of framework it becomes necessary to point to another indicator attesting to the constitutional moment and the public support for the process of change.

It is difficult to point out a clear indication of a constitutional moment in Israel, which preceded the adoption of the Basic Laws, and which evidenced a broad base of public support. The claim of a crisis of trust between the public and the political system during the relevant period, appears to be substantiated, but there is no support for the assertion that the ramifications of the constitutional revolution were presented, and discussed, and that they received broad public support prior to the Knesset vote on the adoption of the new Basic Laws. The issue received limited media coverage both prior to and following the passage of the Basic Laws, and even within political echelons, there was no evidence of any commotion that might have attested to the heightened awareness of the historical nature of the moment. Most of the Knesset Members voted with their feet, not even bothering to appear

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23 See e.g. GUY BECHOR, CONSTITUTION FOR ISRAEL (1996) [Hebrew].
24 As noted by Amnon Rubinstein, "Most of the media failed to even report the legislative process, and the television totally ignored it. When the law passed the second and third readings journalists reported the matter, but the editors did not regard it as news-worthy. Most of the media did not even inform their readers that the Knesset had passed a law as revolutionary as Basic Law: Human Dignity and Liberty." Amnon Rubinstein, The Knesset and Basic Laws on Human Rights, 5 LAW AND GOVT IN ISRAEL 339, 349 (2000) [Hebrew]. In the weeks following the passage of the laws, a number of interpretative articles were published by experts in Public Law. See Claud Klein, The Quiet Constitutional Revolution, MAARIV, 27.3.92 [Hebrew]; Baruch Beracha, From Rhetoric Speech to the Language of Law, HAARETZ, 2.4.92 [Hebrew]; Amnon Runbinstein, A Big Constitution Arrives, HAARETZ, 3.4.92 [Hebrew]. It would seem however that these articles attest precisely to the absence of public and media awareness of the far reaching implications of the Basic Laws.
in the Knesset Plenum to vote on the Basic Laws. As noted by Ruth Gavison, "The high profile of the new Basic Laws . . . commenced with a series of articles and speeches given by Justice Barak, who has the copyright on the commonly accepted appellation of the 1992 legislation as the 'Constitutional Revolution'." These data hardly point to a picture of a historical moment, being rather a snapshot of a strikingly regular, normal political moment. As indicated by Aharon Barak "the Constitutional Revolution took place quietly, almost clandestinely." The contention regarding the adoption of the constitution on a "small day" was raised in the past in the framework of the debate on the normative justification for a constitutional revolution. But, to the extent that it is true it undermines the basis for Ackerman's theory in the Israeli context, on the factual basis too. If the enactment of the Basic Laws was not the natural outgrowth of broad public support, against the background of the trust crisis in the political system, how did initiators of the legislation succeed in overcoming the obstacles that had inhibited the completion of the process for an entire generation?

C. COMPROMISE

One of the major obstacles to the enactment of a constitution when the State was created was the disagreement among the diverse sectors of Israeli society as to the contents of such a constitution. The Harrari resolution attempted to overcome this difficulty by the segmentation of the constitutional enterprise. Reaching agreement on a comprehensive document seemed an impossible task, but this did not preclude the attempt to progress in stages, anchoring partial agreements at each successive stage. One of the explanations for the 1992 success, appearing in statements made by a number of those who were involved in the promotion of the Basic Laws legislation, was that the initiators adopted the same method. Instead of insisting on a full-fledged bill of rights, they chose to proceed step by step. At the first stage

25 Basic Law: Human Dignity and Liberty, the more important of the two, was confirmed in the third reading in the Knesset on 17.3.92. 54 Knesset members participated in the vote, with 32 voting for, 21 against, and one abstention.

26 Gavison, The Constitutional Revolution, supra n.4, at 96, note 177. Gavison refers to an interview conducted with Barak in the legal journal, ORECH DIN, where Barak said: "In March 1992 two Basic Laws were issued in absolute silence. March passed, April, May and nothing, nothing at all happened, and as I read the two Basic Laws I said to myself: this is our Constitution. And then, in a short lecture that I gave, I spoke about the constitutional revolution." Barak himself demonstrated his courtesy, and granted the copyright on the term "constitutional revolution" to Claude Klein. See Barak - Constitutional Revolution, supra n. 11, at 5 ("Copyright on public use of the term "constitutional revolution" apparently belongs to Claude Klein, who in an article published in MAARIV on the 27.3.92 wrote that with the passage of two Basic Laws dealing with human rights, a quiet constitutional revolution had occurred.")

27 AHARON BARAK, SELECTED WRITINGS, (Haim H.Cohn and Yitschak Zamir, eds. 2000, vol. 1) 401, 415-416 [Hebrew].

28 See primarily in the judgment of Cheshin in United Mizrahi Bank, supra, n.18.
they anchored those rights that enjoyed broad consensus, and deferred the continuation of the process until a later stage.\textsuperscript{29} Less problematic rights such as human dignity, property rights, freedom of movement, and freedom of occupation, were included, while the more problematic and politically contested rights in the Israeli context, such as freedom of religion, freedom of expression, and equality were omitted from the Basic Laws, or removed from them during the negotiation stages. In addition to agreement on the provisional removal of some of the rights, the same writers point to a number of other concessions intended to allay the fears of the religious front, which had traditionally opposed the anchoring of human rights in a Basic Law.\textsuperscript{30}

There are those who are rather skeptical regarding the sincerity of the intentions of the laws’ initiators to compromise.\textsuperscript{31} But either way, today it is crystal clear that irrespective of their degree of sincerity, the Israeli Supreme Court rendered the compromise meaningless. The Court adopted a strategy that enabled it to read all of the missing rights into the language of the Basic Laws.\textsuperscript{32} The conduit chosen by the Court to do this was the term “Human Dignity”, and the interpretative method presented in the effort to justify the judicial broadening of the ambit was that of “purposive interpretation”, as conceived by President Aharon Barak.\textsuperscript{33} Among the justices of the Supreme Court there were some who had principled reservations regarding the judicial expansion of the rights included in the Basic Laws. For example, Justice Dorner, whose term in the Supreme Court was characterized by extensive activism, did not endorse the inclusion of the right to equality, and freedom of expression within the framework of human dignity.\textsuperscript{34} She based her reservations on the originalist interpretative

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{29} Yehudit Karp, \textit{Basic Law: Human Dignity and Liberty—A Biography of Power Struggles}, 1 LAW AND GOV'T IN ISRAEL, 323, 338 (1993) [Hebrew]; Rubinstein, supra, n. 24 at 340 (“How is it that despite everything, a basic law as important as Basic Law: Human Dignity and Liberty came into being? How is that the Knesset, at a unique hour of grace, accepted these laws, after all the previous attempts had shattered on the rocks of political and religious opposition. It should immediately be said that had the draft bill not been split up into four separate draft bills, then entrenched human rights in the Twelfth Knesset would have had the same fate as in the previous Knessets”.)
\item \textsuperscript{30} See Rubinstein, id. at 346.
\item \textsuperscript{31} See for example Karp, supra n. 29 at 358 (“Conceivably, supporters of the law supported it because of their assumption that the omission with respect to the equality section would be filled in by the court by force of interpretation or judicial innovation, which would rely on the basic principles of the system.”)
\item \textsuperscript{32} See Hillel Sommer, \textit{The Non-Enumerated Rights: on the Scope of the Constitutional Revolution} 28 MISHPATIM 257 [Hebrew].
\item \textsuperscript{34} H.C. 4541/94 \textit{Miller v. Ministry of Defense}, 49 (4) P.D. 94,131 (equality) (“The legislative history of the Basic Law indicates that the omission of the general principle of equality was intentional…. In view of this
method, while pointing out that the pitfalls of this method do not apply to the Israeli reality. Over the years however, the position of those supporting the broad reading gradually became the dominant position. To date, the Court has yet to strike down legislation by reason of a contradiction between the provision and unenumerated rights, but the *obiter dicta* of countless judgments has rendered these rights a part of Israeli Constitutional Law.  

According to the explanation being examined, the consent of the traditional opponents of the constitution to support the Basic Laws was based on their understanding that it represented a compromise, in the framework of which the problematic rights had been deleted from the proposal, and only those acceptable to all were retained. However, this explanation too has its difficulties. Even if the particularly problematic rights, such as freedom of religion and equality, were omitted from the Basic Law, the consent to the anchoring of the rights which *were* included in the Basic Laws is far from simple. What reason could the religious *Knesset* Members have had for waiving their principled and sweeping opposition to the enactment of a bill of rights? One view is that the religious consent is a result of the fact that the Basic Laws also anchored the Jewish character of the State. However, even were we to agree that the aforementioned anchoring of the Jewish character of the State carried a certain weight in

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37 Support for this explanation can be found in statements made by M.K. Yitzchak Levi in the debate preceding the first reading on the private bill submitted by Dan Meridor and Benny Begin with the aim of adding a rigidity provision to Basic Law: Human Dignity and Freedom. Levi explained that despite his party's support for the original legislation in 1992 it would oppose the proposal because meanwhile Barak's article had been published, which included his interpretation of "Jewish and Democratic State", an interpretation that emptied it of any Jewish content that was not also universal. See *Knesset Protocols* 2.8.93, at 7179-7180.
softening up the religious front, we are still left wondering why they agreed to the law. Didn’t they understand that empowering the court would ricochet against their own interests, even after the removal of certain more problematic rights? In fact, in comments after the fact, the opponents give expression to another possible explanation. It is to this explanation that we now turn.

D. DECEPTION

This thesis views the success of the 1992 initiative as stemming from mistake and deception. The initiators of the law exploited their opponents' ignorance, presenting them with a misleading picture, on the sole basis of which they withdrew their opposition.38 For example, Knesset Member Uriel Lin, Chairman of the Constitution Committee, when submitting Basic Law: Human Dignity and Liberty to the Knesset for the second reading, said the following:

We are not transferring the focus of power to the Supreme Court. Nor are we adopting the format proposed in Basic Law: Legislation or Basic Law: Human Rights that were filed at time. No Constitutional Court has been established…which will be conferred with special power to strike down laws.39

Knesset Member Lin further stated:

The authority was not transferred to the judicial system. The authority remains in this house. And if heaven forbid our experience with this law shows that we made a mistake, and that the interpretation given to this law is incongruous with the legislator's original intention, then the Knesset has the ability to change the law. . . . I oppose the establishment of a constitutional court because I think that it confers far reaching powers to a small group of judges whose interpretation will determine the deletion of laws in Israel.40

38 See for example, the following expressions: "On a certain day, or more correctly – night, in an atmosphere totally devoid of any festivity, two laws were submitted to vote, and less than half of the House members were present… nobody mentioned that this was a constituent assembly, nobody said that this was a revolution, and nobody said that any constitutional change was underway. Then they voted. A few months later they informed the people: a revolution had taken place. Nu, this was the first revolution that took place without the public being aware of it. Only after the fact was it informed of the revolution…those Knesset members who perhaps knew that this was a far reaching step, intentionally hid that information from the other Knesset members… this is how one builds a constitution? Why was it necessary to deceive the Knesset members?" (M.K. Michael Eitan, Knesset Protocols 16.1.95) "In the previous Knesset, already late at night, the Basic Laws were passed. These were the Basic Laws that were supposed to be adopted in the full plenum of 120 Knesset members. This is the festive day for democracy when the constitution is adopted late at night, while intentionally deceiving the religious and ultra-orthodox public, whose consent they required in the previous Knesset session…” (M.K. Aryeh Deri, Knesset Protocols 12.2.96).

39 Knesset Protocols 3783 (1992)

40 Id., at 3788
The compromise thesis discussed above dealt with a compromise on the contents of the constitution, a compromise that was not honored by the Supreme Court. Its veracity may impugn the legitimacy of the constitutional enterprise and its consequences, but in my view it does not lead to its categorical invalidation. Conceivably the constitutional history of other democracies contains no parallel example of such blatant judicial disregard for the constitutive intention so soon after the adoption of the constitution. But there are definitely cases in which over the years the court interpreted the constitution in a manner that deviates from the original intention of its drafters.41 Those who in principle reject judicial intervention in the formulation of the constitution will certainly berate the conduct of the Israeli Supreme Court, and even those supporting such intervention as a matter of principle may nevertheless have reservations in the Israeli context due to the head-on confrontation between the legislative intention and interpretation given by the Supreme Court, especially given the chronological proximity between the two. Nonetheless, the difference between constitutional judicial legislation in Israel and constitutional judicial legislation in other countries is one of degree only. On the other hand, the deception thesis, presuming its validity, challenges the fundamental validity of the new Basic Laws. The challenge to their validity does not flow from the immoral nature of the deception, but rather from its consequences: What possible validity can a document referred to as a 'constitution' have if adopted under circumstances in which a significant portion of its supporters were unaware that they were actually voting for a constitution? To the best of my knowledge, no precedent exists in any democratic state for a process in which the court determines post-facto that a constitution was adopted under circumstances in which a significant number of those who supported it were in fact unaware

41 For example, in France, the Constitution of the Fifth Republic of 1958 does not include a bill of human rights, but its preface refers to the proclamation of 1789, and to its confirmation and completion in the preface to the 1946 constitution. In 1970 the French Government prohibited the establishment of a leftist political party, relying on the 1936 law which banned the existence of private militias. In response, a group of citizens established a an association going by the name of the newspaper of a party that had been outlawed. The Minister of the Interior gave instructions not to recognize the party. His decision was overturned by the Administrative Court, in reliance on clear precedents of the Supreme Administrative Court. In response, the Government passed a law that vested the registrar with the authority to refuse to register an association that "appeared to have an immoral or illicit purpose or to be trying to reconstitute an illegal association". The President of the Supreme Court submitted a query to Constitutional Committee, claiming that the law contravened the provision of s. 4 of the Constitutional Council which provided that parties and political groups could associate and operate freely. The Constitutional Council struck down the law by a majority of 6 against three, but its decision was not based on section 4, but rather on the preface to the Constitution which in the Council's view had introduced the 1789 Proclamation of Human Rights into the Constitution, the opening declaration of the Fourth Republic Constitution of 1946, and the Fundamental Principles recognized by the law of the Republic. For a detailed description see, ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 66-69 (1992). As is well known, in the U.S. too the Court has demonstrated its creativity in the interpretation of the Constitution. For a critical discussion, see Bork, supra n.35.
that the issue at hand was a constitution. Concededly, according to the doctrine espoused by Barak in the *Laor* case, the court does not even require a written constitution as a precondition for its exercise of substantive judicial review. However this is purely from a theoretical perspective. In practice, Barak himself cited the enactment of the Basic Laws as the time at which the Israeli Constitutional Revolution occurred, and he insists on the anchorage of rights in the text of Basic laws as the precondition and the criterion for the exercise of judicial review. From here it may be inferred that even according to the consummate activist, the constitutional status of Basic Laws in Israel is a condition for the exercise of judicial review.

Either way, our concern is not with the normative implications of various explanations for the success of the constitutional proceeding in 1992 but rather with the explanations themselves. On this level, the deception thesis is marred by a certain weakness. For even if the initiators of the legislation attempted to camouflage the real significance of the proceeding, is it possible that the traditional opponents were really unable to see through the smokescreen? Even if we accept the claim that the average Israeli politician is occupied primarily with survival, and is less concerned with parliamentary work that requires knowledge and understanding, the starting point of our discussion was that previous attempts to anchor human rights in Basic Laws failed precisely because of their opponents' awareness of the far reaching implications of such legislation. It is difficult to accept that the 1992 *Knesset* was ignorant to the extent of being gullible enough to buy that which had not been sellable to its predecessors.

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42 See Moshe Landau, Symposium, The Mizrachi Judgment -- Three Years Later, 5 HAMISHPAT 249, 254 ((2000) [Hebrew] ("The Constitution as depicted by President Barak is the only one in the world to have been created by a judicial proclamation.")

43 H.C. 142/89 *Laor Movement v. Knesset Speaker*, 44 (3) P.D. 529. In fact, the innovation in the *Laor* case was even more far reaching. Not only did Barak raise the possibility of disqualifying a law despite the absence of a written constitution permitting it, but he gave legitimacy to a standard stricter than that normally determined by a written constitution regarding cases in which a statutory provision severely violates fundamental values of the system. The case concerned a document of constitutional validity that determined a particular norm. In Barak's view, the law in question complied with the requirements of the constitutional document, but Barak was still prepared to consider the possibility of its disqualification. This possibility was also raised, though not analyzed in depth, in Barak's judgment in H.C. 4676/94 *Miteral v. Israeli Knesset*, 50 (5) P.D. 15. In HCJ 3267/97, 715/98 *Rubinstein v. Minister of Defense*, 52 (5) P.D. 481, Justice Cheshin raised an even more extreme possibility, whereby the Council might not only posit a stricter standard that that determined by the constitution, but would even rule expressly against its provisions: "]secondary legislation cannot provide Yeshiva students with an exemption from military service in the normative sense. We are all agreed on this point. Personally, I will not relate to the question (regarding which we were not asked to decide) whether primary legislation of the Knesset could exempt Yeshiva students from military service. There are those who would claim (and I will not elaborate) that even a Knesset Law would not be sufficient. It could further be contended that even a Basic Law would not be sufficient." Id., at 541
I once proposed a partial answer to this challenge. Conceivably, the opponents of constitutional anchorage of human rights were negligent in their work, however even had they been far more serious and thorough, they would have had reasonable grounds for accepting the claims of the initiators of the legislation, at least with respect to Basic Law: Human Dignity and Liberty.\footnote{Gidon Sapir, \textit{Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment}, 22 \textit{HASTINGS INT'L. \\& COMP. L. REV.} 617, 657 note 134.} The view that has gained increasing currency in Israel over the years is that Basic Laws do not enjoy normative supremacy, apart from their entrenched components.\footnote{See for example the comments of Justice Elon in \textit{Laor, supra} note 43. ("It is undisputed that as a rule, the validity of Knesset legislation is not subject to judicial review, apart from exceptional cases in which secondary legislation is enacted in contravention of the "entrenchment" of a Basic Law. In the latter case, the validity of the legislation is subject to judicial review, and should it be found that it was enacted in contravention of the entrenchment in the law, the Court will declare that the legislation was illegally enacted." \textit{Id.} at ## of his opinion). For an analysis of this view, see MARTIN EDELMAN, \textit{COURTS, POLITICS, AND CULTURE IN ISRAEL} 13-25 (1994).} Furthermore, the concept of entrenchment was understood, simply, as referring to formal requirements (perhaps even proceeding) that were a condition for changing the law. Basic Law: Freedom of Occupation is entrenched. Basic Law Human Dignity and Liberty is not entrenched. Therefore, according to the constitutional doctrine accepted at the time of the enactment of the Basic Laws, only Basic Law: Freedom of Occupation was intended to enjoy constitutional status, which would enable review of primary legislation.\footnote{See Klein, \textit{supra}, n. 12 at 125 ("If… for example we were to adopt what has been the accepted view in Israel for a few years, to the effect that no supremacy at all attaches to non-entrenched Basic Laws, the inevitable conclusion would be that any future legislation in conflict with a provision of Basic Law: Human Dignity and Liberty, would supersede it.)} As noted by Judith Karp, "Prima facie, Basic Law: Human Dignity and Liberty lacks any accepted and recognizable feature that would attest to the legislator's intention to make it a meta-law, enjoying superior constitutional status and which would determine the validity of laws that contravened it."\footnote{Karp, \textit{supra}, n. 29 at 361.} Indeed scholars writing for purely academic purposes just after the adoption of the Basic Laws, determined that Basic Law: Human Dignity and Liberty does not enable judicial review.\footnote{E. Sprinzak \\& L. Diamond, \textit{Introduction}, in \textit{ISRAELI DEMOCRACY UNDER STRESS} (E. Sprinzak \\& L. Diamond eds., Boulder, Rienner, 1993) 20, note 1. ("Although the law… was adopted as a basic law, in contrast to the new Basic Law Freedom of Occupation, it was not entrenched… Thus, although it is called a basic law, it does not include the element that grants this appellation practical meaning").} Even President Barak, whose academic writing addressed the question of status of Basic Law: Human Dignity and Liberty, left this question as requiring further examination.\footnote{See Aharon Barak, \textit{The Constitutional Revolution: Protected Human Rights}, 1 \textit{LAW AND GOVT. IN ISRAEL} 9 (1992) [Hebrew] (Barak expressed the hope that the discourse over the constitutional status of Basic Law: Human Dignity and Liberty, which contains an limitation clause which is not entrenched, would become redundant when the law itself becomes entrenched); Aharon Barak, \textit{Protected Human Rights in the Private Law},}
academic writing as a preliminary accessory tool for substantiating a disputed judicial innovation that he was about to introduce, could easily have anticipated what was to come.\footnote{See Roi Amit, The Canonic Positions – The Barak Text as a Canon in the Making, 21 TEL-AVIV U. L. REV., 93, 118 [Hebrew]. (“The theoretical text enables taking a direct position with respect to the judicial text, taking a stand/position and outlining policy that has yet to be expressed in the court itself”). In his article Amit examines additional methods by which Barak succeeds in conferring a canonical status to the positions he presents, even in cases in which they represent an innovation and deviation from the previously accepted view. One of the methods is the resort to obiter dictum and quoting it at a later stage as part of the ruling. Awareness of Barak’s utilization of this technique has even spread to the U.S.A. See Richard A. Posner, Enlightened Depost, THE NEW REPUBLIC (23.4.07).} However the fact that Barak required an interim period on his way to substantiating constitutional status of the Basic Law indicates the problem and the difficulty of the procedure that he was leading.

The end of the story is well known. The Court changed the doctrine. Initially, it added the idea of "substantive entrenchment" which conferred supremacy on Basic Law: Human Dignity and Freedom, and subsequently it altogether waived the requirement of entrenchment as a condition for normative supremacy, thereby investing all of the Basic Laws with constitutional status.\footnote{Regarding Basic Law: The Knesset, see EA 92/03 Shaul Mofaz v. Central Election Committee Chairman for the Sixteenth Knesset, 57(3) P.D. 793. Regarding Basic Law: The Judiciary, see LCA 3007/03 Shaul Mofaz v. Central Election Committee Chairman for the Sixteenth Knesset, 56(6) P.D. 592; HCJ 2208/02 Shalama et al v. Minister of the Interior, 56(5) P.D. 950; HCJ 212/03 Herut National Movement v. Chairman of Central Elections Committee to Sixteenth Knesset, 57(1) P.D. 750; HCJ Amuta for Co-Existence in the Negev v. National Infrastructures Ministry et al, 57(2) P.D. 102; Regarding Basic Law: The Government, see HCJ 1384/98 Avni v. Prime Minister et al, 52(2) P.D. 206. For a description and assessment, see Ariel Bendor, Four Constitutional Revolutions, 6 LAW AND GOV’T IN ISRAEL 305 (2003).} The bottom line is that the Constitutional Revolution did not occur in 1992 with the enactment of the Basic Laws. The accepted doctrine at the time of their enactment was that only Basic Law: Freedom of Occupation enjoyed constitutional status, and this law only entrenched one specific right. Basic Law: Human Dignity and Liberty only became a constitutional law at a later stage, in the Mizrahi judgment, in which the Court changed the constitutional doctrine.\footnote{United Mizrahi Bank, supra note 18.} If the revolution did not occur with the enactment of the Basic Laws, it obviates the need to explain how those who initiated the laws prevailed over the traditional opposition.

The deception claim is an alluring one, but not free of weaknesses. In an article written a number of years after the enactment of Basic Law: Human Dignity and Liberty, the law’s initiator, Professor Amnon Rubinstein, adamantly refutes not only the deception claim, but also the claim of mistake. Rubinstein insists that when voting on Basic Law: Human Dignity
and Liberty, the *Knesset* Members were clearly aware that they were voting on a law with constitutional status, and that the success of this proceeding was neither the result of mistake or deception but rather of a compromise that was reached.\(^{53}\) Indeed, Rubinstein's statements sharply contradict the aforementioned statements of *Knesset* member Lin, but the evidence adduced in support of his claim, for the most part, is not easily refuted. For example, Rubinstein cites *Knesset* member Levi, the then leader of the National Religious Party,\(^{54}\) in a newspaper interview in which Levi explains that he personally initiated the inclusion of the principles of the Israeli Declaration of Independence in Basic Law: Human Dignity and Liberty so as to block the possibility of a repeal of the Law of Return by the Court.\(^{55}\) This citation gives the impression that the N.R.P leader was well aware of the potential of the law. Rubinstein argues that the claim of deception is similarly incongruous with the battle waged by representatives of the religious parties regarding the rights to be included and the wording of the section dealing with the saving of laws. If Rubinstein is correct, not only was there no deception, there was not even any mistake.

The attempt to explain the religious parties' consent with the fact that Basic Law: Human Dignity and Liberty is not entrenched (thus justifying the assumption that the law lacked constitutional status) is problematic too. An entrenchment section was actually included in the original draft law. It was only omitted in the second reading in the wake of the reservations of *Knesset* members Ravitz and Halpert, the representatives of the ultra-orthodox, which were adopted by a bare majority of one vote.\(^{56}\) *Knesset* Member Levi too, who supported the law, gave advance notice that he would vote in favor of omitting the entrenchment section. *Prima facie*, this attests to the religious *Knesset* members' informed understanding of the decisive importance attaching to the issue of entrenchment, and as such provides further support for the explanation we gave. However, an opposite conclusion can also be extracted from this datum. If the Religious *Knesset* members had really internalized that the constitutional status of Basic Law: Human Dignity and Liberty would rise or fall in accordance with its position on the entrenchment issues, and if they really had no intention of granting the Supreme Court the power of judicial review, why then did *Knesset* Member Levi support the draft bill in the first reading, instead of actively opposing it, as long as

\(^{53}\) Rubinstein, *supra* n. 24 at 350 ("The claim that the Knesset was unaware of the possibility that it was passing a meta-law that would enable judicial review is unfounded").

\(^{54}\) On the NRP and its attitude towards the state, see Charles S. Liebman and Eliezer Don-Yehiya, Religion and Politics in Israel, ch. 7 (1984).

\(^{55}\) Rubinstein, *id.* at 341.

\(^{56}\) For a description of the unfolding of events in this matter, see Rubinstein, *id.* at 347.
entrenchment provisions had not been omitted? How was it that ultra-orthodox Knesset members, who then served in senior positions in the coalition, allowed the draft bill to even reach the stage of the second reading, instead of using all the parliamentary measures at their disposal to torpedo it at an earlier stage?

The claim of deception and mistake in the strong sense encounters a number of factual difficulties, but a somewhat toned down version might be more convincing. The weakness of the deception/mistake claim derives to a certain extent from a skewed understanding of the events of 1992, when viewed purely from the perspective of today's reality. We must however be careful to avoid that kind of anachronism. Certain legal-constitutional realities of which the contemporary Israeli law student has precise knowledge were altogether unknown in 1992. As noted by Yoav Dotan, until 1992 "Israeli case-law was dominated by the principal of parliamentary supremacy. The course on constitutional law in law faculties was essentially an introductory course to the laws of public administration. A highly instructive example of this is given in the best known academic text on Israeli constitutional law – Prof. Rubenstein's book on the Constitutional Law of the State of Israel. From the dozens of chapters comprising the book, just one of them addresses the constituent standing of the Knesset, and that chapter too consists largely of a historical survey. Judicial review of the constitutionality of laws occupies about five pages only . . . The possibility of a court deviating from that framework, and systematically reviewing, and even overturning Knesset legislation that contradicted various entrenched sections of Basic Laws, is mentioned as "speculation" only, which contradicted the dominating principle at that time – of parliamentary supremacy."57 The current awareness in Israel of the possibility of judicial review stems from Court's use of the powers that it arrogated itself, and from the proliferation of public responses to the actions of the Court. Had MK Levi known then what he knows today, he would presumably have adamantly opposed the enactment of the Basic Laws. In that sense, Knesset Member Levi's support for the Basic Law may be regarded as a mistake.58

57 Yoav Dotan, A Constitution for the State of Israel - The Constitutional Dialogue after the "Constitutional Revolution, 28 MISHPATIM, 149, 166-167 (1997) [Hebrew].
58 This is the only way of understanding the following kind of statements made by M.K. Levi, where he relates to the meaning of the limitation clause proposed for Basic Law: Freedom of Occupation: "The question is how does one understand the section. One interpretation would be that the law is a law, and this Basic Law does not presume to limit any other law….the other possibility is to say that …here we are qualifying other laws, and declaring that the laws will be examined, and if they contain elements that are not in the public interest, then the Basic Law will prevail. …My understanding is that this Basic Law does not purport to cancel any other law" (Protocol of debate in Constitution, Law and Justice Committee on 5.2.1992, p.32). None of the members of the Committee bothered to relate to these comments.
The deception claim too may be expressed in a milder form. Prior to the enactment of the Basic Laws, constitutional law experts had an advantage over their Knesset counterparts who were not versed in the law in general, and specifically in constitutional law. Jurists such as Rubenstein and Lin knew and understood far more than Knesset members who lacked legal training such as Levi, Ravitz, and Halpert. Under these circumstances, the statements cited above of Knesset member Lin, who then served as head of the Constitution Committee and who orchestrated the various stages of legislation, could be accepted at face value and could slowly penetrate the awareness of those who had traditionally opposed the law. As opposed to this "popular understanding" of Lin's statements Amnon Rubinstein proposed a more esoteric, sophisticated reading, viewing them as relating to the question of the model to be chosen for implementation of judicial review – would it be a Constitutional Court, or would the authority be transferred to the regular courts – and not as dealing with the question of whether the court would have any authority at all to invalidate primary legislation.59 A few years after the adoption of the Basic Laws, Lin became aware that his statements had provided a basis for the deception allegation, and he was quick to refute it in the spirit of Rubinstein's explanation.60 However, this contrived explanation which defies even tenuous acceptance,61 seems even less plausible when considering the fact that Lin's statements were made in 1992. Sophisticated constitutional discourse in Israel was just beginning and the question of which to adopt: a Centralized or Decentralized mechanism of judicial review had

59 Rubinstein, supra note 24, at 350 n.7.
60 See Uriel Lynn, Basic Laws as Part of Israel's Written Constitution, 5 HAMISHPAT 267 (2000) [Hebrew] ("There was not a single member of the Constitution Committee who was unaware that the two Basic Laws conferred the judiciary with authority for judicial review over any legislation that infringes basic rights under those laws, including regular legislation of the Knesset itself. The debate was not over whether the court could invalidate a regular law, but rather whether the authority for judicial review should be limited to the Supreme Court or given to the entire judicial system. The decision was in favor of the entire judiciary. The legislature's intention was to create protected basic rights. The limitation clause which enumerated conditions for assessing the validity of a regular law would be legally meaningless in the absence of the power of judicial review." Id. at 277) In an article published by Lynn just after the enactment of the Basic Laws he makes no reference to the deception claim, apparently because it had not yet been made. See Uriel Lynn, A Foundation for a Written Constitution in Israel, 1 HAMISHPAT 81 (1993) [Hebrew].
61 I think that this conclusion is unavoidable, having consideration for the particular context. Lynn's position as quoted in the body of the text was made first expressed in the deliberations of the Constitution Committee, in response to the M.K. Ravitz's proposal to include an explicit provision in the Basic Law stating that it would not affect arrangements of matters relating to marriages and divorces and matters of Sabbath and the Festivals. Lin's reply to this was that the matter was negotiable but "it must be remembered that the big difference between this Basic Law and the other laws which you have been considering is the establishment of the Supreme Court as the Constitutional Court. In all of those draft bills the Supreme Court received the power to invalidate laws. Here we are not dealing with this subject. Here we are not giving that power to the Supreme Court" (Protocols of deliberations in the Constitution, Law and Justice Committee, 9.3.1992, p.34). It is clear that in these comments Lynn was attempting to appease Ravitz, and to explain to him why legislation dealing with Shabbat or Festivals, or personal status, whether existing or future could not be harmed by the Court. If Lynn's intention was only to say that the Supreme Court would not be vested with any exclusive authority, then his comments would not have provided any kind of answer to Ravitz's concerns.
yet to be seriously discussed. It is more logical to presume that listeners understood Lin’s comments according to their simple meaning.

Further support for a softened version of the deception claim can be found in the pronouncements of jurists in the aftermath of the adoption of the Basic Laws. As is well known, in the landmark Bank Mizrachi case, adjudicated a long time after President Barak and others had begun enlisting support for the idea of a constitutional revolution, Justice Cheshin adamantly argued his view that the Basic Laws were without constitutional validity. A similar view was expressed by Deputy President (Ret) of the Supreme Court, Menachem Elon, President (Ret) Moshe Landau, and Ruth Gavison. Even President Barak conceded that "until the Mizrachi judgment it was possible to claim …that the Basic Laws dealing with human rights did not trigger any constitutional revolution, neither in the dimension of the existing law, nor in the dimension of the desirable law." There are no grounds for presuming that prior to the enactment of the Basic Laws the religious Knesset members were already aware of the views of these jurists. However the fact that these legal experts continue to hold the view that the adoption of the Basic Laws did not herald a constitutional revolution, buttresses the thesis that those involved in the discussions preceding the enactment of the Basic Laws had firm grounds for believing that the Basic Laws did not empower the court to invalidate primary legislation, especially when having consideration for the ambiguous statements of the initiators of the laws.

The milder version of the deception thesis can also rely on the manner in which the Basic Laws were accepted in the Knesset itself, the media, and the public at large. Rubinstein and Lin claim that all the members of the Constitution Committee clearly understood the far reaching ramifications of the new Basic Laws. But they too have difficulty in explaining the indifference with which the laws were accepted by the Knesset and the media. Irrespective of our assessment of the manner in which the Knesset functions, it is illogical that so few

62 See in the opinion of Justice Cheshin in United Mizrachi Bank, supra, n.18.
63 Elon's comments here are somewhat laconic, but they can be understood in that manner. See Menachem Elon, Basic Laws: Their Enactment and their Interpretation – From Where and To Where? 12 BAR ILAN LAW STUDIES 253, 256 (1996) [Hebrew] (“In my view there are no grounds for the assumption that the Basic Laws usurped our State legislative authority of its stature as the body at the head of the pyramid of the three branches: legislative, executive, and judiciary. This status has still been preserved…”)
64 Moshe Landau, Reflections on the Constitutional Revolution 26 MISHPATIM 419 (1996) [Hebrew]; Moshe Landau, Granting a Constitution to Israel by way of a Court Ruling, 3 LAW AND GOVT 697 (1996) [Hebrew].
members of Knesset participated in such a momentous vote.\textsuperscript{67} Regardless of our view of the Israeli media, it is hardly feasible that it would pass up a scoop as significant as a constitutional revolution. Even were we to accept Rubinstein and Lin’s claim that neither of them intentionally deceived the Knesset members, the low participation in the vote combined with the media silence, supports the claim that neither of them went out of their way to explain the historic significance of the occasion to the Knesset members and the public at large. It certainly substantiates MK Shevah Weiss's definition of the proceeding as "a semi-clandestine, semi-legitimate smuggling of the Constitution into the agenda of the State of Israel".\textsuperscript{68} or the explanation of Prof. Claude Klein who regard the success of the initiative as a "sophisticated exploitation of the "end of season" atmosphere that prevailed in the final days of the Knesset".\textsuperscript{69}

A tempered version of the deception/mistake thesis is required not only because the conduct of the religious Knesset members fails to substantiate the thesis in its extreme form, but because of the need to consider an additional factor, the influence of which on the constitutional revolution I have only mentioned incidentally until now. I am referring to the court. In his academic writings Barak claims that "the revolutionary body that executed the revolution was the Knesset itself, and the revolution was executed in compliance with all of the rules and laws that are definitive of the revolution itself. This was a constitutional 'constitutional revolution'".\textsuperscript{70} However, even according to Barak, the Knesset activity was a necessary but not sufficient condition for the occurrence of that revolution. In his own words, "the constitutional revolution became possible in 1992 by virtue of the cooperation between the constituent authority and the judicial authority. Neither of the two authorities could have produced the revolution alone. It was only the unifying of forces between the Knesset and the court that actually lead to the constitutional revolution".\textsuperscript{71} For our purposes, even if the success of Rubinstein, Lin, and their colleagues was facilitated by their failure to make the effort to fully explain the revolutionary potential of their initiative, they could not have succeeded without the tight co-operation, (perhaps even complicity), on the part of the court. Having consideration for their professional and personal familiarity with the judges, it may reasonably be presumed that the laws' initiators anticipated the judges' cooperation in

\textsuperscript{67} The best proof of the connection between the M.Ks's awareness of the importance of the Basic Laws and the degree of participation in voting, is the high degree of participation in the vote conducted later regarding the amendment of the Basic Laws.
\textsuperscript{68} D.K. 124 (1992) 2596
\textsuperscript{69} Klein, supra n.12 at 23.
\textsuperscript{70} Aharon Barak, The Law of Israel: Past, Present, and Future 43 HAPRAKLT 5 (1997) [Hebrew].
\textsuperscript{71} Barak - Constitutional Revolution, supra n. 11 at 19.
advance. But apparently, even they never imagined just how much cooperation they would actually receive. Did they imagine that the rights that they were compelled to waive would find their way into the Basic Laws by force of court rulings? Did it ever occur to them that the enactment of the Basic Laws would induce the court to proclaim a general upgrading of all the old Basic Laws? In short, did they anticipate that the court would use the new Basic Law in a manner that would effectively obviate the need for any additional legislative activity? Presumably, the answer to these questions is in the negative. The conclusion is therefore that even if the initiators of the law had properly disclosed their intentions they would only have been able to include a small part of what is today known to all.

E. A Joint Project of the Old Elites

We have focused thus far on the question of how the supporters of an entrenched bill of rights prevailed over the traditional opposition of the religious block. However, this presentation of question is inaccurate. As noted above, opposition to a constitution at the beginning of the State was by no means the exclusive legacy of the religious. The ruling Mapai party also opposed it. The dividing line between supporters and opponents more or less matched the dividing line between the governing coalition and the opposition, and for obvious reasons.

In a parliamentary democracy, the coalition parties control the legislature. Enactment of a constitution curtails the legislature’s power, and hence the ruling parties are naturally reluctant to adopt a constitution. However, this reluctance is not limited to the coalition parties; in fact it encompasses the entire legislature as such, regardless of its political persuasion. Jon Elster, who researched the proceedings generally accompanying the framing of constitutions in different states, noted that the process is frequently characterized by the interplay of a number of interests, including "institutional interests". One of the institutions

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72 See statements of M.K. Chaim Ramon, in the Knesset debate on 3.3.98: "I want to remind the Knesset Members just how we enacted the Basic Laws in the twilight of the Twelfth Knesset. I was the Chairman of the Labor faction...even Knesset Member Amnon Rubinstein, and certainly not me, did not imagine that it would be interpreted in the way the Court interpreted it... I refer to this constitutional revolution as an incidental constitutional revolution because it was unintentional on the legislature's part", (D.K. #)

73 See Gavison, The Constitutional Revolution, supra n.4 at 66-67. The religious opposition alone was insufficient to torpedo the constitutional project, because the religious parties only constituted a small minority of Knesset seats. See also Giora Goldberg, Religious Zionism and the framing of a Constitution for Israel, 3 ISRAEL STUDIES 211 (1998) (arguing that the religious political parties did not oppose the idea of framing a constitution during the initial stage of Israeli statehood, but changed their attitude only after Ben-Gurion began to publicly express his inclination to avoid a constitution. Realizing that Ben-Gurion’s opposition would block the process of framing a constitution, the religious political leaders preferred to oppose the constitutional idea so as to present a political achievement to their voters); DAFNAH SHARFMAN, LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL 38-45 (1993); Michael Mandel, Democracy and the New Constitutionalism in Israel, 33 ISR. L. REV. 259 (1999) ("the hegemony of labour at the helm of a strong state . . . seem to me the most convincing explanation for the lack of a constitutional Bill of Rights in the first generation of the State's existence." Id. at 274).
with an interest in the process is the legislature. The legislature's vested interest is against an entrenched bill of rights, which severely curtails its powers. As a means of neutralizing this and other problematic interests, Elster proposes that the constitution be adopted by an ad hoc body, to be disbanded immediately upon completing its task. By definition, such a body would be free of institutional and other problematic interests.\textsuperscript{74}

Elster's thesis provides a possible explanation for the failure to adopt a Constitution upon the establishment of the State of Israel. As mentioned, the Israeli Declaration of Independence promised the enactment of a constitution, and actually prescribed a procedure for its enactment. Elections would be held for the Constituent Assembly; the Assembly would then enact a Constitution and having discharged its one and only duty, would disperse; Elections to the legislature would then be conducted on the basis of the arrangement established by the Constitution. This scenario is consistent with Elster's proposal that the constitution should be adopted by a body established uniquely and specifically for that purpose, after which it should dissolve. However, the reality that transpired was different. The Provisional Council of State, which functioned as interim legislature, voluntarily dispersed and transferred its powers to the Constituent Assembly and thus the Constituent Assembly summarily collapsed into a legislature.\textsuperscript{75} According to Elster's thesis, at that moment the Constituent Assembly also became a party with an embedded structural interest against the adoption of a constitution. This factor provides an additional, cumulative explanation for failure of the first Knesset, as well as of the subsequent Knesset's failure to enact a Constitution.

Assuming that the institutional interest did not disappear and that the division along coalition-opposition lines did not change, it turns that the 1992 success required not only a victory over those whose opposition was content-based, but also over the ingrained interests of the coalition, and to a certain extent even of the Knesset as a whole, against the anchoring of a Bill of Rights in the Constitution. How can we explain the 1992 success in contrast with the previous failures?

The triumph over the coalition parties' inbuilt opposition to the enactment of a bill of rights that would curtail its powers can be explained as the result of a change in the relations between the political powers in Israel. This change began to surface towards the end of the 1970s. Until then, the Israeli political system had enjoyed stability. The ruling party's identity

\textsuperscript{74} See Elster, \textit{supra} n. 6 at 395 (“To reduce the scope for institutional interest, constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures”).

\textsuperscript{75} See Gavison, \textit{The Constitutional Revolution, supra} n. 4 at 75.
was known in advance and even its partners in government were more or less fixed. However, since the elections to the ninth Knesset, which were held in 1977, and until today, the Israeli political system has been characterized by fluctuation and mutability. Governments can and do change hands and no party holding the reins of power can guarantee the longevity of its tenure.\textsuperscript{76} A governing party firmly established in power would be loath to lend a hand to the weakening of the parliament under its control. On the other hand, a ruling party that in the near future might very well become an opposition party will have no strong interest militating against the adoption of a constitution.\textsuperscript{77}

The instability of the Israeli governmental system largely neutralized the governmental interest against the constitution. But what of the legislature’s institutional interest against a constitution that would curtail its power? This interest is not dependent on the stability of the division of powers between the coalition and the opposition, being shared by all parties regardless of their standing. This is where the fourth explanation enters the picture. According to this explanation the Knesset’s institutional interest did not disappear, but under certain circumstances which we will immediately address, a significant portion of Knesset members orchestrated a decision that would operate against their own institutional interest in order to bolster the power of the court.

The past few decades the political system in Israel have been characterized not only by fluctuations in the identities of the ruling parties, but also in the diminishing influence of the "political centre" and increasing potency of factors that were once located at the periphery. The veteran parties have become progressively weaker in contrast with the nascence and growing empowerment of sectorial parties.\textsuperscript{78} The hegemony of the secular-Jewish-veteran center comprising moderates of the left and the right is in jeopardy. As a result, members of this group fear the prospect of a dramatic change in the character of the State as a result of the nerve centers of political power coming under the control of peripheral forces with value systems alien to that of the secular-center. In a political-cultural atmosphere of serious

\textsuperscript{76} Beginning as of the second half of the seventies, cracks began to appear in the hegemony of Labor party which had ruled in the Yishuv and in the State, until that time. A clear transition point to the new era was the upheaval of 1977, in which the Labor party lost its power over Government which it had held until that time. The new post-hegemony era was characterized by the split of political power between different parties, none of which had political hegemony. For a description of the collapse of the Labor Movement's hegemony, see Menachem Mautner, The Eighties – The Years of Anxiety 26 TEL-AVIV U. LAW REV. 645 (2003) [Hebrew].

\textsuperscript{77} An interesting parallel for strategic conduct motivated by the fear of losing power can be found in the conduct of Francois Mitterand. Alec Stone notes that in 1986 confronting growing signs of the socialists’ collapse in the coming up elections, Mitterand prepared himself to sit in the Opposition, by appointing his Minister of Justice to be the President of the Supreme Constitutional Court. See Stone, supra n. 41, at 86.

\textsuperscript{78} Such as Shas (representing oriental traditional Jews), Israel be-Aliyah and Israel Beiteinu (representing immigrants from the former Soviet Union), and various parties that represent the Arab minority.
concern regarding an 'alien' takeover of the legislature, a conflict arises between the institutional interest of the legislators and their sectorial value-based interest. If the Knesset is no longer firmly controlled by supporters of old values, then a legislator desiring to ensure the continued dominance of these values must look elsewhere for protection, even at the price of harming the interest of the Knesset in which he is a member.

In the Israeli reality such protection may be found in the Supreme Court. The mechanism for selecting judges in Israel is unique in that it confers upon incumbent Supreme Court justices unparalleled power to select those who join their ranks. The composition of the Supreme Court traditionally reflected the values of the old elite. For as long as the mechanism for selecting judges remains unchanged, the continued hegemony of the old, elitist values in the court is assured. From the perspective of the elite's representatives in the legislature, who are fearful of a "hostile takeover", the circumstances are such that there is compelling logic in the bolstering of the court's power, by conferring it with the authority to supervise the legislature's decisions, even if it means compromising, and harming their own institutional interest.

This explanation for the constitutional revolution in Israel was presented inter alia by Ran Hirschl as part of a general theory that he developed in order to explain acts of parliamentary self-weakening in various states, a process which prima facie defies logic. As stated, his

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79 See e.g. Edelman, supra n.45 at 34: ("By established practice, appointments to the Supreme Court require an affirmative vote of all three justices on the panel."). Moshe Ben-Zeev, who served as the Attorney General between the years 1963-1968 wrote: "It is impossible to appoint a person to the post of a judge, and certainly not to the post a Supreme Court justice, if the appointment is uniformly opposed by the three Supreme Court judges participating in the Committee. I had hoped that this was an unwritten custom, but if this is not the case, it should be anchored in law". M. Ben Zeev, Politics in the Appointment of Judges, ORECH DIN, (27.5.81) 13 [Hebrew]. For additional sources see Mordechai Heller Appointment of Judges: The Solution to the Problem in the Elyon, 8 AZURE 54, 61-65 (1999). Over the last few years fissures are beginning to appear in this conventional understanding, and the Supreme Court justices are increasingly confronting Ministers of Justice who are unwilling to be submissive.

80 For a similar argument see Mautner, supra n.76 (in the wake of the lost autonomy and the struggle over the characterization of Israel, members of the old elites classes find themselves in a state of anxiety which has compelled them increasingly to rely upon the colleagues in the Supreme Court, and to the non-critical acquiescence that has characterized their response to the changes in the rulings of the Supreme Court during the eighties).

explanation is persuasive in the Israeli context, given its unusual and exceptional system of judicial appointments. On the other hand, the attempt to transform this local explanation into a general theory for explaining parallel processes in other states is less convincing, *inter alia* because of its disregard for the accepted judicial selection mechanisms in the majority of states, which confer the political system influence if not control over the judicial output. Under circumstances in which the political system controls judicial selections, the transfer of authority to the court serves the threatened elites for a short period only, whereas in the long-term it may transpire to be particularly dangerous.\(^{82}\)

**F. WHICH EXPLANATION IS THE CORRECT ONE?**

This article presented four possible explanations to the surprising adoption in Israel of two basic laws concerning human rights in March 1992. Each of the explanations has its strengths and weaknesses. The historical moment claim is born out by the reality prevailing in Israel prior to the adoption of the basic laws and the public, extra-parliamentary pressure that crystallized at that time for the enactment of a constitution. It is however belied by the indifference, by way of understatement, that accompanied the adoption of the basic laws in the Knesset and in the public at large. The compromise claim is consistent with the wording of the basic laws and evidence of negotiations and compromises in the legislative process. However, questions remain regarding the surprising abatement of orthodox opposition, and post-facto, the claim is expressly refuted by some of the Orthodox MKs. The deception or mistake claim provides a better explanation than the compromise or agreement claim for the surprising agreement of the traditional opponents and for the absolute silence in which the basic laws were adopted. It is further supported by expressions of the legislation's initiators and of various commentators prior to and immediately after the enactment of the law. However it is vociferously denied by the initiators of the law and in a state of tension regarding certain pronouncements of one of the representatives of the religious parties Knesset member, Yitzchak Levi. The claim of a joint venture of the old elites explains the disappearance of coalition interests and of the legislature in its entirety, and their voluntary abdication of their authority in favor of the court. However it does not purport to explain how this enabled the triumph over the contradictory religious interest.

\(^{82}\) See Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15 (2006) 17; Mark Tushnet, 75 FORDHAM L. REV. 755, 764 (2006) (“the best the displaced coalition's leaders can hope for is that their partisans in the courts will be able to delay and smooth out the transition between one constitutional order and the next.”)
Which of the explanations is the "correct" one? In my view, notwithstanding the passage of only 15 years since the enactment of the Basic Laws, the evidence on the matter is insufficient for purposes of giving a categorical answer. However even were I equipped to offer a definite opinion I am uncertain as to whether it is possible to identify a single explanation as the correct one. There is compelling logic in the claim that each of the four explanations made its contribution to the success of the legislation. The crisis of public faith in the political system generated public pressure on the Knesset, causing the legislators themselves to appreciate the need for change. The tactics of atomizing the bill of rights into its separate components, and the willingness to negotiate assuaged the opposition of its traditional opponents. Intentional ambiguity and ambivalent pronouncements on the part of the initiators of the law was complemented by the vagueness of constitutional doctrines and widespread public ignorance of constitutional matters at that time, and specifically among Knesset members. These were all factors that blurred the revolutionary potential of the basic laws, lulling their opponents into complacency. Finally there were the fears of the old elites of their hegemony, and the fluctuation that typified the governmental system beginning as of the end of the 70s. The effect of the latter two factors was to neutralize the institutional interest of certain Knesset members and the interest of those holding the reins of power against the transferring the focus of power to the court. Moreover, they reinforced the sense of urgency felt by the initiators of the law. Summing up, I suggest that the enactment of the basic laws was the product of the merging of all these elements. However, the combined operation of all these elements was unable to transform the basic laws into what they have become today – a fully fledged Bill of Rights. The completion of that task was the product of a dominant and determined court and a weak and hesitant legislature, but this narrative will be dealt with in another forum.

83 For a description of the Supreme Court's approach over the last few years, see Yoav Dotan, Judicial Accountability in Israel: The High Court of Justice and the Phenomena of Judicial Hyperactivism, 8 ISRAELI AFFAIRS 87 (2002) (describing the Israeli Supreme Court during the nineties as "hyperactivist"). For a presentation of Aharon Barak's judicial world view which conquered the Israeli Supreme Court over the past few decades, see AHARON BARAK, THE JUDGE IN A DEMOCRACY (Princeton University Press, 2006); AHARON BARAK, JUDICIAL DISCRETION (Yadin Kaufmann trans., Yale University Press, 1989). For a critique of this approach at varying levels of sharpness, see ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003), 111-134; Posner, supra note 50 ("What Barak created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive Supreme Court justices. He puts Marshall, who did less with more, in the shade"); David B. Sentelle, Judicial Discretion: Is One More of A Good Thing Too Much? Judicial Discretion By Aharon Barak, 88 MICH. L. REV. 1828 (1990); Martin L. C. Feldman, Book Review: Judicial Discretion By Aharon Barak, 65 TUL. L. REV. 451 (1990); Amos N. Guiora and Erin M. Page, Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005).