

# ***A DEFENSE OF NON-REPRESENTATIONAL CONSTITUTIONALISM: WHY CONSTITUTIONS NEED NOT BE REPRESENTATIONAL***

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## ***I INTRODUCTION***

It is common to assume that the legitimacy of constitutions hinges on the fact that they are representative of the people. This is often why constitutions require public acceptance in the form of referenda which indicate the willingness of the people to be bound by the Constitution. In his dissent in the famous Israeli case *Bank Hamizrach v. Migdal* Justice Cheshin expressed this view and said:

Like my colleagues, I too believe that we deserve a constitution and that a constitution would benefit us. Let a constitution be drafted and submitted for a referendum. Let the constitution be adopted in a process of six readings spread out over the two Knessets. Let any act be done, provided that it involves a substantial deviation from regular legislative proceedings, and provided that the people are involved in the enactment of the constitution. All of these are legitimate acts, and we will acquiesce to them and cherish them. But with all my might I will oppose our recognition of the Knesset's authority to enact a constitution by force of a judicial ruling, via a legal analysis of a document dating back forty seven years, in reliance on disputed conceptions which have no firm roots in Israeli society. And where is the people? Should we not ask its opinion? On the contrary, let us call the people and consult them.

Justice Cheshin expresses the standard opinion under which the normative force of the constitution hinges on the fact that it willingly endorsed by the people. This Article challenges this view. More specifically, I differentiate between two types of legitimation: *representational legitimation* and *non-representational* or *reason-based legitimation* and show that some of the puzzles in constitutional theory can be resolved by acknowledging the significance of the latter type of legitimation. To put it provocatively: the legitimation of a constitution need not rest on the conviction that it represents the people whom it governs; it may simply rest on the belief that it is a good or just constitution. Representational legitimacy is only one form of legitimacy but not the only one.

My point of departure is legitimation. Founders of constitutions strive to realize legitimation and it is this impetus which provides the key to the understanding of their

decisions. The primary challenge of the founders of political revolutions is how to reach legitimation. Legitimation is crucial for the success of any constitutional order but it is particularly crucial at the time of political revolutions and yet, legitimation of revolutionary constitutions is a tricky process. After all the revolutionaries disrupt the existing constitutional order; such disruption is often the byproduct of delegitimizing an established existing legal order. On what basis can the revolutionaries succeed in establishing legitimacy of their own constitutional order? How can they address the challenge that their new proposed constitutional order is not better than that of the former constitutional order, or is not better than an alternative constitutional order proposed by another group of revolutionaries which is equally worthy? Let me briefly summarize my main claims.

Legitimacy is representational if it rests upon the conviction that the constitution is representative of the people, that it is constitutive of their collective identity, that it promotes their distinct values as a nation and that it is being sustained by the active engagement of citizens with the constitution. Legitimacy is non-representational or reason-based if it rests upon the conviction that the (procedural, institutional or substantive) aspects of the constitutional order promote justice, the protection of rights, stability and/or well-being.

I shall argue that an understanding of constitutional evolution can be greatly enriched by understanding the role that these two modes of legitimation play in the evolution of constitutions. Most importantly, to be legitimated the constitution need not be representational. The current conflict between populists on the one hand and liberals on the others can be better understood as a debate between advocates and opponents of representational constitutionalism. I shall also argue that Israel can provide an example: the contemporary controversies concerning the so called 'constitutional revolution' rest partly upon a conflict between these two modes of legitimation.

## *II THE REPRESENTATIONAL AND THE REASON-BASED MODES OF LEGITIMATION*

Constitutions, I shall argue, can be legitimated in two ways: representational legitimation and reasons-based legitimation. Representational legitimation grounds legitimacy in claims concerning popular will, consent, voluntary endorsement, active

engagement, participation etc. The constitution is binding because we want it; we have agreed to it, we have voted for it, it reflects our identity as a community, etc. Crudely phrasing it, it is binding because it is *our* constitution – the constitution to which we agreed and which we cherish; most typically, it is also the constitution which we (or, at least our representatives) ratified on the grounds that it entrenches the values that are constitutive of our political or collective identity. Non-representational or reason-based legitimation rests on judgments concerning the institutional, procedural or substantive justness, correctness or usefulness of the constitution. The constitution is binding because it establishes good institutions, entrenches just norms and is worthy therefore of our allegiance. In short, under representational legitimation, the constitution merits our allegiance because it is ours while under reasons-based legitimation it is ours because it merits our allegiance.

When I do not write academic articles, I read theology. The similarity between the concern I raise here and a classical puzzle in theology is evident. One of the classical concerns of theologians has been to address the relations between God and goodness. Under one view, whatever God wills is good by virtue of its being willed by God. This view is often labelled 'theological voluntarism'.<sup>1</sup> What is shared by all theological voluntarists is the view "that entities of some kind have at least some of their moral statuses in virtue of certain acts of divine will." In contrast anti-voluntarists adhere to the view that goodness precedes God's will. The tradition of intellectualism in theology suggests that God wills the Good because it is judged by God to be good. Crudely speaking, under the first view the good is good because it is willed by God while under the latter it is willed by God because it is good. It is precisely this classical distinction between voluntarism and the so called intellectualism which I wish to import from theology to constitutional theory. I suggest that the legitimation of constitutions may be grounded in voluntarism (will-based legitimation or representational constitutionalism) or in intellectualism (reason-based legitimation or non-representational constitutionalism).

Under the representational mode of legitimation, the constitution is legitimate because it is ours and it is ours because we created, we committed ourselves to it and because

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<sup>1</sup> See Mark Murphy, Theological Voluntarism in Stanford Encyclopedia of Philosophy. <https://plato.stanford.edu/entries/voluntarism-theological/>

our values are entrenched in it. Typically, constitutions that are legitimated in this way are subject to a referendum and constitutional debates are central to the public life of the polity. In contrast, under the reason-based mode of legitimation we endorse the constitution because it is just or effective. In such cases the constitution need not be ceremonially accepted by citizens and it need not guide them in their public life. In reality almost or perhaps all constitutions gain their legitimacy both in representational and in non-representational manner. Yet, as I show below, some constitutions are more representational than others.

Let me provide an analogy: compare the type of engagement that an individual has with his private garden and the engagement that an engineer has with his enterprise of building a bridge. The owner of the garden aims to shape her garden in a way that addresses her own needs, tastes, sensibilities and preferences. She wants the garden to appeal *to her* aesthetic judgments. She can assert truthfully that other gardens are equally or even more beautiful than hers and nevertheless she prefers *her* garden to that of others. In contrast an engineer who builds a bridge aims at building *a good bridge* rather than a bridge *that appeals to him*. An engineer typically does not say that he builds a bridge to satisfy his own inclinations or to appeal to his own aesthetic judgments; the bridge simply ought to be a good, safe, solid and even a beautiful bridge but not one that is designed specifically to appeal to its creator. Representational legitimation can be analogized to the case of the garden; it rests on the conviction that the constitution is a constitutive component in the lives of the polity. Consequently, it ought to represent the collective values, ideals and aspirations of the political community. In contrast, reason-based legitimation rests not on the conviction that the constitution is constitutive of our collective identity but simply on the conviction that it is a good constitution; it serves our interests and/or effectively promotes our well-being.

As indicated above, the conventional reservations applying to any dichotomy (except perhaps in logics) should also apply here as well. The dichotomy between the two modes of legitimation is not a sharp dichotomy; it is often the case that legitimation rests on both representational and reason-based modes of legitimation. Often the judgment that a constitution is legitimate on representational grounds and the judgment that it is legitimate on reasons-based grounds are inter-related. Typically, different political and social movements use both representational arguments and reason-based

arguments to justify their allegiance to a particular constitutional order. Further the balance between these two types of legitimation can shift in time such that a constitution that has been primarily legitimated on reason-based grounds may eventually be transformed and be legitimated on representational grounds and vice versa.

The US is perhaps the primary example of a constitution that is legitimated on representational grounds; it is the will of the American people which provides the foundations for the normative force of the US constitution. To illustrate the representational force of the US Constitution, Ackerman analogized the US Constitution to a non-realistic picture which may represent the deeper dimensions of one's identity –ones which may not be represented by a photograph.<sup>2</sup> Representational legitimation hinges on popular endorsement. To be genuinely representative, the constitution needs to be accepted by the public and to be constantly present in the public sphere; its meaning needs to be constantly debated and used in political debates. Such an understanding of constitutions is deeply ingrained in the US constitutional law scholarship.

Needless to say that what counts as popular endorsement (sufficient for representation) is controversial. Populists believe that ideally, representation requires the representative to accurately mirror the actual preferences and judgements of her constituents. Recently, Ofer Malcai and I argued that this view fails to acknowledge the complexity of preferences and judgements; for instance, the prevalence of conditional and second-order preferences. More specifically, we argued that representation may require the representative to decide (or vote) against the view of the represented as long as the decision is justifiable to the represented.<sup>3</sup> Representation is about taking seriously *the perspective of the* represented; looking at the world from *the standpoint of the represented* etc. Theories of representation differ in what they perceive to be the

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<sup>2</sup> Ackerman, *supra* at 1028. Ackerman differentiates there between mimetic representation and semiotic representation. Ackerman describes the difference between the two as follows:

On the one hand you may find somebody with photographic aspirations, who might provide an image of you as you appear at the present moment [mimetic representation]. This mimetic kind of representation has familiar advantages and disadvantages...Perhaps an artist who self-consciously appreciates that he *cannot* reduce your living reality to a piece of paper-that he is *only* providing a representation-will paint a portrait that, while less realistic, will nevertheless convey a deeper meaning to its audience.[semiotic representation]

<sup>3</sup> Alon Harel & Ofer Malchai, *Vox Populi Vox Dei: Populism, Elitism and Private Reason* (unpublished manuscript)

authentic perspective of the represented, but they all aim to capture what it means for one person to act in the name of another. Representational constitutionalism cherishes the view that the constitution is ultimately legitimated by representing the people.<sup>4</sup>

But representation is not the only mode of constitutional legitimation. Reasons-based constitutions are legitimate despite not being representational. They are legitimated by virtue of being perceived as good, just, efficacious or desirable on other grounds that do not presuppose representational legitimacy. It is therefore the (perceived) virtues of the constitution and/or its justness rather than the active endorsement of the constitution by the people which provides the basis for legitimation.

Before illustrating the significance of this distinction, let me draw a distinction between two types of reasons-based legitimation: substantive reason-based legitimation and institutional/procedural reason-based arguments. Substantive reason-based legitimation rests on the conviction that the *content* of the constitutional provisions is just, that these provisions protect the right values and entrench the right norms etc. Institutional/procedural legitimation rests on the belief that the constitutional form in itself is desirable. Hence the constitution is valuable not only or primarily because it protects or promotes the right values but also because it protects these values in the right way.<sup>5</sup>

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<sup>4</sup> For a classical work differentiating between different conceptions of representation, see Hana Pitkin, *The Concept of Representation* (1972).

<sup>5</sup> The first type of reasons-based legitimation (substantive reason-based legitimation) needs no special explanation. In order to be legitimated, constitutional documents need to include provisions which are perceived to be just or at least not to be perceived as unjust. Most typically the constitution is understood often as entrenching pre-political rights – rights that existed prior to the polity and the constitution merely entrenches them within the legal order. The more interesting and less obvious reasons-based legitimation is the procedural/institutional reason-based legitimation. In *Why Law Matters* I argued that the *constitutional* protection of rights that rests on the binding normative force of constitutions is superior not because it is a more effective in protecting rights or protecting democracy or realizing any other contingent ends but because it protects these ends for the right reasons or in the right way. The key element in this analysis is what I labelled 'binding constitutionalism'. Constitutional entrenchment of rights facilitates public recognition that the protection of rights is the state's duty rather than a mere discretionary gesture on its part, namely that the state has no discretion but to honor these rights.

The rationale underlying binding rights-based constitutionalism is grounded in the significance of the public recognition of rights-based duties binding the legislature. It rests on the importance of the publicly salient differentiation between discretionary legislative decisions (namely those decisions that are grounded in the legislature's inclinations/preferences/taste and judgments), and those decisions that are grounded in the legislature's rights-based duties. It is one thing to be granted a right because the people regard it as desirable and wish to grant you the right or even believe it is mandatory on their part to give you the right. It is another thing to be granted a right by a constitution or by a court which, in effect, pronounces that the people have no power to deprive you of the right because it is a right that is so fundamental that it is not subject to the contingencies of majoritarian legislation. Constitutional entrenchment is appealing not because it successfully entrenches *the right values* but because it

To sum up the discussion so far, I argued that there are two modes of legitimation: representational legitimation and non-representational or reason-based legitimation. The former rests on the conviction that the constitution is an embodiment of the values of the polity. Under representational legitimation our allegiance to the constitution rests upon the fact that it is our constitution; that we participated in shaping it, that it reflects the values that constitute us as a community etc. The latter simply maintains that the constitution is grounded in reason. Under reasons-based legitimation our allegiance to the constitution rests upon the fact that it promulgates the right values both substantively and procedurally/institutionally.

To show the relevance of reason-based legitimation (and perhaps more accurately the incompleteness of accounts that rest purely on representational legitimation) the next Part considers two examples illustrating the usefulness of the distinction drawn above between the two forms of legitimation.

### III ILLUSTRATIONS: GERMANY AND ISRAEL

This Part uses the dichotomy between representational and reasons-based legitimation to shed light on three major issues. I first examine the grounds for the success of the German Constitution and argue that the German Constitution is a non-representational one. I later show the relevance of this dichotomy in shedding light on the contemporary debates between populists and liberals. Last, I use the distinction between representational and non-representational legitimation to investigate the contemporary debates in Israel concerning the status of the Israeli basic laws and the powers of the Court.

#### 1. The German Constitution

The German Constitution (as well as other 'elitist' constitutions) is a constitution that was constructed by elites at a time when the masses were overwhelmed by the defeat in the war. What is the source of legitimation of these constitutions? Why is the German Constitution which has never been properly endorsed by the German people so stable and robust?

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successfully *entrenches* the right values. The Constitution is legitimate because it is the right form by which our rights should be respected (rather than because we chose it). This analysis can be classified as a reason-based source of legitimacy of constitutions. For a detailed exposition of this view, see ALON HAREL, *WHY LAW MATTERS*, 147-190 (2014).

The outlines of the German Constitution were dictated by the allies. The conditions set by the allies included the requirement that the constitution be democratic, establish a federal order and protect basic rights. But it was also understood by the allies that if the new constitution were to succeed it ought to be established in cooperation with the German people rather than imposed on them.<sup>6</sup> Yet despite this qualification, the German Constitution was not the exclusive product or creation of the German people. The Constitution that ultimately was adopted was subject to the approval of the allies and those used their powers to dictate changes in it. How can such a constitution be legitimate?

In a rare attempt to address this puzzle one of the former Justices of the German Court asserted that: "Allied intervention did not succeed in branding the basic law with the stain of an instrument imposed by the occupying powers."<sup>7</sup> Here I wish to suggest a different answer; the German Constitution is legitimated not by virtue of popular assent or endorsement that rests on the conviction that it is constitutive of German values or on a ceremonial referendum that conveys the voluntary allegiance of the German people to the constitution or on any other form of representational legitimacy. Instead, it is legitimated on the grounds that it is believed to be desirable on both substantive and institutional reasons. The German Court has explicitly sided with the reason-based view when it argued:

Laws are not constitutional merely because they have been passed in conformity with procedural provisions... They must be substantively compatible with the highest values of a free and democratic order, i.e. the constitutional order of values, and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law<sup>8</sup>

Acknowledging that not all constitutions are representational explains a fundamental difference between US citizens' and German citizens' attitude to constitutionalism. The former hail the Constitution as a great achievement of their own; they study its

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<sup>6</sup> See David P. Currie, *The Constitution of the Federal Republic of Germany* pp. 9-10.

<sup>7</sup> Cited in Currie, *supra* note 8 at 10.

<sup>8</sup> (6 BverfGE 32 [109]). For a translation of this case, see

<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=610>

provisions in school, debate its meanings in the media and often justify their political positions on constitutional grounds. It is the constant popular engagement with the constitutional provisions which facilitates the constitutional patriotism characteristic of the USA. In contrast the German citizens traditionally are not engaged in debating the substantive provisions of their constitution. Instead, they defer to the expertise of the Constitutional Court and accept its determinations as binding.<sup>9</sup> Their deference to the Court relies at least in part on the German (understandable) distrust of representative institutions. History has taught the German people that representative institutions may fall prey to brutal extremism and the deference to the Court rests on the conviction that the Court is an institution that may protect the polity from such risks.<sup>10</sup>

I suggest that this difference in attitudes between US citizens and German citizens is attributable also to the difference between the two forms of legitimation: representational legitimation in the US context and reason-based legitimation in the German context. Representational legitimation requires constant engagement with the constitution; after all the legitimacy of the constitution hinges on the *enduring* commitment of the people to the constitution. Commitment presupposes knowledge, understanding and constant engagement. In contrast non-representational legitimation may rest upon trust in the judgments of elite institutions such as the court. After all non-representational constitutions do not rest upon the active endorsement of the constitution but upon a judgment that the constitution is conducive to the right values. To the extent that the Court is trusted, active engagement with the constitution is not necessary for its legitimacy.

The fundamental difference between the US and the German Constitution can be further understood given the different timings in the history of the nations that the respective constitutions were written and ratified. The US Constitution was accepted at a time of great confidence in the virtues of the American people and their ability to govern themselves. In contrast the German Constitution was written not only after military

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<sup>9</sup>Research has shown that the German Constitutional Court is highly popular and enjoys broad public support. See, e.g. James L. Gibson et al, *On the Legitimacy of High Courts* 92 Am. Pol. Sci. Rev. 343-358 (1998). For the distinct attitudes of Germans towards their constitution and the constitutional court, see also Bernhard Schlink, *German Constitutional Culture in Transition* 14 Cardozo L. Rev. 711, 724-25 (1992); James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court*, 65 J. Pol. 1, 5 (2003).

<sup>10</sup> See, e.g., GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 8-12 (Cambridge University Press, 2005).

defeat but also at a time in which the Germans distrusted the virtues and even the sanity of their own nation. As a matter of fact, the German Constitution can be regarded as a tool to counter all attempt to embody a national entity; it can therefore be described as an anti-representational constitution. When the German Constitution was established, the most urgent task was to distance the new State from the nation establishing it (rather than represent it).

The ideal of representation rests upon a conviction in the prior existence of some pre-existing entity that is *worth representing* and there was no such entity to represent in Germany in 1949. The less representative the constitution is, the better. In contrast at the time the US Constitution was ratified, the US nation had traditions which it was willing to endorse and entrench and, hence, the establishment of a representational constitution.

The US Constitution is legitimate because it is the constitution of the people of the United States – one which they shaped in light of their own distinctive values and aspirations and which they sustain by virtue of their allegiance to these values. In contrast the German Constitution is legitimate simply because it is a good and a stable constitution. It is good both in its substantive content but, more importantly, it is also good because of the stability and trustworthiness of the institutions it created and are in charge of interpreting it.

## 2. Populism, Liberalism and the Israeli Constitutional Revolution

Let me use a second example illustrating the contrast between representational legitimacy and reason-based legitimation. To do so I will first make a broad generalization and later turn to explore the ways in which the two modes of legitimation operate in the Israeli context.

A prominent characteristic of contemporary democracies is the persistent conflict between populism and liberalism.<sup>11</sup> The traditional concern of populists is the concern for representation. I will argue that the current cultural and political conflicts concerning populism and liberalism can often be conceptualized as a conflict between representational and reasons-based legitimation. Populism considers political

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<sup>11</sup> The contrast was examined and investigated by Margaret Cannovan, *Trust the People! Populism and the Two Faces of Democracy* XLVII Political Studies 2, (1999). For another recent and influential attempt to capture the contrast between the two, see Jan-Werner Muller, *What is Populism* (2016).

representation to be a substitute for direct, personal democratic participation; it purports to give effect to the people's actual will; its primary ambition is to represent the people as realistically as possible.<sup>12</sup>

Populism is not the only theory of representational legitimacy but it is a theory that cherishes a certain form of representation under which representatives are (presumptively) required to make the very same decisions as members of the public would make were they to occupy a political office. This explains why populism is highly critical of intermediate institutions (such as activist courts, the media or NGOs) which place limits on representatives, labelling such institutions as elitist.<sup>13</sup> On this view, courts exercising judicial review illegitimately obstruct representation while the media and NGOs distort the people's authentic voice.<sup>14</sup> It is the duty of deputies in a democracy to take seriously the duty of representation, i.e., to take seriously the convictions and preferences of voters. It is this 'democratic' intuition that explains the appeal of contemporary populist politics.<sup>15</sup>

In contrast many liberals retort that representation may conflict with other central concerns of the liberal state: equality and/or freedom, protection of minorities, dignity etc. Liberals also emphasize the centrality of intermediate institutions which are not purely representative: courts, the media etc. The ambition to represent the people is often mitigated by the recognition that there are values that limit the powers of the people. Hence the common accusation that liberal institutions suffer from a 'democratic deficit' that they fail to be responsive to popular sentiments or, in other words, that they fail to be representative.

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<sup>12</sup> G. Hermet, *Les populismes dans le monde. Une histoire sociologique. XIXe-XXe siècle* 50 (Fayard 2001), cited in Cesare Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 EUR. CONST. L. REV. 5, 11 (2011).

<sup>13</sup> JAN WERNER MULLER, WHAT IS POPULISM, 2 (2000).

<sup>14</sup> Israeli politicians frequently make the accusation that the media is 'leftist' and that NGOs act as 'moles', even prompting legislation aimed to constrain the ability of NGOs to raise funds. See Ruth Eglash and William Booth, *Israeli NGOs decry 'deeply anti-democratic move' as new law approved*, WASHINGTON POST (July 12, 2016), [https://www.washingtonpost.com/world/israeli-ngos-decry-deeply-anti-democratic-move-as-new-law-approved/2016/07/12/a07b1bdb-a431-4fce-b76d-d0a35dfca519\\_story.html?utm\\_term=.0987f3bc7028](https://www.washingtonpost.com/world/israeli-ngos-decry-deeply-anti-democratic-move-as-new-law-approved/2016/07/12/a07b1bdb-a431-4fce-b76d-d0a35dfca519_story.html?utm_term=.0987f3bc7028).

<sup>15</sup> This does not imply that populist leaders conform to the ideals they cherish. In an ironic reaction to the pretension of Trump to speak for the people, the political scientist Cas Mudde argued that "Where populist leaders claim to be vox populi, the voice of the people Trump is the voice of Trump." See, Cas Mudde, *The Blog: The Power of Populism? Not Really!*, HUFFPOST (Feb. 13, 2016, 11:50 AM), [http://www.huffingtonpost.com/cas-mudde/the-power-of-populism-not\\_b\\_9226736.html](http://www.huffingtonpost.com/cas-mudde/the-power-of-populism-not_b_9226736.html). Hence, Mudde concludes that Trump cannot be classified as a populist.

I do not claim that there is a complete convergence between on the one hand populist arguments and representational legitimation and, on the other, between liberals and reasons-based legitimation. Liberals often raise representational arguments; more particularly, they challenge the populist understanding of representation.<sup>16</sup> For instance, it is argued that representation requires differentiating between deeper and more long-standing convictions which merit great respect than mere short-term whims. Under this view intermediate institutions such as courts can be more representational than traditional representational entities such as the legislature.<sup>17</sup> It is also the case that sophisticated populists sometimes raise reason-based arguments. For instance it is claimed that the people have the intellectual tools and the wisdom necessary to render the right decisions.<sup>18</sup> Yet as I show the Israeli experience suggests populists often use representational arguments while liberals are often inclined to use reasons-based arguments.

The most vocal opponents of the Israeli constitutional revolution of the 1990's use predominantly representational arguments. In their view, the Israeli constitutional revolution, in particular, the enactment of the two basic laws protecting rights and conferring the power of judicial review to the courts is wrong because these basic laws have never been accepted or endorsed by the citizenry of the country. In contrast, the most vocal proponents of the constitutional revolution use reasons-based arguments. They argue that the constitutional revolution protects minorities, promotes justice, is conducive to freedoms etc. They also argue that courts are better institutions to make such decisions than legislatures.

The representational arguments opposing the granting of the power of judicial review have been raised in the Knesset prior to the legislation of the basic laws. The Knesset members themselves raised the concern that entrenching a constitution may be anti-democratic. Thus it was argued:

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<sup>16</sup> See Harel and Malchai *supra* note .

<sup>17</sup> For such a view, see, e.g., Robert Alexy, Balancing, Constitutional Review and Representation 3 International Journal of Constitutional Review (2005). Alexy believes that "the only way to reconcile constitutional review with democracy is to conceive of it, too, as representation of the people."

<sup>18</sup> This is the view of the Israeli Minister of Justice Ayelet Shaked in her manifesto. See Ayelet Shaked, *The Path to Democracy and Governance*, 1 HASHILOACH 37, 54 (2016) (Hebrew).

"How could it be that we would enact such a law in the Knesset without being aware that the idea in the background is usurpation, taking the powers of the Knesset and the legislature and granting them to the Supreme Court."<sup>19</sup>

The representational argument against judicial review is described by Shuki Segev as follows:

[T]he new basic laws were enacted by a very small majority, they did not engage the positive aspect of constitutional making. No special procedures were followed and no special majority was formed that could have overcome past disagreements about how to achieve popular ratification or how to symbolize the formation of a broad consensus.<sup>20</sup>

Segev and other opponents of the constitutional revolution presuppose therefore that the legitimacy of a constitution must be representational. They preclude therefore the very legitimacy of a constitution such as the German Constitution which does not rest on representational grounds.

Politicians also frame their opposition to the Court and also to the discretion of public officials in terms of representational legitimation. Minister of Justice Ayelet Shaked argued:

I believe that the people and their representatives are those who ought to express the will of the people and that they ought to have the final say in the public sphere. The government is no one's contractor. It is committed only to the people a majority of whom voted for it ... [The government] is committed to a people who seeks to determine its fate *directly* and through its representatives.<sup>21</sup>

In contrast Chief Justice Barak – the most vocal representative of the constitutional revolution argued on reasons-based grounds that:

In my opinion every branch of government, including the judiciary, must use the power granted to it to protect the constitution and democracy. The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy and substantive democracy, as expressed in basic values and human rights.<sup>22</sup>

Justice Aharon Barak also believes that: Democracy has its own internal morality, based on equality and dignity of all human beings.<sup>23</sup> Hence, in his view:

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<sup>19</sup> DK Knesset member Michael Ethan (1991) 1247 (Isr.).

<sup>20</sup> Joshua Segev, Who Needs a Constitution? In Defense of the Non-Constitution Constitution-Making Tactic in Israel 70 Albany L. Rev. 409 (2007).

<sup>21</sup> See supra note 21 (emphasis added).

<sup>22</sup> Aharon Barak, A Judge on Judging: The Role of the Supreme Court in a Democracy 116 Harvard L. Rev. 16, 26 (2002).

<sup>23</sup> Id p. 39.

"there is no (real) democracy without recognition of basic values and principles such as morality and justice. Above all democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority."<sup>24</sup>

To amplify this hypothesis let us also mention the response of Justice Aharon Barak to the procedural requirements set by Justice Cheshin. Justice Cheshin who was cited at the outset believed that a constitution needs to be approved by the people. Chief Justice Barak answered:

It is true that no special appeal was made to the public to approve the text of the Basic Laws, as it developed in the course of the Knesset debates over the years. But such an appeal was not necessary. It may be desirable, but it is not indispensable. Direct appeal to the nation is one method of adopting a constitution, and perhaps the most desirable. But this is not the only method and it involves considerable difficulty. The constitutional history of many nations recognizes constitutions that derived authority from the nation but were not presented for direct national approval.<sup>25</sup>

It is evident that Justice Barak believes at least partly in the necessity of a non-representational constitution – a constitution whose value rests on its just content. Hence the concern raised by representational constitutionalists such as Justice Cheshin that the constitution must rest on the will of the people is constrained by the conviction that reason sets limits to the will of the people. Consequently, the symbolic procedural requirements indicating popular acceptance such as a referendum or "six readings spread over two Knessets" that are regarded by Justice Cheshin as essential are not regarded by Justice Barak as necessary.<sup>26</sup>

It seems therefore that the debate between on the one hand Justice Cheshin and other jurists who claim that the Israeli Basic Laws do not grant the courts the power of judicial review and, on the other hand, Justice Barak and the jurists who claim that the basic laws empower the court to invalidate legislation should be (at least partly) conceptualized as a dispute between representational constitutionalists and non-representational constitutionalists. This also explains why the former regard popular

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<sup>24</sup> Id at 39.

<sup>25</sup> Supra note .

<sup>26</sup> Interestingly to support his view, Justice Barak mentions the German Constitution and the fact that it was not endorsed by the people in accordance with the requirements regarded as necessary by Justice Cheshin.

referenda and other rituals of this sort as essential while the latter deny the significance of such ceremonial gestures.

Note again some qualifications to these observations. First I do not claim that there is a necessary connection between liberalism and reasons-based legitimation on the one hand and populism and representational legitimation on the other. At most we can speak of a natural disposition which is reflected in the Israeli public discourse. Second I do not claim that as an empirical matter liberals use only reasons-based arguments and populists use only representational arguments. Associating populism with representational legitimacy and liberalism with reasons-based legitimation is a generalization. But it is a generalization which is supported by observing the Israeli public discourse concerning the constitution. Third the populist opponents of the constitutional revolution have been shown not to be consistent in their own urge for representational legitimacy. Recent developments in Israel indicate that the opponents of the constitutional revolution are not always faithful to their own convictions.<sup>27</sup>

Underneath the conflict between liberals and populists lurks a disagreement concerning the philosophical question whether ultimately the constitution ought to be legitimated on representational or reasons-based grounds. In a previous article I wrote:

The debate... is a very old debate: the debate between reason and will as the foundation of law. Thomas Aquinas believed that law is 'an ordinance of reason.' Jean Jacques Rousseau equated the law with the general will and argued that the general will can never be wrong. It seems that legal theory will continue in different ways to move from one pole (reason) to the other (general will). I urge you (despite the seductive beauty of Rousseau prose) to join Aquinas' camp – the camp of law as an ordinance of reason.<sup>28</sup>

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<sup>27</sup> Just few months before this paper was written the Knesset has adopted a new basic law which was supported precisely by those populists who complained bitterly about the non-representational foundations of the constitutional revolution: Basic Law: Israel as the Nation-State of the Jewish People (2018). The law that is supposed to entrench Israel as a Jewish state was passed by a very small margin (62 in favor 55 against). So while most of the supporters of this law complain about the small margin in which the previous basic laws have been passed (and draw the conclusion that they are not sufficiently representational and therefore illegitimate), they have not followed their own judicial philosophy: short term interests, hypocrisy and most likely intellectual dishonesty of monstrous magnitude led the supporters of the new basic law to act against their own philosophical inclinations. But those reservations do not undermine the basic observation that opponents of the constitutional revolution seem to adhere to the conviction that only representation can lend legitimacy to the constitution and that the basic laws and, in particular, the judicial interpretations of these laws are not sufficiently representational. They deny therefore (or, more accurately ignore the very possibility of reasons-based legitimation).

<sup>28</sup> See Alon Harel, Why Constitutional Law Matters: Between Popular Sovereignty and Reason: Comments on *We the People* vol III 13 *Jerusalem Review of Legal Studies* 31 (2016)

It seems to me that ultimately the debate between the two modes of constitutional legitimation is a reincarnation of this earlier debate. Admittedly the previous debate between reason and will was a normative while the current debate is a descriptive debate. But the structural features of these debates is similar. Traditional constitutional theory presupposes that legitimation must rest on representational grounds. The force of the constitution needs to be grounded in the conviction that it is *our* constitution; that it *we* who created it and therefore that we are bound by it. In contrast, I argue that a different source of legitimation is that the constitution is just both substantively and institutionally/procedurally. The controversy concerning the Israeli constitutional revolution is to a large extent (although not exclusively) not only a practical or a legal debate about the powers of courts and judicial review; it is also a philosophical debate as to the groundings of legitimation. Should legitimation rest on representational grounds or can legitimation rest on reasons-based grounds. I urge Israelis to join the latter camp.