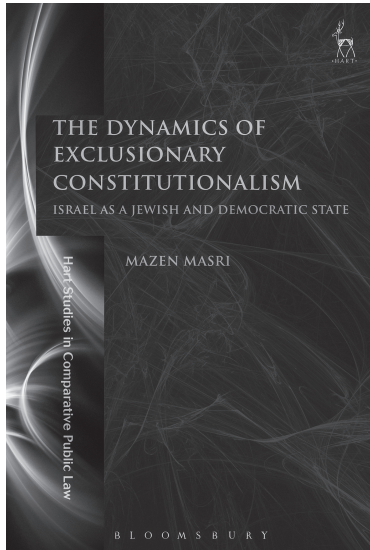


Recent Books



The Dynamics of Exclusionary Constitutionalism: Israel as a Jewish and Democratic State, by Mazen Masri. Oxford: Hart Publishing, 2017. 256 pages. \$99.00 cloth, \$78.29 e-book.

REVIEWED BY RICHARD FALK

This book is an odd scholarly achievement. It relies on a sophisticated analysis to disclose the obvious: the various ways Israel has kept its balance on the conceptual tightrope strung by the Zionist movement that sets its imperative goals as being at once Jewish and democratic, and how these goals are connected to one another by the Israeli legal system when in conflict. What makes Masri's scholarship worthwhile is his scrupulous demonstration of how Israeli scholars and jurists have squared this legal circle in such a way as to empower members of the Knesset and judiciary as they shape the rule

of law into an instrument of pervasive injustice at the expense of the Palestinian people.

Masri is more cautious than I would be in drawing conclusions. He asserts, "Primie facie, the Jewish and democratic elements are at odds, or at least at tension, with each other" (p. 4). I would not hesitate to conclude these elements flagrantly contradict one another throughout the evolving Israeli narrative, and that the principal role of Israeli law is to camouflage this contradiction to soothe the conscience of liberal Zionists.

Although Masri acknowledges the relevance of the settler-colonial origins of Israel, his focus is limited to the Israeli legal system as a complex operational reality. The scope of Masri's critique makes no effort to encompass the Palestinian national movement. It is confined to the treatment of the Palestinian minority within the Israeli state. The book is at its best when depicting the legalistic acrobatics of Aharon Barak, former chief justice of the Israeli Supreme Court, and Ruth Gavison, an influential professor, who do their utmost to resolve the contradictions in practice between sustaining the Jewish identity of the state and its central legitimating claim to be a democracy, which anachronistically continues to be lauded in the West as "the only democracy in the Middle East." It is not that the democratic torch should be handed to one of Israel's Arab neighbors, but

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rather that it has become increasingly clear to anyone willing to look closely at the Israeli reality that it has long forfeited the democratic side of its defining identity, except as a figment of the public-relations imagination of the Zionist movement.

Masri is well aware that the severity of the legal challenges facing Israel are rooted in the demographic dimension of the pre-Israeli Zionist struggle. After all, if the goal was to be Jewish and democratic, it was an absolute necessity to have free elections, which meant that the leadership would never feel secure unless there was a substantial Jewish majority population within the confines of the Israeli state. This may seem a rather inconsequential obstacle until one recalls, as Masri reminds us, that the Jewish population of Palestine was no more than 10 percent in 1920, and substantially less when the Balfour Declaration was issued three years earlier. Even in 1946, Jews made up only 33 percent of the Palestinian population. Of course, the Masri puzzle would have been impossible to solve without the Nakba, which led from this perspective to the dispossession and permanent expulsion of somewhere in the vicinity of 750,000 Palestinians during the “Partition War.” This “solved” Israel’s demographic problem, at least temporarily, but it did not, and this is the point, solve Israel’s *democratic* problem. I feel that Masri might have made the demographic concerns of Zionists more understandable if he had elaborated this foundational reality in somewhat greater detail, and drawn the distinction between procedural appearances (elections) and substantive realities (equality of rights as between Jews and non-Jews).

What the author skillfully shows, with an impressive exposition of Israeli legal rationalizations, is how Israeli demographic concerns exerted a structural influence on lawmaking with respect to the differential rights of return enjoyed by Jews and Palestinians, as expressed in immigration laws and interpretations of citizen rights. For instance, Masri shows how Gavison cleverly argues, and the courts follow along, that it is permissible for a democratic state to sustain the identity of its political community by favoring one ethnicity over another. In practical terms this meant it was legally acceptable for the Knesset to discriminate between Jews and others so as to maintain the Jewish identity of Israel. There is an Orwellian trope here. In order to preserve the Jewish state as “democratic” it was necessary, and hence permissible, to discriminate against the Palestinian minority.

This green light given to ethnic discrimination included a legal endorsement of the unlimited right of return for Jews anywhere in the world no matter how tenuous their connection with the land and its history, which was abetted by Jewish immigration being induced by a variety of economic incentives and subsidies. In contrast, Palestinians, even those with the deepest conceivable roots in the territory now occupied by the Israeli state could be *legally* excluded, even if this meant permanent family separation. As Masri persuasively shows, it was vitally important to the Zionist project that their discriminatory treatment of Palestinians conform to Israeli applications of the rule of law. It was also important to rely on law to identify who was entitled to be considered a Jew.

A second level of contribution by Masri, which he might have asserted more forcibly, is that the dynamic of underwriting the primacy of the Jewish identity of the State of Israel has badly tarnished its *international* democratic credentials. In effect, Israeli reliance on sophisticated versions of legalist reasoning, while generally accepted by Israelis and Zionist support groups around the world, has lost

its capacity to hide the existential subjugation of the Palestinian 20 percent minority living within Israel. Barak and others have jumped through hoops to insist that Palestinians and Jews are equal in their status as citizens of Israel, which means putting far to one side the array of discriminatory laws based on nationality that restrict every aspect of life for a Palestinian citizen of Israel. What this means, in effect, is that if the goddess of justice's blindfold is stripped away, a rather disturbing reality is brought into view: Israel, to sustain its identity as a Jewish state, has been forced to hollow out the actual experience of democracy when it comes to the Palestinians living within the country. Note that Masri's critique does not extend to the cruder uses of law in the occupation of the West Bank and East Jerusalem, or to the Israeli arguments about their legal right to use massive force against the Gazan population at times and intensities of their choice.

Masri has written an admirably scholarly account of the way Israeli legal thought and governmental institutions have produced this outcome internal to Israel. He usefully labels the phenomenon "exclusionary constitutionalism." This emphasis on constitutional foundational verities of Israel is important and persuasive, and is most authoritatively set forth in the Declaration of the Establishment of the State of Israel (14 May 1948), which not only prefigures the Jewish/democratic *problematique* that is the concern of Masri, but also helps us understand that an apartheid future for Israel seemed inevitable from the moment of its inception as a state. As Masri notes, "the logic of elimination" (p. 125) virtually compels a settler-colonial political community, which aspires to achieve sovereign statehood and international legitimacy, to suppress any resistance challenge mounted by the natives. Although the point is not directly made, I finished Masri's book with the realization that from its Zionist origins in the late nineteenth century the goal of a Jewish state *in Palestine* could never be credibly reconciled with achieving a democracy based on the substantive equality of its citizens, if their ethnicity were to be disregarded. An ethnocracy was within the realm of the attainable, and that is what Israel always has been from the day of its establishment, however much elaborate legal cosmetics were applied to hide the blemishes.

Masri's contribution extends beyond its immediate relevance to the Palestinian experience in Israel. It offers a frightening template for how law can serve the purposes of injustice if deployed even by individuals endowed with subjectivities of goodwill yet pursued for the sake of unworthy goals. In this regard, the creativity of the jurist becomes the subservient handmaiden of an oppressive state, and in this case assists in the dirty work of fashioning an apartheid state. Of course, the problems of the Palestinian minority are but the tip of the bloodied iceberg of Israeli subjugation of the Palestinian people *as a whole*, an apartheid structure of ethnic victimization that extends to those living under occupation, in refugee camps and involuntary exile, as well as Gazan captivity. In effect, the torments of Palestinians in Israel, which Masri so usefully depicts, is a relatively small piece in the larger Israeli matrix of control that comprises the overall Palestinian ordeal.

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