

Basic Law: Israel as the Nation State of the Jewish People

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Abstract

Basic Law: Israel as the Nation State of the Jewish People declares that Israel is the nation state of the Jewish people. It also includes several symbolic and operative provisions which are designed to strengthen the Jewish character of the state. The Basic Law purports to legally define and entrench the particular rather than universal values of Israel—the values that distinguish Israel from other nations rather than those that are shared by other nations. It anchors the Jewish identity of the state in its formal constitutional structure. My aim in this article is to present the history of the constitutional evolution of Israel and then to describe the conservative reactions to the constitutional liberalization of Israel. Then, I turn to examine the Basic Law, its provisions, and the arguments of advocates and opponents. Last, I evaluate its impact on the Israeli legal system. I shall argue that the Basic Law is part of a systematic attack on democratic liberties in Israel that may eventually transform Israel from a liberal democracy to an authoritarian democracy.

Keywords: citizenship; democracy; minority rights; nationalism; national identity

Introduction

Basic Law: Israel as the Nation State of the Jewish People declares that Israel is the nation state of the Jewish people. It also includes a number of symbolic and operative provisions that are designed to strengthen the Jewish character of the state, such as the declaration that Israel is the place for self-determination of Jews (and only Jews), the strengthening of the status of the Hebrew language, the official recognition of the name of the state, the flag, the anthem, the status of Jerusalem as the capital of Israel, the special relationship with the Jewish diaspora, Jewish holidays as the official resting days in the State, memorial days, and more. It was enacted on July 19, 2018, after a long process of deliberation in the Knesset, the government, and the public.

The Basic Law is different from previous Basic Laws. Previous Basic Laws in Israel were either designed to establish foundational institutions and define their powers or, alternatively, to protect universal rights. Although the previous Basic Laws protecting universal rights also contain references to the Jewish nature of the state, they were clearly intended primarily to promote human rights (Naot 2007). In contrast, Basic Law: Israel as the Nation State of the Jewish People purports to legally define and entrench the particular rather than universal values of Israel—the values that distinguish Israel from other nations rather than those that are shared by other nations. Therefore, it is meant to anchor the Jewish identity of the state in its formal constitutional structure.

My aim in this article is to present the history of the constitutional evolution of Israel and then to describe the conservative reactions to the constitutional liberalization of Israel (See also Barak-Eerez 1994; Navot 2007). Then, I turn to examine the Basic Law, its provisions, and the arguments of advocates and opponents. Finally, I evaluate its impact on the Israeli legal system. I shall argue that while the Basic Law has no direct or immediate effects on the Israeli legal system, it is part of a systematic attack on democratic liberties in Israel which may eventually transform Israel from a

liberal democracy into an authoritarian democracy. The Basic Law should be evaluated in light of many other legal and political developments designed to accentuate the ethnic superiority of Jews in Israel and to limit some of the traditional rights cherished by liberals.

Notably, though, theorists dispute whether Israel has ever been a liberal democracy (Smooha 2002). This claim, however, is irrelevant for this article. Evidently, Israel has some features of a liberal democracy, even if it is a defective one. Whether it has enough features to justify its characterization as a full-fledged or a defective liberal democracy is irrelevant for the purposes of this article.

The Emergence of Israeli Liberal Constitutionalism

UN resolution no. 181(II), adopted on November 29, 1947, ended the British mandate and divided the territory between Israel and Palestine, declaring that both states would draft a democratic constitution. In accordance with this decision, the Israeli Declaration of Independence pronounced that the duties of an elected constituent assembly included the drafting of a constitution.

The Declaration of Independence reflected a broad consensus of groups, such as revisionist (right-wing) parties, the labor movement, religious groups, and communists. Given this broad consensus, one could have expected that Israel, like many other newly born states at the time, would indeed draft a democratic constitution, as constitutions were used in various newly born countries to entrench the legacy of the national charismatic leaders who brought about independence.

Yet, this promise was never fulfilled and, unlike Prime Minister Jawaralal Nehru in India, Prime Minister Ben Gurion did not regard a constitution as an effective means of entrenching his legacy. Further, the state was too polarized and fragmented. So, the broad consensus reflected in the Declaration of Independence could never be replicated. Some of the religious parties were reluctant to support the drafting of a constitution because they perceived the Torah as the ultimate constitution of the Jewish people. Ben Gurion himself became more skeptical about the possibility of drafting a constitution. His pragmatic, anti-formalist sentiments led him to postpone the drafting of a constitution and instead engage in building the state—perceived to be more urgent than the former. He also opposed the idea of a supreme law which may limit the executive powers.

The proponents and opponents of drafting a constitution compromised with the Harari proposal, named after Knesset Member Yizhar Harari, on June 13, 1950. Under the Harari proposal, “The First Knesset instructs the Constitution, Law and Justice Committee to prepare a draft State Constitution. The constitution will be built chapter by chapter, in such a way that each will constitute a separate Basic Law. The chapters shall be presented to the Knesset when the committee completes its work, and all the chapters together shall comprise the Constitution of the State” (Center for Israel Education 2018).

Subsequently, the Israeli Knesset adopted a series of “Basic Laws.” Most of these Basic Laws dealt with the institutional structure of the state: the Government, the Judiciary, the President, the Knesset, and others. Only by 1992 were two Basic Laws protecting human rights enacted: Basic Law: Human Dignity and Freedom (1992) and Basic Law: Freedom of Occupation (1994). It is the enactment of these two Basic Laws that marked the beginning of the “Israeli Constitutional Revolution” (Kretzmer 1992).

These Basic Laws have two important features: first, they include a provision which states that their purpose is to establish the State of Israel as a Jewish and democratic state. The phrase “Jewish and democratic” was coined and has become a key phrase in Israel jurisprudence. Secondly, both Basic Laws include a provision which assert that there shall be no violation of the rights specified in these Basic Laws except by a law befitting the values of the State of Israel, enacted for a proper purpose and no greater than is required. This means that the Knesset ought not legislate laws which conflict with these Basic Laws.

In 1995, in a seminal decision that has been compared to the famous *Marbury v. Madison* in the USA, the Supreme Court decided that the two Basic Laws grant the judiciary the power to invalidate

statutes. In a very lengthy decision written by nine justices, Justice Aharon Barak and a few other Justices argued that by enacting the Basic Laws, the Knesset acted as a “Constituent Assembly” and therefore has the power to bind itself (*United Mizrahi Bank v. Migdal Cooperative Village* 1995). Consequently, the Supreme Court has the power to strike down laws incompatible with the two Basic Laws. Some justices used different argumentation but also concluded that the courts have the power of judicial review. While the Supreme Court eventually decided to uphold the relevant law in *United Mizrahi Bank*, the Supreme Court later used the opportunity to strike down other statutes.

Furthermore, under the leadership of President Aharon Barak, the Supreme Court adopted what is described by its opponents as an aggressive and interventionist sentiment (Barak-Erez 2009). Thus, the two human rights Basic Laws were used not only to strike down statutes but also to interpret legislation in a way that is conducive to the protection of individual rights. The Supreme Court was willing to interfere not only in the areas of human rights or public law. It also became more interventionist in its interpretation of traditional private law doctrines. Values, such as equality, liberty, and fairness, were injected into every field of the law. The Court gradually became bolder in its interpretation of existing legislation and, as a result, lost much of the public prestige it once had, especially within conservative and religious circles. The Supreme Court was perceived by many to be a sectarian player in the political stage, promoting a liberal agenda rather than acting as a neutral adjudicatory body.

What prompts particularly the rage of the opponents of the Supreme Court was the value-laden method of interpretation and the extensive use of balancing. They claimed that the Court acts arbitrarily based on its own sectarian values; it legislates, rather than applies, the law. They also argued that the Court deviated from the rights that were explicitly specified in the Basic Laws and included under the category “dignity” rights that the legislature did not intend to protect such as equality.

Political Reactions to Liberal Constitutionalism

This section analyzes reactions to the emergence of liberal constitutionalism in Israel. These reactions can be divided into three kinds: (1) a systematic effort to change the activist jurisprudence of the Supreme Court, taming it; (2) changing or transforming the substantive liberal jurisprudence of the court; and (3) extensive anti-liberal, authoritarian legislation. The Basic Law of Nation-State falls under this latter category.

The question of whether the recent changes which I analyze below are enough to transform Israel into an authoritarian state is controversial. Some scholars believe these warnings are exaggerated (Roznai 2018). Others believe that these changes represent a real danger to the Israeli liberal democracy (Brandes 2017). I believe that these developments indeed reflect deep-seated sentiments, but nothing in my analysis here hinges on this conviction. Let me therefore present each one of the institutional attempts made by conservative politicians to undermine the liberalization of the Israeli constitutional scheme.

The first method touches upon procedural adjudicatory, rather than substantive values, held by the Court. The accusation that the Court is too liberal and sectarian led many to criticize the activism of the Supreme Court (rather than its substantive liberal values) and to advocate for a more restrained court (Gavison 2006). This was done primarily by proposed legislation, most of which has not yet materialized, and by using the power of the government in the appointment of judges. There were several proposals to include a notwithstanding clause in Basic Law: Human Dignity and Liberty and to elect the President of the Supreme Court by the Knesset (rather than by seniority, as is currently the custom). The Minister of Justice Ayelet Shaked has also declared her intention to appoint judges who oppose judicial activism. In a pointed manifesto, she argued that “the people and their representatives are those who ought to express the will of the people . . . [The government] is committed to a people who seeks to determine its fate *directly* and through its representatives” (Shaked 2016).

Second, there has been a consistent effort to change the substantive values guiding the Supreme Court both by legislation and judicial appointments. Almost all of Ayelet Shaked appointees have been conservative judges, and it has been claimed that a desirable feature of her favorite candidates is not their judicial competence or excellence but their membership in the national-religious community known for its conservatism (Newman and Woolf 2017).

Last, in recent years the Knesset has legislated statutes that limit basic liberties. Anti-liberalism has been described by some as the glue holding Prime Minister Netanyahu's coalition together (Strenger 2011). The coalition has enacted the anti-boycott law, which imposes sanctions on speech that supports the boycott on Israel or settlements in the occupied territories. The "Nakba Law" authorizes the Finance Minister to reduce state funding or support to an institution if it holds an activity that rejects the existence of Israel as a "Jewish and Democratic state" or commemorates "Israel's Independence Day or the day on which the state was established as a day of mourning" (Nakba Law 2011). An amendment to the Entry To Israel Law prohibits the entry into Israel of any foreigner who makes a "public call for boycotting Israel" or "any area under its control"—a reference to the *Israeli settlements*. These are merely scattered examples, but there are many more.

The Basic Law: Nation-State law belongs to the category of authoritarian laws. Yet, as I later show, it represents an interesting case in which the anti-liberal values of the current government override its anti-activist values. While it reflects the wish to assert the Jewish self-determination in Israel as a component of the vision of the state at the expense of liberal, democratic, or universalist components, it does it in a way that grants the Supreme Court vast powers to interpret the law and hence provides a great opportunity for judicial activism. This may reflect the conviction that the composition of the court has become—or is likely to become—sufficiently conservative and therefore judicial activism could serve conservative causes.

Israel as the Nation-State of the Jewish People

The Knesset passed the Basic Law: Israel as the Nation State of the Jewish People on July 19, 2018. 62 Knesset members voted in favor of the law, while 55 voted against it. It was deliberately designed to provide a counterweight to the liberal values that characterized the constitutional revolution in the 1990's. Hence, the novelty of the law is not in the willingness to entrench the status of the state as a Jewish State. This was already done in former Basic Laws and other official documents. Its novelty is not in what it includes but in what it omits, namely, the deliberate omission of any reference to universal values, including those which have become standard, such as the key phrase "Jewish and Democratic State."

The Basic Law is declarative and expressive. Many of its provisions have been taken from existing legislation. Its proponents hope that its provisions will be used to tilt the balance toward nationalist values at the expense of civic and universal values. But this hinges upon judicial interpretation. I shall divide the discussion into two parts. I first describe the history of the law and the different provisions of the Basic Law. Then, I analyze reactions to the Basic Law and its potential effects.

History of the Basic Law and Its Content

In 2011, Chairman of the Foreign Affairs and Defense Committee Avi Dichter, from the centrist party Kadima, filed a Basic Law proposal with 39 other Knesset members: *Israel as the Nation-State of the Jewish People*, which seeks to determine the nature of the state of Israel.

The proposal included a provision guiding judges to use the Jewish Law as a source of inspiration—a guidance that already exists in a regular law and a provision that was eventually dropped from the Basic Law. At the same time, unlike the Basic Law that was eventually enacted, it included a reference to values, such as democracy, basic liberties, and justice.

The proposals to enact Basic Law: The Nation-State divided not right and left party members or Zionists and non-Zionists but liberals and anti-liberals. The more senior, older members of the

Likud party that inherited the liberal values from the founder of the revisionist movement, Ze'ev Jabotinsky, opposed the legislation, as they regarded it as eroding the liberal foundations of the state. President Rivlin (former member of the right-wing Likud party) even declared his intention to sign the enacted Basic Law in Arabic, thereby expressing his opposition to this law.

The Basic Law consists of 11 sections. Some are ceremonial and symbolic, such as the flag, the anthem, and Memorial Day. Others touch upon immigration, relations to the Jewish diaspora abroad, Jewish settlement, and related issues.

Section 1 includes basic principles. It affirms the right to Jewish national self-determination in the land of Israel. It also emphasizes (for the first time in Israeli legislation) that the right to national self-determination in the state of Israel is granted *exclusively* to the Jewish nation. This is a direct reference to proposals that recognize some degree of collective self-determination to Palestinians within the State. The section emphasizes the asymmetry of Jewish and Palestinian citizens. Under this provision, the former enjoy collective *and* individual rights, while the latter enjoy only individual rights—or, at most, limited collective rights (that are not perceived to threaten the exclusivity of the Jewish right to self-determination).

Section 2 specifies the official symbols of the state: the name of the state, the flag, the anthem, and other symbols. The symbols of the state refer exclusively to Jewish culture and history. The flag includes references to Jewish symbols; the anthem (Ha'Tikva or “The Hope”) refers to the history of the Jewish nation and the two thousand years of longing of the “Jewish soul” to the land of Israel. In the past, State Comptroller (and later a Supreme Court Justice) Miriam Ben-Porat suggested to revise the anthem in a more inclusive way by adding references to the Palestinian citizens of Israel and their culture. Section 2 contains an explicit rejection of such proposals, and it will make it much more difficult to change the anthem in the future.

Section 3 reiterates what has been already entrenched in Basic Law: Jerusalem as the Capital of Israel (1980). It reiterates the commitment to maintain the status of *unified* Jerusalem as the capital of Israel.

Section 4 was among the more controversial sections. During mandatory times, there were three formal languages in Israel: English, Hebrew, and Arabic. After the founding of the state, English was dropped, and Hebrew and Arabic were the official languages. The status of Arabic was, however, contested. For instance, in the judgment HCJ 4112/99, the court examined the decision of the municipality of Tel Aviv to use only English and Hebrew on street signs. The Supreme Court declared that this decision is illegal and forced the municipality to use Arabic as well. However, in the same judgment, the court emphasized that Hebrew and Arabic are not of equal status. The use of Arabic, especially its presence in the public sphere, is not considered to be a merely technical matter; it is perceived to touch upon the collective right to the culture of the Palestinian minority in Israel.

The disagreements concerning the status of Arabic are clearly reflected in section 4 of the Basic Law. Section 4 does not use the term “official language.” Hebrew is the language of the state, while Arabic has a “special status.” Furthermore, the law also declares that it does not detract from the status that has been given in practice to the Arabic language before the enactment of the Basic Law. This provision is clearly designed to appease some of the opponents of the Basic Law. It also implies that the new Basic Law cannot be used to change the Supreme Court's decision in HCJ 4112/99. More generally, while there is an expressive demotion of the status of Arabic here, it is not at all clear that the declaration has any immediate practical import.

Sections 5 and 6 address the relations between Israel and the Jewish people. The relations between Israel and the Jewish diaspora have been controversial. Historically, there was a movement in Israel—the Canaanites who wished to create a new Hebrew-Israeli nation which will be separate from the Jewish nation living outside of Israel. The famous poet Yonatan Ratosh published a manifesto advocating that there is no bond between Jewish people and the new Hebrew residents in Israel (Ratosh 1943). The movement has had some minor successes, but it largely disappeared from the Israeli public sphere. Sections 5 and 6 emphasize the bond among Jews inside and outside Israel and reject the Canaanite challenge. Section 5 states that Israel will be open to Jewish immigration

and section 6 speaks of the duties of Israel to act to preserve the cultural historical and religious tradition of the Jewish people in the diaspora.

Section 7 is the most contentious section in the Basic Law. At its beginning, Zionism cherished the value of Jewish settlement of the land. The Zionist ideology was partly based upon the ideal of agricultural settlements and, consequently, Zionist organizations bought much land in Israel. After Independence, remnants of the ideal of settlement remained in Israeli legislation. In particular, the Israel Land Authority leased some of its lands to Jews only, as these lands officially belonged to Jewish organizations, not to the state. In a famous decision HCJ 6698/95 (Ka'adan), which is comparable to the famous *Brown v. Board of Education*, the Supreme Court declared that the practice of excluding non-Jews from a "Jewish" settlement because they were not Jewish was illegal. Since this famous decision, there have been consistent efforts to undo it and revive the legality of taking ethnic identity into consideration when admitting families into new communal settlements. A law allowing the exclusion of families because of an alleged "threat to the social fabric" passed judicial review because it declared that exclusion based on ethnicity or religion was prohibited.

At present, section 7 does not explicitly allow separate settlements based on racial, ethnic, or religious identity, as the more extreme proponents of the Basic Law wanted. It declares, however, that Jewish settlement is a national value. The legal implications of this statement are unclear at this point and, like many other provisions of the Basic Law, hinge upon the interpretation given to this provision by the Supreme Court.

Section 8 establishes the official status of the Jewish Calendar. Section 9 dictates the official holidays and memorial days. Section 10 declares that the Jewish holidays will be the holidays in the State of Israel, but it also protects the rights of religious minorities to celebrate their own holidays. Section 11 declares that this Basic Law can be changed only by a majority of Knesset members (at least 61).

The Post-Traumatic Effects and Normative Evaluation

As expected, reactions to the Basic Law were polarized. The liberal members of the Knesset described it as an apartheid law (Lis and Landau 2018). Opposition to the Basic Law came from the left, the center, and the more liberal members of right-wing parties.

Interestingly, for the first time in the Israeli history, many eminent figures in the Druze minority, which has traditionally been very loyal to the state and whose members serve in the army, expressed outrage (Sommer 2018). As a result, even the more ardent proponents of the law raised some doubts and were considering the possibility of amending the law. The witty opponents of the law suggested that perhaps Israel ought to declare itself as a Jewish and a Druze state.

The proponents of the Basic Law argue that Israeli society has become too westernized; in particular, they argue that the legal system has become too activist and liberal at the expense of Jewish and nationalist values. Under this view, the Basic Law restores the proper balance between Jewish values and civic, universal values (Lintl and Wolfrum 2018). This is, according to its proponents, the reason why the Basic Law rightly fails to reference universal values, such as democracy, equality, or freedom.

Yet, as indicated earlier, the Basic Law represents a departure from the traditional hostility to judicial activism. The Basic Law provides the Supreme Court broad and almost limitless discretion. Furthermore, the Basic Law represents a departure from the traditional criticisms used by conservatives against the two former human rights Basic Laws: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Right-wing opponents of these laws have been criticizing the willingness to pass Basic Laws that do not reflect a broad consensus. In their view—at least when the two human rights Basic Laws were at stake—Basic Laws must pass only after a broad consensus is reached (Segev 2007). Yet, the Basic Law that is supposed to entrench Israel as a Jewish state passed by a very small margin. So, while most of the supporters of this Basic Law complain bitterly about the small margin in which the previous human rights Basic Laws were passed,

concluding that they are not sufficiently representational and therefore illegitimate, they have evidently not followed their own judicial philosophy.

This transformation can be described as resting on short term interests, hypocrisy, and intellectual dishonesty of monstrous magnitude. But it may also reflect the sense that, given the changing composition of the Supreme Court, granting power to the court can now benefit conservative ideology. In any case, it is evident that the very accusations directed against the two human rights Basic Laws by the conservatives—namely, that these laws are sectarian and do not reflect broad consensus—can now be used by the left to criticize the Basic Law. This is particularly true given that *only* members of the right-wing coalition voted for it. Given the intense opposition to the Basic Law by the Left, the Center, and the more liberal members of the Right-wing parties, it seems that it cannot be regarded as promoting the values of Israel but only the values of the anti-liberal segments of Israeli society.

The opponents of the Basic Law raise both principled and pragmatic reasons. The Basic Law contains some provisions which are very difficult to reconcile with a democratic or an egalitarian state (Prusher 2018). Most clearly, section 7 prioritizes Jewish settlement over settlement of non-Jews. The demotion of the Arabic language is also regarded as unacceptable (hence, the protest of President Rivlin). In addition, pragmatic arguments are being raised: it is argued that the law will strain the already uneasy relationships between Israel and its minorities, such as Palestinians, Druze, and others.

The opponents also point out that the Basic Law is part of a much larger enterprise to weaken, and even to eradicate, the liberal foundations of the Israeli legal system. As discussed earlier, there has been a flood of legislation limiting the right to free speech, ability of human rights organizations to raise money abroad, freedom of movement, and other freedoms. Therefore, one ought to evaluate the Basic Law in light of the broader encroachment on basic liberties in Israel.

As this article was written, several petitions against the Basic Law were submitted by various groups. The Court, however, may find it very difficult to declare the Basic Law void. This is not only because of the constant threats directed against the Court by politicians or the political appointments of Minister Ayelet Shaked. It is also because there is no precedent in Israel for a judicial decision to invalidate a basic law. Such a decision would require the Supreme Court to resort to the doctrine known as unconstitutional constitutional amendment (Roznai 2017). This doctrine allows the Court to strike down a constitutional provision when it conflicts with basic or foundational constitutional principles. Given the current composition of the Court and its vulnerability, this is unlikely to happen.

Yet, it is certainly possible that in rejecting the petitions, the Court will express its clear opinion that the Basic Law is indeed a merely declaratory law that has little operative implications. This will enable the Supreme Court, on the one hand, to satisfy the proponents of the Basic Law by affirming its validity and, on the other hand, to indicate that if the Knesset wishes to further erode the liberal foundations of the Israeli law, it must do so more explicitly. For instance, if it wishes to overturn Ka'adan and allow racial segregation, it should do so explicitly rather than by making vague declarations, such as the one made in section 7 of the Basic Law, namely, the declaration that Jewish settlement is a national value.

Let me conclude by reiterating two major observations made earlier. First, the law may reflect the conviction of the conservative and nationalist political forces that the judiciary is currently, or in the near future, conservative, and therefore they need not oppose judicial activism. This may require the Left to reevaluate its position toward the Supreme Court. Secondly, the Basic Law is one more step toward the decline of liberal democracy in Israel and the establishment of an illiberal and authoritarian democracy.

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