Constitution by Consensus

Proposed by the Israel Democracy Institute

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The Israel Democracy Institute

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Proposed by the Israel Democracy Institute

Under the Leadership of

Justice Meir Shamgar

DRAFT

CONSTITUTION BY CONSENSUS

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Introduction

Justice Meir Shamgar

Proposal for a "Constitution"

The Israel Democracy Institute has prepared the text for a constitution which is intended to serve the legislature in its discussions and perusal of the issue of a constitution and provide it, in advance, with a preliminary version of a compilation of provisions which could serve as a platform for such perusals and discussions. The Institute did not base its activity on the assumption that the legislature would adopt its draft version in every detail. Quite the contrary, the legislature is free to do as it pleases, as Israel's Declaration of Independence and the Knesset decision of June 1950, dubbed the Harari Decision, endowed the Knesset with the authority to enact a constitution for the State of Israel. Consequently, this draft is intended solely to aid those appointed to the task; the decision rests ultimately in the hands of the legislature. The fellows of the Institute do not have any pretensions as to owning a copyright on this Constitution, and we do not believe that any future constitution must adhere to the version proposed here solely for discussion and perusal by those authorized to do so.

How is this Proposal Different from Previous Proposals?

Undoubtedly, it may be assumed that some will contend that many proposed versions of a constitution have already been submitted, and therefore, yet another draft is unnecessary. In response, the Israel Democracy Institute's proposal relies on an updated version of Basic Laws passed by the Knesset to date. This proposal also strives to incorporate most of the lessons which may be drawn from the way in which the constitutional provisions in Basic Laws and other laws have been functioning. The version proposed here, therefore, is a compilation incorporating the key lessons and conclusions which may be drawn from the governmental processes since the establishment of the State to date.

An important and central principle in this Constitution may be taken from the chapters governing the principles of the state and the basic rights of the citizen. Whereas because under this proposal, the constitution will have the status of supreme law, superceding ordinary legislation, that is, its provisions will constitute obligatory guidelines for ordinary legislation, such principles and rights will also be elevated to a special and privileged legal and educational status, which will serve as a basis for ordinary legislation.

What is a "Constitution"?

I would add a number of clarifications about the essence of a "constitution" when adopted. A constitution is a codex, a collection of legal statutes, through which the state organizes the division of labor, powers, and obligations among the branches of government, and defines the relationships among them, and between them and the citizen. Most of the current constitutions also include a list of basic human rights (a Bill of Rights), which every governmental authority must respect and refrain from violating. The constitution, therefore, is a compilation of the fundamental principles upon which the government is based.

This is very general description, and so I shall add the following: by virtue of a constitution, we fashion the ruling institutions and delineate their powers, rights, and obligations. In a liberal democracy, a constitution endeavors to articulate the division of powers, granted by the people to each of the branches and institutions. A democratic constitution refrains from granting unlimited power to any one of the branches, but rather institutes checks and balances to ensure that the powers are defined and delineated in advance. Thus, we also allow for mutual review and supervision among the different branches, preventing each authority from exceeding its circumscribed powers.

The objective in all the above is to grant the power to rule, in other words, to create "governance," in concert with applying restraints and limits to each of the branches, to prevent an over-concentration of power in the hands of any one branch – a concentration which could result in a totalitarian regime.

As such, the constitution is intended to grant powers to the authorities responsible for governing the state, with the following functions:

a. Defining the rights and obligations of the branches, and defining basic human rights; this is an expression of the character and essence of the state;
b. Imposing limitations on the powers of the branches, so as to prevent them from exceeding their circumscribed powers; this is a structural limitation;
c. Compelling the branches of government to conform to the limitations prescribed by law, so that their activity shall be subject to those supra-norms which express the fundamental beliefs of the state; this is a value-based limitation;
d. Creating a balance among the branches, ensuring mutual supervision and review; this is an expression of mutual dependency among the government authorities.

The restraints which the constitution places upon the powers of each of the branches are aimed at integrating protection of the rights of every individual, including effective protection of the minority, into a foundation necessary for efficient and effective government. These restraints prevent arbitrariness and the unreasonable use of power, allowing people with different opinions and beliefs to live together; they create a legal basis for the division of powers, which, as mentioned above, prevents a concentration of absolute power in the hands of one authority, while ensuring that the democracy will protect every minority within its borders, and granting it all the liberties which constitute the basic rights in a free society.

"Constitution" – a Product of Necessary Compromise

We are aware that the Knesset's attempts to author a complete constitution have failed in the past. The Israel Democracy Institute has been guided by the desire to outline contours which would merit consensus which is as broad as possible among the public, and among the elected representatives in the legislature. Broad consensus necessitates compromise; but it is clear that the "very good" is, as always, the primary enemy of the "good." Every

compromise includes some concession to absolute perfection, which by nature does not take into account any existing debate.

In this context, an objection has been raised that perhaps the very fact that the constitution necessitates compromise is reason enough to delay approval of a constitution to some later date, even if such date is not known in advance. The Israel Democracy Institute does not adopt such a stance. Postponing approval of the constitution, and allowing Israel to remain without a constitution for many more years, as a lone state among democracies and non-democracies alike, merely prolongs the damage. The disadvantages are clear to all, both in terms of establishing norms and in terms of the State's image in the eyes of the world. It does not merely perpetuate, for an unknown length of time, a lack of normative supreme values depicting the lines for action by the legislative, executive, and judicial branches, but rather, in fact, also anticipates that change will come at some unknown future date. There is no reason to believe that a time will yet come when compromise will become unnecessary, for compromises have been adopted in most of the constitutions of the world. Whosoever delays a compromise by consensus also delays the willingness to accept the yoke of principles by consensus. The expectation of "better" days to come is not only indeterminate, but also involves a gamble which does not consider the danger inherent in a continued lack of binding norms. Maintaining the status quo does not constitute a change for the better, but is only an acceptance of the inability to achieve the most, leaving the field wide-open. In summary, compromise increases consensus, and postponing compromise perpetuates disagreement. It is not irrelevant in this context to cite the opinion of a foreign legal scholar:

> "Yet it might not be a bad idea if a democratic country, about once every twenty years or so, assembled a group of constitutional scholars, political leaders, and informed citizens to evaluate its constitution in the light not only of its own experience but also of the rapidly expanding body of knowledge gained from the experience of other democratic countries" (Robert A. Dahl, **On Democracy**, Yale University Press, 2000, at 141).

Conclusion

This draft is the product of long, fruitful, and interesting hours of discussion, both by the Public Council, established for this purpose, and by the Israel Democracy Institute. This draft can serve as a platform for discussion and lead Israel towards clear, comprehensible, and unambiguous norms to guide all its branches of government. It is not a panacea, for its success, that is, achieving its goals, rests to a great extent on an active and open public which will, in fact, track its functioning and implementation, and will be diligent about upholding its principles. The very existence of a constitution provides the public with a sturdy foundation upon which it can rely. The absence of a constitution decreases the breadth of consensus and leaves the public at a dead end, stranded in an endless, circular argument over the essence of its guiding principles. The Israel Democracy Institute prefers the first alternative over the second.

Section II

Constitution by Consensus Proposed Articles

Introduction:

Declaration of Independence

On the 5th of Iyar 5708 (May 14, 1948), the Jewish People's Council declared the establishment of the State of Israel in the following words:

ERETZ-ISRAEL (the Land of Israel) was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.

After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.

Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. Pioneers, ma'pilim (immigrants coming to Eretz-Israel in defiance of restrictive legislation) and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community controlling its own economy and culture, loving peace but knowing how to defend itself, bringing the blessings of progress to all the country's inhabitants, and aspiring towards independent nationhood.

In the year 5657 (1897), at the summons of the spiritual father of the Jewish State, Theodore Herzl, the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country.

This right was recognized in the Balfour Declaration of the 2nd November, 1917, and re-affirmed in the Mandate of the League of Nations which, in particular, gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.

The catastrophe which recently befell the Jewish people – the massacre of millions of Jews in Europe – was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the comity of nations.

Survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to Eretz-Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland.

In the Second World War, the Jewish community of this country contributed its full share to the struggle of the freedom- and peace-loving nations against the forces of Nazi wickedness and, by the blood of its soldiers and its war effort, gained the right to be reckoned among the peoples who founded the United Nations.

On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.

This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own

sovereign State.

ACCORDINGLY WE, MEMBERS OF THE PEOPLE'S COUNCIL, REPRESENTATIVES OF THE JEWISH COMMUNITY OF ERETZ-ISRAEL AND OF THE ZIONIST MOVEMENT, ARE HERE ASSEMBLED ON THE DAY OF THE TERMINATION OF THE BRITISH MANDATE OVER ERETZ-ISRAEL AND, BY VIRTUE OF OUR NATURAL AND HISTORIC RIGHT AND ON THE STRENGTH OF THE RESOLUTION OF THE UNITED NATIONS GENERAL ASSEMBLY, HEREBY DECLARE THE ESTABLISHMENT OF A JEWISH STATE IN ERETZ-ISRAEL, TO BE KNOWN AS THE STATE OF ISRAEL.

WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel".

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.

THE STATE OF ISRAEL is prepared to cooperate with the agencies and representatives of the United Nations in

implementing the resolution of the General Assembly of the 29th November, 1947, and will take steps to bring about the economic union of the whole of Eretz-Israel.

WE APPEAL to the United Nations to assist the Jewish people in the building-up of its State and to receive the State of Israel into the comity of nations.

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.

WE EXTEND our hand to all neighboring states and their peoples in an offer of peace and good neighborliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land. The State of Israel is prepared to do its share in a common effort for the advancement of the entire Middle East.

WE APPEAL to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream – the redemption of Israel.

PLACING OUR TRUST IN THE "ROCK OF ISRAEL", WE AFFIX OUR SIGNATURES TO THIS PROCLAMATION AT THIS SESSION OF THE PROVISIONAL COUNCIL OF STATE, ON THE SOIL OF THE HOMELAND, IN THE CITY OF TEL-AVIV, ON THIS SABBATH EVE, THE 5TH DAY OF IYAR, 5708 (14TH MAY,1948).

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The Constitution of the State of Israel is founded upon the principles in this Declaration of Independence.

Part One
Principles

1. Basic Principles

(a) The State shall be called "Israel";
(b) Israel shall be a Jewish and democratic state;
(c) The State shall act with equality towards all its citizens;
(d) The system of government shall be a parliamentary democracy.

2. Sovereignty

The source of the government's authority is the sovereign will of the citizens, as expressed in the Constitution and in free elections.

3. Flag, Insignia, Anthem

(a) The flag of Israel shall be white, with two light blue strips adjacent to its top and bottom margins, and a light blue Star of David at its center;
(b) The emblem of Israel shall be a seven-branched candelabra flanked by two olive branches, with the word "Israel" at its base;
(c) The national anthem shall be "Hatikva" ("The Hope").

4. Capital

(a) Jerusalem shall be the capital of Israel;
(b) Jerusalem shall be the seat of the President of the State, the Knesset, the government, and the Supreme Court.

5. Language

(a) Hebrew shall be the language of the State;
(b) Arabic shall be an official language. The use of the Arabic

language within or in the presence of State institutions shall be regulated by law or pursuant thereto.

6. Sabbath and Festivals

The Sabbath and the Jewish holidays shall be official days of rest in the State of Israel. Non-Jews shall retain the right to days of rest on their Sabbaths and holidays.

7. Hebrew Calendar

The Hebrew calendar shall be the official calendar of the State of Israel.

8. Right of Return

The following shall be entitled to immigrate to Israel:

(a) A child born to a Jewish father or mother according to Jewish law, provided he or she did not convert to another religion willingly;

(b) A convert to Judaism;

(c) An individual with a proven bond to the Jewish people, as shall be prescribed by law.

9. Citizenship

(a) Israeli citizenship shall be granted to any person who was born where his or her father or mother was a citizen of Israel and resident thereof, to a person who immigrated to Israel by virtue of the Right of Return, to [such person's] spouse and children;

(b) A law may prescribe the granting of Israeli citizenship to relatives of one eligible to immigrate to Israel;

(c) Provisions regarding the granting of Israeli citizenship, renunciation, or revocation thereof shall be prescribed by law;

(d) Citizenship may be revoked only by the procedures established by law and on the grounds prescribed therein, provided, however, that no person shall become totally stateless as the result of such revocation.

10. Minorities

The State of Israel shall guarantee the status of the Arab minority, the Druze minority, and other minorities in its midst.

11. Religions

(a) The State of Israel shall guarantee the status and independence of all the religions therein;

(b) The State of Israel may provide and finance religious services;

(c) The holy sites shall be guarded from desecration, other damage, and from anything which is liable to impair the freedom of members of the religious communities to access the sites which are sacred to them or infringe upon their sensibilities toward such sites.

12. Protecting the Heritage of the Land and its Residents

The State shall guarantee the preservation and development of the historical and cultural heritage of the land and its residents.

13. Protection and Development of the Land

The State shall cultivate the value of the landscape, the environment, and natural resources and shall act to prevent their being harmed, while preserving a balance with the need to develop the land.

Part Two
Basic Human Rights

14. Basic Principles

Basic human rights in Israel shall be founded upon the sanctity of life, human dignity, human liberty, equality, and the aspiration to achieve social justice.

15. Right to Life, Body, and Dignity

(a) Every person shall have the right to life, body, and dignity;
(b) The death penalty shall not be imposed;
(c) It is prohibited to torture or treat any person in a manner which is cruel, inhumane, or dehumanizing;
(d) Every person shall have the right not to participate in medical or scientific experiments on his or her body without consent.

16. Liberty

(a) Every person shall have the right to liberty;
(b) No person shall be subjected to slavery, oppression, or forced labor.

17. Equality under Law and the Prohibition against Discrimination

All are equal before the law; persons shall not be discriminated against on the basis of race, religion, nationality, gender, ethnicity, country of origin, disabilities, or on any other grounds.

18. Freedom of Opinion and Expression

Every person shall enjoy freedom of opinion and expression in private and in public, including the freedom to publish opinions and information through any means.

19. Freedom of Information

Every citizen or resident shall have the right to receive information from a public authority.

20. Freedom of Assembly, Procession, and Demonstration

Every person shall have the freedom to hold assemblies, processions, and demonstrations.

21. Freedom of Faith and Conscience

Every person shall have freedom of faith and conscience.

22. Freedom of Religion and the Prohibition against Infringement on Religious Grounds

(a) Every person shall have freedom of religion;
(b) No person shall be deprived of rights, and no obligations shall be imposed on a person, on grounds which are essentially religious.

23. Freedom of Art, Creativity, Research, and Instruction

Every person shall have freedom of art, creativity, and scientific research and instruction.

24. Privacy and Good Reputation

Every person shall be entitled to privacy, modesty, and a good reputation.

25. Freedom of Movement

(a) Every person lawfully in Israel shall be free to travel within the country as he or she wishes;
(b) Every person shall be free to leave Israel;
(c) Every Israeli citizen and every resident of Israel shall be entitled to enter into Israel.

26. Legal Rights

(a) Every person shall have the right of recourse to judicial authorities;

(b) Every person shall have the right to a fair judicial process;

(c) Every person shall have the right to legal representation of his or her choice; the State shall place legal representation at the disposal of a person, in cases and under conditions to be prescribed by law;

(d) Every person shall have the right to defend himself or herself if accused;

(e) Every person shall be presumed innocent until proven guilty by law; no person shall bear criminal liability for an offense unless it has been proven beyond a reasonable doubt; no person shall be convicted or indicted for an act or omission for which previously convicted or acquitted;

(f) There shall be no offense or penalty with respect thereto, unless prescribed by law or pursuant thereto; no person shall be criminally liable for an act or omission which did not constitute a legal offense at the time of the act or omission, and no person shall be subjected to a penalty more severe than that prescribed by law at the time of committing the offense.

27. Rights of Detainees

(a) Every person who shall be arrested shall have the right to the following: to be informed, upon being arrested, of the grounds for the arrest; to have notice of the arrest transmitted to a person close to him or her as soon as possible; to meet, without any unreasonable delay, with an attorney of his or her choice and to consult therewith; and to be informed of these rights;

(b) A person who shall be arrested on suspicion of committing a crime shall be entitled to be brought before a judicial authority for a review of his or her arrest as soon as possible;

(c) The arrest or incarceration of a person shall be in a manner that ensures the maximum protection of human dignity and other rights.

28. Right to Property

(a) Every individual shall have the right to property;

(b) There shall be no confiscation of an individual's property unless for public purposes and in consideration of appropriate compensation.

29. Freedom of Occupation

Every citizen or resident of the State is entitled to engage in any occupation, profession, or trade.

30. Freedom of Association

(a) Every citizen or resident of the State shall have freedom of association, including the right to establish parties and political associations;

(b) Every citizen or resident of the State shall have the freedom to associate with trade unions.

31. Strike

Workers shall be entitled to strike over a labor dispute, in accordance with a decision by their workers' union, and employers shall be entitled to a lockout, provided the orderly functioning of essential civil services is not severely harmed. The right to strike and the right to lockout, including for those not associated in a workers' union, shall be prescribed by law.

32. Social Rights

(a) The State of Israel shall act to promote the personal and economic welfare of its citizens and residents, out of recognition of human dignity;

(b) The extent of the social rights detailed in Articles 33 to 36 shall be prescribed by law or pursuant thereto.

33. Right to Social Security

The State of Israel shall act to promote social security.

34. Right to Health

The State of Israel shall act to ensure public health and shall ensure the provision of health services.

35. Right to Education

(a) The State of Israel shall be diligent in advancing education, out of recognition of its value and importance in developing a person's spirit and talents, and ensuring equal opportunities for all its residents;

(b) The State of Israel shall ensure 13 years of free education, where the first 11 shall be mandatory.

36. Rights at Work

The State of Israel shall act to promote fair work conditions, out of recognition of the value of work.

37. Rights of the Child

(a) Every child shall have the right to basic conditions of life, and to development, to the extent possible, within the framework of the family;

(b) Parents, the natural guardians of their children, and any other legal guardian, shall have the responsibility, the obligation, and the right to ensure the well-being of the child;

(c) Should the parents or any other legal guardian not fulfill their obligations towards their child, the State shall act to fulfill the parental obligations as defined by law.

38. Group Rights

Every person affiliated with a national-ethnic, religious, cultural, or linguistic group has the right – on his or her own or with other members of the group – to preserve and develop his or her culture, religion, language, and heritage.

39. Violation of Rights

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

40. Commission on Human Rights

(a) A Commission on Human Rights shall be established by law, which shall act to promote the awareness, respect, and preservation of the human rights guaranteed by this Constitution or by law, and which shall handle complaints on this issue;

(b) The aforesaid law shall regulate the Commission's appointment process and the manner in which it operates.