Does Where You (Legally) Stand Depend On Where You Sit?

The Israeli Supreme Court's Decision on the Nation State Law

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On July 8, 2021, the Israeli Supreme Court rejected the petitions challenging Basic Law: Israel as the Nation of the Jewish People ("the Law"), enacted almost three years earlier. The 205-page decision includes the opinion of the ten judges in the majority, each of whom wrote his or her own opinion, and the single minority opinion of Justice Kara, who is the only Arab judge in the Court, and the only judge who thought that several of the Law's articles should be invalidated.

The lengthy decision discusses two intertwined questions. The first is a *doctrinal* one regarding the authority of the Court to invalidate a Basic Law, which is a constitutional norm in Israel. The second is a *substantive* question regarding the meaning and implications of the Law for Israel's non-Jewish minorities, and its compatibility with the principle of equality. While the two questions are discussed as separate, they are relational: the narrower the authority is perceived to be, the more serious the Law's harm needs to be in order to justify invalidating it, in whole or in part.

The Law and the Character of the State: Where are Democracy and Equality?

The Law was enacted on July 19th, 2018, following a heated political and public debate. It consists of a total of 11 articles. Article 1 states the land of Israel is the "historic motherland" of the Jewish people, that the state of Israel is the nation-state of the Jewish people, where they exercise their right to self-determination, and the right to self-determination in the State of Israel is exclusive to the Jewish people. Article 2 determines the state symbols. Article 3 declares "complete and united" Jerusalem to be the state's capital. Article 4 determines that Hebrew will be the state's language, and that Arabic will be awarded a "special status". Article 5 determines that the state will be open to Jewish immigration. Article 6 establishes the state's commitments to the Jewish diaspora. Article 7 declares Jewish settlement to be a "national value", and that the state will take actions to promote it. Article 8 determines that the Hebrew calendar will be the official state calendar. Article 9 states the Independence day (Yom Ha'atzmaut) is the official state holiday. Article 10 states that Memorial Day and Holocaust Day are official state memorial days. Article 11 determines that the Law can only be changed by a Basic Law accepted by a majority of the members of the Knesset.

Some of the Law's articles, in particular those regarding state symbols, flags and holidays, reinforce principles that already exist in other laws, elevating them to the status of a Basic Law. Other articles, including article 1, article 4 and article 7 introduce new terms or principles into Israel's legal scheme.

The enactment of the Law created an intense public debate. In a blogpost published shortly after the enactment of the Law, I argued that the Law's harms can be classified into three categories: potential violations of equality, violations of the right to self-determination, and undermining social solidarity in Israel. The fifteen petitions filed against the Law, discussed together, refer explicitly to violations of equality and self-determination. In addition, all petitions stress the offence caused by the Law's message, characterizing it as exclusionary and discriminatory. The petitions argue that the extent of the harm, which undermines, they claim, democracy in Israel, justifies the exceptional measure of invalidating a Basic Law.

The doctrinal questions: More than meets the eyes?

The public and political dispute in Israel regarding the Court's authority to invalidate a Basic Law has escalated in recent months. On the one hand, the *Knesset* has, in a number of controversial acts, amended Basic Laws to facilitate political goals. The Court, in response, has stated on several instances that it has the authority to invalidate a Basic Law. It made use of this authority in the recent case of *Shafir*, in which it determined that an amendment to a Basic Law that enabled carry-on of the state budget amounted to an "abuse" of the constitutive authority.

However, the Court has not yet offered a complete theory of its authority to conduct judicial review of Basic Laws, and the petitions against the Law were perceived, first and foremost, as another chapter in the ongoing story of delineating this authority.

The main point emphasized by the Court in this regard is that the fact that Israel's constitution is not yet complete is relevant to the authority to perform judicial review over it. In 1950, the *Knesset* decided that instead of adopting a full constitution, it will enact Basic Laws in an ongoing process. This process is still ongoing, the Law being the latest chapter in Israel's constitutional scheme.

The characterization of the Law as a chapter in a partial constitution that is not yet finished is central to the decision. Chief justice Hayut explained that as the process of constitutional enactment is still ongoing, the time is not ripe to adopt a doctrine regarding the constitutionality of constitutional amendments. Instead, she determined that until the enactment of Israel's constitution is complete, the Knesset, which enacts the Basic Laws, is bound only by a minimal limitation that prohibits it to change Israel's core character as "Jewish and Democratic". Hayut leaves open, however, the authority of the Court with respect to this limitation, concluding, as I will discuss, that the Law can be interpreted in a manner that does not negate this minimal core.

The notion that the Israeli constitution was a constitution "in the making" was repeated in the concurring opinions. The majority judges all perceived the enactment of the Law to be part of the constitutional enactment process and thought that the fact that the constitutional "rules of the game" are not yet entrenched demands the Court to exercise restraint in conducting judicial review of Basic Laws. While the decision recognized that in exceptional cases the Court does have the authority to invalidate a Basic Law, the majority judges all conclude that this is not such case.

Can a circle be squared? An "enabling interpretation" of the Law

Chief Justice Hayut opened her substantive analysis by asking whether the Law undermines the democratic nature of Israel to an extent that justifies invalidating it, in whole or in part. She answers in the negative. Instead, the path she chooses for upholding the Law is to adopt "an enabling interpretation" of the Law. The bulk of Hayut's opinion is dedicated to explaining and clarifying how the Law can be interpreted in a manner that is consistent with democracy and equality, as well as with the right to self-determination in international law. She stresses, for example, that the Law is "declarative" and thus has no effect on individual rights, and that the determination that the right to national self-determination in the state of Israel is "exclusive" to the Jewish people does not preclude the recognition of collective rights of "internal cultural self-determination of minorities". She further stressed that article 4 should be interpreted to perceive both Hebrew and Arabic as official languages, and that Article 7 should be interpreted, as far as possible, in a manner that is compatible with the principle of equality, entrenched in Basic Law: Human Dignity and Liberty, albeit implicitly, as part of Israel's constitution in-process.

While much judicial emphasis was dedicated to analyzing the relationship between the Law and the right to equality, the majority judges appear to underestimate the harm caused by the Law's expressive power, treating it either as secondary harm, as harm that can be mitigated by the court's statement that the Law does not necessarily violate equality, or as harm that could not be addressed in the legal arena.

For example, Justice Amit contended that the "enabling interpretation" was also "reconciling-bridg-

ing-softening". Justice Hendel, while concluding that the Law did not violate equality, stated that that the Law "erroneously casted upon too many citizens the wrong impression that they are not equal citizens", that "a humiliating message sometimes overshadows equal practical arrangements" and expressed hope that the decision will "assist in fixing this message". Justice Melcer stated that "its is desirable" the Israeli constitution recognizes the multiculturalism of Israeli society, but did not perceive it to be the Court's role to address that lack of such recognition.

Of the majority judges, Justice Barak-Erez is the only judge that addressed the Law's possible effect on social solidarity. However, she distinguishes between the legal discussion and the public discussion, and classifies that possible effect of the Law on solidarity as belonging to the latter.

The stark difference between the opinions of the ten judges of the majority and the opinion of Justice Kara, the single minority judge, is not only a difference in result – Kara determined that sections 1(c), 4, and 7 of the Law should be invalidated – but also a difference in tone. While the majority decision's tone is cautious and restraint, the minority decision is passionate and determined. Kara determined that the Law has a "bad and discriminatory tone", that it "negates the core of democratic identity" and that it "shatters the basis of the constitutional structure". He states that the law renders minorities "invisible" and negates their existence. The doctrinal discussion on the Court's authority to invalidate a Basic Law, which was prominent in the majority decisions, is relatively short in the decision of the minority. The Law was so harmful, according to Kara, that the authority to invalidate it was evident.

The discrepancy between the majority opinions, which perceive the potential harm caused by the Law as harm that can be mitigated through interpretation, and the minority opinion, which perceives the Law, in its current form, as non-redeemable, is consistent with the research that indicated that the effect of the Law is perceived differently by the Jewish majority and by minorities. While judges generally tend to present their positions as neutral, non-deriving from their personal identity, the Jewish-Arab division in this decision is striking, and Kara addresses it explicitly, quoting, in both Hebrew and Arabic, the phrase that "a hand in the water is not like a hand in the fire".

Providing a veneer of legitimacy

For those following the ongoing struggle between the Knesset and the Supreme Court, and the public debate on the limits of the Court's power to conduct judicial review, the Hasson decision is not surprising. In the context of this struggle, and considering that the Law has few operative clauses, it was unlikely to begin with that this would be the case in which the Court would exercise an authority perceived as controversial. However, while expected, the path chosen by the Court may have a negative effect on attempts to change the Law in the political sphere. Ultimately, the decision legitimizes the Law, sending the message that it "can be lived with". This message undermines and weakens the political campaign to change it. In this respect, the Hasson decision raises important questions regarding the relationship between legal and political struggles.

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