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Abstract: This paper presents a case study of constitution making process within a very divided society. The aim is to assess weight of variables such as external and internal constraints, individual, institutional and group interests and perceptions in the failure of constitution making processes that take place in very divided society. To study the question, the paper takes Israel as a case study, a very deeply divided society with some component of consociative regime where the few attempts to write a constitution have failed, making Israel a unique case of democracy without a formal constitution.

Introduction

Most democracies’ legislatures and government are required to act under and within constitutional documents. Although a Constitution was intended to be written in the first years of statehood, the country still lacks a formal constitutional document -either written or unwritten. Instead, Israel possesses quasi-constitutional texts framing the political
regime and mechanisms. While the people representative had been satisfied with the quasi-constitutional status quo for decades, the present situation has been challenged in the last years and in 2006 the Knesset Constitution, Law and Justice Committee presented a Constitution draft to the assembly with the objective to enact it for the 60 years of the state.

How can the original failure to draft a Constitution be explained? Why has the quasi-constitutional situation been recently challenged? And what does it tell us on the possibility for a parliament to enact a Constitution in a very deeply divided society? The aim of this paper is to answer these questions by analysing the development of such variables as external and internal constraints, constitution making procedures, individual, group and institutional desires and beliefs. Analysing a specific case like Israel may be very useful in order to illuminate the strength or weakness of the aforementioned variables in the process of constitution writing and more largely in constitutional changes.

The analysis that follows is divided in three parts. A first part of the paper is a brief presentation of the theoretical approaches, on which the paper is based. The second part is devoted to the possible explanations of the two major constitutional failures Israel has known. In a third part, the last attempt of status quo breakthrough is analysed in order to both understand the causes of such move and the difficulty encountered in the constitution making process. Besides the existing literature on constitution making and on the Israeli experience, the paper mainly relies on press articles and official documents.

Constraining variables on constitution-making processes

Whether written or unwritten, constitutions carry out two basic functions: they serve as a framework that defines and limits the government’s methods of actions and operate as guardian of fundamental rights. In very divided society, they are also used in order to ensure the stability of the government by entrenching constitutional rights to the various segments of the society (Lijphart, 1968). Constitutions are thus symbolic, political and legal documents that are established in order to facilitate a change in regime or self-

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1 As will be seen, the Supreme Court has adopted a different view and attributed a constitutional and hierarchically superior status to the Basic Laws.
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definition as well as to emphasise “a break with the past” (Gavison 2003). Hence, they are usually written in specific socio-political frameworks: socio-economic crises, revolutions, regime collapse, fear of regime collapse, war and post-war context, new state formation and finally the liberation from colonial rule (Elster 1995, 370-373). In a similar fashion, it is only under certain particular conditions that constitutional documents are amended or rewritten, namely, critical transformations of the socio-political, socio-economic or demographic configurations (Banting and Simon 1985, 10). On the contrary, under normal circumstances, there is a high probability that the constitutional reform does not succeed at all for no urgent need to reshape the institutions will be felt (Elster 1998 394).

Within the constitution making process, the constitution-makers are subject to a variety of constraints. First they can be subordinate to “upstream” constraints that are imposed on the assembly before it starts to deliberate and to “downstream” constraints, namely the pressures coming by the need for ratification (Elster 1995, 373).

The capacity for the constitution making to be concluded is also dependent on the procedures and actors taking part in the constitution writing process. First, when the legislative has an important role in the constitution making, the institution will tend to promote its own interests, e.g. by giving the parliament a preponderant importance at the expense of the executive or by giving the parliament large powers to amend the constitution. (Elster 1993, 380). Second, when a constitution is drafted by a regular parliament rather than a by an ad hoc body, the outcome will be dependent on political group interests and on the ability to reach a compromise between them (Elster1993, 378). Finally when the constitutional discussions are carried out publicly rather than in secret, the compromise will be more difficult to be reached. This is the case, because on the one hand, ideological rhetoric used in public discourses can blur the real interests of the group and on the other, because in a public discussion, the constitution framers will be less inclined to change their mind and more tempted by stubbornness (Elster 1993, 388). In such cases, only reciprocal concessions between the delegates, misrepresentations or threat bargaining can lead to a constitution draft. We may add to this that in very divided society with consociative patterns, the difficulty to reach a compromise is even higher due to the high polarisation of the assembly and to the groups’ fear to lose their position
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and/or to dissatisfy their social basis (Lusztig 1994). From his analysis, Elster concludes that in order to succeed, constitution making should not be drafted by ad hoc bodies and the discussions should neither be totally secret—for it puts group interests in the forefront—nor totally public—for it encourages grandstanding rhetoric (Ester 1993, 395).

Analysing the Israeli constitution making can be very useful in order to assess the heuristic value of these hypotheses. Indeed, Israel has a very divided society that is reflected in its parliament through the integral proportional electoral system. Second, the Israeli system entails some consociative patterns. Finally, constitutional attempts have been numerous, hence providing us with several cases for comparative analysis.

Explaining the choice for the quasi-constitutional regime in Israel

The foundation of the state of Israel corresponded in many levels to a favourable moment for constitution making processes as pointed out by Elster. It was formed as the result of a fight against the British colonial presence and was seen by its leaders as a revolution (Gavison 2003, 56). In spite of this, the Constituent assembly failed to accomplish its duty and in 1950, the Israeli parliament, the Knesset approved a proposition postponing the constitutional writing. Instead of a constitution, a series of Basic Laws regulating fundamental matters were progressively passed\(^2\) that can however hardly be regarded as a constitution substitute\(^3\). This quasi-constitutional situation is still prevalent today, after 60 years of statehood. How can this situation be explained?

The original failure of the Constitution project: the weight of group and institutional interests

At the independence of Israel, the desire to write a Constitution was strong in the society and in the political spectrum (Gavison 2003, 55). This sentiment was partly due to

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\(^2\) These Basic Laws concern the Knesset (1959); the Land (1960); the President (1964) the Government (1968); the State Economy (1975); the Army (1976); Jerusalem, the Capital of the State (1980); the Judiciary (1984); the State Comptroller (1986); Human Dignity and Liberty (1992) and Freedom of Occupation (1992).
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the external constraint imposed by the UN resolution compelling Israel to draft a Constitution but also to the wish to mark a rupture with the past and to stress the revolutionary feature of the state establishment (Gavison, 2003). Hence, the declaration of Independence read by the Prime Minister Ben-Gurion stated that a “constitution […] shall be adopted by the Elected Constituent Assembly not later than the 1st of October 1948”. When the constituent assembly was finally elected in 1949, it was rapidly turned into a regular legislative assembly, thus giving it two functions: that of constituent assembly and that of a parliament. In 1950, after a long debate at the Knesset, a majority of the representatives decided not to write a constitution at this stage and opted instead for the progressive enactment of several Basic Laws.

The failure in the constitution making at the time has often been explained by the religious groups’ opposition to the project and the secular leaders’ fear to increase the religious-secular tensions (Lerner 2004, 238, Peleg 1998, 230). The relations between both groups were indeed quite complex at the time. Before the state independence, a part of the religious sector, the ultra-orthodox group, had strongly opposed the establishment of a Zionist state. Although the relations with the Zionist religious were less difficult, they were also marked by disputes on the question of the state identity, i.e. Jewish or secular. After decades of disputes, the secular segment reached an agreement with the religious that set up an kind of consociative system in the state to be: it granted special protections to religious activities and guaranteed the autonomy of the religious group in several fields of activities (Don Yehia 2000). This agreement known as the status quo permitted to avoid clashes between the groups and made possible the formation of coalitions between the segments during the first decades of the state. In this context, it is often assumed that the fear to reactivate the secular vs. religious conflict at the

3 According to Elster three criterions must be met for a document to be called “constitution”: it must be referred to as a “constitution”, it must regulate matters more fundamental than others and require more stringent amendment procedures than the other laws.
4 The Resolution stated, “The Constituent Assembly of each State shall draft a democratic constitution for its State and choose a provisional government to succeed the Provisional Council of Government appointed by the Commission.” Part 1, B 10.
5 To them, the creation of a state in the « holy land » by human beings rather than thanks to God’s will was seen as a heresy.
6 This agreement known as the status quo includes provisions related to Jewish holidays, imposition of kashrut in state kitchens, the regulation of personal status by religious law and the recognition of education autonomy for the religious group.
independence pushed the leaders to renounce the constitutional project.

However, a closer look at the debate that took place in the Knesset between 1949 and 1950 reveals that the fundamental causes explaining the positions toward the constitution were much more complex. First, the two camps that formed during the debate did not overlap the religious vs. secular line of division. Indeed, while the pro-constitution camp was composed of secular parties both from the left -the Marxist party Mapam- and from the right -the nationalist party Herut and the liberal party the General Zionists-, the opponents’ camp included both the secular socialist party –the Mapai- and the religious segment –the Zionist religious and ultra-orthodox parties.

In fact, the main elements explaining the position seem to be related to group interests and perceptions. To understand the opposition to the Constitution, the first element to be mentioned is the perceptions and beliefs of the then Prime Minister Ben-Gurion whose influence on the other anti-constitution camp was strong. Ben-Gurion’s objection was related to three major elements. In his discourses, the Prime Minister focused on mainly ideological reasons: the fact that liberal principles were already mentioned in the Declaration of independence; the idea that drafting a Constitution should not take place at a time when only a minority of Jews had established in Israel; and finally, he argued that a Constitution making process would deepen the rift between religious and secular (Sharfman 1993, 39). Under the surface, other strategic elements however appear. First, as the chair of the biggest party in the parliament, Ben-Gurion did not wish to keep the proportional electoral system that favoured the small parties and, which a constitution would have entrenched (Gavison 2003, 58). Moreover, Ben-Gurion’s main fears about the constitution that a superior legal document would limit the powers and the efficiency of its government (Sharfman 1993, 40, Aronson 1998, 1994). While its party supported the constitution project during the first electoral campaign, Ben-Gurion rapidly tried and convinced its group that the postponement of the constitution was the best solution for the state and for the party (Rackman 1955, 16-18).

The position of the religious parties that were at the time united in a single list and member of the government coalition was indirectly influenced by Ben-Gurion’s arguments. Originally, the Zionist religious group did not perceive any inherently
incompatibility between a constitution and their loyalty to religion (Goldberg 1998, 212). They in fact conceded that a brief constitution defining the regime could be useful in a new state. The non-Zionist ultra-orthodox group did not oppose the Constitution idea as a whole either. They adopted a pragmatic position and tried to exert an influence on the constitutional process in order to avoid the inclusion of the religious matters in the constitutional document (Goldberg 1998, 213). However, when both segments understood that Ben-Gurion would oppose the constitution making, they modified their position. The Zionist religious leaders decided to support Ben-Gurion’s postponement proposition while the ultra-orthodox segment shifted to a complete opposition attitude to the constitution. The ultra-orthodox shift in only two years can be explained by the leaders rational choice: when Ben-Gurion’s party took position against the constitution making, it became clear that the document would not be written. Thus, by supporting the leading party’s position, the religious were sure that they would be able to present a political achievement to their voters (Goldberg 1998, 215).

On the other hand, the pro-Constitution group’s position was obviously related to its minority position in the Knesset and to its semi-peripheral position in the socio-political sphere. Indeed, if the group asserted that such a document was necessary to organise relations between branches of the power and that its symbolic strength was necessary to reach national cohesion, the Constitution was above all regarded as a necessary tool to protect the liberties of the minority from the government (Sharfman 1993, 48).

It thus appears from this that the major line of division during the original constitutional debate did not overlap the secular religious cleavage but rather a government parties vs. non-government parties line of division, where both defended their perceived interests.

In June 1950, the debate finally brought about the vote, of a text of compromise called the Harari proposal. The text states that, “The First Knesset assigns to the Constitution, Law and Justice Committee the preparation of a proposed constitution for the state. The constitution will be made up of chapters, each of which will constitute a separate Basic Law. The chapters will be brought to the Knesset, as the Committee completes its work, and all the chapters together will constitute the constitution of the
state”. This resolution, although it did not fully satisfy any of the political groups⁷, had the advantage that it did not sacrifice any groups’ perceived or actual interests, at least in the short term. Indeed, for the pro-constitution camp, it could be seen as a first step to the enactment of a constitution, while for the anti-constitution group, the fact that it did not specify the status of the Basic Laws vis-à-vis the other laws complied with their wish that the judiciary would not interfere in the governmental activity. Finally, the religious group interest were not challenged as the status quo agreement was left intact.

Table 1. The constitution project configuration and outcome

<table>
<thead>
<tr>
<th>Respective camps</th>
<th>For the constitution</th>
<th>Against constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political parties</td>
<td>Marxist party, Communist party, nationalist party, liberal party, progressive party</td>
<td>Labour party Ultra-Orthodox party, Zionist religious party</td>
</tr>
<tr>
<td>Position in the government</td>
<td>Outside the government</td>
<td>Within the government</td>
</tr>
<tr>
<td>Arguments Ideological</td>
<td>Defence of liberties</td>
<td>Need to have the support of all the society</td>
</tr>
<tr>
<td>Group interests</td>
<td>Protecting the minority group from the ruling majority</td>
<td>Guaranteeing the government large power of action</td>
</tr>
<tr>
<td>Outcome</td>
<td>Compromise between the two camps</td>
<td>Status quo: postponement; no supra-constitutional text</td>
</tr>
</tbody>
</table>

The first failure to write a constitution in Israel thus seems to confirm Elster’s observations. Indeed, the fact the constitutional assembly was turned into a regular parliament that pursued the task to write the constitution, gave crucial significance to group interests leading to the failure of the constitutional project. Furthermore, the fact that the parliament led the process also gave important weight to institutional interests, which is reflected by two elements. On the one hand, the wish to leave the government free from judicial review led Ben-Gurion and its party to object the constitution. On the other, the compromise that was ultimately reached both guaranteed that regular laws enactment would not be restrained by a supra-constitutional text and left the Knesset a

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⁷ The Mapam was particularly critical toward the Harari proposal because it did not specify any time limit in the constitution making as well as the communist party (Rackman, 1955). The religious on the other hand remained on their anti-constitution stand and abstained from voting the law (Goldberg, 1998).
large breathing-space for constitutional reform as the Basic Laws did not require any specific procedures to be enacted.

The growing weight of the secular vs. religious cleavage and the second missed constitutional attempt

With the enactment of the Harari proposal, ideological and political debates over the constitution were halted and the question of the legal superiority of the Basic Laws over regular laws was left open. By the 1980s, nine Basic Laws had been passed by the Knesset, among which only the Basic Law relating to the Knesset (passed in 1958) entailed an entrenched provision\(^8\) requiring an absolute majority to be amended. The quasi-constitutional situation thus seemed quite well accepted. However, after 30 years of accommodation with the quasi-constitutional state, demands for a constitution started emerging.

These demands can be seen as the result of socio-political developments that were at work since a decade and more specifically of the religious groups' evolution. Since 1967, the cleavage between secular left and religious had increased considerably partly due to the ideological positioning of the latter on the “territorial issues” (Hazan 2000, 126). In 1977, after 30 years of Labour-led government in collaboration with religious parties, the right-wing party Likud took power, hence turning the dominant party system into a bipolarised political system. Paradoxically, this new political configuration increased the power of religious political parties, which suddenly became the core of a battle between both large parties to form a coalition government. As a consequence, religious parties took advantage of their black mail potential to radicalise their demands generating the paralysis of coalition making and government (Bogdanor 1993). In this context, secular parties and academic groups pushed for constitutional changes in order either to limit the power of the religious parties and/or to increase the place of liberal democratic values in the system (Gavison 2006, 369). Consequently, the constitutional project as a whole progressively became identified with a secular liberal project by the religious groups;

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\(^8\) The entrenched provision defines the elections as general, secret, proportional and equal and can only be changed by a majority of the members of the Knesset, i.e. by 61 members of the Knesset.
Hence, when a proposition was made in the late 1980s to enact a Basic Law on Human and Civil Rights, as well as a Basic Law: The Legislation, which would have endowed the superior status of Basic Laws, the religious parties opposed very fiercely to the proposition (Goldberg 1998, 227). As a result, the promoters of the project rapidly realised that in the present political configuration the constitutional project would be impossible and they focused on the mere idea of a Bill of rights. However, even this appeared as extremely difficult for all attempts to pass a Bill of rights had failed before due to the religious group objection to support a legislation that would possibly challenge the protection of religious specific laws (Kretzmer 1992, 241). Hence, in 1992, instead of the coherent Bill of rights that was first advocated, the Knesset finally passed two separate Basic Laws on human rights: one related to freedom of occupation and another to human dignity and liberty.

Despite the essential symbolic weight of these laws and the consequences they would later have (see below), their content was the reflection of a compromise between the government political forces and more specifically, between secular and religious government groups. The first consequence was that the laws anchored only a few specific rights, leaving out fundamental rights like freedom of expression, equality and freedom of religion. The second consequence and clear mark of the compromise was the inclusion of a reference to Israel as a “Jewish and democratic state”. Third, at the demand of religious groups, a clause was added that determined that “Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law” (section 10). Finally, from the two texts, only the Basic Law related to freedom of

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9 After the “constitution failure” in 1950, two propositions to enact a Bill of rights had already been introduced, first in 1964 by the opposition liberal party and then in 1974 by the Constitution, Law and Justice Committee working in the framework of a left-wing coalition. The political configuration between 1984 and 1990—a unity government between the two big parties with three little parties—could have led to the enactment a constitutional text without the risk of the government dissolution but the fear to lose the religious groups’ support in the near future led the large parties to restrain their ambitions to fulfil the constitutional process or even of a Bill of rights enactment.

10 On the explanations of the two Basic Laws vote, see Sapir 2008.

11 The religious parties feared that the recognition of freedom of expression could lead to sanction actions offensive to religious sensibilities. See Segal, Zeev, « First a wide consensus, the a constitution », Haaretz, 07/06/1999.

12 Section 1 of the Human right and Dignity law and section 2 of the Freedom of Occupation law.
occupation had an entrenched provision giving it a special status vis-à-vis other laws\textsuperscript{13}. The first draft of the human dignity and liberty law also involved an entrenched provision but it was removed from the text at the second reading for the ultra-orthodox threatened to oppose the law (Sapir 2008, 15). Moreover, it must be noted that even the entrenchment of the Freedom of Occupation law was not, in the eyes of the legislators, a way to give supra-constitutional status to the law, (Sapir 2008, 15) which explains why religious representatives did not oppose the law.

\textbf{Table 2. The failure to enact the Bill of rights: configuration and outcome}

<table>
<thead>
<tr>
<th>Respective camps</th>
<th>For the Bill of rights</th>
<th>Against a full Bill of rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political parties</td>
<td>Marxist party, Communist party, right wing party, I progressive party</td>
<td>Ultra-Orthodox party, Zionist religious party</td>
</tr>
<tr>
<td>Position in the government</td>
<td>Outside and within the government</td>
<td>Within the government</td>
</tr>
<tr>
<td>Reason for group positioning</td>
<td>Asserting Israel democratic features</td>
<td>Defence of Israel as a Jewish state</td>
</tr>
<tr>
<td>Ideological claim</td>
<td>Defending the secular groups/defend minorities and democratic ideals</td>
<td>Protection of the religious laws and segment</td>
</tr>
<tr>
<td>Group interest</td>
<td>Strategic interests: Fear to lose religious support</td>
<td>Only way to defend its position</td>
</tr>
<tr>
<td>Reason for compromise</td>
<td>Renounce to full Bill of rights</td>
<td>Guarantee that the law has no constitutional character</td>
</tr>
</tbody>
</table>

The second failure to enact a Constitution as well as a complete Bill of Rights can thus be understood in the framework of a growing religious vs. secular cleavage in which the religious groups had become opposed to the mere idea of a constitutional project (Goldberg 1998, 227). As a result, the Bill of rights project was finally turned into two texts of compromise where the religious-secular strains appear very clearly. More generally speaking, the fact that the representative assembly rather than an \textit{ad hoc} body carried on this process and in a public fashion explains that group interests have prevailed, and especially political strategic interests. On the one hand, the proponent of

\textsuperscript{13} The entrenchment of the law derives from a provision stating that the law can only be changed by another
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The Bill might have carried on the process for strategic interests, or the fear to lose a coalition partner –the religious parties- would not have played. On the other, the religious intransigence toward the Bill of rights might have been lessened if the process had been carried on secretly because it would have diminished its fear to lose some of its social basis’s support.

The constitution by broad agreement: toward a status quo break?

The failure to enact a Bill of Rights did not put an end to the constitutional dynamic that had emerged in the secular camp. For several years, the dynamic was especially present in the civil, which generated a few constitutional documents. At the same time, the issue was still under discussion in the political arena and in 1999, the Justice Ministry proposed to enact a law entrenching the existing Basic Laws while the Prime Minister was pushing for the writing of an entire constitutional document that would substantively change the polity. In the following government, an expert-committee chaired by a Court justice Yaakov Neeman- was appointed to accelerate the constitution process. A few months later, it presented a Basic Law: Legislation to the Knesset, which was meant to entrench all previous Basic Laws and give them supra-constitutional status (Gavison 2006, 378).

In parallel, the Constitution, Law and Justice committee resumed the constitution making process with the intention to enact a constitution that would be submit to the public as a referendum. In February 2006, after hundreds of discussions, it handed in a first constitution draft that was presented to the Knesset and successfully passed the first reading. How can the new move to write an encompassed constitution be explained?

What do we learn from the context in which it has taken place and from the constitutional outcome at this stage of the process?

Basic Law,

14 Among those, we can cite the Israel Democratic Institute “Constitution by consensus “ chaired by an ex-President of the Supreme Court, Shamgar (see http://www.idi.org.il hebrew) ; the Institute for Zionist Strategy project (see http://izs.org.il ). They all provoked harsh criticism and debates both from the religious segment and from the Arab minority.
16 See the official web site of the committee http://www.cfisrael.org/home.html
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A new constitutional moment?

The Constitution, Law and Justice committee’s project has been launched in a specific socio-political configuration that could be seen as a new constitutional moment. Since the years 2000, the relations between the Arab citizens and the state have indeed been very strained, due to the Intifada support by some Arabs and to the consequent violent confrontation with the police at the occasion of Arab demonstrations. Moreover, in the context of the constitutional dynamic, some demands were expressed by the Arab segment, which were welcomed very harshly by the Jewish public. These demands called either for a multicultural/consociational constitution where the Arab segment would have minority’s right and a right to autonomy similar to that of the religious segment or for a state that would only keep the second part of the “Jewish and democratic state” definition\(^\text{18}\). At the same time, the religious-secular relations continued to be marked by high tensions.

In this context, the new constitution making process could be understood as a willingness to reframe the system in order to reconcile the variety of the social segments and to permit the re-establishment of the state’s legitimacy on both the religious and the Arab segments. The first element that goes along this interpretation is the proclaimed ideal of the Constitution Committee. Contrarily to the Neeman proposal, the aim of the committee was not to entrench the existing Basic Laws and give them supra-constitutional status, hence entrenching the existing system. On the contrary, the idea was to write a comprehensive “constitution for all” that would satisfy all segments of the society\(^\text{19}\). In effect, this meant a very open constitution making that would be based on the pre-existing Basic Laws but would discuss them for possible alteration.

A second element that confirms this hypothesis is the self-imposed constraints, in which the Committee decided to work. In order to be implemented the “Constitution for all” will


\(^{19}\) Ibid.
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Indeed have to be ratified both by the Knesset and by the people as a referendum. Consequently, the committee has decided to invite a series of civil society’s members from all segments to take part in the discussions, even though this procedure complicates the formulation of a compromise (Elster 1993).

The search for reconciliation interpretation must however been mitigated. Indeed, despite the “Constitution for all” ideal, the constitution will need to be ratified by only a majority of the Knesset and by only a majority of the people indifferently to their social belonging. Thus, the ratification could be concluded without the approval of representative part of the society’s segments. Moreover, since the beginning of the process, fierce objections have been pronounced against the constitution making by both ultra-orthodox groups and the Arab segment (Gavison 2006, 379) who have as a result, almost entirely boycotted committee discussions. In spite of this, the committee continued to work and ultimately presented a constitutional document based on these discussions, hence not taking into account these segments’ views.

A propitious political configuration?

Another interpretation of the new constitution making could be seen from an opposite perspective, namely, as the result of change in political configuration. As has been seen, the two first constitution failures were in part due to the religious group interests’ weight. Thus the recent development could be explained either by a crucial change in the religious group attitudes or by a diminution of their force. However, neither interpretation seems really convincing.

When the Constitution, Law and Justice committee was demanded to work on the constitutional draft, the religious parties had not changed their position toward a constitutional document. Except from the pragmatically position of the Zionist religious, the other religious groups had even radicalised toward the constitutional project. As for the political weight of the religious groups, a change had obviously occurred in these years. The unity government formed in 2003 was dominated by secular parties (Likud, The Labour Party and the secularist Shinuy) as has the 2006 government, and the political

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20 About the Project, see the Constitution for all website http://www.cfisrael.org//prelims.minutes.html.
configuration was thus propitious for passing a constitution. However, on the one hand, it was not the first time that such a situation presented itself -the 1999-2001 government was a left-secularist government- and on the other, the overall weight of the religious parties in the Knesset had not substantially diminished after the 2003 elections.

The political configuration is thus not the major explanatory element of the new move. Moreover, it does not explain why the “Constitution for all” project in particular has been able to endure where the others have not.

The institutional interests interpretation

Another explanation for the new constitutional process could be the existence of a shift in institutional interests. As has been noted, the Knesset had always been very cautious not to give the Basic Laws any clear superior constitutional status. Before 1992, only one article of one Basic Law was entrenched, but even then, it was not interpreted as a constitutional superior article (Sapir 2008). However, in 1969, the Supreme Court upheld that the entrenched clause provided it a superior status toward regular laws. Similarly the legislature had not wished to increase the power of judicial review of the Supreme Court by enacting the two human rights law. However, as soon as the laws were voted, the President of the Supreme Court asserted that a “constitutional revolution” had taken place and a year later, the justices stated in a decision that it was permissible to overrule any new law that would infringe Basic Laws on human rights. This declaration brought about intense debates in the political arena as well as in the society. The immediate and strongest reactions came from the religious groups whose traditional autonomy in certain matters was viewed as

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22 In 1999, the religious parties had gained 20% of the votes while in the 2003, they gained 17% of the votes.
23 HCJ 98/69 Bergman v. Minister of Finance 23(I).
25 Ha’mizrachi Bank v. Migdal Communal Village, C.A. 6821/93. Such decision was based on section 8 of the Basic Law: Human Dignity and Liberty that states, “The Rights according to this Basic Law shall not be infringed upon except by a statutes that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary, or by regulation enacted by virtue of express authorisation in such law” (Hofnung 1996).
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challenged by the Court (Lerner 2004, 246). Progressively, however, what had started as a religious vs. liberal conflict widened and turned into an institutional disputes between the parliament and the Supreme Court (Gavison 2003, 64). The power of the legislature was indeed challenged on two levels from the perspective of the legislature. First, this was the case because the judicial review on regular laws infringed the Knesset’s liberty of legislation, and on another more symbolic level, because by completing the constitutional process, the Court was seen as taking the role of the only legitimate actor in this process, i.e., the parliament. In this context, in 2001, the Ministry of Justice pushed for the creation of constitutional council that would depend more on the political sphere and would take away several prerogatives from the Supreme Court.

More recently -in 2007- a similar attempt to curtail the Court’s power of judicial review was made by the current Justice Ministry Friedmann.

It is in the context of this institutional struggle, that the constitution making currently taking place must be understood. Indeed, if both propositions to put an end to judicial review have not been completed, neither was the constitutional proposition to institutionalise the present institutional relations (Neeman proposition of 1999). Rather, the only constitution making that has not been rejected by now offers the possibility to deliberate on all constitutional aspects, including the Supreme Court’s role and judicial review. Furthermore, this dimension of the project has been made very by the chair of the committee from the very beginning. In his discourse at the opening session of the committee, the chair explained that the need to write a Constitution was urged on “by the activism of the Supreme Court and its steps to legislate a de facto constitution of its own accord” and stressed that “where the court interprets Basic Laws as a constitution set in stone, it infringes on the authority of a legislative branch which never ratified any such constitution.”

This issue has then been at the centre of the discussions in the committee and has led to a major alteration of the current system of judicial review in the proposed draft (see below). Hence, the institutional interest interpretation seems at least partially

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26 The first decision to void a Knesset law was related to religious issues that had always been protected by the status quo agreement of 1948.

27 Gidon Alon, “Suggestions for a Constitutional Court were Rejected by the Knesset” Haaretz, 03/01/2002.

28 Yoaz, Yuval, “Mazuz: Don’t pass laws to limit High Court hearings”, Haaretz, 05/03/2007.

29 See Constitution for all website.
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convincing in explaining the new move for the new constitution making.

_The Constitution for all: what possible outcome?_

Even if the process of constitution making is not over yet, the discussions that have been taking place and the constitution draft that has been proposed to the Knesset give an idea of the constitution making possible chance of success.

The main element to be highlighted is that although the discussions have been very different from what had taken place before, the general framework of the constitution making has not been dramatically altered: on the one hand, the constitutional framer is again the parliament, in which both institutional and political interests are at stake, and on the other, the discussions within the committee are more public than they have ever been due to the participatory element that was introduced in the process. This had several implications.

First, the ultra-orthodox groups decided to boycott the constitution making process as a whole. This decision was taken despite the fact that their group interests in redefining the Supreme Court’s activity and judicial review were high. The potential discontent of their electorate if they collaborated on a constitution project perceived as mainly secular, in a context of strained secular relations, account for this radical option. Similarly, and contrarily to their usual stance, the majority of the Arab parties and the extreme left party opposed to the process as well. The arguments invoked were the fear that the present constitution making would not do enough for the minority’s rights and more largely for basic rights. Hence, instead of trying and influence the process, their anticipation on the outcome pushed them to object the process from the beginning. In fact, it seems that a full involvement in the discussions was seen as too risky in terms of social group support, especially at a time where relationship between the Arab populations and the Jewish State institutions were so bad. Hence the group partially boycotted the discussions and rejected

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30 Only one member of the Ashkenazi ultra-orthodox party took part to the discussions in order to try and influence the decisions. Yoaz, Yuval, “Experts putting final touches on Israel”, Haaretz, 06/10/2004
31 Ibid.
32 They both claimed that in the present circumstance, the constitution would neither protect minority and human rights nor the role of the judicial review and the Supreme Court that is essential in this perspective.
the draft written by the committee\textsuperscript{33}.

\textbf{Table 3. Political positions on the current constitution making}

<table>
<thead>
<tr>
<th>Respective camps</th>
<th>Against the process</th>
<th>For the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political parties</td>
<td>Extreme left (Meretz), Communist party, Arab parties</td>
<td>Ultra orthodox parties</td>
</tr>
<tr>
<td>Position in the government</td>
<td>Outside of the government</td>
<td>In the government (2003-2006)</td>
</tr>
<tr>
<td>Ideological claims</td>
<td>Defence of a secular democracy for all its citizens, Defence of the present power of judicial review</td>
<td>Defence a Jewish State ruled by the Jewish laws.</td>
</tr>
<tr>
<td>Group interests</td>
<td>Protecting the Arab minority;</td>
<td>Maintaining the status quo agreement</td>
</tr>
<tr>
<td>Institutional interests</td>
<td>Guaranteeing the Court’s position.</td>
<td>Limiting the Supreme Court’s activity.</td>
</tr>
<tr>
<td>Strategic interests</td>
<td>Fear to lose social basis.</td>
<td>Fear to lose social basis.</td>
</tr>
<tr>
<td>Possible Outcome</td>
<td>Text of compromise between Zionist religious vs. Secular government parties, Institutional interests oriented document</td>
<td></td>
</tr>
</tbody>
</table>

Secondly, such political configuration had a clear impact on the –temporary- outcome of the constitutional process. Despite the proclaimed wish to write a “Constitution for all”, the constitution making procedures and the conflicts within groups led to a process mainly led by the ruling secular parties and the Zionist religious party, with at least two consequences. On the one hand, the fact that government parties led the process generated an institutional interest-oriented text as has been reflected by the inclusion of an extended override clause\textsuperscript{34} in the document that limits judicial review over the Knesset.

\textsuperscript{33} Knesset Protocols 13/02/2006
\textsuperscript{34} Chapter 8, section 6.

See Constitution, Law and Justice Committee protocols 21/06/2005 and 24/12.2006; the vote on the constitution draft in the Knesset: Knesset Protocols 13/02/2006 and Meretz website.
activities. On the other hand, the fact that most non-government parties did not take part in the debates led to the formation of a compromise text between only a limited range of groups as the identity of Israel clause shows. The Constitution draft indeed has chosen to define Israel as a “Jewish and democratic state”, a definition that is rejected by ultra-orthodox, extreme left parties and Arab groups.

Under these circumstances, it appears that the committee’s document will hardly be enacted in the following years. If it is voted though, then the Knesset will have to sacrifice the “Constitution for all” ideal and hence, there is much doubts over the possibility that the Constitution gets any of the necessary legitimacy it needs. Hence, we can presume that in this context, it is very probable that the quasi-constitutional status quo will endure again for several years.

Conclusion

From the presentation of the Israeli constitution making process, several conclusions can be drawn. First of all, the Israeli case corroborates Elster theory according to which a constitution making led by the elected assembly will aim at defending institutional interests. Institutional interests have been the major cause of the first constitutional failure despite the very propitious moment in which it occurred and it has also been a major element in the third constitution making. It must however be added, that in the Israeli case at least, institutional interests do not coincide with the entire institution’s needs but mainly with those of the government parties.

Secondly, as pointed out by Elster, in the framework of a constitution making process carried out by the legislative in a public fashion, discussions will be more complicated. Indeed, in each of the three constitution making attempts, three types of group interests and perceptions have impeded the constitutional conclusion. First “direct group interests”, or the will to guarantee the group privileges as a social and political actor, have played. The religious fear to make concessions on the status quo agreement as the fear of

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35 On the other hand however, the Knesset did limit the amendment procedure of the Constitution, hence limiting its future power as an institution.
the Arab parties to curtail judiciary protection of the minority through curtailment of the Supreme Court’s prerogatives are examples of such interest role. Secondly, “strategic group interests” have been dominant: the fear to be deprived of a part of its electorate can lead a group to oppose or adhere to a constitution making when it is a public process. This was for example the case of the religious ultra-orthodox groups after the increasing prevalence of the secular vs. religious cleavage, who decided to take a radical stance on the constitution making despite the direct interests they could have had in influencing the constitutional process. Another kind of strategic interest that has been present was related to the calculation of the possible loss in coalition partners. This was especially true in regard to the human rights Basic Laws when the secular chose to reach a compromise with the religious. Third and more generally speaking, it appears that correspondingly to Lusztig’s assertion, constitution making carried on by the representative assembly in deeply divided societies is highly complicated. If the first constitution making could have succeeded but was impeded by mostly institutional interests, the cleavages’ deepening that occurred over the years both between religious and secular and between Arabs and Jews had considerable consequences on the capacity of the legislative to reach a compromise. While during the first constitution making, all groups took part in discussions, leading to a compromise between them all, the current constitutional process has been carried on without three major segments of the socio-political arena – the ultra-orthodox, the Arab minority and the extreme left. Hence, such a constitution making model, if it finally leads to a Constitution will be incapable to create the necessary legitimacy that such a document requires. In conclusion, it appears from the Israeli analysis, that the wish to conclude a constitutional process in deeply divided society is even more dependent than other types of societies on the very procedures they use in their constitution making process.

36 See Knesset Protocols 13/02/2006
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