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BASIC LAW: ISRAEL AS THE NATION-STATE OF THE JEWISH PEOPLE: LESSONS FOR PARTICULARISTIC AND UNIVERSALISTIC CONSTITUTIONAL LEGITIMATION

1. INTRODUCTION

The '*Basic Law: Israel as the Nation-State of the Jewish People*,' passed by the Knesset on July 19, 2018. This Article describes the main provisions of the Basic Law; it discusses some of the past history leading to the legislation. It also provides some evaluation as to its effects and speculations concerning its future. But the main argument made here uses this basic law to make a broader point concerning constitutional legitimation. More specifically I argue that there are two ways to gain constitutional legitimacy: representational and reasons-based. While particularistic values such as the ones entrenched in the basic law gain legitimacy from representation universalistic values need not rest on representation. I conclude by arguing that given the failure to gain consensual support for the basic law, it is an illegitimate attempt to entrench particularistic values in a divisive society. It is only by representing the public that this law can gain constitutional legitimacy.

The Basic Law purports to entrench the identity of the state as a Jewish state. While the older canonical official documents such as the Declaration of Independence and *Basic Law: Human Dignity and Freedom* speak of Israel as a Jewish state which also cherishes universal values (equality and justice in the case of the Declaration and democracy in the case of *Basic Law: Human Dignity and Freedom*), the new Basic Law omits any reference to such universal values. The key phrase that has been used in the last three decades in official documents was: 'Israel as a Jewish and a democratic state.' The omission of this phrase or any reference to democracy or equality in this Basic Law was a deliberate choice on the part of the Knesset. For reasons that will be mentioned later all proposals to add references to universal liberal values were rejected by the Knesset. The novelty of the Basic Law is not therefore in the willingness to entrench

the status of Israel as a Jewish state but in the deliberate omission of any reference to universal values.

Section 1 describes the provisions of the law and the debates surrounding some of them. Section 2 points out the deeper roots of the debate and its effects on the Israeli polity. I will also argue that the initiative to pass this law can be regarded as indicating a shift in the status and perception of the Court in Israel. Instead of being regarded as an ally of liberalism and liberal forces in Israel, it has now been transformed so radically that it may be regarded as an ally of nationalism and particularism. In section 3 I differentiate between two means of legitimation: representative legitimation and reason-based legitimation. I shall argue that the basic law entrenches particularistic values and consequently its legitimacy must rest on a consensual represntation. Given that no consensus has been achieved I argue that while the basic law is legally valid, it represents an illegitimate attempt on the part of a sectarian group, namely nationalist and conservative forces to entrench their own sectarian values.

2. THE SECTIONS OF THE BASIC LAW

The Basic Law consists of 11 sections dealing with different aspects including broad ceremonial provisions, provisions concerning immigration, official symbols, e.g., flag and anthem etc. Some of the sections are very controversial while others raise little public interest. I will describe each section and with respect to some of the sections I will also provide general background information.

Section 1 is a general section affirming the right to Jewish self-determination in the land of Israel. There are two major novelties in this provision. First it speaks for the first time of the "natural cultural, *religious*, and historical right to self determination". The right to 'religious' self-determination is new and has not been mentioned in any official documents in the past. Second, for the first time, section 1 of the Basic Law emphasizes that the right to national self-determination in the state of Israel is granted *exclusively* to the Jewish nation. This is a direct reference to proposals to regard Israel as facilitating, encouraging or at least acknowledging collective self-determination for both Jews and Palestinians. The section therefore is designed specifically to pronounce that there is an asymmetry between the status of Jews and Palestinians in Israel. While the former have both individual and collective rights as a group, the latter have only individual rights.

Section 2 specifies the official symbols of the state: the name of the state, the flag, the anthem etc. The symbols of the State of Israel refer exclusively to Jewish culture and history. There were proposals to design more inclusive symbols. Late Justice Miriam Ben-Porat supported changing the Israeli anthem (Hatikva – the Hope) and include in it references that will be more inclusive

and refer to the history of Palestinian citizens of Israel. Section 2 contains an implicit rejection of these proposals.

Section 3 reiterates what has already been entrenched in *Basic Law: Jerusalem as the Capital of Israel* (1980). It declares the status of unified Jerusalem as the capital of Israel. It is worthwhile mentioning that after the Six Day War many villages which have never been part of Jerusalem have been annexed to it. As a result, unified Jerusalem consists of many Palestinian villages which have never been part of the city.

Section 4 has been one of the stumbling blocks in the negotiations leading to the legislation. The issue in this section is the status of the Arabic language. The official languages in mandatory Palestine were English, Hebrew and Arabic. After independence, English was excluded and the official languages in Israel have since then been Hebrew and Arabic. The recognition of Arabic as an official language has had practical effects. Several decisions of the Supreme Court protect the status of Arabic language. For instance, in HCJ 4112/99 the Court decided that municipalities are obliged to use street signs in Arabic in addition to Hebrew. The Court in this case has said that Hebrew has a superior status but Arabic has also a significant place in the public life in Israel. Section 4 demotes Arabic from its status as an official language to a language "with a special status". An indication to the debates preceding the legislation can be found in the last sub-section of section 4 which asserts: This law does not detract from the status that was given in practice to the Arabic language before the enactment of this law. This provision was included to appease some of the potential opponents of the Basic Law.

Section 5 declares that Israel will be open to Jewish immigration and section 6 speaks of the duties of Israel towards Jews abroad. It declares among other things that Israel will act to preserve the cultural, historical and religious tradition of the Jewish nation in the diaspora.

Section 7 has been probably the most contentious section. Zionism at its beginnings cherished the value of settling in the land. The Zionist organizations bought land and promoted Jewish settlement on the land of Israel. The ideal of the 'occupying the land' was regarded as central to the success of the Zionist movement. After the Independence remnants of this idea were retained in Israeli legislation. In particular, the Israel Land Authority leased some of its lands to Jews only as they officially belonged to Zionist organizations and not to the State. In a famous decision HCJ 6698/95 (Ka'adan) which can only be compared with the famous US *Brown v. Board of Education*, the Supreme Court decided that this practice is illegal. Since then there were consistent efforts to revive the legality of racially homogenous settlements which so far failed. Section 7 does not explicitly allow racial segregation but its proponents hope that this will be its practical effect. It declares that the state regards the development of Jewish settlement as a national value and will act in order to promote and advance the establishment of Jewish settlements. The opponents of the Basic Law regard this provision as the most anti-democratic section in the Basic Law.

Section 8 establishes the official status of the Jewish Calendar; section 9 dictates the national holidays and memorial days; section 10 declares that the Jewish holidays will be the holidays in the State of Israel but protects also the rights of religious minorities to celebrate their own religious holidays. Section 11 declares that this Basic Law can be changed only by a majority of the members of the Knesset (61 members).

3. THE POST TRAUMATIC EFFECTS AND NORMATIVE EVALUATION

The Basic Law has occupied the Israeli Knesset for many years. The idea to enact such a statute was first raised in 2011. Various proposals some of which were more nationalist than the new Basic Law and others more moderate have been made. The reactions to the enactment of the Basic Law have been dramatic. A Palestinian member of the Knesset (Zouhir Bahloul) resigned as a protest. The Basic Law has been described by its opponents as an apartheid law and some members of the Knesset suggested that this should be its official title. The proposal to amend the name of the law to Basic Law; Apartheid was however rejected. The hostile reactions to the law come from the left, the center and from the more traditionalist rightwing conservatives who are still faithful to the liberal-legalistic tradition of Menachem Begin and the revisionist movement. Further, after the law was passed leaders of the Druze community which has traditionally been very loyal to Israel and its members serve regularly in the army raised bitter protests. As a result, even some ardent supporters of the Basic Law, such as the extreme rightwing Minister Naftali Bennett has expressed his concern that the law may alienate the Druze community. The witty opponents of the law suggested that the Basic Law should be revised and declare that Israel is a Jewish and a Druze State. It is time now to evaluate the law, examine the arguments made by its proponents and opponents and predict (of if you wish speculate) about its potential future effects.

The proponents of the Basic Law argue that the Israeli society has become too westernized; in particular, it is argued that the legal system has been too activist in promoting western values at the expense of Jewish and nationalist values.[1] Under this view, the Basic Law restores the proper balance between Jewish and universalist values. This is why the proponents of the Basic Law were so opposed to the inclusion

[1] Echoes to this accusation can be found in Aviad Bakshi & Gideon Sapir, Israel as a Nation State in the Supreme Court Ruling, https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/%D7%A1%D7%A4%D7%99%D7%A8-%D7%91%D7%A7%D7%A9%D7%99-%D7%97%D7%95%D7%A7-%D7%94%D7%9C%D7%90%D7%95%D7%9D-%D7%91%D7%92%D7%A6.pdf.

of universalist values into this Basic Law as such an inclusion would not restore in their view the balance between Jewish and universalist values.

There is however a great inconsistency in the arguments of the proponents of the new Basic Law which unfortunately has not been pointed out in the debates preceding the legislation. Most of the proponents of the Basic Law have been very critical of the powers of the Court and also highly critical of the basic laws themselves and the judicial interpretation of these laws.[2] In particular, it has been argued that basic laws, in particular basic laws which entrench central values, should be passed only on the basis of broad consensus that reflects the deeper shared values of the nation as a whole. Yet, the Basic Law that is supposed to entrench Israel as a Jewish state was passed by a very small margin (62 in favor 55 against). So while most of the supporters of this law complain about the small margin in which the previous basic human rights laws have been passed (and draw the conclusion that they are not sufficiently representational and therefore illegitimate), they have not followed their own judicial philosophy: short term interests, hypocrisy and most likely intellectual dishonesty of monstrous magnitude led the supporters of the Basic Law to act against their own philosophical inclinations.

Given the intense opposition to the Basic Law on the part of all opposition members from the left and center as well as opposition on the part of the traditional rightwing conservatives and almost all minority Knesset members, the law cannot be genuinely regarded as resting on the shared values of the Israeli society. It is clearly a sectarian law promoting not the values of Israel as such but the values of the current government as such. The values promoted by the law are not the shared values of the State of Israel but the shared values of two political parties: the Likud and the Jewish Home party. Moreover, the law is vague in its provisions and it grants therefore courts broad discretion. It is difficult to reconcile the traditional criticisms and often also verbal abuse of the Court by prominent members of nationalist parties arguing that the Court is too activist with the willingness to pass a basic law which is highly vague and inevitably leaves much powers in the hands of the Court. It seems therefore that the only way to explain the shift in the tactic of conservative forces is their belief that the composition of the Court has changed and that the Court can now be regarded as an ally of conservativism rather than liberalism. This results from many recent appointments made by current Minister of Justice Ayelet Shaked.

The opponents of the Basic Law raise both principled and pragmatic reasons. The Basic Law contains some provisions which are very difficult to reconcile with a democratic or an egalitarian state. Most clearly section 7 prioritizes Jewish settlement over settlement of non-Jews. The ardent supporters of the law have not succeeded to pass a provision which will override Ka'adan and allows the estab-

[2] I wrote about this previously in: https://verfassungsblog.de/the-israeli-override-clause-and-the-future-of-israeli-democracy/.

lishment of racially segregated municipalities. But even its more moderate form is regarded by many as pernicious. The demotion of the Arabic language to a language with 'special status' is also regarded as unacceptable. In addition, pragmatic arguments are being raised; it is argued that the law will strain the already uneasy relationships between Israel and its Palestinian citizens. The Druze community has also expressed its intense resistance to the Basic Law.

The opponents also point out that the Basic Law is part of a much larger enterprise to weaken and even to eradicate the liberal foundations of the Israeli legal system. In recent years there has been a flood of legislation limiting the right to free speech, limiting the ability of human rights organizations to raise money abroad, limiting the freedom of movement and others. Here are some examples: The "Nakba Law" restricts the right to commemorate the Nakba (the day of mourning of Palestinians expelled from Palestine in 1948); a new law regards the call to boycott settlements in the Occupied Territories as a civil wrong; another amendment prevents the entrance to Israel of people who are supportive of the BDS. Many other proposals are being discussed now in the Knesset and may pass in the future. One ought therefore to evaluate the Basic Law in light of the broader encroachment on basic liberties in Israel.

As this Article is being written several petitions against the Basic Law are being prepared and will be submitted to the Supreme Court. The Court however may find it very difficult to declare the Basic Law void. This is not only because of the political threats directed against the Court made almost daily by prominent politicians or because of the flood of political appointments to the Court made by the Minister of Justice Ayelet Shaked. It is also because the law is a basic law; to strike its provisions and declare them void would require the Court to use the doctrine known as the unconstitutional constitutional amendment doctrine used famously by the Indian Court. This doctrine allows the Court to strike down constitutional amendments when they conflict with fundamental constitutional principles. Given the current composition of the Court and its vulnerability, it is very unlikely to happen. One potential effect of the petitions against the Basic Law is to force the Court to express its opinion concerning the interpretation of the more provocative sections of the law. The hope of the opponents of the Basic Law is that in order to maintain the image of Israel as a liberal state, the Court will express its opinion that section 7 that declares that promoting Jewish settlement is a national value should be interpreted narrowly and it does not allow the establishment of racially segregated settlements.

This observation provides the basis for my prediction regarding the effects of the law in the short term. In the short term at least, the Court will interpret the provisions of the Basic Law narrowly to minimize the conflict between the provisions of this Basic Law and the provisions of other basic laws such as *Basic Law: Human Dignity and Freedom*. This will no doubt provide a basis for accusing the Court of activism. But this accusation cannot but be disingenuous.

The Basic Law contains so vague provisions that any judicial interpretation can be classified as activist. In the longer term and with new political appointments to the Court, Israel may gradually resemble democratic-authoritarian states such as Turkey or Hungary rather than democratic-liberal states such as Britain or Germany.

4. THE SYMBOLIC UNDERLYING CLASH: UNIVERSALISM VERSUS PARTICULARISM

The clash between the courts and the executive is no doubt governed partly by questions of ego and power. The Court is often depicted as elitist and as an institution that is detached from the genuine popular sentiments. But it would be hardly surprising for those who follow the news in Israel or similar conflicts abroad that the conflict has its roots in the conflict between what can be labelled universalist values and particularistic values. The Israeli Supreme Court is perceived to be the defender of universalist values while the government has become gradually the advocates of particularistic values in particular Jewish values.

In this section I wish to first to establish this claim in the Israeli context and second to explain the historical roots of the conflict. While I believe my explanation applies also in the context of other legal systems I will focus my attention on Israel.

One of the most persistent accusation directed against the court is that it is not sufficiently 'Jewish' and Zionist. Both the ultra-orthodox community and traditionalists accuse the court in being anti-Jewish and/or anti Zionist. Let me provide a few examples:

Aryeh Deri a member of an Ultra-Orthodox party said:

"even if you were to bring the Ten Commandments as a basic law of the constitution committee I would vote against it … I do not know what you and the Supreme Court are conspiring to do to us."[3]

In 1999 hundreds of thousands of ultra-orthodox demonstrated against the Supreme Court. The main grievances raised by the ultra-orthodox involved the divisive proposal to conscript the ultra-orthodox to the army, the status of rabbinical courts and the relations with the more conservative and reform Jews. In addition, judgments of the court protecting gays and women have also been subjected to harsh criticisms. In reaction to the decision of the Court granting rights to the same sex couples, MK Avraham Ravitz said:

Again we have to encounter a decision of the Israeli Supreme Court which changes the fundamentals of life and sets up norms which violate the most fun-

[3] Divrei Haknesset 30 (1992).

damental conventions of human society... The Court created a novel definition of couple a definition which has been fundamental to human society since God Created man.[4]

In contrast to the ultra-orthodox who focus their attention on religious values, traditionalists and right-wing Jews focus their attention on the alleged hostility of the Court to Zionism. Thus Minister of Justice Ayelet Shaked who is known in her hostility to the activism of the Court argued that: "national challenges have become a legal blind spot" that carry no decisive weight in comparison to questions of individual rights. She added that the court's rulings do not consider the matter of demography and the Jewish majority "as values that should be taken into consideration."[5] This accusation is characteristic; it is often claimed that the Court is not sufficiently Zionist and it places universal human rights values above Zionist values.

These examples are illustrative of two sets of particularistic values that come into conflict with universalistic values in Israel: Jewish values on the one hand and Zionist values on the other. The Court is perceived by many to give priority to universalistic values over the particularistic ones (religious or Zionist). This perception is far from being accurate but it is an established perception – one that is shared by both advocates and opponents of the Court.

This perception has led the conservative forces in Israel to use two different tactics. The first is to curb the power of the Court and thereby limit its influence; the second is to change its composition and to steer it away from its allegedly liberal values.

Minister of Justice Ayelet Shaked uses both tactics. On the one hand she protests against the powers of the Court and on the other, she also does her best to change the composition of the Court and to steer it away from its alleged universalistic values.

Minister Shaked has suggested that "decision-making and governance are not in the hands of the people but in the hands of the justice system"; due to judicial "supremacy", the elected branches "fail to achieve their goals and fulfil the will of the people."[6] Shaked also criticized the civil service, accusing it of advancing political goals which, in her view, should be left to elected representatives.[7]

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[4] Divrei Haknesset 3240 (1994).

[5] https://www.haaretz.com/israel-news/israel-s-top-court-disregards-zionism-justice-minister-says-1.5446684.

[6] A. Mageazi, *Shaked: "It seems that governance..."*, Ynet (May 18, 2015), http://www.ynet.co.il/articles/0,7340,L-4658424,00.html [Heb.]; J. Liss, *Shaked: "We are proud of our Supreme Court..."*, Haaretz (May 12, 2015), http://www.haaretz.co.il/news/politi/1.2634880 [Heb.]. *See also* Y. J. Bob, *Shaked: Judges are not the sons of light*, *legislators are not sons of darkness*, Jerusalem Post (Dec. 22, 2017), https://www.jpost.com/Israel-News/Shaked-Judges-are-not-the-sons-of-light-legislators-are-not-sons-of-darkness-519767 (Shaked suggesting that judges are members of "detached old elites").

[7] M. Sones, *Shaked: "Political power has passed to the bureaucrats"*, Arutz Sheva (May 22, 2017), http://www.israelnationalnews.com/News/News.aspx/230022; Yonah Jeremy Bob, *Shaked*

In a pointed manifesto, she argued that representatives "ought to express the will of the people" and the government is "committed to a people who seeks to determine its fate *directly* and through its representatives."[8] In a similar vein, upon the HCJ invalidating the Anti-Infiltration Law for infringing the Basic Law: Human Dignity and Liberty, Minister Miri Regev declared that the HCJ is "disconnected from the people."[9] Alongside these statements, a bill has been proposed to curb the powers of the HCJ, including its authority to invalidate unconstitutional legislation.[10]

On the other hand, Minister Shaked has been involved in changing the composition of the Court and also an ardent supporter of Basic Law; Israel as the Nation State of the Jewish People. In a highly publicized statement, Minister Shaked asserted that "High Court no longer a branch of left-wing Meretz party.[11]

This section has established that the conflict between the courts and the executive branch is often a dispute between universalistic values and particularistic values. The Court is perceived as the defender of universalistic values at the expense of particularistic values. These particularistic values consist of both traditionally Jewish values as well as Zionist values.

5. CONSTITUTIONAL LEGITIMATION: REPRESENTATIONAL V. REASON-BASED LEGITIMATION

Constitutions, I shall argue, can be legitimated in two ways: representational legitimation and reasons-based legitimation. I further argue that representational legitimacy is relevant when the constitutional values are particularistic ones while reason-based legitimation can legitimate only universalistic values.

Tells Eilat Confab that Unelected Bureaucrats Endanger Our Democracy, Jerusalem Post (May 24, 2017), http://www.jpost.com/Israel-News/Shaked-tells-Eilat-confab-that-unelected-bureaucrats-endanger-our-democracy-493718.

[8] A. Shaked, *The Path to Democracy and Governance*, 1 Hashiloach 37, 54 (2016) [Heb.]. (emphasis added).

[9] *See* Filc (2018), *supra note*, at 134. *See also* G. Morag, T. Tzimuki, *Shaked denounces HCJ illegal aliens ruling*, *calls for new constitutional revolution*, Ynetnews (Aug. 29, 2017), https://www.ynetnews.com/articles/0,7340,L-5009369,00.html.

[10] *See* Draft Private Members Bill amending the Basic Law: Judiciary (Amendment – Judicial Review of Legislation) 2017 (Isr.) The Bill includes an "override clause" that would enable a majority of 61 Knesset Members (out of 120) to override HCJ decisions which invalidated laws on constitutional grounds. Roznai, *supra* note, at 9. *See also* Press Release, *What is the Public's Opinion on the Override Clause?*, Israel Democracy Institute (Apr. 29, 2018), https://en.idi.org.il/articles/23379.

[11] https://www.timesofisrael.com/justice-minister-high-court-no-longer-a-branch-of-left-wing-meretz-party/.

Representational legitimation grounds legitimacy in claims concerning popular will, consent, voluntary endorsement, active engagement, participation etc. The constitution is binding because we want it; we have agreed to it, we have voted for it, it reflects our identity as a community, etc. Crudely phrasing it, it is binding because it is *our* constitution – the constitution to which we agreed and which we cherish; most typically, it is also the constitution which we ratified on the grounds that it entrenches the values that are constitutive of our political identity. In contrast under the reason-based mode of legitimation we endorse the constitution because it is just or effective. In such cases the constitution need not be ceremonially accepted by citizens and it need not guide them in their public life. The Constitution simply entrenches values which are binding irrespective of our acceptance or willingness to accept. For instance it entrenches dignity, freedom, equality and the normative force of these values is independent of our willingness to accept them.

Let me provide an analogy: compare the type of engagement that an individual has with his private garden and the engagement that an engineer has with his enterprise of building a bridge. The owner of the garden aims to shape her garden in a way that addresses her own needs, tastes, sensibilities and preferences. She wants the garden to appeal *to her* aesthetic judgments. She can assert truthfully that other gardens are equally or even more beautiful than hers and nevertheless she prefers *her* garden to that of others. In contrast an engineer who builds a bridge aims at building *a good bridge* rather than a bridge *that appeals to him*. An engineer typically does not say that he builds a bridge to satisfy his own inclinations or to appeal to his own aesthetic judgments; the bridge simply ought to be a good, safe, solid and even a beautiful bridge but not one that is designed to appeal to its creator. Representational legitimation can be analogized to the case of the garden; it rests on the conviction that the constitution is a constitutive component in the lives of the polity. Consequently, it ought to represent the collective values, ideals and aspirations of the political community. In contrast, reason-based legitimation rests on not on the conviction that the constitution is constitutive of our collective identity but simply on the conviction that it is a good constitution; it serves our interests and/or effectively promotes our well-being.

The conventional reservations applying to any dichotomy (except perhaps in logics) should also apply here as well. The dichotomy between the two modes of legitimation is not a sharp dichotomy; it is often the case that legitimation rests on both representational and reason-based modes of legitimation. Often the judgment that a constitution is legitimate on representational grounds and the judgment that it is legitimate on reasons-based grounds are inter-related. Typically, different political and social movements use both representational arguments and reason-based arguments to justify their allegiance to a particular constitutional order. Further the balance between these two types of legitimation can shift in time such that a constitution that has been primarily legitimated on reason-based

grounds may eventually be transformed and be legitimated on representational grounds and vice versa.

I stated earlier that the conservative and in particular the nationalist forces in Israel condemned the basic laws on the grounds that they have not passed in a consensual manner. This is hardly surprising; as the conservative forces push forward a nationalist agenda which is also a particularistic agenda, its only claim to be legitimate is *to represent*. Legitimacy must in such cases derive from popular will which is shared by many segments of the population. The Constitution can legitimately entrench such values because these values are not sectarian; they are shared by all segments of the public. On the other hand, the earlier human rights basic laws have been enacted on the basis of the conviction that they entrench universal values: dignity and freedom. Hence under the view of their supporters the legitimacy of these laws does not hinge on the fact that they represent the values of the nation. Their normative force rests on the fact that they entrench universal values. Hence representation is not the foundation of the legitimacy of these provisions; instead their legitimacy derives from fundamental principles of political morality.

The best way to illustrate the contrast between representation and reason-based concerns is to compare the US and the German Constitution. The US Constitution is legitimate because it is the constitution of the people of the United States – one which they shaped in light of their own distinctive values and aspirations and which they sustain by virtue of their allegiance to these values. Hence the famous beginning of the Preamble to the US Constitution: we the people of the United States establish this constitution for the United States of America. It is our willingness to establish ths constitution which explains its normative force. In contrast the German Constitution was written under military conditions and its claim to be representative was severely compromised by these conditions. How can the non-representative German Constitution be legitimate?

The answer to this puzzle is that the German Constitution is legitimated not by virtue of popular assent or endorsement that rests on the conviction that it is constitutive of German values or on a ceremonial referendum that conveys the voluntary allegiance to the constitution or on any other form of representational legitimacy. Instead, it is legitimated on the grounds that it is believed to be desirable, or just or more broadly grounded in reason.

Acknowledging that not all constitutions are representational explains a fundamental difference between US citizens' and German citizens' attitude to constitutionalism. The former hail the Constitution as a great achievement of their own; they study its provisions in school, debate their meanings in the media and often justify their political positions on constitutional grounds. It is the constant engagement with the constitutional provisions which facilitates the constitutional patriotism characteristic of the USA. In contrast German citizens traditionally are not engaged in debating the substantive provisions of their constitution. Instead,

they defer to the expertise of the Constitutional Court and accept its determinations as binding.[12] Their deference to the Court relies at least in part on the German (understandable) distrust of representative institutions. History has taught the German people that representative institutions may fall prey to brutal extremism and the deference to the Court rests on the conviction that the Court is an institution that may protect the polity from such risks.[13] I suggest that this difference in attitudes between US citizens and German citizens is attributable to the difference between the two forms of legitimation: representational legitimation in the US context and reason-based legitimation in the German context.

The fundamental difference can be further understood given the different timings in the history of the nation at the time the respective German and US constitutions were established. As a matter of fact, the German Constitution is a tool to counter all attempt to embody a national entity; it can therefore be described as an anti-representational constitution. When the German Constitution was established, the most urgent task was to distance the new State from the nation establishing it (rather than represent it). Representation must represent some pre-existing entity that is worth representing and there was no such entity to represent in 1949. The less representative the constitution is, the better. In contrast the US nation had traditions which it was willing to endorse and entrench and hence, the establishment of a representational constitution.

The debate in Israel should in my view be conceptualized as a debate between advocates of particularistic values who must ground their claims on representation and advocates of universalistic values who ground their claim in universalistic values. It is therefore not only a political debate concerning which values should govern but also a philosophical debate concerning the way constitutions can be legitimated. Particularists believe that constitutions must rest on representational grounds while universalists believe that representation is not needed for legitimacy. The basic law which is at the center of this Article is a particularistic law; its claim to legitimacy must rest on representation. We can turn now to examine the normative implications of this observation.

A constitution is legitimate either on the grounds that it entrenches universal values or on the grounds that it is representational. To the extent that the constitution entrenches particularistic values it ought to do so only on the grounds that these values represent the nation. The Basic Law: Israel as the Nation State

[12] Research has shown that the German Constitutional Court is highly popular and enjoys broad public support. See, e.g, J. L. Gibson et al., *On the Legitimacy of High Courts*, "American Political Science Review" 1998, issue 92, pp. 343–358. For the distinct attitudes of Germans towards their constitution and the constitutional court, see also B. Schlink, *German Constitutional Culture in Transition*, "Cardozo Law Review" 1992, issue 14, pp. 711, 724–725; J. L. Gibson, G. A. Caldeira, *Defenders of Democracy? Legitimacy*, *Popular Acceptance and the South African Constitutional Court*, "The Journal of Politics" 2003, Vol. 65, pp. 1, 5.

[13] See, e.g., G. Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge 2005, pp. 8–12.

of the Jewish People entrenches particularistic values. It needs therefore to rest on consensual endorsement of these values. However, as the intense opposition to the basic law shows this Basic Law is divisive rather than consensual. Hence it is incompatible with the very logic of advocates of particularism; it entrenches particularistic values when these values remain sectarian and are not shared by large segments of the Israeli society.

Needless to say the conflicts described above are not unique to Israel. The conflict between universalistic values protected traditionally by courts and particularistic values promoted by the executive is a common phenomenon. It seems that the recent conflicts in Poland can be conceptualized in similar terms. Hence, I hope this analysis could be used to better understand the recent political developments there.

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Summary

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it is an illegitimate attempt to entrench particularistic values in a divisive society. It is only by representing the public as a whole that this law can gain constitutional legitimacy.

KEYWORDS

constitutional theory, Basic Laws of Israel, Israel as the Nation State of the Jewish People, representation

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teoria konstytucyjna, Ustawa Zasadnicza Izraela, Izrael jako Państwo Żydowskie, reprezentacja