

The Future of Israel as a Jewish State

ISRAEL'S EMERGING CONSTITUTION

By Yitzhak Klein and Moshe Koppel

Fifty-five years after its creation, the State of Israel has no constitution. But that may be about to change. For the past two years, the Knesset's Law Committee has been drafting a constitution for Israel, which it hopes will reflect a national consensus. The constitutional project involves dangers as well as opportunities for the Jewish people worldwide. In this article, we will briefly describe the process and outline its most salient opportunities and dangers.

Background

A constitution typically serves two main roles: It determines the structure of government, and it embodies national

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values that the government is supposed to pursue or protect. These values range from the particular norms and mores that reflect a nation's history and embody its collective aspirations to those rights that are commonly considered universal and self-evident. Laws that are written into a constitution are typically different from ordinary statutes in the sense that they are superior (ordinary statutes are interpreted in light of the constitution and not vice versa), justiciable (the constitution can serve as the basis for striking down ordinary statutes) and entrenched (it is harder to amend the constitution than to amend ordinary statutes).¹ Thus, writing a constitution is a tricky matter: The process of balancing collective mores and individual rights requires the delicacy of microsurgery, yet the results are liable to be wielded like a sledgehammer.

It should not be entirely surprising, then, that the State of Israel, where the

proper balance between particularist and universal values has always been a contentious topic, does not have a constitution. This is not entirely for lack of trying. The history of the matter is as follows: In December 1948, the Law Committee of Israel's provisional government, headed by Mizrahi leader Zerach Warhaftig, adopted a draft prepared by Dr. Leo Cohen as the basis for discussion of a potential constitution.

The Cohen draft begins with the following:

We, the Children of Israel, in giving thanks and praise to God, Creator of the Universe, who has redeemed us from slavery to freedom and has brought us to the Land which He has promised to our Forefathers...

The draft grants certain powers to rabbinical courts, particularly in matters regarding marriage and divorce. Nevertheless, the overall thrust of the document is not particularly Jewish; with

regard to most matters of civil law, it makes no overt reference to Jewish law at all.² In the end, the draft was rejected by the religious parties as inadequately Jewish, and by the socialist Mapam party as too Jewish.

Ultimately, the attempt to draft a constitution failed primarily because Ben-Gurion's dominant Mapai party had little interest in *any* constitution that could be used by the courts to limit its power to legislate and govern as it pleased. Instead, in June 1950, the Knesset adopted what has come to be known as the *Harari Resolution*, which states:

The first Knesset charges the Law Committee with the duty of preparing a draft constitution for the State. The constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and all the chapters together will form the state constitution.

Since that time, the Knesset has passed a series of "Basic Laws" that define the rules of the political game,

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without investing them with more authority than that accorded ordinary legislation. There the matter ended as far as the Knesset was concerned, until after the elections of 2003, when the newly appointed head of the Law Committee, MK Michael Eitan (Likud), picked up the commission laid on the committee's

table in 1950 and announced that he would fulfill it.

The Situation in the Law Committee

MK Eitan's initiative has met with little resistance. To understand why those who previously resisted a constitution might be interested in adopting one now, it is important to understand how circumstances have changed for all the players involved.

The Israeli Left, which once resisted any attempt to limit its power to govern, has lost its power and has despaired of regaining it in the foreseeable future. It now sees an entrenched constitution as its best chance to rule from the grave for at least a few more generations. At the same time, the religious parties have correctly noted that the courts have increasingly treated the existing Basic Laws as if they were superior and justiciable—despite little indication from the Knesset that this is the case. In other words, the Supreme Court acts as if Israel already has a constitution and, from the point of view of the religious population, it's not a

good one. Therefore, the new initiative might be an opportunity to prepare a better one. In short, at least two of the players in this process are motivated by the fear that time is working against them. Each wishes to entrench a constitution that reflects its own values before those values are unceremoniously swept from the public square.

Unsurprisingly, the process has attracted the attention of a fair number of organizations and individuals who have dogs in this fight. While the Law Committee itself consists only of seventeen Knesset members (distributed roughly according to the parties' representation in the Knesset), other interested parties have been invited to participate in committee meetings devoted to the constitution. This provides the Law Committee with low-cost research (Knesset members have no budget for independent research), and creates the impression of a broad-based popular initiative. In fact, however, most outside participants are representatives of left-leaning organizations, reflecting the fact that in Israel left-leaning public advocacy is better funded and better organized. The authors of this article are often the sole representatives of a nationalist Jewish point of view at the committee meetings.

Most of the issues being dealt with in the Law Committee's work are uncontroversial. But several issues are absolutely crucial, and their importance for Israel's future Jewish character cannot be overstated. In the following sections, we will outline the most salient of these.

Protecting the Jewish People from Israel's Supreme Court

A constitution determines the balance of powers between the judiciary, the executive and the legislature. Paradoxically, however, since a constitution at once limits what the executive and the legislature can do, and serves as a tool to be used by the judiciary, the very adoption of a constitution typically shifts that balance in favor of the judiciary. This crucial insight must be of great concern to anyone with a stake in Israel's future as a

Jewish state. As Yonoson Rosenblum discussed in these pages, Israel's Supreme Court constitutes a grave threat to Israel's Jewish character ("Courting Disaster," [spring 2001]: 9-20). As a self-appointing body, the Court is impervious to the will of the people. It has shown itself incapable of self-restraint with regard to the determination of which issues it is prepared to adjudicate. Moreover, it fancies itself the champion of universalism



Iwo's Delicatessen, a store in downtown Jerusalem that sells non-kosher meat. Photo: www.sassontiram.com

and internationalism on all matters concerning Jewish, or indeed Israeli, national interest. In a string of decisions over the past decade, the Court has, with little or no basis in actual law, overruled the legislature or executive regarding Shabbat desecration, the sale of pork, heterodox conversion, military actions, Jewish settlement (*within* the green line), budgetary allocations to *yeshivot* and more. In each case, the Court's decision reflected the rarified sensibilities of those whom Chief Justice Aharon Barak refers to as that "part of the general public ... whose values are universal [and] ... which is enlightened and progressive."

For those who are so insufficiently enlightened and progressive as to remain concerned with Israel's Jewish character, the primary constitutional priority must be to circumscribe the exaggerated power that the Court has already appropriated.

This can be done in a number of ways.

The first is to include a constitutional provision expressly limiting the Court's power to interfere with political matters. Chief Justice Barak is fond of citing the United States Supreme Court's 1803 decision in *Marbury v. Madison* as a precedent for a Supreme Court granting itself the power of judicial review. He is less fond of the "political question doctrine," part and parcel of that same deci-

sion, in which the Court explicitly restricts the power of judicial review to matters that are not political. In the words of Chief Justice John Marshall:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Amen. The Israeli constitution must afford Israelis no less protection from their Supreme Court.

Another way that the constitution can serve to remedy the tyranny of the courts is by simply changing the method by which judges are appointed. Currently, a committee of nine appoints all the judges in Israel. Three members are sitting Supreme Court judges, and another two are representatives of the Israel Bar Association—people who may have to appear in court before the judges, and are thus dependent on their favor. Two Knesset members (one from the coalition and one from the opposition) and two ministers round out the committee. Thus, the judges of the Supreme Court dominate the appointments process and can use it to appoint their favorites and perpetuate their own ideological standpoint. The entire appointments process is conducted behind closed doors; no protocols are kept, and leaking the contents of the meetings is a prosecutable offense. Over the past twenty years this process has predictably produced an ideologically and demographically homogeneous Court. Although more radical solutions might be desirable, a simple remedy would be to include a constitutional provision requiring Knesset approval of all nominations made by the committee.³

Israel as a Jewish State

Another crucial issue is the centrality of Israel's Jewishness, which must be measured by concrete detail. Those who wish to see Israel's Jewishness minimized will attempt to restrict all mention of Israel's Jewish character to the constitution's preamble where it can be presented with great fanfare as a quaint historical fact of no practical consequence. Fortunately, MK Eitan is committed to giving Israel's Jewish character pride of place in the constitution and has asked the authors of this article to prepare a draft of the section of the constitution tentatively titled "Israel as the State of the Jewish People." Our guiding principle in preparing this draft was to avoid unnecessary controversies by steering clear of broad, and ultimately meaning-

less, pronouncements as well as of contentious details best left for ordinary statutes. This policy has served us well. Incredibly, it has proved relatively straightforward to produce a draft to which representatives of both Shinui and Agudah could, with some reservations, agree. The draft has gone through three sub-committee meetings. The current version of the section is presented here (in italics) with our comments:⁴

1. The State of Israel is a Jewish and democratic state and is the State of the Jewish People.

The phrase "the State of the Jewish People" seems oddly vexing for Israeli

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legislators. *The Basic Law: The Knesset* was amended in 1985 to include the phrase, and then amended again in 2002 to remove it. Shortly thereafter, the phrase resurfaced in a law on parliamentary immunity. The phrase "Jewish and democratic state" has no less checkered a history ever since its introduction in 1953 in a law mandating public schools and its resurfacing in the 1992 *Basic Law: Freedom and Dignity of Man*. In his decisions and public addresses, Chief Justice Barak has interpreted the word "Jewish" in that phrase in a manner so general as to render it devoid of any concrete meaning. The following clause is meant to restore some of the lost meaning.

2. The State of Israel shall strive for the unity of the Jewish People and for the welfare of members of the Jewish People wherever they may be.

The State of Israel shall act to preserve and nourish the Jewish heritage.

The educational system in the State of Israel shall give special emphasis to the transmission of Jewish culture.

Israel's formal involvement in the welfare of Jews outside its borders dates back to a 1950 law mandating the hunting down of Nazis. Nevertheless, this involvement is not without its opponents. Recent developments have rendered this policy more palatable to those who take their cues from what the rest of the world deems acceptable. Many of the states that emerged from the collapse of communism are ethnic democracies, similar in many ways to Israel. Thus, for example, states such as Poland, Slovenia, Bulgaria and Romania all have laws in their constitutions establishing special relationships with non-citizens living abroad who have ethnic ties to the state.

The careful reader will note that phrases like "Jewish heritage" and "Jewish culture" are compromises designed to facilitate broad consensus.

3. The State of Israel will enable non-Jews in Israel to act for the preservation of their identity, language and heritage, as they perceive them and in accordance with the laws of the State.

This clause is controversial only in its details: Should these rights adhere to individuals or communities? Where precisely is the divide between cultural rights and political rights? However, the basic principle is broadly accepted since both Jews and Arabs share an interest in remaining ethnically distinct.

4. The State of Israel will encourage the ingathering of exiles (kibbutz galuyot) and Jewish settlement of the Land.

Every Jew is entitled to make aliyah to the Land (of Israel), unless the Minister of the Interior has determined that there is high probability that the applicant will endanger public welfare, health or security.

Every Jew who makes aliyah is entitled, in accordance with the laws of the State, to Israeli citizenship.

Nothing in this clause may prevent others from obtaining citizenship according to conditions established by law.

The encouragement of Jewish settlement is not to be taken for granted. In the Katzir decision of 1997, the Court

struck down the Jewish National Fund's right to reserve its land for Jewish settlement—within Israel proper. The Law of Return, granting all Jews the right to live in Israel and obtain citizenship, was originally passed in 1950. The definition of the term “Jew” for purposes of this law is not currently resolvable, and is left for ordinary legislation.

5. *Hebrew is the official language of the State of Israel.*

Arabic will be given special status in the law.

The establishment of Hebrew as Israel's official language is more novel than one might imagine. The current law is a holdover from the days of the British Mandate and assigns equal status to Hebrew and Arabic. On the basis of the present law, the Court recently ordered all street signs in Tel Aviv to be replaced with signs displaying street names in Arabic.

6. *The established days of rest in the State of Israel are Shabbat and Moadei Yisrael.*

The public character of these days of rest shall be set in law. A statute that is legislated on the basis of this clause shall not be interpreted or struck down on the basis of other sections in the constitution.

Establishing Shabbat and *yamim tovim* as official days of rest is not controversial. The precise nature of this “rest,” however, is quite controversial, and is left for ordinary legislation. The danger is that the content of such ordinary statutes may then be struck down by the courts through the use of *Basic Law: Freedom of Occupation*. Thus the caveat that other parts of the constitution shall not be used to interpret or invalidate any such laws. This caveat is, unsurprisingly, a bone of some contention. Agudah wishes to broaden its application, while secularists prefer to do away with it altogether.

7. *Kashrut will be observed in public facilities mandated by law.*

Although this rule is generally observed, in any case, it is, in fact, not mandated by law. It was established by Ben-Gurion in his famous “status quo”



A supermarket in Jerusalem that is open on Shabbat. Photo: www.sassontiram.com

letter (the agreement, reached by Ben-Gurion and representatives of the

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Orthodox Jewish community in Israel around the time of the State's founding).

Another clause that is included, but that we don't cite here, maintains the current flag, anthem and state symbol (each of which has been challenged as “too Jewish”). Another issue is the specification of the powers to be granted to the rabbinical courts and to the Chief Rabbinate. A clause addressing this will eventually be added.

Prognosis

If the process for appointing judges is suitably amended, and the powers of those judges properly defined, and if Israel's Jewish character is legislated in a concrete and meaningful way, then the emerging constitution will have been worth the wait. Otherwise, Israel's days as the focal point of Jewish life around the world will likely be numbered.

The prognosis is, to be frank, quite uncertain. A wide array of forces is being marshaled against the sort of constitution most committed Jews would hope to see. Chief Justice Barak and his predecessor, Meir Shamgar, met with Law Committee members to impress upon them the importance of granting the Supreme Court as broad a range of powers as possible. Shamgar made a special point of noting that, in his opinion, the current method of appointing judges permits *too much* involvement by elected officials. In hearings on minority rights, Arab Knesset members, as well as representatives of Arab “civil rights” groups, made it clear that they would fight any provision in the constitution that defines Israel as a Jewish state, even if minorities

hold full individual and collective equality in that state. A federation of groups, created and funded by the New Israel Fund, has presented a “social rights” law, the express intention of which is to legally bind Israeli social policy to United Nations and European Union treaties and to give the courts power of the purse. The Israel Democracy Institute (IDI), a private policy center, has prepared its own draft of a constitution—which it is trying to press upon the Law Committee—that would preserve the current method of judicial appointment and would disqualify any law motivated primarily by religious considerations. The effect of such a limitation would be that any law whose provisions happened to coincide with *halachah* would suffer the additional burden of proof that it is motivated primarily by any ideology in the world other than Judaism.⁵

The battle is, however, far from lost. Most Knesset members support the positions we have advocated in this article. Unfortunately, Knesset members

identified with religious or right-wing parties in Israel are often cowed by what they believe to be the superior intellectual credentials of vocal civil liberties crusaders opposed to the very idea of a Jewish state. Moreover, their constituencies, burdened by more pressing financial and social issues, rarely press them on broad issues of principle, leading some Knesset members to believe that constitutional reform is not a priority. Given the proper encouragement, these legislators are likely to find the resolve to do what is right and give Israel the constitution it deserves.

The Law Committee understands full well that for any such constitution to be implemented, broad support for it is necessary, including support from Jews outside of Israel. Jews around the world, and especially those in the United States, who are concerned with Israel's future as a Jewish state, would be well served by becoming engaged in this process.⁶ JA

Notes

1. This framework is far from universal. For

example, England has no written constitution at all, Australia's constitution does not include rights, and Switzerland does not permit disqualification of statutes as unconstitutional.

2. The full text of Dr. Cohen's proposal, along with the detailed responses of Rav Yitzhak Herzog and others, can be found in Rav Y. I. Halevy Herzog, *Tehukah LeYisrael al pi HaTorah* 3, ed. I. Warhaftig (Jerusalem, 1989).

3. A brief that we presented to the Law Committee illustrating the unique inequity of Israel's method of judicial appointments, and suggesting a number of possible remedies, can be found at http://www.merkazmedini.org/legislative_proposals.php.

4. The full text of the proposed section, along with commentary, can be found at the Knesset's official web site: http://www.cfishrael.org/drafts_other.html.

5. The IDI proposal does attempt to preclude constitutional intervention with regard to a limited number of religion/state issues such as Shabbat rest, marriage, conversion and *kashrut* in the army.

6. For further information on how to participate in Israel's constitutional process, contact Yitzhak Klein at yklein@merkazmedini.org.