

Premier of the state. Again, it is not the Foreign Office but the Commonwealth Relations Office that deals with the Commonwealth government on matters concerning the federation as a whole.³⁵ The chronology of the Secession movement in the United States on the eve of the Civil War has got curiously tangled up.³⁶ The decision of the United Kingdom Parliamentary Select Committee not to receive Western Australia's petition to secede did not so much deny "the right of secession in either Canada or Australia" as make it plain that it could not be done by one state or province acting on its own.³⁷ It is true that there is no document explicitly recognizing the right of a member of the Commonwealth to secede from it; but there are a number of authoritative statements which make that right absolutely clear, at least since 1949. Similarly, although no right of withdrawal is included in the United Nations Charter, the San Francisco Conference adopted a "Declaration of Withdrawal" which put the right effectively on record.

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ISRAEL'S EMERGING CONSTITUTION 1948-1951. By Emanuel Rackman. New York: Columbia University Press, 1955. Pp. xvi, 196. \$3.00.

RABBI Rackman, a member of the Faculty of Political Science at Yeshiva University, has written a very timely study of the difficulties that faced the political leaders of the new State of Israel in the task of drafting and adopting a written constitution. It should prove of great interest and value not only to specialists in Jewish history and culture but also to those students of the broad subject of comparative constitutional law who are concerned with the practical problem of implementing democratic principles and forms of government in newly independent and self-governing countries.

One special feature of constitution-making in the new State of Israel, in comparison to similar experiments in, say, Ireland, India, or Pakistan,¹ is the availability of an extraordinarily broad and varied body of jurisprudential experience—a consequence of the immigration during the postwar years of vast numbers of refugees and displaced persons from most of the European countries and even from Asia and Africa. It is indicative of the high quality of technical skill and the wide range of legal backgrounds available to the Israeli government that the first draft of a constitution was the work of a former German constitutional lawyer, Dr. Leo Kohn, who years before had assisted in similar work for the government of Ireland, then newly independent from the United Kingdom and looking around, in the inevitable reaction against all things Eng-

35. *Ibid.*

36. *Id.* at 764-66.

37. *Id.* at 766.

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1. See, generally, McWhinney, *The Courts and the Constitution in Catholic Ireland*, 29 TUL. L. REV. 69 (1954); *Democratic Constitutionalism in South-East Asia—Constitution-making in India, Ceylon and Pakistan*, 1 HOWARD L.J. 149 (1955).

lish, for Continental European models for their new constitution. Dr. Kohn had gone on to write the leading text on Irish constitutional law; and finally, as a distinguished civil servant in the Israeli Foreign Ministry, was called on to prepare a constitution for consideration by the Constituent Assembly of Israel.

The task, in comparison with that in Ireland, proved a difficult one. The Irish constitution-makers were agreed from the outset on the key concepts of their society: it was to be a Roman Catholic state, in which Roman Catholic ideals would be used to resolve the essential problems of the Church, the family, education and private property; thus the problems of drafting were purely mechanical ones. In contrast, although the State of Israel certainly had as its historical *raison d'être* the Jewish religion, there was sharp disagreement in the Constituent Assembly as to whether the new State should be religious or secular in nature;² and whether indeed, there should be a constitution at all. And even had there been agreement in principle on a constitution embodying religious ideals, there was still considerable room for argument as to precisely what that involved.

Generally speaking, it was the orthodox religious leaders in the Constituent Assembly who questioned the desirability of the whole constitutional project. They suggested that Israel's Torah was her constitution, pointing out that the Torah provided not only doctrines for man's spiritual guidance, but directives for every aspect of his individual and social existence as well. These religiously derived objections were bolstered by pragmatic arguments that reflected the European background of the Israeli political leaders. As one of them said (recalling Savigny's successful fight to delay Thibaut's proposals in 1814 for codification of the laws of Germany): "Alas, our generation is not equal to such a lofty view."³ And legal arguments with an English flavor were used to refute the contention that the constitution must fix all details in accordance with the patterns of other states, it being urged instead that a constitution need only enunciate general principles, leaving it to the nation to develop, by subsequent trial and error, her own particular parliamentary methods and institutions.⁴

Views such as these were widely held, and given more weight by the support of the strongest postwar Israeli leader and first Prime Minister of the new State, David Ben-Gurion, who originally favored a written constitution and then changed his mind. The upshot was that Dr. Kohn's draft was shelved and the constitutional project substantially dropped, although technically the resolution of the constitutional issue was that in principle a constitution should be adopted but not at the present time, and certainly not in the form of an immediate comprehensive enactment. For the time being, a number of fundamental or basic laws could be adopted and put into operation *seriatim*, and eventually they could be consolidated into a written constitution.

In fact, a number of basic laws have been enacted, relating to such subjects

2. The Israeli experience recalls the controversies in this regard in the Constituent Assemblies of both India and Pakistan.

3. P. 46.

4. P. 78.

as the election and functions of the President, the appointment and resignation of ministers, the mode of parliamentary elections, the rights and immunities of members of the legislature, the establishment of the defense services, the organization of the law courts and appointment of judges, and similar matters. These laws, supplemented by the "Jewish legal and ethical tradition," may be regarded, in the absence of a formal, written constitution, as Israel's "oral constitution."⁵

This oral constitution is, in effect, not too different from the parliamentary constitutions of Western Europe. Effective power is concentrated in the Kneset, a single-chamber legislature which provides the personnel of the government, elects the President of the State, enacts laws, fixes the national budget, imposes taxes, and passes votes of confidence and censure on the government.

One noticeable feature of the resultant system of government is the absence of express limitations in the form of a Bill of Rights or similar guarantees against the legislative power. The Constituent Assembly, or more specifically its Committee on the Constitution, which considered Dr. Kohn's draft and other proposals, included many who wanted to enact provisions of this nature. But since, quite apart from the dispute over the issue of a religious versus a secular state, every shade of opinion was represented on the Committee—ranging, in terms of political and economic philosophy, from liberal capitalism through Fabian socialism to Marxist communism—no sufficient consensus could ever be arrived at as to the content of the guarantees to be included in the proposed constitution. The common factor that did link them all, Judaism, failed to provide a concrete political philosophy or system of political ideas that would dictate the contents of such a Bill of Rights.

The reasons for this lack of political signposts in the tenets of Judaism, as outlined by Rabbi Rackman,⁶ make interesting reading. First, there is in fact no definitive political philosophy in Judaism: both secularists and religionists among the leaders of the first Kneset could thus have used biblical and talmudic materials to sustain their opposing points of view. Again, the rabbinical seminaries of Palestine taught and developed talmudic learning for centuries with such obliviousness to Western political thought that the concepts of sovereignty, authority, power, constitutional limitations and mixed government were never related to the source materials of Judaism. Finally, when in very recent years there developed a decided trend toward applying talmudic sources to the theoretical foundations and practical institutions of a modern state, the emphasis was on civil and criminal jurisprudence rather than on public law.⁷ So much so, indeed, that when Dr. Kohn provided in his draft constitution for the institution of judicial review, he indicated the notion was inspired by American practice and did not refer at all to the much older talmudic source.

Rabbi Rackman is particularly severe in his criticisms of the party leaders in Israel for their failure to adopt a written constitution, charging them, in effect, with playing at party politics in the Constituent Assembly and ignoring

5. P. 114.

6. Pp. 48-49.

7. Cf. Yadin, *Sources and Tendencies of Israel Law*, 99 U. PA. L. REV. 561, 569 (1951).

long range constitutional questions in favor of partisan bickering. But the differences of opinion also reflected the wide diversity of background, outlook and experience of the present-day population of Israel. The Mapai (Palestine Labor Party) which generally favors a secular state, was the largest political party in the first Kneset, and yet it did not have a clear majority and so was forced to make a coalition with the religious parties. The abandonment by Mr. Ben-Gurion, its leader, of his original support of a written constitution, may have been dictated by the exigencies of practical politics. On the other hand, the Mapam (United Labor Party), small in numbers but strong in ideas since it draws its strength from the collective agricultural settlements, the urban workers and the intelligentsia, has been militantly anti-religious throughout. It has favored the written constitution and has also bitterly attacked the Mapai coalition with the religious bloc, which it complains has had the result of delaying a necessary and inevitable Kulturkampf by the government against the Church.

Just as the socialist parties have been split by the religious question, so the religious bloc has frequently been divided by non-religious, economic issues. The principal religious party, the General Zionists, is cloven into two groups tending to line up according to social and economic class affiliations. The dominant group largely represents the industrialists, merchants, citrus fruit growers and landlords, and is understandably strongly right-wing in economic outlook. The rival group, which eventually broke away to form the separate Progressive Party, believes in state control of the economy and draws its strength from middle and, even more, lower middle class elements, and in addition from the new immigrants from Central Europe who could not break into the older political parties where the membership was overwhelmingly Eastern European in origin.

The plan finally worked out in the Israeli Constituent Assembly of adopting only a skeletal constitution—the basic laws which were subsequently adopted *seriatim*—seems, in the light of the differences dividing the political leaders, a pragmatically sound solution to the problem of agreeing on a constitutional instrument. The minimum machinery of government is there and can be supplemented in the future as agreement is reached. One wonders if some such similar expedient might not, in the case of the newly independent countries of Southeast Asia, have provided a convenient method of transition to self-government—a method that would have avoided the extremes of overly inclusive drafting (*vide* the cumbersome, all-foreseeing Indian Republican constitution, a product of three years of deliberation from 1946 to 1949), or simple stalemate (the Pakistan Constituent Assembly, finally dissolved in late 1954 by Executive decree, had deliberated for eight years without reaching agreement).

Although the constitutional compromise promises to be workable, Rabbi Rackman is clearly correct in adverting to the dangers of the atomising of power represented by the multi-party system that has developed in the Kneset, preventing any party from getting an effective majority. Insofar as this means that no assuredly stable government can be formed, it seems to open up for

Israel all the risks of a weak executive that have so plagued France under the Third and Fourth Republics. This will be a severe handicap for a country facing the internal and external problems that confront Israel today. Even with problems such as reform of the electoral laws (at present based on the Continental proportional representation system), it is probably overly optimistic to hope for much improvement at the present time, in view of the fierce doctrinal issues dividing the parties.

There are, as we have noted, no express limitations on the law-making powers of the Kneset, nor is there any provision for judicial review, for no action has been taken, or even foreshadowed, on Dr. Kohn's proposal to this effect. Nevertheless, there is still some limited opportunity for court intervention, just as in England, in the process of scrutinizing Executive application or purported application of laws enacted by the Kneset.⁸ If the courts have not yet had much to do with public law, however, they have been able to draw freely on the bodies of private law developed in other countries. The English common law was introduced into Palestine after World War I, as a result of the British mandate. One of the important consequences of this association with English law, amplified by the fact that the Supreme Court of Palestine consisted mainly of English judges, was the introduction of the English doctrine of precedent and the principle of *stare decisis*, although even under the British mandate the majority of lawyers practising in Palestine had been trained in the law schools of Continental European countries where these English doctrines were unknown, and they had always, in consequence, been reluctant to follow them.⁹ Since the establishment of the State of Israel there has been a definite trend towards citing and relying on American precedents, and American decisions are now preferred to English ones whenever the court thinks them better suited to local conditions.¹⁰

The new Supreme Court of Israel which took the place of the old Palestine Supreme Court six years ago is broadly varied in background. Of the nine justices on the Court today, two were born in Israel and the others came from the United States, the United Kingdom, Germany, Danzig, Poland, Lithuania and Russia. As to education, two were trained in law in the United States, four in the United Kingdom and three in Germany.¹¹ Although, as we have already noted in connection with the Constituent Assembly, there may still be difficulties in arriving at a formal definition of the key philosophic concepts of the new State of Israel, we may be sure, in the light of this highly rich and varied judicial background, that the Israel Supreme Court will soon develop a jurisprudence distinguished for its intellectual breadth and eclecticism.

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8. See, generally, Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955).

9. Sussmann, *Law and Judicial Practice in Israel*, 32 J. COMP. LEG. & INT'L L. (3d ser.) parts III & IV 29, 30 (1950).

10. Gorney, *supra* note 8, at 1196.

11. Gorney, *supra* note 8, at 1210.

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