

Liberal Zionism, Comparative Constitutionalism, and the Project of Normalizing Israel

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In the first half of the 1990s two important constitutional laws were enacted by the Israeli Knesset - Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. The enactment of these laws meant that Israel had, for the first time, a partial bill of rights. Equally novel was the appearance of the phrase "Jewish and democratic" with both laws emphasizing in their statement of purpose "the values of the State of Israel as a Jewish and democratic state."

Whereas the ethnic element was emphatically present, the notion of equality was deliberately absent. Behind this absence was the status of the Palestinian minority and relations between religious and secular Jews.¹ In spite of this glaring omission, this came to be known as a "constitutional revolution." Amnon Rubinstein – law professor, former member of the Knesset and minister – is considered to be one of the main minds and forces behind it.

The second half of the 1990s witnessed the forceful introduction of the phrase "a state for all its citizens," into the Israeli public debate, mainly by leaders and intellectuals of the Palestinian minority. Palestinian citizens of Israel challenged the Jewishness of the state and demanded democratization and equality. In reaction to these challenges, many Zionists formulated defenses of the "Jewish and democratic" state. Others attempted to enact laws and draft constitutions or consensus-formation

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¹ Yehudit Karp, *Basic Law: Human Dignity and Liberty, A Biography of Power Struggle*, 1(2) *MISHPAT UMEMSHAL* [Law and Government in Israel] 342 (1993) (Hebrew).

documents that would entrench the Jewish character of the state.

This essay is a critical scrutiny of one recent prominent example of a defense aimed at normalizing Israel-Alexander Yakobson and Amnon Rubinstein's book *Israel and the Family of Nations: the Jewish Nation-State and Human Rights* (english edition, Routledge, 2009). The focus will be on the use of the comparative method in the service of this project. As I argue and demonstrate below, this project is, first, an attempt to escape from the demanding aspects of liberal theory; second, a legitimization project; third, it uses functionalism as the comparative method to achieve the required result; fourth, it is selective in employing the comparative method in order to ensure the lowest common denominator; fifth, it often ignores the gap between form and practice; and sixth, it focuses on law-as-text to present legal and constitutional arrangements as free from ideological manipulation.

The Project:

Alexander Yakobson and Amnon Rubinstein (hereinafter: the authors) clearly have a mission: to provide a systematic and comprehensive defense of Israel as a Jewish and democratic state. Not as an aberration among democracies, that is, a special kind of democracy (ethnic democracy), as some Zionists would argue (e.g. Sammy Smooha), but as a normal liberal democracy.² In order to show that a Jewish state can also be democratic they do two things: water down Jewishness and water down democracy. For the first, they argue for a secular understanding of Jewishness. For the second, they attempt to demonstrate that Israel's constitutional structure does not contradict existing democratic arrangements in the world. Indeed, having lowered the bar to a minimum, they argue that Israel passes the muster and, at times, is even ahead of other democracies in its relationship with the Palestinian minority.

The authors explain right at the outset that they refuse to engage with liberal democratic theory. By focusing on the practice, rather than the ideal, they want to circumvent the demanding aspects of liberal theory. These demanding aspects are, for them, "an abstract, radical and rather utopian model of liberal democracy" (p. 4).

In order to show that Israel does not deviate from democratic practice in the world as we know it, the authors employ the comparative approach. Dozens of countries

² The difference between Smooha and the authors of the book under review is that the former recognizes the contradiction between Jewishness and democracy while the latter deny it and maintain that it is merely a tension. Both, however, reach similar conclusions: Israel is a democracy (first-rate according to the authors; second-rate according to Smooha). Both also use the comparative method and both attitudes lead to the conclusion that either few reforms are needed in Israel or none.

are mentioned time and again for the purpose of showing that the critiques against Israel are unjustified and that they amount to either anti-Zionist propaganda or ignorance (p. 198).

Novelty is not a central characteristic of this book. Indeed, neither the arguments made in the book nor the method deployed is original. Many Zionist writers have defended Israel on similar grounds,³ and other authors have suggested the comparative method.⁴ Yet, the systematic effort and the large number of comparisons make the book an interesting case study.

It also goes without saying that pointing out other cases that might resemble Israel's case in its violation of principles held dearly by liberal democratic theory does not make Israel's case less problematic from the viewpoint of these principles. If John is a thief he becomes no less a thief by mentioning ten other thieves.

In addition, the attempt to escape from theory to comparisons is futile. One either presupposes a theory or needs to elaborate one for the comparative method to be descriptively intelligible and normatively consequential. To compare democracies and non-democracies one needs to have an idea of what makes them democracies or non-democracies—that is, one needs a theory of democracy. In addition, to compare democracies and other regimes for the purpose of evaluating the latter one needs to identify the core properties that democracies share and that make them identifiable as democracies. It is obvious, to mention one example, that the existence of a monarchy in England is not what makes England a democracy. If England is a democracy then it is so in spite of the existence of a monarchy, not because of its existence. Thus, a monarchical dictatorship cannot be evaluated as a democracy by pointing out that democratic England has a queen. Using non-core democratic elements as the evaluation measurement is an abuse of the comparative method. A regime needs to satisfy the core elements of democracy to qualify as such and these elements need to be identified by a theory of democracy.

The Comparative Method:

The comparative approach seems well-adapted to the authors' mission in their

3 See, e.g., Ruth Gavison, *The Jewish State: A Justification*, in *New Essays On Zionism*, 3-36 (David Hazony, Yoram Hazony, & Michael Oren eds.) (2007).

4 See, e.g., Alan Dowty, *Is Israel Democratic? Substance and Semantics in the "Ethnic democracy" Debate*, 4(2) *ISR. STUD.* 1 (1999).

search for a normative validation of Israel through descriptive comparative inquiry. Comparativists, David Kennedy argues, are people with projects. They are usually driven by the “is” question - “how can I make them understand?” - and they have no time for the “ought” question - “what ought to be done?”⁵ The comparative approach seeks also to depoliticize law by showing it as free from political and ideological manipulation.⁶ Indeed, if similar, or worse, arrangements have been employed and justified in other countries, then Israeli arrangements are not peculiar to Zionist ideology - other national movements or peoples enforcing their right to self-determination find themselves in a similar position.

Conspicuously, there are different methods of comparing. The authors, however, do not defend a deliberate choice of a specific method. They seem to assume that their way of comparing is self-evident and does not require a defense. To begin with, they could have chosen to compare Israel to an in-depth examination of one or several countries instead of comparing it to dozens of examples without sufficient and careful attention to details. Indeed, most of the discussions of other countries range from between one paragraph to several pages. For example, it took the authors one paragraph to “refute” the analogy to South African apartheid without any reference whatsoever to academic scholarship on the subject (pp. 178-9).⁷ At other times, they lump several states together in one paragraph. Obviously, had they chosen to compare Israel to a handful of countries they would have achieved a more limited and modest conclusion. The choice of dozens of countries, the authors seem to believe, is apt for the task of normalizing Israel by reaching universalizable results, i.e., that democracies treat their minorities in a similar manner.

In addition, the authors-though they do not mention the name-use functionalism as their method of comparing. Functionalism, preoccupied as it is with an agenda of sameness, seems handy.⁸ The comparativist looks for the functional equivalent in

5 David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, Utah L. Rev. 545, 605 (1997).

6 *Id.* at 615.

7 See, e.g., Daryl J. Glaser, *Zionism and Apartheid: A Moral Comparison*, 26(3) *Ethnic & Racial Stud.* 403 (2003); John Quigley, *Apartheid Outside Africa: The Case of Israel*, 2 *Int'l & Comp. L. Rev.* 221 (1992). Yakobson and Rubinstein argue that the Palestinian national movement “never claimed to represent a national entity comprising all of the country’s population, including the Jews” (p. 179). This claim conflates, however, two aspects: while the Palestinian national movement as a national liberation movement represented the Palestinian Arabs, it did have a “one secular democratic state” project that appealed to all the residents of Palestine. Thus, it can be understood as a program for one civic national entity. As I also explain in the text, Palestinian or Arab nationality—unlike Jewish nationalism—can be inclusive for different religions or ethnicities.

8 Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative*, 4(3) *I-CON* 439 (2006).

other legal systems. She identifies a human need that the legal system or institutions are responding to and then she looks for the institutions that serve the same function in different countries. Another similar way of achieving the same goal is sometimes called the problem-solving approach: the comparativist identifies a problem that faces different systems, the way they address it and through which institutions. Again, it is “the belief that similar problems have similar solutions across legal systems, though reached by different routes.”⁹

Thus, the choice of comparativism and functionalism presupposes the results the authors are seeking to prove. They assume sameness or similarity and, unsurprisingly, they arrive at sameness and similarity. Moreover, justifying-by-comparing can be a choice between two options: either to justify existing arrangements as permissible and acceptable, or to criticize these arrangements by exposing them as mere choices (rather than being necessary or natural) and by pointing at other preferable or optimal arrangements.¹⁰ The authors are clearly concerned with the justification of the permissible, i.e. the minimum. They are not looking for the best practices and standards against which Israel can be measured. They are seeking to legitimate the Israeli constitutional structure and practices by making them look as more natural than they really are. Some discriminatory arrangements are “explained” as non-discriminatory and others are considered the natural order of things. In this sense, the book under review is an apology to the existing order and to the status quo.

The authors’ focus on law-as-text is another method for abstracting power configurations from ideological domination. While the authors claim they want to focus on practice, “practice” turns out to be no more than formal arrangements, as it is primarily a collection of quotations and references to written constitutions and laws.

On Selectivity:

It is easy to see how the use of comparisons by the authors serves their pre-conceived goal. The comparativist chooses the context, the units of analysis, the measure, fields, and objects of comparison. All these presuppose a perspective that is neither objective nor disinterested.¹¹ The abuse of the comparative method can be seen

9 A. Esin Öricü, *Methodology of Comparative Law*, in 442 *Encyclopedia of Comparative Law* 443 (Jan M. Smits ed.) (2006).

10 Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* 141 (Foundation Press) (2006).

11 See Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 *Harv. Int'l L. J.* 411 (1985).

in many argumentative techniques the authors choose to employ. In some cases it seems that their skills in comparative law and politics run out. They refrain from further investigation in order to make Israel look better by claiming that it is treating the Palestinian minority fairly and tolerantly in spite of the “unprecedented” situation “in the history of modern democracies” in which this minority’s leaders sympathize openly with the enemy (p. 111).

The selectivity in using documents is another demonstration of the abuse of the comparative method. For instance, they mention the European Framework Convention for the Protection of National Minorities (1995) (p. 119). They could have also chosen to mention the International Labor Organization’s Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (1989) or the UN Declaration on the Rights of Indigenous Peoples (2007). Their choice of the Framework document rather than these two documents is motivated by their (rhetorical) classification of the Palestinian minority as primarily a national minority rather than indigenous minority. The documents on indigenous peoples would allow more self-government rights than the authors would support and more than Israel grants the Palestinian citizens. The authors could have also mentioned the rights granted to the Sami people in the Scandinavian countries. Yet the authors are concerned mainly with anti-discrimination (often practiced in cases of immigrants), rather than with imposing positive duties on the state to ensure collective rights.

Moreover, in their rejection of meaningful collective rights for Palestinian citizens inside Israel, the authors claim that Palestinian national rights are exhausted with the establishment of a Palestinian state. The authors, however, do not mention cases in which the existence of a nation state (such as Germany or France) does not preclude the recognition of collective rights and autonomy of minorities related to these states in culture and language in other states (such as the cantons in Switzerland or Québec in Canada). German, French and Italian languages are recognized as official languages in Switzerland, despite the existence of nation-states in which these languages are also state languages.

This selectivity is also apparent in the narrative of progress that the authors advance, i.e. that the conditions of the Palestinian citizens are getting better and the gaps between Jews and Arabs are being bridged (p. 113). Although they acknowledge the gap between formal equality and the materialization of equality, they quote the rhetoric of some rulings of the Israeli Supreme Court in passing, without rigorous academic examination of these rulings, and they completely ignore the critiques voiced by other academics against these rulings that expose their limitations and

shortcomings (as in the Q'adan case).¹² They also do not present other rulings of the Court that might be inconsistent with this image of progressive evolution. The Supreme Court's ruling justifying the amendment to the Citizenship Law that bans family unification between an Israeli citizen and a Palestinian resident of the Occupied Territories or a citizen of other Arab and Muslim countries is a case in point. Neither the law itself, which clearly discriminates against Palestinian citizens, nor the ruling of the Court is mentioned by the authors.¹³ It might be argued in the authors' defense that the ruling (2006) was a development that occurred after the publication of the book in Hebrew and thus it cannot be expected that the English translation would include it. This argument, however, is unconvincing. Indeed, the law itself was enacted in 2003, after the book was published in Hebrew in the same year. Nevertheless, the authors found it important to update the English edition of their book by mentioning the appointment of the first Arab minister in the Israeli cabinet in 2007. Thus, their ability to update was clearly motivated only by introducing facts that seem to support the "progress" and "closing the gaps" thesis. In addition, it is striking to discover that the authors do not mention a watershed event such as the October 2000 protests, in which the Israeli police killed 13 Palestinian demonstrators. Subsequent developments, in which the report by the official commission of inquiry was ignored and the legal system granted impunity to the policemen, are also not mentioned. These and many other events, developments and court rulings do not fit the progress narrative and so are considered by the authors as unworthy of discussion.

Furthermore, the authors ignore the gap between formal constitutional and legal pronouncements or institutional arrangements on the one hand, and practice and constitutional and political history of the country in question on the other hand. In fact they often doubly ignore it: for Israel and for the compared state. An illustration of this point is the comparison between Israel and England in questions of religion. The authors are defending Israel against the claim that the role that religion plays in the Israeli legal and political system contradicts democratic principles. By repeatedly pointing at England, they claim that democracies can tolerate some relationship with religion without forgoing democracy, and that Israel is no exception (p. 134). Yet,

12 See, e.g., Hassan Jabareen, *The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place With No Palestinian Memory*, in *Challenging Ethnic Citizenship* 196 (Daniel Levy and Yifaat Weiss eds., 2002); Gad Barzilai, *Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics, and the Israel-Arab-Palestinian Community*, 34 *Isr. L. Rev.* 425 (2000).

13 One of the authors defended a version of this law elsewhere. See Amnon Rubinstein and Liav Orgad, *Human Rights, National Security and Jewish Majority: The Case of Marriage Migration*, 35 *HAPRAKLIT* 315 (2006) [Hebrew]

Ronald Dworkin distinguishes between religious-tolerant states and secular-tolerant states. Israel is a religious-tolerant state, i.e. a state that endorses one monotheistic religion but is in principle tolerant to other religions. The secular-tolerant state, as in France, is a secular-tolerant state in which religion is relegated to the private sphere. England, according to Dworkin, is formally a religious-tolerant state, but in practice a secular-tolerant state.¹⁴ Thus, the authors make their life easy by ignoring practice in England to be able to justify the practice of Israel by virtue of England's formal arrangement. One could have used the authors' logic to justify the Moroccan, Jordanian and Saudi monarchies by referring to the monarchies in England or Denmark.

Security and Thin Scholarship:

In their statement of Israel's situation, the authors rehash journalistic accounts of security conditions in 1948 and 1967 that have been refuted by many scholars. Indeed, they do not see any need to engage with authors like Benny Morris, Tom Segev and Ilan Pappé in their historiography.¹⁵ This choice is another indication of the impoverished level of scholarship the authors demonstrate.¹⁶ Indeed, they seem to be replying to arguments mostly made in the media, rather than engaging in a serious examination of well-argued academic works. The main books written about the Palestinian minority by authors like Ian Lustick, Elia Zureik, Nadim Rouhana and David Kretzmer are totally ignored. In discussing some of Edward Said and Azmi Bishara's ideas, they quote two interviews each one of them made separately to HAARETZ. The fact that Said and Bishara are prolific writers with academic publications escaped the authors' attention. Similarly, their repeated rejection of bi-nationalism does not include a discussion of the wealth of scholarship defending this position.

14 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* 57 (2006).

15 The authors mention only one article by Pappé, but not his main books.

16 Many of the assertions made by the authors are unsupported. For instance, they claim that the "gap between immigrant Muslim community and majority society in Western European countries is greater... than its equivalent in Israel!" (p. 114). The skeptical reader finds no support for this claim. Note here that the authors, notwithstanding their claim that the Palestinian minority is a national minority, compare it to immigrant communities in Europe. Similarly, the authors claim that "one of the salient cultural differences between the Jewish majority and the Arab minority is that the latter is, on the whole, considerably more religious than the former" (p. 183). The authors provide no support for this assertion and do not explain what do they mean by religious (e.g. whether it includes conservative and traditional attitudes). They also commit the mistake of essentialism by elevating historical and socio-economic contingencies into cultural differences. A third example is the claim that the Arab parties in the Knesset "endorsed" the "future vision" documents (p. 150). This unsupported assertion is factually mistaken.

Interestingly, the authors do not present notorious examples of measures taken by some states under emergency conditions or in the name of security in order to criticize democracies and their deviation from democratic ideals and constitutional guarantees—rather, they present them in order to justify Israel’s practices (p. 105). The message is: the fact that Israel is under tough security conditions excuses some of its discriminatory practices, since this is what democracies do under similar conditions. Thus, the fact that Israel has practiced such discrimination does not entail the conclusion that it does not belong to the family of democratic states. The authors distinguish between peace-time standards and war-time standards. The comparison between the Palestinian minority’s status and other minorities in peaceful democratic countries, they argue, is unwarranted since Israel is not under similar conditions (pp. 117-8). That, however, does not prevent the authors from making these very comparisons when they think that Israel can be shown in a bright light. Indeed, they argue that in spite of these tough conditions, Zionism and Israel have managed to maintain “universalist ideals” (p. 95).

Nationality and Immigration:

The authors repeatedly assume or imply that there is no difference between the designation “Jewish” and the designation “Palestinian” or “Arab”. Accordingly, the rejection of the Jewishness of Israel is inconsistent with the acceptance of the Arab-ness of an Arab state or the Palestinian-ness of Palestine (pp. 4, 45-6, 118). Yet the identity Arab and Palestinian does not overlap with one religion, as does Jewishness. Indeed, the identity can include any religious affiliation without any need for conversion for purposes of joining the political community. To the extent that some Arab states make Islam the official religion of the state they are clearly violating democratic principles and best practices. The comparison to Arab states is interesting, since it is not obvious how this comparison would support the authors’ conclusion that Israel is a normal democratic state. It is palpable then that the authors are determined to use any comparison that will make Israel look better.

The authors, however, also compare Israel to western democracies. Contrariwise, other Zionist writers have been more forthcoming on the difference between the membership of the Jewish people and other nationalities and on the role of religion in this identity even for secular Jews:

“the Jewish conception of nationhood that sought embodiment in a Jewish state is, in itself, uniquely pointed and restrictive in character. Few other

Western national movements accord such a pivotal role to the religious component in their national identity. Far more potently than, say, the identification of Polish or French national membership with Catholicism, Jewish national consciousness—even for aggressively secular Jews—is indissociable from the Jewish religion. Were a Frenchman to abandon Catholicism to become a Protestant, his French identity would not be fundamentally jeopardized.”¹⁷

Tenuous comparisons pervade the book. In comparing Israel with states like Macedonia (p. 154), India (p. 159) and Spain (p. 169), the authors repeatedly ignore the fact that majorities in these countries are not recent immigrant communities, as is the case with the Jewish majority in Israel. And in their comparison between the Law of Return and other repatriation measures by European states they ignore the fact that in most of the cases to which they refer the majority of the nation maintained a presence in the homeland, already resides in the state and only a minority of the people is addressed by these measures. Yet in Israel’s case, most of the people are outside the state, the right of return as expressed by the Law of Return is understood as constitutive of the state, the Law is also required to maintain the Jewish majority inside the state, and the Law is clearly ideological as it considers even those who were born inside Israel as Jews who exercised their right to immigrate to Israel. The importance of the Law of Return to Israel is clearly not paralleled by the repatriation measures taken by some states. Including the Law under the notion of repatriation is thus misleading. The authors do not distinguish between “maintaining connections” with compatriots and preserving majority status. The former seems more defensible than the latter. Furthermore, they suggest a tenuous distinction between immigration preferential policies that are directed against a group, such as non-whites, which are illegitimate; and policies privileging a specific group with “a genuine connection” to the country in question (p. 126). This distinction is supposed to make the Australian White-only immigration policy in the 1970s unjustified while the Israeli Jew-only fast-track to citizenship justified. Yet, if one uses the authors’ arguments defending the Law of Return (pp. 125-6), one can easily argue in favor of the White-only policy in that it does not discriminate against citizens, but is directed outward to the Whites of the world. Of course, the Law of Return does have discriminatory effects inward: it affects the demographic status by ensuring Jewish dominance, and the two paths to

17 Bernard Susser and Eliezer Don Yehiya, *Israel and the Decline of the Nation-State in the West*, 14(2) MODERN JUDAISM 187, 192 (1994).

citizenship and naturalization of spouses (Jews and non-Jews) clearly influence the distribution of resources among citizens by granting faster citizenship accompanied with economic benefits to Jews and their spouses or relatives.¹⁸ Needless to say, the category "White" is wider and less restrictive than the category "Jew," since "White" is not necessarily associated with religion or conversion. A more apt category for analogy would be "White Catholic" or "White Evangelical."

Inconsistency and Beautification:

The authors do not seem to be aware of the inconsistency in their arguments. When the Jews were a minority in Palestine the authors defend the minority's right to self-determination in a state and hence partition. Yet, when the Palestinians became a minority inside the new state of Israel the authors reject the minority's right to self-government in a (cultural) autonomy and they justify current Israeli policies, although they would recommend official recognition as a national minority. This recognition, however, is merely formal since it does not entail, say, control over the Arab education system (p. 121). This double-standard in argumentation is striking given the fact that one can accept the arguments mentioned by the authors as supporting the Jewish right to self-determination (such as special connection with Palestine, no-other-homeland, and victims of a catastrophe) and see them also in the Palestinian minority's case. Arguably, applying minority standards (especially as immigrants) on Jews pre-1948 could lead the authors (if they were consistent) to reject statehood and, thus, partition.

Similarly, the book relies heavily in its opening chapters on UN partition resolution 181. If one accepts the legitimacy of the international structure of power and UN resolutions, then one should explain the selectivity in supporting some resolutions rather than others. UN resolution 194 relating to the Palestinian refugees is not even mentioned by the authors. In fact, the authors repeatedly exonerate Israel from any responsibility for the creation of the refugee problem.

In the hands of the authors, many exclusive measures become, in an a-historical fashion, inclusive. Thus, the ethnocentric language of the Declaration of Independence in which Arab citizens are not part of the nation, establishing the state is an indication of recognition of the Arabs as a national minority (pp. 118-9).¹⁹

¹⁸ See also Chaim Gans, *The Limits of Nationalism* 125 (2003).

¹⁹ Orit Kamir, *The Declaration has Two Faces: The Interesting Story of the 'Zionist Declaration of Independence' and the 'Democratic Declaration of Independence'*, 23 *IYONI MISHPAT* [Tel Aviv University Law Review] 473

Likewise, they mention repeatedly the official status given to Arabic as if it is another indication of recognition of collective identity (p. 151). Yet they ignore the fact that this was the arrangement under the mandate, in which English, Arabic and Hebrew were all recognized as official languages. Israel only incorporated this arrangement with one change (annulling the status of English). The authors also ignore that this official status is largely ignored and unimplemented. The main case in which the Supreme Court discussed and recognized Arab language rights on signs in mixed cities was based neither on the official status of Arabic (except for one judge) nor on any recognition of collective language rights. Indeed, it seems that the motivation for this recognition in formal law was to delineate between the communities so that they will not assimilate into each other and facilitate the control of the Arab minority. The movement restrictions in the military administration period, the oppressive measures against Arab national movements, the separation between the Arab and Jewish education systems (p. 153), the lack of civil marriage, and the monopoly of religious authorities on personal status can all be seen as exclusive measures.²⁰ Yet, in the hands of the authors some of them become well-meaning and generous arrangements. Similarly, Zionist intentions and plans towards the Palestinian natives, specifically those who would become citizens, are no less beautified by selective quotations from Zionist leaders and authors (chapter 2). These can be questioned not only by bringing to the fore other quotes that are prevalent in writings critical of Zionism²¹ but also in research that shows the less pleasant practices.²² Furthermore, Ian Lustick has argued that these Zionist statements were only tactical.²³ This orientation of beautification continues in their statements of more recent events such as their claim that Ariel Sharon's government accepted the Road Map (p. 64). The fact that Sharon's government had fourteen reservations that virtually emptied the Road Map of much of its content is ignored.

(2000) (Hebrew) (analyzing the ethnic and exclusionary character of the Declaration, noting that the Declaration denies the possibility that Palestine is the birthplace of an Arab national identity.) See also Yoram Shachar, *The Earlier Drafts of the Declaration of Independence*, 26(2) IYONI MISHPAT 523 (2002) (Hebrew) (an historical account of the different drafts of the Declaration, noting that the word democracy did not survive in the final draft).

²⁰ The literature on the control of the Arab minority through the education system is well-known. See, e.g., Majid Al-Haj, *Education, empowerment and Control: the Case of the Arabs in Israel* (1995).

²¹ For example, the authors quote from Theodor Herzl's novel *Altneuland*, suggesting that he had "pioneering overtones in terms of equal rights for the 'Other'" (p. 89). Yet, other quotes from the same novel can easily show that Herzl had adopted degrading European imperialist representations of non-European natives.

²² Hillel Cohen, *Army of Shadows: Palestinian Collaboration with Zionism 1917-1948* (2009).

²³ Ian Lustick, *Arabs In The Jewish State: Israel's Control Of A National Minority* 32-33, 36-37, 39-40 (1980).

Misunderstanding Liberalism:

The last chapter of the book is concerned with the question of neutrality of the state towards its citizens and the possibility of inclusive state identity. This chapter, the longest in the book, is rather confusing. The authors seek to collapse the distinction between civic nationalism and ethnic nationalism by trying to show that states that embrace civic nationalism are actually not neutral and are therefore ethnic states no less than Israel. However, in the course of doing so, the authors demonstrate both a misunderstanding of liberal theory and a misunderstanding of the critique of liberal theory.

They construct a straw man they call neutrality that does not really correspond to neutrality as understood by prominent liberal authors (pp. 141-2). They seem to suggest, if taken to their absurd logical conclusions, that the neutrality required by liberal theory would mean assigning numbers instead of names to states, since this would be the only way the state would be neutral in its name. Or that any language is non-neutral and so being neutral would mean that a computer language should be used in communication between citizens who belong to different languages, ethnicities and descents. If state names and language are non-neutral, then liberal neutrality is impossible and should be abandoned.

In making or implying such arguments, the authors make no effort to distinguish between different kinds of non-neutrality. The authors clearly conflate an argument that Liberalism makes (neutrality, i.e. impartiality, towards competing conceptions of the good, such as in religions) and an argument it does not make (neutrality in absolute terms). Liberal theory is neutral with respect to citizens' choice between Islamic, Christian and Jewish ways of life, but it is not neutral with respect to a political regime that is based on religion (as in a Christian, Islamic or Jewish state). The latter is ruled out in liberal theory from the company of legitimate liberal democratic regimes. One can accept the argument that an official language of the state is not a neutral choice but need not accept a conclusion that the state can also have an official religion, since it cannot be neutral anyway. For liberal theory, only the latter is clearly illegitimate from a neutrality-of-the-good point of view. One can also accept the argument that some national identities include religious elements and traditions and that these might be dominant by virtue of a majority status, but need not proceed to conclude that these elements should be institutionalized or that discrimination in naturalization processes is permissible as well. One can also accept the authors' argument that "Israeli" is not neutral and yet maintain that it is more neutral than "Jewish state." The authors are in fact suggesting an absurd claim:

if you recognize that the state flag and language are not neutral, which they are not from the perspective of the Palestinian minority, then that should lead you to accepting the Law of Return and the maintenance of a Jewish majority. They do not seem to recognize, as I am suggesting here, that there is a long walk between these two poles.

Consider the example of Spain (p. 168). The authors argue that the state identity is inclusive but not neutral, especially since the state faces national demands by some groups. How does this justify forgoing an inclusive identity, even if non-neutral, towards embracing an exclusive identity? Israel is exclusive both in identity and in practice. An argument that Spain is not neutral or even exclusive in its practice does not lead to the position that it should be even more non-neutral and exclusive.

Liberal theory, however, is not as absurd as the authors suggest (without caring to support their argument by engaging with liberal authors). John Rawls distinguishes between four stages: the hypothetical original position, in which representatives arrive at a political conception of justice behind a veil of ignorance that hides from them morally irrelevant facts; the constitutional convention, in which the principles of justice of the political conception of justice are applied in the process of establishing a constitutional regime that includes a bill of rights that Rawls calls "constitutional essentials"; the legislative stage, in which legislation should comply with the constitutional essentials; and finally the interpretive stage, in which judges interpret legislation. Neutrality, accordingly, is fully guaranteed only in the original position, in which the principles of justice are chosen. Thus, only the basic structure of the well-ordered society (a society in which all citizens affirm these principles of justice) and the constitutional essentials are required to be neutral. Therefore, the name of the state, the language of the majority, the anthem, the flag and other symbols are not necessarily affected by these restrictions, since they are neither part of the basic structure (which includes the major political and economic institutions) nor part of the constitutional essentials.

In addition, Rawls distinguishes between neutrality in aim (the basic structure and public policy are not to be intended to favor any conception of the good) and neutrality in effect (the state should refrain from any policies that might facilitate and encourage the adoption of a specific conception of the good by citizens). Only the first is demanded by Rawlsian liberal theory. The latter, he says, is impractical and thus is not required by liberal theory. State neutrality towards the good does not mean that, in effect, some conceptions of the good benefit more from the basic

structure and are able to recruit more adherents than others.²⁴ Obviously, a majority will benefit more as it will be the dominant culture. So long as the state does not become committed to the majority's conception of the good and the basic structure and constitutional essentials are not tilted to serve it, Rawls would not complain. The authors, it goes without saying, have no time for an inquiry into the meaning of neutrality in liberal theory or for such distinctions.

Misunderstanding the Critique of Liberalism:

It is the very fact that there is no neutrality in effect (that Rawls would not deny) that motivates Will Kymlicka's project. The authors, however, misunderstand the critique of neutrality in liberal theory as they seem to understand this critique to be an argument for group-differentiated rights as a substitute for equality, rather than as complementary to equality and inclusive identity of the state. In other words, they understand it as an argument allowing privileging majorities.

Their use of Kymlicka's theory is instructive of their selective and inaccurate appropriation of theories, case-studies and arguments. They seem to forget that Kymlicka starts from the recognition of the non-neutrality of state symbols and language in order to argue for special group rights for disadvantaged and underprivileged minorities to compensate them and enable them to obtain real equality. Indeed, equality is one of the main justifications that Kymlicka provides for group rights. Accordingly, for the state to treat all citizens equally it should redress the disadvantages suffered by minorities. Group rights granted to minorities do not mean forgoing an inclusive identity or formal equality in the law; rather they are a supplement to it. Immigrants (ethnic groups) should be provided with access to the mainstream culture so they can integrate and national groups should have access to their own culture. Kymlicka's theory does not justify majorities in either preventing integration of willing minority members or discriminating against national minorities who seek to preserve their culture. Yet the authors seem to suggest that the only sense of inclusive civic identity is the assimilationist model (which is not correct as far as Kymlicka is concerned) (p. 180). Thus, they seem to suggest that the French model that refuses to recognize minorities is the only model for civic nationalism. Yet Kymlicka is clear: he criticizes German and Afrikaner arrangements vis-à-vis membership in the nation: "Such descent-based approaches to national membership

²⁴ John Rawls, *Political Liberalism* 193-4 (1993). For a similar position see Ronald Dworkin, *Sovereign Virtue: The theory and practice of Equality* 154, 282-3 (2000).

have obvious racist overtones, and are manifestly unjust. It is indeed one of the tests of a liberal conception of minority rights that it defines national membership in terms of integration into a cultural community, rather than descent. National membership should be open in principle to anyone...²⁵ Had the authors used Kymlicka because they really found his theory convincing they would have found it difficult to be reconciled with supporting preference to Jews and the Law of Return.

Kymlicka distinguishes between self-government rights that should be granted to national minorities and polyethnic rights that are given to immigration minorities. As we saw above, the authors would reject any self-government rights-delegation of powers to the minority, federalism, or autonomy-for the Palestinian minority. All they are willing to concede is rhetorical: an official recognition as a national minority. The reason is obvious: by recognizing Palestinian citizens as a national minority, the authors think that they can have a better case for the Jewishness of the state. First, by recognizing the Palestinians as such they are not faced with the demand to assimilate; an assimilation that the Jewish majority does not want to offer for a large minority.²⁶ Second, once recognized as a national minority it is easy to point out the connection between them and their nation cross the border. What follows is the argument that rejecting meaningful collective rights for the minority and justifying privileges to the majority are rationalized by the fact that Palestinian national aspirations are to be realized in the Palestinian state.²⁷ Kymlicka would have been surprised to see this appropriation of his views: instead of recognizing the Palestinian citizens as a national minority in order to grant them national collective rights, they are recognized only in order to strip them of such rights. What starts, at face value, as a well-meaning position turns out to be no more than a justification for denying rights.

Justifying their rejection of civic nationalism, or the “composite national identity” model, the authors seek to distinguish the Israeli case from cases like the United Kingdom and Spain (p. 181). The difference for them is that the Spanish or the English were territorially concentrated, lived together for centuries and in spite of periods of antagonism experienced cooperation. On the contrary, Arabs and Jews see themselves as different peoples, they are involved in a bloody conflict, they have affinities with groups outside the state borders, Palestinian citizens are not territorially concentrated, and Jews fear an Arab majority in a bi-national state solution. If one

25 Will Kymlicka, *multicultural citizenship: A Liberal Theory Of Minority Rights* 23 (1996).

26 Curiously, the authors obscure this fact and present the argument as if it is solely concerned with the wishes of the Arab minority to preserve its identity.

27 See a similar argument regarding the Law of Return in Yael Tamir, *Liberal Nationalism* 160 (1993).

looks, however, from the perspective of the Spanish citizen in the time of the civil war, that is, the perspective of the participant (people living through difficult times), then one might conclude that there is no way to foster an all-encompassing nationality. This, however, is refuted by subsequent developments. Similarly, the collapse of the white regime in South Africa after decades of brutal oppression of blacks did not result in wide-scale atrocities against whites. So the authors are reifying the concrete historical moment, as they understand it, by seeing only the synchronic point of view. They seem to ascribe no significance to historical developments over time. They also reify identities as if they were immutable rather than recognizing their fluidity. It is also unclear why ties with outside communities should prevent civic identity (it depends what kind of ties one asks for), other than the stubborn refusal to accept or even imagine such a civic identity.

The Impact of Occupation:

Tellingly, the Israeli occupation of the Occupied Palestinian Territories is rarely mentioned in the book. The authors say that they support the withdrawal from these territories and the establishment of a Palestinian state. Yet, in discussing the democratic character of the state, they seem to assume or suggest that the occupation has no effect on Israel-proper and its democratic credentials. Indeed, the Association for Civil Rights in Israel issued a statement suggesting that a state cannot be democratic when it denies millions of people basic rights in a prolonged occupation.²⁸ Israel has been an occupying power throughout most of its history and its occupation is becoming one of the longest military occupations since World War II. In a book subtitled "The Jewish nation-state and human rights," one would have expected some discussion of the non-democratic practices and violations of international law. Such discussion, however, is absent from the book and reports by Israeli, Palestinian and international human rights organizations are not mentioned. This absence is question-begging and particularly striking in cases like the rejection of the analogy to South African apartheid. Clearly this analogy is mostly employed in reference to Israeli policies in the Occupied Territories. Without discussing and refuting these underpinnings of the analogy it is unclear how the authors can describe the analogy as "propagandistic" and "deplorable" (p. 179). Indeed, this excess of language without discussing the merits of the analogy makes the book "propagandistic" rather than an academic or scholarly work.

28 *A Democracy on Paper Only?*, available at: <http://www.acri.org.il/pdf/democlong.pdf> (Hebrew) (June 2007); a short description in English is available at: <http://www.acri.org.il/eng/print.aspx?id=319>.

On Liberal Zionism:

In the final analysis, the so-called liberal Zionist is someone who equates spuriously between the nationalism of the settlers and the nationalism of the natives. These are both legitimate nationalisms with just claims, the authors maintain, and the resolution of the conflict should be in the form of two states since this is the only solution that embodies this equivalence (pp. 9, 58, 70).²⁹ The liberal Zionist endorses some future-oriented form of distributive justice.³⁰ While he might acknowledge some of the historical injustices made to the Palestinian minority (p. 95), including on the land issue, he will see the Q'adan decision as the resolution of these injustices (pp. 3-4) and does not consider or suggest a redistribution of lands that would address these injustices, such as the return of Palestinian citizens to their expropriated land. By being future-oriented, this position presupposes the legitimacy of the Zionist project and the facts it created on the ground. The liberal Zionist position would support inclusion in the Jewish-Zionist structure as it already exists. For this inclusion to be possible, Palestinian citizens should be stripped from national collective demands and aspirations that contradict or impede the Zionist project or would cast a doubt on its legitimacy. The rejection of meaningful recognition of national rights for an indigenous Palestinian minority is thus essential to presenting Israel as a normal nation-state.

The liberal Zionist is able to claim being both a liberal and a Zionist because his liberalism takes reality as a given, rather than man-made, and the community as a pre-ordained fact. Thus, in order to be a liberal the Zionist presupposes the conditions for the existence of a Jewish majority in Palestine. Zionism, however, is by itself the very project of creating these conditions, i.e. transforming the Palestinian-Arab homeland into a Jewish homeland by altering the demographic reality (from an Arab majority to a Jewish majority) and the concomitant alteration of the geography of the place. Only now can the liberal Zionist offer the Palestinians rights in the Jewish homeland. Thus, the liberal Zionist presupposes 1948 and the injustice done to the Palestinians. Whether by partition, ethnic cleansing or massive fleeing-the dirty work has been done by others. Only post-1948 can he really exist. Post-1948 all he needs to claim is that the privileges given to the majority are derived from the right to self-determination of majorities or the effect thereof. The return of the Palestinian refugees inside Israel will change the community and so will make it impossible for

²⁹ See also Tamir, *supra* note 27, at 82.

³⁰ See also Basic Law: Human Dignity and Liberty (Article 10: "This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law").

the liberal Zionist to exist. Thus, only with the preservation of the results of 1948 will he be able to continue to exist. The maintenance of injustice is necessary for the liberal Zionist to subsist.

Academic and intellectual rationalizations and legitimations of injustice abound. The book reviewed here is a case in point.