The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements

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GENERAL INTRODUCTION

Beginning with the collapse of the Soviet Union nearly twenty years ago, Western society has witnessed the emergence of a significant number of new countries striving to join the family of Western, democratic-style, states. Indeed, we are hopeful that this trend of democratization will continue and more societies will follow in the footsteps of these new states, including Arab-Moslem countries.

The purpose of this article is to reemphasize some of the basic guidelines for these emerging new democratic states. There are some fundamental preconditions entailed in the process of becoming a democratic state. The mere existence of a written document entitled “Constitution” is not enough; a society is entitled to be considered a democratic state by the international community only if its legal system contains two attributes—the recognition of basic human rights and the idea that basic human rights are protected by some type of judicial review performed by an independent court system. Furthermore, it would be better if these basic human rights were enumerated in a written constitution. Nonetheless, based on the Social Contract concept, the recognition of these basic rights does not necessarily require a written document; rather, they may be “carved out” from overarching values hovering above the legal system of every democratic society. Accordingly, these basic rights cannot be eliminated by the legislature or even by a constitutional assembly.

1. Professor of Law, Haifa University Faculty of Law; Visiting Professor of Law, University of Michigan Law School. I would like to thank the Michigan Law School for its support; special thanks to Tom Green, Reuven Avi-Yonah, James Boyd White and Daniel Halberstam for their comments and support. Special thanks to Mathias Reimann for his wonderful and most helpful comments. I am indebted to Ms. Kimberly Worly from the Michigan Law School for her assistance. Also, I give thanks to the participants of the Summer Faculty Seminar at the University of San Diego Law School, the participants of the faculty seminar at American University WCL, and the participants of the conference on “Constitutionalism in the Middle East: Israeli & Palestinians Perspective” at the University of Chicago Law School, for their comments. The responsibility is obviously mine.
Moreover, there are different models of a written bill of rights: some contain only the basic human rights and are considered a "thin constitution" while others try to comprise a very broad amount of constitutional rights, not only of the "first generation" but also of the "second" and "third" generations as well. In the latter case where the bill of rights contains many socio-economic "positive" human rights, there is a risk that if the economic system is not ready for such rights, this bill of rights might instead become a lifeless and meaningless letter of law.

The development of Israeli Constitutional Law may serve as a case study.

United Nations Resolution 181 regarding the establishment of the Independent Jewish State required that the new state adopt a constitution that was to include basic human rights. As it appears, the new state had significant difficulties in following that requirement. The state of Israel was founded as a nation composed primarily of Holocaust survivors and refugees from around the world, without a practical democratic culture and tradition and without a written constitution, but with a long history of ongoing struggle for freedom, liberty, and justice. Immediately after its establishment, the State of Israel developed a reasonable system of recognition of basic human rights, however, without a written and comprehensive document. Furthermore, the concept of judicial review within its domestic legal system was fully recognized only 48 years later.

This article discusses some of the constitutional developments in Israel. It offers emerging democracies some of the Israeli experience to consider and compare to their own situation. It discusses some of the omissions that were effected by the Israeli establishment, specifically by the Constitutional Assembly, the Knesset (The Israeli parliament) and the judicial branch. The first omission was the circumvention of the above-mentioned UN resolution. The second was the failure of the Israelis to regard the Israeli Declaration of Independence as a legal document, and the third was the lack of acceptance and full implementation of the concept of judicial review. As will be discussed, none of these omissions was crucial nor did they stop the Israeli legal community from developing a constitutional system that recognizes basic human rights.

The latest significant constitutional development is what has been known as the Constitutional Revolution. Indeed, it is too early to conclude whether this event should be regarded as a mistake or might be the appropriate cure to the above-mentioned omissions.

2. For a short discussion about positive constitutional rights see infra text accompanying ns. 139-149.

3. The legal system within the occupied territories that was established by the state of Israel during the 1967 war is not part of our discussion here.
I will offer my own interpretation for the development of a democratic society. I will attempt to show that there is a way how a basic bill of rights and the concept of judicial review can be developed gradually in a "common law fashion," even without a written constitution. I will also emphasize the dangers and risks that may result from an overly aggressive judicial review system. Hence, the article may provide lessons for other nascent democratic societies and the international community as well, that they may learn from both the achievements and the mistakes of Israel.

I. A Brief Overview and Several Interpretations

A. The Early Stage – The UN Resolution, the Declaration of Independence, and the Failure to Provide a Written Constitution

1. The UN Resolution

We begin our brief and limited historical review at its starting point—the "Archimedes anchor"—Resolution 181 of the United Nations General Assembly of November 29, 1947, which dealt with the plan for the partition of Palestine into a Jewish and an Arab state and which gave the Israelis international recognition to establish their own independent nation. The resolution called for an election of a Constituent Assembly and the preparation of a democratic constitution by that Assembly, which was to include instructions relating to the preservation of the basic rights of the state's citizens:

The Constituent Assembly of each State shall draft a democratic constitution for its State and choose a provisional government to succeed the Provisional Council of Government appointed by the Commission. The Constitutions of the States shall embody Chapters 1 and 2 of the Declaration provided for in section C below and include, inter alia, provisions for . . . .

Guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association;

5. Id. Part I. (Future Constitution and Government of Palestine), Sec. B ("steps preparatory to independence").
2. The Israeli Declaration of Independence and the Election to the Constituent Assembly

On April 18, 1948, at the Declaration of the State, the Israeli People’s Council (Moetzet Ha’am) was established. On May 14, it became the Provisional State Council which functioned as the interim legislature of the new state until the elections for the Constituent Assembly (Ha’assefa Hamechonent) took place. The Israeli Declaration of Independence May 14, 1948,6 proposed that the elected Constituent Assembly prepare a constitution for the State of Israel. Hence, the first election, held on January 25, 1949, was in fact, the election of the Constituent Assembly. The Constituent Assembly convened for only four meetings.7

The first significant constitutional development occurred on February 16, 1949, when the Assembly adopted the Transition Law,8 at which time it renamed itself the “First Knesset,” refashioned itself as the Israeli legislature9 and thus failed to follow its designated mission to provide the state of Israel with a written constitution.10 This

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6. This noble document, representing the vision and the credo of the Israeli Zionist movement, contains some basic values and legal norms: e.g.: “The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.”

7. A caveat: the purpose of this short informative description is just to present the historical development in a very short fashion; it is not meant to explain, justify or criticize the decisions that were made by the Israeli establishment; for further discussion see inter alia AMON RUBENSTEIN, CONSTITUTIONAL LAW 46-54 (Hebrew, 5th ed. 1998). For English language sources see infra ns. 9-14.


10. Among other arguments, explanations or excuses for that omission was a semi-legal argument which claimed that despite, and perhaps even because of, the absence of a written constitution in Great Britain, the rule of law and democracy there has been solid, and civil freedoms have been upheld. Here, again, I would not comment on the wisdom of such an analogy between a homogeneous, older society with a significant tradition of democracy and a newly born state which consists of Jews from different cultures and societies and a significant Arab population which was regarded as hostile toward the basic idea of a Jewish state; see inter alia Shapiro,
omission, together with other developments mentioned below, paved the way for the “Harari Resolution” made by the Knesset in 1950, and the “two hats doctrine” which was integrated into Israeli constitutional law by the Israeli Supreme Court almost half a century later.

The “compromise” the first Knesset reached in 1950, known as the “Harari Resolution” states as follow:

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.


11. As mentioned already, I will not try to provide any justification or criticism for the decision not to legislate a written constitution; instead I mention the major arguments raised at that time (in addition to the previously noted argument that compared the Israeli democracy to the British one – see supra n. 10): the idea of the constitution developed in previous centuries, against the background of social and economic struggles that no longer exist; the Declaration of Independence which included the basic principles of any progressive constitution; and the Transition Law of 1949, which was passed by the Constituent Assembly, and constituted a fulfillment of the state’s obligations towards the United Nations on this issue; only a minority of the Jewish people were in Israel, and the state did not have the right to adopt a constitution that would bind the millions that had not yet arrived; because of the nature and special problems of the state, it was difficult to reach a consensus regarding the spiritual principles which were to shape the image of the people and the essence of its life, and the debate about the constitution could lead to a cultural war between the religious and secular communities; the State of Israel was in the midst of a continuous process of change and crystallization, and this did not go together with a rigid constitution. For a short description of the arguments for and against drafting the Constitution see inter alia: supra n. 9 and also: Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 LAW & SOC. INQUIRY 91 (2000); Bernard Susser, Toward a Constitution for Israel, 37 ST. LOUIS L.J. 939 (1993); Ran Hirschl, The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Societies, 36 STAN. J. INT’L L. 73 (2000); Shimon Shetreet, Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset, 77 TUL. L. REV. 659 (2003); Barak Cohen, Empowering Constitutionalism with Text from an Israeli Perspective, 18 AM. U. INT’L L. REV. 585 (2003); Zaharah R. Markoe, Expressing Oneself without a Constitution: the Israeli Story, 8 CARDozo J. INT’L & COMP. L. 319 (2000); Gidon Sapir, Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment, 22 HASTINGS INT’L & COMP. L. REV. 617 (1999); Gal Dor, Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective, 11 IND. INT’L & COMP. L. REV. 1 (2000).

12. See infra text accompanying ns.104-115.


The first Basic Law—Basic Law: the Knesset—was finally enacted by the third Knesset in 1958. Yet it took the Knesset and the above-mentioned committee more than 40 years to present the Israeli public with statutory Basic Laws that address constitutional human rights: the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.

Though the Israeli Supreme Court recognized some basic human rights much before the Knesset acted, it refrained from anchoring them to a formal concrete written document and decided not to give the Declaration of Independence any legal meaning.

In the long run, however, none of the omissions stopped the Israeli legal community from developing the most significant constitutional concepts: human rights and judicial review.

3. Common Law Human Rights

A democratic society cannot survive without basic human rights. Spirit and culture cannot wait too long. In Israel, basic human rights were recognized and declared at a very early stage, immediately after the establishment of the State. The Israeli legal community constantly developed and strengthened some of the basic principles of these constitutional rights. In the famous Kol A'am case, Justice Agranat “carved out” the constitutional rights of freedom of the press and freedom of expression, relying on similar values found in the legal system of every nation that considers itself a democratic society.
4. The Absence of Judicial Review

The mere recognition of human rights is not enough. Without an efficient tool for the protection of individuals and minorities from the potential abuse of legislation representing the majority, human rights may be merely a lifeless letter. Alas, the Israeli Supreme Court was reluctant to provide this ultimate tool during the early stages. At this time, the Israeli courts adhered to an increasingly aggressive interpretation of the laws aimed at protecting these rights, yet refrained from adopting the full doctrine of judicial review. The generally accepted rule was that there were no limits imposed upon the legislature and that the courts lacked the authority to nullify its acts. Justice Bernzon indicated in the mid-1960s:

I very much doubt we have the authority to nullify the effectiveness of the law, or part of, if it has been legislated by the Knesset in due process, even if it is clear to us that it contains a factual error or it is based on a false assumption. The Knesset pours the wine into the pitcher and the court simply says in its interpretation of the law what the taste of the wine is. It cannot say that the pitcher is empty as opposed to the many words of the law.26

B. The Second Stage – The Urge for Judicial Review

Gradually, but decisively, Israeli society began to develop its own approach toward judicial review. Studying these developments reveals that regarding this issue of judicial review, some fascinating steps were taken before the “constitutional revolution” was launched. In my opinion, in these stages, the Israeli system was already approaching the adoption of the concept of judicial review, enabling the Supreme Court to declare “unconstitutional” laws void.

A basic milestone in the development of judicial review was Justice Haim Cohen’s article from the early 1970s on the “Meaning of the Triple Fiduciary of the Judiciary,”27 where he doubted whether a judge was obligated to obey laws created by a mean-spirited legislature:

It is found that the loyalty to justice is superior to the loyalty to such law, or more precisely the fidelity to the sacred principles of democracy and human rights rejects the fidelity to oppressing laws of a tyrant legislature.28

25. See supra ns. 9, 10, 11.
26. H.C. 188/63, Bazul v. The Minister of interior affairs and others, 19(1) P.D. 337.
27. 7 MISHPATIM 5 (1976).
28. Id. at. 8; on the German sources of his approach see HAIM COHEN, THE LAW 512- 518 (1992).
Not surprisingly, such a notion found its way to the Supreme Court, first in a dictum by President-Justice Shamgar in the *Cohen* case\(^{29}\) and later in the very powerful statement by Justice Barak in the *Lao*\(^7\)r case:

In my mind there are three conclusions: one is that on a doctrinal-principle level, it is possible that a court in a democratic society nullifies a law that contradicts the basic principles of the system, even if those principles are not anchored in a strict constitution or a protected Basic Law. There is no axiomatic matter with an approach that a law is not nullified due to its content. The court’s nullification of a law due to its strong violation of the basic, fundamental principles does not violate the principle of the legislature’s sovereignty, because sovereignty is always limited. It does not violate the principle of separation of powers since this principle is based on checks and balances that limit each of the branches. It does not violate democracy, since democracy is a delicate balance between the role of the majority, human rights and basic principles, which limit each of the authorities; such a balance cannot be conceived by itself as an undemocratic matter. It does not violate the power of the judicial authority since the goal of this authority is to ensure the rule of law, including the rule of law within the legislature itself.

The second conclusion is that, according to the accepted social and legal concepts, a court is not supposed to delegate itself the authority to declare the nullification of a law that contradicts the basic principles of our system. This has been our way for the past forty years. Such an approach was accepted by us as heritage of the British approach, and we developed it on the experience of our democracy. It reflects social consent of the Israeli public. It enjoys the consensus of the enlightened, intelligent public. Only through such an approach can the disagreement dividing us with regards to the need for a strict constitution and judicial review be understood.

Third, in light of social, legal concepts in Israel, and in light of the constant line of decisions of this court throughout the years, it is not appropriate that we reroute ourselves from our usual approach that reflects our legal, political tradition and it is not appropriate that we adopt a new approach that recognizes the power of a court to declare a law as nullified that does not violate a specific provision of a protected Basic

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law but that contradicts the basic principles of the system. If we do allow this, we will be perceived by the public as infringing on the public consensus regarding the role and duty of a judge in Israeli society. The Israeli public's comprehension of the judicial process does not associate with such a ruling. It seems to me that the public comprehension is that such an important and meaningful decision should be made, in this stage of our national life, by the people and their elected representatives.30

A careful reading of the above quotation reveals the following conclusions: The courts have the "natural" power of judicial review, but this concept is not aligned with the public's traditional understanding of the role of the courts. If the public demonstrated its approval to change this tradition, the court would be able to implement this concept of judicial review.

C. The Third Stage – The Constitutional Revolution

1. A Written Bill of Rights

Over a period of many years, several attempts were made by the Knesset and the Ministry of Justice to construct the Israeli Bill of Rights, but to no avail. The Knesset failed to enact the Basic Law: Human Rights in its entirety, mostly due to opposition to some of its provisions by the religious parties.31 Thus, it was decided to enact those sections of the law on which there were no fundamental clashes of opinion or opposition amongst the members of the Knesset. Finally, in 1992, in a rare moment of unity, the Israeli Knesset narrowly passed two Basic Laws: the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.

Immediately afterwards, Justice A. Barak, a former professor of law who later became president of the Israeli Supreme Court, entitled this development "The Constitutional Revolution." The phrase was intended to indicate that those Basic Laws introduced into Israeli constitutional law, both the Israeli Bill of Rights and the concept of judicial review, granted the courts the authority to declare "ordinary laws" unconstitutional and null and void.

2. The Basic Law: Human Dignity and Liberty

Section 1 of the Basic Law: Human Dignity and Liberty, which was added to the original version32 in 1994,33 declares that:

31. See supra ns. 9, 10, 11.
32. See supra, n. 17.
Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom, and these will be respected in the spirit of the principles of the Declaration of Independence of the State of Israel.

Furthermore Section 1a states:

The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state.

Section 2 states: "There shall be no violation of the life, body or dignity of any person as such," where section 4 states in a similar but positive fashion: "All persons are entitled to protection of their life, body and dignity." Other provisions address personal liberty, freedom of movement and privacy. Section 3 was added to the final version of the bill, during Knesset deliberation, and bluntly states: "There shall be no violation of the property of a person."

Section 8 of the Basic Law is what has become known as the "limitation clause," stating:

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

This "limitation clause" indicates that there are no absolute human rights in Israel and thus the courts are called to judge violations of the above-mentioned human rights by balancing conflicting rights and interests.

3. The Adoption of the Constitutional Revolution by the Israeli Supreme Court

On November 9, the Israeli Supreme Court published its lengthy decision on the case of Bank H'Mizrachi v. Migdal (herein-

33. The amendment law passed by the Knesset on 9th March, 1994; 1994, S.H. 90.
34. Sec. 5. states: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise." Sec. 6 declares: "(a) All persons are free to leave Israel; (b) Every Israel national has the right of entry into Israel from abroad." Sec 7 elaborates: "(a) All persons have the right to privacy and to intimacy; (b) There shall be no entry into the private premises of a person who has not consented thereto; (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects; (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person."
35. It is noteworthy that this date is three days after Prime Minister Rabin's assassination took place. This may explain the fact that most of the Israeli public was not aware of the fact that beginning November 10 the State of Israel had entered into a new legal and constitutional era.
36. C.A. 6821/93, Bank H'Mizrachi et al v. Migdal et al, 49(4) P.D. 221.
after, the “H’Mizrachi” case). The Court concluded that the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation are part of the Israeli written Bill of Rights and granted the courts the power of judicial review of ordinary legislation.

The facts of the H’Mizrachi case were simple, if a bit strange. Following a very long and painful economic crisis in the Israeli agricultural industry, the Knesset legislated the “Gal Law” (named after the head of the finance committee of the Knesset), which significantly reduced the debts owed by some farmers’ unions to industrial banks in Israel. The banks brought the case to the courts, arguing, inter alia, that the Gal Law violated their constitutional right to property. The Supreme Court assumed that the law did indeed violate the banks’ property rights. The Court concluded that it had the authority to nullify the aforementioned law. Nevertheless, the Supreme Court found that under the economic and social circumstances of that time, the violation was justified under the “limitation clause.” Thus, the Court refrained to declare the Gal Law void.

4. Constitutional Revolution or the Evolution of Israeli Constitutional Law?

Unlike the characterization of the 1992 enactments as a “Constitutional Revolution,” I will propose a different assessment which pertains to the process not the result. I do not question the conclusion of the Supreme Court that there are some basic, fundamental constitutional rights in Israel, and that the Israeli legal system has adopted the concept of judicial review. However, I do question whether those rights and judicial review (“the constitutional concepts”) are the creation of the Knesset and the result of a “Constitutional Revolution.”

My basic argument is that due to unique circumstances and developments in the legal system in Israel, neither constitutional concept depends on a written constitution. Rather, the Israeli legal system was able to develop these concepts based on the following: the fact that the international community’s recognition of the state of Israel came with the requirement that the state would guarantee basic constitutional human rights; the fact that both the Zionist establishment and the state of Israel accepted this resolution; and the mere fact that Israeli society considers itself democratic.37

If this is the case, the current Knesset may merely acknowledge or even declare these constitutional concepts, but did not create them. As such, the Knesset does not have the power to curtail, diminish, or eliminate those basic fundamental concepts.38 Thus, I will first

38. For a stimulating discussion about the dichotomy between the people and the Parliament in England, according to the British Scholar A.V. Dicey, see Rivka Weill,
examine the question regarding whether a revolution indeed took place in Israeli constitutional law, and if so, who created it. Additionally, I will examine whether the second Knesset and its successors, all elected as the legislative body, have the power and the authority to conduct such a major revolution. I will then argue that the proper way to characterize the constitutional development is as a "Constitutional Evolution" rather than a "Constitutional Revolution."

However, before arriving at such a conclusion, several assumptions must be made.

Not only does the theory of the invisible hand apply to economic life, but it is a valid doctrine and should be applied to political and cultural aspects as well. Under this doctrine, a wise and prudent nation and its public will eventually adopt the optimal resolutions that benefit its own welfare once it possesses all the relevant information to do so.39

Second, the foundation of the social and political structure of any democratic society is based on consent;40 i.e. on the social contract.41

Third, the international community has the ability to offer its recognition to a new state by requiring the interested state to comply with certain requirements and provisions. A reasonable requirement is that the new state adopt the basic concept of democracy, respect basic human rights, and provide efficient tools to protect them.

Fourth, the sovereign in Israel, like in any other democratic state, is the public, or the nation's people.42 The sovereign appoints agents and authorities to serve its needs. The major agents are the judiciary, the legislature and the executive branches, and in certain situations the Constitutional Assembly, all of which are public agents.43 They are elected—or appointed—by the public, whether directly or indirectly, and are given the responsibility to serve the public interest and the public interest only.44 Accordingly, they are

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Dicey was not "Diceyan," 62 CAMB. L.J. 474 (2003). See also Justice Heshen's approach, infra ns. 166-168.

39. In spite of course, to the problems presented by the Public Choice theories and the Arrow's impossibilities doctrine, which are left out of this paper; see inter alia: DONALD G. SAARI, CHAOTIC ELECTIONS! A MATHEMATICIAN LOOKS AT VOTING (2001); see also infra text accompanying ns. 67-67.

40. For an elaborated study, see YOSEPH M. EDREY, THE BASIC LAW: THE STATE ECONOMY (Hebrew, Jerusalem, 2004).

41. See our discussion regarding the theoretical origins of the social contract, infra Part II. A; see also COHEN, supra n. 28, at 514; See also ROBERT S. PECK, THE BILL OF RIGHTS AND THE POLITICS OF INTERPRETATION (1992) and also S. Freeman, infra n. 77.

42. See supra n. 38.

43. There are also some other agents, such as the free press, that owes the public a great level of fiduciary. We leave this fascinating issue out of this article.

44. As Justice Cohen states: "The public servant does not possess anything. They do not own anything. Whatever they have belongs to the public and they owe only a great deal of unlimited fiduciary to the public." See H.C. 142/70, Shapira v. The Israeli Bar Ass. District of Jerusalem, 25(1) P.D. 331, 328.
bound to promoting and advancing the public interest in order to increase the welfare and the utility of the people. All public agents owe the highest fidelity to the public.45

As a matter of efficiency,46 each public agent is allocated certain duties and responsibilities. The legislature is responsible for enacting laws.47 The executive branch is in charge of executing and implementing the accepted policy adopted by the elected government. The judicial authority has the power to solve legal disputes and, under the common law system, to interpret legal norms and develop and update the legal system as circumstances change.48 The Constitutional Assembly, when in place, is responsible for composing the national credo, the basic values of the society and its general goals. It also must demarcate boundaries over which no other authority should cross in its pursuit of the national welfare and utility.

Under this form of government, the human being and his or her welfare is the center of society. Thus, the purpose of the social structure is to promote the welfare and well-being of individuals and the public. Since all government agencies are public agents, all the public’s agents are bound to the will of the sovereign. As such, their purpose is to materialize and achieve the society’s goals without deviating from the “agency contract.”

There is a risk that an agent might err regarding the understanding, interpretation, implementation, or execution of the will and interests of the public. A judicial agency might construe a legal norm in an unacceptable manner in the eyes of the public, and in turn, the legislature would be called to correct this mistake. The legislature might mistakenly cross one of the boundaries established by the public, necessitating the calling of the court to correct this problem. When the public is not slow or reluctant to honor minorities’ human rights, such corrections may take place either by way of interpretation according to the society’s basic values, by filling up lacunas in legal norms, or by developing the legal system in cases neglected by the legislature.49 In rare cases, the court may react to such a situation by eliminating the particular part of the legislation not in accordance with the society’s credo.

45. For a full discussion about this fidelity under the Israeli law, see EDREY n. 40, part 3.
46. We will not get into the issue of separation of powers and its rationales – including the issue of conflict of interest and the fear of powerful government – in this article.
47. Note though that the Basic Law: the Knesset does not define the Knesset’s mission, it just declares that the Knesset is the Parliament of Israel (in the original, official Hebrew version it states that the Knesset is the “House of the Elected”). No mention is made of the fact that the Knesset is the legislature body. See The Basic Law: The Knesset, 1958, S.H. 69.
Upon studying Israeli constitutional law, one will notice that there is no specific provision in any basic law detailing the allocation of powers in Israel. For example, the Basic Law: The Knesset does not explicitly say that the Knesset is the legislature in Israel. Section 1 of this Basic Law merely states that the Knesset is the House of the Elected Ones (Nivcharin in Hebrew). The Basic Law: the Judiciary does not enumerate the full powers of the judiciary branch, but states only that judicial power is vested in the various courts. No provision describes or explains the meaning of this judicial power. Indeed, the fact that Israel has a House of "elected ones" leads one to the conclusion that this House is responsible for legislation, as in any democratic state. Moreover, the fact that the state of Israel has a judicial system in which courts judge, decide and solve legal disputes reinforces the democratic nature of the state. As such, it would be illogical to assume that the Knesset is not the Israeli legislature simply because the Basic Law: the Knesset does not directly grant that body the power to enact laws. It would be equally misconstrued to assume that the courts are not allowed to solve legal disputes just because the Basic Law: the Judiciary does not explicitly state so. Similarly, it would be unacceptable that the absence of a written Bill of Rights in Israel until 1992 meant the non-existence of national human rights standards in general, or that the judicial branch did not have the power to decide whether the legislature violated or infringed upon one of the basic human rights, mentioned in both the UN Resolution 181 and the Declaration of Independence.

Indeed, there is no need for the legislature to reinvent the wheel and elaborate upon the precise structure of the separation of powers in the state. Suffice it to say (for the time being, as long as there is no Constitutional Assembly) that the legislature established an election system and declared the three authorities to be the executive (the Cabinet), the judiciary, and the legislature. The remaining details will in time be achieved by the state's legal culture and tradition as a member of the Western, democratic community.

Hence, it seems quite clear that the two Basic Laws that mention basic human rights were not intended to provide full and detailed solutions to the Israeli constitutional human rights problems; rather, they were a mere recognition and declaration of the fact that the

50. Though section 2 (a) of the Transition Law of 1949 supra n. 8, states: "a legislation action will be named law."

51. The Supreme Court, the District Courts, the Magistrate's Courts and other venues designated by law as a court; The Basic Law: the Judiciary, Sec. 1(a).

State of Israel is a member of the democratic international community and complies with its basic requirements.53

5. A “Thin” Constitution

Since the highest legal authority in Israel has decided that the Basic Laws are the Israeli written Constitution, I will argue that due to the way the Israeli Constitution has been adopted, it should be construed as a “thin” constitution,54 almost neutral. Therefore, the judicial branch should demonstrate a great deal of constraint while exercising its judicial review power, and should refrain from loading the Israeli Bill of Rights with social, economic and political meaning and connotations. These should be left to the legislature and the political arena, provided the fundamental human rights are respected and protected.

II. Basic Fundamental Rights and Their Protection

A. The Origin of Basic Fundamental Rights – The Social Contract

This article does not intend to provide an overall survey of the leading theories of the modern Western liberal democratic system. It is sufficient to refer to the very basic assumptions and the underlying rationales of such a system. Even though it seems quite obvious, it would be wise to remember that no matter how many, or what kinds of refinements, improvements, and adaptations each democratic society may introduce into its own constitutional bill of rights, the modern democratic state is based on consent, on a social contract. Revisiting the founders of the classical literature in this area reveals the idea that basic human rights are inseparable from a modern democracy. The creation of human rights and protection of these rights is not a written document—a constitution—but rather the consent of a given society to live together in an organized civil democracy, with its sole purpose being the enhancement of its welfare and happiness.

As opposed to the “organic state” concept,55 Western societies, ever since the seventeenth century, have believed that the state is


54. For further discussion about the two basic models of constitutions see infra Part IV.

55. Under the “organic” concept of the state, the state is conceived as a natural organism. Each individual is a part of it. The government is “the organism’s heart.” The individual has meaning only as a part of the community and the well being of the individual is derived or even defined with respect to the well being of the whole, of the organism. Thus the state is stressed above the individual. For a brief discussion see inter alia: James M. Buchanan, The Pure Theory of Government Finance: A Suggested Approach,” in Fiscal Theory and Political Economy – Selected Essays 8-22 (James M. Buchanan ed., 1960); Klaus Vogel, The Justification for Taxation: A Forgotten Question, 33 Am. J. Juris. 21, 30-32 (1989). For another classification see
supposed to serve the individual. They believe that in the center of the society there is a man or woman with his or her own needs, happiness, welfare and liberty; the individual, rather than the group, is at center stage.\textsuperscript{56}

The roots to understanding the need for basic fundamental rights and the search for a list of basic inalienable rights lie within the paradox resulting from the organization of a society—the transition from the “state of nature” to the social contract. The rudimentary question, which arises from such a change, concerns what the average human being is prepared to relinquish or cede in exchange for the protection and benefits of the social contract. The “true” state of nature is almost irrelevant for our purposes;\textsuperscript{57} it matters little whether we assume that the state of nature develops into an unbearable state of ongoing fights,\textsuperscript{58} or whether we assume that it is not a state of complete anarchy, but rather an ideal state of complete liberty.\textsuperscript{59} In both cases, an individual agrees to leave it, to enter into a social contract and to give up some of his or her “natural rights” in order to improve his or her situation. Therefore, according to the former assumption, an individual yields his or her natural rights, but acquires certain rights\textsuperscript{60} as a result of the social covenant. Without these acquired rights, his or her situation would be worse relative to the initial state of nature.\textsuperscript{61}

Barak, supra n. 37, pp. 118-119, where President Barak distinguishes roughly between three primary societal models: the first regards the state with great suspicion; under the second one the state, represented by the executive and legislative branches, is viewed as a realization of national aspiration; under the third model the state is perceived both as a source of good and a source of evil. The state is feared as a source of harm to the individual, but it also supported as a source of protection for the individual.

56. Cohen, supra n. 28, pp. 55-80; See also the economist Harvey H. Rosen as he recalls a most familiar quotation by the American statesman Henry Clay: “Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people.” (Speech at Ashland, Ky., March, 1829); Based on the writings of Hobbes, Smith, Jefferson, and even Kenneth Arrow, Rosen distinguishes between the “organic” concepts and the “Mechanistic View of Government,” see Harvey S. Rosen, Public Finance 5-7 (6th ed. 2002).

57. Of course this difference is extremely important when dealing with the scope of human rights, but not when dealing with their mere existence.


60. As Hobbes put it: “And whereas many men, by accident become unable to maintain themselves by their labour; they ought not to be left to the charity of private persons; but to be provided for, as far forth as the necessities of nature require, by the laws of the commonwealth,” supra n. 58 Chapter 30, 303-304.

61. As T. Hobbes suggested: “To come now to the particulars of the true liberty of a subject; that is to say, what are the things which, though commanded by the sovereign, he may nevertheless without injustice refuse to do; we are to consider what rights we pass away when we make a Commonwealth; or, which is all one, what liberty we deny ourselves by owning all the actions, without exception, of the man or assembly we make our sovereign.” See supra n. 58, Chapter 21, 141.
According to the latter assumption, the major flaw in the state of nature is the lack of judicial and penal authority. The transition into a societal organization is not the result of an emergence from a state of adversity or hardship. The major purpose of the social contract is fulfillment of the function missing in the natural state—what is known as the rule of law. The authoritative decision process is intended to solve controversies between humans, and to be the exclusive coercive power to establish law and order, including the power to use violence to punish offenders.\textsuperscript{62} The social contract does not entail the relinquishing of natural rights, but only of a human's natural authority to do justice against offenders of his or her rights.\textsuperscript{63}

Not only does a human not relinquish the natural rights to life, liberty and even to property, but the sole purpose of the commonwealth is to protect these rights and to ensure their fulfillment. The authorities of the government—the executive as well as the legislative branches—derive their power from those rights ceded by its citizens. Accordingly, when legislation infringes upon the subject's natural rights, it is no longer permitted or acceptable.\textsuperscript{64} Thus, while Locke acknowledged the majoritarian principle, according to which the majority has the right to act and legislate,\textsuperscript{65} the majority is not authorized to legislate on matters other than those placed in the hands of the community at the expense of natural liberties.

J. J. Rousseau presents an approach even more complex. Rousseau begins \textit{The Social Contract} by defining the conflict between striving for individual liberty and the majoritarian principle:

\begin{quote}
My purpose is to consider if, in political society, there can be any legitimate and sure principle of government, taking men as they are and laws as they might be...\textsuperscript{66}
\end{quote}

Then he moves to the following question:

\textsuperscript{62} Locke, \textit{supra} n. 59, at Chapter 7, pp. 341-3.
\textsuperscript{63} "Man being born, as has been proved, with a Title to perfect Freedom, and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man, or Number of Men in the World, hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men; but to judge of, and punish the breaches of that Law in others, as he is persuaded the Offence deserves, even with Death it self... But because no Political Society can be, nor subsist without having in itself the Power to preserve the Property, and in order thereunto punish the Offences of all those of that Society; there, and there only is Political Society, where every one of the Members hath quitted this natural Power, resigned it up into the hands of the Community..." \textit{Id. at} 341-2 (Chapter xii, sec. 88).

\textsuperscript{64} This is what Locke called "Exercise of Power Beyond Right," or Tyranny. In his words: "When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion." \textit{Id. at} 416-423 (Chapter xviii, sec.199-210).

\textsuperscript{65} \textit{Id. at} 348-9 (Chapter viii).

... How to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and remains as free as before...67

The answer to this challenge provided by the author of *The Social Contract*, is the "total alienation by each associate [of the social pact] of himself and all his rights to the whole community."68 This discharge, however, is not free of exchange or reward. Each individual (possibly due to the "veil of ignorance"...), actually stands to gain from the contract:

... in the first place, as every individual gives himself absolutely, the conditions are the same for all, and precisely because they are the same for all, it is in no one's interest to make the conditions onerous for others.

... Finally, since each man gives himself to all, he gives himself to no one; and since there is no associate over whom he does not gain the same rights as others gain over him, each man recovers the equivalent of everything he loses, and in the bargain he acquires more power to preserve what he has.69

If the determination of rights were left to the individual, the lack of higher authority in the form of a judicial system would result in each man demanding to be his own judge not only in some cases, but in all. Rousseau's idea is thus the incorporation of every member and his rights as an indivisible part of the whole. Natural rights are not conferred upon an almighty sovereign, but rather are entrusted to the community, the general populace. Through this incorporation, the "general will" is established, as reflected by democratic principles and elections. This incorporation serves to protect and preserve the prepossessed natural rights.

One should not overlook the potential conflict between the "general will" and individual rights.70 Rousseau's answer to this elementary problem may be viewed as naive, perhaps utilitarian. One may even recognize the attributes of an "invisible hand" theory:

The commitments which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them a man cannot work for others without at the same time working for himself. How should it be that the general will is always rightful and that all men constantly wish the happiness of each but for the fact that

67. *Id.* at 60.
68. *Id.*
69. *Id.* at 61.
70. *But see supra* n. 39.
there is no one who does not take that word 'each' to pertain to himself and in voting for all think of himself?\textsuperscript{71}

Indeed, the "general will" is derived less from the quantity of voices than from their quality – the common interest that unites them. The fundamental characteristics of the social contract are the equal submission of certain rights, the common pledge under the same conditions, and the enjoyment of the same rights. The nature of the pact thus becomes "not a covenant between a superior and an inferior, but a covenant of the body with each of its members." The purpose of the contract is the common good, which, under the terms of equality, leads in turn to the good of the people, who ultimately obey no one but their own will.\textsuperscript{72} To conclude, we may reiterate:

What man loses by the social contract is his natural liberty and the absolute right to anything that tempts him and that he can take; what he gains by the social contract is civil liberty and the legal right of property in what he possesses. . . We might also add that man acquires with civil society, moral freedom, which alone makes man the master of himself. . .\textsuperscript{73}

Two major conclusions can be drawn from the quotation. First, the basic fundamental human rights, such as the right to life, liberty, equal opportunity, human dignity, integrity of one’s body, equal representation, through the right to vote and the right to be elected, and even to property, are all derived or construed from the social contract. They exist because each member of society has never given them up (nor acquired them by entering into the social contract).\textsuperscript{74} They are not granted by the "almighty sovereign" or by any document. They are an integral part of each human being as such. Even Hobbes acknowledges, as we have seen,\textsuperscript{75} a basic principle according to which, under certain circumstances, an individual may defy the sovereign if the latter attempts to take actions opposing the essence of the individual’s existence. The derivative conclusion involves recognizing that every democratic society, by definition, is founded on the basis of a short list of fundamental democratic principles that are the "heart and soul" of democracy, without which one cannot imagine its existence. These principles need not be put in writing as formal law or even in a formal written constitution; rather, they exist so long as democracy exists. Such rights and principles, which by definition cannot be disregarded, are termed in this paper "basic fundamental rights."

\textsuperscript{71} Rousseau, supra n. 66, at 75.
\textsuperscript{72} Id. at 76-7.
\textsuperscript{73} Id. at 65 (Book 1, Chapter 8).
\textsuperscript{74} Supra n. 60.
\textsuperscript{75} Supra n. 61.
Thus, the assumption underlying the above discussion is that while the majoritarian system of decision-making, even in its theoretical ideal form (50% + 1), is the direct method of establishing law, it must not be the ultimate determinant of human affairs. Free of limitations and restraints, the majority could use its power to divest minorities or individuals of their basic fundamental rights, and would also have the ability to create dictatorships or arbitrariness, ultimately leading to tyranny. Hence, a second conclusion is that in addition to the basic fundamental rights, an essential attribute of a democratic society is the rule of law and the need for an independent judicial system that decides legal conflicts. Other legal disputes that an independent judicial branch must address are: What are the limitations by which the majority is bound? Does the majority violate any of the basic fundamental rights? Is the violation justified?

B. Who Ensures the Protection of Basic Fundamental Rights? The Concept of Judicial Review

The aforementioned tension that arises in a democracy between the majority's elected leaders on the one hand, and the individual and minority voters on the other, is by no means unique. Rather, it is a typical element in situations of agency and trust where there exists an imminent fear that the agent or trustee will overstep the boundaries of his representation, will commit misuse or breach of trust, or will favor his own interests at the expense of the beneficiary. Such concern is justified by the reality that members of legislative bodies often work, act, and strive to advance their own narrow, short-term goals and interests. One may suppose that a member's immediate

76. See for example Alexis de Tocqueville who recognized a threat to democracy in the majoritarian principle: "A majority taken collectively may be regarded as a being whose opinions, and most frequently whose interests, are opposed to those of another being, which is styled a minority. If it be admitted that a man, possessing absolute power, may misuse that power by wronging his adversaries, why should a majority not be liable to the same reproach? Men are not apt to change their characters by agglomeration; nor does their patience in the presence of obstacles increase with the consciousness of their strength. And for these reasons I can never willingly invest any number of my fellow creatures with that unlimited authority which I should refuse to any one of them"; Alexis De Tocqueville, Democracy in America, Ch. XV., 304-305 (1961).

77. Supra n.s. 44-45; see inter alia, Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9 LAW AND PHILOSOPHY 349 (1990). Freeman finds support for such an approach in the writings of John Locke. See Locke, supra n. 59, Chapters 11-13.

78. Michael E. Granfield, Changing Industries and Economic Performance, in LARGE CORPORATIONS IN CHANGING SOCIETY (J.F. Weston ed., 1975). A similar notion may be found in Richard A. Posner, Economic Analysis of Law 405 (2nd ed., 1977). It is worthy to note the warning expressed by James Madison: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex... it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions..."; accordingly, Madison envisioned the Constitution, as well as Judicial Review as effec-
interest involves being reelected. In order to achieve this, his or her aim is to appeal to the will of the voters and to act accordingly. Naturally, legislative members are thus inclined to take actions that will benefit the majority of the voters. Consequently, it is necessary to protect the minority, or individuals, from potential harm, malevolence and wrongdoing inflicted by the majority through its elected representatives. Thus, a normative framework that restrains members of the legislature from acting contrary to basic principles is required.

As we are aware, only enforeable rights are legal rights. If it is accepted that there are some basic fundamental rights that every member of the community possesses and upon which nobody, including the majority in a democratic community, is allowed to infringe upon, then the simple question is: Who should ensure that the majority respects the minority’s rights? Who supervises the majority and prevents it from violating the human rights of both the individual and the minority?

Once again, I argue that the concept of judicial review is an integral part of any democratic society and does not depend on the existence of a written constitution. As has long ago been established, there is no need for a specific provision in a constitution to contemplate the concept of judicial review.

Professor Samuel Freeman employs the concept of basic rights to refute the principal argument against judicial review. The argument suggests that because judges are appointed rather than elected and therefore do not face the test of reelection, judicial review as an institution undermines democratic principles. Freeman reminds us that “this family of ideas—equal freedom, equal rights, and equal political participation—is central to the natural rights theory of the social contract tradition of Locke, Kant, and Rousseau, and to the modern version of that tradition, Rawls’ justice as fairness.” Every democracy is founded upon the principle of decision-making according to the opinions of the majority. From here arises the simple problem of the degree to which the majority is authorized to infringe upon basic rights. Moreover, who is to decide whether the majority indeed has violated such rights, and what shall be done in such a case? Freeman claims that in a democracy, which is a form of sovereignty, judicial review expresses the common commitment of free and equal citizens to preserve and uphold the conditions of their sovereignty. True, if we were

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79. See infra n. 101-106.
80. See supra text accompanying n. 76.
to adopt a procedural model of democracy, then the power and authority to decide whether the majority has or has not violated the rights of the minority would have to be entrusted to the institution that also functions according to the majoritarian principle. Nevertheless, the democracy we strive for is a material, essential, and substantial one. It would therefore be wrong to allow matters regarding the existence, scope, significance, and substance of fiduciary relations to be decided by one side to those relations. If the claim arises that the majority violated the correct balance between democratic decision-making and the preservation and respect of basic rights, it is not for the same majority to determine whether such a violation actually occurred and what the consequences shall be. The people are the sovereigns, and they invest agents with the responsibility to legislate, as well to adjudicate and resolve disputes. Like any other power, the authority of the legislature as well as the judiciary is subject to the duties and responsibilities associated with fiduciary relations.

The need to place the authority to review legislation into the hands of a judicial branch is derived from the principles of modern, Western democracy. As we saw above, the theoretical origin of modern democracy is the existence of a social contract or covenant. The individual does not relinquish his or her natural and basic fundamental rights when joining the covenant, and consequently, the majority must not be permitted to deprive him or her of those rights. Since individuals, or minority groups, do not have the power to influence or bring forth a change in legislation or the administration, it is necessary to place human rights in a position superior to that of regular legislation. When there is a dispute over whether the majority has abused its power and violated an individual or basic minority right, it is quite clear that a “third party” should be called upon to decide the issue. Indeed, the third party is the independent judicial branch, whose members are appointed for tenure without any commitment to the majority per se. The authority to review whether the majority or the legislature has violated the rights of the minority is what is known as Judicial Review.

III. WAS THERE INDEED A CONSTITUTIONAL REVOLUTION?

In this chapter, I will argue briefly that the title “Constitutional Revolution” does not appropriately describe the process the Israeli legal system has been through for the past fifty-five years. I will argue that instead of using the very loaded and even provocative term,

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82. See infra n. 106.
83. Freeman, supra n. 77, at 349.
84. It is also apparent that the constitution must include instructions regarding the form of administration, including a system of election that will prevent hurting the minority or distortion of the will of the majority. For example, Bernard H. Siegan, Commentary on Monahan Paper, 21 UNIV. BRIT. COL. L. REV. 163 (1987).
“revolution,” the Israeli legal community should use the term “evolution,” implying a systematic, desired, predictable, and even unavoidable process. The phase and direction of such an evolution depend on cultural, economic, security-related, and existential facts surrounding each state or society.

A. The Development of Basic Human Rights Without a Written Constitution

For much of its history as a state, Israeli society has maintained the view that there are some basic and fundamental human rights deserving protection. Yet, for several reasons detailed below, Israeli society has had and continues to have significant difficulties—and has made some significant mistakes—in formalizing that concept into an unequivocal written document.

From the very early stages of its statehood, Israeli society has been torn and tormented. Throughout its existence, it has experienced a great deal of tension and conflict. The relationship between church and state and the determination of the state’s borders are two prominent examples of issues not yet resolved by the Israelis. Nevertheless, Israeli society was able to internalize the idea that as a member of the democratic community, there are some basic rights that no government may violate.

A close study of the Israeli legal and cultural environment reveals that there has been an ongoing constitutional development within the society. The Israeli legislature has translated this development into some written statutes and the judiciary has contributed its share as well. Yet, this process has been done without any ma-

85. To name some examples: sec. 2 of the National Educational law (1953, S.H. 137) elaborates the goals of national education by referring to the basic liberties mentioned in the Declaration of Independence and calls for the development of a respectful relationship toward human rights and the provision of equal opportunity to every boy and girl; The Equal Opportunity at Work Law (1988, S.H. 38) prohibits any kind of discrimination based on sex, sexual preferences, personal status, parenthood, age, religion nationality, place of origin, personal views, political party or reserve military service; Sec. 1 of the Women Equal Rights Law (1951, S.H. 248) declares that the purpose of the law is to ensure full equality between man and woman, according to the principles of the Declaration of Independence. Furthermore, other provisions of the law specify the definition of this equality; Sec 2 of the Local Authorities (elections) Law (1965, S.H. 248) bases the electoral system of the localities on principles of equality both to vote and to be elected (for the same principles see also sec 4 and 6 of the Basic Law: The Knesset). Other laws introduced the concept of affirmative action to the Israeli legal system both for women and minorities, see sec 4 of the Civil Defense law (1951, S.H. 87), sec 8(b) of the Sport Law (1988, S.H. 122), sec. 18A and 18A1 to the Government Corporation Law (1975, S.H. 132). For the protection of privacy see sec 1 of the Protection of Privacy Law (1981, S.H. 240).

86. There is no need to cite here a list of hundreds of cases. See for example B.s.p 2169/92, The State of Israel v. Swisa, 46(3) P.D. 338, 344, where the Supreme Court discusses the synthesis of the values of a Jewish-Democratic State and shows that under both a person has an ultimate right for personal freedom. See also H.C. 6699/ 96, Ka’adan v. The Management of the Israel Real Estate et al, 54(1) P.D. 258, 272-
jor plan or long-term strategy. As long as there is no accepted process designed to produce a written constitution, it seems that the creator of Israeli values is the Israeli sovereign, namely the Israeli public, through its agents and its leaders—legal, political and spiritual. In order to explore this and the special circumstances that brought Israeli society to such a unique situation, we must briefly examine four stages Israeli society has experienced, and continues to experience in its struggle for independence: 1) the legitimacy stage, during which the state made efforts to attain recognition by the international community and international institutions; 2) the security stage which involved military struggle, with its primary goal being the attainment of both military and political independence; 3) the economic stage where the nation strived to gain economic independence and establish and maintain a prosperous economy; 4), the cultural stage in which the nation shaped and defined its culture and values.

The first stage was conducted mainly during the pre-state era by the Zionist leaders. It produced, among other achievements, UN Resolution 181, including the requirement that the new state adopt a constitution “guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms....”

The second stage has been extremely painful and is not completely over. The national and ethnic trauma of the Holocaust in Europe, which destroyed one third of the Jewish population, was integrated into the daily life of Israelis. The constant fear of a second Holocaust, this time in Israel, was quite tangible and based on reality. Thus, because the nation’s energy was primarily channeled into grappling with the military struggle for Israel’s basic existence, the struggle to determine the nation’s cultural identity was pushed to the wayside.

The third stage, related to economics, was also quite difficult, yet has produced very impressive results and has therefore consumed a great deal of national energy. Thus, this third stage has provided yet another excuse for postponing the Israeli effort to determine and shape its normative and cultural values.

276, where the court declares that equality is “one of the fundamental basic values of the State of Israel... stems from the Jewish-democratic character of the state, from the principle of rule of law and from the Declaration of Independence which states: “The State of Israel... will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex”; and see also the articles supra n. 9-10.

87. See Weil, supra n. 38.

88. Supra n. 5.

89. On the other hand, The Israeli Supreme Court President Barak indicates: “Since the Holocaust, all of us have learned that Human rights are the core of substantive democracy.” See Barak, supra n. 37, at 20.
Nevertheless, the development of a nation’s spirit and culture cannot be suspended indefinitely. In spite of these other challenges, the Israeli culture has flourished, though not at the level that was necessarily hoped for. Indeed, there have been some exceptional achievements, albeit only partial. To be sure, Israeli society lacked the national energy to fully cope with the development and acquisition of a cultural identity. Indeed, Israeli society is a torn and tattered one, full of social conflicts. The causes are quite evident, and include the deep tensions between church and state, Jews and non-Jews, ethnic groups from around the world, poor and rich, liberals and socialists, and Zionist and anti-Zionists, to name only a few. While it was hoped that the constant cultural struggle would provide some sort of resolution to these conflicts by bringing a sense of cultural unity and identity to the nation, instead it has already consumed a great deal of the national vigor. As a result, the exhausted Israeli society has been unable to openly confront these conflicting groups and movements. Thus, Israeli society was compelled to form the basic minimum set of values under which every group and individual felt sufficiently “comfortable.” The “status quo” was agreed upon not as the ideal solution but as a “time-out” measurement. It was meant to enable the State of Israel to prepare itself for the real confrontation, while at the same time initiating some national concessions and a basic social understanding among the many conflicting groups.

While the nation’s cultural identity remained undeveloped, basic human rights were established and declared immediately after the establishment of the State of Israel. Ever since then, they are being constantly developed.

B. The Developmental Concept of Judicial Review in Israel

As mentioned above, despite the fact that Israeli courts recognized the existence of basic fundamental human rights, the Israeli Supreme Court was reluctant to adopt the full doctrine of judicial re-

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90. See supra text accompanying n. 22.
91. The Status Quo was a semi-agreement between Prime Minister Ben Gurion and the National Religious Parties which left the then current “church and state” situation intact. As a result, there are no civil marriages in Israel today, public transportation during Sabbath is very much limited, and most of the Jewish holidays are national holidays as well. See inter alia H.C. 2901/97, 5070/97, Na’amit et al v. The minister of interior affairs et al, TAK-EL 2002(1) 634, at p. 655; H.C. 58/68, Shalit v. The minister of interior affairs et al, 23(2) P.D. 477, 522-525; See also Lahav, supra n. 24, at 197; See also Sapir, supra n. 11, at 619-34.
92. As mentioned already, Justice Agranat “carved out” the constitutional rights of freedom of the press and freedom of expression from those over-arching values floating in the background of legal systems in every democratic society H.C. 73/53, 87/53, Kol Havam Inc. et al. Minister of Interior affairs, supra n. 21.
93. Supra ns. 9-14, 22.
view, 94 until the 1970s. The most significant change began with Justice Haim's Cohen article 95 and continued with Justice Barak's dicta in the Lao"r Case, which stated that the judiciary has the right to nullify unconstitutional laws. Still, as previously mentioned, even Justice Barak concluded that:

...the public comprehension is that such an important and meaningful decision should be made, in this stage of our national life, by the people and its elected representatives. 96

With all due respect, such aspiration is a bit naive and ignores the basic fact that the elected representatives represent the majority. It is very unlikely that they willingly impose upon themselves any significant restriction of their political power and discretion. If we were to wait until the members of the Knesset created and directly introduced the full concept of judicial review into the Israeli legal (and political) system, in all likelihood, such an occurrence would never take place. 97

The enactment immediately after publication of the Lao"r case of the two basic laws on the right to human dignity and liberty and on the right to freedom of occupation indicates the public's new consensus. The public was expressing its consent to change the aforementioned tradition, and to accept the concept of judicial review. Such willingness to change represents an encouraging dialogue between the courts and the public's elected representatives. 98 If the court was waiting for a sign from the public signaling its readiness for a new era where judicial review could be implemented, these two basic laws served as that much anticipated sign. But whether it was a sign, a mere change of tradition, or a declaration of its existence, the enactment did not constitute the creation or recognition of judicial review. It had been there already.

C. The Basic Laws as a Declarative Bill of Rights

Essentially, the Israeli legislature has reacted to this readiness by taking the basic values and normative principles developed by Israeli society and internalizing them into the legal system. Since "the Law is nothing but a focal mirror image of the moral values [and the scientific achievements] of the current generation," 99 the basic values and principles of Israeli society must be reflected in its legal system. Indeed, the major institution in Israeli society that has chosen to guard the constitutional and legal values is the Israeli Supreme

94. Supra ns. 9, 10, 11, 26.
95. Supra n. 27.
96. Supra n. 30.
97. Supra especially n. 78, infra ns. 107-111.
98. See supra ns. 9, 10, 11.
Court. Under this approach, the enactment of both the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation has been an additional indication of approval from Israeli society to acknowledge and integrate basic human rights and the doctrine of judicial review into the Israeli legal system. Thus, basic human rights and judicial review are not the product of the Knesset but are a product of Israeli’s democratic society and its acceptance of the international community’s requirements. So long as there is no election of the Constitutional Assembly, even today’s Knesset lacks the power to eliminate or diminish basic human rights standards or the power of judicial review.

It is extremely difficult for me to accept the thesis that the current Knesset is a Constitutional Assembly. It was not elected as such, and its electors were unaware of the possibility that the members they elected to the Knesset would be called upon to proclaim or limit the values and the credo of the State of Israel. Furthermore, the current Knesset’s authority is limited not by those laws which it creates or imposes upon itself, but rather by the “social deed of agency” that appoints it to legislate. This deed by definition prevents the Knesset from enacting “bad laws.” It also directs the Knesset to serve only as a “good legislature” that respects the basic fundamental rights—rights which no reasonable individual relinquishes upon entering the social contract. Thus, the Basic Laws are not a constitution but rather reflect the Knesset’s understanding that it is limited by the basic overarching principles hovering above Israeli democracy and required by the international community.

Nonetheless, the Supreme Court has chosen a different path.

D. Does the Knesset Have Unlimited Power? – The “Two Hats Doctrine”

In the Mizrachi case, the majority of Israeli Supreme Court justices, headed by its new President-Justice Barak, adopted the “two hats doctrine” approach offered by Professor Klein some twenty-five years earlier. Essentially, the idea of the doctrine is, due to the Harari Resolution, that the Knesset has two hats - the legislative hat and the constitutional hat. Whenever the Knesset enacts a law entitled “Basic Law,” it wears the constitutional hat and thereby creates or adds to the Israeli Constitution. In President-Justice Shamgar’s last case on the bench, instead of the “two hats doctrine,” he

100. See Gad Barzily, Ephraym Yaar-Youchman and Zeev Segal, The Supreme Court in the Eyes of the Israeli Society, (Hebrew, 1994).
101. See R. Weil’s presentation of Dicey’s approach, supra n. 38.
102. According to Justice Cohen’s terminology, supra n. 27.
103. Supra ns. 27, 60-76.
105. Supra n. 13.
preferred to rely on the notion that the Knesset has the authority to restrict its power to legislate, and in fact did so by enacting the aforementioned Basic Laws. Only Justice Heshin disagreed with both his colleagues' doctrines; he relied instead on the idea of overarching values and norms associated with, and being an integral part of, the democratic State of Israel.

The main problem of the Supreme Court's majority approach is that it gives the Israeli legislature a rare and significant power to decide its own boundaries and limitations. The "two hats doctrine" loses sight of the basic concepts of separation of powers and checks and balances, which ensure that individual government agencies do not become too powerful and create potential for a conflict-of-interest situation.

Based on conventional knowledge the ultimate goal of the Knesset members is usually reelection. With this goal in mind, they will do almost anything to appease the voters; they therefore act on a short-run populist agenda, aiming their goals at the median voter. The members of the Constitutional Assembly, on the other hand, are not professional politicians. In most models they are elected only for one term and do not have short-term interests, but instead grapple with long-term considerations. Their role is to provide guidelines limiting the power of professional politicians elected to the legislative assembly.

Unfortunately, the quality of the current Knesset is such that it does not strictly adhere to the constitutional spirit nor does it maintain the Constitutional Assembly's required accountability and responsibility. The current Knesset is extremely preoccupied with the multitude of political issues facing the country today and the crucial decisions it is forced to make. At issue are the following: the future of the West Bank and Gaza Strip, negotiations surrounding the return of territories to the Palestinians and the Syrian Government, the determination of the "right" and efficient economic policy, distributive justice, and the separation between church and state. All of these issues provoke extremely heated debate in Israeli society today. As mentioned, Israeli society is very much divided. As such, some Kness-

106. Granfield, supra n. 78.
107. For a basic model, see for example Rosen, supra n. 56, at 109-113; Joseph E. Stiglitz, Economics of the Public Sector 93-95 (3rd ed., 2000).
108. In a very famous article published by one of the Zionist movement's leaders, Echad A'am draws a fascinating distinction between Cohen and a Prophet. The first one is a servant of the public and is supposed to provide current public services. The latter is more of a spiritual leader whose major concerns are the visions, or the long range interests of the society. Echad Ha'am, Moses, in On A Crossroad, 78 (Hebrew, Dvir, 1953). In our term, the member of the Knesset is the Cohen, the prophet is the member of the constitutional assembly.
set members are willing to sacrifice constitutional principles in order to achieve their political goals, such as promoting chances for peace in the Middle East or annexing parts of the Biblical land of Israel to the State of Israel. The likelihood of this happening causes doubt about whether the Knesset and its members still maintain the necessary energy, integrity, and discretion to properly consider fundamental constitutional issues.

It would be difficult to try to predict what might happen if the Knesset were to twist the meaning of human dignity or tries to curtail the Supreme Court’s power of judicial review. After all, based on the “two hats doctrine” a Knesset wearing its constitutional hat may abuse the power granted to it under this doctrine. Would it be safe to assume that in such a case the courts would maintain their judicial review power over basic laws? If so, is it possible that the courts have the power to nullify legislation made by what the majority of the Supreme Court considers the Constitutional Assembly? If not, Israeli society is doomed to the full consequences of the “two hats doctrine,” so that whenever the majority of the Knesset decides to wear the constitutional hat, it would have the power to enact any norm. Under such a system, human rights in Israel and their protection would be tenuous at best, far from guaranteed.

The argument proposed in this article is that there was no constitutional revolution, but rather a constitutional evolution. This argument may ease the difficulties discussed above. The enactment of the two Basic Laws indeed acknowledged, declared and essentially reinstated UN Resolution 181, the Declaration of Independence, the election to the Constituent assembly,110 as well as the doctrine already adopted in the early 1950s by the Supreme Court and then further developed by the Israeli legal community and eventually the Israeli public. This doctrine embodied the notion that emanating from the Israeli legal system are overarching legal and constitutional norms and values which are an integral part of any democratic state. It stated that whenever there is a legal dispute over whether the legislature has crossed the line and violated basic fundamental human rights, the judicial branch should decide whether such violation did indeed occur and if so, whether it was justified. Moreover, these constitutional concepts are not created by the Knesset, and the Knesset is not empowered to diminish or deny them. As a result, it would be objectionable to argue that those natural rights internalized into the statutory Basic Laws may be eliminated by the legislature upon reaching a random and coincidental majority111 of Knesset members.

110. Supra text accompanying ns. 5-7.
111. Note, that in Israel the Legislature is composed only of one house; no Senate and Congress, nor Common and House of Lords. On the advantages of having two houses see William T. Mayton, The Possibilities of Collective Choice; Arrow's Theorem,
Eliminating these basic rights would essentially amount to the majority of Knesset members taking advantage of the situation and power allocated to them by twisting the accepted and reasonable meaning of the term "human dignity."

E. The Aftermath

It is indeed too early in the development of Israeli constitutional law to summarize and attempt to draw major conclusions from the constitutional revolution. Estimating its magnitude is likewise premature. Nevertheless, two observable facts are noteworthy: the Knesset’s reaction to the power bestowed upon it by the Supreme Court and the inconsistency the Supreme Court has demonstrated ever since adopting this "constitutional revolution," while trying to load the economic and social meaning of constitutional rights.

1. The Knesset’s Reaction

As a general rule, the Knesset’s reaction to the constitutional evolution was indeed a positive one, i.e., the Knesset and its legal counselors adapted to the idea that any new legislation must comply with the new guidelines of the two new Basic Laws. However, two phenomena are noteworthy. First, it should be mentioned that since the enactment of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, the Knesset has been unable to agree on any other Basic Law that provides constitutional rights. Attempts were made to enact the Basic Law: Social Rights, but to no avail.112 Second, as indicated by the following developments, the Knesset has been unable to resist pressure stemming from the religious parties, even when wearing the constitutional hat.

For many years, the only importer of frozen meat into Israel was the Israeli government. When a decision was made to privatize this import, the religious parties opposed the decision out of fear that without the government’s control, non-Kosher meat might enter Israel. Consequently, the government decided to continue the privatization process by special legislation aimed at easing this concern. Before the legislation process was enacted, an importer applied to the Supreme Court (in its capacity as the High Court of Justice) and asked it to order the Ministry of Commerce to issue an import permit without any delay. The Supreme Court issued this order, noting that the only consideration the Ministry of Commerce was allowed to take

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112. For a comprehensive discussion of the various bills, see A. Bendor, Deficiencies in Legislation of the Basic Laws 2 MISPAT U’MIMSHAL 443, 334-336 (Hebrew, 1995).
into account was the public's health—no religious concerns.113 In his opinion, Justice Or provided dicta saying that since the new law may violate the right to freedom of occupation, it required a majority of 61 out the 120 Knesset members. Later, in early 1994, the Knesset approved the government's proposal and enacted the new law which required any person intending to import frozen meat to Israel to provide a Kosher certificate from the chief rabbinate.114

Several weeks earlier, the Knesset had worn its constitutional hat and introduced a new proviso into the Basic Law: Freedom of Occupation, allowing the Knesset to enact a law violating the right to freedom of occupation under some circumstances. Indeed, the new Meat Law requiring a kosher certificate for imported meat included a special statement, noting that "this law shall be effective despite the Basic Law: Freedom of Occupation."

A new petition was addressed to the Supreme Court by several importers. They argued, inter alia, that the new Meat Law violated their rights to religious freedom and freedom of conscience, thus infringing upon their right to human dignity. Furthermore, they argued that due to the restriction of the Meat Law, their businesses had lost significant economic value, violating their property rights. In addition, the importers argued that the new Meat Law violated the principle of equality since it required only a Jewish Kosher certificate and not a Muslim Halal certificate. Finally, they argued that the law unfairly increased the price of non-kosher meat, forcing underprivileged non-Jews or customers not adhering to the dietary laws to pay the price for a law enacted for the benefit of religious Jews. Despite these claims, the petition was rejected by a panel of nine justices, headed by President Barak.115

My own conclusion from the above development is twofold: First, the Knesset failed the first serious test by behaving like a political legislature while pretending to wear the constitutional hat. Second, the Supreme Court was reluctant to cope with the pressure, tactics, and activities used by the politicians, while those politicians were wearing their constitutional hat.

2. Social and Conservative Values and the Constitutional Debate

Watching the immediate reaction of the Supreme Court to the constitutional revolution, the general feeling among scholars and practitioners was that in their eagerness to implement the constitutional revolution and strengthen it, some of the Supreme Court Jus-

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tices moved too quickly and loaded the constitutional rights with normative, economic and social values. By doing so, those justices overlooked the fact that the new Israeli constitution was embraced by the Knesset without wide public support; that the two Basic Laws represent a very delicate balance between conflicting ideas, values and world views; and that any hasty violation of this delicate balance might undermine the unity of Israeli society.

a) Conservative Trend?

As mentioned above, the first case that was brought to the Supreme Court dealt with the constitutional right to property. Immediately thereafter were several troubling indications that some of the Court’s decisions were a bit hasty, and that due to its efforts to strengthen human rights in Israel, the Court was about to make the right to private property one of the most important constitutional rights in Israel.116 This development was harshly criticized by the Israeli academia. Soon after the H’Mizrachi case, Professor A. Marmur expressed deep concerns regarding whether the Israeli constitutional revolution was in fact a libertarian revolution aimed at changing basic social concepts, providing more economic rights to those who already had them, and pushing away the social democratic values and communal character of Israeli society.117 He was not alone in his suspicion.118

In addition, there have been a significant number of cases119 in which the Supreme Court reversed long-standing decisions and used

116. For later cases where the Supreme Court has followed the H’Mizrachi case and provided significant importance to the property right, see inter C.A. 5546/97, Kiryat Ata v. Holzman et.al., 55(4) P.D. 629; H.C. 2390/96, Kersik et al. v. The State of Israel, 55(2) P.D. 625. C.A. Ra”a 6072/98, Shadmon et al v. The State of Israel et al, 54(1) P.D. 519.

117. A. Marmur, Judicial Review in Israel 4 MISHPAT U’MIMSHAL 133 (Hebrew, 1997).

118. For example: Two young researchers from Haifa expressed the same line of concern while analyzing an article written by Justice Barak, and expressed the following opinion:

The way Justice Barak interprets the new Israeli Constitution as a constitution with its basic premise of market economics based on free competition brings him to present a solid doctrine of an economics-based constitution lacking in social aspects; a constitution with liberal, maybe complete libertarian attributes. This doctrine is not necessarily the outcome of the new Basic Laws, and in our mind even not an accepted one... When scrutinizing the author's concept, we got the impression that the scope of the rights he deals with are the rights of the middle and upper class of Israeli society.


119. In the Shadmon case (supra n. 116), the Supreme Court used the property right to justify its decision to reverse the long-standing contract law precedents regarding the way the parties’ intentions should be construed in times of inflation. The outcome of the Court’s decision was that the Government was required to allocate a significant amount of money in order to compensate a large number of private savers, even though the contract did not mention such compensation. The decision was criti-
the constitutional right to property as a means to apply conservative economic principles.\textsuperscript{120}

Furthermore, following an article written by one of the leading tax scholars in Israel,\textsuperscript{121} Justice Rivlin stated:

\textit{Nobody doubts that any tax is by definition a violation of the right to property.}\textsuperscript{122}

Such a view\textsuperscript{123} seems to completely ignore a significant line of argument that regards a tax system, as long as it is based on accepted principles of good tax, as a taxpayer's consideration for the public goods and services that enable her to produce, save, or consume her wealth.\textsuperscript{124} A month later President-Justice Barak offered a much more balanced perspective:

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\textsuperscript{120}cized by the media (G. Eshet "In name of stupidity" Yediot Achronot Oct. 29, 2000), and legal literature (Yosef Edrey, \textit{Who Should Guard the Public's Property and the State's Treasury}, Shmgar Book (A Barak, M. Heshin, E. Arbel, N. Cohen, M. Mauntner, Eds) (Tel Aviv 2003), Vol A, at 155-220), and after some time passed, the Supreme Court changed its decision in an additional hearing of the same case (A.H. 1792/00 The State of Israel v. Shadmon et al. 65(5) P.D. 643.).

\textsuperscript{121}For the major judicial reform regarding the power of the government or one of its agents to confiscate property for public use see for example: C.A. 5546/97, Kiryat Ata v. Holzman et al., 55(4) P.D. 629 (concluding that when the government confiscates 100% of real estate for public use the amount of the compensation is 100% instead of the statutory 75%); H.C. 2390/96, Kersik et al. \textit{supra} n. 116 (changing a long-established precedent, and nullified a confiscation of real estate due to the delay in implementing the original purpose of the use of the property). C.A. Ra'a 6072/98, Shadmon et al., \textit{supra} n. 116.


\textsuperscript{123}A.C. 10608/02 Hazima v. Department of custom duty (Has not published yet, para 8. of the justice's opinion).

\textsuperscript{124}See inter alia Arthur Okun, \textit{Equality and Efficiency} 40-46 (1975), which explains that the taxpayer's ability to produce income derives inter alia from the economic system offered by a certain given society; Richard A. Posner, \textit{Hegel and Employment at Will: A Comment}, 10 CARDOZO L. REV. 1625 (1988-1989); (Posner's analysis of how wealth and property originated in modern society stressing that economic rights are "Luxuries Enabled by Social Organization"); Edwin A. Seligman, \textit{Essay in Taxation} (London, 8th ed. 1917) (developed the doctrine of Economic Allegiance, i.e. the duties to pay taxes for enjoying the economic system enable the production of income): \textit{See also} the League of Nations, Economic and Financial Commission: Report on Double Taxation, General Principles which Govern International Competence in Taxation (1923); for Hebrew publications of these views, see Edrey, \textit{supra} n. 40; Yosef M. Edrey, \textit{Taxation of International Activity} 34-38 (Hebrew, 1992); Y. Edrey \textit{A Declarative and a Constructed Constitution: the Right for Property Under the Israeli Constitutional Law and its location on the "Constitutional Rights" Scale}, 28 MISHPATIM 461 (Hebrew, 1997) (developing the doctrine of "joint ventures" which is based on the above principles).
b) Social Rights?

One may argue that as a response to the new conservative economic trend, and maybe to the public and academic reactions, the Supreme Court began to develop a different discourse.

1) The Right to Strike

As early as 1993, Justice Dov. Levine expressed his opinion (in dicta) that a employee's right to strike is a constitutional right derived from the constitutional right for human dignity.126

2) Distributive Justice

In a petition brought to the High Court of Justice regarding the use of state land Justice T. Or commented:

The value of distributive justice is of a most significant weight which every administrative authority must give an appropriate weight in its decisions pertaining to a distribution of public resources.127

3) Human Dignity and Minimum Human Subsistence

In 1994, President-Justice Barak expressed the following view, first in his book on interpretation128 and later in dicta in one of his court opinions:

A man who resides in streets without dwelling, is a man whose human dignity is violated; A man who is hungry to a piece of bread, is a man whose human dignity is violated; A man who does not possess any access to a basic medical treatment, is a man whose human dignity is violated; a man who is forced to live in disgracing material conditions, is a man whose human dignity is violated.129

It is unclear whether this dictum represents the court’s opinion about the meaning of current Israeli Basic Law: Human Dignity and Lib-

125. H.C. 1221/99, Eliasphore v. V.A.T (Have not published yet, para 13 of President-justice's opinion).
126. H.C. 1074/93, The Attorney General et el v. The Bezeq Employee's Union et el., 49(2) P.D. 485. The majority of the court left this dictum without their comments.
127. H.C. 244/00, Siach Hadash (New Discourse) et.el v. The minister of national Infrastructure et el, P.D. 56(6) 25, 64-65.
128. See also AHARON BARAK, LEGAL INTERPRETATION; VOLUME III: CONSTITUTIONAL INTERPRETATION 422-423 (Hebrew 1994).
129. R.Cr.A. 4905/98, Gamzu v. Liebovitz et. al., 55(3) P.D. 360, 376.
erty or just an ideal that the Israeli society should strive toward.\textsuperscript{130} It is also not clear to me whether the court considers this right to be a positive-active right—meaning the government has a constitutional duty to provide a man with minimum human subsistence—or only a passive-negative right, meaning the government is prohibited to take action\textsuperscript{131} that might deprive a man from the minimum standard.

4) Constitutional Rights, Social Policy and the State Budget

Following a severe economic crisis in Israel, the Government decided in 2003 to cut some welfare allowances that were previously granted to poor families. A petition was brought to the High Court of Justice. On January 5, 2004, Justice Dalia Dorner issued an interim order against the government requiring the government to define "dignified human subsistence."\textsuperscript{132} After a special vocal deliberation in the Knesset and significant criticism in the media,\textsuperscript{133} the state replied that it could not provide such a definition, suggesting in a most subtle way that it was not the Court's business to get involved with the legislature's decisions regarding implementation of social and political policy. Two months later, after Justice Dorner retired, the Supreme Court, headed by President-Justice Barak, agreed to change the order and only asked the government to explain its considerations in curtailing the welfare allowances.\textsuperscript{134}

In short, one may conclude that the Israeli Supreme Court has not yet shaped its approach toward the character or substance of the Israeli constitution. Is it a neutral thin constitution (minimal-consensual constitution)\textsuperscript{135} Or is it a constitution that represents social or economic values (socio-economic constitution)? The following chapter offers some elaborations of these two models.

\textsuperscript{130} A most practical view is embodied in an article published by retired Justice H. Cohen in 1993:

It is in appropriate to interpret the dignity, which should not be violated and that there is a duty to protect it, in a narrow and limited way. The interpretation of the basic legislation, which its purpose is to anchor human rights, should be done in a generous and expanded way and to fill the terms the legislature uses with any benefiting content that is available (emphasis added).


\textsuperscript{131} On the passive-negative vis-à-vis positive-active human rights, see infra text accompanying n. 143.

\textsuperscript{132} H.C. 366/03, 888/03, Court session January 5, 2003.

\textsuperscript{133} See for example A. Tal, HA'aretz, February 27, 2004.

\textsuperscript{134} Supra n. 132, Court session on March 3, 2004.

\textsuperscript{135} Prof. Ruth Gavison has voiced a very strong opinion against the process of the "Constitutional Revolution." See inter alia Gavison, supra n. 109.
IV. MODELS OF CONSTITUTIONS

A. Introduction

In order to best understand the scope of the constitution and the rights it espouses, one must distinguish between two major constitutional models—the Minimal-Consensual Constitution and the Socio-Economic Constitution.

B. The Two Different Models of Constitutions

1. A Minimalist-Consensual Bill of Rights – the Social Contract

As discussed earlier,136 if it is accepted that a democratic society is based on the notion of consent embodied by the social contract, it must also be accepted that there are some basic, “natural”137 rights, which no reasonable man would relinquish upon entering the social contract. The social contract by definition contains a list of human rights that warrant protection.138 This list of rights, known as “the first generation of human rights,”139 is assumed by any reasonable person to be the bedrock and foundation of any democratic society. The fact that each and every person possesses these rights is a matter of general consensus. Consequently, the function of such a written constitution is declarative—the written constitution does not create these basic rights, but merely declares their existence and the fact

136. Supra Part I.
137. An interesting justification for adopting a neutral bill of rights may be found in the following:
Rather than seeking to inculcate and encourage one conception of the good life, the constitution should, so far as possible, provide a framework within which everyone has the opportunity to pursue his own life. . . . The Constitutional legal order of a liberal society should be neutral between different conceptions of good.
See inter alia Nigel E. Simmonds, Central Issues in Jurisprudence 27-32 (1992); note however that Simmonds talks there on legal order and does not confine it to the constitutional level.
138. The term “basic or fundamental rights” is a problematic one. We are referring to several commonly used terms, such as natural rights, basic democratic super-principles, etc. - which all have in common the attribute of being considered an absolute necessity, by definition, in a Western democratic society:
They consist[ed] of somewhat vague ideas that there were natural laws governing the universe that people of reason could discover. After the Renaissance, with such writers as Grotius in Holland and Pufendorf in Germany, the idea turned from the fact that there were laws in nature that could be discovered to the idea that natural laws were principles that all 'people of reason' could accept as being self evident.
that its society is a democratic one. The given state has accepted the international community's preconditions to respect those basic human rights.

A minimal-consensual constitution includes only those rights not provoking significant controversy within Western-liberal-democratic-type societies. In order to avoid controversy, these matters cannot stem from political, economic or social perspectives open to debate. Nevertheless, I am not suggesting that because these rights are of a "neutral" character that the process of identifying them is simple and clear. I do argue though, that a strong legal community is capable of drawing a distinction between such fundamental-neutral rights and socio-economic rights. These "neutral" rights may originate from a mutually accepted starting point, possibly the basic right to life, after which other rights follow, so long as they are acceptable in all democratic societies, regardless of political, economic or social policy. The function of such a "Bill of Rights" is to protect individuals and minorities from the majority's abuse of power. Such an enumeration of rights is ubiquitous in every democratic society, regardless of the economic or social system. The following list of fundamental human rights exemplifies those basic rights awarded protection in every democratic society: the right to life and bodily integrity, the right to liberty, the right to human dignity, the right to equality and non-discrimination, the right to a fair trial and due process, the right to free speech, the right to a free conscience and a religious belief, the right to association, the right to freedom of occupation, the right to freedom of opinion, the right to participate in the democratic process, and the right to private property.

This list of basic rights is by no means exhaustive. Additionally, many of these rights are interrelated; for example, the right to liberty includes the right to freedom of movement, occupation, expression, religious belief, and conscience. Furthermore, the right to human dignity includes the concept of liberty and self-autonomy.

Despite the enumeration of these rights, their scope and meaning is unclear. For example, some may argue that the right to bodily integrity entails the right of every woman to choose to have an abort-

140. See also Robert Peck's observation, referring to this passage, from the Virginia Declaration of Rights: "... All are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact deprive or divert their posterity namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Peck emphasizes that "these rights are not grants of any government, even one based on the consent of the people, but are instead a more fundamental and higher law that a legitimate government must recognize and protect." ROBERT PECK, THE BILL OF RIGHTS AND THE POLITICS OF INTERPRETATION 45 (1992); See also HADLEY ARKES, BEYOND THE CONSTITUTION (1992); WILLIAM E. CONKLIN, IMAGES OF CONSTITUTION (1989); Note also Justice's Heshin's opinions, infra ns. 166-168.

141. Such are the rights mentioned in the UN Resolution 181, supra n. 5.
tion. Others may argue that the source of this right is the right to human dignity and liberty. While still others may argue that abortion violates the unborn child's right to life.

Even though these rights are treated as basic fundamental human rights present in any democratic society, they undoubtedly do not represent unified and one-dimensional concepts and values. Each nation and society shapes those rights according to its own unique attributes and character. Indeed, the ultimate scope, interpretation and meaning of these rights involves national and social deliberation. So long as the entire public does not participate in such deliberations, does not elect representatives to the Constitutional Assembly, and is not aware that its representatives (in Israel, the members of the Knesset) are dealing with constitutional issues, the interpretation of these rights should be as narrow and neutral as possible. Therefore, as little decision-making as possible should be involved for issues not yet agreed upon by the public. Instead, the interpretation of these rights should be a very deliberate one, moving gradually, taking into consideration the unique social structure and environment of that particular society. Accordingly, the use of the limitation clause and the balancing formula should be carried out in a most delicate and careful fashion.

2. The Socio-Economic Model

The second constitutional model, referred to as the socio-economic constitution, includes not only the basic fundamental rights, but also the principles and rights reflective of a given society's choices regarding particular social and economic policies. Because one may not assume the existence of social or economic constitutional rights unless included in a formal constitutional document, such a constitution must be a written one. As distinguished from the first model, the socio-economic constitutional model does not derive from or protect only those principles by definition essential to a democratic society. Rather, under this model, the function of the constitution is to reflect the political and social credo of the particular society at a given time, and also to declare the inalienable and undeniable basic fundamental rights.

For example, the socio-economic model allows constitutions of social-democratic states to include not only the protection of social rights but also the provision of those rights by the government (i.e., active or positive constitutional rights). Such active-positive

142. For a similar idea in England, see Weil, supra n 38.
143. On discerning between positive and negative freedoms, see inter alia, Kiesling, supra n. 138, at 245-264 (chapter 8):

...The privilege of being allowed to operate freely within a stipulated space has come to be known among social philosophers as enjoying negative freedom, meaning the freedom to not be interfered with...[while those who
rights place a positive duty upon the state to actually provide, rather
than merely permit or make possible, each individual with a minimal
standard of living, the right to work or receive social aid and welfare,
education, health services, etc. These rights, known as “second and
third generation human rights,” are by nature controversial. Their
purpose is to protect certain worldviews and perspectives. Neverthe-
less, they are not necessarily linked to basic democratic principles. As
such, these rights are not included in the minimalist-consensual bill
of rights.

The socio-economic model is intended to present the political and
social “credo” of a given society at a given time. The political forces
in power strive to entrench their perspectives on particular matters
by means of the constitution. In order to do so, they direct present
and future legislators to follow a path in conformity with their per-
spective. Because this constitutional model includes more than
merely basic rights, the constitution must therefore be formally
drafted in writing and passed by the sovereign through the assembly
or convention that is elected for the purposes of drafting the society’s
“credo.” Such a constitution is a constitutive constitution. Indeed, the
socio-economic constitution fulfills a constructive function. Once en-
acted, it creates new constitutional rights. Therefore, the process
through which such a constitution is drafted or amended must be
clear and unequivocal.

The socio-economic constitution raises some basic issues. The
major issue regards the wisdom and legitimacy of the constitutional
assembly’s decision to adopt certain social and political principles
into the constitution; in doing so, the assembly limits the ability of
future generations to choose and implement different social and eco-
nomic policies. Indeed, a legislature which limits itself is one thing,
but a legislature or elected assembly which limits future legislatures
by confining them to certain perspectives is another. This is a com-
plex issue beyond the scope of this article.

Other problems may be created when the socio-economic consti-
tution offers some social positive-active rights that the state is unable
to provide.

stress the positive liberty idea claim that . . . what is necessary for human
freedom. . . is that people be given a reasonable range of opportunities for
implementing a life plan in which they will achieve meaningful self-realiza-
tion. Only after this has been accomplished will all people be free to enjoy the
 guarantees of the rights that the negative libertarian would wish them to
have.

Id. at 245,247. See also Isaiah Berlin, Two Concepts of Liberty, in Four Essays on
Liberty (1969); Marjorie E. Kornhauser, Equality, Liberty and a Fair Income Tax, 23

144. On the International Declaration of Human Rights and the International
Convention of Civil and Political Rights from 1966, see Henkin, supra n. 139.
145. See inter alia Olivier, supra n. 139.
An impressive example\textsuperscript{146} of a socio-economic constitution is the new Constitution of South Africa of 1996.\textsuperscript{147} This constitution consists of a chapter of the Bill of Rights that includes not only passive social constitutional rights but also positive-active rights which impose significant positive obligations on the state.\textsuperscript{148}

The purpose of the South African Constitution is declared in its preamble:

We, the people of South Africa,

Recognize the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Based on these goals, the Bill of Rights of the South African Constitution provides a very extensive list of constitutional rights, including the traditional "first-generation rights," or civil and political rights, as well as "second and third generation rights," or socio-economic and developmental and environmental rights.\textsuperscript{149}

\textsuperscript{146} On the EU Constitutional law, see Henkin, supra, n. 139.


\textsuperscript{148} Such is the duty to enhance social justice and the duty to provide health care, food, water, and social security; see SA Constitution, chapter 2 - Bill of Rights, sec. 27.

\textsuperscript{149} Id. § 24.
The South African Constitution adopts the positive constitutional rights approach. It imposes a positive duty on the State to take steps toward the implementation of socio-economic constitutional rights, including the following: access to adequate housing; access to health care, food, water, and social security; the right to further education; the obligation generally to perform constitutional duties; elevating the status and advancing the use of indigenous languages; enacting equal opportunity legislation; ensuring access to land on an equitable basis; respecting, promoting and fulfilling the rights in the Bill of Rights generally; and legally securing tenure or comparable redress, as well as restitution of property or equitable redress. In some cases, a specific time frame for adopting appropriate national legislation is set. As Marius Olivier concluded:

When these rights and the way in which they are provided for and protected are viewed in context and as a whole, the inference can be drawn that the Constitution clearly intends to regard South Africa as a social State. This also flows from the stated aim to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person. Also, the Constitutional Court has often reiterated that the meaning of the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses, and that the Constitution endeavours to bring about reconciliation and reconstruction.

It is too early to predict whether such a generous constitution will prove to be a great social success, or whether it is too ambitious and will only result in disappointment and disrespect towards the constitution as an institute.

150. Id. § 26(2).
151. Id. § 27(2).
152. Id. § 29(1)(a) and (b).
153. Id. § 2.
154. Id. § 6(2).
155. Id. § 9(4).
156. Id. § 25(5).
157. Id. § 7(2).
158. Id. § 25(6) and (9).
159. Id. § 25(7).
160. Its noteworthy that in some cases a specific time frame for adopting appropriate national legislation is set, including the right to have access to housing (Bill of Rights 1996, § 26(2)) and the right to have access to health care, food and water (Bill of Rights 1996, § 27(2)), the right to access to social security (Bill of Rights 1996, § 27(2)); equal opportunities, access to information, and just administrative action, (Bill of Rights 1996, Schedule 6 item 23).
161. In the Preamble to the Constitution 1996.
162. Olivier, supra n. 139, at pp. 121-122.
3. The Significance of the Distinction

The significance of the distinction between the two models of constitutions is clear. As long as the constitution is a minimal-consensual one, and not of the socio-economic model, it should be interpreted with extreme restraint so that the constitutional rights, including human dignity and property rights, maintain for the time being their basic character with minimal implications in terms of social and normative values.

The analysis of constitutional rights must begin with a classification of the constitutional right with one of these models. Such a classification in turn leads one to a better understanding of the second issue at hand—the status and weight of the right under discussion.

C. The Israeli Minimal – Consensual Constitution

As indicated above, there is enough support of the notion that the Israeli Bill of Rights was not created in 1992 by the enactment of the Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. As retired Supreme Court Justice Haim Cohen stressed, while the Universal Declaration of Human Rights lacks the status of a statute in Israel, the basic rights listed in it are nevertheless a part of practiced Israeli Law, whether by force of statutes, through precedent, or even by force of international customary law. Justice Mishael Heshin, in one of his minority rulings, emphasized a similar notion soon after the Basic Law: Human Dignity and Liberty was enacted. First, he expressed the idea that these basic rights were not born with the creation of the basic laws, but rather that the basic law primarily intended to grant a written statutory seal of the natural rights that pre-existed it. Second,

[T]he basic rights do not draw or derive their moral and social force from the basic law itself, but rather from within

163. The sweeping definition used above does not imply that classification of rights as basic constitutional rights is a simple task or matter. Such an approach is over-simplistic. See inter alia RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

164. In a conference at Haifa University Faculty of Law “The Constitutional Revolution – the Next Steps,” (1997) (Papers have not been published), Israeli Supreme Court’s President Aharon Barak, while emphasizing that the new basic laws are indeed a constitution, termed the current Israeli constitution as incomplete, “handicapped” or crippled.

165. Supra n. 41.

166. Cr.A. B.S.p 537/95, Imad Ganimat v. State of Israel, 49(3) P.D. 355. In this much debated case, it was decided by the court that the interpretation which was given in the past to the Arrests Act need not be changed in light of the introduction of Basic Law: Human Dignity and Liberty. Justice Heshin’s dissenting opinion stressed that the right to human dignity has always existed in Israeli Law: The Arrests Act was drafted and passed accordingly, and the courts gave full consideration to human rights in the interpretation of it.
themselves—from the light, the power and the heat hidden within them. . .

The same theme was repeated by Justice Heshin in other cases:

This basic law. . . was meant chiefly to give a formal expression to rights we have acquired—all of us and each of us—directly from nature. . . . This right of mother and father (to parenthood—Y.M.E.) existed over time, prior to any law or constitution. It is the law of nature, the law within our hearts. And even if these matters were to be mentioned in statutes or constitution, they would be no more than an echo and voice to the right from nature. . . .

Clearly, such a constitution focuses on the basic human rights with which every human being is born, and which command respect since humans were created in “God’s image, after God’s likeness.” If a written minimal-consensual constitution is to be instituted, it is merely a declarative minimalist-consensual constitution, not a socio-economic one.

The purpose of the above discussion and conclusion that the Israeli Constitution is minimalist-consensual is to emphasize that Israel’s constitution should be interpreted under conditions of extreme moderation and self-discipline. Prof Ruth Gavison has expressed such a view unequivocally. Gavison argued that an effort should be made to refrain from introducing social values and principles into the current Israeli constitutional norms, especially those controversial values that divide Israeli society. The decision about such controversial values should be left to the political arena and reflected by ordinary legislation. Gavison fears that otherwise, the courts will be required to enter into the political field, and its unique status will hence suffer. The public’s trust in the judiciary relies on its conception of the court as the governmental branch which applies the norms already decided by the legislature.

Thus for the time being, the constitutional rights must be interpreted moderately. They should not initiate any radical changes in the Israeli legal system that might be reflected in Israeli socio-economic public life, including issues of distributive justice. It is important to keep in mind that if a change of such character is accepted by the public, it should be introduced by the elected government and legislature rather than by the courts. Due to the unusual circum-

167. Id. at 404-405.
170. See supra ns. 117-122.
171. On the risks of such tendency, the Israeli system has to study some lessons from the American experience regarding the Lochner (Lochner v. New York, 198 U.S. 45 (1904)) case; see inter alia: LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW...
stances of the Israeli process as discussed above, the court’s mission and responsibility for now is solely to protect the core of the basic fundamental constitutional rights.

V. CONCLUSIONS AND LESSONS

A. Conclusions

In this article, I argue that any state that considers itself a democracy and wishes to be recognized as such by the international community must have at least two constitutional elements. One is a list of minimum basic fundamental human rights; the other is an efficient, independent judicial system that ensures protection of these rights including protection from the political majority—i.e. judicial review.

These two elements are derived from the classical theory of the social contract. They do not require a written constitution; they stem from the state’s legal, cultural and political systems and should be adopted either through statutory interpretation, through precedent, or by force of international customary law.

A written constitution may serve as a declaration that a state is democratic, and recognizes these concepts (minimal-consensual constitution). Of course, a written constitution may also add more human rights to the minimum one (socio-economic constitution) or introduce local adaptations and modifications.

I used the constitutional development in the state of Israel as a case study. I attempted to show that until 1992, Israeli constitutional law developed gradually in a “common law” fashion, in order to ensure the protection of basic fundamental rights in Israel. The first step of this development took place even before the establishment of the state, namely by UN Resolution 181 which required the Jewish people to legislate a constitution containing basic human rights in the Jewish state. The Israelis acknowledged this resolution. Later, in the very early stages of the state of Israel’s existence, the developmental process continued in the Israeli legal community. The Israeli Supreme Court recognized basic fundamental human rights simply because Israel regarded itself as a democratic state. These basic rights were recognized despite the fact that at the time, the state


172. Of course there are some other attributes which are not discussed in this paper, such as the free democratic election system, though a thorough study of the above two concepts leads by definition to the other ones.

173. Note that there are several approaches to the concept of judicial review. In this article we refer only to the American model, which should not be regarded as the only one.
lacked a written constitution, Basic Laws, and a Bill of Rights.\textsuperscript{174} In these early stages, there was significant doubt as to whether the Supreme Court did in fact have the power of judicial review over ordinary laws enacted by the legislature.\textsuperscript{175} The Israeli legal community and the Supreme Court suggested that judicial review was an integral part of any democratic society. This notion formed the thesis of the aforementioned article published by Supreme Court Justice Haim Cohen,\textsuperscript{176} and later reemerged in Justice Barak’s dicta.\textsuperscript{177} The Israeli public responded with the enactment of the Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. By legislating these two Basic Laws, the Israeli community demonstrated that the nation’s legal and political tradition recognized and supported the existence of the two constitutional concepts (basic human rights and judicial review). If there had been any doubt of this, these two basic laws intended to eliminate such doubt. In other words, there was not a Constitutional Revolution \textit{per se}, but rather a continuation of the Constitutional Evolution in line with the common law tradition.

This argument rests on the fact that these two constitutional concepts exist in any democratic society—a democratic society is by definition one that is accepted by the international community since it espouses basic fundamental human rights and protects them through a legal process. As such, the Knesset did not create these two concepts; it merely acknowledged and formally declared their existence. Since these concepts are inherent to a democratic society, the Knesset, elected by Israelis as the legislative assembly, does not have the power to undermine or eliminate them. Only the Constitutional Assembly, a body elected by Israelis for the purpose of shaping Israel’s national values and credo, might have the power to modify these concepts. Without an election of the Constitutional Assembly, Israeli society must continue, through its agents, to develop Israel’s common law constitution one step at a time, with the ultimate goal being the preservation of the basic principles of a Jewish and democratic state.

Since the highest Israeli judicial authority has decided that the Basic Laws are in fact the Israeli Constitution, I conclude that the Israeli Constitution should be regarded as a minimal-consensual constitution. As long as the Israeli public is able to hold elections to the Constitutional Assembly, the legislature and the judicial branch

\textsuperscript{174} For example in the Kol A’am Case (\textit{supra} n.21) The Supreme Court overturned the Interior Minister’s decision to stop the publication of a small Arab-Israeli newspaper. The court based its decision on the principles of freedom of the press and freedom of the speech, even though no statutory provision was there, that recognized such rights. For further discussion see Lahav, \textit{supra} n. 24.

\textsuperscript{175} H.C. 188/63, Bazul v. The Minister of interior affairs and others, \textit{supra} n. 26.

\textsuperscript{176} \textit{Supra} n. 27.

\textsuperscript{177} \textit{Supra} n. 30.
should demonstrate much constraint and prohibit the Israeli constitution from transforming into a common law socio-economic model.

B. Lessons

The Israeli constitutional experience, with its achievements and omissions, may serve as a lesson to other nascent democratic states. The international community might benefit from these lessons, as well.

1. When the international community considers recognizing a new state, it should not only precondition certain constitutional rights, but it should also require assurances that those conditions will be met. Furthermore, recognition should require a specific timetable for the implementation of such conditions.

2. The opportunities for a nation to construct a written constitution are rare. Such opportunities might be the establishment of a new state, the establishment of a new democratic regime, or another significant (or perhaps traumatic) change in the life of a nation.

3. Once the opportunity to draft a constitution passes, it is almost impossible to reverse the wheels of history and agree upon an accepted written constitution.

4. Two preconditions should suffice for the conclusion that a state has an unwritten constitution. The state considers itself democratic, and the state relies upon the recognition of the international community.

5. An unwritten constitution should include at least two constitutional concepts: a minimal-consensual bill of basic fundamental human rights, and a system of judicial review.

6. The minimal-consensual bill of rights (i.e., the “first generation human rights”) should be developed by the state’s constituency and agents. The judicial branch should play a significant role in that process.

7. A sensible legal establishment should interpret the minimal-consensual bill of rights in a very cautious and careful manner, while demonstrating constraint refraining from introducing controversial meaning into this “thin” constitution.

8. As long as the state has a minimal-consensual bill of rights, the socio-economic rights (i.e., the “second and third generation of human rights”) should remain in the political arena and to the discretion of the political parties, who compete for the sympathy of the state’s constituency. In other words,
socio-economic rights should be enacted by the legislature and should not rise to the constitutional level through judicial interpretation.

9. A socio-economic constitution, containing second and third generation of human rights, should be introduced to the state constitutional system directly by an institution designed to approve the constitution. Such institution may be an elected constituent assembly or any other political mechanism that employs a careful and calculated process approved by a super majority of the state’s citizenry.

10. The concept of separation of powers should be used in order to guarantee the veil of ignorance—that is, to eliminate, or at least minimize conflicts of interest. Hence, there must be a clear separation between the legislature and the body which limits the law givers’ powers and determines their functions. Thus, the legislature should not be granted the power to legislate the state’s constitution.