

Cleary's News

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Letter from Tel Aviv

Can You Say Constitution?

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To keep up with my friends at Cleary, I thought I would send some news from the Holy Land. Rather than focus on the hyperdrama of Israeli-Palestinian sovereignty disputes, I prefer to let you know about a jurisprudential phenomenon tak-

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ing place here — something that looks like the birth of a constitution.

As you may know, during the 1980s, the Supreme Court of Israel was polarized by a

dispute between its justices over the interpretation of the 1980 Foundations of Law Act, a law which authorizes the courts to employ the “principles of freedom, justice, equity, and peace of the Jewish heritage” as precedent, in cases of lacunae in traditional legal sources. One extreme was represented by Justice (and

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Yale University Professor) Aharon Barak, who claimed for that heritage any appealing approach to justice that could be linked to Jewish thinking. The other was championed by Justice (and New York University Professor) Menachem Elon, who insisted that the Jewish heritage be seen only as the normative laws by which Jews governed themselves historically, i.e. traditional Jewish civil law. The ideas of Spinoza, the brilliant but outcast medieval Jewish philosopher, is a good example of where these two judges could split vehemently. Ultimately, Barak saw himself as enlightened; Elon saw himself faithful.

It would be hard to dismiss the dispute as fanciful. A Court that cannot speak as a chorus on the foundations of law, especially when no formal constitution is in place, is hamstrung. Yet neither of the justices would yield, each believing the soul of his country to be at stake. The debate reared its bitter head in countless pointedly worded and divided Supreme Court opinions, even though Barak and Elon maintained their inexplicably warm friendship.

From its inception, the outcome of the Foundations of Law Act fight seemed predetermined because of as simple a reason as age. Elon retired from the bench in 1993, upon reaching the mandatory retirement age of 70, and since then Barak, 13 years Elon's junior and now Chief Justice, has driven the Court, more often than not unhindered.

The debate, however, did not go quietly into the night. In 1992, in the gloaming of Elon's tenure on the Court, the legislature enacted two laws, the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty. These two pieces of legislation repitted Barak against Elon with such intellectual force that, even today, after his retirement, Elon crusades against Barak's "enlightenment." While Barak continues to hold the powerful pulpit of the Court, Elon employs lectures and articles with not quite equal,

but nonetheless passionate, force.

The two Basic Laws enshrine, respectively, the right to practice a vocation and the right to personal dignity, life, body and property free of undue government infringement. While both laws certainly are noble, they are far more than that. They are revolutionary. That is because both incorporate the seeds of something that, prior to their enactment, had been considered unattainable for Israel in this century — a constitution. Each of the sister acts contains a very constitutional element: a sharp restriction on the validity of any subsequent contravening legislation. As well, the Freedom of Occupation Law is "entrenched," which means that a majority of the parliament, instead of the more standard parliamentarians voting, is required for its amendment.

After enactment of the two Basic Laws, what was left for the constitution-minded was to arrange for judicial review. After some earlier feints, the Supreme Court did, or at least almost did, just that late last year. In seeming but not quite *Marbury vs. Madison* fashion, the Supreme Court declared that certain licensing requirements in an otherwise obscure financial advisors law conflicted with the right to an occupation free of undue restriction, but invited the parliament to fix the law by a date certain, otherwise the Court would strike those requirements. The baby teeth of an Israeli constitution had emerged.

Would that it were so simple. Following the judiciary's flexing of its new muscles, many of the very parliamentarians who had voted for the two Basic Laws in the first place assaulted judicial review as unintended and undemocratic. They have since progressed to assailing the Court itself and its judges personally, threatening to somehow curtail the power of the Court and its more outspoken members. With a constitutional crisis so easily brewed, it is not hard to understand why the Court's initial assertion of judicial review was so demure.

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Even more fundamentally, the nature of this infant "constitution" is indistinct. Constitutions embody hard decisions about a society's identity. Israel, however, is about as far away from knowing what kind of country it is or wants to be, as any I can imagine. The tension between democratic values and security concerns, Arab and Jew, secular and religious, and sometimes, still, Ashkenazies and Sephardies is so urgent, that it is no wonder that the two Basic Laws are founded on an enigma that will keep judges occupied for years and the country on a perpetual edge of constitutional uncertainty.

The enigma is this: each of the Freedom of Occupation Law and the Human Dignity and Liberty Law does permit infringement on the rights it founds by laws that are consistent with the "values of the State of Israel," and the purposes section of each Law declares that the objective of that Law is "to secure in a Basic Law the values of the State of Israel as a Jewish and democratic state." While Israel has long thought of itself as both Jewish and democratic, it has done so in a lazy, unchallenged way. Following enactment of the two Basic Laws, the Supreme Court could no longer avoid articulating how exactly those two concepts harmonize, if they do at all.

So how does the Court go about defining a national Jewish and democratic value? There is plenty of precedent around for what democratic means; Israeli judges have been wrangling with that issue for years. As to what Jewish means – that's the old not-quite-resolved Barak-Elon dispute from the 1980s. And where do the two intersect, even if you know what a Jewish state means? No doubt, somewhere along that increasingly sensitive fault line between Barak and Elon.

Barak lost no time in staking out his position. In a university address almost immediately after passage of the two constitutional laws he proclaimed:

The basic values of Judaism are the basic values of the state. I mean the values of love of man, the sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of law over the legislator and the like, values which Judaism bequeathed to the whole world. Reference to those values is on their universal level of abstraction, which suits Israel's democratic character, thus one should not identify the values of Israel as a Jewish state with the traditional Jewish civil law. It should not be forgotten that in Israel there is a considerable non-Jewish minority. Indeed, the values of the State of Israel as a Jewish state are those universal values common to members of democratic society, which grew from Jewish tradition and history.

In other words, Jewish means democratic.

Elon would have none of that. At a 1992 constitution conference he was incredulous:

One may wonder: How can it be that there is an entirely different standard for each of the two expressions contained in the same statute and in the same clause – "Jewish and democratic" – when both of them came to describe the same thing – the character of the State of Israel? . . . How can it be that the expression "democratic" – which by the way appears second, after the expression "Jewish" – is to be given its full meaning and is to be interpreted according to the decisions and literature that were written on the subject inside and outside of Israel, yet the expression "Jewish" must be "abstracted" of all independent and original meaning, to be regarded as an artificial attachment that is subordinate to the concept of "democracy"?

Since their gambits, the two men have expounded. Barak has evolved his position somewhat; he now presupposes that Jewish and democracy can coincide at a level of high abstraction of both ideals and promotes grand Jewish values, like Zionism and his conception of the "heritage of Israel." Some Court watchers, however, suspect Barak. They note that when addressing the Jewish character of the State he refers only to transcendent principles of Judaism, but exhibits no such abstraction when analyzing democratic values, as he happily cites specific rules and cases from around the world to define democracy. To them, the harmony that

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Barak claims to find between the ideals of Judaism and democracy is a celebration of democracy in sheep's clothing. This, they worry, risks Israel's character, bringing the country inappropriately close to foreign models.

Elon too professes that Jewish and democratic can coexist at some level, but advocates a uniquely Jewish, not Western, view of democracy. Elon concedes that the values of a Jewish state include Zionism and its various derivatives — something other than traditional Jewish civil law — but does not hesitate to “characterize the democratic viewpoint in the light of Jewish values, *for the values of a Jewish state are mentioned first in the statute.*” Many in Israel worry about a creeping theocracy, but Elon considers a Jewish character to democracy as allegiant to both the centuries-old dream of a national homeland for the Jewish people and to human and civil rights.

To Elon, emphasizing the Jewish values of the state does not mandate belief in God or invite religious rule; rather, he takes great pains to demonstrate that the principles of Jewish law have long secured individual rights, balanced, however, by individual responsibilities instead of state interests, which are propounded by the more Western conceptions of democracy.

I wish I could conclude this letter with a neat resolution of the debate, but, of course, I cannot. The contest will persist, with belly fire, no doubt. Some recently appointed Court justices have begun to challenge Barak from within in a number of areas, and it is anybody's guess how long Israel will retain this “constitution” and what it means anyhow. For a country facing crises of character and fate, constitutional uncertainty can feel like malnutrition, but, for constitution hounds, Israel today is a land of plenty.

