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THE ISRAELI CONSTITUTION TODAY: REFORM AND REALITY

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Constitutional Reform is On the Agenda

Constitutional reform has been a very visible issue on Israel's public agenda for the past two years, since a group of university professors headed by Uriel Reichman of the Tel Aviv University Law School launched their initiative to bring about formal consideration of a draft constitution which they developed. The draft was notable for four elements: 1) Its authors sought its adoption as a single, complete constitution. 2) It proposed a complicated electoral reform system involving the election of half of the Knesset's 120 members from single-member districts and half by proportional voting as at present, with the subsequent party strength measured in such a way that the number of seats in the Knesset would actually change from election to election and the list elected by proportional representation would determine who controlled the government. 3) Direct election of the head of government or prime minister. 4) A bill of rights written in the spirit of liberal democracy with certain minimum guarantees for the preservation of religious legislation and some major openings for the government to suspend the exercise of rights where state security demanded it.

After two years of intensive and very well-funded effort, the Reichman group has succeeded in making constitutional reform an item on the Knesset agenda, but has not succeeded in forcing the issue. They got as far as they did, not through their efforts to promote a public groundswell, but because the indecisive Knesset elections of November 1988 and the ugly coalition bargaining that followed was so repellent to so many including those engaged in it. As it turns out, even the 60-80 percent of Israelis who respond favorably when asked whether they want

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constitutional change of one kind or another do not see the issue as a very important one, certainly not enough to press actively for change. It seems that for them constitutional change is something like the electoral college issue in the United States. When asked, most Americans indicate that they would like to abolish the electoral college, but studies have shown that they really do not care very much about the issue compared to all the other issues confronting them.

An Abortive Start?

In response to the events of November and December 1988, the new government committed itself to constitutional reform and appointed an interministerial committee chaired by Gad Yaakobi, Minister of Communications, the champion of electoral reform since he was a young member of the Knesset. The Yaakobi committee took as its agenda two issues: a change in the electoral system to provide for a reform that would eliminate the proliferation of small parties and have at least some district representation, and the possibility of direct election of the head of government in order to promote governmental stability.

In June, it presented its plan for electoral reform that was very close to what the Reichman group had advocated, only it involved 60 members elected from multimember districts, thereby adding added insurance that the major party organizations would continue to control matters. Rather than providing for a change in the size of the Knesset based on the election results, it did worse. It provided that nobody elected from a district could take a seat in the Knesset if the party he or she represented did not win at least 4 seats from the statewide poll. The potential interference with democratic processes for the sake of party control raised a howl among those who followed the matter and the committee itself began to reconsider the issue in July.

In the meantime, electoral reform stalled. The big parties were less interested in it, while the small parties indicated to both Labor and Likud that they would punish any party that sought to change the present system. One might ask why Labor and Likud simply did not get together and enact the legislation, which they could easily do, ignoring the small parties. The answer is clearly that there is not enough trust between the two big parties. Each was fearful that if they made such a deal, the other would back away from it at the last minute and therefore win the support of the small parties in future coalition-building efforts.

The issue of direct election of the head of government had originally been put forward principally by Likud Knesset members with the quiet backing of Prime Minister Shamir. Then Shimon Peres publicly endorsed it as likely to help Labor and Shamir, with his usual caution, backed away from it. The change seemed dead in the water over most of the spring and summer, but has just been revived for consideration by a Likud party committee which has called for a "package" reform including the electoral system and the prime ministership. As most senior Israeli politicians privately admit, direct election is the only way to achieve governmental stability. No electoral reform that would fit the standards of Israeli democracy could prevent at least one or two small parties from holding the balance of power, which would defeat a major part of the purpose of the reform.

A Bill of Rights?

While all of this was transpiring, Justice Minister Dan Meridor (Likud) began efforts to secure the enactment of a Bill of Rights. The Basic Law which his ministry drafted bore many resemblances to the Reichman proposal, and as such aroused the strong objections of the religious parties who felt that it endangered the status of all religious legislation in Israel. It also aroused the objections of those who did not see a Bill of Rights with so many loopholes as an effective protection for the individual.

The bill seemed to be going nowhere until Agudat Israel threatened to secede from the coalition and in Shamir's bargaining with them to keep them in (he wanted them for possible future association

in a narrow coalition if Labor were to leave the government), the Prime Minister conceded to their demand that there be no constitutional reform. When this news was announced, a wave of anger swept over the public and the Knesset. The Knesset immediately passed Meridor's proposed Basic Law in its preliminary reading, Labor announced that it would continue to press for electoral reform unilaterally, and a few weeks later the Likud agreed that it would as well.

The action on the Bill of Rights was hailed in the foreign press as a major step forward. In fact, the passage on a preliminary reading only means that the bill is referred to committee where it has to be negotiated prior to coming to the Knesset for its first reading, which means it still must pass through the three readings required of all legislation. There is not much chance of that.

Before looking askance at this situation, it is well to pause to consider what it would mean to enact two poorly-designed constitutional changes in place of the present system. In this writer's view, a bad reform is worse than no reform at all because it will remove the impetus for further reform and disillusion the citizenry with its result. This would be true in the case of both the proposed electoral reform and the proposed Basic Law on rights.

With regard to the former, unless electoral reform is adopted that secures a real connection between the voter and his or her representative and that breaks the monopoly of party leadership control over who gets nominated in the first place, nothing will have been achieved. It is not an argument for a two-party system for Israel. Israel, like most European countries, is so constituted that a multi-party system is likely to exist no matter what. But it does have to do with the matter of the accountability of one's representatives.

With regard to the Basic Law on rights, so far those who have tried to draft such laws for Israel have misunderstood a fundamental principle of rights, namely that governments do not grant rights, that rights are inherent in the individual, that all governments can do is to find ways to protect them. This is not merely a theoretical issue. In a bill in which government grants rights, at the same time it provides for exceptions to their protection. This is the problem with so many so-called Bills of Rights. This problem has been avoided in the United States where rights are deemed to be natural or inherent in every individual, so that all that a constitutional Bill of Rights must do is to specify how they are to be protected. This can be done in language that is sufficiently firm to provide real protection, yet sufficiently flexible to require interpretation, so that societies can protect themselves as well. But to write down that people are free to do everything except where reasons of state make it necessary to prevent them from doing so is to offer too much with one hand and take too much away with the other.

What Does Israel Need in the Way of Constitutional Reform?

Beyond these immediate problems, there are the larger questions of what does Israel need in the way of a constitution relative to what it already has. Overlooked in all of the latest flurry of activity is the constitution that Israel has developed over the past forty years.

Although Israel does not have a single complete constitutional document, the Jewish state has developed an operative constitution of its own, embodied in a set of written texts that reflects the social content on which the state is based and an expanding constitutional tradition. Those texts were properly promulgated by the representatives of the people and recognized by Israel's Supreme Court. The texts have been collected and published for the first time by the Jerusalem Center for Public Affairs (The Constitution of the State of Israel, 1988) as Israel's operative constitution that determines the basic operations of the Israeli polity, the basic rules of governance enforced by those empowered to execute and enforce the law and, as such, interpreted by the courts as a constitution.

Political Compact and Covenant

The constitutional character of a civil society is not based on the existence of a written constitution alone. Both as a new society in the modern sense and as the heir to Jewish political principles, Israel was founded on the basis of a political compact that is both a social contract through which its citizens have established the terms of civil peace upon which their polity rests and a covenant that morally connects Israelis to a set of shared political principles and aspirations.

Israel's Declaration of Independence is precisely that kind of political compact. The Declaration of the Establishment of the State of Israel, as it is officially known, represents the consensual basis upon which the state rests. In essence, it is Israel's founding covenant. As indicated by the range of signatures appended to it, it was proclaimed as the expression of a wall-to-wall consensus which extended beyond the Zionist movement to include the Communists and the ultra-Orthodox non-Zionists of Agudat Israel. Precisely drafted to assure the support of all parties to Israel's founding, it combines Jewish national aspirations and universal human rights, religious and secular sensibilities, Zionist needs and the political ends of modern democracy. As such, it was and is a consensus-building document.(1)

As a synthesizing document, the Declaration's phrasing reflects the problems of reaching consensus. For example, there was the well-known controversy over whether or not there should be a reference to God in the text. For the secularist, anti-religious left that was still very powerful in 1948, any mention of Divine providence was anathema. For religious Jews and those perhaps not so personally observant but still anchored within the framework of Jewish tradition, the proclamation of the reestablishment of the Jewish state could not appear without such a reference. The compromise worked out was built around the inclusion of Tzur Israel (Rock of Israel), a phrase traditionally used as a euphemism for God, yet vague enough to allow for various interpretations.

"Written" and "Unwritten" Constitutions

The Israeli experience can be instructive with regard to the nature of constitutionalism. By and large, modern political science has emphasized the distinction between written and unwritten constitutions as basic to the understanding of constitutionalism, citing the American constitution as the prime example of the former and the British constitution as the prime example of the latter. That distinction has come under increasing criticism in recent years. Political scientists have pointed out that the American constitutional document cannot be understood on the basis of the plain text alone but only as it has been interpreted by the Supreme Court of the United States and in light of various conventions and usages that have grown up in the course of two hundred years. Similarly, the "unwritten" British constitution is built around a series of fundamental documents as hallowed as their American counterpart.(2)

A more proper distinction to be made is between constitutions-as-fundamental law and constitutions-as-convention or custom. This understanding is based on the fact that in the largest sense, every constitution possesses both written and unwritten elements; the difference being whether the whole is considered to be fundamental law or simply a reflection of the underlying conventions and customs of the civil society it serves. Thus, in the American constitutional system, the conventions surrounding the Electoral College that morally bind presidential electors to follow the decision of the majority of the voters in their respective states are considered by Americans to be a matter of fundamental law even though they are merely custom. For the British, on the other hand, convention or custom is considered to be much stronger than "mere" law, since law can be changed by Parliament, while a sitting Parliament would have to be very bold indeed to change a basic convention or custom.

New societies, in general, tend to emphasize fundamental law rather than custom or usage precisely because they are

new societies. Since customary usage is not available to them, they have to enact laws and legitimize them by linking them to fundamental law. New states serving old societies reject customary usage as inconsistent with their efforts to build something new. At most they are willing to incorporate elements of the customs that cannot be ignored in the hope of neutralizing or transforming them politically.

Advocating the Torah as a Constitution

Israel has been unable to adopt a constitution full blown, not because it does not share the new society understanding of constitution as fundamental law, but because of a conflict over what constitutes fundamental law within Israeli society. Many Orthodox Jews hold that the only real constitution for a Jewish state is the Torah and the Jewish law (halakhah) that flows from it. They not only see no need for a modern secular constitution, but even see in such a document a threat to the supremacy of the Torah and the constitutional tradition associated with it that has developed over thousands of years to serve the Jewish people in their land and in the diaspora.(3)

Their opposition is sometimes interpreted as the opposition of traditionalists to modernism or as a struggle between supporters of convention and custom versus supporters of a written constitution as law. This would be a serious misreading of the situation. The most traditionally Orthodox Jews are as convinced that their constitution, the Torah, is law and not custom or convention, as the most ardent supporters of a modern written constitution.

Whatever one's opinion about the appropriateness of the Torah as the constitution of a modern state, it is impossible to ignore the fact that it was considered the constitution of ancient Israel and so treated by the Jewish people in the past.(4) Jewish political culture does not recognize constitutions derived from convention; conventions and customs are important and, indeed, may attain the status of law for some purposes, but they are derived from a constitutional base and are not replacements for law. Quite to the contrary, the Jewish people as the first new society back in biblical times, is strongly committed to the principle of fundamental law and the idea of constitutionalism derived from it.

This issue was fully debated by the First Knesset sitting as the Constituent Assembly in 1949 and 1950. The debate finally ended in a compromise: the effort to adopt a single constitutional document was dropped, but the Knesset was empowered to sit as a continuing Constituent Assembly and to adopt Basic Laws as consensus was reached around each subject, which would ultimately be linked together as a constitution.

Basic Laws and Other Constitutional Documents

The proposal for piecemeal writing of the constitution was accepted so every Knesset is also a constituent assembly that can enact Basic Laws by a modest special majority of 61, namely, half plus one of its total membership. The Knesset deals with Basic Laws and other constitutional matters through a standing Constitutional, Legislative and Judicial Committee. Basic Laws constitutionalizing its legislative, executive and judicial organs, the presidency, the state's economy and lands, civil-military relations, and the status of Jerusalem, have been enacted since the late 1950s.

Israel's Declaration of Independence has been given quasi-constitutional status by the courts in lieu of a formal bill of rights, since it specifies the basic principles of the regime. The operative paragraph is: "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."

ISRAEL'S CONSTITUTIONAL FRAMEWORK

1. Declaration of Independence (1948)
2. Legislation of Constitutional Import
   - 2.1 Law of Return (1950)
   - 2.2 World Zionist Organization-Jewish Agency (Status) Law (Covenant Between State of Israel and World Zionist Organization/Jewish Agency for Israel) (1952, amended 1971)
3. Basic Laws
   - 3.1 The Knesset (1958)
   - 3.2 Israel Lands (1960)
   - 3.3 The President of the State (1964)
   - 3.4 The Government (1968)
   - 3.5 The State Economy (1975)
   - 3.6 Israel Defense Forces (1976)
   - 3.7 Jerusalem, Capital of Israel (1980)
   - 3.8 The Judicature (1984)
   - 3.9 The State Comptroller (1988)

Unsettled issues such as local government and its status and powers vis-a-vis the state, and of controversial ones such as the relationship between religion and state, have been left in abeyance.(5) Beyond the Basic Laws, other legislation has constitutional implications and is so treated. Thus the Knesset has constitutionalized the definition of who is a Jew for registration purposes through the Law of Return. Its resolution of that issue is periodically called into question and has been given stronger constitutional status through court interpretation and through the reluctance of the Knesset itself to change what it has done even when pressed hard to do so.

Similarly, the evolving relationship between Israel and the Jewish people has been constitutionalized through a covenant negotiated with the World Zionist Organization and the Jewish Agency, and enacted as legislation by the Knesset. That covenant, concluded between the Government of Israel and the World Zionist Executive in its role at that time as the directorate of the Jewish Agency, allocated functions between the two bodies and made it clear that the Agency was not a state institution but a national one (that is, one that belongs to the whole Jewish people). This covenant was supplemented by a joint declaration in 1960 which specified that "the State of Israel sees itself as the creation of the Jewish People in total, and expects efforts from the ZWF's (Zionist World Federation) side to reach the unity of the nation for the State...."(6) Subsequent agreements have transferred other functions to the state and have altered the structure of the Agency to make it more representative of the Jewish people as a whole, but the basic constitutional framework remains the foundation of the federal pattern which Israel and its diaspora partners are fostering as a means of unifying world Jewry.

Most Israelis view their state as a regime properly based on civil rather than religious law -- the accepted slogan is "a state of hok (civil law), not a state of halakhah"(7) -- but believe it only proper that the Knesset has specified in law that the state's legal system should be based on traditional Jewish legal-constitutional principles, which include a full civil code, to the extent possible. Thus, in 1980, after extensive negotiation and debate, the Knesset enacted legislation shifting the basis of Israeli law from English Common Law to the "principles of freedom, justice, equity, and peace of the heritage of Israel."(8) The wording is a compromise formula designed to accommodate Israel's linkage to one of the great legal traditions of the world, one whose standards of justice and equity and legal principles designed to implement those standards are widely regarded quite apart from their religious significance, yet conciliate those who fear any steps that might lead to recognition of halakhah as binding law in the Jewish state.(9)

The Expanding Role of the Supreme Court

Unlike most parliamentary systems, Israel's Supreme Court has come to play an important and expanding role in the development of the state's constitutional law. The Court has taken the task of constitutional interpretation and is pressing it to

the farthest possible limits with the consent, active or tacit, of the Israeli public and acquiescence of the state's other governmental institutions. This is in keeping with Jewish political culture that has always placed a high value on courts and judges as arbiters of the law. The Court's role is further enhanced by the range of constitutional issues confronting Israel because of its unique character as a Jewish state.

Taken together, the nine Basic Laws properly enacted by the Knesset constitute a constitution by most standards. In comprehensiveness, they are not inferior to the original American Constitution of 1787 before the addition of the first ten amendments (the Bill of Rights) after ratification of the original document. Moreover, the other three acts of constitutional standing provide for protection of rights and express Israel's raison d'etre and vision.

What is Lacking?

What then is lacking? Several elements: some form of popular ratification, greater entrenchment of the Basic Laws as constitutional laws (i.e., a more demanding process of adoption and amendment), and a sense on the part of the Israeli public that all of this adds up to a "real" constitution. Beyond that, there are those who are unhappy with the contents of Israel's present constitution -- who want a different electoral system, or presidential rather than parliamental government, or a bill of rights, or want a halakhic state. Whatever the reason, they find it convenient to dismiss what exists in the hopes of getting something more to their liking.

Consequently, in line with the implicit political theory under which the state operates, the Basic Laws that have been enacted have continued to be called "Basic Laws" and to be treated individually. They have never even been bound together, much less referred to as a "constitution."

The Jerusalem Center for Public Affairs undertook the first publication of the complete constitution of the State of Israel to date to make the citizens of Israel aware of the constitution they have. Only with that awareness can they judge whether it is adequate or not. No doubt some will be pleased with the product, others will see it and decide to seek incremental additional improvements, and still others will be more firmly convinced that drastic changes are needed. Whatever their opinion, reading and reviewing the constitution that exists is a prerequisite for any further steps in constitutional design they might care to take.

There seems to be widespread feeling that at the beginning of Israel's fifth decade a state-wide constitutional debate is in order. While a founding covenant should stand as long as the polity it serves, the social contract that gives the covenant practical meaning inevitably is renegotiated in every generation. In Jewish tradition, forty years is the outside limit of a generation. Moreover, we are already engaged in the renegotiation, like it or not. What remains is the opportunity to raise the deliberations surrounding that renegotiation to a proper level. That is what constitutionalism is all about.

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Daniel J. Elazar is President of the Jerusalem Center for Public Affairs. The Constitution of the State of Israel (61 pp.) is available from the Jerusalem Center in separate English and Hebrew versions for $3.00 each, plus $2.00 postage and handling.

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Footnotes

1. These themes are treated more extensively in Daniel J. Elazar, Israel: Building a New Society (Bloomington: Indiana University Press, 1986). On the Declaration of Independence, see Horace M. Kallen, Utopians at Bay (New York: Theodore Herzl Foundation, 1958). Kallen was the first to single out a number of the themes in the Declaration of Independence which deserve careful examination for what they say about the consensus upon which Israel is based and the definition of the state's vocation. He was the first to view the

Declaration as expressing Israel's turning away from "Europe's religio-cultural" tradition toward a restoration of an "authentic image of the people of Israel." His comparison of the Declaration with the Torah and the American Declaration of Independence is particularly useful for understanding the similarities and differences between the two new societies. For a history of the drafting of the Declaration and its impact, see Yigal Aricha, Megillat HaAtzmaot -- Chazon ve-Metziot (Declaration of Independence -- Vision and Reality), unpublished paper, Bar-Ilan University, 1983 (Hebrew). Today school children in Israel are beginning to study the Declaration from similar perspectives, as described in Aricha.

2. Keith G. Banting and Richard Simeon, eds., The Politics of Constitutional Change in Industrial Nations (Toronto and London: Macmillan, 1986); Ivo Duchacek, Power Maps (Santa Barbara, Calif.: A.B.C.-Clio, 1973); Carl J. Friedrich, "Constitutions and Constitutionalism" in David L. Sills, ed., International Encyclopedia of the Social Sciences (New York: Macmillan and Free Press, 1968), Vol. 3, pp 318-326; Carl J. Friedrich, Constitutional Government and Democracy (Boston: Ginn, 1950); Charles H. MacIlwain, Constitutionalism, Ancient and Modern (Ithaca, N.Y.: Cornell University Press, 1940); Kenneth L. Wheare, Modern Constitutions (London: Oxford University Press, 1951).

3. On the Torah as constitution and halakhah as constitutional law as they affect Israel, see Ervin Birnbaum, The Politics of Compromise: State and Religion in Israel (Rutherford, NJ: Farleigh Dickinson University Press, 1970); Menachem Elon, "The Sources and Nature of Jewish Law and Its Application in the State of Israel," Israel Law Review 3 (1968), pp. 88-126, 416-457; Y. Gershoni, "The Torah of Israel and the State," Tradition 12, 3-4 (1972), pp. 25-34; "Jewish Law in the State of Israel," in Proceedings of the Rabbinical Assembly 36 (1974); and Norman L. Zucker, The Coming Crisis in Israel (Cambridge, Mass.: MIT Press, 1973).

4. Cf. inter alia, Josephus Flavius, The Antiquities of the Jews.

5. Amnon Rubinstein, HaMishpat Hakonstitutionali shel Medinat Yisrael (The Constitutional Law of the State of Israel) (Jerusalem: Schocken, 1969, 2nd ed.) (Hebrew).

6. As quoted in S.N. Eisenstadt, Israeli Society, (New York: Basic Books, 1968).

7. S.Z. Abramov, Perpetual Dilemma: Jewish Religion in the Jewish State (Rutherford, NJ: Farleigh Dickinson University Press, 1976); Birnbaum, op. cit.; S. Ginossar. "Who Is a Jew; A Better Law? The Law of Return (Amendment No. 2) 1970," Israel Law Review 5 (1970), pp. 264-267; S. Rosenne, "The Israel Nationality Law 5712-1972 and the Law of Return 5710-1950," Journal du Droit International, Vol. 81 (1954), 5; Amnon Rubinstein, "Who's A Jew and Other Woes," Encounter (March 1971), pp. 84-93; M. Shava, "Comment on the Law of Return (Amendment No. 2) 5730-1970," Tel Aviv University Studies in Law (1977), 140; and Z. Terlo, "The Immigration Laws of Israel -- Some Future Problems," Public Administration in Israel and Abroad (1967), Vol. 7, p. 24.

8. The Foundations of Justice Act (1980). The phrase "the heritage of Israel" is a standard Hebrew expression for Jewish tradition.

9. For Religious Zionists, the Torah is perceived to have constitutional import and provides a larger constitutional grounding for the frame of government that is emerging out of the Israeli constitutional process. Since the Torah does not specify any particular regime, it is relatively easy for them to accept Israel's freedom in constitutional design on that level. Indeed, leading Religious Zionist rabbis such as Rabbi Amital hold that halakhically the laws of Israel are binding on its citizens even though not formally based on the Torah because they fall within the category of mishpat hamelukhah (literally: the law of the kingdom), a category that has existed parallel to the Torah since the days of the Prophet Samuel and King Saul 3,000 years ago. For a comprehensive analysis of mishpat hamelukhah, see Shimon Federbush, Mishpat Hamelukhah BeYisrael (Jerusalem: Mosad Harav Kook, 1952) (Hebrew).