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aharon barak.(Photo by: MARC ISRAEL SELLEM)

No, Aharon Barak does not oppose Israel's Nation-State Law

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Israel's Nation-State Law was legislated as a response to the "constitutional revolution" proclaimed by former Chief Justice Aharon Barak in 1992. Barak's "revolution" included the profound changes he introduced in constitutional law by declaring that no issue is beyond the reach of the High Court of Justice ("Everything is justiciable") and by letting anyone petition the Court (no more locus standi); by ruling that the Court is entitled to repeal laws deemed incompatible with basic laws; by turning the advice of the Attorney General into binding decisions; and by specifying that in case of tension between Israel's Jewish and democratic values, the state's Jewishness should be interpreted "with the highest level of abstraction."

Since anyone may now petition the Court on anything, and since Israel's Jewishness has been declared to be an abstract matter, the legal basis for Israel being a nation-state can potentially be challenged in Court via petitions by people or organizations which reject Israel's Jewish national identity. The Nation-State Law was legislated precisely to provide the Court with the legal basis to reject such petitions.

Many oppose the law altogether and want it repealed. Yet not all critics of the law oppose it per se. Some recognize that the law constitutes an important addition to Israel's incomplete set of constitutional laws, and that it is similar in substance to most European constitutions. However, they take issue with the fact that the law reserves the right to national self-determination in Israel to the Jews but does not specifically state that all citizens enjoy equal civic rights. Indeed, most European constitutions include both elements: national self-determination for the majority nation only; equal civic rights for all.

It turns out that this is the position of Aharon Barak. On December 17, 2018, Barak publicly stated, for the first time, his stand on the law (at an event hosted by the Herzliya Interdisciplinary Center). "This is an important law" Barak said. To the surprise of many, Barak declared that he does not have an issue with the law, including with Article 1c (which states that "the implementation of the right to national self-determination in the State of Israel is exclusive to the Jewish people").

Barak said of this article: "I have no issue with this" and added that he supports the idea that Israel is the nation-state of the Jewish people.

Barak drew a distinction between national rights and civic rights: “The recognition of the minority rights of Israel’s Arab citizens does not grant them a national right to self-determination within the State of Israel. They are a minority whose identity and culture must be protected, but if they want to realize their right to national self-determination they can only do it in a state of their own, not in Israel.”

Yet precisely because Barak agrees that it is legitimate to reserve the right to national self-determination to the majority nation, he insists that civic equality must be made explicit. Barak is willing to accept the argument that the principle of equality does not belong in the Nation-State Law, but then this principle should be made explicit in the 1992 basic law on human dignity and freedom. This law does not include the word equality either, and it does not make it explicit that all citizens enjoy equal civic rights regardless of the national or religious affiliation. Hence does Barak suggest that the 1992 basic law on human dignity and freedom be amended to make the principle of civic equality explicit.

Barak’s suggestion is reasonable and fair, though its implementation should wait until further constitutional legislation defines the limits of Barak’s unilaterally declared revolution. By granting constitutional status both to the exclusive Jewish right to national self-determination (which the Nation-State Law does) and to the civic equality between all citizens (which can be made explicit by amending the basic law on human dignity and freedom), Israel would translate into law two basic principles of its Declaration of Independence. In any case, Barak’s stand on the Nation-State Law is a far cry from the claims made by the law’s most vocal opponents.

If the father of Israel’s “constitutional revolution” says he has no issue with Israel’s Nation-State Law but only wants to amend another basic law so as to grant constitutional status to civic equality, surely those in Israel and abroad who want the law repealed must be missing something. They are not only more royalist than the king; they are more judgmental than the judge.

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