

## **Israeli Constitutional Committee Faces Double Bind<sup>1</sup>**

**by Jonathan Cook<sup>2</sup>**

As Israel celebrated its fifty-sixth Independence Day in April 2004, with most cars, streets, homes and public buildings draped in the national colors of blue and white, a senior member of the Israeli parliament launched a salvo beloved of the Zionist majority. Ilan Shalgi of the secular Shinui party demanded that both Arab and ultra-Orthodox Knesset members be required to fly Israeli flags from their official cars during the festivities. "They're not members of Israel's parliament? They aren't proud to be Israelis?" he asked rhetorically.

Shalgi's implicit accusations of disloyalty were mild by the standards of Knesset chamber posturing. But such sentiments, shared by politicians of the left and right, are now shaping - and limiting - a debate that may have enduring significance for Israel's democratic pretensions. For a year, members of the Knesset's Constitution, Law and Justice Committee have been meeting on Sundays to draft a constitution that would, once and for all, define the nature of the state and the rights and obligations of citizenship.

### **FRACTURE LINES**

The task of hammering out a written constitution has confounded Israeli governments and legislators for more than five decades. Strangely, given its historic nature, the committee's work has attracted almost no media coverage, even though - or, maybe, precisely because - it threatens to reopen wounds that have not fully healed since the Jewish state's blood-stained birth in 1948. The biggest hurdle facing the committee - the one at which all previous efforts have stumbled - is the selection of a formula of words for describing the state's character. The bottom line for the great majority of parliamentarians is the Zionist orthodoxy that the state is both Jewish and democratic. But this is where the trouble begins for two constituencies which together comprise almost a third of Israel's population: the Palestinian minority and the Jewish ultra-Orthodox, or Haredim.

The sole Arab committee member, Azmi Bishara, is the most high-profile advocate of Israel as "a state of all its citizens," a non-Zionist constitutional model in which all Israelis would be equal citizens in a secular democratic state. His proposed reforms, widely approved by the Palestinian minority, outrage the full spectrum of Jewish and Zionist opinion. Bishara attended the first few committee meetings before deciding his participation was pointless and possibly harmful, given that his presence alone might legitimize the proceedings. "Every time I argued that, in my opinion, Israel is a democratic state and not a Jewish and democratic state, [the right-wing parties] began shouting, and you cannot hold a serious and businesslike debate in this manner. I am not demanding that they accept my opinion, but at least they should allow me to voice it."

The ultra-Orthodox parties are participating only symbolically, with one representative, Avraham Ravitz of United Torah Judaism, keeping a wary eye on the proceedings. He recently told the Israeli daily *Haaretz* that what concerned him most was that "a situation does not come about in which due to democratic principles the Ministry of Education would interfere in Haredi education and compel us to teach our children secular subjects."

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<sup>1</sup> Reprinted by permission from the author. The article previously appeared in Middle East Report 231 (Summer 2004).

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Since Israel's creation, the country's 678,000 ultra-Orthodox Jews and 1.2 million Palestinian citizens have stood astride central fracture lines in the Israeli polity. The first refuse to pledge loyalty to a secular democratic state on the grounds that their sole allegiance is to God and his laws; the second are effectively excluded from full participation in a Jewish state because of their ethnicity. Secular Jews view the high birth rates of both groups as threatening the long-term viability of Israel's self-definition as a "Jewish democratic state." On the one hand, with the ever greater representation of the ultra-Orthodox in the Knesset, how can Israel maintain its claim to be a democracy when ever more political concessions must be made to a community demanding theocratic rule based on the *halakha* (rabbinical law)? On the other hand, with a burgeoning Palestinian minority, how can the state describe itself as Jewish when an ever rising number of its citizens are non-Jews?

### **DANGERS OF CODIFICATION**

Spirited secular-religious debates during the drafting of the Declaration of Independence, the document that created the state of Israel on May 14, 1948, left Israel's founding fathers well aware that by defining too precisely the character of the new state they might tear apart the fragile Jewish consensus. Secular Zionists and the Orthodox clashed over whether to mention God in the document, before settling on a compromise reference to the "Rock of Israel," which the Orthodox understood to mean God and the secular could interpret in a metaphorical sense. The Orthodox rabbinate also extracted from the secular Zionists an agreement giving them exclusive control over personal status laws for Jews, such as those governing marriage, divorce and death, and the right to define who is a Jew for the purpose of public records. To this day in Israel, the rabbinate mandates that government offices observe the Sabbath and kosher laws, and religious institutions, including seminaries and schools, are guaranteed generous public funding. These secular-religious compromises enshrined an official policy of ambiguity toward the importance of *halakha* in the Jewish state. The Declaration proclaimed simply: "It is the natural right of the Jewish people to lead, as do all other nations, an independent existence in its sovereign state." As for the drafting of a constitution, the declaration promised it would be completed by the autumn of 1948. By June 1950, however, the goal had been officially abandoned. Instead, the task of formulating a set of Basic Laws - each of which would represent an article in a future constitution - was handed to the Constitution, Law and Justice Committee.

From the outset, the committee faced a double bind. First, many constitutional principles could not be enshrined in law for fear of incurring the wrath of the ultra-Orthodox community. Second, the committee was conscious of the dangers of codifying in law any of the vast array of practices that discriminate against non-Jews. Such discrimination had to be either unofficial or veiled if Israel was to maintain its international legitimacy. Unofficial discrimination was effectively sanctioned by the state's failure to create constitutional laws protecting human rights. Legislative or policy abuses could not, therefore, be challenged through judicial review. Veiled discrimination was built on a complex structure of laws that in only one case openly discriminated in favor of Jews: the Law of Return entitles any Jew (in this case more generously defined by the state than in *halakha*) to migrate to Israel. A vast artifice of other racist legislation has been propped up on this law alone, offering privileges to "those entitled to come to Israel under the Law of Return."

To date, the Knesset has approved 11 Basic Laws. The earliest covered topics for which there was a Jewish consensus: on the structure and role of the Knesset and government, on the state's ownership of Israeli land on behalf of the Jewish people and on the designation of Jerusalem as the country's capital. Fundamental human rights of the kind more usually associated with a Bill of Rights were ignored both because they would upset the ultra-Orthodox and because they would strengthen the rights of the Palestinian minority.

## **HOLES UNPLUGGED**

Only in the late 1980s, under the pressure of international human rights standards Israel had signed, did the government contemplate giving official sanction to rights law. In 1988, then-Justice Minister Dan Meridor began work on a Basic Law on Human Rights, though predictably his efforts quickly ran aground on the rock of ultra-Orthodox opposition. However, a portion of Meridor's proposed legislation made it into the statute books a few years later on the initiative of academic and moderate Knesset member Amnon Rubinstein. He included elements of the Basic Law in two private member's bills, which passed almost unnoticed through the Knesset in 1992 to become the Basic Law on Human Dignity and Freedom and the Basic Law on Freedom of Occupation.

The significance of these two laws is still hotly debated in Israel. At the time of their passage, the head of the Supreme Court, Aharon Barak, termed them a "constitutional revolution." That was an overly optimistic interpretation. Key human rights such as equality, freedom of expression, freedom from religious coercion and the rights of the individual before the courts were not included, and there was no attempt to give legal force to social rights - such the right to education, health, work and welfare - commonly found in modern constitutions.

Also, critically, there is no provision in any of the Basic Laws that explicitly recognizes the authority of the Israeli courts to declare invalid new laws that violate the principles of existing Basic Laws. The Supreme Court has ruled that such authority does exist but has shown extreme judicial restraint in exercising it - not least for fear of undermining its own legitimacy within the Jewish consensus, particularly among the right wing and the ultra-Orthodox.

Legislation to plug most of these holes in the Basic Laws, and to revise the existing Basic Laws, is now being considered by the committee as part of its attempts to draft a single constitutional document. Under discussion are new Basic Laws on Legislation, on Rights in Trial, on the Judiciary and on Social Rights. A final constitution, according to its driving force and the current head of the committee, Michael Eitan, a senior member of Prime Minister Ariel Sharon's Likud party, will include a preamble defining the character of the state, an administrative section defining the relationship between government and citizen, and a final section on human and civil rights. The committee has concentrated first on administrative questions, leaving the most inflammatory issues - the preamble and the rights-based laws - for later.

## **ISRAEL'S "BRAND IMAGE"**

Eitan appears to understand the serious pitfalls ahead. "Walking through the field of the constitution is like walking through a minefield," he said. "You can move forward, avoid the first mine, the second and the third and the fourth, and in the end everything blows up at the last mine." So given his own assessment and the fact that successive justice ministers have failed to advance a Basic Law on Human Rights, why is Eitan so committed to pushing ahead with his much larger project now?

The official answer is that, for the first time in living memory, the government coalition does not include members of the two ultra-Orthodox parties, Shas and United Torah Judaism, and so does not have to rely on their votes. According to Eitan, the government's current junior partners, the militantly secular Shinui party and the settler-friendly National Religious Party, will not oppose the principles of a constitution. "This coalition has one important attribute and that is the agreement by Shinui and the National Religious Party to work together within the government. A majority of the people can coalesce around this agreement."

But according to Marwan Dalal of Adalah, the legal center for Palestinian minority rights, there is a far more important factor. He points to an unlikely but increasingly strong common interest on the Zionist right and left in promoting a constitution. Both groups, he says, believe for different reasons

that they must act before it is too late. “The waters are rising and they want to build the dam as soon as possible,” he said.

The source of their common bond is what appears, to the country’s Zionist elites, to be the rapidly approaching end of the Israeli-Palestinian conflict as a confrontation over borders. The consensus that some form of Palestinian state will be created is consolidating Zionist opinion behind the idea that Israel must provide itself and the world with a much clearer “brand image.” The views of the left-wing Israeli novelist A. B. Yehoshua are typical. In a recent interview in which he supported Sharon’s plan for unilateral “disengagement” from the Gaza Strip, he said: “I truly believe in clear identities and clear boundary lines between them.... [Until now] we have hooked our circulatory system to that of the Palestinians and the two nations are poisoning each other.”

The left in particular is keen to shore up Israel’s democratic credentials as the country symbolically separates from the Palestinians, through both the wall being built around the most heavily populated areas of the West Bank and Sharon’s proposed evacuation from Gaza. It fears that, without a clear democratic image, the future of the Jewish state is in doubt. That has been brought home by the recent smattering of articles by Jewish intellectuals espousing a one-state solution, such as Tony Judt’s high-profile essay in the *New York Review of Books*, and by the growing clamor in Europe for an academic boycott of Israel.

#### **DEMOCRACY AND DEMOGRAPHY**

One of the prime movers for a constitution has been the Israel Democracy Institute, a centrist think tank led by Arik Carmon. Since 1992, the institute has been gauging the quality of democracy in Israel as compared to 35 other democracies, and it has grown increasingly alarmed by the trends. In the 2003 Democracy Index, Israel ranked low in all aspects of human rights protection, in ethnic discrimination and in religious coercion. It placed at the bottom on stability and social cohesion, with a more frequent turnover of governments than any other democracy. The index also noted a rise in the last decade in inequality and corruption, and a fall in political participation and press freedom.

But the most worrying findings came in an opinion poll of Israeli voters which found only 77 percent of Jews persuaded that democracy was the best form of government. A majority of Jews were also in favor of overt discrimination against the Palestinian minority: 53 percent opposed equality for Arabs, 69 percent did not want Arab parties in the government and 57 percent thought Arabs should be encouraged to leave the country.

One of the institute’s main activities since 1999 has been a behind-the-scenes campaign to create what it calls a “Constitution by Consensus.” It started with an attempt to bring together prominent Jewish and Arab intellectuals to draft a charter for coexistence between the two communities. Led by Ruth Gavison and Adel Manna<sup>6</sup>, the participants discussed fraught questions such as giving Palestinian citizens the status of a national minority, requiring them to perform national service of either a military or civilian nature, and reallocating to them state lands. However, the sticking point was reached in debates about Israel’s definition. Jurist Mordechai Kremnitzer suggested that Israel should be described as “the state where the Jewish people had actualized its natural right to self-determination in Israel.” The Arab delegates rejected this ahistorical formula. Soon afterward, the eruption of the Palestinian *intifada* in the autumn of 2000 sounded the death knell for the sessions.

The establishment centre-left also includes the Supreme Court justices and their leader, Aharon Barak, who are equally worried about Israel’s reputation abroad. Barak, who likes to cast the judiciary as the upholder and guardian of the Jewish state’s ideals, has found the court increasingly besieged by the ascendant right wing. In particular, Barak has been forced to defend his court from an assault by extreme right-wingers such as Minister of Transportation Avigdor Lieberman, who has been pushing for the Supreme Court’s replacement by a Constitutional Court, made up of appointed

politicians, rabbis and political scientists who would be more responsive to popular wishes. Barak's fear is that, if the Knesset continues on its rightward path, Israel will hit a crisis of legitimacy from which it may not be able to recover. Barak appears to want a constitution, hoping that the imposition of democratic restraints on the Knesset will end the need for his own court's repeated confrontations with the legislature. "But he is unnerved, too," says Dalal. "He knows that any constitution written and approved by this Knesset is unlikely to be a good constitution."

The right's motivation for pursuing a constitution is twofold. The baser instinct is that, as some sort of separation from the Palestinians is achieved, Israel needs to "clean its own house." Its calculations are primarily demographic: Israel must make sure it acquires the maximum land for the Jewish state and the minimum number of Arabs. In other words, the right wants to ensure that the state is unassailably "Jewish" and that demographic threats - whether from Palestinians of the occupied territories or from inside Israel - are neutered. It is no coincidence that the formulation of a constitution has begun at the same time as the prime minister has again raised the option of an exchange of territory with Palestinians. Israel would take portions of West Bank land on which there are settlements and transfer Israeli land close to the West Bank on which more than 100,000 Palestinian citizens live. There is also, notes Dalal, a pragmatic reason for Eitan's enthusiasm for a constitution now. "Likud is in the ascendant, and he and his party know that they have the best shot ever at shaping a constitution that reflects all their prejudices."

### **THE NEW ZIONIST HEGEMONY**

The *intifada* has brought these two streams of Zionist opinion, the left and right, into the same fold. With the left's failure to reach agreement with its former Arab allies over the core issue of the state's Zionist self-description and the Palestinian minority's perceived treachery in demonstrating in support of the *intifada*, the Zionist mainstream can find common ground. Since the *intifada*, negotiations have concentrated on forging a new Jewish consensus, one between the secular and religious, and the left and right. The Palestinian minority, on the other hand, has been recharacterized from a potential partner to an imminent and existential threat to the Jewish state.

Nadim Rouhana and Nimr Sultany have described this post-*intifada* phenomenon as the "New Zionist Hegemony." "The emphasis on Israel's Jewish identity has reached unprecedented heights since the October 2000 protests and the earlier rise in Arab national consciousness," they write in the fall 2003 edition of the *Journal of Palestine Studies*. "After all, if Israel is structured (in reality and in the public mind) as an ethnic Jewish state, it is only natural that any rise in non-Jewish political and national consciousness will be construed as a threat to the Jewish public."

The change in mainstream Zionism's approach was demonstrated at the first conference of the Herzliya Interdisciplinary Center in December 2000, organized by the newly created Institute of Policy and Strategy. Under the title "The Balance of Israel's National Strength and Security," more than 300 leading Jewish politicians, academics, security officials and policymakers pushed the topic of the demographic threat posed by the Palestinian minority to the top of the agenda. The conference recommended a "policy of containment" to preserve the Jewish character of the state, including promoting Jewish births and removing incentives for Palestinian citizens to have large families. There was also discussion of reinvigorating the Judaization project in the Arab heartlands of the Galilee and the Negev and the transfer of the Arab population in what is known as the Triangle area, close to the Green Line, to a future Palestinian state.

The Herzliya conference was followed by what would come to be known as the "Kinneret Covenant," another attempt to consolidate the Zionist consensus. Published in January 2002, it was the product of a year's labor by some 60 prominent Jewish leaders and thinkers outside the government and Knesset who belonged to an organization called the Forum for National Responsibility. Originally conceived by the former settler leader and right-wing columnist Israel

Harel, the forum included such diverse figures as Yuli Tamir, a founder of Peace Now who was Absorption Minister in Ehud Barak's government, Arnon Sofer, a demographer at Haifa University who believes the Palestinian minority poses an existential threat to Israel, the fanatical right-wing general Effi Eitam, now leader of the National Religious Party and a government minister, and Uzi Dayan, head of the National Council for Security. Drafting the document were philosophers, artists, generals, lawyers, journalists, poets, settlers and rabbis.

The final covenant, signed after a three-day intensive discussion on the shores of Lake Tiberias, is a revised and updated Declaration of Independence. Its main defining clause reads as follows: "As a Jewish state, Israel realizes the right of the Jewish people to self-determination. The Jewish character of the State of Israel finds expression in a deep commitment to the history of Israel and to the culture of Israel; in relations with the Jews in the Diaspora, in the Law of Return, in encouraging immigration and in the absorption of the immigrants; in Israeli creative arts and in the Hebrew language, which is the main language of the state." The Palestinian minority, which was not represented in the discussions, earns a short section promising to end discrimination. "Israel will uphold the right of the Arab minority to preserve its linguistic, cultural and national identity." The demographic debate is also slipped in: "In order to continue the existence of a Jewish and democratic Israel, a significant Jewish majority must continue and be maintained."

Several of the participants expressed the view that Israel's Palestinian citizens had no one but themselves to blame for their exclusion from the Kinneret debate. "The meeting to produce an internal Jewish dialogue was the result of the systematic campaign of Israel's Arabs, under the umbrella of Israeli democracy, to commit themselves first to the Arab Palestinian nation and only then to the State of Israel," said the poet Hava Pinhas-Cohen. None of the left-wing Kinneret contributors seemed to be aware that they had shifted the debate from one about the state's democratic impulses to one about its Jewishness. It was taken for granted in the covenant that Israel is democratic.

### **ERODING CITIZENSHIP**

A similar process is taking place in the current arguments before the Constitution, Law and Justice Committee. "What we are seeing is a debate based on a two-state solution being justified on the grounds that Israel must be a Jewish state rather than that it must be a democratic state," said Dalal. "Consider the differences with the new South Africa. There the purpose of the constitution was to advance human rights. Here the committee's purpose is to advance the state's Jewishness."

Assisting Eitan's committee are the leading faces of the New Zionist Hegemony: Uriel Reichman of the Herzliya Interdisciplinary Center, Amnon Rubinstein and Arik Carmon. They will be managing the debate to try to build a Jewish consensus for a constitution, bringing together the left, the right and the ultra-Orthodox under the banner of a constitution that, given the current makeup of the committee and the Knesset, is likely to be Likudnik in essence. The Palestinian minority's stake in the drafting of such constitution is certain to be minimal.

Michael Karayanni of the law faculty of Hebrew University in Jerusalem argues that the Palestinian minority's marginalization in this process is inevitable given the decades-long failure of multiculturalism to make inroads into Israeli society. "There has not developed in Israel a concept of 'public common bond' or a 'sphere of common citizenship' to bridge between the Arab and Jewish citizens of Israel. Every notion of 'common good' is strictly devised in accordance with the interests and ideals of the majority group—the Jewish community." This view is supported by Palestinian civil rights lawyer Yousef Jabareen, who believes that the minority is harmed most adversely by Israel's system of ethnic favoritism, more so than by its individual acts of discrimination. "The true injury suffered, for example, by Palestinian children does not result solely from unequal resources, nor from the fact that they are denied learning their own history and heritage in schools, nor from the

fact that they are denied comparable public institutions to promote their language. Rather, the injury is due to the fact that their educational system is an integral part of the system that defines them as inferior and their fellow Jews as superior.”

The constitutional status of Israel’s Palestinian minority is likely to erode further. After decades in which Palestinian citizens were labeled “Israeli Arabs” by officials determined to separate them ideologically and historically from their Palestinian kin, the Israeli leadership is taking a dramatic change of tack. According to the *Haaretz* columnist Uzi Benziman, the military establishment has begun lumping the minority in with what it calls “Palestinian society.” This is not a belated attempt to redress the community’s historic grievances but part of a campaign to push its members even further outside the Jewish consensus. “Key officials in the Israel Defense Forces and the defense establishment are convinced that there is no difference between the negation of the existence of Israel as a Jewish state by the Palestinians who live in Nablus and the Palestinians who live in Umm al-Fahm [a town inside Israel]. The segment of the Palestinian population that lives in Israel and is counted among its citizens reluctantly accepts its civil affiliation with the state but opposes the country’s definition as a Jewish state.” The “negation,” Benziman reveals, consists of the minority’s support for a “state of all its citizens.”

At the December 2003 Herzliya conference, Binyamin Netanyahu—Sharon’s presumed successor as prime minister—warned of what he considered the main threat to Israel’s future. “If there is a demographic problem, and there is, it is with the Israeli Arabs who will remain Israeli citizens,” he said. “The Declaration of Independence said Israel should be a Jewish and democratic state, but to ensure the Jewish character is not engulfed by demography it is necessary to ensure a Jewish majority.” Netanyahu’s message is doubtless prominent in the minds of the legislators of the Constitution, Law and Justice Committee as they strive to forge an Israeli constitution based on a Jewish consensus.