

Constitution or Prostitution?

By Baruch Kimmerling¹

In contrast to popularly held opinion, a state does not need a constitution. A constitution cannot solve the fundamental problems of a regime or a society. The Soviet Union, for example, had a marvelous constitution and ran a state of outrageous terror. The classic constitutional country – the United States – has shown that a constitution cannot provide relief and protect fundamental rights in times of crisis, while the regime tramples on the rights of minorities and other groups deemed “threats to the nation.” The US Constitution has not yet succeeded in providing full rights to Blacks, women, or persons with “unacceptable” sexual tendencies. Slavery continued for almost eighty years after the adoption of the constitution, and segregation ended officially, but not in practice, only in the 1960s. Furthermore, the Constitution did not protect American citizens of Japanese origin against being herded into concentration camps during the Second World War, ostensibly for security reasons. Nor did it defend the American citizens who were persecuted by Senator Joseph McCarthy in the dark days of the 1950s, nor the victims of the current “PATRIOT Act.” In addition, despite the Constitution’s separation between church and state, set forth in the First Amendment, the separation is in practice incomplete.

Conversely, democracy in Britain, which has no written constitution, functions fairly well (with a few exceptions). From the aspect of treatment of its own citizens, Britain is one of the most enlightened regimes on earth.

In addition, potential harm and threats are inherent in a constitutionally-based regime, primarily when the constitution covers up pernicious political and cultural practices. The constitution bestows a façade of propriety and enlightenment upon the regime, and increases its legitimacy, while denying universal human and civil rights to some or all of its citizens. However, a constitution can be useful at the last, final, and closing stage of a state's democratization processes, but not as a means with which to repair the regime or the political culture.

From this perspective, and for a further reason which will be explained below, the Israel Democracy Institute, in spite of its good intentions, is making a grave error in attempting to formulate and enact into legislation a “Constitution by Consensus.” It should be clear to anyone who embarks upon such an endeavor, and is part of the democratic-universalistic stream in Israel’s culture war, that the Knesset’s current composition and the distribution of political power as it presently stands, make the legislation of an enlightened and truly liberal constitution impossible. This is readily apparent, for example, in the enactment, by a large majority and without hesitation, of a most problematic amendment to the “Citizenship Law”. Indeed, the drafts of the proposed bill are a stinging insult to any thinking person and to anyone striving for a properly functioning state.

The very term “Constitution by Consensus” is a cover-up for the enactment of a constitution by compromising universalistic-enlightened, as well as religious-nationalistic, beliefs and attitudes. At best, such a constitution will lead to paralysis and the preservation of the current *status quo*. Worse still, the draft breaches the *status quo* and moves toward even greater ethnocentricity than we face today. The draft of 24 November 2004 states that, “Everyone is equal before the law; no person shall be discriminated against for reasons of race, religion, nation, country of origin, or any other reason, whenever such reason is irrelevant.” Yet, many provisions of the draft document are

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inconsistent with this section.² For example, under the heading “return,” the document states that, “Every Jew is permitted to make *aliyah* [the immigration of Jews] to Israel. Arranging the right to make *aliyah* shall be established in statute, provided that the right shall not be limited, except by a statute to maintain public peace, health, or state security.” That is, no mention is made of immigration by non-Jews, and it infers a reduction in the scope of the entitlement pursuant to the right of return, making the section even more exclusive than the Law of Return as it stands today. To avoid any doubt on this point, the “nationality” clause states that, “Israeli nationality is given to a newborn individual whose mother or father was a citizen of Israel and resident of the state, and who made *aliyah* pursuant to the Law of Return.” In practice, then, the granting of nationality in the future is denied to anybody who is not Jewish. A constitution of this kind, which hermetically closes ethno-national borders, but is incapable, for understandable reasons, of defining a state’s geographical and geopolitical borders, cannot be taken seriously as a liberal constitution. This reasoning leads us to another rule: as long as a state’s borders cannot be fixed, borders which establish its ethno-national composition, it is impossible to enact a constitution and establish the purported “final rules of the game.”

A further example is that, whereas under existing law Arab citizens have a unique and singular collective right – formal equality in status between Arabic and Hebrew (although strict compliance, or even the desire to comply, is lacking) – in the draft constitution proposed by the Israel Democracy Institute, Hebrew is the only official language of the state. The draft constitution gives Arabic “a recognized, special status in Israel,” which is vague and non-binding, does away with the equality of Arabic, and confines it to a linguistic ghetto.

Given that Israel was indeed established as a Jewish state (even though the Jews themselves have been unable to agree on a definition of this “Judaism”), I do not believe that this identity should be taken from it, just as Italy is in principle an “Italian” state.³ But this self-determination is not inconsistent with Israel – in which more than twenty percent of the population is not Jewish (either Palestinians or others) – being also “a state of all its other citizens.” If this addition bothers many Jews, the simplest solution would be to delete from the statute books and the constitution the restrictive and *a priori* discriminatory definition.

More difficult to understand is the linking of “Jewish” and “democratic,” an apparent attempt to balance and limit the two characteristics. Israel can be Jewish and democratic without joining these two terms, which belong to different substantive worlds. This linkage enables the constitution to contain a declarative clause – which seems to be completely superfluous – stating that Israel is a Jewish state and a state of all its citizens, and in another declarative clause that Israel is a democratic state. Also required are operative clauses to explain the kind of democracy that is involved (for example, parliamentary), the manner in which it is attained (through elections), and the requisite checks and balances.

² This draft constitution is based on the Declaration of Independence, but this clause is more advanced than the Declaration’s promise that the state “will provide equal and complete social and political rights to all its citizens, regardless of religion, race, or sex; will ensure freedom of religion, conscience, language, education, and culture,” in that it adds national origin.

³ I am aware that many jurists, researchers, and philosophers, including conservatives, raise a strong argument against this tenet, saying that the Italian nation can also include Muslims, Jews, Christians, Buddhists, and others, but the “Judaism” of Israel cannot. This objection is correct as regards “Judaism” as a people or nation, but Israel as a state can include, if it wishes, ethnic, religious, and national groups on an entirely egalitarian basis.

The draft proposal is also deficient in that the Ottoman system remains in place – that is, religion and the state are not separated. Powers over matrimonial law remain with the religious authorities, which operate under different norms from those adopted by modern states, and violate principles regarding equality. Further, in light of Israel's particular situation, the draft constitution fails to separate the military from politics (for example, by subordinating the military and the entire defense establishment to the civilian leadership, or setting down a lengthy period of time before retired military officers are permitted to assume senior political positions). The present situation calls for a provision in the proposed constitution emphasizing property rights, but much is lacking regarding social rights, which are taken for granted in a properly functioning welfare state.

The draft proposal also contains booby-traps, which revoke even the constitution itself, such as the provision which provides that, "Rights pursuant to this constitution shall not be violated other than by a law befitting the values of the State of Israel, intended for a proper purpose, and to an extent no greater than necessary, or according to such a law, based on explicit authorization stated therein." Or, more explicitly, this section seems to allow for an interpretation according to which rights may be violated in the name of "the values of the State of Israel" – which contain, as in every state, contradictory values and conflicting proper purposes enshrined in conflicting interests, and ultimately controlled by political power.⁴

The same is true of a section which reads, "A candidate's list shall not participate in elections to the Knesset, and no person shall be a candidate in elections to the Knesset, if the goals or acts of the list or of the person, whether explicitly or by implication, endanger the existence of the State of Israel." This vague section is ostensibly intended to help democracy to protect itself, but actually contradicts freedom of opinion, speech, and assembly. There can be no freedom of speech if the way to articulate legitimate political expression is denied.

The only consolation is that we can assume that this basket of "consensual understandings" will be perceived as a threat to the Israeli regime and to Israeli politicians, and that the Knesset will reject it. The reason is clear: along with the deficiencies mentioned above (and the many which were unmentioned), the present draft of the constitution contains many good and valuable provisions which protect various and sundry human and civil rights liable to threaten everyone who fears proper government.

⁴ This section is very similar to the limitations clauses of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. These clauses empower the Supreme Court to nullify legislation inconsistent with the conditions set forth in the section. In practice, it limits the power of the Knesset and enables judicial review of laws that are inconsistent with the constitution. Without it, the constitution is meaningless. The Supreme Court has so far given a universalistic construction to this section by adopting the test of proportionality. The test includes strict elements found in advanced legal systems, such as in Canada and in the European Court of Human Rights. However, there is good reason for concern that at some time in the future, either sooner or later, another interpretation will be given to this section, in which excessive weight is given to the words "values of the State of Israel."