TOWARDS A NEW EUROPEAN IUS COMMUNE, 1999

A CONSTITUTIONAL REVOLUTION?* / Ruth Gavison * *

In his opinion in Bank Hamizrahi published here, President Aharon Barak sets in great length his analysis of the constitutional history of Israel and his interpretation of the impact of the legislation of the Basic Laws of 1992. Barak is not only the President of the Court, he is probably the most influential jurist in Israel. He has set out his views on these matters in a large numbers of articles and books, addressed to both professional and lay audiences. People were encouraged to hear of the 'constitutional revolution' which will permit the court to review legislation by the Knesset when it violates human rights. They were pleased to have an additional guarantee against the arbitrariness of power-seeking officials. Naturally, his analysis and interpretation are likely to become the law and the accepted approach to these matters.

It is precisely because of this that I would like to clarify that Barak's positions on the description of the constitutional process, the impact of the 1992 legislation, and the desirability of these statements about the law and the history are quite controversial in Israel. Some of the opposition to these ideas comes naturally from politicians who hate to see their sovereignty limited by judicial review over primary legislation, but some comes from the academic communities of both law and political science, from judges including present and past supreme court judges, and from legal practitioners of all political persuasions. Moreover, the people voicing misgivings about some of Barak's positions include many whose commitment to the promotion and protection of human rights in Israel is

clear and long-standing. As far as I can see, this is not a debate of the powers-of-light against the powers-of-darkness. At present, the constitutional situation in Israel is very fluid. It may well be that at the end of the day, Barak's present interpretation will become the law of the land. If this happens, my description of the present law will do more justice to his huge achievement than Barak's own statement, which describes the present, in part, in terms of what seems to many progressive minds a wishful future.

There are a few interrelated theses in Barak's analysis: First, he thinks that the Knesset maintains the constitutive powers given to the first constituent assembly, which in fact did not enact a constitution. He concludes from this that legislation dubbed 'basic laws' is on a higher level than 'regular' laws, even if these laws are not entrenched in any way. In this, he (and President Shamgar) change the understanding of 'basic laws' by both the Knesset and the legal community until the present. Legally, they seek to retroactively change the status of unentrenched basic laws by requiring that they can only be changed by basic laws-' Second, he describes the enactment of the two Human Rights Laws in 1992,3 as a 'constitutional revolution', giving all human rights a higher status, under which there are limits on the power of regular legislation enforceable by judicial review. Third, he describes Israel as a 'constitutional democracy' with three equal and independent powers. Fourth, he states that the 1992 laws do give the courts the power of judicial review, even thought they do not mention it explicitly.

All the Judges on the Supreme Courts, and most legal commentators, agree on the last point. They agree that if a future law violates one of the rights explicitly mentioned in the two laws (human dignity, liberty, privacy, reputation, freedom of movement, property, and freedom of

occupation), and the limitation of the right does not fall within the conditions described above, the court may have the power to invalidate the law. They disagree on the question of whether 'liberty' and 'human dignity' are broad enough to include the rights not mentioned in the 1992 Laws - including free speech, freedom of religion, freedom from religion, and equality. Barak and some others tend to a broad interpretation, despite the fact that the legislative intent was clearly to exclude them, while Heshin and a number of others favor the narrower one. They also disagree on ways of changing the Human Dignity and Liberty Law, which is not entrenched. Barak holds that a change can only be made in a basic law (and the change itself may be judged according to the limitation clause), while Heshin and possibly others think that the Knesset can limit the rights by a regular law enacted by a regular majority, so long as it states that the law should be valid notwithstanding the basic law.

These are important details, which will be clarified as constitutional adjudication accumulates. The more interesting controversies relate to the description of the constitutional process from the foundation of Israel in 1948 until the present.

Most observers of the Israeli legal system think that Israel does not have a formal constitution, despite the fact that, over the years, a number of 'basic laws' have been enacted." This interpretation rests on the fact that all 'basic laws', including the recent ones, were adopted by regular legislation processes. Mostly, their provisions were not entrenched. More importantly, these laws were enacted piecemeal, at large intervals. These laws were never put together in a single comprehensive document. Furthermore, the process of legislating all parts of what is usually included in the 'material' constitution

could not be completed because of a persistent objection in the Knesset to the enactment of a Bill of Rights and to the principle of judicial review over the Knesset's legislation.

President Barak suggests that the persistent attempts to enact a Bill of Rights and judicial review show that the Knesset accepts the idea of a constitution and of judicial review. But the legislation, and mainly what could not be legislated, show that the Knesset stopped short of enacting

or e~do~sing a con~titution. Moreover, Israel is a rifted society. A constitutional order III a society like that should be a matter of some give-and-take on framework principles, adopted as a package deal with checks and balances, after some public debate, in a special process, and based on a b~oad consensus. All of these features of constitution-making were absent III Israel. In fact the 1992 Basic Laws were passed with small attendance and with a rather slim majority. Clearly, the legislation did not look much like a revolution of any sort.

This is why Judge Heshin, joined by many of the academic commentators, doubts that the Knesset has constituent powers, which it has been using in enacting basic laws. This is why they also criticize dubbing the 1992 legislation 'a revolution', which creates the wrong impression that with it Israel passed from a pre-constitutional to a post - constitutional moment.

With all the judges of the Supreme Court and most commentators, I agree that the Knesset can bind itself. If the Knesset wishes to limit its power to change its Laws in the future, it can do so, its sovereignty notwithstanding. I tend to agree with Heshin, however, that even if the Knesset can, in principle, adopt a constitution, legislating constitutional arrangements one at a time, most of which specifically are not meant to be

special legislation, cannot create a formal constitution without an act of consolidation and special legislation, preferably by a special process of approval or ratification.

The eagerness to declare the revolution and the constitution might have been more justifiable had the 1992 Laws been enacted after a serious public debate and with a broad consensus, and had the declared 'revolution' been confined to the rights enumerated by the laws. But both features were missing, and the rhetoric trumpeted judicial review and limited powers of legislation as the results of the legislation on all matters. Clearly, the claim that Israel already has a formal constitution, and the description of this constitution as one creating three powers which are co-equal and independent, is not an accurate description of the situation in Israel. The courts are constituted by an unentrenched basic law, which the Knesset can change using a regular majority. While the

Israeli judiciary does enjoy large measures of independence.P Israel's constitutional structure still has the Knesset at the top.

Barak conceded, as he had to do, that the enactment of the Bill of Rights was not complete, and that the constitutional provisions should be more entrenched than they were. However, it seems that the 'revolution' discourse has hindered the chances of this development. Many MK's, mostly from the religious parties, were quite apprehensive about judicial review. Most of them objected to the legislation of the basic law, and those who supported it did it for two reasons: First, the laws define Israel as a Jewish and democratic state, thus formalizing its Jewish nature; second, and no less important, they thought they succeeded in limiting the impact of the new laws to matters that did not involve value controversies. The rhetoric and some decisions indicating the potential scope of the laws as interpreted by the activist members of the court made these

supporters regret they had agreed to the Iegislation.? As a result not a single basic law had been enacted since 1994 (when the 1992 Laws were amended)."

My conclusion is that the 1992 Laws did not create a revolution. If there was a revolution, it was the creation primarily of the court itself, led by its President Barak.8 Two questions arise. First is this development pushing the idea of a constitution and judicial review against the background of the constitutional reality - good for Israel? Second, in a democracy, should a process like this be led by the court itself? There is

some debate concerning both questions. I tend to give negative answers to both of them.

Since the Israeli polity has never formulated a constitutional document which was evaluated as a whole and endorsed by a large majority, the constitution which is now being elevated into the status of higher law is a cluster of specific arrangements, without much internal coherence, enacted at different periods, and including some extremely problematical parts (such as the Basic Law: Jerusalem as Israel's Capital, which specifies that Jerusalem shall never be divided). Moreover, this 'constitution' includes or protects laws which are outrightly undesirable, such as the Defense Regulations giving military commanders immense powers over individuals and groups, or a religious monopoly over marriage and divorce. Finally, the material now covered in basic laws is in different levels of generality and conciseness. While some basic laws could be simply incorporated into a formal constitution, others (especially the earlier ones) contain a richness of details fitting the status which they originally had - that of regular legislation." On the other hand, many of the most basic laws in Israel, notably the Law of Return 1950 and The Equal Rights of Woman Law 1951, were not called basic laws. As a result, the call to

entrench all existing basic laws in a sweeping way seems quite undesirable, especially if the entrenchment is going to take the form of special majority requirements for change which will not be applied to the entrenching law itself. 10

In addition, the piecemeal nature of the legislation means that no thought was given to the overall picture. The design of the institutions was made, in part, by simply legalizing the structures that developed in the Jewish community before the State. A relevant point related to the court itself. Israel has one of the most apolitical systems of judicial appointments in the world. The Supreme Court judges have a practical control over appointments to the bench. 11 This seemed a benefit of the system as long as the Knesset maintained its power to change by legislation what it deemed unacceptable decisions. This may seem quite inappropriate if the courts are going to assume the power to invalidate Knesset legislation as well. In most continental countries, only special constitutional courts have these powers. In the US, where the 'regular' Supreme Court exercises this power, judicial appointments are clearly much more political then they are here.

President Barak objects to the idea of a constitutional court in Israel. He wants the regular courts, possibly just the Supreme Court in an extended panel, to exercise powers of constitutional review. But he also objects to more political responsiveness and representativeness on the Court. This may well be an untenable position. Why should a life-tenured, professional, unrepresentative Court be allowed to second-guess legislative judgments of proportionality or of the legitimacy of purposes? Not surprisingly, pressure is mounting to increase the representation of religious people on the Court. Under this

new conception of the Court's powers, the fact that there has never been an Arab judge on the court seems even more significant and unacceptable.

The way the constitution is created, and the way judges are appointed, highlight the main danger from this constitutional process: instead of the constitution being a document of shared commitment and allegiance, it is becoming a subject of rifts and controversies. The newly-declared constitution is seen by some as a set of partisan norms, partly foreign and alienating, imposed on society from the outside by a professional elite.

This leads me directly to the role of courts in developing a constitution in democracies. Clearly, courts are essential factors in the protection of individual and minorities rights. They do this irrespective of the existence of entrenched Bills of Rights and judicial review, as the experience of England proves. The Israeli Supreme Court has a very impressive record of protecting some human rights, especially those of free speech in the Jewish sector, in the absence of such constitutional devices. In some areas, it has granted rights a more expansive protection than they were given under the US Federal Bill of Rights. A strong and independent judiciary is an essential element in a democracy.

However, what the 'revolution' process is generating is very different, and quite unique. Supporters of this move often remind us that CJ Marshall judicially created judicial review in the absence of explicit mention in the US constitution in the famous Marbury v. Madison. They conveniently forget that Marshall 'invented' judicial review because he was interpreting a formal entrenched constitution, unifying the union, ratified by the states. 12 In Israel, Barak is inventing the constitution itself. The reason Israel does not have such a unifying document is not that it does not need one, or that people have not tried. Israel needs a constitution badly, because it is a deeply divided society. Almost

20% of its citizens are Arabs, who feel alienated from the Jewish state and discriminated by it. Among the Jews, there is a hot and deep debate about the meaning of the Jewishness of the state, in which some claim it must be related to Jewish law and religious traditions, while the others argue in favor of a secular sense of nationhood, historically related to religion but normatively independent of it. Because these views of what the state is and should be are so disparate and inconsistent, semi-federal understandings about political power-sharing seem almost necessary if Israel is to survive as a stable democracy. 13 However, the Jewish majority is reluctant to concede the claims of the Arab citizens to equality and full citizenship, while the Orthodox religious establishment is reluctant to give up its monopoly. As a result, progress can be, and has been, made incrementally, but no profound agreement about shared basics can be reached.

I have already mentioned that the attempt to elevate the status of existing basic laws by the 'revolution' rhetoric is problematic: Among other things, these reflect the Jewish majority and do not give Arabs their due. But when the problem of the constitution and its absence is seen in this way, it seems clearer to me that the court should stay out of the

process. Even where there is a clear and shared constitution, many argue that courts should restrain themselves from making judgments that are best made by representative legislatures. 14 Clearly, in the absence of such an agreement in the political community and the general population, the legitimacy of the court's pushing to grant itself the power of judicial review of Knesset is very problematic.

It has been argued that this approach dooms Israel to be controlled by its politicians, without a chance to join progressive nations with a constitution, a Bill of Rights and

proper protection of rights. It has also been argued that the people does want a constitution and judicial review, and that this is all the legitimacy the court may need. I beg to differ. First, I do not think that Israel is a place where human rights are violated on a systematic basis, or, more specifically, that whatever violations do occur are the result of the absence of a Bill of Rights and judicial review. The Supreme Court, in its innovative interpretations, has done much to make Israel's record a very impressive one. IS Protection of human rights in Israel did not start in 1992, and progress that was made can be ascribed to the Basic Laws only very indirectly, if at all.I6 This is another good reason to avoid talk of a 'revolution'. Second, courts never work in a vacuum. Before 1992, courts did much less than they could have done in terms of doctrine (without judicial review of Knesset legislation) to protect the rights of Arabs and residents of the occupied territories. 17 They were also very careful in the sensitive matters of religion and state. It is unlikely that these political constraints will change much in the near future. Consequently, even had a Bill of Rights been enacted, it is unlikely that this, in itself, would have revolutionize the protection of human rights, so that all discrimination against Arabs would have disappeared, and all violations of freedom from religion would have been declared invalid. Third, and maybe most important, it is far from clear that the Supreme Court should undertake the risk it is taking. If it is successful, the population at large will accept and endorse western liberal values, and applaud the court as defender of these values. But it may well be that this result is not likely to be reached in Israel, given its population. At the moment, what seems to be happening is that the rifts in Israeli society, which until now were hardly noticeable with regard to the court, now reach the court itself. The court is now perceived by a larger part of the population as a political

player like any other, and not a neutral body seeking to be a part of the framework adhered to by all, irrespective of their partisan allegiances. Even if the pressure to politicize appointments can be resisted, it is going to be hard to re-establish the vision of the court as a defender of all.

It is too early to know how the constitutional process started in 1992 will develop. In the meantime, the record is mixed. It is important to have the full picture when we seek to understand and to assess the processes we are studying. Israel has survived as a democracy against many odds. Its institutional structure is impressive in many ways. The Supreme Court has made a significant contribution to these achievements. I take it as a sign of maturity of Israeli democracy that a debate about the role of the court can develop. It is important to remember, therefore, that Israel has many voices on most issues, including that of the nature of Israel's constitutional reality and its desirable and probable developments.

Notes

*I have written at great length about the subject in my "The constitutional revolution: A self-fulfilling prophecy, not a description of reality", 28 Mishpatim (1997) (Heb).

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While supporting their two-tier theory of legislation, this conclusion is undesirable. Why should a law seeking to change a detail that is at present included in an unentrenched basic law be dubbed a basic law? This may create a proliferation of basic laws. The solution should be to re-enact basic laws so that they include only principles which deserve to be included in a formal constitution. This is precisely what would have to be done if the Knesset set out to legislate a 'real' constitution, rather than give retroactive constitutional import to piecemeal past legislation, accumulated over 30 years.

For a short description of these laws see Landa's text above. See also D. Kretzmer, "The New Basic Laws on Human Rights: Mini-Revolution in Israeli Constitutional Law?" 26/sr. L. Rev. (1992).

4 For a general description see Gary Jacobsohn, Apple a/Gold, Constitutionalism in Israel and the US. Princeton (1993).

5 See S. Shetreet, Justice in Israel. A study of the Israeli Judiciary, Dordrecht Nijhoff, 1994. 6 Judge Barak expressed the view that when Jewish principles conflicted with democracy, Judaism should be taken at its most abstract and universalistic interpretation, so that conflict is avoided. Many, including ex-deputy President Judge Elon, took this to mean that the 'Jewishness' of the state was practically neutralized. What seemed an innocent law protecting freedom of occupation, which seemed so safe that it was entrenched and thus requires a majority of 61 to amend it, was used to invalidate a proposed attempt to maintain the status quo under which only kosher meat was allowed to be imported into the country, based on the right of a person who wanted to import non-kosher meat to freedom of occupation.

7 The Freedom of Occupation Law was amended, among other things, to include an override clause, so that special legislation could be passed maintaining the kosher monopoly over the importation of meat. One religious MK announced that he will not vote for a basic law seeking to legislate the ten commandments. Another said that he will never again support the entrenchment of laws because of the positions of President Barak.

8 Barak concedes that the decision to call the legislation 'revolution' was pragmatic, and that he wanted to attract attention to the impact of the new laws. He also concedes that the term had alienating effects on some segments of the population.

9 The fact that the initial 1950 decision to postpone enactment of the constitution and enact instead basic laws was ambiguous on this very point is illustrated by the fact that supporters of a formal constitution resisted the Government initiatives to legislate very detailed basic laws. The Knesset legislated them nonetheless.

10 Freedom of Occupation Law requires a 61 majority for change but was enacted by 32 M.K's.

The Basic Law: Government. which introduced direct elections also requires 61 for changing it. but was passed by 54 M.K's.

II For details see Shetrcet, op. cit.

12 Despite this fact, there are many criticisms of Marshall's reasoning, see, e.g., Bickel, The Least Dangerous Branch, Ch.l , and some analyses suggesting that Marbury was only legitimate because it dealt with the ultimate power to interpret the judicial jurisdiction itself:

Clinton, Marbury v. Madison and Judicial Review. Nonetheless, all agree that Marshall succeeded in establishing the legitimacy of judicial review in the US.

13 See my 'The Controversy Over Israel's Bill of Rights', 1985 15 Israel Yearbook of Human Rights

14 Holmes' famous dissent in Lochner v. New York is still one of the best formulations of this position.

15 See Jacobsohn, op. cit.

16 The only law invalidated so far involved a transition provision in a law regulating brokers.

The law requires licenses and tests, and imposes a variety of limitations on the freedom to provide brokering services. It was challenged by brokers. The court upheld most of the provisions, and invalidated one transition clause. The law exempted from most tests those with over 7 years experience. The court held that 7 years were too long a period, and sent the law to the Knesset for re-Iegislation. The Knesset, in tum, responded in a mixed way. The court indicated that drawing the line at 3 or 4 years might be reasonable. It seems that the legislature will suggest 5, but the Speaker responded by an invitation to start a public discussion of judicial review. It might give one a clue to the influence of the revolution rhetoric that some groups asked the AG to clarify that the Speaker should not be allowed to continue with his initiative ... In

recent years, a number of laws with human rights implications were enacted, notably one relating to detention before trial. While it seems that the practice has changed, and the liberty and human dignity rhetoric may have helped, the legislators could have enacted the same laws without the basic laws, and the judges could have reached the same results by a more stringent supervision of police discretion.

17 There is no doctrinal reason preventing the courts from invalidating deportations or demolition of houses of suicide-bombers. Nonetheless, the court unanimously upheld the deportation without hearing of 415 Hammas activists in December 1992, and consistently permits demolition of houses. Barak participated in both decisions. Heshin did not sit in the deportation case, and is the only judge dissenting in principle from demolition of houses as a form of collective punishment not imposed on the criminal himself.