

SYMPOSIUM ARTICLE

Constitutionalising Israel's Constitutional System

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Abstract

The current political landscape in Israel, with countrywide demonstrations occurring weekly, and citizens calling for democracy in the face of initiatives introduced by the coalition, may be regarded as transformative events with potential constitutional implications. This article explores the question of whether Israel is experiencing a 'constitutional moment' and what such a moment entails, taking into account the intricate social, legal and political reality of the country. I argue that the current events should be examined and analysed within a broader context of processes that have been occurring in the Israeli society and legal system over the past two decades. These processes may hinder or create challenges for the realisation of a constitutional moment, rather than facilitating progress towards that goal. Correspondingly, the article lays the basic foundations for the occurrence of an Israeli constitutional moment, which I refer to as 'constitutionalising Israel's constitutional system'.

1. Introduction

In January 2023, the newly appointed Israeli Minister of Justice initiated a set of changes to the legal system, referred to as the 'judicial reform'. These changes consist of five main constitutional components:

- (a) government control over the judicial appointments committee and changing the process of appointing judges, particularly Supreme Court justices, from a professional to a political procedure;
- (b) abolishing judicial review of Basic Laws and allowing review of ordinary laws only, with an expanded panel of justices and requiring a large majority for their invalidation;
- (c) abolishing the doctrine of reasonableness as a basis for invalidating administrative decisions;

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- (d) the introduction of an override clause that would allow the parliament to reinstate a law struck down by the Supreme Court on the grounds of violating human rights and lacking proportionality;
- (e) changing the status of legal counsel in government ministries to positions of trust.

The underlying theme behind these proposed changes is reflected in the slogan, 'Returning Governance to the Public'.¹

Ever since the proposed legal changes were made public, countrywide demonstrations have been taking place weekly, with citizens protesting against the initiatives. The immense demonstrations have ignited broad and intense debates, delving into the historical injustices inflicted upon marginalised segments of Israeli society who have endured exclusion and discrimination over the past seven decades. The events have also sparked renewed discussions and debates surrounding the occupation of the West Bank and its profound implications for the fundamental principles of the Israeli governance system.² These developments have intensified the controversies within Israeli society and spurred initiatives that reflect the pressing need to establish a social and inclusive consensus, potentially leading to the creation of a new social contract, possibly embodied in the form of a formal constitution.

This article explores the question of whether Israel is experiencing a 'constitutional moment' and what such a moment entails, taking into account the intricate social and political reality of the country and its unique constitutional system. I argue that given this constitutional system, the above events should be analysed within the larger context of processes occurring within the Israeli society and legal system during the past two decades. These processes may hinder or raise challenges before the establishment of a constitution rather than facilitate progress towards that goal.

Nevertheless, certain basic conditions must be present to generate an Israeli constitutional moment, which I refer to as 'constitutionalising Israel's constitutional system'. This would involve a comprehensive and inclusive process that considers the diverse perspectives and interests within Israeli society and that adheres to basic constitutional values of democracy, rule of law, protection of human rights, and equality. Such a process would require broad consultations, public debates, and engagement with various stakeholders, particularly from minority groups. First and foremost, however, the

¹ Jeremy Sharon, 'Justice Minister Unveils Plan to Shackle the High Court, Overhaul Israel's Judiciary', *The Times of Israel*, 4 January 2023, <https://www.timesofisrael.com/justice-minister-unveils-plan-to-shackle-the-high-court-overhaul-israels-judiciary>.

² Adam Sella, 'The Fight within the Fight: Where Does the Occupation Fit in the Judicial Overhaul Protests', *Haaretz*, 6 July 2023, <https://www.haaretz.com/israel-news/2023-07-06/ty-article/premium/the-fight-within-the-fight-where-does-the-occupation-fit-in-judicial-overhaul-protests/0000189-2abb-dcb5-a5df-6fff82320000>. For an analysis of the legality of the occupation system see Elya Milner and Alexandre Sandy Kedar, 'Squaring the Circle: Settler Colonialism, the International Law of Occupation and the Separation Barrier (2023) 105 *Political Geography*, article 102929; Orna Ben-Naftali, Aeyal M Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law* 551, 611.

constitutionalisation process should provide a mechanism to address the issue of occupation in the West Bank and its implications for defining Israel as a democracy.

The article is structured as follows. First, I introduce the term ‘constitutional moment’ (Section 2), then describe the constitutional system in Israel and the changes it has undergone in recent decades (Section 3). In the following section (4) I discuss the argument that Israeli society is not experiencing a constitutional moment and conclude with insights on how to constitutionalise the constitutional system in Israel (Section 5).

2. What constitutes a ‘constitutional moment?’

Various theories and concepts have been developed to understand and analyse constitutional changes, particularly those that occur outside the formal limits established by the constitutional text. Bruce Ackerman’s prominent theory introduces the concept of the ‘constitutional moment’ in his trilogy on the evolution of the United States’ constitutional system.³

A constitutional moment refers to a period in the history of a nation, which is characterised by significant changes, debates or events that result in the re-evaluation, revision or creation of a constitution. It is a time when the fundamental principles and structures of and rights in the governing system of a country are reconsidered and possibly changed.⁴ Constitutional moments often occur at times of profound social, political or legal upheaval, such as after a revolution, war or key political transition. They are marked by intense discussions and negotiations between stakeholders, including politicians, legal experts, activists and the general public.

The purpose of these discussions is to address issues, rectify power imbalances, and establish a new constitutional framework that reflects the aspirations, values and needs of society.⁵ Constitutional moments can shape the future of a nation, determining the balance of power, the scope of government authority, and the rights and liberties afforded to its citizens. They are pivotal moments in the history of a country, reflecting the collective will and vision of its people as they strive to establish a more just, inclusive and democratic society.

However, more importantly, as presented by Ackerman, the framework of the constitutional moment contributes to the rebirth of democracy in the modern era and provides a hope for constitutional creativity, because it is operated under the slogan of ‘the will of the people’.⁶ Therefore, considering (i) the coalition’s declaration that these changes are a return to democracy and (ii) the demonstrators’ calls of the end of democracy, and considering the possible clash between the executive and judicial branches following

³ Bruce Ackerman, *We the People: Vol 1 Foundations* (Harvard University Press 1991).

⁴ *ibid* 37–39.

⁵ *ibid* 43.

⁶ *ibid* 314–19.

their enactment, a constitutional moment can provide a proper theoretical framework for examining and analysing the recent events in Israel.

Ackerman identifies four key stages that a constitutional moment involves.⁷ The first is the signalling of a constitutional transformation by a government branch that claims to have the broad and decisive support of the people for the proposed changes. This can be achieved through various means, such as public opinion polls, mass mobilisation or electoral victories. At the second stage, political leaders of the movement need to develop concrete proposals that outline the transformative agenda. These proposals should be specific enough for the people to understand and evaluate, allowing them to accept or reject the proposed changes. Third, a substantial period of mobilised deliberation is necessary, often triggered by conflicts between branches of government. During this period the proponents of change work to gain sustained support from the majority of the people through active engagement, discourse and debate. Finally, after one side has prevailed in the political arena, the courts play a role in translating or codifying the political success into cogent doctrinal principles that shape constitutional law going forward. The courts help to institutionalise the changes and ensure ongoing adherence to them.

During a constitutional moment, key constitutional documents – such as charters, bills of rights or constitutions – may be drafted, revised or amended. These documents serve as the foundation for the governance of the country, delineating the powers and limitations of government institutions, protecting individual rights, and establishing the rule of law.⁸

Ackerman's theory, which has been influential in American constitutional scholarship, is both descriptive and normative,⁹ and has been met with much criticism. It has been argued that it places excessive emphasis on legal elites, such as judges and prominent legal scholars, in shaping constitutional moments,¹⁰ and does not adequately address the broad social and cultural circumstances that influence constitutional change. It overlooks the influence of broad social and political forces (such as social movements, cultural shifts and public sentiment) that contribute to constitutional change and play a significant role in shaping constitutional moments.¹¹

⁷ Ibid 48–49, 266–68, 272–90. See also Bruce Ackerman, 'The Living Constitution' (2007) 120 *Harvard Law Review* 1737, 1757–71.

⁸ Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar 2011). Although the book focuses primarily on comparative constitutional law, it provides insights into the drafting and design of constitutional documents during moments of constitutional change.

⁹ Michael J Klarman, 'Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments' (1992) 44 *Stanford Law Review* 759, 763.

¹⁰ Terrance Sandalow, 'Abstract Democracy: A Review of Ackerman's *We The People*' (1992) 9 *Constitutional Commentary* 309, 335–36; Frederick Schauer, 'Deliberating About Deliberation' (1992) 90 *Michigan Law Review* 1187 (Book Review).

¹¹ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (Oxford University Press 2006) (critiquing Ackerman's theory of constitutional moments, questioning its feasibility, and pointing out the need for broader democratic participation in constitutional decision making).

Moreover, Ackerman's four-stage model may oversimplify complex processes of constitutional change and transformation. Critics contend that constitutional moments are often characterised by overlapping and interrelated stages which cannot be neatly categorised into distinct phases.¹² Also, because Ackerman's theory focused primarily on the American constitutional experience, it may not be universally applicable to other countries. To apply it elsewhere, a more comparative and context-specific analysis of constitutional moments is needed.¹³ Most importantly, though, Ackerman's approach, which emphasises the role of popular support and mobilised deliberation in the constitutional moment, may not fully address the concerns of those who prioritise transcendent standards of right and wrong over the will of the people. The concept of a constitutional moment emphasises the importance of democratic processes and popular participation in shaping constitutional change. Yet, there are alternative viewpoints according to which objective or transcendent standards should guide constitutional decision making, regardless of popular will. These perspectives often draw on natural law, moral principles or constitutional principles grounded in fundamental rights and justice.¹⁴

Nevertheless, Ackerman's theory can serve as a framework for analysing the dynamics of constitutional changes and understanding how transformative events in other countries can shape constitutional developments beyond formal amendments. Its applicability to other systems may vary depending on the characteristics of the constitutional and legal structures of the country.¹⁵ In this respect, the countrywide demonstrations in Israel, in which citizens are calling weekly for 'd-e-m-o-c-r-a-c-y',¹⁶ and at the same time the initiatives introduced by the government may be seen as transformative events with potential constitutional implications. Thus, the current political landscape raises questions about the possibility of a constitutional moment or constitutional change. Before delving into these inquiries, an introduction to the unique constitutional structure of the Israeli legal system is in order.

3. The constitutional structure of the State of Israel

Israel is a unicameral parliamentary democracy in which the legislative body is the Knesset. It does not have a formal written constitution, but its constitutional framework is based on Basic Laws and judicial precedent. In its 75 years of existence, the Knesset has enacted 13 Basic Laws. These laws, together with hundreds of constitutional rulings of the High Court of Justice covering

¹² See Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Bloomsbury 2015).

¹³ Klarman (n 9) 759–97.

¹⁴ *ibid* 763–66.

¹⁵ Sujit Choudhry, 'Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?' (2008) 6 *International Journal of Constitutional Law* 193.

¹⁶ Meron Rapoport and Oren Ziv, 'What's Behind the Calls for "Democracy" in Israel?', *The Nations*, 24 February 2023.

various aspects of governance, human rights and state identity, serve as the closest approximation to a constitution in Israel.¹⁷

Basic Laws are classified into two groups according to the areas they regulate. One group regulates the regime of the state and relations between the various authorities, and includes the following Basic Laws: the Knesset; the President of the State; the Government; the Judiciary; Jerusalem, the Capital of Israel; State Economy; Israel Defense Forces; Referendum; Israel Lands; and State Comptroller's Office.¹⁸

The second group governs essential aspects related to the nature of the state, the civil community, and the extent of political rights enjoyed by individuals. These provide the legal framework for matters such as the scope of citizenship, civil rights, social relations, and the interaction between the various religious and ethnic communities. They play a crucial role in regulating the daily lives of citizens and relations between individuals and communities and between communities and the state. This group includes three Basic Laws: Human Dignity and Liberty, Freedom of Occupation (enacted in 1992), and Israel – Nation State of the Jewish People (enacted in 2018). The first two Basic Laws are considered landmark legislation enshrining fundamental human rights in Israel. They establish and safeguard rights such as dignity, life, freedom, privacy, property, the right to enter and leave the country, and freedom of occupation. However, they do not include provisions on equality, freedom of speech or freedom of religion, but these are protected by rulings of the Supreme Court and recognised as constitutional values.¹⁹

Another significant aspect of these two Basic Laws is the inclusion of provisions that enable judicial review by the courts over legislative and executive actions, and decree the supremacy of the Basic Laws over regular laws.²⁰ These provisions empower the judiciary to act as guardian of constitutional values, granting the courts the authority to invalidate laws and administrative decisions that are found to be inconsistent with the values incorporated in the Basic Laws. This mechanism of judicial review, which provides a means to safeguard constitutional rights and ensure the compatibility of laws and decisions with the principles enshrined in the Basic Laws, has been regarded as a 'constitutional revolution'.²¹

Thus, in addition to the Basic Laws, the Israeli legal system is shaped by legal principles, court decisions and customary practices, which have evolved

¹⁷ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006). Written by the former President of the Israeli Supreme Court, Aharon Barak, this book provides insights into the jurisprudence of the Supreme Court, including its interpretation and protection of constitutional rights.

¹⁸ For further elaboration on the legislation of Basic Laws see Suzi Navot, *The Constitution of Israel: A Contextual Analysis – Constitutional Systems of the World* (Bloomsbury 2014) s 1.

¹⁹ See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015).

²⁰ Basic Law: Human Dignity and Liberty, s 8; Basic Law: Freedom of Occupation, s 4.

²¹ Adam Shinar, Barak Medina and Gila Stopler, 'From Promise to Retrenchment: On the Changing Landscape of Israeli Constitutionalism' (2020) 18 *International Journal of Constitutional Law* 714, 715; Yoram Rabin and Yuval Shany, 'The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?' (2004) 37 *Israel Law Review* 299.

over time. The Supreme Court, which also serves as the High Court of Justice, plays a significant role in ruling on constitutional and administrative petitions that challenge the actions of public and governmental authorities, as well as on the legality of legislation, in interpreting the law and safeguarding constitutional rights.²² The task of interpreting the law is complex and challenging because of the definition of the state as 'Jewish and democratic'.

This definition raises tensions between the commitment to preserve the Jewish national identity of the state and the commitment to realise the democratic principles of safeguarding human rights and equality. The tension intensifies on two levels. The first concerns internal Jewish issues, such as the separation of state and religion affecting gender equality, LGBTQ rights, and the status of the Sabbath (which affect the right to equality and of freedom of occupation). The second level is external and relates to the execution of the rights of non-Jewish communities, mostly the Palestinian citizens of the country when, among others, they demand equal allocation of land and budgets on account of strengthening the Jewish identity.

The enactment of the latest Basic Law: Israel – Nation State of the Jewish People (Basic Law: Nation State) has further intensified this tension. Admittedly, most of the sections of this Basic Law have already been addressed in existing legislation and judicial decisions,²³ all of which stress the substance and nature of the Israeli civil space as a space that is essentially Jewish. However, their grouping in the new Basic Law upgraded their legal status and raised their protection to constitutional level, which may compete with other such values, for example, human dignity and freedom. This means that if a contradiction arises between one constitutional value (human dignity) and another (Jewish settlement), the Court is required to make a horizontal as opposed to a vertical balancing of rights, and decide which of them prevails over the other in the circumstances of the case.²⁴

This is a significant consequence in so far as it concerns a legal dispute surrounding two arrangements which have sparked legal and public controversy and which may affect group and individual rights of marginalised groups that suffer from discrimination and exclusion, particularly the Palestinian citizens of Israel. Several petitions challenging the constitutionality of the Basic Law were filed with the Supreme Court and heard jointly.²⁵ The main legal claims concerned the failure of the Law to enshrine the principle of equality in the

²² For a general review of the Israeli Supreme Court see Keren Weinshall-Margel, 'Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel' (2011) 8 *Journal of Empirical Legal Studies* 562; Manal Totry-Jubran, 'Dissent, Diversity and Representation: Lessons from the First Minority Judge in the Israeli Supreme Court' (2022) 31 *Social and Legal Studies* 603, 607–09.

²³ See Manal Totry-Jubran, 'Basic Law: Israel – The Nation State of the Jewish People: Interpretation of the Jewish Settlement Section in the Light of the Principle of Equality' in Yuval Shany and Yedidia Stern (eds), *Commentary on the Nation-State Law* (Israeli Democracy Institute 2023) 539.

²⁴ See also Ori Aronson, 'The Nation-State Law in the Light of the Other Basic Laws' in Shany and Stern, *ibid* 79, 104–08.

²⁵ HCJ 5555/18 *Hasson v Knesset of Israel* (8 July 2021).

case of violation of three existing arrangements relating to the Arabic language, Jewish settlement policy, and the right to national self-determination.

Section 4 of Basic Law: Nation State (regarding the legal status of the Arabic language) states that ‘Hebrew is the language of the state’²⁶ and that ‘the Arabic language has a special status in the state’.²⁷ Section 4(c) of the Law states that ‘nothing in this section is intended to harm the status granted in practice to the Arabic language before this Basic Law came into force’. From the formal legal aspect, section 4 changes the normative arrangement enshrined in section 82 of His Majesty the King in Council, 1922–1947²⁸ from an ‘official’ to a ‘special’ arrangement, without ascribing any content to that status.²⁹

The second provision concerns the constitutional status of the Jewish settlement policy, enshrined in section 7 of the Basic Law: Nation State, which states that ‘the state considers the development of Jewish settlement a national value, and will act to encourage and promote its establishment and consolidation’. The interpretation of this section may affect the scope of the application of the principle of equality concerning the settlement of non-Jewish citizens, that is, the Palestinian citizens of Israel who wish to be part of a Jewish settlement, as in the *Ka’adan* case heard by the High Court of Justice in 1995. *Ka’adan* stated that the state cannot allocate public land in a discriminatory manner for the sake of preserving the Jewish character of the settlement.³⁰

A third arrangement that has been challenged is section 1(c) of the Basic Law: Nation State (‘the exercise of the right to national self-determination in the State of Israel is unique to the Jewish people’) on the ground that it creates an opportunity for harming the exercise of the group rights of the Arab minority. In my opinion, this is the most problematic section of the Basic Law: Nation State because it ignores the fact that this space is also the homeland of the Palestinian minority, which is entitled to exercise its right to culture and self-determination.³¹

²⁶ Basic Law: Nation State, s 4(a).

²⁷ *ibid* s 4(b).

²⁸ The relevant arrangement before the passage of the Basic Law: Nation State was s 82 of the King in Council, which grants official status to the Arabic language. In practice, the state did not introduce the Arabic language into the public sphere. Official forms and records are not published in Arabic; nor are the official notices of the local and municipal authorities.

²⁹ See also Meital Pinto, ‘A Divided Language: Official Status vs. Special Status of the Arabic Language in Israel’ (2021) 20 *Democratic Culture* 267, Part 4.

³⁰ HCJ 6698/95 *Ka’adan v Israel Lands Administration*, 54(1) PD 258. See also Totry-Jubran (n 23) 545; Asur Weizman and Barak Medina, ‘Article 7 of Basic Law: Israel the Nation-State of the Jewish People: “The State Considers the Development of Jewish Settlement a National Value and Will Act to Encourage and Promote its Establishment and Consolidation”’ in Shany and Stern (n 23) 507, 515–23; Haim Sandberg, ‘Proposed Interpretation of Article 7 of the Nation-State Law: “Jewish Settlement”’ in Shany and Stern (n 23) 567, 570; Ronit Levine-Schnur and Adam Shinar, ‘Article 7 of the Nation-State Law: Can Disputes be Reconciled?’ (2021) 20 *Democratic Culture* 127.

³¹ See also Manal Totry-Jubran, ‘We Are Not Guests in this Country, even if the Supreme Court Thinks Otherwise’, *Globes*, 15 July 2021. Regarding the meaning of section 1(c) of the Basic Law:

In July 2021, the Supreme Court, by a majority of ten justices of an extended bench against the dissenting opinion of the only Arab justice,³² rejected all petitions. In a comprehensive decision of around two hundred pages, it ruled that there was no ground to strike down the Basic Law or to interfere with its provisions, and that it should be interpreted in an affirming manner that is consistent with the other Basic Laws as well as the principles and values of the Israeli legal system. The Court explained that the Basic Law was a chapter in the emerging constitution of Israel, intended to enshrine elements of the identity of the state as a Jewish state without detracting from the elements of its democratic identity, which are enshrined in other Basic Laws and the constitutional principles practised in our system.³³

To conclude, the formal Israeli system fails to protect one of the fundamental constitutional values, the right to equality, and includes contradictions that might infringe minority rights.

4. Is Israel experiencing a constitutional moment after all?

The application of Ackerman's American theory in other contexts requires distinguishing between two types of constitutional 'change' or 'moment'. One type is an explicit, formal constitutional amendment or the enactment of a new constitution. The other is an implicit change, one that is reflected mainly in a radical shift in constitutional interpretation by the Court. This article deals exclusively with the former. However, it should be stated here that the latter form might also be at work in Israel, as a result of among others, the recent events, discussed here.

On the one hand, the countrywide demonstrations, marked by calls for democracy, appear to be an expression of *popular* demand for greater accountability, transparency and citizen participation in decision-making processes. Thus, they can be framed as a reflection of the public's desire for transformative constitutional reform. On the other hand, the legal changes introduced by the coalition, resulting in a concentration of power in the executive branch, reshaping the balance of power and the relations between branches of government and the protection of individual rights and liberties, may also be considered transformative events with constitutional implications.

Which of these events, if either, constitutes a constitutional moment? Before broaching this question, I must attend to a methodological obstacle. Applying Ackerman's theory in the Israeli context is challenging because of the absence of a unified, comprehensive constitution and an organised

Nation State see Yuval Shany, 'The Self-Determination Section of the Nation-State Law' in Shany and Stern (n 23) 53.

³² In a minority opinion, Justice Kara stated that the provisions of ss 1(c), 4 and 7 of Basic Law: Nation State negate the core of the democratic identity of the country and undermine the foundations of the constitutional structure, and therefore are invalid.

³³ *Hasson v Knesset* (n 25) Justice Hayut, para 17; Justice Solberg, para 14; Justice Hendel, para 4; Justice Mazoz, para 10; Justice Barak-Erez, para 14.

framework that regulates the process of constitution making.³⁴ Because of that, during the past decade there have been 28 amendments to Basic Laws, the sole purpose of some being to meet momentary political needs.³⁵ This makes the examination of a popular and informal constitutional moment more difficult because we have no model of formal constitutional legislation or amendment by which to judge.³⁶

As noted, exploring the above question requires a comprehensive analysis of ongoing developments and changes that have occurred within the Israeli legal, political and social environment over the last two decades. These processes lead to the conclusion that Israeli society today is far from experiencing a constitutional moment, for several reasons.

First, rather than having a broad consensus, as required by Ackerman's first stage, the demonstrations on the one hand and the government agenda on the other attest to strong disagreements between the diverse communities that make up Israeli society. According to the Minister of Justice and his supporters, the proposed judicial reform is aimed at 'strengthening democracy, rehabilitating governance, restoring faith in the judicial system, and rebalancing the three branches of government'.³⁷ The same suggested changes have raised concerns in various segments of society about the potential concentration of power in the executive branch and its implications for democratic governance.³⁸ These controversies are also manifested in the unstable political situation and repeated elections following governments serving for short terms.³⁹

Second, no ample and thorough deliberative process appears to be taking place in the course of these events, as required by Ackerman's third stage.

³⁴ Yaniv Roznai and Matan Gutman, 'Saving the Constitution from Politics: The Israeli High Court of Justice and the Misuse of Constituent Power Doctrine', *VerfBlog*, 30 May 2021, <https://verfassungsblog.de/saving-the-constitution-from-politics>.

³⁵ For a comprehensive review see Roznai and Gutman (n 34); Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21 *European Review of Law Reform* 403.

³⁶ For elaboration of this problematic status see Gideon Sapir, 'Constitutional Revolutions: Israel as a Case-Study' (2009) 5 *International Journal of Law in Context* 355, 362-65; Elyakim Rubinstein, 'The Constitutionalism on the Slope: Contempt and Predation, and Can Sisyphus' Stone be Raised to the Top of the Mountain', *ICON-S-IL Blog*, 24 January 2021.

³⁷ Sharon (n 1).

³⁸ Michael Starr, '30,000 March in Tel Aviv Against "Coup d'État" Levin Judicial Reform', *The Jerusalem Post*, 8 January 2023, <https://www.jpost.com/breaking-news/article-726915>; Jonathan Lis and Yael Frierson, '18 Former Israeli Supreme Court Justices Publish Statement Opposing Judicial Overhaul', *Haaretz*, 12 February 2023; 'Israelis Abroad to Protest New Government's "Coup d'État"', *Haaretz*, 25 January 2023, <https://www.haaretz.com/israel-news/2023-01-25/ty-article/.premium/israelis-abroad-to-protest-new-governments-coup-detat/00000185-e89e-d31b-a1f7-fdff2a6d0000>; Bar Peleg and Josh Breiner, 'Hundreds of Thousands Protest Netanyahu's Judicial Coup in Biggest Rally Yet', *Haaretz*, 11 March 2023, <https://www.haaretz.com/israel-news/2023-03-11/ty-article-live/israelis-take-to-streets-against-judicial-coup-for-10th-week-in-a-row/00000186-d12e-dc44-abe6-d5aefeb60000>.

³⁹ TOI Staff, 'Israel Has Held Most Frequent Elections among Democracies since 1996 Report', *The Times of Israel*, 22 March 2021, <https://www.timesofisrael.com/israel-held-most-frequent-elections-among-democracies-since-1996-report>.

After several weeks of countrywide demonstrations, in March 2023 the Prime Minister announced the suspension of the legislative process and a shift towards a dialogue channel facilitated by the President of the state. The talks, which lasted for three months, did not include representatives of all political parties, but only two parties out of five in the opposition, and reached no agreement.⁴⁰ Despite ongoing calls for returning to the talks, the unilateral process of legislation is proceeding.⁴¹

Third, taking on the criticism raised against Ackerman's theory, I contend that to experience a constitutional moment, that moment must, first and foremost, be *constitutional*. This means that in addition to the stages mentioned above, such an event must adhere to basic constitutional values, including the rule of law, democracy, separation of powers, individual rights, and equality.⁴² Several issues raise obstacles before experiencing a constitutional moment in Israel, which may be divided along two axes. One is 'internal', concerning within-Jewish issues, such as the separation of state and religion affecting gender equality, LGBTQ rights, the status of the Sabbath, and more.⁴³ The other is 'external', concerning the non-Jewish communities, on which I focus here.

Along the external axis, two central issues prevent an Israeli constitutional change. The first is the occupation regime that prevails beyond the Green Line and the continued control over the civilian population by a military government, with daily violations of human rights and absence of the rule of law.⁴⁴ For as long as this regime exists, Israel can at most be characterised as, what Stopler referred to, a 'semi-liberal constitutional' state. Such a regime is not entirely liberal, but upholds certain liberal features that are reflected in the rulings of the courts and in some liberal legislation that promotes the

⁴⁰ Ash Obel, 'Coalition, Opposition Hold First Talks on Judicial Overhaul with President Herzog', *The Times of Israel*, 28 March 2023, <https://www.timesofisrael.com/coalition-opposition-hold-first-talks-on-judicial-overhaul-with-president-herzog>; TOI Staff and Jeremy Sharon, 'Gantz: No Progress in Talks with Government on Judicial Reform Compromise', *The Times of Israel*, 1 May 2023, <https://www.timesofisrael.com/gantz-no-progress-in-talks-with-government-on-judicial-reform-compromise>.

⁴¹ At the time of writing this article (mid-July 2023), a proposal to abolish the reasonableness standard was discussed in the Constitution, Law and Justice Committee. In response to this discussion, thousands protested at Ben-Gurion Airport and at the Port of Haifa: Michael Starr and Eliav Breuer, 'Thousands Flood Airport in Judicial Reform Protest, Police Arrest 37', *The Jerusalem Post*, 3 July 2023, <https://www.jpost.com/breaking-news/article-748632>. Eventually, despite the massive protests, on 24 July the law to abolish the reasonableness standard was enacted by 64, all members of the coalition, meaning that it was the government that enacted the law and not the Knesset.

⁴² Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1406.

⁴³ For a general overview of gender inequality see Ruth Halperin-Kaddari, *Women in Israel: A State of Their Own* (University of Pennsylvania Press 2004); on LGBTQ rights see Aeyal Gross, 'The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics' (2015) 45 *Columbia Human Rights Law Review* 81; on state and religion see Ruth Gavison, 'Jewish and Democratic? A Rejoinder to the "Ethnic Democracy" Debate' (1999) 4 *Israel Studies* 44.

⁴⁴ See references in n 2.

principle of equality.⁴⁵ The second issue concerns the fragile status of the Palestinian citizens of Israel under the current legal system, which includes the Basic Law: Nation State and which is reflected in the definition of the state as Jewish and democratic,⁴⁶ as well as other previous and future laws and policies presented by the current government that infringe their individual and group rights.

A call to establish a comprehensive and cohesive framework which outlines the rights, responsibilities and governance structures of the state, and which reflects democratic values and a call for establishing a constitution and a new social contract, is a welcome step.⁴⁷ However, I argue that for this call to be a true constitutional moment it must be a *civil* social contract rather than a cry for a *Jewish* social contract. It seems that Israeli society is not ready even for a within-Jewish social contract, and it suffers from conflictual relations along both the internal and external axes.

5. Conclusion: How to constitutionalise the Israeli system

The recent events are not an Israeli constitutional moment, and there is still a long way to reaching such a moment. Constitutionalising the Israeli regime, which lacks fundamental constitutional protection of rights, would be the first step towards this goal.

Constitutionalising the constitutional system of Israel would involve a comprehensive and inclusive process that considers the diverse perspectives and interests of Israeli society. The path to constitutionalisation is complex and nuanced, requiring a genuine commitment from political leaders, civil society and the public in general. It is a journey that necessitates careful deliberation, compromise and recognition of the shared values and aspirations that may underpin a unified constitutional framework for Israel. Thus, to constitutionalise the constitutional system of Israel, certain basic procedural and substantive conditions must exist. Below are some fundamental conditions that are often considered important in such a process and that are relevant in the case of Israel:

- (1) *Addressing key challenges* A constitutional process should address key challenges unique to the country, concerning both the internal and external axes. The external axis includes discussing the implications of the occupation regime on the rights of millions of Palestinians living

⁴⁵ Gila Stopler, 'Semi-Liberal Constitutionalism' (2019) 8 *Global Constitutionalism* 94.

⁴⁶ Katie Hesketh and others, *The Inequality Report: The Palestinian Arab Minority in Israel* (Adalah 2011), available at: https://www.adalah.org/uploads/oldfiles/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf; Association for the Civil Rights in Israel, 'The Project for Democracy – Fighting for the Ground Rules', October 2010, available at: <https://law.acri.org.il/he/wp-content/uploads/2011/08/democ-chap2-en.pdf>.

⁴⁷ Tamar Hostovsky Brandes, 'Israel Is in Need of a New Social Contract', *The Jerusalem Post*, 19 April 2023, <https://www.jpost.com/opinion/article-739607>; Herb Keinon, 'In the Judicial Reform Debate, Everyone is in a Breach of Contract', *The Jerusalem Post*, 17 July 2023, <https://www.jpost.com/israel-news/politics-and-diplomacy/article-750291>.

under Israeli military control and reaching a solution that would end the apartheid regime and ensure their rights. It should also ensure the rights of the Palestinian citizens of the state, who are a politically weakened group with little control over shaping their rights.

A constitutional process must also provide protection for other marginalised groups within the internal axis through promoting gender equality and addressing the historical grievances of several groups that compose Jewish-Israeli society.⁴⁸ This would be no less of a challenge than dealing with the external axis, as there is a lack of an overlapping consensus in Israel regarding its constitutional identity, particularly in issues relating to the separation of state and religion, which greatly affect gender equality and LGBTQ rights. Such a controversy has existed ever since the establishment of the state and, at a certain point of time, should be discussed and determined.

- (2) *Broad social consensus* There should be recognition by a significant portion of the population – including various political, social and religious groups – of the need for a constitution and the importance of constitutional reform. Building consensus and promoting a shared understanding of the benefits of constitutionalisation are vital for a successful process.
- (3) *Inclusive and participatory process* The process of constitutionalisation should be inclusive, allowing for broad participation by *all* sectors of society, including particularly marginalised communities and minority groups. Creating mechanisms for public consultations, debates and forums that facilitate diverse perspectives can ensure a more representative and democratic outcome.⁴⁹
- (4) *Independent and expert commission* Establishing an independent and expert commission or body can be instrumental in guiding the constitutional process. Such a commission could conduct research, gather public input, draft proposals, and provide technical expertise to inform the deliberations.⁵⁰
- (5) *International and comparative perspectives* Drawing on international and comparative experiences can provide valuable insights and best practices for constitutional design. Learning from other countries that have undergone similar processes can help to inform decisions and avoid potential pitfalls.⁵¹

⁴⁸ Learning from the South African experience can be helpful in this respect: Christina Murray and Richard Simeon, 'Recognition without Empowerment: Minorities in a Democratic South Africa' (2007) 5 *International Journal of Constitutional Law* 599; Christa Rautenbach and Lourens du Plessis, 'The Constitutional Court of South Africa' in András Jakab, Arthur Deyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 560, 561–65, 578–85.

⁴⁹ Levinson (n 11).

⁵⁰ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 395–96.

⁵¹ Roger Masterman, '18 Multi-Layered Constitutions' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 473.

- (6) *Time and patience* Constitutionalisation is a complex and time-consuming process. It requires patience and a long-term commitment to overcome obstacles and reach a broad consensus. Rushing the process or imposing predetermined outcomes can undermine its legitimacy and sustainability.

The process of creating a constitution or experiencing a constitutional moment is an opportunity to address historical grievances, rectify injustices, and build a shared vision for the future of *all* citizens. These local conditions provide a starting point for considering the requirements for a constitutional moment and the constitutionalisation of the constitutional system of Israel.

To conclude, the recent events have sparked discussions that acknowledge the need for a new social contract to address the frustrations and aspirations of all segments of Israeli society. Israel has always been a conflictual society, but whereas previous disrupting events concerned certain groups,⁵² these current events are focused on Israeli society as a whole, with most groups voicing (or starting to voice) their positions. Thus, this may be an opportunity to engage, talk, listen, draft a new inclusive social document, and possibly start to heal the wounds of historical injustices. So, despite my conclusion that Israel is not witnessing a constitutional moment, if we consider the question of whether Israel's constitutional moment *has* finally arrived, my answer is in the affirmative.

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⁵² These include the ultra-Orthodox demonstrations against the Supreme Court in 1999, the demonstrations against disengagement in 2004, the Ethiopian demonstrations against discrimination and over-policing in 2019, the demonstrations of the Palestinian minority in 1976 (the Land Day), in 2000 (October events), and in May 2021 (the mixed cities events).

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