

A Constitution for Israel: With Whose Consent and at Whose Expense?

By Aeyal Gross¹

National consensus is in fashion. The Israel Democracy Institute has for some time promoted its Constitution by Consensus project, which at one time was accompanied by jingles and posters. The Forum for National Responsibility drafted the Kinneret Covenant. Professor Ruth Gavison and Rabbi Ya'akov Medan published a "Foundations for a New Covenant among Jews in Matters of Religion and State in Israel." Much has been written, and rightly so, about the absence of Arabs from the Kinneret Covenant. One wonders how a new social contract can be proffered for Israel without Arabs being included. However, it is not only Arabs who are not represented. The gay and lesbian population is not part of the structure of the Kinneret Covenant, or represented in the Public Council of the Constitution by Consensus project of the Israel Democracy Institute. The consequences for the human rights of gays and lesbians are likely to be grave indeed. This short essay will examine how the draft constitution proposed by the Israel Democracy Institute perpetuates and increases socio-economic inequality, and tramples on the rights of the Arab minority, women, gays and lesbians.

The problem for gays and lesbians is clearly visible in the Gavison-Medan document. The authors propose civil marriage in Israel, limited to a union between a man and a woman. For its agreement to this compromise, the secular population "concedes," according to the proposal, "the sweeping recognition" of co-habiting couples. The rights of persons living together out of wedlock will be arranged by contract and special arrangements, as necessary." Clearly, the primary loser in this proposal is the gay and lesbian segment of the population: on the one hand, the persons who are unable to marry are the members of same-sex couples; on the other hand, these persons will lose the few rights that they have had until now from the partial recognition they receive through the rights given in Israel to co-habiting couples. Same-sex couples are given rights because Israel has an institution – co-habiting, *de-facto* couples – which provides rights to unmarried couples. For example, the Nazareth District Court recently recognized the inheritance rights of a same-sex partner, based on an arrangement that granted those rights to co-habiting couples. When this institution disappears, leaving "contracts and special arrangements" for same-sex couples, their rights will be severely impaired. Contracts can be made today. The problem relates to recognition by third parties (either the state or private entities). Thus, contracts are an insufficient solution. Furthermore, contracts place burdens, including a financial burden, on the couples to arrange their relations, burdens not imposed on the rest of the population. As for "special arrangements," there is no guarantee that these arrangements will be equal to those given to married couples.

Despite all of its inherent severity, the Gavison-Medan proposal does not profess to cover the entire Israeli public. The problem is even worse in the Constitution by Consensus. While the Israel Democracy Institute points out that its Public Council will contain "members that reflect, in large degree, the composition of Israel society in all its variety, and the tensions existing within its population," there is no structural representation for the gay and lesbian community. It goes without saying that the gay and lesbian community is interested in the various proposed constitutional arrangements in Israel. For example, they are interested in the way in which equality will be set forth in a constitution, and wish for provisions to prohibit discrimination on the basis of sexual orientation.

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In addition, this group is extremely interested in the kind of recognition granted to couples in Israel, hoping that same-sex couples will benefit equally from all rights granted to couples who are not of the same sex. Discussion over the way in which these issues are formulated in a constitution is flawed if it does not include the perspective of the gay and lesbian community. Responding in June 2001 to a letter on this subject, the Institute stated that, "the Public Council is not a body whose members represent all components of Israeli society – as such." This statement is inconsistent with the description of the Council quoted above, which is conspicuous in the Council's public campaign. The effect is apparent in the draft constitution recently distributed by the Institute, which does not include a section prohibiting discrimination on the basis of sexual orientation. The Kinneret Covenant proposal is also lacking in this regard. The Kinneret Covenant speaks about equality in Israel without distinction based on "religion, national origin, and sex," but does not mention equality on the basis of sexual orientation.

The lack of representation of gays and lesbians in these fora is not accidental; as the Gavison-Medan document shows, the attempt to achieve national consensus, including secular-religious agreement, about the future of the state is likely to disintegrate when the discussion touches on a handful of subjects, one of them being equality for the gay and lesbian community. Gavison-Medan chose to sacrifice, in the name of consensus, this community's right to equality. This is the reason, I believe, that the broader fora, which profess to represent the entire public (or the entire Jewish public, as in the case of the Kinneret Covenant), fails to include this group. The fear of opposition by the religious groups certainly plays a crucial role here. Ultimately, though, the secular population in these fora is likely to find itself cooperating in the discrimination against gays and lesbians, by excluding them from the process in order to please the religious representatives. Indeed, all these projects made consensus the overriding consideration. They fail to recognize that politics is a daily struggle in which consensus is lacking on many issues, and instead takes the approach that consensus is of the utmost importance. If this were not the case, then it is unclear why would they be willing to favor consensus over the protection of human rights, especially the right to equality.

This problem and others arise in the Constitution by Consensus project. It is unfortunate, though not surprising in light of the remarks made above, that the "consensus" that the Institute achieved came at the expense of certain segments of the population, and it is doubtful whether the draft constitution will aid the minorities and disempowered segments of Israeli society.

Particularly problematic is the degree to which the proposed constitution is liable to perpetuate and increase socio-economic inequality in Israel. The constitution does not grant the right to property in a way which would enable everyone to live in dignity. Rather, it establishes the right of every person to his or her property – that is, to safeguard the existing regime regarding the possession of property. This provision may be seen as perpetuating the current division of property, including land, the distribution of which resulted from discriminatory action by the state over many years. The constitution will provide protection for the land arrangements which resulted from the expropriations and allocations made by the state, and may render a re-division which is more just and takes into account the past discrimination impossible.

On the other hand, the constitution does not grant social rights, other than the important right to thirteen years of free education. Social rights within the constitution are limited to a general declaration that the state, "will act to promote well-being ... social security ... fair working conditions," but fails to grant any right to the citizen or impose any explicit duty on the state. Also conspicuous is the absence of any mention – even declaratory – of the right to health.

The constitution provides little to benefit Arab citizens of Israel. Despite a general section that ensures the status of the Arab minority, the constitution fails to delineate its special status in the State of Israel. The section also deals with "other minorities," and the status of the Arab-Palestinian minority as a special indigenous people is missing. Furthermore, contrary to the *status quo*, in

which Hebrew and Arabic are official languages, the draft constitution establishes a hierarchy in which "Hebrew is the language of the state," whereas Arabic has "a recognized, special status" that will be set forth in statute.

In addition, the proposed constitution alters the rules on disqualifying political parties from taking part in elections to the Knesset: although one should welcome the proposal to eliminate the possibility of disqualifying parties which deny the Jewish character of the state, it revokes the existing possibility of disqualifying a party for the sole reason that it is justifiable to enable a "democracy to defend itself," that is, to disqualify parties which threaten democracy and its values (an example being Kach, which was disqualified some years ago). The only way left to disqualify a party is based on acts and purposes of the party which, either explicitly or by implication, "endanger the existence of the State of Israel." This section is liable to be applied against Arab parties, whereas anti-democratic and racist parties will be immune from sanction.

Moreover, the constitution continues the custom of defining the state as "Jewish and democratic," with all the problems inherent in such a constitutional definition. It is interesting to note that it is proposed that the explanatory notes should state that "Jewish state" means also "state of the Jewish people," while "democratic state" means also "state of its citizens." In this sense, the constitution maintains the existing paradigm regarding the nature of the state. One wonders to what extent Palestinian Israelis, and Jewish citizens of Israel who believe that defining a state according to an ethnic characteristic (state of the Jewish people), and not according to a civil characteristic (or at least an attempt to include both definitions) is inconsistent with democracy, can agree to this. This issue was discussed in articles published in the past two volumes of *Adalah's Newsletter*.

Gays, lesbians, and transgender persons, too, have no reason to be happy with the proposed constitution. Although the constitution prohibits discrimination based on "race, religion, nationality, sex, ethnicity, and country of origin," it fails to explicitly prohibit discrimination based on sexual orientation or gender identity. The draft also prohibits discrimination "of any other kind," but the failure to explicitly forbid discrimination on the basis of sexual orientation requires explanation, at a time when this basis appears in many Israeli statutes prohibiting discrimination. In this case, the Israel Democracy Institute's refusal to include representatives from the gay and lesbian community in its Constitution by Consensus project is one of the factors which lead to this failure.

Women, too, will be disappointed by the proposed constitution, which states that, regarding matters within the sole power of the religious courts - marriage and divorce - the constitution is not paramount.

The constitution can be expected to impair the status of minority groups and minority opinions in that, following elections, the president of the state will request that the head of the largest Knesset faction form the government. This provision will deter voters from casting their ballots for small parties, and will bring about, though the back door, the return of the direct election of the prime minister.

The draft constitution contains other provisions that endanger human rights; rather than stating, as is proper, that the government is the executive branch, with the army, security forces, et cetera, being subject to it, the proposal states that the executive branch is composed of the government and its ministries, the army, security forces, et cetera. In so doing, the constitution grants the security forces status as part of the executive branch, alongside the government, and not as a body subject to an executive branch comprised of the government alone. Further, in contrast to the current situation, the proposal restricts the government's entry into international human rights conventions, by stating that such conventions (unlike most treaties) also require Knesset approval. Another difficulty is a provision which permits the enactment of emergency regulations which infringe fundamental constitutional rights (subject to the regulations being for a proper purpose and

to an extent no greater than necessary), but which fails to state that certain human rights are non-derogable, even during times of emergency.

Conclusion

The draft constitution proposed by the Israel Democracy Institute protects the rich while failing to benefit the poor, perpetuates inequality, and tramples on the rights of Arabs, women, gays and lesbians. It does this in the name of a consensus whose participants are not exactly clear, though it is clear at whose expense it comes. It is striking to notice how secular Jews and religious Jews can find a compromise on the rights of gays and lesbians without asking gays or lesbians their opinion. Consensus to violate rights on these points is accomplished for the most part not by persons whose rights are violated, but by persons who readily waive the rights of others.

We may need to establish a coalition of the victims of this constitution: Arabs, the unemployed, the homeless, the disabled, the infirm, women, women whose husbands refuse to divorce them (*agunot*, or "chained women"), gays and lesbians. These segments of the population have apparently been left out of the "consensus," as perceived by the Israel Democracy Institute (even though some of them are represented in the Institute's project). It may be that a cooperative effort by these groups is the best way to point out the potential damage inherent in the proposed constitution. Therefore, now is the time to ask: a constitution with whose consent and at whose expense?