

Israel's Constitutional Moment

Israel's first elections, in January 1949, were called to choose the members of a constituent assembly, whose sole aim was to draft a constitution. Yet the members of that body opted to transform themselves instead into a standing legislature, and to make do with a series of Basic Laws intended, at some future point, to form the basis for a constitution. As Prime Minister David Ben-Gurion, the architect of this decision, explained, "We don't have time for this matter now. We need to build houses for new immigrants. We can create a constitution when we have some breathing room." In his view, the citizens of Israel, making up less than 10 percent of the world's Jewish population, lacked the authority to determine for future generations the character of the Jewish state: "When the Jewish people will come to Israel, it will create for itself a constitution.... When there are five million Jews in Israel, they can break their heads on drafting a constitution."

In the 56 years since then, Israel has absorbed waves of immigrants, but has remained one of the world's two democracies (alongside Great Britain) lacking a written constitution. In July 2000, however—less than a year before Israel's Jewish population reached the five-million mark—the Jerusalem-based Israel Democracy Institute (IDI) launched the most ambitious effort in the country's history to draft a constitution. Under the chairmanship of former Supreme Court President Meir Shamgar, IDI established a Public Council—approximately 100 legislators, public figures, jurists, and scholars representing a range of social and ideological groups—whose aim

was to produce a “Constitution by Consensus.” After fewer than a dozen two-day sessions spread over three years, IDI’s Public Council handed the work over to an eight-member committee, chaired by Shamgar, and consisting entirely of IDI research fellows. Since February 2003, this smaller and far more homogeneous group has succeeded in hammering out a nearly complete text. In February of this year, this draft was formally presented to the Public Council, accompanied by a massive public-relations campaign. The next step, according to the IDI leadership, is to present a final version to the Knesset and ask that body to use it as the basis for creating the nation’s constitution.

People familiar with Israeli legal history might easily conclude that the IDI effort—like the 24 previous draft constitutions that have been prepared in the past by political parties, civic organizations, scholars, and rabbis—has little chance of passing the legislature. Such a dismissal would be wrong. IDI’s Public Council boasts an impressive and influential roster, including 22 current Knesset members and 18 former or current government ministers. More important, perhaps, is the fact that the IDI campaign dovetails with a major constitutional initiative on the part of the Knesset. Since May 2003, the Law, Constitution, and Justice Committee, which has the legal responsibility for developing a constitution, has undertaken the legislature’s first sustained effort in half a century to do so. Under the leadership of committee chairman Michael Eitan (Likud), committee members have held 55 working sessions and, according to Eitan, aim to complete a draft during 2005 and pass it on to the full plenum in advance of the next elections, scheduled for November 2006. Eitan’s goal is for the Knesset to debate, amend, and enact a constitution during the coming term.

Though there is no guarantee that Israel will adopt a constitution in the near future, the continuation of the status quo can no longer be taken for granted. And if a constitution does in fact pass, it will contain crucial provisions shaping the character and regime of the Jewish state for generations.

The questions must therefore be asked: Is a constitution good for Israel? Should IDI's "constitution by consensus" serve as its basis? And if not, what is the best way to develop and ratify a constitution that can provide a sound basis for a Jewish democracy?

The case for a constitution is as simple as it is powerful. Israel needs such a formative document in order to strengthen its democratic regime, which has been undermined by the growing inability of the nation's elected representatives to steer the country's course; and to preserve its character as the state of the Jewish people, which is being eroded by universalist and post-national ideologies that have made inroads in academia, the legal establishment, and the government bureaucracy.

Israel's democratic governance suffers from a growing imbalance of authority among its three branches. The Knesset, which is the repository of the popular will and is charged with translating the values and interests of the citizenry into laws, possesses virtually unlimited powers in theory; Israel is, after all, a parliamentary democracy in which the executive lacks veto power and must maintain the confidence of the legislature to govern. In practice, however, the Knesset is permanently hamstrung by an electoral system that features the world's purest version of proportional representation: Any party list that garners 2 percent or more of the vote earns seats in the 120-member legislature, in direct proportion to its share of the vote. This system, rather than creating a majority that can govern effectively, mirrors within the legislature all the key divisions in society, and gives an incentive for politicians to court the extremes in the hope of differentiating themselves from their competitors. In the January 2003 elections, for example, 14 separate lists earned seats; taken together, the two "major parties," Likud and Labor, won fewer than half the available mandates. This fractiousness, coupled with the fact that the most talented Knesset members are elevated to government ministries, means that the parliament is rarely capable of independent

action, especially with regard to the value-laden issues for which it bears primary responsibility.

The judiciary, on the other hand, has stepped into the void, and regularly makes decisions that by any conventional understanding of the division of powers should be reserved for the legislature. Supreme Court President Aharon Barak, who in 1992 declared a judicially-led “constitutional revolution,” is well known for proclaiming that “the whole world is filled with law” and that “everything is justiciable.” In keeping with this philosophy, the Supreme Court has involved itself in a series of value-laden controversies and issued rulings that flew in the face of legislative intent, such as criminalizing mild corporal punishment by parents, despite the fact that the Knesset had explicitly declined to take such a step when revising the criminal code; declaring “unconstitutional” the decades-old policy of Jewish settlement on land owned by the Jewish Agency, although the policy was grounded in legislation passed by the Knesset; and requiring the Interior Ministry to recognize the lesbian partner of a child’s mother as his second “mother,” even though Israeli law does not recognize homosexual marriages and stipulates that “adoption may be carried out only by a man and his wife together.” These and many similar decisions, which might well be reasonable were they made by a popularly elected legislature, constitute a clear flouting of the democratic spirit when they are enacted via rulings made by a handful of appointed judges.

What makes the court’s activism especially problematic is the unique Israeli system of judicial appointments, which functions without any effective democratic controls. The nine-member Judicial Appointments Committee is dominated by an unelected bloc consisting of the Supreme Court president, two of his court colleagues, and two representatives chosen by the National Bar Association. Together with the justice minister, who traditionally supports the position of the justices, this creates a working majority of six, and neutralizes the influence of the three elected officials who are supposed to reflect the public’s values. Supreme Court justices, in effect, choose their own successors, with the none-too-surprising result that the court’s

members over time have become ideologically homogeneous—and generally hold views that lean far more toward abstract universals than toward affirming the particularly Jewish character of the state. As such, the views of the court have become largely inconsistent with the values of most Israelis. (See Mordechai Haller, “The Court that Packed Itself,” *AZURE* 8, Autumn 1999.)

The executive branch, for its part, tends to wield too much power in its relations with the Knesset, and too little relative to the judiciary: A variety of ministerial bureaucracies make administrative decisions on profound questions of values, while the legislature lacks even the staff to carry out proper oversight, let alone the ability to step in and become involved in the decision-making process. In public education, for example, virtually all decisions—including radical changes in public-school curricula during the past decade—are made by appointed committees composed of academics whose views are often quite far from those of the parents, teachers, and students whose lives are directly affected by them. The result has been, again, a significant dilution of Jewish-national content in history, civics, and other classes that hold the key to shaping students’ understanding of the country in which they live.

On the other hand, the executive has become vulnerable to judicial encroachment in a range of areas, of which none has been more keenly felt than in security affairs. In the past year, for example, the Supreme Court delayed the building of Israel’s security fence on several occasions, and even ordered the government to change its route on the grounds that the elected officials and security experts who had mapped it out had not struck the correct balance between the need to protect Israeli citizens from an unprecedented wave of terror and the right of Palestinian farmers in the West Bank to work their land. In November 2004, the Supreme Court also asserted its authority to overturn the appointments of high-ranking IDF officers whose opinions concerning battlefield ethics contain blemishes that in the justices’ eyes render the appointment “unreasonable.” Though a three-judge panel decided after deliberating for ten weeks to uphold the promotion of Dan

Halutz to the position of deputy chief of staff—thus paving the way for his recent elevation to the IDF’s top post—the court explicitly claimed the right to overturn such decisions in the future.

The growing impotence of the Knesset, the body most representative of public sentiment; the acquisition of power by the Supreme Court, which is least representative; and the authority wielded by the government bureaucracy—all these amount to a creeping disenfranchisement of the Israeli electorate. The most striking result has been the rapid erosion of Israel’s character as the state of the Jewish people—despite the fact that most Israelis continue to support the state’s active role on behalf of Jewish national interests in areas such as education, land-use policy, and the role of the IDF.

Passing a constitution is the best means of strengthening Israel’s democratic regime, since the imbalance among the branches of government has had the effect of diluting the voter’s capacity to influence the most fundamental aspects of public life. Yet it is also a critical means of maintaining Israel’s character as the state of the Jewish people, by giving protected status to the most important principles on which this character is founded.

At first blush, the initiative of the Israel Democracy Institute—which is the only draft constitution currently under public consideration—ought, therefore, to be a welcome development. Yet a close reading of the text demonstrates that the IDI constitution, if it were adopted, would *weaken* Israeli democracy by exacerbating the very trends that have thrown it off course, and would almost certainly accelerate the process of eroding the Jewish national character of the state.

Perhaps most significantly, the IDI draft does nothing to address the prime cause of the Knesset’s weakness, the proportional electoral system that leads to perennial factionalization, and instead accords it constitutional protection by specifying that elections for the legislature will be “general, direct, equal, secret, and proportional, in accordance with the law.” Since future amendments will require the support of two-thirds of Knesset

members, adopting this clause now means giving up on Israel's last real chance to shift to a majority-producing system, such as the first-past-the-post "Westminster model" employed in Great Britain, in which legislative elections are held on a district basis, and candidates must secure a plurality of votes to gain a seat. Such a system tends to create two or three major parties, one of which typically secures enough seats to govern, and encourages moderation among political candidates, who must appeal to a broad swath of public opinion in order to win. The IDI constitution even precludes a more modest reform, such as adopting the German model, in which half the seats are chosen in district elections and the remainder by proportional representation.

At the same time, the IDI proposal would give full constitutional backing to the present system of judicial appointments, which virtually guarantees that the Supreme Court will remain unreflective of the values broadly held within society. Unlike Knesset elections, whose particulars are left to separate legislation, the appointment process for judges is set in the IDI constitution in very explicit terms: The selection committee, it says, "will consist of nine members, who shall be the president of the Supreme Court, two other justices of the Supreme Court who shall be chosen by their judicial colleagues, the justice minister and an additional minister determined by the government, two Knesset members chosen by the Knesset, and two representatives of the bar association, who shall be chosen by the national council of the bar association."

Moreover, instead of curbing the appetite of an activist judiciary, the IDI proposes to increase the court's strength in a number of crucial ways. When the executive branch chooses to establish a national commission of inquiry to examine political, diplomatic, or security failings, *all* members of the commission will be appointed by the president of the Supreme Court. Similarly, the court system, which today is administered by the justice minister, is to be placed under the joint authority of the justice minister and the Supreme Court president. The granting of pardons, which is traditionally a matter reserved for heads of state, and which in Israel falls within the

exclusive purview of the nation's president, would be circumscribed: The IDI constitution specifies that the president could exercise this authority only after "consulting with a special committee, which shall be headed by a former Supreme Court justice." Most tellingly, the IDI draft explicitly grants the high court wide-ranging powers of judicial review, declaring that "The Supreme Court, and it alone... is authorized to determine if a law is invalid because it is unconstitutional.... If the Supreme Court [so] determined, it is authorized to give any order or form of redress that it deems appropriate in light of the circumstances of the case."

The IDI draft is slightly better in its treatment of Israel's Jewish character, as it accords constitutional protection to a few key elements of the Zionist tradition: The Law of Return granting Jews around the world the right to immigrate to Israel and become citizens; Jerusalem's status as the capital of Israel; Hebrew as the state's official language; the Sabbath and Jewish holidays as national days of rest; "Hatikva" as the national anthem; and an azure-colored Star of David and parallel stripes against a white background as the national flag.

At the same time, however, the IDI draft proposes the effective severing of the essential connection between the Jewish people and the State of Israel. Unlike Israel's Declaration of Independence, as well as virtually all the draft constitutions previously submitted for the Knesset's consideration, the IDI draft does not describe Israel as the state or the national home of the Jewish people. It does not mention the connection between the Diaspora and the State of Israel, nor does it accord the state any role in furthering connections with Jews outside Israel by means such as fostering *aliya*, promoting Jewish education, or encouraging the study of Hebrew. Within Israel, as well, there is no mention of Jewish or Zionist education. Instead, the draft constitution declares that "The state shall ensure the preservation and development of the historic and cultural heritage of the land and its inhabitants." Such a formulation, if taken seriously, gives no precedence to Jewish history and culture over that of Canaanite, Roman, Crusader, Ottoman, and Arab civilizations.

The Israeli army, which was founded not only to protect the state and its citizens, but also to defend the interests of the Jewish people—as it did, for example, in airlifting the Jews of Ethiopia in the 1980s—is likewise given a redefined role in the IDI draft. The army is responsible, according to the opening section on its goals, “for the security and defense of the state, and the defense of its citizens, its residents, and those who enter its gates fleeing an enemy.” If buttressed by an explicit government decision, the IDF may also take actions outside Israel’s borders if their immediate effect is to save lives or grapple with the effects of natural disasters. Yet the constitution does not permit the army’s use for offering assistance to Jewish communities abroad. Instead, it strangely notes that a separate law *could* be passed that would authorize the army “to act for the achievement of essential national-governmental goals.” But even this would be permissible “only with the consent of those carrying out these activities.” Helping distressed Jewry would, in other words, be transformed from a central purpose of the state and its armed forces to a matter for voluntarism alone.

Another aspect of the Zionist tradition left out of the IDI constitution is “Jewish settlement,” or any similar formulation that would legitimize the century-old policy of shaping the demographic balance in key border areas. There is no doubt, of course, that equality must be a core principle of any democracy. Yet for the IDI constitution it becomes the pinnacle of Israel’s values, starting in the first article of the first section, “Fundamentals,” which defines the country’s name as “Israel,” describes it as “a Jewish and democratic state,” and declares that “The regime of the state is parliamentary democracy, which is based on equality of all its citizens.” No other core principle is included in this opening section, giving equality a status privileged above that of life, liberty, human dignity, and majority rule, to name just a few other elements of democracy. In the second section of the constitution, “Fundamental Rights of Man,” which sets forth the basic rights to be enjoyed by individuals and groups in Israel, equality is given an especially broad definition. Article 4 states that: “Everyone is equal before the law; one cannot discriminate between one man and another on the basis of

race, religion, nationality, gender, community, land of origin, or any other reason, as long as that reason is not relevant to the matter.” This right, and the concomitant prohibition on discrimination of any kind, is declared in absolute terms.

There is a counterbalancing provision in article 22 of that section, but it is too weak to act as an effective guarantor of other equally important values. It states nebulously that “One cannot infringe on any of the rights in this constitution except by means of a law that befits the values of the State of Israel, that is intended for a worthy purpose, and to the extent that is necessary....” Since the values of the State of Israel, as set out in the IDI draft, most emphatically include equality and do not include the traditional understanding of the Jewish character of the state, it is difficult to imagine that a Supreme Court called upon to judge the constitutionality of a law allowing Jewish settlement, for example, would find it valid. Given that the court’s future members would be appointed not by a body of elected officials, but by the current members and their successors, there is little doubt that such a clause effectively would ban any concerted effort to create Jewish communities in the Negev, the Galilee, or other border areas.

If a constitution is crucial for strengthening Israel, but the principal draft being trumpeted today will only make matters worse, what should be done by Israeli citizens and by Jews concerned about the character of the Jewish national home?

The ideal would be for the Knesset to call for the election of a broad-based constituent assembly, whose members would have the responsibility of drafting a constitution, which would ultimately be sent to the people for ratification by means of a referendum. The participants in such a constituent assembly, unlike today’s Knesset members, would not be beholden to the current electoral system for their positions, and therefore would be freer

to make the far-reaching changes that are needed. Within such a body, the representatives of the various ideological and social groups could freely debate and reach compromises that would reflect the values of the mainstream of the Israeli populace—that is, of those who genuinely want Israel to be a Jewish state governed in accordance with democratic principles. Opponents of such a constitution, who might well include the representatives of the Arab-Israeli sector and the more extreme elements of the Haredi community, would not be given veto power, but would instead need to understand that a constitution would be passed in any event, and that they are better off being a part of this process and securing the gains they can, rather than opposing it from the outside.

Indeed, Israel is unlikely to get a “constitution by consensus,” as IDI puts it, but rather something much more akin to what MK Michael Eitan calls a “constitution by broad agreement.” This is, in essence, parallel to the process which guided the drafting and ratification of the United States Constitution, in which the emergent mainstream that met in Philadelphia in 1787 developed a proposal for a federal system among the thirteen former colonies, which only subsequently was accepted by radical advocates of states’ rights and equally radical proponents of a complete merger of the states.

If, however, the Knesset Constitution Committee insists on doing the drafting itself, as Eitan has indicated it will, then its members must rise to the level of national responsibility they are taking upon themselves, and give serious consideration to the kinds of sweeping reforms that are needed. In taking on this responsibility, they would do well to reject the IDI draft as the basis for their own version. The problem with the IDI constitution is not this or that phrase, but the basic conception, and it would be a mistake to treat this document as the starting point for a genuine “constitution by consensus.” Instead, the Knesset must effectively start from scratch, guided by a desire to bring about broad agreement on a course that will strengthen Israel as a Jewish state and a democracy.

Israel needs a constitution, and the nation's future might well depend on whether such a document is passed and ratified in the coming years. With the proper mindset, the nation's political leadership, together with an active citizenry, could bring about such a constitution. When this comes about, the future of the Jewish state will be far more secure, and the country will be positioned for the challenges ahead.

Daniel Polisar
March 15, 2005
