Israel's Nation-State Law

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Abstract

The nation-state law constitutes a necessary addition to Israel's incomplete set of basic laws because Israel's quasi-constitution was lacking the equivalent of a preamble and because Israel's "constitutional revolution" threatened to undermine the laws and symbols that make Israel a nation-state. The law is no different in its scope and content to the constitutional provisions of most European countries. The fact that the law does not include the principle of civic equality can be remedied by adding this principle (already enshrined by Israeli jurisprudence) to the basic law on human dignity and freedom. The purpose of this chapter is to explain the rationale of the nation-state law; to examine its origin, scope, and content; and to discuss the controversy around it.

Keywords

Nation state law · Constitutional revolution · Judicial activism · Basic Laws

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1 Introduction

Seven decades after its independence, Israel still lacks a written constitution. This is an anomaly, but not one that will 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, determine the powers of the three branches of government, and 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 it did not have a basic law defining the identity and purpose of the state until the passing of Basic Law: Israel Nation-State of the Jewish People (hereafter: "nation-state law") in 2018.

To some, filling this legal void was unnecessary since Israel is de facto a nation-state as its Declaration of Independence 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). Others claim that the nation-state law discriminates against non-Jews and should, therefore, be amended or repealed altogether.

The significance of the nation-state law cannot be understood outside the context of judicial activism, hence the necessity to analyze the law in light of Israel's "constitutional revolution." To that end, the present chapter shall: a. argue that the nation-state law is a by-product of Israel's "constitutional revolution"; b. explain the origin, scope, and content of the law; and c. discuss the controversy around the law.

2 A By-Product of Israel's "Constitutional Revolution"

Israel's prestate Jewish population (or *Yishuv*) was made up of the "old Yishuv" (i.e., the small number of Jews who had remained in the Land of Israel since the exile imposed by the Roman Empire in 70 AD) and the "new Yishuv" (i.e., Jews mostly from eastern Europe, Russia, and Yemen, who had immigrated to the Land of Israel in the nineteenth century). While the first waves of immigration (*Aliyah*) from 1881 onward were mostly composed of Eastern European and Yemenite Jews, the fifth *Aliyah* (1930–1939) included many German Jews fleeing Nazi Germany. Thus, the country's economic infrastructure and political institutions were mostly built by Eastern European and Russian Jews, while German Jews formed the bulk of the country's intellectual elite.

Both Russian and German Jews were mostly secular, but the former oscillated between nationalism and socialism, while the latter tended to be staunchly liberal. German émigrés founded the liberal *Ha'aretz* newspaper and became key figures at the Hebrew University as well as at the Supreme Court. Both Israel's first justice minister, Pinhas Rozen, and first president of the Supreme Court, Moshe Smoira, were *Yekim* (the vernacular Hebrew word for German Jews).

Even though the *Yekim* dominated academia and the judiciary, and even though they considered themselves "the enlightened ones," the Supreme Court did respect the principle of the separation of powers during the first decades of Israel's

independence. For example, the High Court of Justice (HCJ) was petitioned in 1969 by an aspiring politician who claimed that the law on political parties was unfair because it did not enable new political parties to obtain state funding. In its decision, the Court agreed that the law was indeed unfair and discriminating, but it ruled that there was nothing it could do. Only the Knesset, the judges wrote in their ruling, had the legislative power to pass a new law and the Court could not infringe upon that power (HCJ, *Bergman* vs. *Finance Minister*).

The HCJ also used to be of the opinion that not everything is justiciable and, therefore, that the Court should not be asked to get involved in political matters. When Israel established diplomatic relations with the Federal Republic of Germany in 1965, for instance, the Court was petitioned to prevent the appointment of the first German ambassador, who had been an officer in the Wehrmacht. The Court dismissed the petitioners and explained that "The Government decided what it decided. The Knesset endorsed the government's decision. The considerations were not legal ones, but matters of foreign policy and of the suitability of the designated ambassador. The Court is not entitled to get involved in those matters" (HCJ, *Reiner* vs. *Prime Minister*).

This traditional stance of the Court changed under the influences of Justices Meir Shamgar and Aharon Barak (Friedmann 2013, 27). Barak served as justice at the Supreme Court between 1978 and 1995 and as the Court's president between 1995 and 2006. In 1992, Barak proclaimed a "constitutional revolution" based on two basic laws passed that same year: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation (Barak 1992, 9).

When passing those two bills, the Knesset did not intend to grant the Court the power to nullify regular laws that contradict basic laws (Bell 2020, 244). Indeed, Aharon Barak was criticized for unilaterally declaring a "constitutional revolution" that had not been intended by the Knesset. Former justice Moshe Landau declared that "this would be the first constitution in history produced by a mere declaration from the court" (Friedmann 2013, 80), and former Knesset member Michael Eitan quipped that "this is the first revolution in history that happened without the people's knowledge" (Friedmann 2013, 80).

Barak's proclamation of a "constitutional revolution" had been preceded by steps that enabled this revolution. In 1988, Barak had in effect canceled the principle of *locus standi* – that is, the requirement, also known as "standing," that a petitioner must prove that he is directly affected by the government decision or law against which he is petitioning the Court (HCJ, *Ressler* vs. *Minister of Defense*). Back in 1970, the High Court of Justice had established the precedent for standing when it rejected a petition about the drafting of ultra-orthodox Jews to the army, arguing that the petitioner was not directly and personally affected by the military service exemption enjoyed by *yeshiva* (Talmudic academy) students, and therefore, that he had no standing (HCJ, *Becker* vs. *Minister of Defense*). In 1988, Barak ruled otherwise in a petition submitted on the same issue and standing, he decided, was no longer required.

Hence, Barak opened the gates of the High Court of Justice to everyone. However, the fact that the Court could now be petitioned by anyone did not mean

that it could be petitioned for everything. Barak changed this too by expanding justiciability in the 1988 *Ressler* ruling. While in the past the Court had declared that it could not interfere with political issues (such as the government's decision to accept the credentials of a German ambassador, for instance), Barak declared that, from now on, nothing would be beyond the Court's reach.

Yet how could the Court interfere with government decisions that were clearly not illegal? For a government decision to be challenged in court, it must be potentially illegal. Barak solved that problem too, by declaring that the Court could interfere not only based on the alleged illegality of a government decision but also based on its alleged "unreasonableness" (HCJ, *Eisenberg* vs. *Minister of Construction and Housing*). Citizens are now entitled to petition the Court not only if they are convinced that a government decision is illegal, but also if they feel that the decision is "unreasonable."

Not only did Barak unilaterally extend the powers of the Court, but he also extended the powers of the attorney general. In 1962, the Agranat Commission had determined what the powers of the attorney general should be. The report of the commission concluded that while the government should take into account the opinion of the attorney general, his opinion was not binding (Friedmann 2013, 56). Barak decided otherwise, however, and ruled in 1987 that the attorney general's opinion is binding (HCJ, *Laor* vs. *The Council for the Review of Movies and Spectacles*).

The four elements of Barak's constitutional revolution – canceling standing, making everything justiciable, adding the concept of "unreasonableness" to judicial review, and making the opinions of the attorney general legally binding – became fully palpable in the ruling on Raphael Pinhassi of 1993 (HCJ, *Amitai* vs. *Prime Minister*). Pinhassi was a cabinet member under Prime Minister Yitzhak Rabin who had been indicted for financial wrongdoings. According to the law, only convicted ministers must resign in such circumstances. Pinhassi had not been convicted yet (his trial had not even begun), and Prime Minister Rabin did not want to fire him. But some Israeli politicians and NGOs decided that Pinhassi should be fired anyway. Since there was no standing requirement anymore, those NGOs were able to petition the Court. By law, Pinhassi did not have to resign, and the prime minister did not have to fire him, so there was nothing illegal with keeping him in his job. But the petitioners claimed that it was "unreasonable" for Pinhassi to stay (Friedmann 2013, 172). The prime minister's opinion was that Pinhassi should neither resign nor be fired, but the attorney general thought otherwise.

In his ruling, Aharon Barak made full use of his new arsenal. The NGOs that petitioned the Court were now entitled to do so even without having to prove that they would suffer some direct and irreparable damage were Pinhassi to keep his job. There was nothing illegal in the prime minister's decision not to fire Pinhassi, but Barak ruled that it was "unreasonable" (Friedmann 2013, 172). As for the prime minister's position that Pinhassi should keep his job, Barak ruled that it did not matter, since only the attorney-general's binding opinion should be taken into account in Court, not the personal (and irrelevant) opinion of the prime minister.

Barak went a step further in his 1995 *Bank Mizrahi* ruling (CA, *United Mizrahi Bank Ltd.* vs. *Migdal Cooperative Village*) by declaring that the HCJ was entitled to

nullify laws deemed inconsistent with basic laws. In this milestone ruling, Barak claimed that Israel's basic laws have a constitutional status. Therefore, the Court can strike down ordinary laws even though the law itself does not grant the Court such power. Barak justified this new constitutional theory (and practice) by what he called a "democracy of values" or "substantial democracy" – concepts which only the Court can detect in the ether (Bell 2020, 244).

The Court's judicial activism and new doctrines had far-reaching consequences on the separation of powers. The Court struck down five laws between 1992 and 2006, and 15 between 2006 and 2019 (Bell 2020, 245). In recent years, the Court has ruled on matters that it would have deemed outside its realm in the pre-Barak years. In 2009, for example, the Court ruled (having been petitioned by law students) that the Knesset lacked the authority to allow the pilot operation of a prison managed by a private company (HCJ, *Academic Center of Law and Business* vs. *Minister of Finance*). In 2017, the Court blocked an amendment to a law mandating a property tax, arguing that the legislature had not sufficiently debated the merits of such a tax (HCJ, *Quintinsky* vs. *Knesset*).

This extreme form of activism has opened a Pandora's Box by enabling individuals and NGOs to challenge legislation and government decisions, including those pertaining to Israel's very identity as a Jewish nation-state. In 2000, for example, the High Court of Justice ruled in the *Ka'adan* case that Arab citizens should be allowed to purchase a plot on land bought by the Jewish Agency with the specific purpose of settling Jews in Israel (HCJ, *Ka'adan* vs. *Israel Lands Authority*). On the face of it, the Court's ruling looked like an antidiscriminatory measure favoring equal civil rights, even at the expense of the Jewish Agency's commitment to its donors. Yet the very same Court had ruled in the 1989 *Avitan* case that a Jew should not be allowed to purchase a plot of land in a Bedouin village (HCJ, *Avitan* vs. *Israel Lands Authority*).

Likewise, the High Court of Justice was petitioned twice, in 2006 and in 2012, to cancel Israel's citizenship law because the law prevents family reunification between Israeli Arabs and Arabs from the West Bank. The true motive of the petitioners, however, was to impose upon Israel, via the back door, the Palestinian "right of return" by way of fictitious marriages (Eisenman 2018, 13). The High Court rejected the petition on both occasions, but with a very short majority. Had the petition been accepted, Israel's demographic makeup would have been dramatically transformed. On the other hand, the Court stroke down on four occasions government decisions and measures meant to restrain and discourage mass illegal immigration from Sudan and Eritrea (HCJ, *Adam* vs. *Knesset*; HCJ, *Eitan* vs. *Government of Israel*; HCJ, *Desta* vs. *Knesset*; HCJ, *Garsegeber* vs. *Knesset*).

Israel's self-definition as a Jewish state can therefore be challenged via the High Court of Justice as a result of the constitutional revolution. Although Israel did define itself as a Jewish state in its Declaration of Independence, the legal status of the Declaration of Independence is that of a declaratory document with no constitutional value according to the High Court of Justice (HCJ, *Ziv* vs. *Governik*). As a result, Israel was a Jewish state de facto but not de jure, and the nation-state law was passed in 2018 to fill this lacuna.

Instead of a constitution, Israel passed basic laws defining the powers of the three branches of government (such as the Knesset law) and protecting human rights (such as the Human Dignity and Liberty law). No basic law, however, defined the state's Jewish identity until the 2018 nation-state law. The consequence of this legal void was that the laws, policies, and practices that characterize Israel as a Jewish state could be challenged in Court thanks to the constitutional revolution. The nation-state law was conceived precisely to grant the High Court of Justice the constitutional justification for rejecting petitions meant to challenge or undo the constitutive elements of Israel's identity as the nation-state of the Jewish people.

3 The Origin, Scope, and Content of the Nation-State Law

In 2003, the Knesset's "Constitution, Law and Justice Commission" (the Knesset commission in charge of drafting and approving basic laws) initiated a process meant to draft and approve a written constitution. Among the think tanks consulted by the commission were the Israel Democracy Institute (IDI) and the Institute for Zionist Strategies (IZS), both of which submitted their own draft constitution in 2006. The IDI draft enshrined the Supreme Court's new powers, while the IZS draft sought to restrain the Court's overreach (Bell 2020, 246). However, both drafts were comprehensive and included clauses on national identity, separation of powers, and personal freedoms. Both had a preamble that listed "basic principles" as most constitutions do. The preamble of the IDI's draft granted constitutional status to Israel's flag, national anthem, state insignia, the Hebrew language, Jewish holidays, Jerusalem being the capital of Israel, and to the Law of Return. The IZS draft would also have constitutionalized the state's national identity. Incidentally, the nation-state law does just that. Why, then, was it adopted separately and not as part of a constitution?

The answer to this question is that the constitution on which the Knesset's "Constitution, Law and Justice Commission" had been working since 2003 was never adopted. Once it became clear that the constitution project was going to be shelved, turning the drafts' preamble into a basic law became the only realistic way of completing Israel's constitutional patchwork. Hence, the nation-state law was first submitted as a bill in the Knesset in August 2011. The bill was submitted by forty Members of Knesset from seven political parties representing the left (Labor and Independence), the center (Kadima), and the right (Likud, National Union, Jewish Home, and Israel Beitenu). Then Kadima Chair Tzipi Livni, who had originally endorsed the bill with a minor reservation, subsequently withdrew her support ahead of the 2012 elections for the leadership of Kadima because one of her contenders, Avi Dichter, had taken upon himself to promote and pass the bill. Most Kadima MKs backtracked under Livni's pressure, thus dooming the bill's prospects. The bill was eventually submitted again in 2018, and the Knesset approved it this time with a 62–55 majority (Bell 2020, 248).

The nation-state law completes Israel's de facto constitution (i.e., its corpus of basic laws). Constitutions generally codify three principles: a. the purpose and identity of the state; b. the separation of powers; and c. the fundamental rights of

citizens. Israel already has basic laws that define the separation of powers (such as Basic law: The Knesset) and that protect fundamental rights (such as Basic law: Human Dignity and Freedom). Israel did not have a basic law on the state's purpose and identity until the 2018 nation-state law. The nation-state law does what most European constitutions do: it specifies that the right to self-determination belongs to the majority nation; it describes the flag; and it codifies the country's official language, national anthem, and national holidays. The nation-state law does not replace other basic laws but completes them. It is not a constitution but an addition to an incomplete set of basic laws.

Up until the passing of the 2018 nation-state law, laws and symbols related to Israel's Jewish identity were not immune from petitions at the High Court of Justice. The Law of Return (which grants automatic immigration rights to Jews) could be challenged for being discriminatory; so could Israel's national anthem (which expresses the Jews' two-millennia faithfulness to their land) and flag (which only has a Jewish symbol) for ignoring the feelings of the Arab minority; and non-Jewish 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 nation-state law, the Court had no constitutional basis for rejecting such petitions. The nation-state law grants a constitutional status to the 1950 Law of Return, which offers an automatic immigration right to Jews. The Law of Return was motivated by humanitarian considerations to grant a safe haven to persecuted Jews. It has not lost its relevance, nor does it deny non-Jews the right to apply for immigration to Israel.

The nation-state law officializes Israel's responsibilities toward the Diaspora Jews regardless of their religious affiliation or lack thereof. Article 6 of the law says the following:

(a) The state shall strive to ensure the safety of members of the Jewish people and of its citizens, who are in trouble and in captivity, due to their Jewishness or due to their citizenship;
(b) The state shall act, in the Diaspora, to preserve the ties between the state and members of the Jewish people; (and)
(c) The state shall act to preserve the cultural, historical and religious heritage of the Jewish people among Jews in the Diaspora.

Israel's ultra-orthodox legislators had strong reservations about Article 6 because it includes Jews or all Jewish religious denominations. Article 6 (c) implies that the State of Israel shall share the cost of Jewish education in the Diaspora, with no distinction between the Orthodox, Conservative, and Reform streams of Judaism. Ultra-orthodox Knesset members opposed that clause because they did not want their taxpayer money to go to Reform or Conservative Jews in America whom they accuse of overlooking Jewish law. The article was approved nevertheless.

Article 6 of the nation-state law is consistent with similar provisions in the constitutions of other Western democracies. The Constitution of Slovenia states that Slovenia "shall maintain concern for the autochthonous Slovene national minorities in neighboring countries and for Slovene emigrants and workers abroad and

shall foster their contacts with the homeland" (Article 5). The Greek Constitution says that "The State must care for emigrant Greeks and the maintenance of their ties with the Fatherland" and must care for "all communities of Hellenes abroad" (Article 108). The constitution of Hungary has similar provisions for ethnic Hungarians who live outside of the country (Article D).

The nation-state law recognizes Israel's minorities the right to rest on their religious and/or national holidays and days of rest (Article 10). It makes Hebrew the official language and grants "special status" to the Arabic language (Article 4). The Arabic language was not "downgraded" by the law. Before the nation-state law, the status of the Arabic language was ambiguous. The British authorities had made English, Arabic, and Hebrew the three official languages of the Mandate. This British ruling was never officially repealed after Israel's independence, but it was modified by subsequent legislation and jurisprudence. Israeli law makes the use of Hebrew mandatory and the use of Arabic optional on election ballots (Bakshi 2011, 13). The High Court of Justice rejected a petition in 2002 that demanded the publication of its ruling in Arabic (Bakshi 2011, 31). There are two official languages in binational and federated countries, such as Canada (English and French) and Belgium (French and Flemish), but Israel does not belong to that category. Israel is a nation-state with a significant Arab minority, and the language of that minority was granted a "special status" by the nation-state law.

The right to national self-determination is a cardinal principle in international law. 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.

4 The Controversy Around the Nation-State Law

Israel's Declaration of Independence grants the right to national self-determination within the State of Israel only to the Jewish people, but it also grants equal civic rights to all citizens regardless of their ethnic or religious identity. The Declaration states that Israel shall "guarantee completely equal political and social rights to all its citizens regardless of their religion, race, or sex." For instance, the Druze are equal citizens and partners in Israel's society and future like other Israeli citizens. They enjoy all the civic rights granted by the state. Yet, they do not have a right to national and territorial self-determination within the borders of the State of Israel. They cannot, for example, declare an independent state in the Golan Heights, annexed by Israel in 1981. The same restrictions exist in other democratic nation-states. The Catalans and the Basques are equal citizens of the Spanish kingdom, but they are constitutionally barred from declaring their national independence. Likewise, the Corsicans are equal citizens of the French Republic, but they do not have a right to national self-determination under the French Constitution.

The principles of exclusive national self-determination and of equal civic rights are not incompatible. Israel's flag only has a Jewish symbol; Israel's national anthem sings the Jewish longing for Zion; Israel's Law of Return privileges Jewish

immigration; the Bedouins cannot declare national independence in the Negev desert, nor can the Arabs in the Galilee. Yet all citizens of Israel can vote and be elected to the Knesset; they can all become judges at the Supreme Court; and all are eligible for the same social benefits. Indeed, there are Arab members of Knesset as well as Arab Supreme Court justices, and there has been a Druze minister in the government. All citizens receive the same benefits from the National Insurance Institute, whether they are Jewish, Arab, Muslim, Christian, etc.

Israel is not alone in being altogether a nation-state and a democracy. Most European countries are. No less than *seventeen* members of the European Union (EU) have a constitution that proclaims sovereignty in the name of the country's majority nation: Austria, Bulgaria, Croatia, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and Spain. *Twenty* European constitutions describe the country's flag (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain). *Twelve* European countries have a cross on their flag (Denmark, Finland, Greece, Iceland, Malta, Moldova, Norway, Serbia, Slovakia, Sweden, Switzerland, and the UK). *Sixteen* European constitutions specify that the country has one (and only one) official language (Austria, Bulgaria, Croatia, Cyprus, Estonia, France, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain). *Thirteen* European constitutions codify their national anthem (Bulgaria, Croatia, Czech Republic, Estonia, France, Hungary, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, and Slovenia).

Among EU member states, some have constitutions that are explicit about the right to national self-determination. The Latvian constitution invokes the "unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries" (Preamble)**.** Similarly, the Slovak constitution opens with the words "We the Slovak nation," and it underlines "the natural right of nations to self-determination" (Preamble)**.** Likewise, the Slovenian Constitution proclaims the "inalienable right of the Slovenian nation to self-determination" (Preamble). These European constitutions distinguish between nation and citizenship. All citizens are equal before the law, but not all citizens belong to the nation in whose name the nation-state proclaimed its independence. The Latvian constitution was proclaimed in the name of the "Latvian nation," but it does not infringe upon the civil rights of non-Latvian citizens such as Russians (who constitute nearly one-third of Latvia's population). The same is true of Israel's nation-state law: it grants the right to self-determination to the Jewish majority without infringing upon the civil rights of the country's minorities.

Unlike many European constitutions, Israel's nation-state law does not establish an official religion. By comparison, Lutheranism is the official religion of Denmark, Finland, Iceland, and Norway; Greek orthodoxy is the official religion of Greece; and Catholicism is the official religion of Malta.

Israel's Declaration of Independence never once uses the word "democracy." Basic Law: Human Dignity and Freedom never once uses the word "equality." One

wonders why the absence of those words arouse concern only when it comes to the nation-state law. The principle of equality before the law is enshrined in the jurisprudence of Israel's High Court of Justice (HCJ, *Yekutieli* vs. *Minister of Religious affairs*; HCJ, *The Movement for Quality of Government in Israel* vs. *The Knesset*), and it is neither undermined nor diminished by the nation-state law. The nation-state law grants constitutional status to the Jewish right to national self-determination proclaimed by Israel's Declaration of Independence. Doing so was necessary because the High Court of Justice ruled back in 1948 that the Declaration of Independence does not have the status of a law or of a constitution (HCJ, *Ziv* vs. *Govermik*).

Basic Law: Human Dignity and Freedom states that Israel is a "Jewish and democratic state." Since one of the characteristics of a nation-state (including of a Jewish nation-state) is to grant preferential rights to the majority nation (in terms of national self-determination and of immigration rights, for example), there are potential contradictions between the two constitutive elements (Jewish and democratic) of the abovementioned basic law. Justice Aharon Barak addressed this issue in a public lecture he delivered at Haifa University in May 1992. In case of a conflict between "Jewish" and "democratic," Barak said, the word "Jewish" shall be interpreted by the court "on a high level of abstraction . . . so high until it becomes identical to the democratic nature of the state" (Barak 1992). The nation-state law enables the Court to lower this "level of abstraction."

Many in Israel and in the Diaspora oppose the law altogether and want it repealed or at least amended (Kontorovich 2020, 138). 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 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.

Accepting the legitimacy of the law while calling for an amendment that would make the principle of civic equality explicit happens to be Aharon Barak's position. On December 17, 2018, Barak made his opinion public on the nation-state law at an event hosted by the Interdisciplinary Center Herzliya (IDC). "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 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 (IDC 2018).

Barak distinguished between national rights and civil 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" (IDC 2018). Yet precisely because Barak agrees that it is legitimate to reserve the right to national

self-determination to the majority nation, he insists that civil 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 national or religious affiliation. Barak suggests 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 quality 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.

One of the principles of Israel's "constitutional revolution" was that the country's basic laws collectively form a de facto constitution and that the High Court of Justice can strike down regular laws it deems incompatible with basic laws. Since the nation-state law is a basic law, it joined the pantheon of the constitution proclaimed by Israel's High Court of Justice. Or so it was assumed until the Court was petitioned in 2020 to repeal or amend the nation-state law. Based on the 1995 precedent of the *Mizrahi* ruling and of the Court's own doctrine that its authority to strike down regular laws stems from the constitutional status of basic laws (CA, *United Mizrahi Bank Ltd.* vs. *Migdal Cooperative Village*), the Court should have dismissed the petition against the nation-state law out-of-hand. It did not. In July 2021 the Court rejected the petition, but it had already created a new precedent and contradicted its own doctrine by not throwing-out the petition against a basic law. By not declaring upfront that basic laws are beyond judicial review, the Court went a step further in asserting judicial supremacy over the legislative branch.

The Court's willingness to consider the nullification of a basic law is tantamount to a second constitutional revolution. Completing the 1995 revolution with a second one is precisely what some Israeli legal scholars have in mind. In an article published in May 2020, Prof. Barak Medina made a case for placing the Court above the constitution. Medina claims that there are some "constitutional norms" as well as "basic norms" and "fundamental principles" that are above the constitution. Those norms and principles, according to Medina, must be determined by judges and legal scholars and enforced by the courts. Hence, there is no problem striking down basic laws if the Court deems them incompatible with the "basic norms" and "fundamental principles" which the Court itself decrees. Medina explicitly refers to the 1995 *Mizrahi* ruling as a first step with must now be completed by placing the High Court above the basic laws themselves (Medina 2020).

Medina's constitutional theory would, in effect, replace the separation of powers with a hierarchy of powers in which the judiciary would be above the legislature. Its implementation would also further exacerbate the social and political tensions which the Court unleashed with its "constitutional revolution." The "second constitutional

revolution" called for by Barak Medina would expropriate the legislature and give judges the last word on political and ideological contentions.

Rather, the controversy around the nation-state law should serve as an opportunity to reach a national understanding of the scope and limits of judicial review and translate this understanding into a basic law that shall define and formalize the separation of powers in Israel. Reaching such an understating is a matter of national interest. It would also be the ultimate tribute to the late Professor Ruth Gavison, the widely respected legal scholar who passed away in August 2020.

5 Conclusion

The nation-state law constitutes a necessary addition to Israel's incomplete set of basic laws because Israel's quasi-constitution was lacking the equivalent of a preamble and because the "constitutional revolution" threatened to undermine the laws and symbols that make Israel a nation-state. The law is no different in its scope and content from the constitutional provisions of most European countries. The fact that the law does not include the principle of civic equality can be remedied by adding this principle (already enshrined by Israeli jurisprudence) to the basic law on human dignity and freedom – a compromise publicly endorsed by the father of Israel's "constitutional revolution." Such compromise, however, must be accompanied by an additional basic law that would delineate the scope and limits of judicial review. The "second constitutional revolution" advocated by Barak Medina (and currently under consideration by the Court), by contrast, would undermine not only Israeli democracy but also exacerbate political and social tensions instead of healing them. If the nation-state law was a counter-revolution, Israel now needs its Tocquevillian moment.

6 Cross-References

- ▶ Arab-Jewish Divide and Arab Politics in Israel
- ▶ Basic Laws of Israel
- ▶ Coalition Politics and Government in Contemporary Israel
- ▶ Electoral Reforms in Israel
- ▶ Islamic Movement in Israel
- ▶ Israel's Arabs: Facts and Fiction
- ▶ Jewish-Arab Relations in Israel
- ▶ Judiciary in Israel
- ▶ Plurality and Containment in Israel
- ▶ The Jewish Origins of Israel's Democracy

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