

‘Constitution by Consensus’: By Whose Consensus?

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This article aims to examine the meaning of the term “Israel as a Jewish and democratic state” for the Jewish and Arab citizens in Israel. Recent reports published in the Israeli press, based on a public opinion survey conducted in the Israel Democracy Institute (IDI), claim that a majority of Arab citizens accept the definition of Israel as “Jewish and democratic.” I shall use survey data published by the IDI, as well as unpublished data from a survey undertaken by Mada al-Carmel - The Arab Center for Applied Social Research (Mada), to show that the term “Jewish and democratic” is, in addition to expressing an internal contradiction, vague and problematic, because it means different things to different people. It needs to be deconstructed before we reach hasty conclusions about its acceptability to Arabs and Jews. Based on the survey data, I shall propose what the term means for the majority of Arab citizens, and what it means for the majority of Jewish citizens.

“Constitutionalizing” Israel as a Jewish and Democratic State

Israel is one of the few self-proclaimed democratic states not to have a constitution. The reason for discarding efforts to formulate a constitution in Israel’s early years is usually attributed to the decision of the “founding fathers” to avoid superfluous tension emanating from upsetting the delicate *status quo*, which was emerging in the fledgling state between the secular and religious segments of Jewish society, and consequently between state and society in Israel. This analysis tends to ignore the Jewish state’s founding fathers’ designs, which sprang from their openly declared goals: to expropriate the resources of Arab citizens and give them to Jewish citizens; to have time to incorporate the spoils of the war with the Palestinians - the enormous property that Palestinians left behind - and to employ these spoils for the benefit of Jewish society and Jewish citizens; and to finalize some laws and regulations giving superiority to Jewish citizens and subordinating the Arab minority in the state of the Jewish people. These acts are inconsistent with a democratic constitution, and accordingly constitutional efforts could have hindered the designs of the founding fathers.

Many of these reasons no longer exist: the spoils of war have been distributed among the Jewish people of Israel; Palestinian refugees have been prevented by law and by force from returning; Arab citizens’ major land resources have been legally confiscated and put to the use of the Jewish people; and a long series of regulations and legislations, passed with increasing frequency in the last few years, has emptied the meaning of citizenship for the Arab citizens of much of its substance, creating a status of quasi-citizenship. As for the religious-secular relationship and the relationship between state and society, many believe that the existing *status quo* can be translated into constitutional formulations.

Although the IDI has been spearheading the effort to formulate a “Constitution by Consensus,” the Institute is not an official body. The Knesset’s Constitution, Law and Justice Committee has lately taken upon itself to advance this effort, and has become the official body now leading it.

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“Constitution by Consensus” in Israel, it should be made clear, means “Jewish consensus.” Indeed, Arabs have been made completely absent from the debate on the constitution, and from all constitutional efforts and exercises in Israel. Needless to say, this absence extends to the Israeli Knesset. The Knesset, after all, constituted Israel as a Jewish state by law, and legislated numerous laws which make it illegal for a party to run for the Knesset if it does not accept Israel as a Jewish (and democratic) state. There is an Arab Knesset member in the Constitution, Law and Justice Committee. However, the Arab member finds himself facing the perpetual dilemma of the powerless: to boycott the effort and be accused of missing an opportunity to influence the outcome, or to participate and legitimize an effort that will result in a constitution approved by the Knesset majority proclaiming Israel as “Jewish and democratic,” when this member and most of his constituency believe that Israel is not democratic and should not be Jewish, and that this description is in any case self-contradictory.

The absence of the Arabs, perpetuated by other “unofficial efforts,” such as the effort of the IDI, raises fundamental questions about the nature of the constitution and the essence of democracy that the constitution aims to protect. It is revealing that the IDI in its own structure, goals, staff composition, conferences, and public debates about the constitution perpetuates the absence of the Arabs. Like the Kinneret Covenant, an exclusively Jewish *ad hoc* think-tank, which discussed Israel’s future (including its relationship with the Arab minority), and produced a document emphasizing the state’s character as “Jewish and democratic,” the IDI is stressing this same character. However, it invites some Arab participants, who increasingly find themselves being used as fig leaves to provide cover for the effort to consolidate a Jewish consensus around the project of constituting Israel as “Jewish and democratic.”

“Constitutionalizing” Israel as “Jewish and democratic” has been the project (or counter-project) of many Israeli institutions, including Israeli academia, over the last twenty years or so. The energy allocated to this counter-project and its persistence directly correlate to the rise in consciousness about the internal paradox of Israel as a Jewish state which claims to be democratic. Arab academics and intellectuals took the lead in exposing this paradox. The presentation of the fundamental democratic idea of “a state for all of its citizens” fueled questions about this paradox, but also energized the counter-project. Leading Israeli sociologist Sammy Smooha of Haifa University theorized the paradoxical reality into what he termed “ethnic democracy,” arguing that a state can be both ethnic and democratic, and that this model is a variation on other models of democracy. Ruth Gavison of the Hebrew University, a leading legal scholar, took the lead in theorizing the “Jewish and democratic” state. By and large, with some significant exceptions, Israeli social sciences and legal studies coalesced around this project, and found in the “ethnic democracy” or “Jewish and democratic” state, a resolution - albeit illusory - to the fundamental contradiction in Israel’s structure.

The coalition of academia, the Knesset, and some academic and semi-academic institutions such as the IDI and the Rabin Center (in which the Kinneret Covenant was envisioned), was powerful and influential. The paradox within the Jewish state had to be concealed and denied, because the identity of the state and individuals who would like to think of themselves as democratic was at stake. The extent of cooperation between the political and the academic can best be exemplified in the Israeli consulates’ sponsorship of Ruth Gavison’s tour of leading American universities, during which she presented the “Jewish and democratic” state to law faculties and the general public. This project is so important to the identity and image of Israel, that the help of international diplomacy was also solicited. The departing American Secretary of State Colin Powell began using the term Jewish state when discussing solutions to the Israeli-Palestinian conflict. The American President himself began using the term “Jewish and democratic” to refer

to Israel, and leading American newspapers and commentators comfortably adopted the term, often using it to encourage Israel to cede Palestinian territories in order to maintain its “Jewish and democratic” character.

With the Jewish consensus in Israel in favor of “constitutionalizing” Israel as “Jewish and democratic,” and the international support this Israeli self-presentation received, the attitude of Arab citizens might seem insignificant. I argue, however, that Arab approval or disapproval of this project is the key to its real legitimacy. It is becoming increasingly evident that a constitution in Israel will require some Arab approval in order to win international legitimacy. The legitimacy that Arab citizens can provide to the constitution is invaluable because if they - the subjects whose inequality this project perpetuates - approve it, then why should anybody else raise doubts about it? For this reason, Arab legislators can achieve serious concessions in the text of the constitution (and in resource distribution) if they give the Jewish consensus their stamp of approval.

Arab legislators, however, are serious representatives of the Arab consensus in Israel, which is dramatically opposed to the Jewish consensus on issues related to the identity of the state, the legitimacy of Israel as a Jewish state, their relationship with Israel, and the Israeli-Palestinian conflict. Furthermore, many of these legislators see how such a “Constitution by Consensus” takes for granted issues that they consider still open, including the issue of Palestinian refugees and their property. One party - the Democratic Front for Peace and Equality - favors delaying the whole process given the current balance of power. The representative of another party - The National Democratic Assembly - in the Knesset Constitution, Law and Justice Committee has so far refrained from participating in the committee’s deliberations, but is interested in initiating a process to produce an Arab proposal for an alternative constitution. The United Arab List is taking the attitude of waiting to see if a constitution is indeed formulated, before opposing it. The attitudes of Arab legislators are understandable when one considers the attitudes of their constituency.

Analyzing the Constitutional Meaning of the “Jewish and Democratic” State

Given the importance of Arabs’ views of, as opposed to Arabs’ active participation in, the “Constitution by Consensus,” the IDI commissioned a public opinion poll “examining positions of the Arab population regarding the establishment of a constitution for the state of Israel.” The poll was conducted in September 2004 by telephone among a representative sample of 504 respondents.

When asked what they considered important for inclusion in a constitution, 100% of Arab respondents included “equal rights for Arabs” in the first, second, or third rank. The issue considered second most important - “economic situation” - received less than 30% of responses in all three ranks. The “Jewish and democratic” state was mentioned by none of the 504 respondents. Respondents were then asked to evaluate the importance of seven articles to be included in the constitution: 1. Israel as a state that guarantees complete freedom of occupation; 2. Israel as a state that guarantees the collective rights of different groups; 3. Israel as a state that guarantees free education; 4. Israel as a state that recognizes the Arab minority; 5. Israel as a Jewish and democratic state; 6. Israel as state that guarantees equal rights for Arabs; and 7. Israel as a state that guarantees complete freedom of religion. More than 95% of the respondents said that all but one of these articles were either very important or moderately important. Only one issue stood out: Israel as a Jewish and democratic state: only 35% of the respondents said that this was very important or moderately important. When the respondents were asked to rank the

articles, only 5% of them ranked the article of Israel as a Jewish and democratic state in the first, second, or third combined; 85% gave it the lowest ranking. Unsurprisingly, 81% ranked equal rights for Arabs as first, second, or third in importance.

Persisting with the issue of “Jewish and democratic”, the respondents were asked if they would support “a referendum for a constitution that defines Israel as ‘a Jewish and democratic state that guarantees full equality for Arabs’”. The findings reveal that 77.4% of the respondents would definitely support or support such a referendum. The fact that the IDI and the supporters of the “Jewish and democratic” state project do not see the contradiction between Israel being Jewish and democratic on the one hand, and between this and the guaranteeing of full equality to Arabs on the other, is an issue for political as well as psychological analysis, for which this short article cannot afford the space. However, in the context of the data that the IDI itself provides, it should be clear that what Arabs mean by a “Jewish and democratic state that guarantees full equality for Arabs” is different from what the project of a “Jewish and democratic” state intends Israel to be. For the Arab citizen, it seems, the message is that, if full equality is guaranteed, Israel can call itself Jewish and democratic. One way to understand this finding is that an Israel guaranteeing full equality to Arabs would be a democratic state in essence, and a Jewish state by fact of the Jewish majority, which would dominate its character. This message should not be confused with acceptance of Israel as a Jewish state in essence (or the state of the Jewish people), which enjoys only some democratic features, as it is now and as the “Jewish and democratic” state project wants it to be, with minor amendments, perhaps, in the favor of Arab citizens. The interpretation presented above for these findings requires substantiation, to which I turn in the final part of this article, and which is also based on survey data.

A few months before the IDI poll, Mada conducted, under the supervision of the author, a comprehensive survey among a random and representative sample of Arab citizens. The sample included around 1,000 respondents, and was conducted by way of face-to-face interviews. While respondents were not asked expressly about a constitution, they were interviewed on related issues, including Zionism, the law of return, the right of return, democracy, Israel as a state for all of its citizens, and future relations between the Arab citizens and Israel.

In the “Jewish and democratic” state envisioned by supporters of the “Constitution by Consensus,” the law of return and Jewish immigration would be central. Similarly, the Zionist identity of Israel is fundamental to their formulation. Results from our survey indicate that 95% of all Arab participants in the sample believe that Jewish immigrants have no right to come to this country. With such a high percentage, one can safely conclude that there are no significant differences between various segments of Arab society – Druze, Bedouin, and other Arabs. Furthermore, when participants were asked to what extent eight issues evoke in them a sense of security or a sense of concern on a five point scale (one indicating high concern, and five a high sense of security), the issue which induced the highest sense of concern was Jewish immigration (an average of 1.5 on the five-point scale), with very little difference between the various Arab groups. 87% of the participants believe that the law of return is racist, and 94% believe that Zionism is a racist movement.

The “Constitution by Consensus” people view Israel as a democratic state. It is essential to ask whether Arabs see Israel as a democratic state or not. Therefore, participants were explicitly asked if they live in a democratic state. We found that two-thirds of the Arab interviewees believe that they do not live in a democratic state. One can argue then that Israel must change in order to be democratic. However, can Israel be both Jewish and democratic? 62% of the participants think that Israel cannot be both Jewish and democratic, and perhaps this is why 67%

of them argue that Israel is not democratic. As for the right of return, it is obvious that the “Jewish and democratic” state is premised on the denial of the Palestinian right of return, in principle and in practice. For that reason, the Arab interviewees were asked whether or not the Palestinians should concede the right of return in exchange for a settlement with Israel that is agreeable on all other issues and guarantees a state in the West Bank and Gaza. 72% of the participants answered that the Palestinians should not accept such an agreement.

Concerning the best arrangement for the relationship between Arab citizens and Israel, approximately two-thirds (64%) chose a state for all of its citizens as their preferred solution for their relationship with Israel, 14% chose a bi-national state in Israel, and 10% chose a state that guarantees the highest degree of possible rights within the context of a Jewish state. When asked about each of these and other arrangements separately, a state for all of its citizens received the approval of 94% of respondents, and a bi-national state in Israel received 70%.

Our survey shows, unsurprisingly, that the majority of Arab respondents do not believe that Arabs enjoy equality in a whole range of issues (with the exception of health services and hospitals). However, the interesting finding is that when participants were asked if, in return for achieving the highest possible degree of individual equality, Palestinian citizens should concede on the following issues: the teaching of history from a Palestinian viewpoint; demanding the right of return for Palestinian refugees; demanding collective rights for the Arabs in Israel; emphasizing Palestinian identity; demanding Israel’s admission of its historic responsibility in the refugees issue; and demanding that Israel alter its Jewish identity, a majority of respondents thought that the Arab citizens should not concede on any of these issues.

Yet, it is noteworthy that 67% agree to a state which guarantees the highest degree of rights, while remaining a Jewish state. These data are consistent with the findings reported by the IDI survey, and should be interpreted in the same way. The finding seems to be reliable; it is the validity of the interpretation which needs to be established.

The broader context provided by the IDI’s survey, and by the additional data provided by Mada, help in reaching a valid interpretation of the findings: should Israel abolish the law of return, stop Jewish immigration, accept responsibility for the refugees problem and recognize the right of return, provide full equality to Arab citizens on a whole range of issues, and become the state of all of its citizens, then many would acquiesce to the definition of the state as “Jewish and democratic.”

It seems that the analysis of the term “Jewish and democratic” reveals a clear picture which can also assist in an interpretation of the ostensibly contradictory findings within public opinion polls. While the “Constitution by Consensus” project would want Arab citizens to accept Israel as a Jewish state in essence, with some democratic features, as it is now with some possible modifications, the majority of Arab citizens will accept the term if Israel becomes a democratic state in essence, and stops being Jewish except for by the virtue of the cultural characteristics of the majority. This clarity points to the vast gap which still exists between Arab and Jew in the acceptability of the “Constitution by Consensus.” If one stops to think about this, however, it should come as no surprise - when the goal is to reach a Jewish consensus and Arab citizens are excluded at every substantive and process level, it becomes a sort of wishful thinking that Arabs would accept this illusory resolution of the contradiction of a “Jewish and democratic” state, when they are its prime victims.