

Collective Rights and Reconciliation in the Constitutional Process: The Case of Israel

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Mr. Altschuler was a secular Jew who lived in Tel Aviv during the British Mandate. The Tel Aviv Municipality fined him for opening his restaurant on the Sabbath. He appealed to the Mandatory court against the fine and asked for the cancellation of the Tel Aviv Ordinance relating to working on the Sabbath. Following his action, Tel Aviv officials, most of whom were secular, raised an outcry against Mr. Altschuler, claiming that he had harmed the cultural autonomy of Tel Aviv and the national uniqueness of the "*Yishuv*," the pre-state Jewish settlement.²

The officials' response was similar to the political behavior of religious, national, and cultural minorities who seek to emphasize their difference and preserve their uniqueness in order to ensure recognition of their collective rights. Indeed, in pursuit of the protection of minority rights of this kind, many democratic states have recognized the right of these minorities to manage their internal cultural affairs without interference from the courts, even where their cultural autonomy infringes individual rights.

In *Kestenbaum*, a case dating from 1992, the Supreme Court stated that self-autonomy is a constitutional right, which must be protected from attempts to impose duties in the name of the *religious and national unity* of Israeli Jews. The Court required the Burial Society, the religious company responsible for burying every Jew in the country, to grant the request of the Kestenbaum family to engrave the name of their deceased son in Roman letters on his tombstone, rather than only in Hebrew, and the date of his death according to the Gregorian calendar, rather than the Hebrew calendar. The decision drew much academic attention because it marked a turning point in the transition from the era of collectivism to the era of individual liberties.³

The so-called "Constitution by Consensus" now proposed by the Israel Democracy Institute (IDI) states that, "The Hebrew calendar is the official calendar of the State of Israel." One could say that enshrining the Hebrew date in the constitution is of marginal importance and is purely symbolic. This is not true. The strength and force of the act is precisely in its symbolic character, which is also reflected in other provisions of the document that emphatically assert ethnic-religious values. For example, the Supreme Court has reversed and altered decisions of rabbinical courts in personal status law cases in order to protect the rights of women and the liberties of the individual. Under the Constitution by Consensus, such intervention in these matters would be limited and narrow in scope, as they involve subjects that are "not constitutionally justiciable," such as "joining a religion, belonging to a religion, or leaving it; the Jewish character of the Sabbath and Jewish festivals in public; and maintaining *kashrut* [ritual cleanliness] in state institutions."

This collectivist obsession also affected the wording of many other clauses of the IDI's proposed constitution. For example, rather than state, consistent with the form commonly used in the constitutions of other countries, that "Hebrew is the official language of the State of Israel," it states, unprofessionally, and driven by a strong desire to strengthen the ethnic underpinnings of the state, that "Hebrew is *the language of the State*." This is but one example among many.⁴

¹ Attorney and General Director, Adalah – The Legal Center for Arab Minority Rights in Israel. This article first appeared, in a different form, in the magazine of the Israel Bar Association – Jerusalem District: 71 *Lishka* 13 (April 2005) (Hebrew).

² Ronen Shamir, "Lex Moriendi: On the Death of Israeli Law," in M. Mautner, A. Sagi, R. Shamir (eds.), *Multiculturalism in the Democratic and Jewish State* (Tel Aviv: Ramot, 1998) 589, pp. 600-601 (Hebrew).

³ Civ. App. 294/91, *Jerusalem Community Jewish Burial Society v. Kestenbaum*, *Piskei Din* 46 (2) 464.

⁴ See the website of the Israeli Democracy Institute, <http://www.idi.org.il> (accessed in January 2005).

The rhetoric of the Altschuler era, which characterized the Jewish minority and the politics of 1948, dominates the Constitution by Consensus. The proposed constitution asserts that the constitution's preamble will be the entirety of the Declaration of Independence of the State of Israel. As we know, the preambles of constitutions set forth the fundamental beliefs of citizens of the state, and thus have educational value and unite the entire citizenry. In addition, the preamble plays a legal role in that it outlines the principal aims of the constitution. In this way, it provides a binding interpretation of the constitution's provisions, and, in some countries, also constitutes an independent source of rights.⁵

As a preamble, the contents of Israel's Declaration of Independence is extremely anachronistic in comparison with the preambles of constitutions that have been adopted elsewhere over the past two decades. Firstly, these preambles are based on a rhetoric of human rights, while the Declaration of Independence of Israel, with the exception of three paragraphs of a universal nature, is extremely ethnic and particularistic. The words "democratic state," "human rights," and "human dignity and liberty" do not appear. Secondly, unlike the preambles of democratic states, which speak on behalf of all citizens or on behalf of the nation, the Israeli Declaration of Independence speaks in the name of representatives of the Jewish people, along with the Zionist movement and all of its bodies and agencies – that is, entities such as the Jewish National Fund and the Jewish Agency, which publicly declare before the courts that they are allowed to discriminate against non-Jews.⁶ Thirdly, the Declaration of Independence states that the history, culture, and collective memory recognized by Israel are those of the Jewish people alone. Thus, it excludes all Arab inhabitants *present* in the country and renders them *absentees* lacking full citizenship rights. In doing so it presents them, at most, as immigrants rather than as an indigenous, native people.⁷

The principle of exclusion inherent in the Declaration of Independence had a major effect on provisions of the Constitution by Consensus. It follows logically, therefore, that its provisions stipulate that Arab citizens are entitled, at most, to civil rights, such as those to which immigrants are entitled. Just as immigrants must accept the "language of the state" which is hosting them and abandon the identity and culture which they willingly left in their homeland,

⁵ Amnon Rubinstein and Liav Orgad, "The Preamble to the Constitution and its Legal Status: The Case of Israel (forthcoming in *HaMishpat*, July 2005) (Hebrew); Jeremy Webber, "Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform," 21 *Sydney Law Review* 260 (1999); Eric M. Axler, "Note: The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights," 24 *Seton Hall Legislative Journal* 431 (2000); Gilbert Paul Carrasco and Congressman Peter W. Rodino, "Unalienable Rights: The Preamble and the Ninth Amendment: The Spirit of the Constitution," 20 *Seton Hall Law Review* 498 (1990).

⁶ Will the interpretation of the preamble lead, in the future, to a legal decision that these bodies may continue to be decision-makers in national institutions, such as the Israel Lands Administration? In any event, this issue will be raised by Adalah before the Supreme Court of Israel in the future.

⁷ The famous Mabo case in Australia in 1992, which recognized the rights of indigenous people on their land started a very deep debate in Australia regarding changes to the preamble of the Australian constitution, since it does not recognize the rights of the aboriginal and indigenous peoples. See Mark McKenna, "First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution," Parliament of Australia Research Paper, 2000; A. Rubinstein and L. Orgad rightly assign great importance to the preamble of the constitution as an educational tool that affects the state's legal norms. They object to including the entire text of the Declaration of Independence as a preamble to the constitution because, *inter alia*, it is particularistic and the "we" in it is Jewish, and it is signed only by Jews. However, they argue that it is important to base the preamble on the Declaration for historical, legal, social, and pragmatic reasons. Therefore, they suggest that the principles found in the Declaration of Independence be adopted as a preamble to the constitution of the State of Israel, relying on the text of the opening clauses of the two basic laws that deal with Human Dignity and Liberty, and Freedom of Occupation. Whilst, based on this proposal, the exclusion of Palestinian Arab citizens will be eased, it will not disappear. In addition, this proposal will not guarantee against a negative legal impact upon their collective rights, based on the Declaration of Independence.

so, too, must Arab citizens accept that Hebrew is the language of the state.⁸ In this context, the Constitution by Consensus states that Arabic will no longer be an official language of the state, but will have a "recognized status," i.e., a non-binding status, and, at most, the status of a working language. It should be mentioned that Arabic is an official language of the State of Israel pursuant to Section 82 of the Palestine Order-in-Council (1922), which preserved the *status quo* from the Mandate period. In reality, however, governmental authorities have not respected this provision.⁹

The current legal rhetoric regarding the rights of Arab citizens, despite its defects, is preferable to the Constitution by Consensus. The Or Commission, for example, stated that, "The Arab minority in Israel is an indigenous group ... there is a distinction in the professional literature between indigenous minorities and immigrant minorities, and the Arab minority definitely belongs to the first category ... this distinction, between an indigenous minority and an immigrant majority, has the potential to increase tensions ... the Arab minority became a minority only in our times."¹⁰ In *Adalah, et. al. v. The Municipalities of Tel Aviv-Jaffa, et. al.*, Supreme Court Chief Justice Aharon Barak draws a distinction between the status of the Arabic language, and other languages besides Hebrew, stating that, "The status of the Arabic languages is unlike the status of other languages. The distinguishing features of the Arabic language are twofold. Firstly, the Arabic language is the language of a large national minority in Israel, which has lived in Israel for generations. This language is one of its [the Arab minority's] historical, cultural and religious characteristics."¹¹

A similar exclusion of an indigenous people appeared in the preamble to the Macedonian constitution that was enacted in 1991. Following the persistent struggle of the Albanian minority (an indigenous people), and with the intervention of the European Union, the preamble was altered in 2001 to include a statement that Macedonia is a state of all its national and ethnic groups.¹² It should be noted that, in negotiating the constitution, the parties operated under the assumption that the Albanian minority in the country constituted around 20-25 percent of the population.¹³

In 1991, the preamble of the Macedonian constitution stated that:

Macedonia is established as a national state of the Macedonian people, in which full equality is provided for Albanians, Turks, Vlachs, Romanies and other nationalities living in the Republic of Macedonia.

The Albanian minority opposed this clause, contending that it left it with a second-class status, and waged an armed campaign with the goal of changing the identity of the state.¹⁴ After the

⁸ For a discussion on the status of Arab citizens, see Hassan Jabareen, "The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place With No Palestinian Memory," 6(1) *Mishpat Umimshal* 53 (July 2001) (Hebrew), and revised version in Daniel Levy and Yfaat Weiss (eds.), *Challenging Ethnic Citizenship* (New York: Berghahn Books, 2002), pp. 196-220.

⁹ On the status of Arabic, see Ilan Saban and Muhammad Amara, "The Status of Arabic in Israel: Law, Reality, and Reflections on the Power of Law to Produce Social Change," in Majid Al-Haj and Assad Ghanem, (eds.), *Arabs in Israel: National and Civil Dilemmas* (Haifa: University of Haifa, 2004), p. 885 (Hebrew).

¹⁰ Official Commission of Inquiry into the Clashes Between the Security Forces and Israeli Citizens in October 2000, Volume A (September 2003), pp. 26-27.

¹¹ H.C. 4112/99, *Adalah, et. al. v. The Municipalities of Tel Aviv-Jaffa, et. al.*, *Takdin Elyon* 2002 (2) 603, paragraph 25 of Barak's decision; see also I. Saban and M. Amareh, p.900.

¹² Vladimir Jovanovski and Lirim Dulovi, "A New Battlefield: The Struggle to Ratify the Ohrid Agreement," in The Institute of War and Peace Reporting, *Ohrid & Beyond* (2002); see also "Constitutional Watch", in 10(1) and 10(4) *East European Constitutional Review* (2001), a publication of New York University School of Law and the Central European University; and A. Rubenstein and L. Orgad, Chapter C.

¹³ The Arab minority in Israel comprises a similar proportion, approximately 20 percent, of the population of the country.

¹⁴ The President of the Albanian Democratic Party, Arben Xhaferi, said, "To whom does the state belong? Macedonians want to create the state as their own ethnic property ... against the will of the Albanian minority. Since then we have had permanent...conflict over the concept of the state. But the

intervention of the European Union, the Ohrid Agreement was signed on 13 August 2001. This document called for a preamble which makes no mention of ethnic nationalities, and states that Macedonia is a state of its citizens.¹⁵ However, the Macedonian nationalists and the Macedonian church objected, and organized a human chain around the parliament to prevent approval of the proposed amendment. Some Albanians also opposed the wording of the provision, and demanded a direct reference to the Albanian people, and not simply a mention of them as a national minority. Following this bitter conflict, Mr. Javier Solana, who represented the European Union, proposed an alternative wording, which related to all ethnic groups in Macedonia, with the term "people" being given to each group, and with the Albanians being referred to as "citizens ... who are part of the Albanian people." On 16 November 2001, a large majority of the parliament voted for the preamble, which states as follows:

The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romany people, the Bosniac people and others...have decided to establish the Republic of Macedonia as an independent, sovereign state ...

One of the primary functions of constitutions in liberal democracies is to safeguard the rights of minorities. However, when the Constitution by Consensus inverts this norm and treats the national majority in the State of Israel as a national minority, it clearly leaves no room for the protection of the rights of the Arab minority. According to the Constitution by Consensus, the same rules apply to Jews as to a national minority, since, to protect their cultural autonomy, provisions must be added which provide for special rights that will preserve the cultural structure of the "Jewish minority" against assimilation or disintegration.

It is the national minority, and not the dominant majority, which needs the recognition of collective rights in order to ensure for its members a sense of cultural belonging which can flourish. Impairment of the minority's cultural structure will lead to disintegration of the liberties of its members, a process which inevitably ensues from the inherent connection between the liberties of the individual and his culture. This is not the case when a dominant national majority is involved, in that cultural membership is guaranteed to the members of the national majority due to the dominance of its language.¹⁶ It is not accidental, then, that international law deals with rights of the minority, and not with the rights of the majority. Thus, any further legislation intended to strengthen the ethnic identity of the dominant majority breaches the principle of equality between the various groups on the one hand, and impairs the personal autonomy of individual members of the majority group, as occurred in *Kestenbaum*, on the other hand.

This is not to say that the national majority does not enjoy any collective rights. Rather, any preference that exceeds the legitimate objective of exercising self-determination is problematic, since it leads to unlawful discrimination based on group membership, and injures the autonomy of the individual. Self-determination of peoples in liberal democracies is reflected in the recognition of their language as an official language. Such recognition automatically ensures cultural rights. The "Frenchness" of French men and women is expressed in French being the official language, and not by the granting of additional preferences based on ethnic identity. The same is true for Americans, and English men and women, for example. I further argue that the state can, and in some cases must, realize the self-determination of more than one national

concept of the state – the constitution of the state – is incompatible with multi-ethnic reality. So the question now is whether we change reality through ethnic cleansing or [change] the concept of the state?" Institute for War and Peace Reporting, "An Optimist in Panic: Interview with Arben Xhaferi," 6 April 2001.

¹⁵ The proposed text of the preamble stated that, "The citizens of the Republic of Macedonia...have decided to establish the Republic of Macedonia as an independent, sovereign state ..."

¹⁶ Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995). See also, Dr. Amal Jamal, "On the Morality of Arab Collective Rights in Israel," 12 *Adalah's Newsletter* (April 2005).

group. It is not a valid argument, for example, that in Canada English speakers do not enjoy self-determination because Canada also grants self-determination to French speakers.

The self-determination of the Jewish people in the State of Israel is expressed by Hebrew being designated as the official language of the state. In addition, because of the special connection between the Jewish religion and the Jewish nation, ensuring autonomy to Jewish religious communities in Israel is a legitimate part of the self-determination of Jewish citizens. Those two factors alone lead to the fact that Israel is the only state in the world with a Hebrew-Jewish name, and is the sole state in the world that uses, fulfills, expresses, and ensures that the Hebrew language, Hebrew culture, and Jewish religion develop and thrive.¹⁷

Therefore, the granting of excessive rights to the dominant group that go beyond language – to which are added, in the Jewish case or one like it, religious autonomy – is a matter of discrimination and not self-determination. This is particularly true when other ethno-national groups live in the state and have the same right to self-determination¹⁸.

The recent experience of the Hungarian people on the subject of immigration and citizenship provides a good illustration of this issue. On 5 December 2004 in Hungary, a country without a liberal tradition, a referendum proposing the granting of citizenship to ethnic Hungarians living outside Hungary was rejected.¹⁹ Nationalist Hungarians, who voted in favor of the referendum, argued that close to five million persons of Hungarian descent were living in countries bordering Hungary owing to historic injustices that resulted from the borders established after the First World War, and that they continue to suffer from discrimination there. Therefore, they argued, the proposal was intended to rectify the historic injustices inflicted upon the Hungarian people, and reflected the obligation of Hungary to reunify its people. The ruling liberal-socialist government and neighboring states opposed the proposal.²⁰

Clearly, the irrational fear of the Arab minority's Arab-Palestinian identity – and not the question of the self-determination of Jewish citizens – is precisely that which forced the drafters of the Constitution by Consensus to firmly establish the ethnicity of the Jewish collective in the document. This is, in fact, the very nationalism which seeks to reconfirm the *national-religious unity* rejected in *Kestenbaum*, and to declare it now a paramount legal norm. This nationalism is the reason for the denial of equal collective rights to Arab citizens of Israel. It is clear that reinforcing this unity infringes both the rights of the individual Jew and the collective rights of the Arab minority.

Why, then, do academic Jewish liberals known for their support of the rights of the individual, along the lines of *Kestenbaum*, continue to support the Constitution by Consensus? They argue that, although some of its provisions are bad, the proposed constitution reflects the maximum consensus which can be reached based on the present political situation, which is in any case preferable to a future liable to deteriorate even further.

¹⁷ In this short article, I did not relate to the important issue of the connection between citizenship and nationality in Israel, in other words, the difference between the Jewishness of Israelis and the Frenchness of French men and women. In France, it is the connection to the territory of the state itself which determines French nationality. In Israel, however, Israeli nationality is determined according to an historical assumption, which is in a constant state of flux. In a recently delivered decision, for example, the Supreme Court of Israel decided that a non-Jew may always become part of the Jewish people for the purposes of the Law of Return by being accepted by any Jewish community in the world. For more information on this decision, see Marwan Dalal, "Imagined Citizenship," in 12 *Adalah's Newsletter* (April 2005).

¹⁸ See Iris M. Young, "Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel," in 12 *Adalah's Newsletter* (April 2005).

¹⁹ The referendum that was rejected by the Hungarians proposed "offering preferential naturalization on request...that grants Hungarian citizenship to persons who claim Hungarian ethnicity, do not reside in Hungary, are not Hungarian citizens and certify Hungarian ethnicity."

²⁰ For more information on the referendum in Hungary see, for example, Michael A. Weinstein, "Hungary's Referendum on Dual Citizenship: A Small Victory for Europeanism," *Power and Interest News Report* (13 December 2004).

A constitution should seek to limit the prospect of large-scale human rights violations. For this important reason, we have been witness over the past two decades to significant efforts to establish constitutions in many countries, among them countries from the former communist bloc in Eastern Europe,²¹ countries in which racial and ethnic discrimination and oppression were prevalent, in military regimes and other dictatorships. In most of these countries, the drafting of the constitution was a stage in the historic transition in the country's political culture. Seeking to build a new culture, one based on human rights, these countries chose to look at the past and examine their history, recognize historic wrongs, and reach historic reconciliation with the groups which suffered from historical oppression and discrimination.²²

Further, there were in many countries fair and just negotiations between the groups regarding the principles that underlie *the drafting process* of the constitution, including a mechanism for decision-making during this interim period. The objective was to ensure that the dominant group would not impose its views on other groups, and that all groups would be included – especially those that had been oppressed – in the process. These joint efforts and recognition of past human rights violations were the primary reasons that the drafting process itself became an historic transition process. This process took place, for example, in Poland, Hungary, East Timor, Brazil, Ethiopia, Uganda, Kenya, Rwanda, Nicaragua, Cambodia, Fiji, and, most conspicuously, in South Africa, where citizens undertook a profound examination of human rights violations during the apartheid regime.²³

The process of drafting the Constitution by Consensus has been very different. Not only does it clearly lack any interim period or process, and not only does it impair the *status quo*, but it also proceeded as if there were no historical oppression or discrimination against Arab citizens of Israel, as if there were no unrecognized villages, as if no citizens had been uprooted from their villages following the founding of the state, as if there were not over three million persons living under Israeli occupation and no Palestinian refugees, as if Jerusalem were a unified city of peace, and as if the borders of the State of Israel were universally recognized.²⁴

In comparison with the new constitutions adopted by the aforementioned states, we see that the Constitution by Consensus represents a past which these constitutions attempted to ensure would not return. Some of these states suffered from “collective-ideological” constitutions, and some from “ethnic-exclusionary” constitutions. The Constitution by Consensus reflects both of these kinds of constitutions. Therefore, it is bad for all citizens: it is too “ideological” for the Jewish citizens and too “ethnic” for the Arab citizens.

²¹ Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: The University of Chicago Press, 2000).

²² For a discussion combining theory and practice regarding twenty-one countries which embarked upon a process of national reconciliation in recent years, see Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London: Routledge, 2002).

²³ For a comparison between the Israeli and South Africa cases, see Aeyal Gross, “The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel,” 20 *Stanford Journal of International Law* 47 (2004).

²⁴ On the question of historical Israeli-Palestinian reconciliation, see Nadim Rouhana, “Reconciliation in Protracted National Conflict: Identity and Power in the Israeli-Palestinian Case,” in A. H. Eagly et. al., (eds.), *The Social Psychology of Group Identity and Social Conflict: Theory, Application and Practice* (Washington, DC: American Psychological Association, 2004).