

# The Current Crisis in Israel's Constitution

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Israel's political constitution has been in a condition of crisis since the 1990s – a crisis that the proposed and recently passed Basic Law reaffirming Israel's character as the Jewish state is intended to resolve. In what follows, I examine some key issues in general and Zionist political theory in order to understand the nature of the present crisis in Israel's constitution. I will suggest that in light of these considerations, a Basic Law reaffirming Israel's character as a Jewish state is in fact much needed at this time – not only in order to stabilize the Israeli constitution, but also as a basis for approaching the broader problem of state legitimacy that has in recent years crippled the state system in the Middle East.

## I. THE TRADITION OF ISRAEL AS A JEWISH STATE

On the face of it, Israel should not need new legislation reaffirming its constitutional character as a Jewish state. Both Zionist political tradition and international diplomatic history amply confirm Israel's character as such. The expression "Jewish State" was coined by Theodor Herzl himself with reference to Jewish national independence, and became the title of his 1896 tract seeking to establish the political theory that would underpin such a state. In proposals submitted to the British government, Herzl went on to ask for the empire's assistance in establishing a territory "which shall be Jewish in character," "founded under laws and regulations adopted for the well-being of the Jewish people," with a Jewish name and a Jewish flag.

From here, the concept of a Jewish state developed in countless exacting debates between the Zionists and their Jewish detractors: in British diplomatic documents such as the Peel Commission report of 1937, which called for the establishment of a “Jewish State”; in the United Nations partition plan of 1947 supporting the establishment of a “Jewish State”; and in Israel’s Declaration of Independence, which refers to Herzl’s theory of the Jewish state explicitly and uses this term repeatedly. Much Israeli legislation, including the Law of Return offering automatic citizenship to Jews of all lands, was based on Herzl’s view of Israel’s purpose, which was embraced alongside a firm commitment to civil equality for non-Jewish citizens. And this tradition was upheld and confirmed in Israeli Supreme Court rulings for decades.<sup>1</sup>

Moreover, Israel’s standing as the national state of the Jewish people rests on a broader body of political theory, which recognizes the principle of the self-determination of peoples as the best organizing principle for the international system.<sup>2</sup> Movements for national self-determination had been known in Europe at least since Dutch independence from imperial Spain in 1581, and had gradually led to the independence of additional conquered peoples from Greece to Poland and from India to Ethiopia. In *On Representative Government* (1861), John Stuart Mill urged national self-determination as the best organizing principle for the international order, arguing that only states with a high degree of linguistic and cultural homogeneity share sufficient common interests to become democracies: multi-ethnic states would necessarily be tyrannies, he wrote, because only oppression can keep the radically conflicting interests of the different peoples of the state at bay. Woodrow Wilson placed this principle at the center of his proposals for reconstruction after World War I.<sup>3</sup>

This does not, of course, mean that every people necessarily

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1 I recount this history in detail in Yoram Hazony, *The Jewish State: The Struggle for Israel’s Soul* (New York: Basic Books, 2000).

2 I have avoided the term “nation-state,” which is often understood to mean that the nation consists of those individuals living in a given state.

3 John Stuart Mill, “On Representative Government,” in *Utilitarianism, On Liberty, and Considerations on Representative Government*, ed. H.B. Acton (London: Everyman, 1984

wants or needs political independence. For example, it may be that today there are no compelling reasons for the Scots to be politically independent from the larger and more powerful English polity after several centuries of successful alliance within the framework of the United Kingdom. But where a people is repeatedly persecuted and massacred over centuries for its distinct traditions and loyalties, political independence is often the best option. This is the case right now with respect to the Kurds and the Assyrian Christians in Syria-Iraq, two peoples for whom only political self-determination and independence is at this point an appropriate response to the horrors they have experienced – and are still experiencing.

## II. BUT IS A JEWISH STATE LEGITIMATE?

If Israel's political and legal standing as the national state of the Jewish people is so firmly supported in Israeli political tradition, international diplomatic history, and general political theory, why should this status require renewed affirmation now in the form of a Basic Law?

The reason is this: for the past half century, we have witnessed a fundamental shift in the political doctrines many in the West accept as providing the theoretical foundations for the state. And this shift, unjustified and undesirable though it would appear to be, has nevertheless raised pressing questions about the legitimacy of Israel as the state of the Jewish people.

This is not a new issue. It is fundamental to modern political theory and can be characterized as stemming from a disagreement between Montesquieu and Rousseau: for Montesquieu, different nations will necessarily have very different constitutions, since their design must be in keeping with the historical needs of different peoples, and must respond to the actual circumstances in which each state is established and maintained. Providing for such differences

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[1861]), 391–98. See also Yoram Hazony, *The Virtue of Nationalism* (New York: Basic Books, 2018).

is, in fact, what is meant when we speak of the right of a nation to “self-determination.” Rousseau, on the other hand, claimed that there is only one legitimate constitution, which derives from abstract reasoning and applies universally to all nations at all times and places. Any government that does not conform to Rousseau’s universal constitution is, on this view, illegitimate.<sup>4</sup>

The form of constitution proposed by Rousseau is one that is known in Israeli political parlance as a “state of its citizens.” Such a constitution assumes that all individuals in the territory of the state enter into an agreement to give up on any other historical political commitments that may have once bound them (e.g., commitments to tribes, peoples, religions) in order to become equal citizens of the state. This universal political model was adopted by Kant and became an integral part of the German Enlightenment. Arrayed against this concept of a universal social-contract state has been a long line of thinkers in the tradition of Montesquieu, including Hume, Ferguson, Hegel, Constant, Burke, and Mill, who, in different ways, argued that the insistence that there is only one politically correct constitution must necessarily lead to oppression and bloodshed – as the attempted homogenization of mankind under a single form of regime comes into conflict with the historical, national, and religious ties that bind actual peoples to one another in real life.

It is not surprising, then, that in the debate over the universal constitution, Herzl and the Zionists were from the outset, in principle, on the side of Montesquieu. Indeed, in *The Jewish State* and in other writings, Herzl repeatedly rejects Rousseau’s social contract as the basis for the state, just as he rejects the French government’s claim that the Jews are no longer a people because they have tacitly signed on to the social contract that supposedly established the French Republic. Instead, Herzl argues that large numbers of Jews all over the world retain their political attachment to the Jewish

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<sup>4</sup> This argument between empiricist and rationalist theories of government appears in England as a disagreement between John Selden and John Locke. See Ofir Haiyry and Yoram Hazony, “What Is Conservatism?” *American Affairs* 1, no. 2 (Summer 2017), <https://americanaffairsjournal.org/2017/05/what-is-conservatism/>.

people, and that they have the political and moral right to act as a people in order to establish a national home in which Jews can be safe from persecution and live in accordance with laws that they will determine themselves.

Among Jews, the question of the universal constitution was decisively settled in favor of the view of Montesquieu and Herzl during the Holocaust, when the policies of the United States and Britain allowed (and in the case of the British blockade of Palestine, actively contributed to) the deaths of countless Jews whose lives might have been saved. A Jewish state that was constitutionally mandated to prioritize the defense of Jewish lives and Jewish civilization would certainly have operated differently than America or Britain. By the time of Harry Truman's Yom Kippur Eve address in 1946 indicating America's possible support for a Jewish state in Palestine, nearly all of organized Jewry had reached the conclusion that Jewish self-determination in the form of a national state of the Jewish people was both justified and necessary.

But as is well known, history has not been kind to the idea of national self-determination. The end of World War II brought a tidal shift, first in Europe and later in the United States, in the direction of Rousseau's universal constitution as the sole legitimate constitution. By the 1960s, Western elites had begun to turn against national particularism of any kind, pointing to Nazi Germany as proof that drawing national and religious distinctions is the root of all political evil. In Europe, the result has been the attempt to dismantle the system of independent national states and replace it with a European Union. In the United States, as well, an accelerating aversion to drawing distinctions based on religion or nationality was felt across a variety of issues, from immigration to national security. (The British vote to leave the EU in 2016, followed months later by the election of an avowedly nationalist president in the United States, are dramatic attempts to reverse these trends. It is too early to say whether these attempts will prove successful.)

That Nazi Germany should be cited as an excuse for delegitimizing the institution of the national state is ridiculous: Hitler was a fanatical opponent of the Western institution of the national state,

which he saw as an effete construction of Western liberalism. His plan for world empire left no room for the principle of the self-determination of peoples. His goal was rather to put an end to the self-determination of peoples once and for all.

Nevertheless, one cannot deny that for increasing numbers of educated people today, the very idea of the self-determination of the Jews in their own national state is to be regarded as akin to racism and Nazism.<sup>5</sup> Both in America and Europe, the movement to brand Zionism as a form of racism continues to gather steam. In Israel, too, “post-Zionism” became the buzzword of fashionable opinion in the 1990s, indicating a preference for setting aside the Jewish-national aspects of Israel’s constitution and public culture. Today, this term is less popular than it once was. But among Israeli academics and jurists, there has been a profound shift in political values in step with the change that we see throughout the West. Rousseau’s concept of the universal constitution has made deep inroads in Israel. And with it the suspicion that the Israeli regime is not a “true democracy” and will not be legitimate until it is reshaped into a “state of its citizens.”

In this, Israel’s intellectual trends are out of step with the vast majority of the Israeli public. But that does not make the present situation any less dangerous.

### III. THE THREAT TO THE ISRAELI CONSTITUTION

If we read the minutes of the meeting of the National Assembly that adopted Israel’s Declaration of Independence and its first constitutional provisions on May 14, 1948, we read a debate overtly concerned with a series of issues in democratic theory, including civil liberties and the separation of powers. The representatives of all parties supported the establishment of a democratic form of government

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<sup>5</sup> On European hatred of Israel and its parallels in the United States, see my essay, “Anti-Nationalism and Hate” in *The Virtue of Nationalism*, 190–234. See also “Israel Through European Eyes,” *Jerusalem Letters* (July 2010) and “More on Kuhn, Kant and the Nation-State,” *Jerusalem Letters* (August 2010), <http://jerusalemletters.com/>.

and were concerned to safeguard it. Nevertheless, it is striking that in tens of pages of debate, there is not a single reference to the possibility that the term “Jewish State” (used by all the participants) or the right of the Jewish people to an independent state of its own, is in any way in conflict with a democratic form of government. The representative of the Communist party proposed that the term “Jewish State” be amended to refer to an “Independent Jewish State” or to an “Independent and Sovereign Jewish State” – proposals that Ben-Gurion rejected. But neither he nor anyone else saw a need to alter the traditional Zionist concept of a “Jewish State” to make it somehow more democratic, because they already believed the Jewish state would be governed democratically in the fullest sense.<sup>6</sup>

This same situation is reflected in Israeli legislation and Supreme Court decisions for the first forty years of the existence of the new nation. Yet beginning in the 1970s, prominent Israeli academics and jurists, in keeping with the support for the concept of a universal constitution then sweeping Europe, began advancing the claim that the state established by the Zionists was a Jewish state instead of being a properly constituted democracy. Such arguments began making headway among Israeli political leaders – some of whom, like former Education Minister Shulamit Aloni, were willing explicitly to argue that the idea of Israel as the state of the Jewish people is “anti-democratic, if not racist.”<sup>7</sup> At that time, we were introduced to a series of alternative concepts (“State of the Jews,”<sup>8</sup> “Jewish and Democratic State,” “State of the Jews and of Its Citizens”) whose aim was to obscure, attenuate, or displace the traditional concept of Israel as the national state of the Jewish people in order to bring the country into conformity with the theory of the universal constitution.

When the decisive moment came in 1992, the Knesset of Israel

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6 Minutes of the National Assembly and the Temporary State Assembly (Jerusalem: The State of Israel, 1948), vol. 1.

7 Shulamit Aloni, “Medinat gutnik ve-Moskovich,” *Maariv*, November 30, 1998. See also *idem*, “Khok yesod: Kevod ha-adam ve-kheruto,” *Te’oriya ve-bikoret* 12–13 (1999): 367–75.

8 Contrary to what is often said, the expression “State of the Jews” does not originate with Herzl. Herzl coined the term “Jewish State” and used it throughout his career. See Yoram Hazony, “Did Herzl Want a Jewish State?” *Azure* 9 (2000), 37–73.

passed two constitutional Basic Laws declaring Israel to be a “Jewish and Democratic State.” While both laws declare themselves, in their preambles, to have been legislated “to establish . . . the values of the State of Israel as a Jewish and Democratic state,” the fact is that the rights enumerated in them are concerned exclusively with protecting values derived from the supposed universal constitution – values such as freedom of speech, privacy, and so on. This means that neither law addresses the possibility that the Jewish state may have the right or the duty to enact specialized, non-universal provisions in some of these areas that would differ from the laws of other nations. For example, Israeli law restricts freedom of speech and religion by restricting missionary activities aimed at converting Jews to other faiths; and it similarly restricts freedom of occupation by regulating the sale of certain food products during Passover, and by limiting the operation of places of entertainment on Holocaust Memorial Day. By explicitly enumerating only universal rights and saying nothing about the Jewish state as expressing the right to self-determination of the Jewish people, the new Basic Laws make it difficult for even a balanced Supreme Court to protect Israel’s historical identity and purpose.

When passed, little significance was attached to this legislation, a fact reflected in the absurdly small number of legislators who even bothered to vote on these bills: the new laws passed by votes of 21–32 and 0–23, respectively, out of 120 members of Knesset. But the consequences were immediately felt in Israeli constitutional law, which has been thrown into a state of confusion from which it has not recovered, as Supreme Court justices and law professors rushed to try to offer new interpretive constructions to fill the theoretical vacuum surrounding the term “Jewish and Democratic State.” The result has been a profusion of competing, superficial, and ad hoc theories, virtually none of which makes significant reference to the relevant political theory or intellectual history of the concept of a Jewish state.<sup>9</sup> It is in this context that Israel’s then-President of the Supreme Court, Aharon Barak, shamed the Zionist and Israeli

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9 For discussion, see Yoram Hazony, *The Jewish State*, 48–52.



political tradition by declaring the country's Jewish character to be "in tension" with democracy, and embarked on a series of decisions aimed at gradually eroding Israel's legal status as a Jewish state.<sup>10</sup> This process reached a climax in the 2000 Ka'adan decision, in which the Supreme Court declared that "the general purpose of all legislation is to secure equality among human beings without discrimination on the basis of religion or nationality," and asserted that policies by the Israeli government and the Jewish Agency are on their face illegal if not in conformity with the principle of equality.<sup>11</sup>

Like the 1992 Basic Laws that recklessly sidelined the concept of Israel as the Jewish state, the importance of the Ka'adan opinion appears to be greatly underestimated even now. A Supreme Court ruling stating explicitly that equality (and not also security, liberty, the well-being of the Jewish people, and other values) is the general purpose of Israeli law, and explicitly invoking American cases such as *Brown vs. Board of Education* to rule inequality illegal in Israel, is an announcement of a new constitutional order. For example, in the US, *Brown vs. Board of Education* rules out state institutions that are "separate but equal," and the Ka'adan decision likewise rules that "separate but equal" institutions are not permissible in Israel. Of course, there should be no legitimate parallel between the American case, which deals with segregation on the basis of race, and the conditions that we find in Israel, in which Jews and Arabs are not different races at all, but are rather ancient civilizations with highly developed national, linguistic, and religious traditions that they are concerned to preserve and pass on to their children. Unfortunately, the court did draw this parallel, inserting it into Israeli constitutional law. If taken seriously, this would mean, for example, that Israel's present educational system – in which Jews and Arabs for the most part send their children to different school systems – is unconstitutional. So is Israel's Law of Return, which offers automatic citizenship to Jews who wish to immigrate. So are Israeli security policies aimed

<sup>10</sup> Aharon Barak, *Iyunei Mishpat* 24 (September 2000): II.

<sup>11</sup> H.C. 6698/95, Aadel Ka'adan v. Israel Lands Administration, 5(1) P.D. 258 (2000), <https://www.escri-net.org/node/365464>.

at protecting Jews around the world. And the same can be said for other Israeli laws and policies as well.

The fact that all the implications of the universal constitution declared in the Ka'adan decision have not yet been unfolded at this time is irrelevant. So long as it stands without clarification in the form of new constitutional law, this ruling is a ticking time-bomb whose consequences are yet to come.

The disappearance of Jewish national self-determination from the court's list of the legitimate aims of Israeli policy is what stands behind the present crisis of Israel's constitution. It is what stands behind the need for a Basic Law reaffirming Israel as the national state of the Jewish people – a law whose purpose is to re-establish the previous status quo in conformity with the Herzlian political traditions upon which the State of Israel was founded, and from which it was, until recently, understood to draw its legitimacy.

#### IV. THE ISRAELI CONSTITUTION AND THE FUTURE OF THE MIDDLE EAST

The Herzlian political model has been dramatically successful. As the Jewish state, Israel has absorbed millions of destitute Jewish refugees from Arab lands, Iran, the former Soviet Union, and elsewhere, offering them freedom from persecution, economic opportunity, and public schools where their children can be introduced to the heritage of their people by learning Hebrew, Jewish history, and Bible (something available in the United States only to Jews who can afford private school tuition due to the current interpretation of the US Constitution). Far from creating a xenophobic and racist regime, the Jewish state has blossomed into a powerful example of a successful democracy – the only country in the Middle East in which Christians, Druze, and other minorities enjoy free worship and need not fear for their lives.

This success has not been in spite of Israel's character as the state of the Jewish people, but because of it. To see this, one need only compare Israel's trajectory to that of other states established in the

region at around the same time but based on a “multi-national” model: Syria (independent 1946) was assembled by the French by forcing together Alawite, Druze, Kurd, Assyrian Christian, and Sunni Arab peoples – willfully ignoring national and religious boundaries, and vocal demands by some of these peoples to be granted independent states of their own. Iraq (independent 1932) was a similar British construct, imposing a single state on radically disparate Kurdish, Assyrian, Sunni Arab, and Shia Arab peoples, among others. Most states in the Middle East – “Pan-Arab” in name only – were built by the Western powers in just this way.

The results of these experiments in constructing multi-national states have been just as Mill predicted: Israel, built around a cohesive and overwhelming Jewish majority, was able to establish internal stability without repression, and quickly developed into a fully-functioning democracy. In contrast, the other states of the region have been able to retain their integrity only through brutality and state terror. The destruction of the Sunni city of Hama by the Alawites in Syria in 1982, and the gassing of Kurds in Halabja by the Sunnis in Iraq in 1988, are only the best-known examples of what has in fact been a chronic dilemma for these regimes: either greater repression, or collapse.

There can be no freedom and peace in Syria-Iraq until the borders are redrawn along ethnic and religious lines. In the end, Kurds, Alawites, Christians, Druze, Sunni Arabs, and Shiite Arabs must each have their own national state, each devoted to the well-being and interests of one people only. And each must have its own “Law of Return,” offering a place of refuge and automatic citizenship to the scattered and persecuted members of this one people.

In a sense, this is a distinctly Israeli vision, emerging from the Jews’ experience of suffering and redemption in the last century. But it is also a humane and universal vision – the only one that can offer genuine hope to the devastated peoples of the region. This vision receives concrete reaffirmation in the proposed Basic Law confirming Israel as a Jewish state, which reinforces a vision of the Middle East as advancing (much as Europe did after emerging from the Thirty Years’ War in the seventeenth century) in the direction of an order of

independent nations based on the principle of religious and national self-determination.

## V. DO WE BELIEVE THERE IS ONE POLITICALLY CORRECT CONSTITUTION?

The universal constitution of Rousseau and Kant is the one “politically correct” constitution permitted by a certain strand of radical Western political thought that has currently become fashionable in the West. The fact that this political theory is widely accepted does not, however, make it moral or prudent. Of course, equality before the law is a crucial political and legal principle that is (as Aharon Barak correctly emphasizes) already expressed in the laws of Moses: if individuals come before a judge in a murder case or in suit over property rights, for example, then we must demand that the law be applied equally to all without distinguishing between individuals on the basis of wealth or gender or national identity. We rightly consider this to be a fundamental principle distinguishing civilized nations from those of barbarians.

However, the moral necessity of such “equality before the law” does not mean that everyone in the world has to be equal in all things and at all times. Indeed, as the Soviets, the Chinese, and the Khmer Rouge amply demonstrated, it is just as easy to conduct a murderous persecution in the name of equality as it is to conduct one in the name of inequality. Jews must never forget that it was in the name of a Rousseau-style “state of its citizens” that Napoleon in 1807 forced French Jews to renounce their historical identity as a people with political aspirations of its own, and to revise Jewish law on all matters that the French government saw as dividing Jews from the broader French public (e.g., marriage and divorce). This is perhaps ironic, given recent events in France, but it is nonetheless a fact: the French concept of a “state of its citizens,” in which Jews were given equal citizenship, was imposed on the Jews by force. It was a persecution in which the Jews were made to give up their

traditional identity and law under explicit threat of being expelled from the country.

Nor is this the exception. It is the rule. In Europe today, sporadic efforts to render Judaism illegal – through bans on circumcision, on kosher slaughter, and so forth – are all ultimately based on the claims of the universal constitution, which insists that “reason” can determine a single proper framework of rights that is correct for all humanity. Because of this conceit, persecutions of minority peoples will always take place in the name of Rousseau’s homogenizing political theory. In the name of making everyone “equal,” the majority can and will continue to persecute the minority until everyone comes out the same.

Like every nation, Israel has a political and constitutional tradition that is its own, and that differs from those of other peoples. This has perhaps been forgotten by some. But this forgetfulness will not go on forever. Long after the current constitutional fashions have passed from the world, there will be an Israel “which shall be Jewish in character,” and which will be “founded under laws and regulations adopted for the well-being of the Jewish people.” It will be a nation that cherishes its non-Jewish citizens who have chosen to make their lives in the Jewish state and to contribute to its upbuilding, defense, and flourishing, and it will work diligently to ensure that they enjoy equality before the law. But this will not be because of any supposed universal constitution – a fiction, with no reality to it. It will be because the Jewish political tradition demands this of us.