Some Reflections on the Livni Initiative

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In her letter of August 12, 2013, Minister Tzipi Livni writes: "I believe the time has come for a constitutional arrangement dealing with Israel's identity, which entrenches its components in a way that combines and balances these values, the Jewish as well as the democratic." She seeks a "suitable constitutional articulation" of this duality, although her declaration that "the time has come for a constitutional arrangement" that would entrench the meanings of these values is vague as to what form this arrangement should take. It could take place within the parameters of a newly adopted comprehensive document, or as an elaboration/clarification of language introduced into the set of Basic Laws in 1992.

For Ruth Gavison, the "ultimate question is whether Israel should seek to give additional constitutional entrenchment and elaboration to its identity as 'Jewish and democratic.'" My answer to this question, however, must begin with another question: what does it mean to entrench a constitutional identity? If it is to suggest that by embedding the substance of Israeli identity in wording that will through its codification acquire a fixed and unalterable meaning, then I worry that the present initiative is predicated on the erroneous assumption that a constitutional identity is something that can be captured and preserved within the boundaries of a text. But this is not the case; thus even in polities where identity is a less fraught phenomenon in the sense that its content manifests a greater coherence than one finds in Israel, meticulous and comprehensive articulation of meaning has typically not been an objective of constitutional draftsmanship. The American Constitution, for example, is replete with "majestic generalities," yet their specific "constitutional articulation" relies as much, if not more, on the political process (a process that includes the judiciary) as it does on what is entrenched in the document.

In Israel, where a persistent and fragile political equilibrium is traceable to the dual commitments of the nation's founding, the course of constitutional identity is impelled by the discord of ordinary politics within limits established by commitments from the past. The disharmony internal to a constitutional text will ordinarily not be as prominent as it is in Israel.

Indeed, in many polities it will be deftly obscured in the mists of compromise language authored by determined constitution-makers. But Israel's evolving formal constitution only renders more transparent than elsewhere a process that is unusual in that nation mainly for the quality of its translucence. The same dynamic, however, is in place – if in less bold relief – wherever competing commitments or aspirations internal to a constitution engage each other while concurrently being deployed in a dialectical relationship with energized forces in the larger social order. This is, in fact, likely to be the case wherever we look, with the development of constitutional identity varying to the extent that internal and external disharmonies are weighted differently as we travel from country to country.

The point I am making will perhaps be clearer with reference to what is occurring in Europe. As the reach and authority of the EU expands in the aftermath of treaties (Maastricht, Lisbon) that implicate the constitutional understandings and practices of the member states, high courts in these states – notably the German FCC – increasingly find themselves in a defensive posture, pressured from within and without to preserve a local constitutional identity against a potentially overbearing central administration. The Court, it is said, must not let the goal of European integration dilute or displace a distinctive constitutional identity that is entrenched in several provisions of the Basic Law. But as others have pointed out, these provisions – for example, the dignity guarantee – possess a historically cognizable meaning, but one that can only acquire a constitutionally significant denotation through dialogical institutional engagement within the broader European community. Identity is not a fixed thing; what specific iteration it assumes will – or should – rely to some extent on the developing interactive constitutional politics on the European continent. The historical experience of member states will set limits to the mutability of constitutional identity, but the attempt to entrench specific inscribed meanings that will direct interpreters to a formulation that will achieve consensus on anything beyond the most general of articulations is as unpromising as it is misguided in its failure to appreciate the dynamic qualities of identity.

Among the options for Israel is to do nothing, and that is where I come out. By that I mean that it would be inadvisable to pursue a more detailed codification of the dual commitments to a Jewish and democratic state. [Note: There are some 189 extant formal written constitutions. Of these, 118 mention democracy, but given that the list includes a broad spectrum of regimes – e.g., France, Cuba – it is very difficult to generalize about the significance

of the invocation. It is also difficult to generalize about specificity of reference, as many provide little or no definition, and quite a few others enumerate the attributes associated with the concept.] I am quite open to the idea of adopting a formal constitutional document that leaves the current standing of creedal expression in its perfunctory condition. But that decision does not directly hinge upon an answer to the immediate question on the table. As to the latter, admittedly the negativism of a do-nothing response is rarely appealing, particularly when the status quo, as in this instance, lacks passionate defenders. While, as I understand it, it is "Jewish" dissatisfaction with the current arrangements that forms the backdrop to the Livni initiative, it can hardly be said of secular democrats that they represent an Israeli constituency at peace with the status quo. Indeed, the so-called status quo agreement strikes many as a continuing reproach to egalitarian values. [Note: To incorporate language about the status of religious law in constitutional form would place Israel in a group of 21 nations whose constitutions do precisely that. Of these 21 nations, all but one address this status as it pertains to Islam.] In the absence of a formal constitution, the religiously based personal law remains firmly in place, and efforts to entrench the principle of equality in the Basic Laws have met with repeated failure.

Given, though, the ongoing realities of Israel's divided society – both political and demographic – might not a continuation of the unresolved tension in Israeli constitutional identity be the safest path to pursue? Is there not good reason to suppose that the potential for *creative ambiguity* is a better option than one that would achieve a more precise articulation of the twofold commitments of the regime? I believe Minister Livni is sincere and well-intentioned in seeking an entrenchment that would reconcile the Jewish and democratic aspirations of the Israeli experiment. But what is the probability that any constitutional settlement will improve the situation now in existence? It is unlikely that this entrenchment would culminate in a Barak-like reconciliation that is predicated on a highly abstract construction of Jewish values. And if it did there would be no end to the discord that would likely follow. Alternatively, those concerned about the halachic core of Jewish life, to say nothing of those acquiescent in the current second-class status of Arab citizens of the state, might be inclined to achieve reconciliation with an abstract solution of their own. Thus they might define democracy as a purely procedural thing, in which the majoritarian will, expressed through the Knesset, would determine the ways in

which the state manifested its Jewishness. Again, reconciliation would arguably be achieved, but at what price?

Professor Gavison points out that "usually constitutional statements about the identity of states come after a revolution or a major change, and as a part of the enactment of a whole constitution or a significant amendment of an existing one." She is absolutely correct about this; I would only add that this experience should not necessarily inspire wrongheaded Israeli action.

Article 2 of the amended Turkish Constitution states, "The Turkish State is republican, nationalist, democratic, statist, laic, and revolutionary." All of the affirmations leading up to the final assertion detail a cohort of commitments flowing directly from the Kemalist ascendance following the revolutionary overthrow of Ottoman rule in Turkey. In a number of late twentieth-century constitutions under the sway of Soviet influence, one finds more specific references to revolutionary inspiration. In Yugoslavia, it stemmed from the "the People's Liberation War and Socialist Revolution"; in Bulgaria, from "the historic victory of the Ninth of September Socialist Revolution of 1944"; and in Czechoslovakia, the 1948 Constitution declares on behalf of the Czechoslovakian people, "We are determined to defend with all our strength the achievements of our national and democratic revolution. . . ." The end of Soviet domination did not signal the disappearance of such revolutionary invocations; in Romania, for example, "the ideals of the Revolution of December 1989" were inscribed in that nation's new document as a repudiation of an earlier revolutionary legacy. This rejection was confined to the European continent, and other socialist constitutions maintained their earlier perfervid commitments. China's amended Charter makes reverential gesture to its "glorious revolutionary tradition" (from both 1911 and 1949); Cuba continues to see its Fundamental Law as "mak[ing] possible the realization of the Revolution"; Vietnam, in 1991, renewed its commitment "to safeguard the socialist regime and the fruits of the revolution." Similar allusions to a specific revolutionary moment with aspirational significance are also present in constitutions with political orientations quite different from the ones just cited. Nepal's Interim Constitution of 2007 has a Preamble that promises a permanent constitution that will "institutionalize the achievements of the revolution." The Preamble of the 1972 Panamanian Constitution consecrates "the social, political, economic and moral principles that inspired the Panamanian Revolution." The Preamble to the

Constitution of the Islamic Republic of Iran points out that the new regime's core identity embodies the meaning of "the great Islamic Revolution of Iran." The document then proceeds to discuss what it claims is a distinctive "feature of this revolution," which is that it is "ideological and Islamic." In doing so, it raises questions that lurk in the background of all these textual inclusions. Does the codification of revolutionary ideology produce a constitutionally legitimate result independently of the substance of the ideology? What if the "achievements" of a revolution, or the principles that "inspired" a revolution, are such that they do not comport with threshold standards of constitutional governance, with what Lon Fuller famously referred to as "the inner morality of law"?

Of course there are other examples of *liberal* revolutions that offer more encouraging emulative guidance. But one should be cautious in following their lead without first considering critical identity-related differences. Where the definition of nationhood is straightforwardly understood in terms of a set of political ideals, binding the future through constitutional prescription may be essential to the self-understanding of the polity. On the other hand, where the essence of the regime is so bound up with the issue of *who* the majority of the citizens are, the adoption of a formal constitution is arguably a less significant event in the life of the nation. And consider that even in the United States, where constitutional identity was at best an aspirational yearning, "credo" provisions and bills of rights were only lightly touched in the post-revolutionary document; indeed it took a bloody Civil War before there was any mention of equality. On the other hand, the thinness of the Constitution allowed a Lincoln and a King to push a redemptive politics that enabled a constitution to make good on a "promissory note" that was not explicitly included in the constitutional text.

Such are my rambling thoughts on this important question. I would be most grateful if in your continuing efforts you kept me informed on developments as they occur.