An Enlightened Constitution

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Background

The country I come from—Israel—has no constitution. That is, no constitution in the narrow sense of a written legal document, immune against hasty changes, and superior to ordinary laws through judicial review. Like Britain and New Zealand, countries with a similar legal situation, Israel has of course a constitution in the broader sense of a legal scheme by which the country is governed. Still, it has no constitution in the sense I use here.

Many Israelis regret the fact that the establishment of Israel 50 years ago was not accompanied by a written constitution. They feel that a golden opportunity was missed. Many still believe that Israel, in the midst of a Kulturkampf between the religious and the secular, is in a desperate need of a constitution now. This is the background for my personal interest in the question what one should be allowed to hope from a constitution, at least ideally.

Constitution and the Enlightenment

Israelis who believe that it is bad that Israel has no constitution describe themselves as enlightened people. This is, of course, a self-congratulatory use of the expression, but it has a descriptive element as well. It refers to people with, broadly speaking, a world view of the enlightenment. For these people, the constitution they have in mind is a natural product of such a world view.

To be sure, constitutions are not the invention of the Enlightenment. It is enough to leaf through Aristotle's constitution of the Athenians—which, though found on a papyrus at the end of the 19th century it was composed in the 4th century BC—to realise that constitutions, written and unwritten, have been with us for a very long time. But what I have in mind are the modern constitutions that can aptly be described as the brain-child of the Enlightenment. The most glaring example of such enlightened constitutions are the 18th-century constitutions: the American constitution of 1789 and the revolutionary French constitution of 1791 (the first of 15 subsequent French constitutions). Both are immaculately conceived by the light of the Enlightenment. In what sense are these constitutions the product of the enlightenment?

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The relevant sense is that of scepticism and suspicion towards traditional authorities—King and Church, Scriptures and Clericals. It is suspicion not only towards traditional authorities but also toward the authority of tradition itself. Instead of tradition the Enlightenment advocate the a-historical authority of reason, or—in the Scottish version of the Enlightenment—of common sense. The Enlightenment, be it atheistic or deistic, stands firm on religious toleration on both counts: religious freedom, and freedom from religion (separation of Church and State).

The Enlightenment's suspicion of tradition is based on the assumption that tradition is a vehicle for the preservation and transmission of superstitions and prejudices, that are embodied in parochial customs and cannot stand the test of universal reason. Thus, a regime whose claim to authority rests on tradition and customs is an arbitrary regime. Not necessarily arbitrary in the sense of being capricious and subject to erratic behaviour, but in the sense that its behaviour, even when principled, is not guided by reason, arid cannot be defended rationally. A constitution is regarded by the Enlighteners as a limitation on arbitrary rule in both senses of arbitrary: the whimsical sense, and the sense of rule motivated by prejudice and superstition. An enlightened constitution should on this view be a Republican constitution that is free from the yoke of the tradition. But even a constitutional monarchy is, of course, a great improvement over an absolutist monarchy.

An enlightened constitution, one that is inspired by the Enlightenment, has to be combative on two fronts. One, the front of the traditional regime, where monarchy is the prototypical traditional regime. Two, the religious front. On the second front an enlightened constitution is expected to make room for different forms of religious life, and to free the public space from the religious grip. A clear expression of freedom from religion one can find in the French constitution of 1958 that says (article 2) 'France is an indivisible *secular* democratic and social republic'. A constitution may include deistic God-talk and still free the public space from religion. Again: I am addressing myself here only to one brand of constitutions, the enlightened ones, but we shouldn't forget that there are theocratic and autocratic constitutions as well.

So an enlightened constitution is motivated by the desire to defend individuals and groups from arbitrary rule, and also to defend individuals and groups from religious coercion. The people who want Israel to have a constitution are mainly motivated by the desire to be freed from religious legislation in public matters and, even more, in personal matters (matrimonial matters are in the hands of religious courts, and there is no civil marriage in Israel). So these, I believe, are the hopes from a constitution by enlightened people in Israel.

The Paradox of the Enlightened Constitution

This is our paradox: out of suspicion towards the tradition, an enlightened constitutional document emerges that starts a constitutional tradition of its own and claims the authority of tradition. The constitutional document comes suspiciously

close to be treated as religious scripture, whose framers are viewed as endowed with supreme intellect and vision. Think of the American constitution and you get the hang of the paradox.

Enlightened constitutionalists would say that the constitutional tradition is a tradition of constant criticism and test before the court of reason. But the veneration towards the constitution is more akin to religious veneration: indeed the constitution became the altar of civil religion in many modern states, including enlightened ones. The constitutional tradition makes the constitution more rigid against changes than it would be had it been left to the mere formal constraints put by the constitution itself. Efforts for constitutional reforms discover the full force of a resisting tradition, which is not unlike the religious case.

The Enlightenment was a revolutionary move that turned from a presumption in favour of tradition to a presumption against tradition. But enlightened constitutions count on a presumption in favour of their own constitutional tradition in establishing the right attitude to the constitution, which is constitutionalism. This veneration that comes with tradition is viewed as an asset that should not be undermined by scepticism and a critical view. The notion that tradition is on the whole bad (as a source of authority) but the tradition of the constitution is good, is an attitude which says don't reform articles in the constitution just because they became arcane, archaic and irrelevant. This in itself is no good reason for a reform. If it doesn't itch don't scratch, you don't operate to remove the appendix just because it lost its evolutionary function and justification. Veneration of the constitution is an asset, so don't mess around with relatively harmless articles that lost their justification. This attitude, which makes a lot of sense, does not however make a lot of enlightened sense, hence the paradox.

Th Defining Moment

I claimed already that many Israelis have a strong sense of a missed opportunity, in that no constitution was created when the state was founded. I believe that indeed an opportunity was missed to frame a truly enlightened constitution. The creation of an enlightened constitution calls for a moment of good will. The foundation of a state, especially after historical events such as a war of liberation, a war of independence, or a revolution, brings about such moments. A moment of good will is a moment that brings out the best and the most generous in people (when they are in a generous mood), that brings out in them the general will at the expense of their concern with special interests.

Moments of beginning, of opening a new page, feel like moments of greatness, of doing it right and not as it was in the past. Such moments, when special interests are frozen, are short. To miss such defining moments of constituting a state on the solid foundation of a constitution that will preserve the good will of the beginning for later on, when moments of smallness take over, is a miss indeed. Of course this account of mine with respect to defining moments of good will is an idealisation, but the grain of truth in it is big enough to justify the sense of a missed opportunity. It is hard to revive moments of greatness in the

ordinary course of daily life. The fear is that a constitution framed in days of smallness would reflect an outcome of a shabby compromise of contingent forces in the society. Judging by the current proposals for a constitution for Israel, 'shabbiness' is indeed the word. I believe that any agreed constitution in Israel framed in its early days would have been more enlightened (in the evaluative sense of the word) than anything that can be obtained now. The moment of grace has gone, and cantankerous moments of grumpiness took over.

If I am right in my conjecture then there is a lesson to be learnt for those who advocate a reform in an existing constitution. Wait for moments of good will, moments of the spirit of greatness. This calls for patience, and the temptation for a change is all there. But a significant reform in a constitution calls for a public spirit that is very different from the ordinary spirit of political power politics, bargains and deals.

My conjecture that a moment of birth for a state or a nation is a moment of good will calls for a methodological hedge, if I may use his pompous expression. Let me start my hedge with a disclaimer. I don't have a theory of constitutions. The truth of my conjecture is more akin to the truth of a proverb than to theoretical truth. Take a proverb like, say, 'all beginnings are difficult'. This brings to mind lots of available confirming instances when at the beginning of a task it was hard, and later, when we got used to it, we did it far more easily. But then the contrary proverb, namely 'all beginnings are easy', also carries with it confirming instances and sounds, if not as good as the original proverb, still good enough. With the negation of a theoretical conjecture (be it its contradiction or its contrary), we are usually hard put to come up with confirming instances. Popper notwithstanding, there might be negative instances to the conjecture, but they are far from accessible, that is, not readily available.

A Warning

The superiority of the constitution over ordinary laws is determined by the direction of fit. The laws should fit the constitution, not the constitution to the law. In case of a contradiction, the law yields to the constitution. This asymmetry is a formal condition for supremacy.

I would like to propose an ideal relation between the constitution and the law, as something to hope for and to aspire to. Moreover, the relation is that of superiority between what I render as ideal and second best. The constitution aspires to the ideal, the law to the second best. The regulative idea for the constitution should be justice. The regulative idea for the law should be peace. By regulative idea, *pace* Kant, I mean an idea that can orient behaviour without the assurance of fulfilling the idea.

Here I would like to make another methodological remark, indeed a warning. I am talking about the end of the constitution being justice, and the end of law being peace. This is a vast and vague claim, but not, I hope, valueless. In saying that the aim of the law against pollution is to stop pollution, the aim is

almost written on the face of the law. And in general, in most cases when the question is what is the purpose of law X, the answer is pretty clear, even if overdetermined—that is, X often has more than one purpose. But to move up and ask what is the purpose (the end, the aim, the goal) of the law in general, as a question about nothing in particular, the question seems to lose its grip. And so it is with the constitution. We can ask about each article in the constitution what its purpose is, but it is pretty slippery to ask what is the purpose of the constitution as a whole. The reason for that is not hard to fathom: the law has the same complexity as life—social life—has. Just as it is unclear what counts as an answer to the question what is the aim of life, so it is with the law. Like life, the law has many goals and purposes and it is hard to single out one goal that will give an informative answer. Yet I believe that to the question what is the aim of social life there is a better answer than to the question what is the aim of life. Cooperation would be my answer. So it is with constitution and the law. The answers, cooperation in the case of social life, justice and peace in the case of constitution and the law, are mere place holders. But I believe that real content can be supplied to fill in the rubrics under these labels.

Between Peace and Justice

Too much has been said and written on the tension between freedom and equality. Not enough has been said and written on the tension between peace and justice. The tendency, if at all, is to take peace and justice in one swoop as if they were fish and chips—things that ought to go together. It took the dark Heraclitus, echoing Anaximander, to state that justice is strife. I see the relation between peace and justice in their Heraclitian tension and when I say that ideally constitution should be regulated by justice whereas law by peace, it is not an harmonious division of labour that I see between peace and justice, constitution and law, but a permanent tension.

I see peace, realistically conceived, as a state of affairs based on compromise, including compromises on just interests to which we give the name rights. Political justice, justice that is an attribute of social arrangements, is constituted by two values: freedom and equality. Both values are in tension with one another. Freedom and equality are vector concepts. They convey not only 'mass', so to speak (value), but also direction: freedom *from* or freedom *to,* and more importantly—equality *to what* and equality *to whom.* Without specifying the direction, these concepts are of little help. A theory of justice is required to explicate these notions, but more importantly, to strike the right balance between freedom and equality. In one pole we find liberalism that tips the balance completely in favour of freedom, and leaves equality merely as equality before the law. On the opposite pole, we find socialism that tips the balance in favour of equality. And somewhere in between is the social democrat who gives precedence to freedom, but view equality, including economic equality, almost as important as freedom in constituting justice.

My depiction of the three positions is of course a caricature. But a good

caricature is judged by how well it highlights the most pronounced features. I hope my caricature, crude as it is, stresses the most pronounced features of those positions, although in an exaggerated way. The spectrum of justice between the two poles is inspired by the Enlightenment ideas. But we shouldn't confuse the source of the notion of justice with its justification and tests. John Rawls justified the deviation of a social policy from equality by its beneficial effects on the least advantaged group or individual in the society. Thus we should test justice by what happens to the least advantaged. But I can see us testing a just constitution by adapting the biblical test of what happens to the most vulnerable group or individual—in the Bible they are the widow and the orphan. The most vulnerable is not necessarily the least advantaged. The most vulnerable is judged by how well their rights are protected in their society, and not by an index of what they have. This biblical, and I hasten to add Qur'anic, traditional test should I believe be adapted by enlightened constitutions.

Moses and Aaron

To be against peace in our culture is like being against motherhood and friendship. The mere mentioning of the word can bring us to yawn. But it is far from being the simple idea it is taken to be, and intellectually more challenging than we realise. After all, people do fight just wars for just and worthy causes. To compromise for the sake of peace in matters of justice is a very demanding claim indeed. In Judaism there is an acute, if not drastic, sense of tension between peace and justice. These two values are incarnated by the two biblical brothers Moses and Aaron. Moses embodies the idea of an unyielding and uncompromising justice, expressed by the Talmudic saying 'Let the law cut through the mountain', meaning, let justice be done, come what may. Aaron, in contrast, embodies the ideal of the lover and seeker of peace. After all, for the sake of peace and prevention of bloodshed Aaron compromised on what is regarded as a terrible sin—the idolatry of the golden calf

Interestingly, the contrast between Moses and Aaron occurs in the Talmud in a discussion (Tractate *Sanhedrin)* on the legal contrast between arbitration and trial. On the Talmudic account, trial is guided by justice, and arbitration by peace. What troubles the Talmudic sages is whether they can, for the sake of peace, compromise on justice. Moses, the most revered person in the tradition, stands for trial and non-compromise, that is for justice, whereas Aaron, the most likeable person in the tradition, stands for arbitration and compromise. I would like to shift the Talmudic tension between trial and arbitration, which reflects the tension between justice and peace, to the contrast between constitution and ordinary law. Constitution carries the idea of justice—ideally, that is—and the law carries the idea of peace.

Under the dictionary entry for 'peace' one can find many segregated senses of the word. The sense that suits our concerns best is the one that appears under the more special entry 'king peace', which refers to civil order and security within the community (the realm), provided by the law. This idea of king peace is what we need here.

I take the principles of the constitution as normative, and laws in contrast as prescriptive. The distinction between the normative and the prescriptive is the following: normative principles are guided by our idea of how things ought ideally to be. Prescriptive laws are guided by our idea of how things will be better if those laws would be followed better without having an idea of the best.

A Shameful Compromise

A constitution should prevent ordinary laws from being an outcome of a shameful compromise. There is a lexicographic order in preventing shameful compromises. Cruelty first. That is, laws based on cruelty should be blocked first. Humiliating laws should be blocked next. A constitution should be devoted to installing what I call a decent society, a society whose institutions do not humiliate those who are dependent on them. But the constitution should not stop at the idea of the decent society. It should aim higher, at the idea of the just society that secures freedom and equality in the right balance. Ideally, the laws should be the needle of the compass, the constitution—its north. But how should it all be done?

Valu s as Rules of Interpretation

My suggestion is to give teeth to that part of the constitution that is usually taken as ceremonially declarative with no legal binding force—the preamble. The preamble in a constitution typically lists the fundamental values to which the judicial and political system constituted by the constitution, is committed when sincere. The proposal is to turn those fundamental values into binding rules of legal interpretation. Rules of interpretation in a legal system are not part of linguistics or hermeneutics, but legal rules. The idea is that from within the range of possible legitimate interpretation of a particular law, the values stated in the constitution's preamble provide rules of selection for that interpretation that fits best those values. A legitimate interpretive option is an option that the legal community would consider an acceptable interpretation. The legal community, for that matter, is as much a figment as a fact, but it is a useful construct all the same.

On my account, a law should always be interpreted by its purpose and not only by its language, even when its language is as plain as a nose in one's face. By the purpose of the law I mean both the law in its narrow aim and in its broad goal. The tendency to interpret the law with only peace in mind usually implies selecting the interpretive option that deviates least from a stable status quo. In contrast, interpreting the law with justice in mind would usually lead to selecting options that deviate significantly from the status quo, within the range of acceptable interpretation. Thus the constitution, on my interpretive picture, is not a conservative tool, whereas the law is. By conservative tool I mean a tool for conserving the status quo.

The interplay between peace and justice as interpretive values is complicated. It is made more complicated by a double-counting of peace. On one count, peace is injected into the very act of legislating the law, and thus it plays a

role in determining the range of possible interpretations. This I believe is the proper place for taking into account the legislators' intentions. And then peace is counted again, when it plays a role—in competition with justice—in selecting the best interpretative option within the range. As interpretive values within the range, justice takes priority over peace. As determining the scope of the range, peace weighs more. In a concrete discussion peace and justice should be unpacked. Thus I consider the clash, say, between freedom of speech and security of the state as part of the conflict between justice and peace.

How can the introduction of the preamble's values as interpretative rules help the Israeli case, where there is no constitution? I do not believe that in the cultural and political situation of Israel today there is a possibility of reaching a respectable compromise for an enlightened constitution. The current moment is not a moment of grace. The proposal is that instead of reaching a shabby compromise on a dreary constitution, Israel should right away make its Declaration of Independence the preamble for any constitution-to-come, and make its values the constitutionally obligatory interpretive rules for current ordinary laws, with the power of judicial review. Israel's Declaration of Independence is not a perfect document, but it is a document of good will drafted in a moment of greatness.

Rules of the Game

It seems that my concern with the big words of the constitution makes me skip the obvious division of labour between the constitution and the law. Constitution is not about justice—and when it is, it is about fair play. The constitution is about laying the ground rules for the big game, that is, politics. Indeed the main bulk of current constitutions is taken with the rules that determine the basic political and judicial institutions, especially in federal states. These rules are frequently described by the metaphor 'rules of the game' in the sense that they are constitutive rules that define the legitimate political practices. The idea of constitutive rules, say of chess, is that there are no antecedent goals to the game that the rules are meant to promote—not even fun; and the rules are meant rather to determine what counts as moves within the game.

Political life is no game. It is not defined by constitutive rules. If it is guided by rules, the rules are regulative, that is, they promote the achievement of antecedent, independent goals. The constitution is not a set of constitutive rules. Although procedural justice plays an important part of an enlightened constitution, determining—ideally—a perfect process, substantive justice is needed even for that. Lawrence Tribe is right on target when he writes:

> There is a curious irony here. One who holds that constitutional law should aim chiefly to perfect process is apparently unable to treat process as itself valuable. For to see why process would itself be intrinsically valuable is to see why the constitution is inevitably substantive.[1]

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1 Lawrence Tribe, *Constitutional Choices* (Harvard, 1985) 13.

The Constitution as an Educator

If an enlightened constitution is meant to be a document of Reason, it is a puzzling document on that score. How, after all, can a constitution be an act of Reason, if what it does is tie the hands of the next generations by a generation that by sheer historical contingency happened to be its framer.

In American banks there used to be a savings program (and perhaps its still exists) called the Christmas Club. The condition for joining the program was that the depositors could withdraw their savings only in the month before Christmas. The interest paid on the savings in this program was generally lower than in ordinary savings accounts in which one is free to withdraw the money at any time. In short, the conditions in the Christmas Club were definitely worse than in an ordinary savings account. It looks as though joining the Christmas Club is an irrational act. But then tying our hands with the constitution looks no better than joining the Christmas Club. Yet we do understand the rationale of both, which is the rationale that Jon Elster called Ulysses and the Sirens. Ulysses was tied to the ship's mast so as not to be swayed by the seductive song of the Siren. It is the weakness of the will that we combat by a pre-commitment. In he case of the constitution it is against the modern Sirens—the demagogues who may tempt us to legislate badly—that we use the constitution as our mast to which we are tied. So the constitution, like the Christmas Club, is a reasonable solution for people who, in their reflective moments, realise that they cannot trust themselves as stable, rational human beings.

But can we trust a parchment scroll to defend us against our irrationalism? Well, the constitution is not a parchment, just as money is not paper. A constitution, among other things, is an educational document. It forces people to deal with matters of principle and with the big issues, and not to be bogged down with the banality of ordinary legislation. It makes them see the big picture and the grand principle, thereby immuning them against the demagoguery of the public Sirens. As always, the educational role of the American constitution is the standard example.

Education, like other curtain-raising notions such as justice and peace, is a notion that invites cheap talk, a talk with no price tag attached. After all, who can be against educating the public to what is just and noble. But there is a heavy price that is paid for the educational role of the constitution, a price most glaringly manifested in the case of the American constitution. I believe that one of the causes for why the American society is so litigational is because of the educational role of the constitution in American life, stressing as it does the absolutist language of rights. Justice is strife, and the price of being educated by a constitution is a reasonable price to pay, but it is a price all the same.