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ISRAEL'S CONSTITUTIONAL TRAGEDY

Menachem Lorberbaum * **

Sanford Levinson's dithering between constitutional faith and lack thereof is on target with regard to the promise extended by a written constitution. My comments will not touch upon the mechanics of the American constitutional system that he has so masterfully analyzed. Rather, I will respond to the question of Israel, mentioned but not developed in Levinson's essay. Constitutional theorists have at least enough faith to maintain the proposition that a written constitution is better than none at all;¹ and Israel, it would seem, serves as a proverbial example of the failure to embrace one.² However, the case of Israel deserves a closer examination. In fact, I will argue it is the attempt to foist the constitutional machinery of judicial review upon the legal and political system in Israel that can serve as an example of a lack of dexterity in constitutional politics.

In 1948, the newly founded State of Israel adopted the outgoing British Mandatory Law as the law of the land, basic to its own legal system.³ Although this structure lacks a single constitutional document, it has developed, in time, a body of Basic

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** The footnotes provided are editorial additions included by the *Touro Law Review* and do not constitute the original work of the author.

¹ Patricia J. Woods, *The Ideational Foundations of Israel's "Constitutional Revolution,"* 62 *POL. RES. Q.* 811, 816 (2009).

² SAMUEL SAGER, *THE PARLIAMENTARY SYSTEM OF ISRAEL* 34 (1985).

³ SUZIE NAVOT, *CONSTITUTIONAL LAW OF ISRAEL* 21 (Kluwer Law Int'l. 2007) (2007).

Laws and a robust tradition of court rulings on constitutional issues.⁴ With regard to its political structure, Israel's parliamentary system is a proportional one that is designed to be inclusive.⁵ However, due to a threshold that is too low, the Knesset has often been plagued by political fragmentation.⁶ The particular division of powers in the Israeli polity has thus led to legal strictures (e.g., Basic Laws and court precedents) on the one hand, and pragmatic principles (e.g., the infamous "Status Quo" on religion and state) enabling coalition forming and governmental stability on the other.⁷ Over the past few decades, the two prongs of the system have balanced each other in the overall public character of the polity.⁸

The two important axes that inform constitutional strife in Israel are:

- (1) The relation between the Jewish majority and Palestinian minority.⁹ This axis has been further acerbated since the de facto inclusion of the territories occupied in 1967 in the life of the Israeli polity.¹⁰ Of the entire Palestinian population under Israeli rule, only a portion of these Palestinians are citizens of Israel.¹¹
- (2) The relation between the secular majority and religious minority within the Jewish population.¹²

In their pull and push, these two axes define the fundamental challenge of Israeli constitutional work.¹³ A constitution seeking to

⁴ *Id.* at 35.

⁵ See SAGER, *supra* note 2, at 45 (describing Israel's proportional system).

⁶ See Marcia R. Gelpe, *Planned Constitution Never Got Written, But Israel Still Got Constitutional Law*, WM. MITCHELL MAG., Spring 1995, at 24, abstract available at <http://open.wmitchell.edu/facsch/108> (discussing the presence of "many actively participating parties").

⁷ *Id.*; Kenneth D. Wald & Samuel Shye, *Interreligious Conflict in Israel: The Group Basis of Conflicting Visions*, 16 POL. BEHAV. 157, 159 (1994).

⁸ See Gelpe, *supra* note 6; Wald & Shye, *supra* note 7 (discussing both aspects of the legal system).

⁹ Nadim Rouhana, *Israel and Its Arab Citizens: Predicaments in the Relationship Between Ethnic States and Ethnonational Minorities*, 19 THIRD WORLD Q. 277, 281 (1998).

¹⁰ Ruth Lapidot, *Jerusalem: The Legal and Political Background*, JUSTICE, Autumn 1994, at 10, available at <http://www.intjewishlawyers.org/main/files/Justice%20No.3%20Autumn1994.pdf>.

¹¹ Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432, 435 (1992).

¹² Wald & Shye, *supra* note 7, at 160.

¹³ Gelpe, *supra* note 6, at 23-24.

be inclusive of the Arab minorities would be seen to downplay the role of Jewish cultural and national hegemony in the constitution.¹⁴ Inclusivity among the Jewish population between its secular and religious groups may seek to thicken their common Jewish values, which could further alienate non-Jewish components from civil society.¹⁵

In terms of their substantive values, both Arab and Orthodox Jewish citizens may share a suspicion or questioning of the legitimacy of secular nation-state sovereignty.¹⁶ But, in terms of parliamentary coalition-making, their status has been dramatically different; Arab parties (though not Arab members of the Knesset) have almost always remained in the opposition.¹⁷ The Arab citizens, though a significant ethnic and cultural minority, have still never been able to transcend this fact politically as a partner in government.¹⁸ On the other hand, Jewish religious—Orthodox—parties have for the most part preferred to join the coalition, whatever principled reservations they may have about the secular Zionist enterprise.¹⁹ In fact, the Orthodox parties have often been the tiebreakers in the system.²⁰ Therefore, the Israeli parliamentary system has yielded a tradition of government whereby the Arab population has never succeeded in translating its numbers into governmental power, while the Jewish Orthodox parties have been advantaged in it.²¹ Cast in liberal terms we can say that the Israeli system has encouraged a curious mixture of tyranny by the Jewish majority with regard to certain civil rights of the Arab minority as well as tyranny by the Orthodox minority vis-à-vis the larger secular Jewish populace (especially with regard to personal status and marriage, which is overseen by the Orthodox state rabbinate since

¹⁴ See Wald & Shye, *supra* note 7, at 159-60 (discussing the conflicting views regarding the implementation of Jewish law on the state).

¹⁵ Nadim Rouhana & Asad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. OF MIDDLE E. STUD. 321, 323 (1998).

¹⁶ *Id.* at 328.

¹⁷ See, e.g., Martin Edelman, *The New Israeli Constitution*, 36 MIDDLE E. STUD. 1, 8 (2000).

¹⁸ Rouhana & Ghanem, *supra* note 15, at 328-29.

¹⁹ Edelman, *supra* note 17, at 3-4.

²⁰ *Id.* at 10.

²¹ See, e.g., Rouhana & Ghanem, *supra* note 15, at 323 (discussing the purported lack of equality resulting from the proportional system).

there is no civil marriage in Israel).²²

These characteristics of Israeli polity set the stage for its unique constitutional politics. The role of the Supreme Court in such a political system has traditionally been to serve as the arbitrator by representing the overlapping consensus among the various elements of civil society.²³ The court here does not give voice to the foundational moment; instead, it is a voice of equity and fairness.²⁴ Rather than dictate a revelatory moment of constitutional decisiveness in legal space, it lends guidance in a highly politicized agora.²⁵

In 1992, the Knesset passed the important Basic Law: Human Dignity and Freedom.²⁶ Chief Justice Aharon Barak declared this event a “Constitutional Revolution” and then proceeded to argue that judicial review is analytically implied by the very concept of a “Basic” law.²⁷ Barak’s opponents argued that the hard-earned parliamentary consensus enabling this legislation would actually be used by a bench typified by liberal judicial activism to undo the particular cultural and religious character of the Jewish public space of Israeli society.²⁸ In terms of the politics of constitutional law in Israel, Barak’s self-proclaimed revolution seemed to have played into the hands of his opposition.²⁹

The attempt to utilize the Basic Laws to found an American style practice of legal supremacy came at the expense of marking the court as a side in the agora.³⁰ Barak’s liberal activist rhetoric rendered the court no longer eligible to serve in its traditional role as supreme arbitrator.³¹ In 2000, the *intifada* undermined the court’s role when most needed to help heal the fracturing of the polity’s

²² See, e.g., *id.*; Edelman, *supra* note 17, at 18-19.

²³ Edelman, *supra* note 17, at 10.

²⁴ *Id.* at 12.

²⁵ *Id.* at 10-12.

²⁶ *Id.* at 15.

²⁷ *Id.* at 16-17 (quoting Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISRAEL L. REV. 3, 3-4 (1997)).

²⁸ Edelman, *supra* note 17, at 19-20.

²⁹ *Id.* at 13.

³⁰ See Emily Bazelon, *Let There Be Law*, LEGAL AFF. (May/June 2002), http://legalaffairs.org/issues/May-June-2002/feature_bazelon_mayjun2002.msp.

³¹ See Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245, 1249 (1969) (identifying the Knesset as “the state’s supreme legal body”).

legitimacy.³²

The state of Israel's most serious problem is the weakness of its political will due to its fractured coalitional politics.³³ The ongoing "tyranny of the [Orthodox] minority" including its disproportional access to goods in terms of distributive justice (e.g., draft exemption and institutional funding) and its dramatic turn to nationalist, and at times markedly racist, sentiments has contributed dramatically to an erosion of Israel's civil society.³⁴ Until this past Knesset, the only serious infringement of personal rights in Israeli law was that of mandated religious marriage and that could easily be amended by legislation enabling civil marriage.³⁵ However, this significant minority has no interest in the liberal constitutional insurance of its right because the Knesset has proven the best purveyor of its privileges.³⁶ The coalition between racist nationalism and Orthodoxy is the powerful drive of the present day Israeli right and has resulted in a flood of legislative initiatives strengthening nationalist indoctrination and curtailing freedom of speech.³⁷ On the other hand, it is plausibly arguable that Barak's judicial activism, acting as though there was a constitution when there was none, undid the crucial role of the court in a polity founded on a significant overlapping consensus.³⁸ Tragically in its wake, we have witnessed the emergence of anti-liberal and racist legislation in the heart of the right's agenda in Israel and not only or even primarily the religious right.³⁹ The old issue of the status of *halakhah* in secular Israel has

³² Jonathan Cook, *The Myth of Israel's Liberal Supreme Court Exposed*, MIDDLE E. RES. AND INFO. PROJECT (Feb. 23, 2012), <http://www.merip.org/mero/mero022312>.

³³ Steven Plaut, *The Supreme Need to Fix the Israeli Supreme Court*, ISRAPUNDIT (Jan. 5, 2012), <http://www.israpundit.com/archives/42611>.

³⁴ See Joshua Mitnick, *Israel's Unity Government: A Bid to Represent the Majority*, THE CHRISTIAN SCI. MONITOR (May 9, 2012), <http://www.csmonitor.com/World/Middle-East/2012/0509/Israel-s-unity-government-a-bid-to-represent-the-majority> (discussing the issues created by proportional representation); see also Bazelon, *supra* note 30 (exemplifying the tension between Orthodox and democratic principles in several court rulings).

³⁵ Raanan Ben-Zur, *Aharon Barak: Don't Leave Marriage in Hands of Religious*, YNETNEWS.COM (May 14, 2008), <http://www.ynetnews.com/articles/0,7340,L-3542718,00.html>.

³⁶ Cf. Danny Danon, *Democracy Is Alive and Kicking in the Knesset*, THE JERUSALEM POST (Feb. 9, 2012), <http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=257243>.

³⁷ Bazelon, *supra* note 30.

³⁸ See Woods, *supra* note 1, at 811 (discussing Barak's view that "every issue—including the political—is justiciable").

³⁹ See, e.g., Donald Macintyre, *'Racist' Marriage Law Upheld by Israel*, COMMON DREAMS (May 15, 2006), <http://www.commondreams.org/headlines06/0515-05.htm>.

given place to a much more pernicious undertaking of unraveling its civil society.⁴⁰ The neo-con Likud Party is very weak in its face and there is no longer a supreme court to act as a break.⁴¹

Still, we recently have witnessed the court striking down the law addressing the exemption of ultra-Orthodox students from military service as unconstitutional.⁴² This might point to a reassertion of the court's stature as supreme legal interpreter, even if no longer moral arbitrator, of Israeli civil society.

⁴⁰ See Albert, *supra* note 31, at 1261 (“[T]he short term prospects for broad invocation of Hebrew law as a source of constitutional principle are probably dim.”).

⁴¹ Mitnick, *supra* note 34; Cook, *supra* note 32.

⁴² Bill Steiden, *Around the World*, THE ATLANTA J. CONST., July 8, 2012, at 12A 2012 WLNR 14207207.