

The Israeli Constitutional Decision of 1950:¹ Real-time Reconstructionist Reactions

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Philippa Strum called it “the road not taken.”¹ Dan Horowitz called it “the decision not to decide.”² Ilan Peleg sees it as both a cause and a reflection of Israel’s current and potentially debilitating *Kulturkampf*.³ Whatever else might be said of it, Israel’s decision in 1950 not to establish a formal constitution was surprising — and yet, as we shall see, in many ways inevitable. In any case, it was a critical and far-reaching decision by the then-young state. That almost 60 years later the state still has no formal constitution suggests that the conditions that drove the original decision were not unique to the state’s initial years.

This article will briefly explore the development of Israel’s constitutional position. Next, noting the decidedly Reconstructionist nature of the solution that Israel’s First Knesset adopted regarding its constitution, it will focus on the real-time views and debates within the Reconstructionist movement as seen in the relevant editorials and articles in *The Reconstructionist* journals of 1949 and 1950. In many ways, those editorials and articles mirrored the developments, arguments and solutions then taking place in the Knesset itself.

Israel’s Constitutional Decision

Israel’s decision not to adopt a formal constitution is surprising for two reasons. First, at the time of its establishment in 1948, Israel was the only nation that had not

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adopted a constitution⁴ among those that had achieved independence after World War II. Second, the drafting of a constitution — and much of its substance — was mandated as a “step preparatory to independence” by the United Nations in its key resolution providing for the establishment of the State of Israel,⁵ even as Israel — in its very own Declaration of the Establishment of the State of Israel — committed itself to a “Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.”

Various explanations were given about the factors that drove the decision: For one thing, David Ben-Gurion was reluctant to have his power in the fledgling state restricted or subject to judicial review.⁶ For another, there was concern that a constitutional document drawn up at such an early point in the state’s existence — at a time when the great influx of expected immigrants from the Diaspora Jewish community had not yet occurred — would not necessarily reflect the views of those future citizens and, thus, it would be premature to draft a binding document.⁷

Often cited as the most compelling reason for Ben-Gurion’s position was his belief that the constitutional process — the drafting and adoption of a single document of fundamental truths applicable to all — would greatly exacerbate the already-dramatic level of tension between the religious element and the secularists in Israeli society. Specifically, he was concerned that the resulting debate regarding the role and power of religion in the political and social structure of the country would be so divisive as to potentially bring the country to the point of civil war or, at the very least, prevent it from achieving the extraordinary level of unity that would be absolutely vital if it were going to survive the war about to be launched against it by its numerically superior Arab neighbors.⁸

The Reconstructionist Compromise

For all of Ben-Gurion’s opposition to a formal written constitutional document at the time, it should be noted that neither the Knesset nor Ben-Gurion himself rejected the concept of a constitution *per se*. Rather, they confirmed the need for a constitution but revised its timing, structure and the methods by which it would be written. On June 13, 1950, the Knesset adopted a resolution presented by Yizhar Harari, a member of the Progressive Party, stating that

the First Knesset assigns to the Constitution, Law and Justice Committee the preparation of a proposed constitution for the state. The constitution

will be made up of chapters, each of which will constitute a separate basic law. The chapters will be brought to the Knesset, as the Committee completes its work, and all the chapters together will constitute the constitution of the state.

The essence of the Harari Resolution (still binding to this day) was to establish a developing constitutional process through the accumulation of “basic laws,” rather than a static, one-time proclamation with the possibility of occasional amendments thereafter. This process addressed many of Ben-Gurion’s concerns about a formal document, especially by its avoidance of an immediate showdown between the religious and secular factions.

Whatever else the Harari Resolution represented substantively, philosophically it reflected a decidedly Reconstructionist approach. It established an evolving process by which the Israeli constitution would develop over time, with future “generations” (i.e., future Knessets) being responsible for continuing that evolutionary process by contributing new “chapters” in the form of “basic laws,” that would engage the times in which they were conceived and applied. It was this evolutionary process that allowed the Knesset to avoid what otherwise might have been a constitutional deadlock.⁹ While there is no reason to believe this was a consciously Reconstructionist decision, it nonetheless represented an approach entirely consistent with Reconstructionism’s means of engagement in the world.

The Real-time Reconstructionist Reaction to Israel’s Constitutional Decision

The connection between Reconstructionist philosophy and the First Knesset’s solution to one of its most important conflicts raises the question of what Reconstructionism had to say at the time about the Israeli constitution and the decision by the Knesset to proceed down the Harari Resolution path. In an attempt to answer those questions, I examined *The Reconstructionist*, the then-biweekly journal published by the Jewish Reconstructionist Foundation, for the relevant years. During those years, Mordecai Kaplan was the chairman of the editorial board, thus ensuring that, at least regarding the editorials included in each of the journals in those years, *The Reconstructionist* represented the views of not only the foundation but also the founder of the movement. Perhaps of greatest interest, the editorials reflected the views of Kaplan and the foundation at the time the events were unfolding in Israel. As such, they provide a unique, real-time insight into Reconstructionist leaders’

thinking on the issues discussed above, mirroring, as we shall see, the developments, arguments and solutions being considered contemporaneously in the Knesset.

As might be expected, the relevant years in terms of editorials and articles regarding Israel's constitutional decision making were 1949 and 1950. In those years, we find two editorials — one in January 1949¹⁰ and one in March 1950¹¹ — with four related articles sandwiched in between, during the months of February, March and April 1949.¹² To put these in their chronological context:

- The first editorial, dated January 7, 1949, came just 2½ weeks before Israel's first elections as a sovereign state.
- The first of the four articles was published on February 14, 1949, the date the Constituent Assembly (resulting from the January elections) convened (and two days before it changed its name to the Knesset, a not insignificant name change), with the three subsequent articles following immediately thereafter, on March 4, March 18 and April 1, 1949.
- The final editorial was published on March 10, 1950, about six weeks after the Knesset had begun a series of nine debates that culminated in the passage of the Harari Resolution on June 13, 1950.

Thus, these editorials and articles were conceived, drafted, edited and published during the height of the Knesset's decision-making process. And their substance tracks the arc of discussion and debate taking place in the Knesset: The first editorial enthusiastically praises the draft constitution that the Knesset was considering; the four articles represent a vigorous debate regarding the pros and cons of the draft; and the closing editorial concludes that a formal written constitution is inadvisable at the time, lest there occur a potentially irreparable rift in Israeli society.

Y. Leo Kohn wrote the draft constitution that was the focus of these editorials and articles.¹³ Although his was not the only draft being considered by the Knesset, it was the one that formed the basis for much of the Knesset's debate¹⁴ and, appropriately, was the subject of the editorials and articles in *The Reconstructionist*.

Just as the new government initially seemed to embrace the idea of a written constitution, so, too, the first editorial in *The Reconstructionist* strongly — some might say, effusively¹⁵ — supported not only the idea but also the Kohn draft itself. Referring to the draft as “a remarkable historical document,” “an extraordinary document” and “one of the most advanced social texts of our time,” *The Reconstruction-*

ist's editorial of January 7, 1949, extolled the Kohn draft. It offered no reservations save a concern for the seeming inconsistency in the draft between proclaiming, on the one hand, the absolute equality of the sexes while vesting the religious courts, on the other, with responsibility for adjudicating matters of personal status. But the editorial board minimized even this concern as a "reservation one may entertain in regard to one or another particular." I would argue, however, that this "reservation" identified the most critical constitutional divide that ultimately would confront the Knesset — namely, the tension between Israel as a liberal, democratic government that declares the absolute equality of the sexes, and Israel as a Jewish state that subjects personal matters, including marriage and divorce, to the androcentrism of halakhic law. Failing to appreciate the seriousness of the problem it had uncovered, the editorial board went on to praise the draft as "a document worthy not only of the valiant idealism of the citizens of Israel but of the prophetic tradition of social justice of the people of Israel."

Given the board's initial enthusiasm, one is struck by the difference in tone and substance between that editorial and the second one some 14 months later. Entitled "Must Israel Have a Written Constitution?" — as compared to the first editorial's title, "Torah From Zion" — *The Reconstructionist* noted Ben-Gurion's newly stated position "in opposition to the adoption by Israel of a written constitution" and agreed with him that "there is no such need (for a constitution) in Israel today." Why the dramatic change? The editorial tells us that

[a]ny attempt to lay down a complete frame of government at the present time would lead to a bitter *Kulturkampf* between the Orthodox and non-conformist elements of the population, who have radically different conceptions of the character of a truly Jewish state No constitution that could be drafted could command the enthusiastic support of these two radically different cultural elements To adopt a complete frame of government now would be ... to invite explosions of violent passions

Having all too casually dismissed the symptom in their first editorial — namely, the inconsistency inherent in declaring the sexes equal while authorizing the rabbinic courts to adjudicate matters of personal status — the editorial board seems now to have realized the full and potentially fatal implications of its inconsistency. Thus, the editorials — like Ben-Gurion and the Knesset themselves — went full circle, from conviction that a constitution would and should be adopted at the present time, to

concern that efforts to arrive at an acceptable document would prove impossible and destructive.

During the 14 months that separated these two editorials, *The Reconstructionist* published a series of four articles that robustly debated key provisions of Kohn's draft. That debate scrutinized a number of the issues that might well have been "deal breakers" if the Knesset had continued to demand the adoption of a formal document. Written by Dr. Milton R. Konvitz¹⁶ and Rabbi Howard Singer,¹⁷ the point/counterpoint exchange was so substantive and insightful that it was cited a number of times in the extensive analysis given the constitutional issue by Emanuel Rackman.¹⁸ Whether the exchange influenced the editorial board in their shift of position from January 1949 to March 1950 cannot be determined with any certainty, although one might cautiously infer that the importance of the issues Konvitz and Singer debated, and the seemingly unbridgeable nature of some of their positions, could not help but have impressed the board members as they convened in March 1950 to write their editorial.

The debate consisted of a two-part analysis of the Kohn draft by Konvitz, a response/rebuttal to Konvitz's analysis by Singer, and a response to Singer by Konvitz. Some of the issues discussed in this colloquy, such as a worker's right to strike, do not appear to be the kind on which the viability of a new state may turn, while others were confined to the interpretation of particular words or phrases in Kohn's draft. Some points, however, were so central to an articulation of the state's purpose and character that, absent at least some basic agreement on these issues, it would seem unlikely that a nation could realistically be expected to reach consensus regarding a constitutional document.

Perhaps the most far-reaching disagreement between the two men — and the one whose implications were most emblematic of the difficulties the Knesset encountered as it considered a constitutional document — concerned the proclamation within the draft that the State of Israel is "designed to be the National Home of the Jewish People, and shall admit every Jew who desires to settle within its territory" Despite the fact that this simply confirmed the credo set forth in the state's declaration,¹⁹ Konvitz questioned the wisdom of this provision and urged its elimination from the draft. He was very concerned that once Israel had resettled displaced persons (who should have priority claim),

the question may be raised seriously whether ... an immigration policy which will suggest racial exclusion laws, or immigration laws which embody racial and religious discriminations, could possibly be justified.

Referring to the State of Israel as “a political entity within the family of nations,” Konvitz said that

it may be difficult to explain ... that a policy of Israel for Jews is justifiable by the tests of a broad democratic philosophy, while a policy of America for Protestants is not justifiable.

Further, Konvitz considered “the provision a danger to Jews living outside of Israel It invites charges of divided loyalties.”

Singer responded aggressively to Konvitz’s position. After noting that “the provision does not keep other groups out; it merely guarantees that Jews may come in,” he went on to say that

Dr. Konvitz casually ignores the fact that this provision is the very heart of the reason for having a Jewish state ... It is less than five years since Dachau gave forth its victims How ephemeral is Dr. Konvitz’s memory!

As if that were not enough, he argued that the absence of such a provision would have a devastating effect on Jews, and closed with the accusation that Konvitz’s position reflects his misunderstanding of the entire nature of the Zionist enterprise. Thus, this sharp exchange between Konvitz and Singer reveals a profound disagreement regarding the very purpose of the state. A more fundamental issue for an emerging state can hardly be imagined; a more difficult issue to resolve in a constitutional draft can hardly be conceived.

Closely associated with this issue of democracy-and/or-Jewish homeland — and in many ways the concrete manifestation of that conceptual issue — was the question of the separation of church and state and, more specifically, the role of religious courts in the new state. If Israel was to be, first and foremost, a Western democracy, then surely all of its laws — including those of personal status — would necessarily have to be determined by a government of elected representatives, not a clerical authority. If its primary defining characteristic was that of a Jewish homeland, then an argument could be made that religious courts would have a legitimate claim to lawmaking, especially on matters of personal status.

Despite their radically different positions as to whether Israel should first be a Western-style democracy or a Jewish homeland, Konvitz and Singer took similar positions with regard to the basic issue of whether religious courts should be the only venue for adjudication of issues of personal status. They both agreed that religious courts should have authority for such issues — but only for those citizens who chose to accept the authority of such courts, while others should be allowed to pursue those issues in secular courts, if they wished. Reflecting on Kohn's draft, Konvitz said that this "issue is of greatest consequence to the future development of Jewish culture . . .," while Singer said that "of all the provisions in the draft constitution, those concerning the religious courts will most need clarification."

The significance of Konvitz's and Singer's agreement on this issue cannot be overstated. The fact that these two men — who opposed one another on virtually all other constitutional matters — nonetheless agreed that religious courts must not be the exclusive legal recourse for issues of personal status in the new state, made the likelihood of successful negotiations between like-minded individuals and the religious parties — who believed with absolute certainty that such must be the case — slim indeed. And given the fact that Ben-Gurion had already conceded authority on such matters to the religious parties as early as 1947,²⁰ the chances for success, such as they were, were surely reduced to nil.

Thus, in this exchange between Konvitz and Singer, we see questions so fundamental in their nature as to threaten any constitutional negotiations, if not the very existence of the state itself. These questions were noted in passing in the first editorial in *The Reconstructionist*, but, in the blush of enthusiasm with which the editorial board greeted Kohn's draft, were not at that time accorded their full significance. They included the following:

- Is the State of Israel to be a Western democracy or the Jewish national homeland?
- Whatever the state's ultimate role, are the legislative and judicial processes regarding matters of personal status to be vested in a religious authority and, if so, what does that say about the status of democratic principles in such a society?
- Can such matters be resolved as part of the process of drafting and adopting a constitutional document, with all of its attendant qualities of universality, longevity and judicial authority?

By tracking and understanding the shifting positions of *The Reconstructionist* editorials in light of the debate between Konvitz and Singer, we can track and understand the decisions made by Ben-Gurion and the First Knesset. We can see the initial embrace of a constitutional enterprise, the enormity of the divisions and dangers inherent in such an undertaking, and the need to find an alternative solution. We might also view the innately Reconstructionist approach of the Harari Resolution as being the only truly viable approach available to a country that was in profound danger of imploding in infancy.

Notes

1. Philippa Strum. "The Road Not Taken: Constitutional Non-Decision Making in 1948–1950 and Its Impact on Civil Liberties in the Israeli Political Culture. *Israel: The First Decade of Independence*. Ed. S. Ilan Troen and Noah Lucas (New York, 1955): 83–104.
2. Strum, 83.
3. Ilan Peleg, "Israel's Constitutional Order and *Kulturkampf*: The Role of Ben-Gurion," *Israel Studies* 3.1.
4. Strum, 83.
5. United Nations General Assembly Resolution 181. 29 November 1947.
6. Peleg, 236. Strum, 92, states that Claude Klein felt that Ben-Gurion saw a direct line between a constitutional system and a strong judiciary, "and Ben-Gurion was afraid of the creation of an independent legal center capable of striking down the acts taken by him and the central committee of Mapai."
7. Strum, 89; Emanuel Rackman, *Israel's Emerging Constitution, 1948–1951* (Columbia University Press, 1955): 113.
8. See Peleg, 237: "He [Ben-Gurion] seemed to have thought that the nation-building project at this time would be jeopardized by a confrontation with the religious parties." See also Strum, 84: "When the specific issues that would have to be resolved in the writing of a constitution were raised in the First Knesset ... it quickly became apparent that forcing them to a conclusion was potentially explosive and divisive. The treatment of religion in the proposed constitution was the main dilemma." See also Peter Y. Medding, *The Founding of Israeli Democracy, 1948–1967* (1990 Oxford University Press, New York): 40: "Mapai MKs argued that to engage in a *Kulturkampf* about matters of conscience would weaken national resolve and threaten national unity at a time when the country already faced major problems of security"....
9. Strum, 96, says "Dan Horowitz may have been correct in arguing that the decision to substitute occasional basic laws that eventually could be codified into a constitution enabled avoidance of matters that could have crippled the young state."
10. *The Reconstructionist*, 7 January 1949 XIV. 18: 3–4.
11. *The Reconstructionist*, 10 March 1950 XVI. 2: 3–5.
12. *The Reconstructionist*, 14 February 1949 XIV. 20: 10–16; *The Reconstructionist*, 4 March 1949 XV. 2: 9–13; *The Reconstructionist*, 18 March 1949 XV. 3: 12–19; *The Reconstructionist*, 1 April 1949 XV. 4: 17–21. There was one other article about the Israeli constitution in *The Reconstructionist* during these years, a relatively short "Dear Friend" letter by Immanuel Lewy on 4 February 1949, but it adds little to the editorials and articles already noted.
13. Kohn was described in an article that he wrote in the *Annals of the American Academy of Political and Social Science*, in July 1959, as the Weizmann Professor of International Relations at the Hebrew University of Jerusalem, the head of the Israeli delegation to the United Nations mediator on Palestine in June 1948 and the author of "various articles on constitutional and political subjects."
14. Rackman, 38.

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15. My characterization of the editorial board's praise as "effusive" is reflective of the statements of Dr. Milton Konvitz (introduced later in the text of this paper): "The editorial accords the draft constitution excessive and over-reaching praise ... Reconstructionists do not believe that Jews are the Chosen People. Nor ought we to claim that the Israeli draft constitution is the Chosen Constitution." *The Reconstructionist* 14 February 14 1949 XIV. 20: 10.
16. Konvitz was described in the 4 February 1949, issue of *The Reconstructionist* as "professor of Cornell University, editor of 'Industrial and Labor Relations Review,' author of several books dealing with constitutional rights and contributing editor to *The Reconstructionist*."
17. Singer was described in the 18 March 1949, issue of *The Reconstructionist* as "assistant leader of the Society for the Advancement of Judaism, New York City."
18. Rackman et al, 89.
19. "[W]e ... declare the establishment of a Jewish state ... [that] will be open for Jewish immigration and for the Ingathering of the Exiles...."
20. Strum, 84–85. Reference is made here to a series of letters from Ben-Gurion to the religious party Agudat Israel, asking for its help in presenting a unified front to the British commission that was deciding whether to recommend a Jewish state. In exchange for that support, Ben-Gurion ceded control to the religious parties on matters of personal status, and, among other things, agreed to the requirement that the laws of *kashrut* would be followed in all government kitchens and, further, that the religious school system would have full autonomy.