

Two Very Different Constitutions for Israel: A Comparison

Introduction

As soon as the "Jewish State" of Israel was declared, the leaders set about to enact a constitution. A constitutional assembly was elected, but no constitution was adopted. Instead the constituent assembly resolved to formulate a constitution piecemeal and transformed itself into the first Knesset.

Because of a number of converging circumstances--particularly a hyper activist Supreme Court embarked on a self-proclaimed "constitutional revolution"-- there is growing support for enactment of a constitution by the Knesset. The Chairman of the Knesset Constitution, Law, and Justice Committee stated recently at the President's convocation marking the presentation of the Institute for Zionist Strategies' draft constitution, that the Knesset will enact a constitution by May 2008.

There are two comprehensive draft constitutions being considered by the Knesset, one by the Israel Democracy Institute (IDI) and one by the Institute for Zionist Strategies (IZS). The principal differences between them are:

1. The IZS draft constitution establishes a Jewish state with a Jewish character and mission and with a fully democratic form of government; the IDI draft establishes an egalitarian democracy with a tenuous Jewish tinge destined to vanish.
2. The IZS draft establishes a system of separation of powers wherein the judiciary branch applies the law promulgated by the elected parliament and wherein members of the Supreme court are appointed after confirmation by the Knesset; the IDI draft codifies the Court's predominance over the Knesset and executive, and perpetuates the closed system of appointments whereby the judges themselves in effect determine who is appointed to the Court.

1. The IZS Constitution Mandates the Exercise of Governmental Powers to Promote and Preserve a Jewish State with a Democratic System of Governance

The major distinction of the IZS draft is its commitment to a "Jewish State which is the National Home of the Jewish People, in which the Jewish People fulfill its yearning for self-determination and promotion of its historical and cultural heritage". The form of government is democratic and this too is a central component of the constitution. The IDI draft also states that Israel is a "Jewish democratic state", but the "Jewish component is a mere declaration shorn of any substantive imperative.

Both constitutions specify that Israel will use the Jewish calendar, observe the Jewish Sabbath as the national day of rest, that Hebrew is the language of the State, and provide for various traditionally Jewish symbols such as the Star of David, the menorah, and the Hatikva as the national anthem. Both constitutions incorporate a right of “return” to Israel for Jews.

The difference between IZS and IDI is not whether Israel is declared a "Jewish democratic state": The difference is whether the constitution makes Israel a Jewish democratic state or whether it makes it a democratic state without a Jewish purpose, a state destined to evolve into a democratic state basically no different than all the others. The IZS constitution sets the Jewish character of the state as an overriding value equal in importance to its democratic nature. There are imperatives on the state to strengthen its Jewish character just as there are imperatives to preserve its democratic form of government. The state is mandated to establish Jewish settlement within its borders, to establish Jewish education for Jews and to monitor and nurture the welfare of Jews everywhere. The Jewish state established by the IZS constitution provides a full and robust bill of rights to protect the Arab and other minorities. It also recognizes that rights cannot be absolute; that they often clash with one another, and that they must carry concomitant responsibilities.

The democratic state which would emerge from the IDI draft elevates the principle of equality as the single supreme value to be implemented by the state. This reduces the weight of other essential elements of a democracy such as freedom, justice, rule of law, majority rule, accountability, separation of powers, stability, and other civil rights which many democratic states rank higher than equality. This ranking fatally undermines IDI's professed goal of establishing a "Jewish democratic state".

For there is no way in which Jews as a group and non-Jews as a group can be completely equal in a Jewish state. Jews alone have the right to immigrate under the law of return and become citizens automatically. A Jewish state will promote Jewish education, Jewish settlement, and the well being of Jews wherever located. While the Jewish state will protect and guarantee the right of all minorities-like any other democracy- (see §15); the Jewish mission of the Jewish state precludes state neutrality among different groups, as collectives. The IDI draft would undermine these distinctions and lead to their nullification by the Supreme Court which it maintains as all powerful.

Further, the constitution must take into account Israel's existential struggle to survive. Almost one-fifth of Israel's citizens are Arabs and Muslims who are tied by ethnicity, family, religion, and culture to enemies still devoted to destroying Israel and to killing Jews. It is certainly not true that Israeli Arabs are all loyal to or working with Israel's Arab enemies. Nor is it true that Israeli Jews are all loyal to Israel. Nevertheless, as a matter of constitutional authority, the government of Israel must be free to make distinctions between Jewish and Arab citizens where reasonably necessary to protect Israel's security. It is traditional and generally accepted for democracies to impose special rules on citizens and residents for national security objectives during times of war. Since Israel is in a perpetual state of war, this governmental authority must be carefully balanced between the need to protect Israel's security and its commitment to democratic

rule and norms. The IZS constitution is carefully crafted to establish this balance (Pars. 5-14, 15, 16): The IDI draft is not.

The IZS understands and is comfortable with the inherent difference between Jews and non-Jews in a Jewish country. The IZS constitution provides that “the State shall act to ingather the Diaspora of Israel and establish Jewish settlement in Israel.” (sec. 27) It also provides that “the State shall act to further the cultural and historical heritage of the Jewish people” and that Jewish Law shall be a source of inspiration for legislation. (sec. 29) Contrast this with the IDI draft which provides that the state shall protect the “historical and cultural heritage of the land and its residents” (sec 12) and “cultivate the value of the landscape.” (sec. 13).

The IZS draft provides that the IDF, pursuant to specific government decision, is authorized to help members of the Jewish People in distress and captivity in addition to protecting Israel and its citizens. (§ 63) The IDI draft does not recognize any connection between the State of Israel and the Jews of the Diaspora or to their well being (§ 116).

The IZS draft provides that the history, heritage, and traditions of the Jewish people shall be taught in schools that serve a Jewish population. (§ 31) Though the IDI draft has much to say about social policy, it does nothing to promote and strengthen a connection between Israel's Jews and their Jewish heritage and past.

In a nutshell, the IZS constitution establishes a Jewish democratic country which advances all democratic values, including equal treatment for all its citizens. In the IZS constitution the Jewish character of that state is not a hesitant and interstitial concession self-consciously advanced to gain majority support: it is the heart of the Israeli constitution and of the state it shapes.

2. The IZS Constitution provides for a Supreme Court to Exercise Normative and Traditional Judicial Authority

Both the IZS and the IDI draft constitutions seek to establish a constitutional framework for the current Israeli system of governance. While the IZS (but not the IDI) draft strengthens the stability of the executive and broadens the responsibility and authority of the Knesset, these reforms do not radically change how the government of Israel is to be organized.

The second major difference between the IZS and IDI drafts relates to separation of authority and balance of power among the three governmental branches. The IZS believes that if the constitution does not restrict the Supreme Court to its proper and traditional judicial role, the constitutional democracy would be placed in jeopardy.

In the past fifteen years the Supreme Court has demonstrated a willingness to make decisions with little basis in law, as traditionally understood [see, generally Prof. Shimon Sheetrit's comprehensive " Report to the President's Commission on the Structure of the Israeli Government"]. That is, the Court has shown a determination and license to shape society in every realm according to its own social and political values rather than implementing those of the Knesset, the government and the public, as traditionally required by the rule of law. When the Supreme Court decides cases on the basis of its own social and political values with little warrant in law as that has always been understood, the Supreme Court is undermining the value of respect for law. This is especially true because the Court is widely viewed as a self-perpetuating elitist group drawn from a narrow segment of society.

This failure is a failure in democratic rule, and is entirely distinct from the Court's pronounced failure to respect Israel's Zionist and Jewish character.

The IZS does not want court-imposed Zionism anymore than it wants court-imposed universalism. It believes that the Court should be an agency of law, and that government sanctioned or imposed values should come from the people by means of law enacted by the Knesset.

In a proper functioning democracy, courts respect their traditional role because of two factors working in harmony: (1) respect for the tradition of judicial self-restraint and deference to democratic institutions and (2) the changing and representative composition of the judicial bodies themselves. The IZS draft constitution defines the appropriate boundaries for judicial action and sets up checks and balances to enforce those boundaries. The courts are confined to their traditional role of adjudicator of real controversies between real parties in strict accordance with law. With time, it is anticipated that Israeli courts will develop an internalized ethic of judicial restraint conforming to the boundaries delineated in the constitution.

The IZS constitution also provides for a system of choosing judges who will be more representative of the citizenry rather than the current system of ideological self replication, utterly unique to Israel, which is fossilized in the IDI draft.

These provisions are necessary to make Israel a state of law. A commitment to law is essential to both the Jewish and democratic character of Israel. The following is a discussion of how the IZS constitution works to achieve this objective.

First the IZS constitution takes pains to reduce ambiguity by the explicit wording of the human rights it recognizes, their limitations, and how conflicts in these rights should be resolved.

Second, the IZS constitution delineates accepted limitations on court jurisdiction that exist universally in democratic legal systems. One such limitation is section 70 of the IZS draft that provides that a court cannot rule on a case unless it is a genuine

controversy between two parties having a legal interest in the outcome – that is, no one can bring a matter to the court just because he/she doesn't like the law. Another, is section 71 which limits the court to issues generally regarded as appropriate for judicial determination. This excludes, for example, court direction of Israel's security and foreign policy and of budget allocations.

Third the IZS constitution specifies some principles of interpretation that the court is required to use. For example, the court is told that when interpreting a statute passed by the Knesset it should be interpreted “solely on the basis of the intent and purpose of the statute as evident from the text.” (sec. 74), and that the Court cannot find rights and powers by implication from the legal systems of other countries or non-governmental organizations. (sec. 74)

Fourth, where a statute is nevertheless declared unconstitutional, the IZS authorizes the Knesset to override the court's decision by a special vote.

The IZS constitution, as discussed above, also proposes to change the current closed system of choosing Supreme Court judges whereby the Supreme Court itself controls appointments to the Supreme Court. The IZS constitution provides that justices be nominated by a special panel of experts appointed by the Knesset and that nominees to the Court be confirmed by the plenary Knesset. (§ 76) Once appointed, the justices become wholly independent.

The IDI draft, on the other hand, rather than reforming the current judicial system, writes it into the constitution and thus eliminates any opportunity of restoring the proper balance among the three branches of government.