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Israel's Emerging Constitution, by Emanuel Rackman

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BOOK REVIEWS

ISRAEL'S EMERGING CONSTITUTION, by Emanuel Rackman. New York: Columbia University Press, 1955. Pp. xvi, 196. \$3.00.

On May 14, 1948, when the Provisional State Council of Israel issued its Proclamation of Independence and the new State was born, the dangers and problems which beset it on all sides were formidable enough to stagger the imagination and to sober the most sanguine. The embittered British Mandatory forces were pulling out of the country in such a fashion as to leave deliberate chaos behind in all phases of governmental function and public services; and Arab regular and irregular armies were already within the borders of the new State, with heavy fighting proceeding on many fronts.

Despite the exigencies of the moment, which might have served as the springboard for the establishment of an autocratic and dictatorial regime, the small group of men who met on that fateful occasion in Tel Aviv to proclaim Israel's independence saw fit to seize history by the forelock and declare *inter alia*:

"We hereby declare that as from the termination of the Mandate at midnight, this night of the 14th to 15th May 1948, and until the setting up of the duly elected bodies of the State in accordance with a Constitution, to be drawn up by a Constituent Assembly not later than the first day of October 1948, the present National Council shall act as the Provisional State Council, and its executive organ, the National Administration, shall constitute the Provisional Government of the State of Israel.

"The State of Israel will be open to the immigration of Jews from all countries of their dispersion; will promote the development of the country for the benefit of all its inhabitants; will be based on the precepts of liberty, justice and peace taught by the Hebrew Prophets; will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will dedicate

itself to the principles of the Charter of the United Nations."¹

It is clear from this document that the "founding fathers" desired and confidently expected that a written constitution would shortly come into being. This expectation has as yet not been fulfilled; Israel today has no written constitution. The Proclamation of Independence itself "has been held by the High Court of Justice not to have special constitutional sanctity such as would invalidate laws repugnant to its provisions; but the Court has also held that the greatest respect will be paid by the courts of Israel to the letter and spirit of the pronouncement inasmuch as it embodies the 'credo' of its people."²

Sincere and scholarly attempts have been made to draft a written constitution. Several model constitutions were in fact drawn. Dr. Yehuda Leo Kohn,³ chairman of the Committee on the Constitution established by the Provisional State Council, submitted a draft that was debated at length in Committee during August and September of 1948. On January 25, 1949, the first parliamentary elections were held in Israel. Dr. Kohn's draft with the amendments thereto was then submitted to the Knesset or Parliament. It was not until early 1950, however, that the Knesset opened debate on the question of the adoption of a written constitution. The debate engendered many contending points of view, many of which had already been presented in prior discussion, and the net result was that no action was taken on the enactment of a constitution, although a positive step favoring the preparation and adoption of a written constitution was taken by way of resolution on June 13, 1950.⁴

Professor Rackman has an excellent summary of the arguments presented at that time for and against the adoption of a written constitution.⁵ However, while it is true, as the author states, that "opposition to a written constitution came principally from representatives of the religious parties and the Head of the Government, David Ben Gurion,"⁶ the reader might be misled into drawing the not illogical conclusion, and one not intended by the author,⁷ that the religious parties were mainly re-

1. Quoted from the English text in DUNNER, *THE REPUBLIC OF ISRAEL* 94-95 (1950).

2. Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1195-97 (1955). The author is the District Attorney of Tel-Aviv.

3. DUNNER, *op. cit. supra* note 1, at 249-59.

4. RACKMAN, *ISRAEL'S EMERGING CONSTITUTION* 117 (1955).

5. *Id.* at 114 *et seq.*

6. *Id.* at 112.

7. *Id.*, Introduction at x.

sponsible for the failure to adopt a constitution. Critics of the religious parties have often advanced this theory but a more persuasive factor was an underlying feeling on the part of many that the time was not yet ripe for the adoption of a hard and fixed constitution. In a recent essay Dr. Yehuda Leo Kohn has expressed this belief accurately and succinctly in saying, "It appeared that while at the beginning there had been practical unanimity in favor of the adoption of a written constitution, opinion in authoritative quarters had hardened during the intervening months against this course. It was widely felt that the time had not yet come for such a decisive step. The development of the young state was still in flux, with thousands of immigrants entering every month, and it was urged that there should be a greater measure of consolidation before an organic law was enacted."⁸ This opinion in all probability will continue to be a most important factor in the thinking of political leaders of the State for some time to come in view of the continuing "ingathering of the exiles" and the constantly changing social and cultural pattern of the country.⁹

When Professor Rackman speaks then of "Israel's Emerging Constitution," he intends to describe not the progressive elaboration of a basic written constitution but the emergence of those fundamental laws and practices that govern the operation of the State. Books have appeared in considerable numbers during the past 10 years depicting almost every phase of Israel's genesis. Most of them have been written from the historical, chronological or the autobiographical point of view. Professor Rackman's present volume differs from these in that it adopts one central theme, a critical analysis of the origins and early evolution of Israel's basic legal and political personality, and it attempts to assimilate under this central theme a vast array of facts and data. It was a complicated and difficult task and it is to Professor Rackman's credit that the result bespeaks a thorough understanding of the subject matter. The period of time covered by the book is short, namely the first three years, from 1948 to 1951, of the existence of the State. While three years may appear to be a brief span in the life of a nation, developments in the tiny political cosmos of Israel, which has been likened to a "pressure cooker" rather than a melting pot, overreached one another in rapid

8. Kohn, *The Emerging Constitution of Israel* in ISRAEL: ITS ROLE IN CIVILIZATION 138 (Davis ed. 1956).

9. Following the recent influx of Jews from North Africa and other Moslem countries, it has been estimated that 45 per cent of the Israeli population is now of Oriental origin. See Nevins, *The Future of Israel* in ISRAEL: ITS ROLE IN CIVILIZATION 220 (Davis ed. 1956). In 1956 immigrants from North Africa made up 80 per cent of the total immigration.

succession. Moreover, a complicated political history preceded the birth of the State and this history is essential to an understanding of the constitutional evolution which followed. This book treats all of this variegated material in a concise and competent manner.

What is perhaps most surprising in Professor Rackman's evaluation of the political and constitutional evolution of the new State is his failure to offer a balanced and adequate appreciation of the judiciary in the total picture.¹⁰ This is all the more surprising in view of the fact that, in addition to his successful careers in other fields, Professor Rackman was at one time a practicing attorney. While undoubtedly there has been great development in the judicial field since the period covered by this book,¹¹ nevertheless even during the period in question the courts of Israel had already achieved an enviable reputation for courage and integrity and a deserved public confidence as courageous bulwarks of personal liberty. It would be a mistake to underestimate the influence these courts, particularly the Supreme Court, sitting as a High Court of Justice, have had and will have on the development of constitutional patterns.

Just what is the role of the judicial branch of government in Israel *vis à vis* the legislative and executive branches of government? This question is of fundamental importance in any consideration of Israel's constitutional pattern, yet it is not adequately treated in the present volume. In the final chapter entitled *The Outlook for the Future*, Professor Rackman states, "If the parties become fewer in number it may happen that one of them will have a majority in the Knes[s]et. The Government will then consist of the leaders of that party and its legislative and executive power will be virtually unlimited except for such criticism as will come from the opposition parties and public opinion. *Since the courts have no power of judicial review and constitutional limitations are nil, the democratic character of the State may be in jeopardy.*"¹² It should be stated at the outset that in all probability the author does not believe that such a situation, though devoutly to be feared, will truly come to pass. He has great faith in Israel's democratic strivings, yet he feels constrained to point out such an objective possibility in view of the absence of a written

10. Most of the author's discussion of Israel's legal system deals with its perplexing religious aspects. See pp. 120-34.

11. *E.g.*, The Judicature Act of 1953 which provides for the selection of higher judges in such a manner as to maximize their independence and integrity. It also repeals the former rule that cases against the government can be instituted only with the consent of the Attorney General. Consider also the model Evidence Bill (1952) and the model Family Code Bill (1956) prepared by the Ministry of Justice of Israel and translated by the Harvard-Brandeis Cooperative Research on Israel's Legal Development, Cambridge, Mass.

12. RACKMAN, *op. cit. supra* note 4, at 169.

constitution. But such an admonition without adequate explanation tells but half a story. With reference to judicial restraint of legislative excesses the statement has a great deal of validity, although even here there are qualifying factors; with reference to executive excesses and abuses the statement would be inaccurate.

It has already been made abundantly clear that the courts of Israel will not hesitate to assume jurisdiction and to invalidate misapplication of executive power.¹³ As ably stated by Uriel Gorney, "The absence of a written constitution does not, however, connote the absence of constitutional restraints on the executive branch of the State of Israel, or the absence of effective safeguards of the rights of individuals. Like its English predecessor, the Supreme Court of Israel, sitting as a High Court of Justice, is invested with important constitutional functions by virtue of its residuary jurisdiction 'to hear and determine such matters as are . . . not within the jurisdiction of any other Court and necessary to be decided for the administration of justice.' This jurisdiction includes the power to hear and determine applications in the nature of habeas corpus proceedings; orders in the nature of mandamus, certiorari, or prohibition directed to public officials, including members of the cabinet 'in regard to the performance of their public duties'; and 'orders directed to a magistrate in regard to the conduct of any preliminary enquiry' in criminal cases."¹⁴

The crux of the problem comes then with the question of judicial restraint of legislative power. Can the courts act as watchdogs to safeguard individual liberties if there is no written constitution to delimit what the legislature may enact? Presented baldly in that fashion the answer is presumably that the courts would have no power to act. However, such a question and answer would not accurately represent the true

13. *Kol Ha'am Ltd. v. Minister of Interior*, 7 Piskei Din 871 (1953) (dealing with freedom of speech).

14. Gorney, *supra* note 2, at 1197. Compare the statement in LEHRMAN, ISRAEL, *THE BEGINNING AND TOMORROW* 39-40 (1951), viz: "There was one cardinal and all-important difference, however, between the Israel and United States Supreme Courts in connection with individual rights. The latter tribunal specifically had the power to nullify unconstitutional legislation which violated the fundamental law of the land. But the Israel tribunal enjoyed no such authority. In the first place, there was no constitution to be violated. In the second place, the Court acknowledged from the outset that the parliament was absolutely supreme. The Knesset, in terms specifically spelled out by the Jerusalem High Court, could pass any legislation it wished to, and the Court could not question it.

"If a law was objectionable it was up to the people to have the Knesset repeal it, not up to the Court to throw it out. The Court further stipulated that the executive branch of the government had to enforce the law. The Court, however, exercised a watch-dog function over such enforcement. A law had to be implemented properly and according to its intention. If any executive action failed to interpret a law correctly, or contravened, abused or ignored it, the Court could rescind that action—and did."

state of facts as they exist in Israel. Although the Knesset failed to adopt the constitutional draft submitted for its consideration, including that section of the draft which dealt with the judicial power and the provision for the High Court to have exclusive original jurisdiction of constitutional questions,¹⁵ the Knesset nevertheless did, on March 10, 1949, ratify an instrument called its *Fundamental Principles*, many of which, in the author's own words, "have great constitutional significance."¹⁶ The second section of this instrument sets forth a virtual Bill of Rights, guaranteeing equal rights, freedom of speech, of association, worship, conscience, education and culture;¹⁷ other sections guarantee further rights. It would appear then that, unless and until repudiated, these *Fundamental Principles* will be the guiding "constitutional" outline for future legislation. Therefore, any legislation repugnant to these *Fundamental Principles* would be "justiciable" by the High Court. In this sense, then, it would seem to be incorrect to assert without qualification even with respect to the legislature that "there is no power of judicial review and constitutional limitations are nil."

Of course the Knesset could by a simple majority vote repudiate its own *Fundamental Principles* and herein lies the essential difference between our own Constitution and the guiding constitutional principles of the Knesset. By the terms of Article V of the Constitution of the United States, amendment of the Constitution becomes a difficult and time-consuming matter involving ratification by three-quarters of the states. This tends to lend stability and permanence to our basic written law. This is not necessarily true of a document which may be repudiated or amended by a simple majority vote of the legislature.

In the final analysis, however, the vitality of democratic institutions wells forth from the understanding of the people and their desire to be free. As Professor Rackman so aptly states, the people of Israel "believe that the ultimate preservation of democratic institutions depends less on constitutional guarantees than upon the general consensus of the land's inhabitants."¹⁸

The problems facing Israel are many and are not to be minimized. Professor Rackman, to his credit, does not seek to minimize them in his book but he would probably add a fervent amen to the hope eloquently expressed by Israeli Supreme Court Justice Cheshin before the Association of the Bar of the City of New York: "Israel is a bastion of democ-

15. See Section V of the Kohn draft constitution as quoted in DUNNER, *op. cit. supra* note 1, at 258.

16. RACKMAN, *op. cit. supra* note 4, at 81.

17. *Id.* at 82.

18. *Id.* at 169.

racy in the Middle East. There is no reason why it should ever cease to be so. We hope that with the help of the free democracies of the world we shall be able to implement all the articles of faith that were laid down in our Declaration of Independence."¹⁹

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THE PRESIDENT: OFFICE AND POWERS. By Edward S. Corwin. New York: New York University Press, fourth revised edition, 1957. 519 pp. \$6.50.

I suppose that in a sense reviewing the latest edition of Professor Corwin's book on the presidency poses the same problem that would confront one who is asked to review Shakespeare's *Romeo and Juliet* or Tolstoy's *War and Peace*. How does one "review" a classic? To be sure, critics still have much to say about the works of Shakespeare and Tolstoy, but this hardly passes under the rubric of reviewing. The short of the matter is that Corwin's study of the presidency has universally been regarded, ever since the first edition appeared in 1940, as a very great book, and that Corwin himself is generally honored as our most distinguished living constitutional authority.

Certainly he has been one of our most productive constitutional scholars and I am glad to note, as this most recent revision of his work on the presidency suggests, that his retirement in 1946 has had no discernible effect upon his productivity. I am sure that Corwin's must be one of the most strenuous and busy retirements in the annals of American scholarship. Some of his most important work has been done since 1946 when, after forty-one years of teaching at Princeton, he left the classroom. It would seem that this is about all he left, since his flow of writing and speechifying has continued without abatement. In fact, I have it on unimpeachable authority that he recently lost his voice as a consequence of too much public speaking and that his doctor sentenced him to a period of complete silence. It is to be hoped that the sentence will soon be commuted since Professor Corwin's voice is one we cannot well spare. True constitutional oracles are, alas, in very short supply.

Corwin came to Princeton in 1905 fresh from his Ph.D. work at the University of Pennsylvania (under the historian John Bach Mc-

19. Cheshin, *Justice in a New State*, 10 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1 (Jan. 1955).

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