

On Thorny Nation-state Issue, Israel's High Court Faces a Tragic Dilemma

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Israel can no longer be considered a young democracy. However, even democracies that have passed the age of seventy may face dangers. The dissolution of the American union and the Civil War occurred in the 85th year of America's democracy. The Civil War erupted in part due to the judgment of the US Supreme Court in the Dred Scott case. In this infamous judgment, the Supreme Court held that no black person of African descent could be a citizen of the United States. The Dred Scott judgment casts serious doubts on the belief that judges should be regarded as society's moral compass. It also shows that mistaken judicial decisions may lead to tragic results.

Drawing analogies is a dangerous business. Whereas slavery existed in the US in the years preceding the Civil War, in 2020 Israel no slavery exists. However, the pending petitions asking the Israeli Supreme Court to strike down Basic Law: Israel - the Nation-State of the Jewish People present a grave danger to the future of Israeli democracy. In our opinion, the Israeli Supreme Court should avoid ruling on this question.

Basic Law: Nation-State is a bad law, and it would have been better had the Knesset not passed it. The law's negative consequences were demonstrated recently in a ruling by Magistrate Court judge Yaniv Luzon. The ruling denied a petition by two Israeli Arab children from the northern city of Carmiel who argued that their right to education was infringed by not receiving funding for their transportation to and from an Arab educational institution outside of the city. Luzon

denied the petition, in part based on the argument that Basic Law: Nation State regards advancement of Jewish settlement as a national value. In order to preserve Jewish majority in the city, held Luzon, it is justified to make Arabs' ability to reside in it more difficult. Those who believed the Basic Law's impact would be mainly symbolic were proven wrong. It seems inevitable that the Basic Law will continue to trickle down into the courts' rulings until its impact will be felt in every corner of Israeli law.

Yet the Supreme Court is currently faced with a tragic dilemma. Striking down the Basic Law would mean that the vision of Israel as the Nation State of the Jewish people — as embodied in the Basic Law — is unconstitutional. Denying the petitions would mean that the highest legal authority in the country endows legitimacy to a Basic Law that undermines the delicate balance between Israel's character as a Jewish and a democratic state.

And if the issues arising from the contents of Nation State Basic Law are not enough, a decision to scrutinize the legality of the Basic Law would create a new precedent that gives the Supreme Court the authority to strike down Basic Laws which are chapters in Israel's constitution. In other words, a ruling that the Court has the authority to review the legality of Basic Laws, even while denying the petitions to strike down this particular Basic Law, would mean that the judges hold the last word on the contents of Israel's Constitution.

Seizing this authority will be another radical step in the Court's long-term involvement in the process of creating the Israeli Constitution. For years, Supreme Court judges denied the claim — made most forcefully by the former Supreme Court President Moshe Landau — that the Israeli Constitution is the brainchild of the Court that crowned the Basic Laws as Israel's Constitution following the legislation in 1992 of Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. If the Court takes the authority to strike down Basic Laws, it would mean that the Court not only has played a leading role in what was termed by the former

president of the Court, Aharon Barak, “the 1992 Constitutional Revolution”, but also that it is now the institution determining the limits of that “revolution.”

The Court is thus caught in a tragic dilemma: any decision will intensify fundamental tensions that have divided Israeli society for at least two generations. However, the judges have the means to avoid this tragic dilemma. They can reject the petitions on the basis of the doctrine of non-justiciability. The great jurist Alexander Bickel, who taught at Yale Law School in the 1960s and 1970s, explained that non-justiciability is part of a group of doctrines that allow courts to avoid deciding in issues that are unfit for determination according to the legal language.

Israel’s cultural identity stands at the center of the petitions challenging the Nation State Basic Law. The identity of a state is not a legal issue in its nature. In view of the fierce disagreements on questions regarding Israel’s identity between Jewish and Arab citizens and between religious and secular Jews, it would be better that the Court would decide controversies relating to Israel’s identity on a case-to-case basis, offering pragmatic solutions for concrete violations of human rights. A decision attempting to explicate the essence of Israeli cultural identity will inevitably incite strong resentment on the part of certain sectors of Israeli society.

Allowing the Court to decide on the issue of Israel’s cultural identity will be a further step in the path that began with the definition of Israel as a “Jewish and Democratic” state in the 1992 two Basic Laws. Prior to 1992, the state’s identity was not an issue for lawyers. The idea that law would determine the identity of the state was foreign to many Zionist leaders who rejected it explicitly. For example, in 1937 Ze'ev Jabotinsky spoke on the character of the future Jewish state before the Peel Commission and stated that he does not believe “it is desirable that the Constitution of any State should contain special paragraphs explicitly safeguarding the national character of it; I think the less of such paragraphs we find in a Constitution the better.”

Similarly, David Ben-Gurion, Israel's first Prime Minister, was concerned that creating a constitution in the early days of statehood would lead to fierce controversies regarding the state's cultural identity. This concern was one of the reasons the first Knesset did not fulfil the promise made by the Declaration of Independence to enact a constitution.

The difficulties in providing a legal definition to the state's cultural identity are evident from the experience Israel has acquired with the "Jewish and democratic" formula. This formula excludes the state's Arab citizens. Basic Law Nation State intensifies this exclusion. The ruling in the Carmiel case attests that such an exclusion may have negative material consequences, such as the denial of financial remedy to Arab children.

Rejecting the petitions on the constitutionality of Basic Law: Nation State on the ground of non-justiciability will allow the Court to avoid the tragic dilemma. The Court will be able to apply the Basic Law in particular, concrete cases in which human rights were infringed. In this manner, the Court will be able to overturn holdings such as the one given by judge Luzon. However, when it comes to the larger fundamental question of the identity of Israel and the constitutionality of the Basic Law, it would be wiser for the Court to deny the petitions on the ground of non-justiciability.

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