

International Conference of the Constitutional Court of the Russian Federation
«**Constitutional Identity and Universal Values: the Art of Balance**»

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Report by **Miriam NAOR**, Former President of the Supreme Court of the State of Israel

The subject of our panel, "National Consent as a Key Element of Constitutional Identity", states something that is, at first glance, taken for granted. A constitution must reflect the beliefs and positions of the people living in the state where it is enacted. However, it is not that simple: how does one know what the consensus is? is it possible to enact a constitution when there is no consensus about basic issues? What should be the appropriate majority for enacting a constitution?

In practice, it is relatively easy to enact a constitution as part of a historical transformation such as a state's declaration of independence, and more difficult when a state already exists, and the constitution is enacted in an attempt to entrench common values. There are often difficulties and disagreements between the various parts of the population about different values. Slavery in the US is an excellent example of that. Although support of slavery today seems anachronistic, immoral and contradictory to values of a democratic state, at the time of the ratification of the US constitution of 1789, slavery was practiced in the US, and was annulled only in 1865, by the 13th amendment after the civil war.

Can it be said that in 1789 there was a consensus about the value that all people have the right not to be owned by another, and that right derived from the very principle of liberty? It seems to me that the real historical answer is negative.

A constitution is supposed to determine the foundations of the state, and the basic rights of the individual. It is also supposed to establish the various bodies of government and distribute functions between them. In liberal democracy, the constitution distributes the powers that the people grants to each of the branches, and to the bodies that comprise them. A democratic constitution expresses an intent to refrain from granting unlimited power to any of the branches, but rather to determine the balance that ensures the granting, in advance, of defined powers. Thus, reciprocal supervision and monitoring by the various branches of government are made possible, preventing trespass of the boundaries that have been set for each branch.

In Israel, the state from which I come, the problem of locating consensus is especially difficult, and that may be the reason that Israel has only a partial constitution. The State of Israel was established in 1948. At the time of its establishment it was in the middle of a difficult war – the war of independence – with the Arab armies. The founding fathers and mothers sufficed themselves with a celebratory declaration of the establishment of the state, determining that a constitution would be ratified soon. That did not happen due to disagreements about the content of the constitution. Instead, it was determined that basic laws, that together would comprise the constitution of the State of Israel, would be gradually enacted. Various basic laws have been enacted, arranging the establishment of the legislative, executive and judicial branches. To this very day the relationship between the three branches has not been settled, causing much tension, particularly between the legislative and executive branches on the one hand, and the judicial branch on the other. Nonetheless, in the 1990's two basic laws were enacted: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation (the freedom to make one's living how one chooses), which generally define human rights, predominantly through use of the words "human dignity and liberty". Basic Law: Human Dignity and Liberty determines, in a clause explaining its objective, that the object is to protect human dignity and liberty, in a basic law, in order to entrench the values of the State of Israel as a

Jewish and democratic state. An identical wording appears in Basic Law: Freedom of Occupation. These basic laws were interpreted by the Supreme Court of Israel 25 years ago as determining the jurisdiction of the Court to annul regular statutes that are not in line with the values of the basic laws.

At the time of its establishment, Israel missed the opportunity to ratify a constitution. In contrast, India, which gained independence approximately during the same years, succeeded in enacting a constitution a number of years later. The drafter of the Indian constitution and its architect was Ambedkar. Ambedkar himself was a member of the untouchable Mahar (dalit) caste, the members of which were not allowed to enter the Hindu temples or to come in physical contact with the members of other castes; and yet, he succeeded in bringing about the recognition of the value of equality in the Indian constitution. The writing of the Indian constitution took three years. It began a number of months before India attained independence, and was completed in January 1950, when the constitution came into effect. Much can be learned from the way the Indian constitution was established, because it was achieved in a splintered society that had no national consensus. The Indian constitutional convention was made up of more than 300 representatives, who acted in the framework of 15 committees in addition to their participation in the debates in the general plenum. The drafting committee, chaired by Ambedkar, integrated the various clauses, and at times changed the wording drafted by the committees. The debates of the constitutional convention were recorded in 12 thick volumes. Ambedkar read through the constitutions of 60 states in order to learn from them.

The Indian constitution was enacted in conditions of a lack of national consensus, in a splintered society with many languages and traditions. Much can be learned from the Indian experience, without copying its constitution as such.

I opened the discussion with the need for national consensus to ratify a constitution. Israel is a good example of the difficulty of finding national consensus. In general I will say that Israel has two central blocs. The first one, which won the elections in the beginning of April this year with 55% of the votes,

is the right wing bloc, and it includes many religious parties. The second bloc is the center-left bloc, together with the Arab parties. Israeli society is splintered and torn on issues of religion and state, settlements in the territories held by Israel, and many more questions.

It is relatively simple to enact a constitution in a homogenous society. It is much more difficult to do so in a divided society. How can national consensus allowing the ratification of a constitution be found in such countries? I shall propose a few ideas on the subject.

First, there must be willingness on the part of the majority in the legislature to ratify a constitution. Without that, it is difficult to see any chance of ratifying a constitution.

In Israel, voluntary teams, at the initiative of the Israel Democracy Institute and headed by the retired President of the Supreme Court Meir Shamgar, sat for a number of years and prepared a long document called "Constitution by Consensus", that was proposed as a basis for debate. It includes almost 200 clauses, covering all the areas which a constitution should have. That was 14 years ago, but nothing came of it. Appointing a body of experts for formulating a preliminary proposal is the right idea, but the branches of government are the ones that must set the process in motion.

The chapter on human rights in the constitution must be drafted only after studying the constitutions of democratic states and international documents like the Universal Declaration of Human Rights. It should be drafted in vague terms, where all can say they agree, and none can say they do not agree. The rights should be drafted at a high level of abstraction. The concepts of human dignity and liberty appearing in the Israeli basic laws are drafted in quite vague terms. It would be difficult to reach a consensus on more clearly defined terms. For example, the various religious parties opposed including the value of equality in the basic laws. Here enter the courts, whose role is to interpret the vague concepts and to flesh them out with concrete content. It is almost unbelievable how many rights the Supreme Court of Israel included, by way of interpretation, within the term 'human

dignity', including the value of equality. The use of the term 'Jewish and democratic state' in the basic laws left a broad opening for interpretation in the spirit of the democratic principles common in the constitutions of democratic countries.

Democracy is a rich and complex concept.

It is understood in various ways, and there are probably no two identical democracies.

One important characteristic of democracy is majority rule.

This principal manifests itself in free elections, in which the people choose their representatives.

Some mistakenly identify democracy with majority rule, claiming that a decision accepted by the majority is necessarily democratic.

That is not correct.

Majority rule is a necessary aspect of a democracy, but it is not the only condition by which a democracy is measured.

Without restraints, the majority's power might become tyranny, and history proves that this concern is not entirely theoretical.

Majority rule that deprives individuals of their rights, majority rule that oppresses the minority, is not democratic rule.

Alongside majority rule, there are other values and principles that are pre-conditions for democracy, such as: separation of powers; independence of the judiciary; the rule of law; and the protection of human rights. As President Zorkin wrote, "In rule-of-law states, the state serves the individual, and not vice versa".

When judges interpret the constitution, they must search for the values accepted in the society in which they live. When employing interpretive discretion, a judge must consider social consensus. In general, a judge should not be the standard bearer of new social consensuses. In general, a judge must express the recognized fundamental values in their society, not create them. At times there is no societal consensus, or there is no information about societal consensus. In general, the

court must act within the framework of societal consensus. There may however be rare cases in which a judge must act against societal consensus. I mentioned previously that slavery was abolished in the US decades after the original US constitution was ratified. I do not believe that the US courts would have been overstepping their role if they had abolished slavery without the 13th amendment.

Indeed, a combination of vague concepts and a high level of abstraction in the constitution, and their interpretation by the court, can assist where the constitutional convention has difficulty reaching consensus.

When enacting a constitution, there's no avoiding compromise. Constitutional law must be based upon national consensus. A constitution reflects the consensus at the time of ratification. This allows the state to educate the citizens in light of that constitution for generations to come. The constitution is a mix of different worldviews, with reciprocal concessions and compromises. If everyone insists on realizing all of their aspirations, ultimately either there will be no constitution at all, or, worse, there will be a series of undemocratic constitutions representing the tyranny of the majority. Such a constitution would be annulled at the first opportunity when the side with opposing views comes to power, and that would occur again and again. A constitution that is amended constantly is not a constitution, even if it is so called. Only concessions and compromises from all sides can prevent that.