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Israeli flag.(Photo by: REUTERS)

The case for Israel's Jewish state law

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Passing this new basic law was necessary because of the judicial activism of Israel's High Court of Justice in the past two decades.

After 70 years of independence, Israel still lacks a written constitution. This is an anomaly, but not one that is going to be remedied any time soon because of unbridgeable gaps between Israel's political parties. Constitutions are the cornerstone of democracies; they define the identity and purpose of the state; they determine the powers of the three branches of government; and they protect individual rights. Israel has "basic laws" that determine the powers of the three branches of government (such as Basic Law: The Knesset) and that protect individual rights (such as Basic Law: Human Dignity and Freedom), but not a basic law that defines the identity and purpose of the state. Basic Law: Israel Nation-State of the Jewish People was passed to fill that void.

To some, filling this legal void was unnecessary since Israel is de facto a nation-state and since its Declaration of the Establishment of the State of Israel does define the identity of the country ("We hereby declare the establishment of a Jewish state") and its purpose (the national independence of the Jewish people). In fact, passing this new basic law was necessary because of the judicial activism of Israel's High Court of Justice in the past two decades.

In 1992, the Knesset passed two basic laws: one on "human dignity and freedom" and one on "freedom of occupation." Justice Aharon Barak (who presided the Supreme Court between 1995 and 2006) proclaimed a "constitutional revolution" after the passing of those two basic laws. What Barak meant was that the High Court of Justice could now strike down laws passed by the Knesset if deemed "unconstitutional" (i.e. incompatible with the two new basic laws). Nowhere in the basic law does it say that the court is entitled to use them to strike down regular legislation. Yet Barak unilaterally granted that power to the court in a 1995 ruling.

The "constitutional revolution" has affected Israel's identity as a nation-state. The basic law on "human dignity and freedom" states that Israel is a "Jewish and democratic state." But what happens when Jewish and democratic values conflict? No problem, Barak wrote in 1992: In case of a conflict, the word "Jewish" shall be interpreted by the court "with the highest level of abstraction." In other words, it shall be ignored. Theoretically, the court could use in its rulings Israel's Declaration of Independence, which defines Israel is a Jewish state. Yet the court itself ruled in 1948 that the Declaration of Independence has no constitutional value.

THE COURT'S activism, combined with the "highest level of abstraction" with which Barak interpreted Israel's Jewishness, were soon to be felt. The court ruled that a Jew cannot purchase a plot of land in a Bedouin village (Avitan case, 1989), but that an Arab can build a house in a village established by the Jewish Agency (Ka'adan case, 2000). The court was petitioned twice by NGOs (in 2006 and in 2012) to cancel Israel's citizenship law so as to impose on Israel the Palestinian "right of return" through the back door via fictitious marriages. Though the court rejected both petitions, it did so with a razor-thin majority of six to five.

Other laws and symbols related to Israel's Jewish identity are not immune from petitions at the High Court of Justice. The "law of return" (which grants automatic immigration rights to Jews) might one day be struck down for being discriminatory; Israel's national anthem (which expresses the Jews' two-millennia faithfulness to their land) and flag (which only has a Jewish symbol) could be challenged in court for ignoring the feelings of the Arab minority; and taxpayers could petition the court against the spending of their money on the preservation of Jewish identity in the Diaspora. Until the passing of the basic law on Israel as a nation-state, the court had no constitutional basis to reject such petitions and to protect Israel's Jewishness. Now it does.

Opponents to the law claim that declaring Hebrew the country's official language, while granting Arabic a "special status," affects the rights of the Arab minority. Would they say the same of the French constitution, which establishes that "The language of the Republic is French" (Article 2) while only recognizing "regional languages" as belonging to the "patrimony of France" (Article 75-1)? Being a nation-state is compatible with the civic equality of minorities. Israel is no exception in that regard.

The right to national self-determination was recognized as a universal one by the League of Nations after World War One. The Jews are entitled to that right like any other nation. Unlike the United-States and Canada, but like most countries in the world (including in Europe), Israel is a nation-state. Yet the Jews' right to self-determination is still being challenged both internationally and domestically. Thanks to the nation-state basic law, Israel's Jewishness is no longer assailable at home.

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