

SYMPOSIUM ARTICLE

The Two Revolutions of Israel's National Identity

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Abstract

The judicial overhaul, designed to weaken the judiciary and unleash governmental power from its structural checks, should be understood, we argue, as part of a deeper transformation of Israel's constitutional identity. At its core, this transformation is not about 'empowering the people' but rather about questioning Israel's commitment to the fundamental principle of equal citizenship, mainly regarding the permissibility of preferring the interests of Jews over those of non-Jews. Understanding the judicial overhaul as part of this larger transformation of the state's identity, towards more Jewish and less democratic, carries normative implications regarding its legitimacy.

The judicial overhaul is often presented by the Israeli government as an attempt to undo the 1992 so-called 'constitutional revolution', questioning its legitimacy and asserting that a counter-revolution would be permissible, aligning with the current will of the people. An examination of Israel's constitutional history refutes this argument. We show that while the 1992 revolution enjoyed both normative and, at least, partial social legitimacy, current attempts do not.

Keywords: Israel; constitutional law; constitutional identity; national identity; equality

1. Introduction

Israeli society is currently undergoing a period of turmoil. The immediate trigger has been the government's initiative, first presented in January 2023, to grant itself the authority to appoint Supreme Court justices and significantly curtail the scope of judicial review. However, the judicial overhaul is only one part of a larger transformation of Israel's national identity. The overhaul

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is the structural aspect of this transformation, designed to weaken if not to completely dismantle all checks on governmental power. The substantive aspect revolves around Israel's commitment to equality, mainly regarding the permissibility of preferring the interests of Jews over those of non-Jews, and thus discriminating against the Palestinian-Arab minority. Together, both the structural and the substantive aspects are chipping away at Israel's democratic foundations and strengthening its identity as a Jewish state. Understanding the judicial overhaul as part of this larger transformation of the state's identity carries normative implications regarding its legitimacy.

Predicting the expected outcomes of implementing the judicial overhaul and, accordingly, understanding the government's main objectives in pursuing this initiative are hardly contested. It is widely expected that following the significant curtailment of judicial review, the government will implement policies that heavily favour Israel's Jewish citizens while discriminating against Palestinian-Arabs, both citizens of the state and those living in the Occupied Territories (who are subject to the government's powers but lack citizenship rights). This prediction is based both on past experiences leading up to the 1992 'constitutional revolution' and on explicit acts and statements made by current coalition leaders.

A more challenging aspect is the debate about the legitimacy of pursuing this expected outcome. Seeing the current judicial overhaul as part of a dual-aspired transformation of Israel's constitutional identity, we suggest, provides some clarity regarding this question. The focal point for this investigation is the 1992 so-called 'constitutional revolution', which similarly entailed two key elements: (i) a radical shift in the definition of Israel's constitutional identity – namely, transitioning from a system where the government could justifiably treat Jews and Arabs differently to one that prohibits any form of discrimination; and (ii) empowering the Court to employ judicial review to enforce this revised constitutional identity. The Israeli government's attempt to undo this development is based on two main arguments: one that challenges the legitimacy of the 1992 shift; and another which suggests that even if it were legitimate, a counter-revolution would now be similarly permissible, aligning with the current will of the people as reflected in the composition of the current coalition.

We critically assess these two arguments, with a focus on aspects that are relevant to the rights and status of the Palestinian-Arab minority in Israel. We contend that both arguments are flawed, showing that while the 1992 'constitutional revolution' enjoyed normative legitimacy and some degree of social legitimacy, current attempts to transform Israel's constitutional identity lack both.

In what follows, we introduce the concept of constitutional (or national) identity (Section 2). We then briefly outline the history of Israel's constitutional identity, highlighting significant changes over time (Section 3). Drawing from this discussion, we address the government's claims regarding the legitimacy of the 1992 revolution and the current attempts at a counter-revolution (Section 4). We conclude with some forward-looking thoughts (Section 5).

2. The concept of constitutional (or national) identity

Constitutional (or national) identity refers to a set of ideals that characterises a specific polity. As defined by Anita Schnettger, it encompasses ‘the entirety of values and structures, ideas of order and fairness, and particularities and peculiarities from different areas of society that form the necessary parts of the collective perception of the people of a state’.¹ Constitutional identity is descriptive but also normative, as it is central to constitutional interpretation. It determines what Ronald Dworkin termed as ‘the theory that best fits the existing legal landscape’.² In addition, it is understood, in some polities, to determine the limits of the power to amend constitutional norms.³ The Israeli Supreme Court has repeatedly referred to the notion of constitutional identity, using various terminologies such as ‘the vision of the people and its faith’ or ‘the nation’s vision and its credo’. Notable examples of referring to this concept in judicial interpretation are the *Kol Ha’am* (1953) and *Yeredor* (1965) decisions;⁴ and the *Hasson* (2021) case, which introduced the doctrine of ‘unconstitutional constitutional amendment’.⁵ Characterising a state’s

¹ Anita Schnettger, ‘Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System’, in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 9, 14.

² Ronald Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057.

³ eg, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Power* (Oxford University Press 2017). Additionally, constitutional (or national) identity also sets the relevant ‘margin of appreciation’ in implementing international or regional norms. An example is Article 4(2) of the Treaty on European Union (entered into force 1 December 2009) [2008] OJ C 115/07 (‘The Union shall respect the ... national identities [of Member States], inherent in their fundamental structures, political and constitutional’).

⁴ HCJ 73/53 *Kol Ha’am Co Ltd v Minister of the Interior* (16 October 1953), Chief Justice Agranat (‘The system of laws under which the political institutions in Israel have been established and function are witness to the [notion] that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, ... mean that Israel is a freedom-loving State. ... [The Declaration] “expresses the vision of the people and its faith”, [and thus] we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State ..., for it is a well-known axiom that the law of a people must be studied in the light of its national way of life’), unofficial translation at <https://versa.cardozo.yu.edu/opinions/kol-haam-co-ltd-v-minister-interior>; EA 1/65 *Yeredor v Chairman of the Central Elections Committee for the Sixth Knesset* (23 October 1965) PD 19 365, 385–86 (1965), unofficial translation at <https://versa.cardozo.yu.edu/opinions/yeredor-v-chairman-central-elections-committee-sixth-knesset>.

⁵ HCJ 5555/18 *Hasson v The Knesset* (8 July 2021), opinion of Chief Justice Hayut, paras 21, 28 (‘The question is ... are there in our system fundamental principles that the Constitutional Assembly may not violate, as they are entrenched on our public tradition, in the state’s constitutive narrative and among the legal community. ... To my view, as long as the matter deals with Israel’s identity as a Jewish and democratic state, the answer to this question is positive. The entire constitutional structure does not leave room for doubt that Israel’s existence and nature came from the integration “Jewish and democratic”, and that this is the beating heart of Israel-style Constitution. ... Denying either of these elements brings about the collapse of the entire structure. ... The limits on the power of the Constitutional Assembly ... are breached when ... a constitutional amendment that denies the core of Israel’s Jewish or democratic identity’).

constitutional or national identity is thus essential for both describing the legal system and carrying out constitutional adjudication.

The challenge lies in identifying this ideal. A primary source for determining a state's fundamental values is a constitutional provision stating the inviolable core of its constitution. Germany's Article 79(3) of the Basic Law is an example of such a provision. However, the explicit terms of eternity clauses – namely, those that cannot be amended and changing them thus requires enacting a new constitution – are not exhaustive in determining the constitutional identity. This identity is formed based on a broader range of sources, including provisions within the constitution or Basic Laws, instruments establishing the state (such as the Declaration of Independence), legislation, government policies, and judicial decisions. Informal elements also hold relevance, such as cultural, historical, social, and political understandings, those which 'form the legally constituted political community in its roots'.⁶ Establishing a state's constitutional identity is a collaborative effort involving the political branches, the judiciary and the public, reflecting evolving perceptions and ideals; hence, the insight that 'the constitution ... is the "shared situation" of society, that continuous arrangement whereby men preserve their common stake in a political regime'.⁷

In the next section we briefly trace the evolving understanding of Israel's constitutional identity. The persisting occupation of the West Bank has fundamental implications for the study of Israel's constitutional identity and for understanding current events.⁸ For the purposes of this article, however, we examine the transformations of Israel's constitutional identity from an internal perspective. From this perspective there is largely a consensus that Israel is a 'Jewish and democratic state';⁹ the precise meaning of this abstract definition has undergone significant transformations over the 75 years of the state's existence.

⁶ Schnettger (n 1) 18. See also Gerhard van der Schyff, 'Member States of the European Union, Constitutions, and Identity: A Comparative Perspective', in Calliess and Van der Schyff (n 1) 305.

⁷ Garry Wills, 'The Convenient State' in William F Buckley, Jr (ed), *American Conservative Thought in the Twentieth Century* (Routledge 2011) 7, 28. Accordingly, '[c]ourts have neither the first nor the last word on the practical meaning of the Constitution; to the contrary, courts are always in complicated streams of mutual influence with citizens, the national political process, and the decisions of state and local governments': Jack M Balkin, *Living Originalism* (Harvard University Press 2011) 68. See also Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373.

⁸ See David Kretzmer, 'The "Constitutional Reform" and the Occupation' (2023) 56 *Israel Law Review* 397; and Tamar Hostovsky Brandes, 'The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?' (2023) 56 *Israel Law Review* 415.

⁹ The major and, to a large degree, rightful exception to this statement is the regime of control over Palestinians in the Occupied Territories, which makes Israel's democratic identity questionable to begin with: David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021).

3. A brief history of Israel's constitutional identity

Israel does not have an entrenched, written constitution, and identifying the state's fundamental principles requires resorting to other sources – mainly legislation, government policies, judicial precedents and public opinion. For examining the transformations in Israel's constitutional identity, we focus mainly on its commitment to equality of its citizens. As outlined below, in rather thick brushstrokes, Israel's constitutional identity has changed at least three times over the years, with current events being part of a transformation starting in around 2011.

3.1. The UN Partition Plan, and Israel's Declaration of Independence (1947–1948)

The UN Resolution,¹⁰ which set out to establish two nation-states in Palestine, one Arab and one Jewish, defined the core constitutional identity of each of these states. Defining a state by reference to the majority's ethnicity creates a major risk that the government would prefer the interests of the majority and discriminate against the minority, especially when the two groups are part of opposing national groups that engage in an armed conflict. Consequently, the Partition Plan required the Jewish state (and the Arab state) to guarantee that 'no discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex. All persons within the jurisdiction of the State shall be entitled to equal protection of the laws'.¹¹ The UN Resolution required that these commitments be included in both the Declaration of Independence, which should prevail over any law,¹² and in a Constitution, which would '[g]uarantee to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association'.¹³

Israel's 1948 Declaration of Independence followed these requirements. The Declaration states that Israel will prefer Jews in its immigration policy, which is aimed at providing Jews with the right of return, and at establishing a decisive Jewish majority among the citizens of Israel. However, fulfilling the requirement of the Partition Plan, the Declaration also explicitly sets out that 'the State of Israel ... will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture'.¹⁴ Additionally,

¹⁰ UNGA Res 181 (II), Future Government of Palestine (29 November 1947).

¹¹ *ibid* Part I, s C, Ch 2, arts 2 and 3.

¹² *ibid* Part I, s C, General Provision ('The stipulations contained in the declaration are recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them'). The Plan also determines that these provisions of the declaration 'shall be under the guarantee of the United Nations, and no modifications shall be made in them without the assent of the General Assembly of the United Nations ...': *ibid*, Part I, s C, Ch 4, para 1.

¹³ *ibid* Part I, s B, para 10(d).

¹⁴ Declaration of Independence, Provisional Government of Israel, *Official Gazette*, No 1, 14 May 1948, <https://www.gov.il/en/departments/general/declaration-of-establishment-state-of-israel>.

the Declaration includes the following provision, which is telling in more than one way:

We appeal, in the very midst of the onslaught launched against us now for months, to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State, on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.

While this section provides a further commitment to the ideal of equality by ensuring the Arab minority ‘due representation’ in government, it is also a marker of the de facto identity of the state. The ‘We’ here, the collective that ‘appeals’ to the Arabs, is not ‘the People’ in an inclusive sense, but rather the body that made the Declaration – *Minhelet Ha’am* (literally the People’s Administration) – which represented only the Jewish inhabitants of Palestine. This conflation between the Jewish people and the state has proved to be more influential than the ideals of equality promised in the Declaration.

3.2. *Inequality and illiberal tendencies (1949–1992)*

Over the years following its establishment, Israel failed to uphold its commitment to treat Jews and Arabs equally. The Palestinian-Arab minority, comprising approximately 15 per cent of the population during the first two decades of statehood,¹⁵ faced widespread discriminatory policies. During these years the government expropriated, mostly without compensation, extensive lands owned by Arab citizens, and allocated these lands to towns and villages in which only Jewish citizens could live. Moreover, there was extensive discrimination in public funding for services such as education, healthcare, infrastructure, and more. Discrimination against Arab citizens in the marketplace, employment, housing, education and service provision was common and was mostly neglected and unaddressed by the government. Most notably, the government often referred to Arab citizens as if they were ‘enemy aliens’, a policy manifested in imposing military rule on most Arab villages, which dramatically curtailed human rights, from 1948 until 1966; in avoiding drafting Arab citizens into the army; and by a practice of enhanced and often humiliating security checks of Arab citizens at airports and other public places.¹⁶ These policies violated the commitment to non-discrimination and equal treatment,

¹⁵ The relative share of Arabs in the state population has gradually dropped from 14 per cent in 1949 to 11 per cent in 1958, following the immigration of Jews in this decade. However, since then it has increased steadily, and reached about 18 per cent in the early 1990s. As of 2022, Arab citizens consist of about 21 per cent of the Israeli population; see, eg, Israel Democracy Institute, ‘Statistical Report on the Arab Society in Israel 2021’, 17 March 2022.

¹⁶ eg, Ian Lustick, *Arabs in the Jewish State: Israel’s Control of a National Minority* (University of Texas Press 1980); David Kretzmer, *The Legal Status of the Arabs in Israel* (Westview Press 1990). See also Ofra Bloch, ‘Hierarchical Inclusion: The Untold History of Israel’s Affirmative Action for Arab Citizens (1948–68)’ (2021) 29 *Law and History Review* 39 (describing how during those decades a regime of more subtle control over the Arab minority developed).

contributing significantly to the substantial socio-economic inequality that persists between Jews and Arabs in Israeli society today.¹⁷

Military rule ended in 1966 and much has changed over the years, but discriminatory policies and treatment of the Arab minority characterised Israel all the way to the early 1990s. This state of affairs can be attributed largely to four main factors. Firstly, all governments have consisted solely of representatives of the Jewish population. Similarly, high-ranking civil service officials were exclusively Jewish. Although Arab citizens had representation in the Knesset, they were never part of the coalition during this entire period, which led to a lack of representation of their interests and perspectives in the government, an absence that significantly influenced the formation of discriminatory policies. Secondly, the majority of the Jewish population in Israel held negative views towards the Arab minority. These views translated into discrimination in the marketplace, de facto segregation in housing and education, and overwhelming support for the government's discriminatory policies, reaching approximately 80 per cent throughout the relevant period.¹⁸

The remaining elements that enabled this violation of the commitment to equal treatment were more legal in nature: specifically, the absence of meaningful constitutional, legislative or judicial checks. The Knesset legislation in this area was minimal; with the exception of immigration, the Knesset neither approved nor prohibited the government's discriminatory policies. The few legislative measures in this domain were enacted to authorise expropriation of lands,¹⁹ and in the context of immigration policy (the Law of Return). Consequently, an examination of Israel's legislation during this period would not reveal an explicit reference to the permissibility or the prohibition of favouring Jewish interests and discriminating against Arabs.²⁰ Most significantly, the Knesset, initially elected in 1949 as a Constitutional Assembly,

¹⁷ A concise summary of these policies and their outcome is available in the report of the Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000 (the Or Commission), 2 September 2003; an English summary is available at <https://www.iataskforce.org/resources/view/431>.

¹⁸ For instance, in one set of polls among the Jewish population in Israel (Sami Smoocha, *Arab and Jews in Israel*, Vol 1 (Routledge 1989) 139; Vol 2 (Routledge 1992)), the proportion of those who expressed support of the statement 'the government should prefer Jews over Arabs' was as follows:

Should the government prefer Jews over Arabs?	1980	1985	1988
Extensively prefer Jews over Arabs	66	57	48
Somewhat prefer Jews over Arabs	17	21	25
Sub-total	83	78	73
Impermissible to prefer Jews	15	20	25

¹⁹ The Purchase of Land Law (Ratification of Actions and Compensations), 1953, which retroactively legalised the government's unlawful land expropriation; and the Absentee's Property Law, 1950, which took over land of Palestinians who were absent on the specific date, whether they had left Palestine altogether because of the war or were internally displaced temporarily.

²⁰ The same pattern has applied, since 1967, to Israel's policies regarding the Occupied Territories, which was left exclusively to the government, with no oversight by the Knesset.

decided against enacting a Constitution and instead chose to enact individual chapters known as Basic Laws, with the intention that these would later be combined to form the Constitution of Israel. This decision, made in 1950, allowed the Knesset to limit its constitutional legislation to non-controversial institutional aspects, such as election rules and the parliamentary system, while avoiding issues related to human rights and the state's constitutional identity.

Shortly after Israel's establishment, the Court ruled that the provisions of the Declaration of Independence were not legally binding,²¹ notwithstanding that the UN Resolution explicitly stated that 'the stipulations contained in the declaration are [to be] recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations',²² and the statement in the Declaration itself that 'the State of Israel is prepared to cooperate with the [UN] in implementing the [Plan of Partition]'. The Court's ruling, along with the Knesset's decision not to enact a Constitution with a Bill of Rights, and the Court's decision that international treaties were not enforceable domestically²³ allowed the Court, similar to the Knesset, to avoid addressing explicitly the issue of Israel's constitutional identity and its commitment to equal citizenship. The Court deferred to the government, citing principled judicial restraint and pointing out the absence of explicit constitutional norms to justify judicial review, disregarding the inherently illiberal nature of the government's policies.²⁴

As a result, during this period (1949 to 1992) Israel maintained a well-functioning democracy mostly in terms of having free elections and peaceful transitions of power between political parties. However, its human rights record was flawed, especially with regard to the Palestinian-Arab minority. Its constitutional identity, as inferred from government policies and the views of the Jewish majority, leaned towards illiberalism. The idea of a Jewish state was understood as legitimising the prioritisation of Jewish interests over those of the Arab population.

3.3. *The constitutional revolution (1992–2011)*

The enactment of Basic Law: Human Dignity and Liberty, in 1992, marked a transformation of Israel's constitutional identity. This Basic Law, along with

²¹ HCJ 10/48 *Zeev v Acting District Commissioner of the Urban Area of Tel Aviv* (2 December 1948), unofficial translation at <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Zeev%20v.%20Acting%20District%20Commissioner%20of%20the%20Urban%20Area%20of%20Tel%20Aviv.pdf>.

²² n 12.

²³ eg, CivA 25/55 *The Custodian of the Property of Absentees v Samara* (12 December 1956) 22 *International Law Reports* 5, opinion of Justice Berenson ('[T]he treaty is not a law that our courts will refer to or give an effect what so ever. The rights that the treaty confers and the obligations it imposes are rights and duties of the state parties to the agreement The persons affected by the treaty do not gain any right based on it'). See Barak Medina, 'Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel' (2017) 50 *Israel Law Review* 331.

²⁴ eg, Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture and Society* (Ashgate 2007).

other laws legislated and judicial opinions decided in those years, have revolutionised Israel's identity, rendering a more democratic and a more liberal understanding of a Jewish state, aligning it with a worldwide trend in the early 1990s of expanding judicial review for the protection of human rights. This transformation was dual and included a structural aspect of authorising judicial review over legislation, along with a substantive aspect of greater commitment to human rights and, in particular, to equality.

In a controversial compromise made in order to secure bipartisan support of the legislation, the Knesset avoided explicitly enumerating the right to equality in the Basic Law. Nevertheless, the conclusion that the Basic Law revolutionised Israel's identity finds strong support in the language of the Basic Law itself and its interpretation by the Court. One noteworthy aspect is the explicit reference to the Declaration of Independence, which was added as an amendment in 1994 and gained the support of approximately two-thirds of the members of the Knesset.²⁵ It states that '[t]he basic human rights in Israel ... shall be upheld in the spirit of the principles included in the Declaration of the [Independence]' (section 1). Additionally, the Basic Law stipulates that 'the purpose of this Basic Law is to protect human dignity and liberty, in order to embed the values of the State of Israel as a Jewish and democratic state, in a basic law' (section 1A). The idea is that 'the values of the state', namely Israel's constitutional identity, are found in the commitment to respect human dignity and liberty, in the spirit of the Declaration. This is a clear indication of an adoption of this new national identity.

Further support for this conclusion can be found in the very enactment of a Bill of Rights (even if incomplete) and the empowerment of the Court to protect it. Although the Knesset did not explicitly empower the Court to declare legislation that violates human rights as invalid, the Basic Law inherently implies that such power has been vested. It stipulates that legislation that violates a human right is valid only if it meets the requirement of proportionality (section 8), and that 'each and every government authority is obliged to respect the rights in accordance with this Basic Law' (section 11). The Knesset also decided, again as a result of a compromise, that the Basic Law would not apply retroactively: 'This Basic Law shall not affect the validity of any law that existed prior to the inception of the Basic Law' (section 10). This provision clearly demonstrates the Knesset's acknowledgement that it brings about a radical change to Israel's constitutional identity.

The central outcome of enacting the Basic Law: Human Dignity and Liberty is that both the Knesset and the Court were required, after 44 years of passivity, to participate actively in the joint project of determining Israel's constitutional identity. The Basic Law provides that state actions that infringe human rights can be valid only if explicitly authorised by legislation, thereby necessitating an active role for the Knesset if the government seeks to curtail rights. Moreover, the new understanding of Israel's constitutional identity is marked by the enactment of several laws prohibiting discrimination in the allocation of public funding, in the workplace and in the marketplace. In 2000, the

²⁵ Amnon Rubinstein, 'The Story of the Basic Laws' (2012) 14 *Law and Business* 79, 96.

legislature even established a legal duty to give preference to Arab citizens in civil service recruitment.

The Court followed suit, unequivocally ruling against policies that favour Jewish interests and prohibiting direct or indirect discrimination against Arabs in a series of cases reviewing governmental policies. The Court encapsulated this approach in the seminal 2000 *Ka'adan* case, invalidating a policy that allocated public lands exclusively for a Jewish village and providing an explicit statement of Israel's new constitutional identity.²⁶

[W]e do not accept the approach that the values of the State of Israel, as a Jewish state, would justify ... discrimination by the State between its citizens, on the basis of religion or nationality. ... Indeed, the return of the Jewish people to their historic homeland is derived from the values of the State of Israel as both a Jewish and democratic state. ... However, the values of the State of Israel as a Jewish and democratic state do not, by any means, suggest that the State will discriminate between its citizens. Both Jews and non-Jews are citizens with equal rights and duties in the State of Israel.

In addition to the Knesset enacting the Basic Law and other legislative acts that align with this new approach and the Court's involvement, the government has also embraced policies that demonstrate a general commitment to treating Jews and Arabs as equals, particularly in the allocation of public funding.²⁷ It is noteworthy that public opinion has also undergone a remarkable shift in this respect (Figure 1).

The transformation of Israel's identity (but only within Israel, not with regard to the Occupied Territories) to a more democratic and more liberal nature should be understood, to a large degree, as a common enterprise, motivated not only by the Knesset and the Court but also by civil society, which was involved in promoting the protection of human rights through both parliamentary efforts and litigation.²⁸ The proportion of the Jewish sector who admitted to supporting discriminatory policies remained relatively high, at around 40 per cent, yet is significantly lower than that of the pre-constitutional revolution period. This enduringly high number reflects and partially explains the fact that de facto discrimination against Arabs has not been fully eradicated, particularly but not exclusively, by private actors (as well as in security-related aspects).

This radical shift in Israel's constitutional identity did not carry on to the occupation in the West Bank. The Supreme Court oversight of the

²⁶ HCJ 6698/95 *Ka'adan v Israel Land Administration* (8 March 2000), Chief Justice Barak, para 31, unofficial translation at <https://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration>.

²⁷ A central example is the inclusion of Arab localities in the National Priority Regions maps; see Ofra Bloch, 'National Priority Regions (1971–2022): Redistribution, Development and Settlement' (2023) 24 *Theoretical Inquiries in Law* 267.

²⁸ For instance, the work undertaken by the Israel Women's Network and the Association of Civil Rights in Israel during those years.

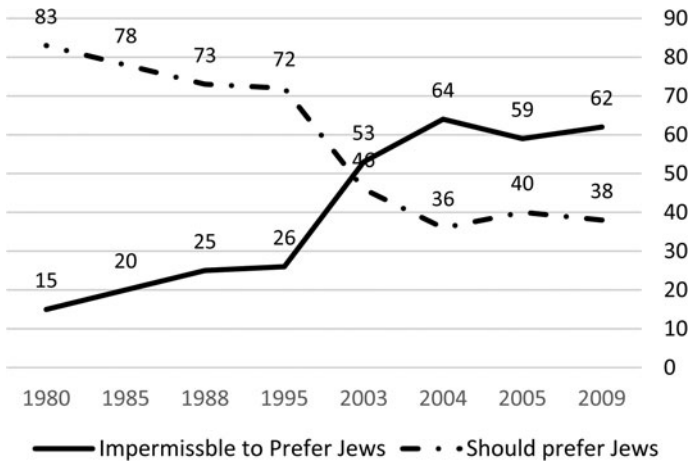


Figure 1. Should the government prefer the interests of the Jews over those of the Arabs? (Position of the Jewish population)

Source: Compiled by the authors, based on data of Sami Smooha, *Arab and Jews in Israel* (updated yearly), available at the database of Israel Democracy Institute, 'Viterbi Family Center for Public Opinion and Policy Research', <https://en.idi.org.il/centers/1159>.

government's activities there remained highly restrained, enabling the government to maintain an oppressive regime in the West Bank, which discriminates extensively between the Israeli citizens who have settled in the area and the Palestinians who live there, lacking the most basic political and social rights.

3.4. A counter-constitutional revolution (2011–2023)?

The current reform attempts should be read, we argue, as part of a dual transformation of Israel's national identity, one that started less than 20 years after the 1992 'constitutional revolution' began. Gradually, the government and the Knesset have shifted their course once again. Various factors, including demographics, have led to a change in the composition of the Knesset, resulting in a much more favourable position towards Jewish supremacy, even beyond the pre-1992 approach.

Starting with the substantive aspect, since approximately 2011 not only has the Knesset ceased to enact laws that prohibit discrimination and promote equality but it has also passed laws aimed at reversing earlier progress. One notable example is a 2011 law that allows for the establishment of admission committees to screen potential residents of certain localities, thus indirectly overturning the *Ka'adan* decision.²⁹ The Court did not always stop those initiatives in the name of equality, and did not provide sufficient protection for the rights of the Palestinians in the West Bank. However, the Court's commitment

²⁹ This law prohibits explicit discrimination, but it allows the committee to reject a candidate based on 'incompatibility with the settlement's socio-cultural fabric'.

to equal citizenship as part of the state's basic values has limited and minimised such policies, even without direct intervention.

The pivotal legislation in this shift has been the 2018 Basic Law: Israel – The Nation-State of the Jewish People. The purpose of enacting this Basic Law was precisely to alter Israel's constitutional identity. The Basic law identifies Israel as 'the nation state of the Jewish People' (section 1) and omits any reference to the state's democratic identity or to egalitarian commitments. One section of this Basic Law even states that 'the State views the development of Jewish settlement as a national value and shall act to encourage and promote its establishment and consolidation' (section 7). However, the Basic Law generally lacks explicit provisions authorising the government to prioritise the interests of the Jewish population.

Despite these changes, the Supreme Court has maintained its interpretation of Israel's constitutional identity. It continues to review legislation and government policies, albeit in a somewhat less 'activist' manner, to enforce the commitment to equal citizenship. Furthermore, in the 2021 *Hasson* decision,³⁰ which addressed the validity of the Nation-State Basic Law, the Court ruled that the powers of the Knesset to enact Basic Laws are limited by Israel's current constitutional identity, and that this Basic Law did not affect the commitment to equality.

Consequently, for the first time in Israel's history, a significant gap has emerged in the understanding of what the state's identity is (or should be), between the mostly illiberal approach of the Knesset and the government on one side, which prioritises Jews over non-Jews, and the Court's more liberal and democratic position on the other side. Public opinion has also shifted, with approximately 50 per cent of the Jewish sector expressing support for discriminatory policies in 2022. This change is reflected in a sharp decrease in the proportion of those who express trust in the Supreme Court, reaching an all-time low of about 40 per cent among the entire population. This decline primarily signifies a growing disagreement with the Court's understanding of Israel's constitutional identity as a liberal state committed to equal citizenship.

It is against this backdrop of sharp disagreement over the state's identity – with the political branches aiming to reinstate Jewish supremacy on the one hand, and the Court upgrading, at least to some degree, the state's democratic commitment to equal citizenship on the other – that we can better identify current events as the complementary structural aspect of a dual transformation of Israel's national identity. With some exceptions, for over ten years the political branches have been working to strengthen the identity of the state as Jewish and weaken its democratic commitment to equality, but have faced resistance from the Court, as well as recognising the international and legal illegitimacy of such an explicit move. Consequently, the government is actively working to, in effect, deny the Court the power of judicial review and restrict the independence of the judiciary. Completing the structural part of the transformation would enable the government to reintroduce discriminatory policies without the explicit approval of the Knesset or the Court, thus avoiding a formal declaration of a change in Israel's constitutional identity.

³⁰ n 5.

4. Rethinking the legitimacy of the two revolutions

Israel does not have a written constitution. It has, however, a constitutional identity. In the previous section we argued that the current judicial overhaul is part of a larger attempt to transform Israel's constitutional identity from a (limited) democratic and Jewish state to a state that is first and foremost Jewish, with no promise of equal citizenship. In this section we discuss the legitimacy of this current transformation.

There are three central types of constitutional legitimacy. The first is the idea that the constitution represents the will of the citizens, a form of social legitimisation. The second is based around the notion that a constitution is normatively just and based on reason.³¹ Lastly, utilising the concept of 'democratic legitimacy', the legitimacy of a constitution is examined not only socially and normatively, but also procedurally.³² The Israeli government often argues that the judicial overhaul is a counter-revolution to the 1992 illegitimate constitutional revolution, but examining the social and normative legitimacy of both revolutions in a historical perspective shows that this claim is both false and incomprehensive.

Social and representative legitimacy

Social legitimacy refers to the idea that a constitution should represent or express the will and values of the people it governs. Scholars have pointed to the democratic deficit of many of the world's constitutions and showed how they were often top-down projects drafted by elitist experts.³³ The 1992 constitutional revolution was similarly based, to a large degree, on international ideals of human rights and was not the result of mass popular mobilisation. The current government adopts this critique to paint a simplistic picture of a revolution that took power from the people and transferred it to the judicial elitists, to justify both the Nation-State Basic Law and the judicial overhaul.³⁴ However, the 1992 revolution was, as we have shown, part of a collaborative effort by non-governmental organisations, the Knesset and the Court to promote equal citizenship and the protection of rights through legislation, government policy, and litigation. It also enjoyed, at the time, public support. In contrast, current attempts are faced with an unprecedented mobilisation of popular and professional opposition.

Procedural legitimacy

Moreover, procedural legitimacy, which refers to the formal establishment of the constitutional identity through a Basic Law, clearly demonstrates the disparity

³¹ Alon Harel and Adam Shinar, 'Two Concepts of Constitutional Legitimacy (2023) 12 *Global Constitutionalism* 80.

³² Balkin (n 7) 64–69; Richard H Fallon Jr, *Legitimacy and the Constitution* (2005) 118 *Harvard Law Review* 1787.

³³ See, eg, Roberto Gargarella, 'Review of Tom Ginsburg and Aziz Huq, How to Save a Constitutional Democracy' (2019) 44 *Revista Derecho del Estado* 397, 399–400.

³⁴ Ron Harris, 'The Imagined Past of Israel's Supreme Court: The Use of Historical Narratives by the Court's Right-Wing Critics' (2021) 44 *Tel Aviv University Law Review* 49.

between the two revolutions. The 1992 revolution, marked by the shift towards a liberal approach, is enshrined in Basic Law: Human Dignity and Liberty. This Basic Law was the product of three years of deliberations, involving significant compromises and bipartisan support, and it unequivocally reflects a change in Israel's identity. In contrast, the current attempt at a counter-revolution is taking place through rushed debates in the Knesset and, most importantly, it is supported by a slim majority of Knesset members, lacking the overwhelming bipartisan support that is needed to gain sufficient procedural legitimacy.

Normative legitimacy

Another way in which a constitution claims legitimacy is on the grounds that it promotes high standards of justice and morality. The question of whether a constitution is morally just is a hard one to answer and can be contested. However, democracy is based on the foundational principle of equal treatment of all citizens; without it, the justification for the regime collapses.³⁵ Thus, at the very least, a constitutional norm that promotes and protects equality is normatively preferable to a constitutional norm that hinders it. Both aspects of the 1992 revolution – the power of judicial review to safeguard minority rights and the commitment to equality – enjoy an exceptionally high level of moral legitimacy. Conversely, the attempted counter-revolution of 2023 – designed to complete the transformation of Israel's constitutional identity to a Jewish state that does not guarantee equal citizenship – lacks such legitimacy.

Indeed, it is plausible to debate various aspects of the 1992 revolution, including the extent of judicial review in matters not related to human rights. However, it is difficult to contest the legitimacy of the transformation, at least in terms of protecting the Palestinian-Arab minority from discrimination. The attempt to reverse course in this regard, and weaken, if not demolish, Israel's commitment to equality, lacks this legitimacy as it undermines the most fundamental democratic principle of equal citizenship.

5. Concluding remarks

The judicial overhaul, designed to limit the authority of the judiciary and grant almost unlimited power to the government, can be and should be understood as a populist constitutional project, similar yet not identical to processes of democratic decline taking place in other states.³⁶ We do not contest this understanding but rather suggest that in order to fully grasp and assess the situation, local historical context is required. When examined in historical context, one can see that the current attempts to unleash the government from its institutional checks and balances are not part of a 'democratic' project to empower the people, as the government and its supporters often argue. Rather, it is part of a

³⁵ John Rawls, *A Theory of Justice* (revised edn, Harvard University Press 1999) 266–67; Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press 2017).

³⁶ Nativ Mordechai and Yaniv Roznai, 'A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel' (2017) 77 *Maryland Law Review* 244; Yaniv Roznai and Amichai Cohen, 'Populist Constitutionalism and the Judicial Overhaul in Israel' (2023) 56 *Israel Law Review* 502.

larger transformation of Israel's constitutional identity, from a limited democracy that is committed, at least formally, to the principle of equal citizenship to a Jewish state that might still hold elections but no longer guarantees equal rights to the Palestinian-Arab minority. Israeli society is in deep disagreement over its basic values, but this disagreement does not justify the transformation of Israel's constitutional identity, as it lacks sufficient social and normative legitimacy.

The events in Israel in recent months have demonstrated that the state's democracy is not only limited to begin with but is also very fragile. This situation, where even a slim majority of the Knesset can change the entire constitutional order without a special procedure, is dangerous for democracy and especially for the minorities living in it. Looking forward, we suggest that it is essential, firstly, to entrench the existing constitutional order. Such a move, which will require a qualified majority to amend the Basic Laws, can be achieved not only by a formal amendment but also through judicial interpretation, which will determine that amendments amounting to a change in Israel's constitutional identity are valid only if passed by a qualified majority. The current constitutional order is far from perfect, but securing it will prevent a temporary majority from abusing constitutional norms for undemocratic purposes.

Secondly, the government's attempt to radically revise Israel's constitutional identity is also directed at expanding further the occupation of the West Bank.³⁷ Stopping the judicial overhaul is thus the first necessary step towards democracy, but is an insufficient one. The radical discrimination between Israeli settlers and the Palestinian population, and the denial of basic human rights of Palestinians, is completely incompatible with the fundamental principles of democracy. Thus, a commitment to act to end the occupation is essential to secure Israel's future as a democracy.

Finally, it is time for Israel to complete the enactment of a constitution through a Basic Law that gives formal legal status to the ideals – first and foremost equality – set forth in the Declaration of Independence. Such a move may not gain the immediate popular support that is required in order to be approved as a constitution, but it may lead, in a gradual process, to an open national dialogue on relevant issues, which may result in a renewed commitment to the fundamental principle of equal citizenship that is essential to secure the existence of Israel as a Jewish and democratic state.

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³⁷ Kretzmer (n 8).