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Israel: A State Governed by Rule-of-Law or Rule-by-Arrangement?

1. Introduction

The central problem—perhaps the only one—that proponents of a constitution for Israel thought they would need to cope with is rooted in the instability of the law in Israel. Israel is not a normal state governed by the rule-of-law in the conventional Western sense; it is a state governed by rule-by-arrangement—arrangements made by political parties and other public bodies that in Israel are above the law. The very existence of the problem indicates the difficulty of overcoming it through constitutional measures, because a constitution that does not guarantee that after its adoption it could serve as an instrument for combating arrangements that stand above the law would be worthless no matter how lofty the ideas it embodies. An essential condition for the creation of such guarantees is the formulation of a document that provides for the elimination of rule-by-arrangement.

Israel turned into a state governed by rule-by-arrangement unintentionally when the Constituent Assembly established itself as the First Knesset (Israeli parliament) and relinquished its obligation to deliberate on a constitution. Israel failed to become a normal nation-state because it was unclear about its objectives. From the outset it refused to recognize itself as a nation, and presented itself instead as the state of the entire Jewish People, i.e., the state of all Jewish communities wherever they happen to dwell. For a constitution to have any success in stabilizing the situation, it must be unconstrained by rule-by-arrangement, and for that, it is essential to separate faith and nationality, church and state. To achieve this we should launch a campaign to reconvene the Constituent Assembly to discuss legal ways to separate church and state. Israel can thus become a normal nation-state governed by the rule-of-law, in accord with the aspirations of the founders of the Jewish national movement and those who came after them, up until the establishment of the State of Israel.

The core of the debate on a constitution for Israel concerns the fundamental difference between the rule-of-law and rule-by-arrangement. The rule-of-law has been subject to much critical debate; very little has been said about rule-by-arrangement. Because these concepts are abstract, they are not easy to comprehend. Moreover, there can be no rule-of-law

without some kind of “arrangement” and vice-versa. The distinction between them is thus not one of essence but of degree. Nevertheless, there is one important fundamental difference, and it pertains to the quality of life of the citizens. Under the rule-of-law, citizens are assured that the law will protect their normal way of life. This is not so under rule-by-arrangement, where a citizen is at the mercy of functionaries responsible for the administration of the law, who also interpret the law as they see fit.

2. The Role of a Constitution

There are many kinds of constitutions in the world. Differences among them derive from legitimate differences of opinion, as well as from the array of situations and divergent aspirations that naturally arise among different nations. In addition to legitimate constitutions, there are illegitimate constitutions and ones that are even invalid from inception. The Soviet constitution exemplifies the latter. For the purposes of the present discussion, one need only note that the Soviet constitution is an exemplary, liberal and humanitarian constitution, and that it was promulgated at a time when governmental terror reigned in the Soviet Union (through the despicable use of the judicial system to stage show trials). While the Soviet constitution is seemingly ideal in its liberalism and the humanitarian sentiments it expresses, it is mere fiction. This is so not because of the viewpoints or ideals it champions, nor because of the situation of the Soviet Union, but because from the outset the Soviet constitution was not designed to be an instrument for the implementation of democratic rights and legitimate wishes of the citizens of its diverse nations. It was designed not to limit or direct the legislature, but to serve solely as a propaganda organ of the regime. Thus, Israelis who wish to promulgate a genuine constitution should first ask themselves what role the constitution should play and what guarantees can there be for it to play that role.

Whereas a dysfunctional constitution reflects a poor regime, the absence of a constitution does not reflect the absence of due process. (The classic example is, of course, the British legal system.) The possibility of a normal state of affairs in the absence of a written constitution, as well as the existence of different constitutions, raises the question of the significance of constitutions and of differences between them. If a variety of constitutions is permissible, why is the Soviet constitution rejected out of hand? The answer is that the Soviet constitution is not reflected in the legal reality. Since deviations from the norm

exist everywhere and concessions on this or that principle are always made, why then do deviations from the constitution in the United States merely engender (sometimes fierce) criticism, while deviations from the constitution in the Soviet Union are deemed proof that the Soviet constitution is not genuine?

This question may be frivolous. After all, any knowledgeable person knows the difference between a violation of the constitution in the United States and in the Soviet Union. In the United States such violations are rare, and in the Soviet Union they were all too common. This is true, but it is a weak argument: it undermines the struggle for a written constitution for Israel, an idea that assumes that the function of a constitution is to help establish a stable judicial regime. We should, rather, view the difference between the two regimes as a matter not of *degree* but of *direction*. When some Soviet public figures began to defend the constitution, it started to have a proper function—that of aiding the struggle to stabilize the law and the rule-of-law. A new picture began to emerge, even though the champions of a proper constitution were a minute minority. For a fleeting moment before the collapse of the Soviet regime, when an open Armenian protest movement appeared in the Soviet Union (in Azerbaijan) and the protesters claimed that their rights were anchored in the Soviet constitution, the face of things began to change. Had this episode (or similar ones) begun a trend, it would have constituted a fundamental change in the function and status of the Soviet constitution, marking, perhaps, the beginning of its transformation into a genuine constitution. (Concomitantly, some far-reaching changes would have to remove its utopian character then.) This was not at all a simple process and, in fact, contributed to the collapse of the regime. Unfortunately, under prevailing circumstances, citizens of the former Soviet Union are not likely to attempt to implement a constitution that was invalidated in order to turn the Commonwealth of Nations into a normal state governed by the rule-of-law. This is so despite the fact that critics of local Soviet powers showed admirable courage and daring. (Today these critics are gone, apparently because they have no idea how best to serve.) Why, then, is there under present circumstances no attempt to make systematic use of the Soviet constitution? Why is it impossible to utilize the Soviet constitution to serve the national interests and aspirations of citizens? The obstacle to this is the Commonwealth of Nations itself—that, like its predecessor the Soviet Union, is governed by rule-by-arrangement. (There are other factors too, such as the inability to end the Chechen war.)

3. The Rule-of-Law: A normal rule-of-law vs. a rule-by-arrangement

Those who argue that Israel needs a constitution here and now claim it is needed because Israel lacks the stability required for legislation. This situation stems from deals made by leaders and political parties with government ministries and public bodies, sidestepping the law on a regular basis. These bodies thus stand beyond the law, leading to corruption, to instability and to demoralization. The proposal for a draft constitution rests on the hope that an established constitution will lead to stabilization of the law by providing a solid foundation for public life that would have a stabilizing effect on the inconstant base of the legal system. The hope is that stability will prevail over instability, not the other way around. What ensures that an entrenched constitution will have a positive influence on the law, and not that unstable law will undermine and weaken the constitution?

In the case of the Agranat Commission, Israel experienced a dismal outcome such as this. This Commission was appointed to look into the reasons for the debacle of the Yom Kippur War. It concluded that the cause of the war was the weak, undermined and inferior decision-making process of the civilian leadership. Prior to its appointment, it was hoped that after the Agranat inquiry, the stable, relatively superior military model of decision-making would have a positive impact on the civilian process, and the Agranat Commission's report would serve as a starting point for rehabilitation of the prestige of the [elected leadership], so damaged by the Yom Kippur War. But the opposite was the case. The Commission shattered these hopes with its decision to reinterpret its mandate and deviate from the original intention expressed at the time of its appointment. The Commission feared that overly harsh conclusions regarding irresponsibility at the ministerial level would demoralize the public. Fear of undermining public confidence in the civic structure actually led to the opposite outcome. The Commission sabotaged its own declared objectives and generated the very public despair that it sought to prevent.

The same holds for any constitution that the political and public leadership could bypass through deals, as is customary today. The harm to the nation would then be intolerable. Hence, we must be very cautious lest we find ourselves sinking into a growing morass of blunders from which we will be unable to extricate ourselves.

In 1992, the Knesset passed a bill allowing for a two-ballot electoral system: one ballot would be cast for a party list and the second ballot would choose the prime minister

directly. The first use of this system was in the 1996 elections. *The public expectation was that this reform would bring about much-longed-for stability. Instead, it brought about the decline of public discourse concerning a constitution. Discussion was frozen until the outcome of change in the electoral system could become clear.*

While the objective of the reform was to stabilize the system as rapidly as possible, it actually increased instability. Before the electoral reform, the public was reluctant to vote for small parties for fear that it would make it harder for one of the large parties to form a coalition and thus lead to instability. However, with the new system, voters felt free to split their votes on the supposition that a directly-elected prime minister would have greater maneuverability vis-à-vis potential coalition partners, and that this should suffice for the establishment of the required stability. Having expressed their choice between candidates from the two leading parties for the post of prime minister, enough voters then tended to cast their second ballot for a different (often smaller) party in the Knesset election. As a result, the number of Knesset seats of small parties increased sufficiently to cause instability. The prime ministers elected by this method were hard put to stabilize their governments. The direct prime ministerial election law was subsequently repealed; broad public disillusionment reinforced Israel's status as a state governed by rule-by-arrangement. One way to change the situation is to analyze the experience of this bitter lesson in public debate in an appropriate forum. Before explaining the reasoning for my choice of a Constituent Assembly as the appropriate forum for such an analysis, I would like to propose an agenda. Topics to be discussed might include:

What renders the Soviet constitution invalid while the American constitution, despite its flaws, serves the legislature, aids in safeguarding the law, and remains open to amendment?

Why is the status of the law and public opinion in Israel so low?

Which is preferable for Israel at this stage: implementing a written constitution, or creating conditions favorable to the development of an unwritten constitution?

The United States, I would argue, is a normal state governed by the rule-of-law, while the Soviet Union was a state governed by rule-by-arrangement. *As long as Israel is conducted through rule-by-arrangement and not governed by the rule-of-law, reform or a constitution will be of no use.* Legislating a constitution will not succeed in raising the stature of the law or stabilizing it. An untimely move will institutionalize and reinforce the current system of

rule-by-arrangement.

Debate on a constitution as such befits only a utopian school of political philosophy. A realistic debate requires examination of the role that a constitution plays in a functioning judicial system and discussion of the function of law in society. Thus, there is no value to the general question of whether the constitution of the Soviet Union was good or defective. It was important at the time to ask why the Soviet constitution was nonfunctional. Anyone who wishes to prevent the enactment of a constitution that is as ineffective as the Soviet one should address this question.

The Soviet constitution, like those in other rule-by-arrangement countries such as India, was never accepted at face value. Rather, it was subject to various interpretations, some better some worse. The reason for this is preference for the intention of the legislators over the wording of the laws that they have enacted. The inner logic of this preference is that when the wording of a law is defective, realism and common sense should prevail over inept wordings. To facilitate understanding of the importance of this idea and the great weight of the inner logic and way of thinking that underpins governance according to rule-by-arrangement, let me offer an example of the best justification for the use of the mode of arrangement. I will then describe the manner in which this way of thinking leads inevitably to corruption. Although rule-by-arrangement inevitably results in corruption, states fall into this pattern because it is the rational outcome of the defects of dysfunctional legal systems.

4. The Internal Logic of Rule-by-Arrangement

Consider any mundane matter from daily life to which the applicable law or ordinances are unsuitable and thus cause pain and despair. In such a case, it is natural, from both the personal and the public perspectives, to deal with the matter not exactly according to the letter of the law. Such situations exist in every judicial system. Every judge and administrator knows that this state of affairs has a catch: on one hand, strict application of an inappropriate law is arbitrary and detrimental to the public; on the other hand, failure to apply the law undermines the very foundations of the legal system. To be more specific, the immediate interest—both personal and national—demands prudent judgment. The long-term interest, however, demands the application of the statute to the letter-of-the-law in order to ensure stability and administration relatively free of bias, confusion or ambiguity.

Action based on judgment in lieu of action anchored in law or regulation creates a lack of uniformity and constitutes a source of confusion and ambiguity.

The genesis of an arrangement may be pathetic. In every state, including a state of the rule-of-law, additions and interpretations of laws occur. In states under the rule-of-law, the system requires validation of the changes. They take the form of by-laws or similar acts of the agencies of the authority responsible for the implementation of laws. Otherwise, administrative orders and stratagems of those who apply the law compromise it. Even in a normal rule-of-law state, catch situations occur that require maneuvering beyond the customary latitude. Administrators then declare them outstanding exceptions to the rule, and they must enact administrative ordinances to treat them and validate them officially. General administrative directives on conduct in exceptional cases guide normal states under the rule-of-law. Catch situations in them are never so common that they constitute a regular obstacle to applying the law to the letter. The case is different in states where the law is rigid and expresses the intention to promote lofty ideals rather than to provide solutions to everyday problems of normal citizens, and in states where there is no recognition of the possibility that the law may suffer from flaws, which are revealed only upon implementation. In the modern world, these defects often appear in tandem: the legal system is rigid, as it expresses a lofty ideal. In traditional societies with extensive administrative systems, the rigid bureaucratic model with no utopian aspirations or pretenses is common, as described in the classical works of Max Weber.

In states with utopian aspirations and pretences, there is no place for directives designed to extricate minor officials from unexpected problems. Thus, when confronted with catch situations, they must interpret the law as best they see fit, and according to various circumstances not envisioned by the lawmakers. So in lieu of operating in accordance with by-laws and reasonable administrative latitude, minor officials interpret the law as they see fit, thus undermining it. Furthermore, the judicial and the administrative systems have no tools for restraining the behavior of minor officials, except for instruments reserved for truly exceptional cases. Hence, as the law does not adequately protect minor officials, government functionaries can carry out their duties only by forays into exceptions to the law. How, then, does a rule-by-arrangement state carry on despite this inevitable decline? My conclusion is

that during the deterioration stage, the system is so helpless in the face of the innumerable exceptions that these exceptions become the new norm.

5. The Origin of Arrangement

The internal logic of rule-by-arrangement inevitably leads to a *modus operandi* whereby the clever and logical interpretation of the law becomes a fact of life. Those who are cognizant of this reality do not expect anyone to take the law literally, but rather to read it according to tendencies of one kind or another. This situation generates many complaints, some of which are forgotten over time while others necessitate negotiation between the public and the authorities in an attempt to pressure representatives of the authority into exhibiting greater wisdom. In extreme cases, the matter may lead to intervention from above, and to additional arrangements. The additional arrangement, however, is no more than another interpretation not anchored in law, constituting yet another strike against the literal reading of the law. Thus, arrangements pile up in a kind of understanding between the citizen and the reading of the law that is the unofficial or semiofficial right of government officials to interpret as they understand it. The average citizen cannot deal with the entire system, yet he can--and is even invited to--do so from time to time, and confronts a specific arrangement of a particular representative of the authority. The more the system becomes a tangle of arrangements, the more negotiation between bureaucrats and citizens becomes an integral part of the system, with a good chance that the latter will prevail in cases where bureaucratic stupidity and the damage it creates are exorbitant. In the absence of the big picture and criteria for normal democratic life, citizens learn to get along within the framework of arrangements, without expecting restructuring of the entire system.

The citizen becomes dependent upon the interpreter of the law, a role that is almost without exception in the hands of bureaucrats or administrators who execute the law, as representatives of the executive authority. Thus is the executive branch granted immunity before the law. *In the absence of a clear, legal position regarding potential lawbreakers, this fuzzy and unofficial status grants the interpreters of the law in a rule-by-arrangement state a supra-legal status.* Any law that might set limitations on interpreters is subject to their interpretation. Consequently, they will choose the interpretation that allows them to retain authority and the right to interpret and limit the law.

As interpreters of the law, government officials are entitled to decide—in light of circumstances and existing data—whether or not to publicize decisions regarding application of the law and its interpretation. They will obscure items that are not in the national interest to publicize. This, too, strengthens the position of the executive authority, for it has control over information vital to the citizenry. This entrenches incentives for representatives of the executive authority to operate in secrecy. This creates incentives for them to assume that there is a protracted and all-encompassing state of national emergency that is reflected in daily life; internal and external enemies surround the homeland. (This claim is always true to some degree.)

The law thus loses the ability to restrict, regulate or direct the struggle for key political posts. Every law is open to various interpretations and even exceptions—even the law whose role is to restrict, regulate and direct power struggles. This kind of law is subject to various interpretations emanating from various positions of power, thus diminishing the weight of the law and increasing the importance of power struggles. When different parties interpret the law in different ways, the interpretation of the powerful prevails. Only laws that can not be interpreted beyond convention, or are interpreted by independent authorities (such as the Supreme Court or an undisputed spiritual leader) stand above all the forces in the arena.

Every law that the public is unable to enforce to the letter is open to various interpretations and distortion to one degree or another, with the struggle among the various powers focusing on which interpretation should be applied. The public can put up a fight and try through its representatives to enforce its interpretation of the law. But the arrangement will drag the representatives themselves into struggles over the right interpretation of the law. The legal system--and with it democracy--is thereby in a permanent state of erosion. The law becomes dependent on arrangements formulated by the regime, and is replaced time-and-again with arrangements that express the power struggle within the regime of the moment. This situation is contrary to the national interest. Arrangement is what turns the law itself into a kind of arrangement, thus impeding any radical change.

This description of the internal logic of the state-by-arrangement is not limited to any particular kind of regime. It therefore also applies to democratic regimes that prevent the development of arrangement by preventing individuals representing the executive authority from falling into traps, or at least keeping the frequency of catch situations down to a

reasonable level so that legislators can deal with them. As a result, the development of rule-by-arrangement and the concomitant erosion of the law are set in process. Such a process is extremely dangerous: political scientists tend to believe that there is no democracy without the rule-of-law. Thus, sooner or later, the erosion of the rule-of-law will impair democracy. Any possibility of overcoming catch situations is contingent upon conducting in-depth debates on them, public and parliamentary. As under rule-by-arrangement the executive authority is liable to impair the law, and as within the framework of arrangements the executive authority is entitled to conceal information, it is caught in yet another trap. Its immunity derives solely from arrangement, and it therefore has a vested interest in concealing information. Thus, the entire legal system is dragged into a similar catch situation that unintentionally jeopardizes democracy as well.

Many political systems have no legislation, only supreme political authority or the supreme authority of tradition. In Jewish tradition and other traditions, a new law is not entitled to override an old law (except in very rare cases). Normally, legislation is rare; it is necessary to word new laws as mere interpretations of old ones. It is possible to view new interpretations as legal reforms. As to the concept of rule-by-arrangement, the idea of reinterpretation of old laws does not apply to such systems, since these systems claim to be infallible and have complete authority, yet arrangements are applicable to inadequate legislation. Political authority and interpretation, however, apply reinterpretation regularly, and this is no remedy if the legal framework itself needs radical reform.

The upshot of the ever-spreading arrangements process, driven by a strong and simple internal logic, is that the law as a whole turns into just another arrangement. In a normal state governed by the rule-of-law, there is a clear legal hierarchy: a Constitution, Basic Laws, regular laws, by-laws, administrative ordinances, and interpretations of officials. The higher authority legitimizes the lower one. *The moment the law recognizes the supremacy of authority of arrangements (of interpretations of the law by officials), the chain of authority breaks, and administrative authority becomes supreme. In such systems, legislation still exists, as does the pretense that the system represents a normal rule-of-law state, although in truth, the law in such a system is subordinate to administrative authority, and its interpretation and execution depends on political forces.*

6. Israel as a Case of Rule-by-Arrangement

Rule-by-arrangement is a rather common phenomenon in the modern world. This is masked by a socio-political fact not directly related to legal and constitutional issues. Fortunately, the standard of living in Israel is relatively high compared to other states governed by rule-by-arrangement. This is liable to suggest, quite erroneously, that Israel is a unique state governed by the rule-of-law. There is some logic to this error: a relatively high national standard of living seems to be—rightly or wrongly—a characteristic of a society with a high level of education in all respects. Western democracy is characteristically normal and stable and under the rule-of-law—a standard element in societies that boast high quality-of-life. Yet despite Israel's image as a state governed by the rule-of-law, the Israeli public has become aware of Israel's being a state governed by rule-by-arrangement and not a normal state under the rule-of-law. This awareness served as background to the proposal to promulgate a constitution that would stabilize the law (despite the limited experience and understanding in Israel of the Western style of life under the rule-of-law.) Recently, awareness of the absence of a constitution and the sense that it is needed has diminished. Nevertheless, there has been no decrease in the level of public awareness of Israel's circumstances as a state governed by rule-by-arrangement and of this as a cause of corruption and erosion of the resources at its disposal. The proponents of the draft constitution were worried about these phenomena and rightly so, and hoped to combat them with the aid of a constitution that would replace arrangements with legislation, stabilize the legal system, and transform Israel from a state governed by rule-by-arrangement into one under the rule-of-law.

Rule-by-arrangement is not unique to Israel. Nor is it limited to a particular type of regime. It is characterized by inadequate legislation coupled with bureaucratic intervention that degrades rather than ameliorates the legal system, and increases intolerably the dependence of the citizens on bureaucrats. Admittedly, this picture fits India better than Israel, but this is not much of a consolation. The Indian example can serve as a signpost, a validation of the concern about the judicial situation in Israel and the view that a constitution is needed here, that the situation is serious and that steps should be taken urgently to rectify it. When in the eyes of the public, intolerable rule-by-arrangement appears to be the only democratic option possible, it is not surprising that ordinary citizens seek an alternative to democracy, in the shape of a strong personality who can put things in order. A modern dictatorship requires more governance by rule-by-arrangement, not less. The Israeli public is not aware of that.

(This is somewhat odd, since the epitome of rule-by-arrangement was the former Soviet Union under Stalin.)

The number of understandings and arrangements that determine daily life in Israel is so large that public life in Israel is incomprehensible without relating to them. The beginnings were modest: the text of the compulsory education law—a law that could not be implemented upon passage because of a lack of resources. It was said at the time that it would not matter much if it took longer than usual for the law to be implemented: after all, in any normal democracy the implementation of new laws may be problematic, and there is a rich, standard tradition for dealing with them. In other places, this is accomplished without the need for special arrangements; Israel exhibited a predilection for arrangements from the very outset. The educational needs of the Arab sector were met by special arrangements, not according to any law, and it has remained thus to this very day, much to our disgrace. Later the air pollution law was passed, with the clear understanding on the part of the legislature that the law would not be implemented at all. A broad legitimacy for arrangements was thus entrenched, and a general umbrella for arrangements took root: the concept of the *status-quo*. Great weight is attached to this concept in Israeli public life, whether as an unwritten Basic Law or as a key element in an unwritten Constitution.

7. Rule-by-Arrangement and the National Question

Israel is special in that it is a religious nation-state—the Jewish state. In this respect it is different not only from states in the West, but even from Islamic states. These do not have a monopoly over Islam; moreover, they declare unequivocally that they are Islamic states and openly declare their preference for Islam over democracy. Israel, however, sees itself both as a democratic country and the sole political representative of all the Jews, including those in Western democracies. They do not have the right to vote in the Jewish state; they view their being Jews in historic-ethnic-religious terms, not national-political terms. Israel stoutly ignores this. It is impossible to reconcile democracy with Israel's undertaking to represent all the Jews in the world, including those who, like the present author, consider democracy inconsistent with the unauthorized representation of Jews in Western countries in disregard of their legitimate opinion.

The first difficulty created by Israel's uniqueness lies in the fact that it is the national state of the Jewish People. As long as Israel is not a normal nation-state, it cannot live by the rule-of-

law and must abide by a complex set of arrangements. The legal status of non-Jewish citizens of Israel (identified as Arabs, namely Arabic-speaking Israelis--Muslims and Christians alike), is perhaps the most important and the most complex case: the disparity between their legal status and the arrangement regarding it is intolerable. (Other arrangements apply to non-Jews who are not Arabs, and even to the Bedouins.) The same holds true for some ultra-Orthodox Jewish groups of Israeli citizens who do not recognize the sovereignty of the State of Israel.

Let me ignore here the special status by arrangements relating to Arab and ultra-Orthodox citizens of Israel, as the matter is complicated enough as it is. The legal status of Israeli Arabs is so complex that even jurists have trouble saying what part of their status is anchored in law, what is based on administrative edicts, and what rests merely on understandings and arrangements. Their status is ambiguous despite many rulings of the Israeli Supreme Court on the matter. The Israeli Declaration of Independence grants all citizens full equality, free of religious discrimination. The Population Registry Law grants Arab citizens personal equality, and even recognizes them as a separate national entity instead of viewing them as Israeli nationals of specific ethnicity. The root of the need for arrangements is the inability to apply the law to members of Israeli minority groups—an inability that rests on the confusion of ethnicity with nationality. This constitutes *de facto* recognition that Israel is a bi-national state: people who are not members of the nation have the right to vote—something that in normal nation-states is unthinkable. This anomaly came about in the off-hand manner typical of rule-by-arrangement states, with astounding disregard of the right and duty (taken for granted in genuinely democratic countries) to hold public debates prior to taking such a fateful decision. The proposal for Israel to have a constitution will enable the opening of this debate in a democratic and dignified manner, devoid of the insidious effect of tacit agreement--the seed of rule-by-arrangement.

Israel does not wish aliens to settle within its borders, and therefore it does not permit non-Jewish residents to be naturalized. As it is unthinkable that Israel would admit this publicly, there are legal provisions for this process, plus an arrangement for circumventing them. This situation is very harmful. The most serious harm that it causes is the lack of public awareness. It precludes all hope that Israel will become a normal state under the rule-of-law and a Western-style democracy. Why is it so hard for Israel to live with a clear and simple,

enlightened immigration law? What is so unique in the laws concerning Israeli citizenship? Of course, what is unique in Israeli law is related to Israel's self-definition as the state of the entire Jewish People, a matter that finds expression in various ways—by law, contrary to the law, and in popular tradition. Things would be less harmful were these expressions of Israel's uniqueness anchored in law and accepted as such. But some of these expressions are anchored in arrangements that serve as legal surrogates. The most important and meanest example in everyday life is the arrangement that exempts any law concerning personal status from including equality for women. According to this arrangement, laws such as the equality of women apply only in secular courts, not the legally recognized mock-religious ones--the seemingly Jewish traditional ones, that operate outside the framework of the law, allegedly in accord with Jewish canon law. They are cynically called "rabbinical courts," although they operate with brute ruthlessness, in a manner that is clearly illegal and contrary to the humanistic tradition of traditional rabbinical courts. (They interpret Jewish law regarding matters of faith as they see fit and in an ultra-conservative manner alien to traditional Judaism). The pretext for having these courts as if they were rabbinical courts rests on the status of the judges there as government functionaries whose authority derives not from the state or from any civil authority but from a special ultra-Orthodox, self-appointed rabbinical council that exists nowhere else. Their role is to apply Jewish canon law not according to the letter (for this is impossible under present conditions) but according to compromises that they themselves determine in undemocratic processes. The public has no knowledge of or control over what takes place there. The circumstances of the judges in these evil courts force their members to increase the erosion of the law regarding the equality of women as much as they possibly can, as the excuse for their standing above the law is the claim that Israeli secular law is contrary to religion, and it should not force the religiously observant to act contrary to religious precept. The proposed constitution must prevent legislation that would force religious people to behave against their conscience. The situation would be doubly disgraceful were the law is injurious to the religiously observant and the arrangement were to protect them.

Popular tradition has, of course, expressions of the uniqueness of the Jewish People, primarily in popular versions of the new Zionist myth. This myth perverts the traditional Zionist image by ignoring the aspirations of the Zionist movement for a normal nation-state

under the rule-of-law as a fundamental tenet of the Jewish national movement. Contrary to the traditional Zionist ideology, the new Zionist myth denies the legitimate right of Jews in the West to self-determination. The expression of Israel's uniqueness as the state of the Jewish People focuses particularly on the Law of Return and arrangements regarding its implementation. These include an arrangement that does not allow non-Jews to become citizens of Israel or attain officer rank in the Israeli armed forces—with the exception of certain minorities with special status, an arrangement that will not be discussed here. The status of Israel as a state governed by rule-by-arrangement is expressed in popular tradition, particularly in the consensus that the Law of Return imposes certain arrangements and that raising public debate in Israel on matters of principle is undesirable, as it might put in question the Law of Return and the uniqueness of Israel, and thus Israel's very *raison d'être*. The requirements of the Law of Return should be clarified, as should the question of whether this clarification can be presented to the international community openly and without detriment to Israel. Or perhaps the law should be altered in such a manner that publicizing its content would become unproblematic. Or it might be preferable to legislate a vague constitution. This is a dangerous illusion. Only a crystal-clear constitution might, perhaps, assist us in moving away from rule-by-arrangement. It is also a dangerous illusion that such an unclear constitution can guarantee the continued rule-of-law. We have just witnessed the result of a disillusionment—the folly that partial reform of the election system would stabilize the system and bring with it a semblance of normalcy.

8. The Law of Return Today

The Law of Return is important, as it declares that the State of Israel perpetuates the existence of the historic Jewish People as the realization of the aspirations of the Jewish national movement, and it happily accepts into its ranks any Jew who wishes to settle there. The Law of Return today is more of a declarative than an administrative directive. Most Israelis know nothing about the administrative side of immigrant adaptation and naturalization. The average Israeli citizen knows only that Israel encourages the immigration and naturalization of Jews. He knows little because Israel organizes its administrative operations with the assistance of a host of arrangements, familiarity with which requires a lot of bother and study of nearly unavailable information. The strangest example is the attitude of Jewish Agency operatives in the former Soviet Union toward those to whom the Law of Return applies.

First, those who wished to immigrate were required to be practicing Jews; later, the representatives of the Jewish Agency identified people to whom the Law of Return applies due to some legal technicalities, with no interest whatsoever in their religious affiliation. This is particularly serious, since the arrangement for the absorption of those eligible under the law is more complicated than almost any other Israeli arrangement. Israel and the Jewish Agency have an agreement by which not a government agency, but the Jewish Agency implements the Law of Return. What kind of terminology, then, should the constitution employ concerning the issue of the right of return? How do the proponents of a draft constitution view the current or amended Law of Return? How can the executive authority be made to operate according to law and not according to some arrangement?

The Law of Return is currently only declarative, as Israelis involved in public relations prefer that the topic not be publicly aired. In its present version, it clashes with the limitations imposed by international law and the charter of the United Nations, and especially with Israel's own unwillingness to declare openly the legality of the present character of the law. A significant amendment to the Law of Return defines a Jew according to the Orthodox interpretation—an interpretation that is not traditional is neither accepted nor acceptable by all Jewish communities. This definition is a constant source of confusion; it is too narrow in some respects and it raises the question of what kind of rabbi is entitled by the State of Israel to conduct a conversion rite. Discussion regarding the arrangement for this matter in the Israeli legislature is unfinished, as a majority of parliamentarians are not religiously observant and have no interest in the details of the question. Some even belong to other religions. How can the law be kept from meddling in arrangements among rabbis? How can a constitution encourage Jewish immigration without discussing arrangements of this sort?

Israel cannot interfere in arrangements among rabbis in other countries without overstepping its authority. Israel intervenes only in the question of which rabbis it recognizes for its own needs, not for the needs of Jewish communities in other countries. Should Israel not recognize the Jewish character of entire Jewish communities or even of Jewish community organizations, how would it represent them? By special arrangements, of course!

Indeed, the rationale for arrangements is pathetic because there is no reason not to anchor the details of the arrangement in laws, by-laws, administrative orders and legitimate judgments on the part of government functionaries. Furthermore, the impotence of the lawmaker in a

state governed by rule-by-arrangement is clearly expressed in the recognition of the supremacy of the arrangement over the law. Jurisdiction regarding eligibility under the Law of Return was first given to immigration and customs officials until a need was felt for a legal change. Why? Because Israel is a state governed by rule-by-arrangement, and the political parties involved in the arrangement did not trust the customs officials to interpret the law as the parties might. The law was called upon to recognize an authoritative arrangement. Thus the lawmakers were useless; the situation became hopelessly complicated ; and even decisions handed down by the Supreme Court can no longer aid in clarifying the issue of “Who is a Jew” under Israeli law. According to court decisions, the terms “Israeli” and “Jew” are identical. Logic follows that there cannot be Israelis who are not Jews, and surely this is not what the court intended. It is clear that there is no hope that the situation will improve through amendments and amendments-to-amendments of the law. A more radical step is necessary--for instance, promulgation of a constitution. This simple and powerful solution is at the heart of plans to draft a constitution forthwith, for in this way it will be possible to preserve the uniqueness of Israel without giving up on jurisprudential stability and without arrangements.

In Israel, arrangement has gone so far that the distinction between law and arrangement is blurred beyond recognition. The claim that the need for a constitution has become terribly urgent is right, as is the claim that there is no difficulty in anchoring the legitimate uniqueness of Israel as a Jewish state in a constitution and in democratic legislation--if we are ready to cut the Gordian knot of the *status quo*.

9. What Not to Avoid

There is logic--although no truth--to the popular idea that an unwritten constitution would be better than the present situation. This expresses a clear preference for the *status quo*, which would thereby achieve legal standing. This would perpetuate the character of Israel as a state governed by rule-by-arrangement. It will then not be a normal state under the rule-of-law that so many of its citizens want. The first edition of Professor Amnon Rubinstein's book on constitutional law in Israel argued that every Knesset must fulfill the duties of a constituent assembly and address fundamental issues and the possibility of writing a constitution for Israel. In the last edition of the book, however, he changed his opinion and argued that in practice Israel already has a constitution. He bases this on the new election law (since

repealed) as clearer and more detailed than its predecessor, and on the enactment of some Basic Laws primarily regarding human rights. He completely ignored the inability of Israel's Supreme Court to apply judicial review concerning the constitutionality of legislation. Moreover, there is no avenue for fighting arrangements, not even those that infringe on human rights, such as arrangements intended to impose religious discrimination.

So, who is right—those who want to protect the *status quo*, or those who prefer to trade it for a constitution? Nothing would be worse than a constitution that preserves the *status quo* and its host of arrangements. We can therefore enthusiastically support those who champion a constitution, but only after some guarantees are instituted that the constitution would replace the *status quo* and allow Israel to move from rule-by-arrangement to a normal rule-of-law.

The erosion of the law in Israel is well known and troubling. It fuels the desire for a suitable constitution that will prevent any further erosion. A constitution can do that—if not directly then at least as a tool in the hands of those who have Israel's best interests at heart. Can the draft constitution presented to the public by a team of senior experts from Tel Aviv University achieve this goal? Or is such a constitution liable to create new arrangements, better than the present ones but dangerous because citizens may falsely assume that the adoption of a constitution would mark the end of arrangements? The price of such a mistake would be very high: abandoning advocacy for a true constitution befitting a normal state under the rule-of-law for generations, since constitutions are not rewritten too often. A constitution that does not abolish existing arrangements will disappoint, and consequently cause despair, in a matter as important as Israel's political culture. Despair has already gained a foothold among the public. It is thus imperative to initiate an in-depth discussion of the matter in the proper forum. It is crucial to act responsibly and to prevent additional disappointments.

The first issue on the agenda of proponents of a constitution who want Israel to become a normal country under the rule-of-law should be the characterization of any constitution that could prevent the erosion of the law as a result of existing arrangements. Erosion begins when the executive branch and the individual representing it consider the law flexible and amenable to changes to be effected according to given circumstances. Discussions leading to arrangements usually begin with changes needed for clear and obvious reasons, making the need for an arrangement obvious. But changes can be too frequent—not as amendments to

the law but as arrangements that representatives of the executive authority find useful—because of the urgency and pressing need for modifications. Soon enough, officials learn to make changes even with no urgency and no general agreement.

What are the requisites of a constitution that can obviate arrangements? First of all, the public should not accept a draft constitution that lets arrangements reenter through the back door. A kind of arrangement liable to be lurking behind a draft constitution is an array of important tacit understandings that are not declared openly, as it would be inadvisable to do so. Such arrangements may sound attractive. After all, there are always understandings that a particular side prefers not to declare openly, that appear desirable but are vulnerable to public exposure. A constitution founded on such understandings—whatever they may be—will condemn to utter failure from the outset all struggle to create a normal state under the rule-of-law, for reasonable arrangements lead to more arrangements—equally or less reasonable. As arrangement follows arrangement, the complications that result become more and more intolerable, each inviting in its wake yet another arrangement to correct the faults of the previous ones or the defects resulting from over-complication, until the situation becomes totally untenable. A state under rule-of-arrangement is impossible even if each arrangement is justified and enjoys full backing, since the sum total of arrangements is out of control, and since the high road to normal legislation is thereby blocked. Tremendous suffering is inflicted on citizens by the inescapable dependence on a tangle of arrangements and assorted bodies that oversee them.

What, then, can be done? One should not sit idly by, and certainly not give up on the idea of a constitution. The situation is serious and requires urgent action, but without reinforcing arrangements with a constitution that recognizes their authority: a constitution should allow citizens to contest it.

Are there special reasons for our present circumstances? If so, can we combat them? Unless we address these questions, we cannot come to grips with the problem in a responsible manner. It is imperative to understand that everyone who hopes that a constitution will establish a normal law-abiding Israeli republic must fight any and all proposed legislation that rests on hidden assumptions that are better left tacit. Without the ability to have an explicit constitution and to declare openly its underlying assumptions, it would be better to wait

patiently and in the meantime hold public deliberations in suitable forums about what to do in the interim.

10. Back to a Constituent Assembly: Toward a New Israeli Republic

Popular Israeli tradition rests on an erroneous assumption concerning the character of the modern secular state--an assumption deriving from a substantial tradition of the Jewish settlement in the Land of Israel that was hostile to religion. This hostility was mislabeled "secularism," as its counterpart in anti-clerical circles in Europe had been called for generations. The secular is that which is outside the religious domain (neither holy nor unholy), and so it was traditionally understood among all parties, religious, non-religious and anti-religious alike, Jewish, Christian and Muslim.

The terminological change comes to blur the important and basic difference between the secular and the anti-religious, including that between a secular state and an anti-clerical state. (The terminological change was made in the silly, but alas successful, hope of making all those indifferent to religion appear hostile to it.)

Consequently, many Israelis are surprised that religion is so widespread in societies in secular countries, and that often religious political parties are in power in such countries. Since the founding of Israel, it was taken for granted that should the religious sector in Israel gain power by democratic means, the leaders of this sector would then have the right to impose religious law on all the citizens. It goes without saying that a state that imposes a religion on its citizens does not allow freedom of conscience and is therefore not democratic. Most Israelis do not know that.

The national-religious parties in the West do not intend to undermine democracy. This is because of a deep awareness of the difference between religious affiliation and nationality--something that they take for granted. Various democratic constitutions forbid discrimination on religious grounds--at times with the aid of legislation that separates political authority and religious authority, church and state, at times even by declaring the dominant religion as the state religion. The state religion serves only for the formal needs of the state for some sort of religious activity (and citizens who do not declare their religious affiliation may automatically be considered members of the state religion). But no more than this. State religion need not undermine the precepts of democracy. Had this not been the case, Jews in the West would not have had full or nearly full civil rights in their own countries and could

not have fought religious discrimination. Israel's Declaration of Independence guarantees the avoidance of all religious discrimination. Its Ministry of Religion was instituted with a declaration of full equality for all religious denominations—and this equality is neither possible nor desired, nor required. It would have been possible to grant the Jewish religion preferential status and declare it the undisputed state religion, along the lines of Catholicism in Spain or Protestantism in Denmark (where it is the state religion). It is preferable for Judaism to be declared the state religion of Israel than to give preferential treatment to Judaism through arrangements that no one honestly wants to discuss in public. Israel's Jewish character is a demographic fact that does not depend on the conduct of its government or the position that the law takes towards it. Those who suggest that the Jewish faith needs help in the form of the imposition of faith by Israeli law lack all sense of proportion and respect for Judaism.

The question of what is desirable from a legal standpoint is not, therefore, a question of how to protect Israel's uniqueness as a Jewish state but what its democratic expression is. To date, those who have debated the fundamental questions facing Israel—questions of policy and ideology--have systematically refused to discuss these issues, preferring a host of fuzzy excuses and the suppression of discussion. The result, of course, has been unsatisfactory. Hopefully, the proponents of a draft constitution will raise these basic questions and the efforts to grapple with them. The refusal to raise them rests on the hidden assumption that the constitution of a Jewish state that prefers Jewish immigration will not quite be democratic. This assumption is fundamentally erroneous. It is hard to understand how this assumption came about and continues to be widely accepted by the public in Israel, although it is so fundamental to public and political life in Israel and so easy to refute.

To repeat, this puzzling situation is not unique to Israel; it is common to all states governed by rule-by-arrangement—since all arrangements are rather pathetic. What is special about Israel is that it *began* as a state ruled-by-arrangement when the Constituent Assembly convened in 1948 with the objective of preparing or discussing a constitution. At the very same time, backstage wheeler-dealers decided that a constitution was too dangerous. Behind-the-scenes, the internal logic of arrangements prevailed through considerations based on a host of factors--reasonable and misguided, ideological, national, party-political, and personal. Since there was no time to examine these calculations--certainly not publicly—the catch

situation gained momentum until the internal logic of the arrangements won out. This was facilitated by national preoccupation with the war situation and the need to absorb masses of immigrants. (At that time, arrangements regarding the absorption of immigrants were already forged by the various political parties without consulting the immigrants themselves). The more the various authorities became entangled, the greater was the incentive to go from the rule-of-law to the rule-by arrangements. Experts, including Professor Amnon Rubinstein, have already claimed that the very first Israeli law—the law establishing the Knesset, lacks foundation.

The proposal that a Constituent Assembly be convened to discuss fundamental questions concerning Israel, a proposal anchored in the Declaration of Independence, affords a direct and simple way to turn any desirable arrangement into a law, on condition that the Assembly recognize that it is not authorized to deliberate on the question of who is a Jew. The Assembly should be a political forum, not a religious one--something that requires replacing the question of who is a Jew with the legitimate and burning question of who is an Israeli. The first question, being a religious one, has no place in a draft constitution that should be put before the Israeli public for a democratic political debate. Putting it in a draft constitution may result in a constitution that will perpetuate arrangements.

The draft constitution presented to the Israeli public before the reform of the election law was enacted decided who is a Jew. It recognizes Israel as the state of the entire Jewish People. It is therefore useless. Its proponents have claimed that this recognition was solely a declarative gesture with no political ramifications, other than for the Law of Return. A more worthy declarative gesture would not conceal the fact that not all Jews have the vote in Israel. A more worthy declarative gesture would be the claim that Israel is the legitimate heir of all the political aspirations of the historic Jewish People, which has shed its political characteristics with the creation of a Jewish homeland in Israel. Israel could thus recognize the right of Jews elsewhere to national self-determination, a right that the draft constitution has ignored. Israel would then no longer force upon them the fictitious status of ownership of the State of Israel—a status that may be detrimental to them. The draft constitution does not change anything with regard to the Law of Return or the current catch situation that it causes, nor does it make even a hint of a suggestion as to how a constitution could extricate us from the trap that we are in. Nor does the draft suggest any other gesture. It makes no allusion to my

suggestion to call Israel the Republic of Israel instead of the State of Israel. The most far-reaching proposal that appears in that draft is the one that deals with a reform of the electoral system. This reform was far-reaching in that it contained the irresponsible proposal calling for the direct election of the prime minister. That was the first practical outcome of the draft, and the innovation only changed arrangements. It did not help those who hope for a significant and accelerated transition from a state governed by rule-of-arrangement to a modern, liberal nation-state that respects itself and its own laws, whose citizens and residents can live without excessive dependence on the regime and its bureaucrats--a state that can be proud of a praiseworthy constitution.

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