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Restructuring a Democracy: An Analysis of the New Proposed Constitution for Israel

The constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309 (1795).

Introduction*

Israel has neither a written constitution¹ nor an entrenched bill of

* The following abbreviations are used in this Note:

L.S.I. -Laws of the State of Israel

P.D. -*Piskei Din* (Hebrew) (Law reports of the Supreme Court, published by Ministry of Justice)

P.É. -*Psakim 'Elyon* (Hebrew) (Supreme Court law reports published by Israel Bar Association, 1949-)

S.H. -*Sefer Hahukim* (Hebrew) (Laws of the Knesset)

S.J. -Selected Judgments of the Supreme Court of Israel (1948-58)

Glossary:

Hapraklit -Law Journal now published by the Israeli Bar Association in cooperation with the faculty of Hebrew University, Jerusalem

Iyunei Mishpat -Tel Aviv University Law Review

Mishpatim -Hebrew University, Jerusalem Law Review

1. Constitutions may be defined broadly or narrowly. Unwritten constitutions are often broadly defined as "flexible," whereas written constitutions are often narrowly defined as "rigid" or "formal." See Munro, *What is a Constitution?*, 1983 PUB. L. 563. Israel lacks a constitution in the narrower sense because it does not have a written constitution: "A written constitution is normally thought and spoken of as a curb upon the supremacy of the legislature; and a constitution under which the legislature is supreme is normally called 'unwritten'." Diplock, *On the Unwritten Constitution*, 9 ISRAEL L. REV. 463 (1974).

Some commentators characterize Israel's Basic Laws as a multi-documentary constitution. See, e.g., H. VAN MAARSEVEEN & G. VAN DER TANG, WRITTEN CONSTITUTIONS 41 (1978). Others view the Basic Laws as a hybrid form of constitution:

The Israel [sic] constitution has been described as an "emerging constitution." Since, however, the accepted use and definition of the word "constitution" includes constitutions based on unwritten rules and embraces the norms embodied in ordinary laws prescribing constitutional principles, I would say, with all due respect, that the expression "emerging constitution" lacks precision. Israel already has a constitution possessing components of

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rights.² In August of 1987, four professors at the University of Tel Aviv Law School³ ("Reichman Group") released a draft constitution for the State of Israel.⁴ The seventeen-chapter document contains a bill of rights, and it details the powers and duties of the government, the Knesset,⁵ the judicial system, the public administration, the Israeli Defense Forces, and the political parties.

An ambitious effort that has received notable support,⁶ the proposed draft merits special attention for several reasons. First, the proposal offers a broad treatment of issues and a crystallization of principles more ambitious than any prior effort.⁷ Second, the proposal comes at a

the mentioned above categories. It has further been said that the constitution of Israel is unwritten. . . .

. . . The constitutional rules of Israel are included in Basic Laws, . . . in ordinary laws including constitutional provisions, in abstract legal norms and in customs and practices. In other words, the Israel [sic] constitution is best described as partly written and partly unwritten although there are as yet almost no legal norms of special preferential status from the legislative point of view.

Shamgar, *On the Written Constitution*, 9 ISRAEL L. REV. 467, 469 (1974).

2. An entrenched law is one that a governing body may repeal or amend only in accordance with a special procedure. Such laws provide a basis for judicial review. On forms of entrenchment, see J. JACONELLI, *ENACTING A BILL OF RIGHTS* 159-72 (1980).

3. The Professors are University of Tel Aviv Law School Dean Uriel Reichman, Baruch Bracha, Ariel Rosen-Zvi, and Amos Shapira. Other Israeli and foreign scholars participated as well.

4. See *Hatza'at Chuka Lemedinat Yisrael* (Proposed Constitution for the State of Israel) [hereinafter Proposed Constitution].

5. Under the Transition Law, 5709-1949, 3 L.S.I. 3 (1949), the Israeli legislature became known as "the Knesset" and the Constituent Assembly as "the First Knesset." H.E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 10 (1968). Without a constitution, the Knesset's legislative powers are unrestricted. *Id.* at 11.

6. Israeli Prime Minister Yitzhak Shamir "congratulated [the drafters] on their 'positive initiative' and said that he would support their efforts to get their proposal accepted." Shaley, *No Doubt About Need for Constitution, Shamir Tells Surprised TAU Profs*, Jerusalem Post, Oct. 9, 1987. Israeli President Hayim Herzog in his address to the Nation similarly emphasized the country's need for a constitution:

Indeed, this is the time to hold a thorough, nonpolitical national discussion, to be based on a new national consent, on the issue of formulation of a Constitution for Israel. A Constitution which will anchor the fundamentals of living in the State and will strengthen Israel's Democracy, a Constitution which will mirror our qualities of unity and uniqueness as a nation, which will be based on the Declaration of Independence as well as on the realities of life in Israel after forty years of sovereignty.

Address to the Nation on the Eve of Rosh Hashana, 5748, by President Hayim Herzog.

Notwithstanding these broad accolades, by its terms the proposed constitution will be enacted only if it receives a vote of two-thirds of the Knesset, as well as a majority of votes in a public referendum. Proposed Constitution, *supra* note 4, § Q(204)(a). Although it is odd that the draft's own terms would dictate its adoption, no other standards seem to exist. In addition, the draft constitution's provisions set forth a more rigorous threshold than that necessary for the adoption of Basic Laws.

7. See Maariv, Aug. 12, 1987, at 10 (Hebrew).

time when Israel's frustration with its political system has peaked.⁸ Cries for reform are no longer limited to a few extremists in Don-Quixotic publications; today, Knesset members and mainstream academics alike champion change.⁹

Third, the drafters of the constitution propose to resolve recurrent Israeli concerns through unique and innovative provisions. Finally, the proposal has received a surprising amount of public attention and support, jolting the collective Israeli conscience and exciting popular imagination more than any previous constitutional effort.¹⁰

Two aspects of the proposed constitution are particularly controversial. First, the proposed draft addresses the government-religion relationship in a bill of rights. The bill of rights attempts to balance Israel's Jewish character with the interests of the country's secular majority. Israel's religious community strongly opposes the draft, fearful of a diminution of Israel's Jewish character.¹¹ Others simply believe the constitution's language is too ambiguous to serve as an effective legal guideline.¹²

A second area of particular controversy is the proposed overhaul of Israel's political structure. The proposal would require relatively small parties with similar views to combine, while ensuring the existence of religious parties, including an Arab party. Some critics fear the effect such change would have on party politics; the smaller religious parties would lose much of their bargaining power in forming coalitions. Others fear that the proposed changes in the electoral system would make it easier for a "strongman" to take control of the government.¹³

Implementation of these two proposals would affect profoundly the religious and political life of every Israeli citizen. Regardless of their ultimate disposal, however, the proposed changes have independent significance as legal, cultural, and political ideas. From all perspectives, the draft proposals are sure to draw the eyes of the world.

This Note surveys the two sections of the proposed constitution addressing the government-religion relationship and political organization. Section I traces the historical progression of Israel's quest for a constitution. Section II focuses on religion and the Israeli state both

8. Indeed, Professor Reichman feels that "[t]he political system has ceased to function." Krivine, *Concerned Scholars Create a Constitution for Israel Including Electoral Reform*, Jerusalem Post, Aug. 10, 1987. See also *The Political System in Israel, Suggestions for Change 1* (B. Susser, experimental ed. 1987) (unpublished manuscript) (Hebrew) [hereinafter *Suggestions*].

9. *Suggestions*, *supra* note 8.

10. Interview with Uriel Reichman, Chairman of Constitutional Committee, in New York City (Oct. 5, 1987). Professor Reichman cites educating the public as the first step in the battle for a constitution. On Jan. 13, 1988, *Maariv*, one of Israel's two mass-circulation daily newspapers, reprinted a copy of the constitution.

11. *Maariv*, Jan. 14, 1988, at 6, col. 1 (Hebrew).

12. Interview with Rudolph Dolzer, visiting Professor, Cornell Law School, in Ithaca, New York (Nov. 18, 1987). Professor Dolzer, a member of the Max Planck Institute, participated in the discussions on the proposed Israeli constitution.

13. See *infra* notes 215-20 and accompanying text.

from an historical perspective and from the standpoint of the proposed constitution. Section III then analyzes Israel's current political and electoral systems, and the likely impact of the proposed constitution. Finally, this Note concludes that, after forty years of postponement and inertia, Israel is ready for a written constitution.

I. Israel's "Creeping Constitutionalism": Historical Origins

Although upon its fortieth year of independence, Israel still struggles to develop its constitutional principles. In the state's early years, its leaders heatedly debated the need for a formal constitution. There were even efforts to draft a constitution. The result, however, was "the great Israeli compromise: creeping constitutionalism."¹⁴

A. The Establishment of the State of Israel and the Promise of a Constitution

On May 14, 1948, "Members of the People's Council, representatives of the Jewish Community of Eretz Israel and of the Zionist Movement" established the Jewish State in the Declaration of Independence.¹⁵ The Declaration begins with an historical-ideological introduction, emphasizing the link between the Jewish people and the land of Israel.¹⁶ The Declaration then establishes a Provisional Council of State and the Provisional Government, and it mandates the later establishment of elected, regular authorities of the State "in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948. . . ."¹⁷

B. The Initial Enthusiasm Wanes

The Provisional Council of State appointed a Constitution Committee on July 8, 1948.¹⁸ The Council discussed issues which were to plague Israel for the next forty years, particularly the role of Judaism in the new state.¹⁹

When the First Knesset created a Constitution, Law and Justice Committee in April, 1949, it appeared that the new body would continue the Constitution Committee's efforts. Soon, however, a new polit-

14. See Lehman-Wilzig, *Political Reform in Israel—Lessons from the American Experience*, in *Suggestions*, *supra* note 8, at 65.

15. Declaration of Independence, 1 L.S.I. 3, 4 (1948), reprinted in Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405 (1983). For a summary of the Declaration's constitutional content, see Y. FREUDENHEIM, *GOVERNMENT IN ISRAEL* 7 (1967).

16. Shapira, *supra* note 15, at 405.

17. 1 L.S.I. 3, 4 (1948).

18. Y. FREUDENHEIM, *supra* note 15, at 8. For a discussion of the Provisional Council's consideration of a written constitution before and after Israel acquired independence, see Klein, *A New Era in Israel's Constitutional Law*, 6 ISRAEL L. REV. 376, 377 (1971).

19. See Y. FREUDENHEIM, *supra* note 15, at 8. For further discussion of the group's deliberations, see *id.* at 18-24.

ical picture emerged, prompting a divisive debate both in committee and in plenary debates. Proponents of a written constitution viewed it as a symbol of sovereign independence and national unity. They emphasized the importance of normative superiority and constitutional entrenchment in the new state's early years.²⁰

Opponents effectively advocated the postponement of an adoption of a constitution.²¹ First, they argued that the Israeli society was an evolving young community awaiting the gathering of Diaspora Jews. Opponents felt that a formalized constitution would freeze the dynamism of the evolving state, ignoring potential creative contributions of the many expected immigrants.²² Second, opponents worried that a constitution drafted in the midst of the nation's struggle for survival would give the government emergency powers that could impinge upon individual freedoms.²³ Third, proponents and opponents of a constitution bitterly divided on the role religion was to play in the new state. Absent a national consensus, critics argued, a rigid constitution could not enmesh religion and state.²⁴ A fourth argument, stemming from the English tradition of an unwritten constitution and parliamentary supremacy, viewed a written constitution as anachronistic.²⁵ Finally, many politicians opposed a written constitution, fearing that it would impede the efficient functioning of the government.²⁶

Instead of adopting a formal constitution, the Knesset ultimately passed the famous compromise "Harari Resolution" of June 13, 1950, which provided:

The First Knesset commissions the Committee on Constitution, Law, and Justice, to prepare a proposed constitution for the state. The constitution shall be constructed in chapters in such a way that each one of them shall be a fundamental law by itself. The chapters shall be brought before the Knesset as the committee finishes its work on each, and all the chapters together shall then be combined into a constitution for the state.²⁷

Although the resolution affirmed Israel's need for a written constitution,

20. Shapira, *supra* note 15, at 408-09. See also S. SAGER, *THE PARLIAMENTARY SYSTEM OF ISRAEL* 37 (1985).

21. Shapira, *supra* note 15, at 409-10. See also S. SAGER, *supra* note 20, at 37-39.

22. Discounting the need for a written constitution, Israeli statesman David Ben-Gurion predicted before the Knesset in 1949 that the nation's population would double in four years. S. SAGER, *supra* note 20, at 36. Underlying the arguments raised to justify postponement of constitutional adoption, however, lurked the "natural interest of the dominant party in the coalition of preserving for itself the largest measure of unhampered freedom to govern." *Id.* at 38.

23. Shapira, *supra* note 15, at 409.

24. *Id.* See also Y. FREUDENHEIM, *supra* note 15, at 34-36.

25. Shapira, *supra* note 15, at 410.

26. Shapira, *supra* note 15, at 408.

27. 5 Knesset Protocols 1743 (1950). The declaration contained four sections: a statement of purpose; directions on how to prepare a constitution; directions on how to bring it before the Knesset; and a conclusive restatement of purpose. See Shamgar, *Legislation, Justice and Citizen's Rights*, 37 HAPRAKLIT 5 (1986) (Hebrew).

it nonetheless formally postponed the adoption of one.²⁸ The Knesset has never clearly elucidated the notion of "chapters," *i.e.*, the distinction between Basic Laws promulgated under the resolution's directive and ordinary legislation. Some commentators have argued that the Knesset intends Basic Laws to be superior to other laws.²⁹ "Thus a Basic Law is really a Constitutional Law and part of a potential constitution."³⁰

The Harari Resolution also fails to specify procedures and deadlines for adopting Basic Laws.³¹ It is unclear whether the Knesset intended that Basic Laws stand superior to ordinary laws and therefore whether more than a mere Knesset majority is necessary to amend Basic Laws.³² An entrenched law is one that only a law enacted by a special procedure can repeal or amend, and courts will invalidate statutes which are inconsistent with entrenched provisions.³³ Although two Basic Laws include entrenched clauses,³⁴ the resolution does not address whether a non-entrenched clause in a Basic Law is superior to ordinary legislation.³⁵ Uncertainty stems from two factors: first, the absence of a repugnance clause specifying that no law is to be inconsistent with the Basic Law; and second, the Knesset's knowing enactment of provisions inconsistent with Basic Laws.³⁶

28. Note, *Adjudication of Freedom of Expression Cases Under Israel's Unwritten Constitution*, 18 CORNELL INT'L L.J. 247, 251 (1985). See also E. RACKMAN, *ISRAEL'S EMERGING CONSTITUTION: 1948-1951* 118 (1955).

29. See Rubinstein, *Israel's Piecemeal Constitution*, 16 SCRIPTA HIEROSOLYMITANA 201, at 206 (1966). Commentators have raised two objections to the view that Basic Laws are superior to ordinary legislation. First, "the Knesset Law, 'for all its official designation as Basic Law has no higher validity than any subsequent statute, and it will be the provision of the *lex posterior*, that will prevail.'" *Id.* at 208, citing B. AKZIN, *INTERNATIONAL LAWYERS CONVENTION IN ISRAEL, JERUSALEM* 161, 190 (1959). Second, since an ordinary Knesset majority enacts Basic Laws, it is illogical that only a special majority could alter them. Professor Rubinstein believes that even an ordinary majority would suffice to enact a constitution. *Id.* at 208-09.

30. Klein, *supra* note 18, at 391. A group of different parts, such as "Basic Laws," can compose a constitution. Klein cites as an example France's Third Republic (1875-1940), which was based upon several "*lois constitutionnelles*" adopted at different times.

Professor Rubinstein has argued that an act designated by the Knesset as a "Basic Law" is a higher, or constitutional, law superior to ordinary legislative acts. Rubinstein's theory stems from an historical analysis of the source of Knesset powers. Rubinstein, *supra* note 29, at 202-05. According to Rubinstein, "a Basic Law passed in accordance with the 1950 resolution indicates, together with other constitutional features found in the law itself, that it is part of the constitution." *Id.* at 206. For further discussion of this thesis, see Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1238-40 (1970).

31. Shapira, *supra* note 15, at 410.

32. Rubinstein, *supra* note 29, at 208-09. See also Shapira, *supra* note 15, at 412.

33. On forms of entrenchment, see J. JACONELLI, *supra* note 2.

34. Basic Law: The Knesset, 12 L.S.I. 85 (1958), provides, *inter alia*, that only an absolute majority of the Knesset can change the electoral system and that emergency regulations may not affect the law absent a two-thirds majority. Basic Law: The Government, 22 L.S.I. 257 (1968), stipulates that only an absolute majority can alter emergency regulations. S. SAGER, *supra* note 20, at 40-41.

35. Rubinstein, *supra* note 29, at 211.

36. Rubinstein, *supra* note 29, at 211.

The Knesset has adopted eight Basic Laws on various issues,³⁷ yet it has failed to enact one that covers either human rights or legislation. Israel clearly has failed to create a constitution by installments, since “the installments are simply not forthcoming.”³⁸ If adopted, a written constitution would clear the uncertainty surrounding the status of Basic Laws and place Israel’s constitutional law on firm ground.³⁹

The Reichman Group’s draft represents the most comprehensive effort yet toward a formal, written Israeli constitution. It is beyond the scope of this Note to discuss every innovation and every refinement the draft offers.⁴⁰ This Note therefore focuses on the two most analytically challenging portions of the proposal: religion and state and the political reform.

II. Religion and State—The Israeli Experience

A. Basic Tenets—A Home for the Jewish People

The Reichman Group proposal makes clear that it intends to preserve the Jewish character of the Israeli state. The proposal begins with a statement of the Israeli constitution’s Basic Tenets: “The State of Israel is the state of the Jewish People, founded on this People’s eternal right to sovereign existence in Eretz (The Land of) Israel.”⁴¹

Some commentators object to including the notion of a Jewish state in an Israeli constitution.⁴² They argue that for the first time in the history of nations in general, and of Israel in particular, a law declares that the state belongs to a people that mostly resides elsewhere.⁴³ Israel, critics argue, is not then the state of its citizens, but of the amorphous “Jewish People.”⁴⁴

Professor Reichman responds to this objection by noting that the Basic Tenets also provide that “[t]he State of Israel is a democratic state.”⁴⁵ In a democratic state, according to Reichman, the rulers are the citizens.⁴⁶ As the proposal further notes, “The source of all govern-

37. See, e.g., Basic Law: The Knesset, 12 L.S.I. 85 (1958); Basic Law: Israel Lands, 14 L.S.I. 48 (1960); Basic Law: The President of the State, 18 L.S.I. 111 (1964); Basic Law: The Government, 22 L.S.I. 257 (1968); Basic Law: The State Economy, 29 L.S.I. 273 (1975); Basic Law: The Army, 30 L.S.I. 150 (1976); Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980); Basic Law: Adjudication, 1110 S.H. 78 (1984).

38. Rubinstein, *supra* note 29, at 207.

39. Rubinstein, *supra* note 29, at 216.

40. Sections that may be of interest but which this Note does not discuss include changes concerning Proposed Constitution, *supra* note 4, §§ F (Legislation), G (Treaties), I (Judicature), and L (Economy).

41. Proposed Constitution, *supra* note 4, § A-Basic Tenets.

42. See, e.g., Michael, *The Proposed Constitution and the Mockery*, Chadashot, Aug. 14, 1987 (Hebrew).

43. *Id.*

44. *Id.*

45. Reichman, *You Did Not Read the Fine Print*, Chadashot, Aug. 21, 1987 (Hebrew).

46. *Id.*

mental authority is the will of the citizens."⁴⁷ These "citizens" include non-Jews, as the following clause indicates: "Human dignity, and the full civil and political equality of all citizens, regardless of origin, religion, race, sex, or ethnic affiliation (*le'om*) underline the foundation of the state of Israel."⁴⁸ Based on this language, Reichman concludes that the state belongs to its citizens, including Israel's Arabs.⁴⁹

Israel was founded on a distinct cultural-historical background. The Declaration of Independence itself proclaims that Israel is a Jewish state, and ignoring this basic notion of statehood is to ignore Israel's past, present, and hopes for the future.⁵⁰ The basic question that has perplexed Israelis for over forty years is whether a secular state can have a significantly religious legal order while maintaining a pluralistic society.⁵¹ The proposed draft attempts to resolve this basic dilemma by distinguishing purely religious from national values.

B. Historical Efforts to Secure Religious Freedom

Great Britain governed Palestine under a United Nations mandate from the end of World War I until May 5, 1948.⁵² Article 83 of the British-enacted Palestine Order in Council, 1922,⁵³ secures freedom of religion in Israel.⁵⁴ It states that "[a]ll persons in Palestine shall enjoy full liberty of conscience, and the free exercise of their forms of worship, subject only to the maintenance of public order and morals."⁵⁵ This provision still has legal effect in Israel and is binding on the executive. It is not, however, superior to Knesset legislation.⁵⁶

Israel's Declaration of Independence also speaks to religious equality:

The State of Israel . . . will be based on freedom, justice, and peace as envisaged by the prophets of Israel; it will endure 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, educa-

47. Proposed Constitution, *supra* note 4, § A.

48. Proposed Constitution, *supra* note 4, § A.

49. Reichman, *supra* note 45.

50. Reichman, *supra* note 45. ("The term 'The State of the Jewish People' has a deep historical, cultural and symbolic meaning."). Some say that without such a clause the constitution could belong to any state in the world. *In the Mafdal [Religious Parties] Willingness to Consider the Proposed Constitution Prepared at Tel Aviv Univ., Chadashot*, Aug. 9, 1987 (Hebrew).

51. See E. RACKMAN, *supra* note 28, at 120.

52. Concerning Palestine's general legislative scheme during the British Mandate and its impact on the Israeli state, see Nimmer, *supra* note 30, at 1246-52.

53. 3 Laws of Palestine 2738 (1922). See *Leon v. Acting Dist. Comm'r*, 1 S.J. 41, 50 (1948) (referring to Palestine Order in Council of 1922 as "the basic constitution of Palestine") (Hebrew).

54. Rubinstein, *Law and Religion in Israel*, 2 ISRAEL L. REV. 380, 401 (1967). Although typically used to connote the right to practice one's religious beliefs, the phrase "freedom of religion" also encompasses freedom *from* religion, that is, the right not to observe any religious laws at all. *Id.*

55. 3 Laws of Palestine 2738 (1922).

56. Rubinstein, *supra* note 54, at 401.

tion and culture; it will safeguard the Holy Places of all religions.⁵⁷

The Declaration of Independence lacks constitutional force and does not represent a legal norm.⁵⁸ Nevertheless, it does articulate the “credo and vision of the People.”⁵⁹ Israeli courts therefore resort to the Declaration only when confronted with ambiguous legislative intent. In such cases, courts prefer the construction extending the greatest protection to individual freedom.⁶⁰

Despite a strong awareness of human rights concerns, there is no separation of religion and state in Israel.⁶¹ The dream of a national-secular Jewish state at one time guided the mainstream of the Zionist movement towards the establishment of Israel.⁶² According to this “secular-Zionist view,”⁶³ the state has the “specific mission” to “constitute the national state of the Jews and to preserve and further Jewish national culture. Religion is relevant but merely as part of the national heritage.”⁶⁴ Thus, “the peculiar nature of Judaism, both in its being a way of life and not merely consisting of religious dogmas and in its intermingling of religious and national elements, is not conducive to any separation of religion and State.”⁶⁵

C. Judicial Protection of Secular Interests

Israeli courts often try to protect the secular block from coercive legislation. The lack of a written constitution, however, allows the legislature to enact laws overruling these decisions.

57. Declaration of Independence, 1 L.S.I. 3, 4 (1948).

58. H/C 10/48, *Ziv v. Gubernik*, 1 P.D. 85 (1948) (Hebrew); Rosen-Zvi, *Freedom of Religion: The Israeli Experience*, 46 ZEITERCHRIFT FÜR AUSKABDUSCHES OFFENTLICHES RECHT UND VOLKERRECHT 213, 219 (1986); Berenson, *Freedom of Religion and Conscience in the State of Israel*, 3 IYUNEI MISHPAT 405 (1973) (Hebrew).

59. *Ziv v. Gubernik*, 1 P.D. 85.

60. Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue, Some Reflections on Freedom of Conscience and Religion in Israel*, 4 ISRAEL Y.B. ON HUM. RTS. 194, 195 (1974); H.C. 262/62, *Perez v. Kfar Shmaryahu Local Council*, 16 P.D. 2101 (1962) (Hebrew) (holding that municipality must rent community halls to non-Orthodox Jews for religious services). The *Perez* court states: “Even if the Declaration of Independence itself has not conferred rights upon the citizen enforceable by way of legal action, it provides a pattern of life for citizens of the State and requires every State authority to be guided by its principles.” 16 P.D. at 2116. Courts also have relied on the Universal Declaration of Human Rights, 1948, and the International Covenant on Political and Civil Rights, 1966, which, although not binding on Israeli courts, reflect “the basic principles of equality, freedom and justice which are the heritage of all modern enlightened states.” H.C. 301/63, *Streit v. Chief Rabbi*, 18(1) P.D. 598, 612 (1964) (Hebrew). See also H.C. 132/66, *Segev v. Safad Rabbinical Court*, 21(2) P.D. 505, 551 (1966) (Hebrew) (referring to Draft Convention for the Prevention of Religious Intolerance). Israeli courts consider freedom of religion and of conscience to be basic human rights. Rosen-Zvi, *supra* note 58, at 220.

61. Shetreet, *supra* note 60, at 205. On ways in which Israel deviates from the traditional model of freedom from religion, see Rosen-Zvi, *supra* note 58, at 223-25.

62. England, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 187 (1987).

63. *Id.*

64. *Id.*

65. *Id.* at 205.

In Israel, conflict often arises in connection with classification and application of national-religious norms.⁶⁶ The particular nature of Judaism, in which national and religious elements overlap, necessitates a distinction between purely religious norms and norms that display national features.⁶⁷ Religious norms generally infringe upon freedom of conscience and religion. An example of such a norm is the prohibition against pork production, enforcement of which violates religious liberty.⁶⁸ Positive societal norms, such as a weekly day of rest, are not religiously coercive.

A legislature imposing these national/societal norms, aiming to formalize historical values and its cultural heritage, does not thereby infringe on religious freedom.⁶⁹ Conflict arises in the incidents where coercive religious laws are passed before they have become positive societal norms.⁷⁰

The legal aspects of most religious coercion issues have centered around the validity of municipal bylaws.⁷¹ A local or executive authority may not impose a prohibition based on a religious objective.⁷² Courts will not permit any entity to use administrative powers or secondary legislation in order to achieve a religious purpose unless the entity has the authority to do so.⁷³

Courts have not been sympathetic to the argument of individuals who claim that witnessing violations of religious laws hurts their religious feelings.⁷⁴ The judiciary, however, will not allow actual interference with prayer, and it has upheld laws prohibiting traffic near synagogues.⁷⁵

66. *Id.* at 215.

67. *Id.*

68. *Id.* at 207.

69. *Id.* at 215.

70. For examples, see *id.* at 211.

71. *Id.* at 199.

72. Rosen-Zvi, *supra* note 58, at 220.

73. See, e.g., H.C. 72/55, Fredi v. Municipality of Tel Aviv—Jaffa, 10 P.D. 734 (1956) (Hebrew) (invalidating bylaw prohibiting pig-raising and restricting sale of pork); H.C. 122/54, Aksel v. Mayor of Natanya, 8 P.D. 1524 (1954) (Hebrew) (invalidating town's refusal to grant shop license to butcher until he agreed not to sell pork).

74. See, e.g., H.C. 287/69, Meron v. Minister of Work, 24(1) P.D. 337 (1970) (Hebrew) (holding petitioner lacked standing to protest grant of Sabbath work permits at television broadcasting company); H.C. 101/70, Rabbi Joshua ZKS v. Mayor of Petach Tikvah, 24 (1) P.D. 698 (1970) (Hebrew) (holding petitioner lacked standing to claim entertainment programs on Sabbath offended his religious beliefs as contrary to collective public interest); H.C. 332/70, Zaltzberg v. City of Ashkelon, 24 (2) P.D. 572 (1970) (Hebrew) (holding petitioner lacked standing to prevent car race). For a view criticizing Supreme Court disregard for religious sentiment, see *Meron*, 24(1) P.D. 337.

75. H.C. 174/62, The League for the Prevention of Religious Coercion v. Jerusalem City Council, 16 (3) P.D. 2665 (1962) (Hebrew) (permitting ordinance closing streets near synagogue on Sabbath because traffic interfered with prayer. The court stated that the religious element is permissible because the same would be allowed

Despite their willingness to invalidate local laws, Israeli courts hesitate to resolve conflicts between the demands of religious rules of conduct and state law. They prefer to apply formal reasons in rejecting petitions aimed at upsetting the delicate balance arranged by political bargaining.⁷⁶ Nevertheless, Israeli law has found ways to confront situations of religious coercion which legal and social arguments could not justify.⁷⁷

In interpreting laws bearing religious undertones, Israeli jurisprudence has at least tacitly accepted the "secular primary-purpose" test.⁷⁸ According to this test, if a law's primary purpose is secular,⁷⁹ then it is not a coercive norm. In *Izramax v. State of Israel*,⁸⁰ for example, Justice Silberg states that where a religious purpose is not primary to a law and a secular purpose can justify the provision, it does not infringe upon religious freedom "even if the statutory provision realizes some religious purpose in addition."⁸¹

D. Sources of Conflict: A Religious Minority Ruling a Secular Majority

Regarding religions other than Judaism, there exists in Israel, at least theoretically, absolute religious freedom.⁸² There is no formal state religion, and the Ministry of Religion deals with all religious groupings in the country and provides them with financial support.⁸³ The most painful problems and discontent in the area of religious liberty in Israel stem from state imposition of Jewish religious norms on all citizens, including other Jews, "whether or not they are religiously observant."⁸⁴ This imposition limits freedom from religion. In the area of freedom of religion, Israeli tolerance does not extend to the Reform and Conserva-

for cultural, commerce or health interests). For a criticism of this decision, see Rubinstein, *supra* note 54, at 401 n.65.

76. England, *supra* note 62, at 201. One divisive issue is the exemption of religious women and students of *yeshivot* (talmudic schools) from the general duty of military service.

77. Discussion of these methods is beyond the scope of this Note, but they include restrictions on secondary legislation and executive acts, ways of interpretation, and "cooperation" between the legislature and the judiciary. For a detailed discussion, see Rosen-Zvi, *supra* note 58, at 238-48.

78. Shetreet, *supra* note 60, at 214.

79. If a law "is acceptable to enlightened members of society," then it may be classified as secular. Shetreet, *supra* note 60, at 214.

80. C.A. 217/68, *Izramax v. State of Israel* 22(2) P.D. 343 (1968) (Hebrew) (holding ordinance respecting religious sentiments permissible so long as drafters did not intend it to serve religious purpose only).

81. *Izramax*, 22(2) P.D. at 356-58.

82. Rosen-Zvi, *supra* note 58, at 218. Israeli law empowers each religious community to establish autonomous religious courts in matters of marriage and divorce. Tabory, *State and Religion: Religious Conflicts Among Jews in Israel*, 23 J. CHURCH & ST. 275, 276 (1981). Israeli statutory law is secular, representing all citizens. Likewise, the state awards the same status to all religions in Israel. Rubinstein, *supra* note 54, at 400.

83. Tabory, *supra* note 82, at 276; Rubinstein, *supra* note 54, at 400.

84. Shetreet, *supra* note 60, at 207.

tive Jewish movements.⁸⁵ Reform Jews are allowed to practice their rituals, but their rabbis cannot perform weddings and the state does not recognize their officials.⁸⁶

Much religiously coercive legislation is a product of the Israeli political framework. Religious groups in Israel traditionally have wielded disproportionate political power. The religious Zionist block, for example, usually participates in Israel's coalition government with the support of only 12-15 percent of the electorate.⁸⁷ By exerting pressure on the majority party, religious groups often use the secular political process to accomplish religion-oriented legislative goals which the 12-15 percent electoral power would never independently allow.

Even aside from the exigencies of coalition-making, the secular Jewish community traditionally has been willing to make concessions to the religious community.⁸⁸ This willingness stems from "the desire to establish a Jewish identity for the country and to reach a common denominator on the basis of Jewish culture together with the difficulty of finding a secular common denominator."⁸⁹ In addition, most Israelis observe at least a minimal amount of tradition, contributing to their willingness to compromise.⁹⁰

Israel's situation is thus unusual:

The paradox in Israel's situation is that the required protection is that of the popular majority vis-à-vis the parliamentary majority, and not the protection of the popular minority against the majority as is generally

85. The rights of Jewish Reform and Conservative denominations are abrogated in Israel. The government gives these denominations considerably less funding than it gives the Orthodox community. Tabory, *Religious Rights as a Social Problem in Israel*, 11 ISRAEL Y.B. ON HUM. RTS. 256, 257-58 (1981). See Rosen-Zvi, *supra* note 58, at 221.

86. Rosen-Zvi, *supra* note 58, at 221. Other forms of discrimination against Reform and Conservative Jews include pressures on the Rabbinate to cancel *kashrut* certifications for places allowing Reform and Conservative services, and laws preventing these movements' rabbis from performing state-sanctioned religious functions. Tabory, *supra* note 85, at 257.

87. D. PERETZ, *THE GOVERNMENT AND POLITICS OF ISRAEL* 112-13 (2d ed. 1983). In the 1988 elections their support rose to 18 percent. N.Y. Times, Nov. 3, 1988, at A14, col. 6. See also *infra* Section III.E. Some say that Labor, the dominant political party until the rise of the *Likud* government, relied on the religious parties' support to stay in power. Tabory, *supra* note 82, at 279, citing E. BIRNBAUM, *THE POLITICS OF COMPROMISE: STATE AND RELIGION IN ISRAEL* 24 (1970). Others say that the Labor party wanted to keep the religious parties in the coalition to prevent disunity. *Id.* citing Don-Yehiya, *Religion and Coalition: The National Religious Party and Coalition Formation in Israel*, in A. ARIAN, *THE ELECTIONS IN ISRAEL* (1973).

88. Rosen-Zvi, *supra* note 58, at 217.

89. Rosen-Zvi, *supra* note 58, at 217. Ben-Gurion, in a letter to the newspaper *Davar*, wrote that as a result of the Holocaust and of broad-based immigration to Israel, Israel needed to find a common denominator in following Jewish law in at least the areas of marriage and divorce. His letter suggests that Israel now revoke those laws since the rationale for their existence has ceased and the religious parties have abused the laws. Letter to *Davar*, Jul. 24, 1970, cited in A. RUBINSTEIN, *CONSTITUTIONAL LAW* 144-45 (2d ed. 1974) (Hebrew).

90. Tabory, *supra* note 82, at 281.

accepted. The majority in essence (the public) stands vis-à-vis the more formal majority (the political majority in parliament) on the basis of the claims that a portion of the concessions that are made on behalf of the religious community are made for improper purposes like political pressures and coalition bargaining and the need to guarantee the ruling regime at the expense of the majority of the public.⁹¹

In Israel, it is the secular majority that most commonly requires protection from religious dogma imposed by the religious minority.

E. A Bill of Rights for Israel

The drafters of the proposed constitution confronted Israel's historical religious concerns in section C(22) of the bill of rights. Their task was particularly difficult given the passion and religious fervor that have prevented solution of state and religion problems for the last forty years. The proposed constitution attempts to resolve conflicting interests by providing freedom of religion and conscience, while permitting certain exceptions. These exceptions include laws, arguably rooted in Jewish tradition, which are nonetheless justifiable on secular grounds. The bill of rights' proposed framework is deliberately somewhat vague in an effort to gain the support of religious groups. This section discusses the application of the constitutional provisions regarding religion and state, as well as the ambiguities associated with these provisions.

1. *The General Structure*

The structure of section C(22), "Freedom of Religion and Conscience," is somewhat ambiguous,⁹² a result of the drafters' efforts to retain the Jewish character of the state, while maintaining a pluralistic society based on equality and freedom.⁹³ This is not the first time in Israeli legislative history that such a struggle has emerged. Israel's Declaration of Independence likewise exemplifies this "ideological ambiguity."⁹⁴ The Declaration on the one hand established a Jewish state based on freedom, justice and peace, as the Biblical prophets of Israel envisaged. Simultaneously, it guaranteed freedom of religion and conscience.⁹⁵ This "inherent contradiction" between the Biblical prophets' visions and "the modern principle of complete equality of all religions"⁹⁶ continues throughout Israel's history, and is evident in the proposed constitution.

91. Rosen-Zvi, *supra* note 58, at 228.

92. Interview with Bernard Susser, Professor, Bar Ilan University, in Ramat Gan, Israel (Jan. 12, 1988). Israelis reject the American model of separation of religion and state for three reasons: (a) the American scheme is too fluid, thereby inviting judicial manipulation; (b) many Israelis move to the country for religious or cultural reasons; (c) the United States Constitution rests on liberalism, a concept foreign to the State of Israel. Interview with Professor Rudolph Dolzer, *supra* note 12.

93. Interview with Bernard Susser, *supra* note 92.

94. Englard, *supra* note 62, at 190.

95. 1 L.S.I., *supra* note 15, at 3-5.

96. Englard, *supra* note 62, at 190.

The first three subsections of section C(22) establish basic principles, while the fourth creates exceptions that allow the state to maintain certain customs. Section C(22) begins:

- (a) Every person is entitled to freedom of religion and conscience.
- (b) A person shall not be prejudiced in his occupation on account of observing the precepts of his religion.
- (c) A person shall suffer no deprivation of rights, imposition of obligations, or enforcement of prohibitions against him on grounds only of religion.⁹⁷

The basic rule that emerges includes: "a) the right to the freedom of religious conscience and b) no coercion, prohibition or negation of rights" on religious grounds.⁹⁸ "In the spirit of the Declaration of Independence,"⁹⁹ sections C(22)(a)-(c) promise freedom of religion and of conscience to all Israelis of all religions. These provisions would revolutionize the existing system by nullifying religiously oppressive laws; buses would run on the Sabbath, and laws prohibiting movies and other cultural activities on that day likewise would be unconstitutional.¹⁰⁰

Subsections C(22)(d)(1)-(5)¹⁰¹ outline exceptions to the basic principle.¹⁰² Subsection (d)(1) permits the State to support religious institu-

97. Proposed Constitution, *supra* note 4, §§ C(22)(a)-C(22)(c). The drafters recognize § 22's inherent compromise. Professor Rosen-Zvi, the leading force behind the section's inclusion, hoped to achieve two goals: (a) the creation of a constitution compatible with modern tendencies, such as freedom of religion and freedom from religion, and (b) the creation of a clause which all major political streams can interpret and then accept. Interview with Professor Rudolph Dolzer, *supra* note 12. According to Professor Dolzer, the drafters "are trying to square the circle." *Id.*

98. B. Susser, A Proposed Constitution for Israel, 6-7 (unpublished manuscript).

99. B. Bracha, *Constitution Now*, Ha'aretz, Aug. 23, 1987, at 72 (Hebrew).

100. *Id.* Laws prohibiting pig-raising and laws prohibiting the sale of *chametz* (leaven) at Passover also would be illegal.

101. Proposed Constitution, *supra* note 4, §§ C(22)(d)(1)-(5) provide:

(d) Nothing in this section shall -

1. preclude the State or public authorities from supporting religious institutions, or from providing religious services or religious education, all on a basis of equality.

2. preclude recognition of a religious marriage or divorce of the parties' choice, or affect any provision whereunder a person's choice of any religious marriage subjects him to the laws of divorce of that religion.

3. affect any provisions given to substantive justification on independent grounds unconnected with religion.

4. affect the show of consideration for the interests of a religious public and the need of such a public to maintain its way of life or to fulfill the precepts of its religion, all on a basis of equality and a proper balance between its interests and the interests of the rest of the public.

5. affect any provisions pertaining to the ritual fitness (*kashrut*) of food in the Israel Defense Army or in public institutions.

102. In the minds of some, subsections (d)(1)-(5) derogate too much from the principles of freedom of religion so that nothing remains of the original notion. Interview with Professor Rudolph Dolzer, *supra* note 12. The Reichman Group and invited scholars discussing this issue in Eilat in the summer of 1987 concluded that if Israelis of all sectors are to accept the proposal, there is no alternative to the scheme drafted. *Id.*

tions and to provide religious education “on the basis of equality.”¹⁰³ In certain instances, the secular majority does support existing arrangements such as the state-funded religious services, management of religious schools, and certain state-oriented religious ceremonies.¹⁰⁴ Generally, secular Jews support a very specific type of religious legislation:

The common denominator that characterizes these matters is that they all provide a Jewish identity for the State without imposing coercive norms on the population. Public support for these arrangements can be based on two alternative arguments: either the arrangement was desirable from the outset, in recognition of the Jewish identity of the State, or the arrangement was a compromise in the context of striving for national unity at a reasonable possible social cost. In these instances, therefore, there exists an identity between the will of the formal and substantial majority.¹⁰⁵

The proposal thus tries to separate those issues upon which the secular majority and the religious minority agree, and to prohibit purely religious and oppressive legislation.

2. *Marriage and Divorce Law*

The next subsection, C(22)(d)(2), confronts a current limitation on Israeli Jews' freedom from official religious dogma. Israelis are subject to religious law mainly in matters of marriage and divorce.¹⁰⁶ The absence of civil marriage under Israeli municipal laws forces its citizens to turn to religious ceremonies run by the established religious communities.¹⁰⁷ Israeli Jews particularly suffer, as their majority is secular yet subject to the exclusive jurisdiction of religious tribunals employing religious laws in matters of procedure and evidence.¹⁰⁸ In fact, “laws of marriage are a clear example of the especially severe limitations that are imposed by religion,”¹⁰⁹ and their application is a permanent source of legal, political and social conflict.¹¹⁰ Responding to modern trends,¹¹¹

103. Proposed Constitution, *supra* note 4, § C(22)(d)(1). This maintains the current dual system of public education; parents can choose between giving their children a religious state education or a general (secular) state education. An ultra-orthodox private school system receives substantial state funds as well. *See* Englard, *supra* note 62, at 201.

104. Rosen-Zvi, *supra* note 58, at 228.

105. Rosen-Zvi, *supra* note 58, at 228-29.

106. Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 L.S.I. 139, states: “Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.” *See also* Englard, *supra* note 62, at 202.

107. Englard, *supra* note 62, at 202. Non-recognized religious communities and denominations lacking official standing may organize under private association rules. *Id.* at 198.

108. *Id.* at 202.

109. Rosen-Zvi, *supra* note 58, at 243.

110. Englard, *supra* note 62, at 202. “The absence of civil marriage and the exclusiveness of religious law has grown in the eyes of the religious population into a central symbol of the Jewishness of the State of Israel. Hence, its adamant attach-

Israel's courts over the years have created "in various areas of family law a civil system parallel to religious law."¹¹² As a result, courts have occasionally recognized marriages outside of the religious context.¹¹³

If the proposal's equal recognition of religious marriages and civil marriages becomes part of an Israeli constitution, courts will no longer need to resort to "disputable answers to weighty legal problems."¹¹⁴ Clause 22(d)(2) allows religious marriage and divorce.¹¹⁵ The proposal does place one restriction on the freedom from religion: entering a religious marriage binds the partners, and they must "pursue a divorce within the same religious authority."¹¹⁶ The orthodox religious establishment probably will "take profound umbrage" to this clause,¹¹⁷ because it views the absence of civil marriage as "a central symbol of the Jewishness of the State of Israel."¹¹⁸

ment to the legal status quo." *Id.* The political argument in favor of the existing system argues that change would endanger the Jewish people's unity. This argument has succeeded "since national unity is a rational, if not utilitarian, objective on which a large consensus exists among the parties." *Id.*

111. In H.C. 80/63, Garfinkel v. Minister of Interior, 17 P.D. 2048 (1963) (Hebrew), a religious court held void as against public policy a private marriage between a divorcee and a *Cohen*, a Jew who is a descendant of a high priest. Justice Landau (majority) stated:

I see no reason for indignation at the conduct of the petitioners on account of the stratagem which they used in arranging that 'private' marriage. Our State assures all its citizens freedom of conscience. The petitioners do not observe the commandments of religion, and by the law of the State they are free to do so.

Id. at 2069. Justice Silberg (minority) wrote:

This court sits not on Olympus but in the midst of its people. We are fully aware of the struggle going on in Israel between the champions of religious marriage and those of civil marriage, and we do not shut our eyes or close our ears to the complaints of both camps against each other. But the problem is far too solemn, too delicate and too multifarious, and colorblind Daltonists who see everything in 'black and white'—or in 'white and black'—will never solve it.

Id. at 2060.

112. *Id.*

113. See, e.g., C.A. 778/77, Farkash v. Farkash, 33(2) P.D. 460 (1979) (Hebrew) (holding civil marriage conducted abroad valid on basis of public policy); C.A. 191/51, Skornik v. Skornik, 8 P.D. 141 (1954) (Hebrew) (holding Israel's recognition of civil marriage conducted under Polish law required by international law).

114. Rosen-Zvi, *supra* note 58, at 242. See also Ettinger, *The High Court of Justice—A Retreat for Captives of Marriage*, 4 MISHPATIM 428 (1972) (Hebrew).

115. B. Susser, *supra* note 98, at 7.

116. B. Susser, *supra* note 98, at 7. The clause prevents the problem of *mamzerut* (illegitimacy)—"a truly painful problem in Jewish law." *Id.* *Mamzerut* is an impediment to marriage in the Jewish religion. Since religious law does not recognize civil divorce, it views a woman who is divorced civilly as still being married to her former husband. The children she has with her new husband, therefore, are considered illegitimate. Englard, *supra* note 62, at 203.

117. B. Susser, *supra* note 98, at 7.

118. Englard, *supra* note 62, at 202.

3. Religious Communities in Homogeneous Neighborhoods

Section 22(d)(4) of the proposed constitution allows religious communities living in homogeneous neighborhoods or settlements to create regulations to protect their way of life.¹¹⁹ This provision would permit local authorities to close streets near synagogues on the Sabbath or to restrict traffic through religious neighborhoods on that day.¹²⁰ However, the draft specifies that such restrictions must be done “on the basis of equality” and must maintain a proper balance between the interests of the religious community and those of the general public.¹²¹

The “equality” standard is highly ambiguous and the drafters probably expect the Supreme Court to shape and refine this formula in the future. In interpreting this provision, Israeli courts will have to navigate carefully between competing religious and secular interests. Some commentators fear that this provision would allow the perpetuation of religiously oppressive laws binding the secular Jewish community against its beliefs. These commentators argue that “[t]here is hardly any oppressive law in the State that does not stem from ‘consideration for the interests of a religious public.’ ”¹²²

4. Maintenance of Kashrut

Today, the Israeli Defense Army and government institutions observe the *kashrut* (“ritual fitness”) provisions concerning food. Section 22(d)(5) of the proposed constitution maintains this restriction despite its religious origin.¹²³ Such protection benefits the community not only for reasons of convenience or efficiency,¹²⁴ but also because observing *kashrut* laws “forges a bond with the past of the Jewish people by means of one of the most conspicuous of Jewish symbols.”¹²⁵

5. The “Independent Grounds” Justification

Subsection 22(d)(3) of the draft constitution offers another ambiguous term in the effort to converge the conflicting ideologies concerning the nature of law in a Jewish state. The proposal states that the principle of freedom of religion and conscience does not affect provisions justifiable “on independent grounds unconnected with religion.”¹²⁶ This standard attempts to distinguish between prohibited coercive religious legislation and legislation which, although containing an ostensible religious component, is justifiable on non-religious grounds.¹²⁷ Such a distinc-

119. B. Susser, *supra* note 98, at 7.

120. B. Susser, *supra* note 98, at 8.

121. Proposed Constitution, *supra* note 4, § C(22)(d)(4).

122. Michael, *supra* note 42.

123. Proposed Constitution, *supra* note 4, § 22(d)(5). For a justification of observing *kashrut* in the army, see Shetreet, *supra* note 60, at 217.

124. Requiring two kitchens in every army unit would be impractical since non-religious soldiers can eat *kosher* food. Shetreet, *supra* note 60, at 217.

125. Shetreet, *supra* note 60, at 217.

126. Proposed Constitution, *supra* note 4, § C(22)(d)(3).

127. B. Susser, *supra* note 98, at 8.

tion posits Judaism not merely as a religion or a theology, but as a broader, national-cultural philosophy.¹²⁸ Accordingly, “[l]egislation that seeks to institutionalize non-specifically religious aspects of Jewish life would not fall under the proscription of religious coercion.”¹²⁹

The drafters expended great effort to create a principle under which religion could be distanced, but not wholly separated, from the state.¹³⁰ They attempted to preserve the cultural-national heritage “that is, after all, a *raison d’être* of the Jewish state,” without offending the secular community.¹³¹

Professor Bernard Susser offers specific examples to illustrate this distinction. Suppose a party claimed that a law designating Saturday as a day of rest represented religiously coercive legislation. A court interpreting the constitution would reject this claim because Sabbath rest is a cultural phenomenon encompassing more than just the religious component of Jewish society.¹³² Likewise, a Ministry of Education decision requiring the teaching of Passover songs and practices, even a model *seder*, would not be unconstitutional. Passover has a national and cultural significance reaching far beyond its religious meaning.¹³³ On the other hand, laws prohibiting public transportation or entertainment on the Sabbath, or laws prohibiting the sale of pork generally, or of bread during Passover, could not withstand constitutional scrutiny.¹³⁴

In section C(22) (“Freedom of Religion and Conscience”) the Reichman Group draws a distinction between religious and national norms, and leaves to the courts the task of defining practical limits in a manner consistent with maximized freedom.¹³⁵ Despite opposition from some religious groups, section C(22) may well represent “the most hopeful and creative attempt . . . to ‘settle’ the religion-state issue amicably and in the national interest.”¹³⁶

A stronger statement of religious freedom than that contained in section C(22), or total separation of religion and state on the American model, probably is culturally and politically unfeasible in Israel. A less ambiguous document is unlikely to withstand the religious parties’ objections. Ambiguity, however, does not undermine the section’s potential impact. Under the proposed framework, the drafters hope that the Israeli judiciary will continue its historical pattern of protecting indi-

128. B. Susser, *supra* note 98, at 8.

129. B. Susser, *supra* note 98, at 8. Even the secular Jewish community follows certain religious traditions which the law does not enforce, including circumcision, The Passover *seder*, and not driving on *Yom Kippur*. See Reichman, *supra* note 45.

130. B. Susser, *supra* note 98, at 8-9; Interview with Rudolph Dolzer, *supra* note 12.

131. B. Susser, *supra* note 98, at 9.

132. B. Susser, *supra* note 98. See also Shetreet, *supra* note 60, at 210-11.

133. B. Susser, *supra* note 98, at 8.

134. B. Susser, *supra* note 98, at 8.

135. Interview with Bernard Susser, *supra* note 92; Interview with Rudolph Dolzer, *supra* note 12.

136. B. Susser, *supra* note 98, at 10.

vidual rights in matters of faith.¹³⁷

III. The Political System in Israel: A Time for Reform

Most Israelis agree that their nation's political system is undergoing a severe crisis.¹³⁸ History has made them pessimistic about their ability to change Israel's public institutions.¹³⁹ Reform proposals are often lost in the paths of history or in the halls of the Knesset.¹⁴⁰ While many desire change, only a few believe it is possible. At a time when Israelis are losing faith in the democratic process,¹⁴¹ the proposed constitution may be viewed in part as an effort to restore that faith.

This Section describes Israel's current political system. It also identifies those areas in which reform is most needed. Finally, it analyzes the proposed constitutional changes and the adequacy of these proposals for political and governmental reform.

A. Elections and Parties: A Current View

Israel is one of the few states in the world maintaining a system of pure proportional representation in a single national constituency.¹⁴² The voters elect the Knesset by a proportional party-list system in which the entire country forms one constituency.¹⁴³ Three criticisms of the electoral system are: "that in encouraging multipartisan and coalition rule it impedes truly responsible government; that it facilitates undemocratic choice of candidates; that it separates between electors and representatives."¹⁴⁴

The State of Israel was founded on a multiparty system. In creating a "regime of many parties," the proportional electoral system preserves this formula.¹⁴⁵ The result is political fragmentation and governmental instability. Roughly fifteen parties compose the Knesset, almost half of which are one- or two-member delegations.¹⁴⁶ The two large parties are nearly equal in size, but they need the smaller parties in order to form a governing majority. As a result, the party forming the ruling

137. See *supra* § II.C.

138. Suggestions, *supra* note 8, at 1.

139. Suggestions, *supra* note 8, at 1.

140. See Y. FREUDENHEIM, *supra* note 15.

141. Polls indicate that about 85 percent of Israeli citizens perceive a need for change in government. Suggestions, *supra* note 8, at 175, 187; Reichman, *supra* note 45. About 71 percent of those questioned, however, view the public's ability to affect politics as low. Suggestions, *supra* note 8; Susser, *supra* note 98.

142. Susser, *Summary and Proposal*, in Suggestions, *supra* note 8, at 214. European countries that use such a system have moderated the "pernicious effects that this system encourages by breaking the single national constituency into many districts, introducing second rounds, providing for electoral thresholds that eliminate small parties, and so on." B. Susser, *supra* note 98, at 10; Susser, *Summary and Proposal*, in Suggestions, *supra* note 8, at 214.

143. S. SAGER, *supra* note 20, at 45.

144. S. Sager, *supra* note 20, at 48.

145. S. Sager, *supra* note 20.

146. B. Susser, *supra* note 98, at 10.

coalition must often concede to the smaller parties' extravagant demands in order to reach a coalition agreement.¹⁴⁷ These sectarian demands often threaten government stability, and contribute to the opinion that "there is only a weak correspondence between balloting results and the kind of Government which takes office."¹⁴⁸ The desire to eliminate small political groups and to induce mergers has spurred repeated proposals to raise the one percent of votes which parties must currently win to receive Knesset seats.¹⁴⁹ The drafters implement this suggestion, discussed in section IV.C below.

A second problem is that the current electoral system facilitates an undemocratic choice of candidates by allowing political parties autonomously to establish internal nomination procedures.¹⁵⁰ No law requires parties to conduct internal elections,¹⁵¹ and criticism has surrounded some parties' practices.¹⁵² Most commonly, the party leadership assigns to a nomination committee the task of preparing a list of candidates. The committee reports its decision to the party's central committee, which then may change particular candidates or the list order.¹⁵³ Even the more democratic method, allowing the party's region to choose a proportion of the candidates, leaves the final ordering of the list to the nominations and central committees.¹⁵⁴ It is thus unclear to what extent parties reflect the views of the population which they purport to represent.¹⁵⁵

Battles between different factions hinder many parties in reaching their goals.¹⁵⁶ A lust for power replaces the solidarity and the shared pursuit of ideals.¹⁵⁷ The parties direct their financial and human resources toward seizing power and achieving personal and factional interests. In the process, members ignore issues they ought to confront.¹⁵⁸ The democratic principle that the party should serve as a link between the electorate and the executive, and work to fulfill the public's wishes, fails.¹⁵⁹

147. B. Susser, *supra* note 98, at 11.

148. S. SAGER, *supra* note 20, at 50.

149. For a brief discussion of these proposals, see S. SAGER, *supra* note 20.

150. Goldberg & Brazeli, *The Weaknesses of the Political System in Israel*, in *Suggestions*, *supra* note 8, at 7 (Hebrew).

151. Goldberg & Brazeli *supra* note 150, at 7. The drafters' proposal includes sections ensuring inner party democracy. Proposed Constitution, *supra* note 4, § O (Political Parties).

152. S. SAGER, *supra* note 20, at 50.

153. S. Sager, *supra* note 20, at 50. The Democratic Party for Change deviated from this pattern in the 1977 elections by using a rank-and-file membership to determine the candidate list. *Id.* at 50.

154. S. Sager, *supra* note 20, at 50.

155. Goldberg & Brazeli, *supra* note 150, at 7.

156. Goldberg & Brazeli, *supra* note 150, at 8.

157. Goldberg & Brazeli, *supra* note 150, at 8.

158. Goldberg & Brazeli, *supra* note 150, at 8.

159. Goldberg & Brazeli, *supra* note 150, at 8. "Similar phenomena occur in other democracies, but in Israel they have an especially severe effect because of characteristics specific to Israeli democracy." *Id.*

Officials who are elected through a candidates list fixed by the central party organization may often feel a greater allegiance to the party than to “amorphous electoral constituents.”¹⁶⁰ Elected officials lack a sense of responsibility toward the voters, and “[v]oters, for their part, regularly complain [in opinion polls] that they lack any direct tie to their elected representatives.”¹⁶¹ This system places the central party organization beyond voter control.¹⁶² It promotes and rewards the “sectarian, loyal and unimaginative functionary, rather than independent, dynamic, innovative personalities.”¹⁶³

The Israeli electoral system produces a passive, apathetic public that has lost faith in the democratic process.¹⁶⁴ Rising impatience with the electoral system, lack of agreement on basic political-societal issues, and a static constitutional scheme¹⁶⁵ combine to demand broad reform.

B. National Elections: A Proposed Constitutional Format

Professor Susser offers five goals for reform in the electoral system. Reform should: (1) protect the heterogeneity and the mainstreams existing in Israeli politics (a new electoral system should not leave the Arabs or the Orthodox Jews without representation); (2) increase stability and efficiency of the system; (3) reduce the ability of small parties necessary to form a coalition from presenting extreme demands contrary to public opinion; (4) reduce the centrality, irresponsiveness, and dominance of the political parties and encourage growth of creative leaders; (5) create direct ties between the citizen and its representatives, enabling the citizen to “punish” elected officials who fail.¹⁶⁶ The drafters of the proposed constitution seek to attain these goals through a new mixed proportional-direct electoral system.

1. *A Dual Vote System*

In section E—“The Knesset,” the proposed constitution suggests a reformed electoral mechanism based on the West German system.¹⁶⁷ The proposal mixes both proportional and direct systems by giving each voter two votes: a national vote for the party, and a regional vote for a

160. S. SAGER, *supra* note 20, at 53.

161. Susser, *supra* note 98, at 11.

162. Susser, *supra* note 98, at 11.

163. Susser, *supra* note 98, at 11.

164. Interview with Uriel Reichman, *supra* note 10. See also *supra* note 141. The fact that over 80 percent of the electorate voted in the last election may indicate a desire for change.

165. The Israeli constitutional scheme has not undergone major changes. The only significant structural reform was the 1975 change in the local election laws. Goldberg & Brazeli, *supra* note 150, at 13. This inertia stems both from the democratic nature of the state and from a lack of public recognition of constitutional defects. *Id.* at 14.

166. See Susser, *supra* note 142, at 215.

167. Bracha, *supra* note 99. For a comparison between the electoral systems of West Germany and Israel, see Newberg, *Strengthening the Democracy in West Germany—Lessons for the State of Israel*, in Suggestions, *supra* note 8.

regional candidate. One half (sixty) of the Knesset seats would be apportioned according to the results in the district elections in the sixty election constituencies; the other half according to proportional national elections.¹⁶⁸ The national vote would decide the proportion of seats each party would receive. The regional vote would determine who is to occupy those seats.¹⁶⁹

The proposal adds a direct link between the voters and half of the 120 Knesset members.¹⁷⁰ In apportioning the seats according to the national vote, the proposal retains the current system's national focus.¹⁷¹ Voters could split their votes. They could vote for a party in the national vote and use the regional vote to elect an attractive candidate from the opposing party.¹⁷²

Such a strategy would not weaken the party supported by the voter in the national vote. The draft constitution's "split vote" option would divorce the outcome of regional elections from the balance of Knesset seats, and thereby avoid "the severe problems involved in demarcation of election districts that confront most direct-regional systems. . . ."¹⁷³ As proposed, each party is to compile a list of candidates and order it based on democratic elections.¹⁷⁴ The Knesset members representing each party "shall be determined in the order of the national list, in omis-

168. Proposed Constitution, *supra* note 4, § E(51). The following provisions would govern district elections:

- (a) A candidate in an election constituency shall be resident in that constituency and belong to a party which is contesting the elections on a national basis.
- (b) Candidacy in an election constituency shall be submitted by residents of that constituency under a democratic process as shall be prescribed by Law. . . . [R]esidents who hold the right to vote may vote in constituency elections.
- (c) The winner in a constituency shall be the candidate, out of the candidates whose party attained the cut-off quota in the nationwide elections as provided in section 53(c), who received the highest number of the votes cast in that constituency.
- (d) A Permanent Committee on constituency elections, which shall be composed and function as prescribed by Law and the majority of whose members shall be judges, shall delimit the constituencies and be empowered to change them. The area of a constituency shall be of unbroken contiguity, and the number of voters in each constituency shall be the same so far as may be.

Id. at § E(52).

169. Goldberg & Brazeli, *supra* note 150, at 12. This is one respect in which the Israeli proposal differs from the West German system. *See supra* note 167.

170. This allocation of half the seats by a national vote and half by regional vote balances both national and local interests. Lehman-Wilzig, *supra* note 14, at 70.

171. B. Susser, *supra* note 98, at 13. This proportional character retains Israel's three main societal cleavages: between hawks and doves, between religious traditionalists and secularists, and between Jews and Arabs.

172. *See* Proposed Constitution, *supra* note 4, § E(53).

173. B. Susser, *supra* note 98, at 13.

174. Proposed Constitution, *supra* note 4, § E(53)(a). Section O includes provisions ensuring democratic processes within the party. Section 57 bars a party from Knesset elections if the Supreme Court holds that its objects or activities "entail any of the following: (1) negation of the existence of the State of Israel as the State of the Jewish People; (2) negation of the democratic character of the State; (3) incitement to

sion of the names of the candidates elected in the constituencies.”¹⁷⁵ If a party wins more seats than the number of Knesset seats it received proportionate to the number of national votes, all candidates elected in the constituencies will represent it. The number of Knesset members will increase by the difference “and no further proportional calculation shall be made among the parties.”¹⁷⁶

2. *The 2.5 Percent Representation Requirement*

Section E(53)(c), which effectively eliminates small party representation, is a crucial part of the electoral reform scheme. The proposal would disqualify parties failing to receive at least 2.5 percent of the votes¹⁷⁷ and it provides that “the votes cast in [these parties’] behalf shall not be included” in the vote count.¹⁷⁸ As a result, the number of parties would likely drop from fifteen to roughly seven, leaving Labor Alignment, a large left-of-center party; *Likud*, a large right-of-center party; a smaller party to the right of *Likud* (today’s *T’chiya*); and one smaller party to the left of Labor (encompassing *Ratz*, *Mapam*, and possibly *Shinui*).¹⁷⁹ The new system also would guarantee an Arab party and probably two religious parties.

Raising the threshold percentage to 2.5 percent has many advantages.¹⁸⁰ Reducing the number of parties will increase the stability of the ruling coalition previously dependent on marginal parties. Small parties will no longer be able to demand outrageous sectarian compromises by the government. The proposal allows the Prime Minister more independence and greater leverage as fewer conflicting ideologies contend for the political spotlight. The new disqualifying percentage will ease the Prime Minister’s duties when forming a coalition and running the government.¹⁸¹ Reducing representational fragmentation also would enable the government to plan consistent short and long-term policies.

racism.” Likewise, § 190(b) establishes these three conditions as an exception to § 190(a)’s guarantee that “Everyone may found and maintain a party.”

Some express concern that this would remove “outside-the-law” parties, such as *Rakkah* (created in 1965 as the New Communist List, quickly becoming identified as an Arab nationalist or liberation movement), D. PERETZ, *supra* note 87, at 102, or parties proclaiming Israeli ownership by the Druz, for example. Michael, *supra* note 42. Reichman responds that Israel’s democratic nature will prevent such discrimination. Reichman, *supra* note 45.

175. Proposed Constitution, *supra* note 4, § E(53)(b).

176. Proposed Constitution, *supra* note 4, § E(53)(d).

177. The system currently requires one percent representation.

178. Proposed Constitution, *supra* note 4, § E(53)(c). When a Knesset member introduced a 2.5 percent threshold requirement in 1981, the bill received strong support but was narrowly defeated by a vote of 44 to 37. See S. SAGER, *supra* note 20, at 50.

179. B. Susser, *supra* note 98, at 14.

180. For a further discussion of these advantages, see Susser, *supra* note 142, at 215-16.

181. See Lehman-Wilzig, *supra* note 14, at 71.

Some argue that reducing the number of parties will harm democracy by eliminating certain groups, and will force supporters of ousted parties to take action outside of the parliamentary forum.¹⁸² Such concerns overlook the equally plausible outcome that the disqualified parties will either unite or join the larger parties.¹⁸³ Moreover, the 2.5 percent requirement still guarantees representation of the Arab party and one or two religious parties.¹⁸⁴

The proposed electoral system is only part of the effort to remedy the malfunctioning political system. The drafters also suggest far-reaching revisions in the political balance of powers. The following section describes the current system and analyzes proposed changes.

C. The Knesset, the Government and the Executive: The Current Balance of Powers

The Israeli Knesset is the 120-member body that sustains the government, oversees governmental activities, and legislates.¹⁸⁵ The Knesset enjoys constitutional supremacy; a simple majority suffices to pass most legislation.¹⁸⁶ The government is responsible to the Knesset and is dependent on Knesset approval.¹⁸⁷ Government composition commonly follows inter-party negotiations, often resulting in a government comprised of ministers whom the Prime Minister dislikes. This situation increases disagreement and weakens the government, leaving it susceptible to blackmail by various political groups.

Parliamentary groups of at least two members may bring a motion of no-confidence in the government.¹⁸⁸ "Basic Law: The Government" states that "[t]he Government holds office by virtue of the confidence of

182. See Lehman-Wilzig, *supra* note 14, at 70.

183. Such realignments have occurred in Israel before. Lehman-Wilzig, *supra* note 14, at 70.

184. The drafters rejected West Germany's model, deeming that country's five percent requirement as too high. The drafters sought to retain the representation of important sectors of Israeli society, such as the Arab sector. Interview with Bernard Susser, *supra* note 92.

185. S. Sager, *supra* note 20, at 145. Statutes prescribe the Knesset's elective duties—*e.g.*, internal duties in choosing presidium and committee membership. The Knesset also "exercises quasi-judicial functions as the final arbiter of its own composition and of the status of members." *Id.* at 160-61.

186. S. SAGER, *supra* note 20, at 110.

187. Basic Law: The Government, *supra* note 34, specifies procedures for choosing a government. The President assigns the task to a Knesset member who is likely to form a coalition and become Prime Minister. If that member fails, the President may assign the task to another. If the latter fails, parliamentary groups comprising a majority can recommend a person who shall be the "cabinet maker." S. SAGER, *supra* note 20, at 196.

188. Interview with Bernard Susser, *supra* note 92. The Knesset's own enactment is the only way to shorten a Knesset term. S. SAGER, *supra* note 20, at 195. Under the current system, when a no-confidence motion is made, the next Knesset meeting must review it as the first item on the agenda. *Id.* at 197. Parties can use this practice to threaten a government with a precarious majority, forcing it to call its supporters to vote. *Id.*; Interview with Bernard Susser, *supra* note 92.

the Knesset.”¹⁸⁹ Under this framework, “[t]he Knesset can express its non-confidence in the Government, and if it makes use of this authority then ‘the Government shall be deemed to have resigned on the day of the expression of non-confidence.’ ”¹⁹⁰ Thus, if the government fails to retain a majority in the Knesset, it will be unable to fulfill its functions and the Knesset could overthrow it.¹⁹¹

Opposition groups occasionally use this extreme tactic to force discussion of issues for which no other procedure is available.¹⁹² No-confidence motions also can serve as a dilatory device.¹⁹³ Since the same majority (fifty-one percent) needed to pass legislation also can topple the government, the system creates instability by allowing sectarian factions to pressure the government to compromise. Under the present framework, a small coalition party can threaten to withdraw its support unless the government meets its demands, leaving the government with only two choices: to concede or to fall.¹⁹⁴ Most often, the government capitulates.¹⁹⁵ A new system that provides the government the political resources to withstand such demands is necessary. The proposed constitution offers a potential solution.

D. “Parlidential” Rule: A Proposed Constitutional Format

The drafters of the proposed constitution strongly disagreed about the type of political reform which would best suit the Israeli political climate.¹⁹⁶ The various proposals for reform, however, generally agreed that there was a pressing need to strengthen the executive against the forces which weaken it.¹⁹⁷ In order to avoid total breakdown of the constitutional project, the drafters agreed to a “parlidential” system of government, a unique creation whose novelty certainly merits scholarly attention.¹⁹⁸

189. Basic Law: The Government, *supra* note 34.

190. G. YAACOB, *THE GOVERNMENT OF ISRAEL* 48 (1982)(Hebrew).

191. *Id.*

192. S. SAGER, *supra* note 20, at 198.

193. S. SAGER, *supra* note 20, at 198.

194. Susser, *Jerusalem Post*, Aug. 28, 1987.

195. Interview with Bernard Susser, *supra* note 92.

196. The group split into two factions. One, including Professor Reichman, supported presidential politics, fearing the lack of leadership in Israeli politics and potential harm to democracy. The second group feared that a presidential system would enable a strongman to take control of the Knesset. This group also feared a situation in which the Prime Minister belonged to one party, while another party controlled the legislature. A hostile Knesset would result in deadlock. Interview with Bernard Susser, *supra* note 92.

197. B. Susser, *supra* note 98, at 14. The United States is the only Western state with a presidential system that has a strong democracy. Some facially democratic countries, such as the Philippines or Korea, also have such governments. Interview with Bernard Susser, *supra* note 92.

198. A “parlidential” structure is an unlikely prospect since most theorists believe that parliamentary and presidential systems are based on mutually exclusive principles. Professor Susser explains:

1. Presidential Elements

The proposed constitution stipulates in section H—"The Government," that "general, nationwide, direct, secret and equal" balloting would elect the Prime Minister.¹⁹⁹ In a first election round, the candidate receiving forty-five percent of the votes would be Prime Minister.²⁰⁰ The Knesset could remove the Prime Minister by a no-confidence resolution which requires passage by a vote of at least sixty percent plus one of the Knesset Members.²⁰¹ This would result in elections for a new Prime Minister and a new Knesset.²⁰² The ingeniousness of the proposed structure lies in its maneuvering between the forty percent (48 members) the government needs to survive and the fifty-one percent it requires to pass legislation.²⁰³

Presidential systems rest on the direct election of the executive, its autonomy from the legislature, on a fixed term of office and so on. Parliamentary systems, by contrast, are founded on the executive's appointment out of the ranks of the legislature, its dependence on legislative support for its survival and on terms of office that are vulnerable to legislative determination. . . . Most obvious of these incongruities is the impossibility of mixing a system that elects the chief executive officer by popular vote with one in which his tenure rests on the confidence of the legislature. . . . A chief executive officer elected—even by a landslide vote—but nevertheless immediately removable by a hostile majority in the legislature, is an unmitigated political nightmare.

B. Susser, *supra* note 98, at 16.

The drafters studied the constitution of the Fifth Republic of France, which integrated presidential and parliamentary elements. In France, the parliamentary and the presidential executives coexist. Since the president is not responsible to the legislature, however, the structure prevents a total mix of systems. The drafters rejected this arrangement mainly because of its tendency towards "pendular swings between 'monarchical' politics—when the president controls a majority in the National Assembly—and the tension-laden paralysis of 'cohabitation' when the president faces a hostile legislative majority." B. Susser, *supra* note 98, at 17. For a discussion of the French political system and additional reasons for its inapplicability to Israel, see Greyfslmer, *The Political System in France and the Israeli Political Reality: Similarities and Differences*, in *Suggestions supra* note 8, at 80.

199. Proposed Constitution, *supra* note 4, § H(115)(a). The President will continue to be the ceremonial head of state. *Id.* at § D. The Knesset may remove the President from office by a two-thirds vote. *Id.* at § 45(a).

200. Proposed Constitution, *supra* note 4, § 115(b). If no candidate receives 45 percent, a second round of elections "shall be held between the two candidates who received the most votes in the first round. In the second round, the candidate receiving the majority of the vote will be elected Prime Minister." *Id.* at § 115(c). Direct elections would determine the Deputy Prime Minister as well. *Id.* at § 117. Today, no party would receive 45 percent of the total vote because small parties would offer candidates for the Prime Minister position both to show that they are a national party and to represent their sectarian needs in a coalition. Interview with Bernard Susser, *supra* note 92.

201. Proposed Constitution, *supra* note 4, § 122(a). Israeli history demonstrates that a Prime Minister is likely to carry out his entire term because of the difficulty in forming a 73-member majority. The system, nevertheless, would guard against abuses of power. Interview with Bernard Susser, *supra* note 92; B. Susser, *supra* note 98, at 17.

202. Proposed Constitution, *supra* note 4, § 122(b).

203. B. Susser, *supra* note 98, at 18; Bracha, *supra* note 99.

The proposal does not eliminate the Prime Minister's need to form a coalition government among the approximately seven remaining parties. The Prime Minister still needs fifty-one percent of the coalition in order to pass legislation.²⁰⁴ If adopted, however, the constitution would enable a government failing to achieve the fifty-one percent necessary to pass legislation to survive as long as it maintained the forty percent needed to block a hostile majority.²⁰⁵ A reduction in parliamentary support below the fifty percent mark would not cause the deadlock normally resulting under presidential politics.²⁰⁶ Each legislative vote would no longer be a potential vote of confidence.

Another presidential element of the proposed parliamentary system relates to the appointment of ministers. The Prime Minister appoints his ministers.²⁰⁷ The proposed constitution provides that within 30 days of a minister's assuming office, a vote of three-fifths of the Knesset can nullify the appointment.²⁰⁸ The proposal further notes that "[t]he Prime Minister and his Deputy, Ministers, and Council Chairmen shall not be Knesset Members."²⁰⁹

There are two important ramifications to such an arrangement. First, it would "open the Knesset to a great deal of 'new blood' "²¹⁰ and increase professionalism. Second, it would make the "prospect of being fired by the Prime Minister a truly daunting one—after all, there would be no Knesset seat to which one could safely return. Dismissal would mean 'political exile'."²¹¹

2. *Parliamentary Elements*

The constitution includes certain parliamentary provisions as well. If the Prime Minister and his deputy resign simultaneously, the Knesset disperses and new elections for both the executive and the legislature follow.²¹² Section 110 of the constitution defines the "Executive" as the entire government, not as the chief executive alone.²¹³ Under this scheme, the government would reach decisions through a determination

204. B. Susser, *supra* note 98, at 18.

205. B. Susser, *supra* note 98, at 18. The government would survive even if it had to set aside its legislative plans temporarily. Interview with Bernard Susser, *supra* note 92.

206. B. Susser, *supra* note 98, at 19.

207. Proposed Constitution, *supra* note 4, § 128(a).

208. Proposed Constitution, *supra* note 4, § 128(d).

209. Proposed Constitution, *supra* note 4, § 134(a). Section 134(b) adds that they may not "engage in any activity calculated to produce any profit, income or remuneration." The problem of "double duties" is common in Israel, and it affects the efficiency and quality of government. Knesset members' attendance at Knesset discussions is often irregular, as they struggle to divide their time between several public positions. The drafters of the proposed constitution believe that "Knesset membership, however, is a 'full-time job' and should so be treated." Susser, *supra* note 142, at 241.

210. B. Susser, *supra* note 98, at 20.

211. B. Susser, *supra* note 98, at 20.

212. Proposed Constitution, *supra* note 4, § 127(c).

213. Proposed Constitution, *supra* note 4, § 110.

of the ministerial majority. The Prime Minister, with only one vote, must labor within this constraint to build a majority.²¹⁴

Some express fear concerning the possibility of a "strongman" with non-democratic tendencies taking power in a system of direct elections.²¹⁵ Reichman responds that critics should view the constitution as one unit, rather than focus on one section as distinct from the others.²¹⁶ The constitution rests on the notion that "the State exists for the benefit of its citizens, and that there is a limit to the ability of the political system to govern the citizens' lives."²¹⁷ The proposal, however, creates a system of checks that should prevent a strongman from seizing power.²¹⁸ These checks include: (1) the Prime Minister's inability to make decisions without governmental support; (2) the sixty percent vote of confidence procedure; (3) the multi-party system, which necessitates coalition-building and works to review the Prime Minister's actions; and (4) the Supreme Court, the Knesset, and the government all monitoring and checking the Prime Minister.²¹⁹

In combining elements that typically do not coexist, the parliemental model may appear somewhat inelegant when compared to traditional systems of government.²²⁰ Paradoxically, the system suits the Israeli climate in the political and institutional sense.²²¹ It offers the stability of a presidential system while safeguarding against the possibility of a strongman taking over. In synthesizing the best features of each political system, the proposal circumvents those scenarios which often result in deadlock and chaos.

E. The 1988 Elections: A Case in Point

The latest elections, held on November 1, 1988, illustrate the danger and imbalance inherent in the current electoral system. Sixteen new parties competed in the general elections. Most of them were "dark horses", unlikely to receive the 24,000 votes needed to win a single Knesset seat.²²² These parties, however, still have a profound effect on

214. B. Susser, *supra* note 98, at 21.

215. See, e.g., *And If The Prime Minister Goes Crazy*, Chadashot, Aug. 14, 1987 (Hebrew).

216. *Id.*

217. *Id.*

218. In creating this system, the drafters engaged in hypotheticals and simulation games. They examined the model's operation under a Prime Minister with totalitarian tendencies, under one that lacks leadership, under one that lacks majority representation in the Knesset, and under a Prime Minister confronted with emergency situations. Professor Reichman admits that there is still room to question the adequacy of the proposal for Israeli politics. See *id.*

219. Interview with Bernard Susser, *supra* note 92.

220. For example, if the Prime Minister is directly and popularly elected, why allow a Knesset vote to dismiss him or her? Likewise, why not allow the Prime Minister to make decisions without the Knesset if the Prime Minister appoints the Ministers himself? B. Susser, *supra* note 98, at 21.

221. B. Susser, *supra* note 98, at 21.

222. N.Y. Times, Oct. 31, 1988, at A8, col. 1.

the election results. In 1984, nearly 59,000 Israelis divided their votes among eleven parties that failed to win any seats.²²³ These votes, distributed among the larger parties, could have saved the country from the election deadlock resulting in the "national unity" government.²²⁴

The presence of so many small parties once again defined the election outcome. The *Likud* and Labor parties won 39 seats and 38 seats respectively,²²⁵ enabling neither party to form a government without the religious parties' participation. These parties, which received a combined total of 18 seats, hold the balance of power. The Orthodox block, enjoying its increased popularity, is pursuing its favorite religious issues, including legislation of Sabbath observance and changing the national definition of who is a Jew to exclude Reform and Conservative converts. Rabbi Peretz, of *Shas*, demonstrating the sort of harsh dealing typical of Israeli politics, said that he would be willing to join a *Likud* government depending "on the degree to which *Likud* will march to our demands."²²⁶

Many Israelis are shocked to discover the power the religious parties now wield,²²⁷ and are fearful of a future filled with Orthodox restrictions and interference. Under the proposed constitutional scheme, one of the two major parties might have been able to receive the majority needed to form a government. Even if not, some of the smaller Orthodox and right wing parties would not have received enough votes to enable them to force the leading party into compromises which do not command the support of the majority of the population. Once again, the Israeli democratic process has failed many of its citizens, highlighting the need for a change in the electoral system.

IV. A Constitution—Now?

The sense of disappointment and waning idealism engulfing Israeli society has led many to believe that the country is ready to renew discussions on the constitutional issue.²²⁸ The feeling of instability and loss of control is particularly strong following the November elections and the events of the Palestinian uprising, which highlight the need for restructuring and new hope. Even if the proposal fails, the effort has brought

223. *Id.*

224. Most Israelis viewed this government, made of the *Likud* and Labor parties, as a terrible experience, not to be repeated. *See, e.g., id.* (discussing "disastrous Labor-Likud national unity Government"); N.Y. Times, Nov. 2, 1988, at A14, col. 4 ("the public has lost confidence in [the two major parties] after the last four years of governing together").

225. N.Y. Times, Nov. 3, 1988, at A14, col. 6.

226. N.Y. Times, Nov. 3, 1988, at A1, col. 6.

227. Four Orthodox parties won a combined 18 seats, 50 percent more than in the 1984 elections.

228. Shtrasman, *A Constitution Now*, Maariv, Aug. 16, 1987 (Hebrew); Zamir, *About the Proposed Constitution*, Yediot Acharonot, Aug. 28, 1987 (Hebrew); Reichman, *Now is the Time for a Constitution*, Yediot Acharonot, Sept. 17, 1987 (Hebrew); Weiss, *A Recommendation for Parliementary Rule*, Davar, Aug. 24, 1987 (Hebrew).

the issue to the public's attention and it has prepared the ground for additional efforts in the future.

Israel has much to gain from a constitution. Current Israeli law is a combination of laws from many sources: British mandatory law, and Ottoman, American, and Jewish laws. The historical development of these sources is dissimilar, and the combination of their basic principles in the Israeli legal framework on occasion leads to unnatural and unsatisfactory results.²²⁹ A written constitution would provide a single, unified legal system suited to the particular needs of the Israeli state.

A constitution also would guarantee individual rights to Israel's citizens, including religious and ethnic minorities, as well as the secular majority. Recent polls indicate that about thirty percent of Israelis are willing to deviate from democratic principles.²³⁰ The importance of a bill of rights and a constitution in such a climate hardly can be disputed.²³¹

The constitution offers a system of judicial review, an additional protection of individual rights and civil liberties.²³² The judiciary may strike down any legislation repugnant to the constitution:²³³ "Such protection is particularly important in a system of governance that does not include a separation of powers or a system of checks and balances between the judiciary and the executive, a system in which it is easy to gather a majority, but difficult to control it."²³⁴

Finally, some believe that the absence of an Israeli constitution indicates the absence of a social agreement.²³⁵ Accepting this deficiency constitutes a desertion of fundamental political and democratic principles. Israeli society cannot afford to lose faith in democracy, and it cannot survive in the face of the conflicts and the compromises of Israeli politics.

Commentators opposing the proposal offer convincing reasons, as well. Some say that the same reasons that postponed the drafting of a constitution in 1949, and which led to the Harari Resolution,²³⁶ still are relevant today;²³⁷ the same cultural pluralism exists, as does Israel's political and military isolation. Courts have developed a method of operating within the existing system and they have created a balance of

229. Susser, *supra* note 142, at 255.

230. See Reichman, *supra* note 45.

231. In addition to protecting individual liberty, a bill of rights would serve an important educational function. Zamir, *Freedom Without a Constitution*, Ha'aretz, Oct. 16, 1987 (Hebrew).

232. Susser, *supra* note 142, at 255.

233. Proposed Constitution, *supra* note 4, § 206(a).

234. Susser, *supra* note 142, at 255.

235. Susser, *supra* note 142, at 255.

236. See *supra* notes 18-27 and accompanying text.

237. *Constitution Now?*, Halishka, Jan. 12, 1987, at 10 (Hebrew). Professor Ruth Gavison, a civil rights activist, argues that Israel was far more democratic forty years ago, that a constitution is therefore just as inappropriate now as it was then, and that a referendum would not increase the protection of individual rights. *Id.*

sorts. A constitution would not bring a consensus, they argue, but would "tear the thin and fragile embroidery that has formed over the years."²³⁸

The bill of rights, which most believe to be a necessary addition, therefore will prompt objections. Disagreement will arise concerning questions of freedom of religion, nationality, and culture.²³⁹ The courts have developed a system of circumventing the mandatory and emergency laws, interpreting them with a view toward human rights. Opponents are concerned that a bill of rights legitimating the current legislation will strengthen the sectors seeking to retain these laws in force.²⁴⁰

Another argument opponents of the proposal advance is that the draft is an unnecessary revolution that ignores the presence of the nine Basic Laws.²⁴¹ They encourage the Knesset to direct its constitutional efforts toward completing the Basic Laws on human rights and legislation.²⁴²

Amidst academic and political discussions concerning the proposal's ability to change the face of Israeli life stands the question of whether the Israeli people are ready to embrace these notions.²⁴³ Many claim that a constitution only can reflect existing conditions, but cannot manufacture political realities.²⁴⁴ A constitution can articulate basic principles, but "[i]n the end, the defence of the people's rights depends on their will to defend them."²⁴⁵

The drafters of the proposed constitution hope to shatter the "cruel magic circle of public apathy and political hesitation" paralyzing the Israeli citizenry.²⁴⁶ Presenting yet another plan of political reform before a disappointed, cynical public will not achieve these ends. In contrast, introducing a tangible and dramatic document—a constitu-

238. Susser, *supra* note 142, at 258.

239. Susser, *supra* note 142, at 258.

240. Gavison, *The Controversy over Israel's Bill of Rights*, 15 ISRAEL Y.B. ON HUM. RTS. 113, 131 n.51 (1985).

241. Beder, *Constitution and the Basic Laws*, Maariv, Sept. 30, 1987 (Hebrew).

242. For Professor Reichman's response, see Reichman, *And Nevertheless, A Constitution Now*, Ha'aretz, Oct. 23, 1987 (Hebrew).

243. On whether the constitutional effort should or should not be an intellectual, rather than a legal-theoretical, endeavor, see Reichman, *supra* note 242; Susser, *supra* note 142, at 256.

244. Susser, *supra* note 142, at 258. Constitutions occasionally succeed in rearranging institutions, but installing order amidst the uncertainty of a multi-cultural, religiously pluralistic society might be beyond the capabilities of a written document.

245. Friedler, *Oxford Professor Cautions Pro-Constitutional Israelis*, Jerusalem Post, Jan. 14, 1988, at 4 (quoting Professor Vernon Bogdanor). Additionally,

[t]he protection of human rights and liberties depends upon the will of the people that they should be respected. I do not believe that a written constitution setting out formally the human rights to be protected gives any more practical force to their protection than the will of the people shown through the Knesset and exemplified by the courts in the interpretation of the law.

Diplock, *supra* note 1, at 463.

246. Susser, *supra* note 142, at 257.

tion—may excite the Israeli imagination and overcome the current destructive inertia.²⁴⁷

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247. Susser, *supra* note 142, at 257.