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A Land of Conflict: Law as a Means of Hegemony

ABSTRACT

The article examines major issues embedded in and related to Basic Law: Israel as the Nation-State of the Jewish People. This Law, enacted in 2018, is highly controversial both in Israel and internationally. I analyze it here through several interlocking prisms that provide a theoretical perspective on hegemonic state law, comparative law, developments in Israeli constitutional law, and the socio-political context of this Law. The article touches on national self- determination; nationality, ethnicity and national symbols; language; immigration, the right of return, and land; the status of Jerusalem; and the conflict between Jews and Palestinians since the 1967 occupation. The comparative perspective I offer here points to legal and constitutional similarities. However, the absence of equality as fundamental to the Law, and its exclusionary ethno-national core, make it highly problematic and may invite constitutional adjudication and possible-though by no means certain-judicial opinions of unconstitutionality or constitutional demands for legal amendments.

INTRODUCTION

Nation-states are embedded in the ethos and collective ideological aspirations reflected *inter alia* in their fundamental constitutional documents. Such documents articulate the intergenerational narratives of the nation and its historical roots as imagined by the constituting elites.[1] Hence, written constitutions and other fundamental pieces of primary legislation reflect ethnic, religious and other collective aspirations. Furthermore, constitutional documents are usually driven by elite groups

to advance their own aspirations and interests[2] as is the case with the American, French, Japanese, and German constitutions, to name but a few.

In that context of the political essence of constitutional documents (beyond their merely formalistic definition) the purpose of the article is to analyze "Basic Law: Israel as the Nation-State of the Jewish People" (hereafter: BSJN) which was legislated in 2018 by the Israeli legislature, the Knesset, after about seven years of stormy debating both in and outside the Knesset. This piece of legislation was undoubtedly momentous for protagonists and opponents alike.

The article argues that as it stands, the BSJN is fundamentally problematic, not because the Jewish majority is not entitled to generate collective national values, but due to the inequality the Law imposes on the Israeli-Palestinian Arab minority. Furthermore, the article argues that the BSJN is useless both de facto and de jure. It has no added legal value either for the Jewish majority or the Palestinian-Arab minority. It is a political nationalist document, not a constitutive constitutional document. Yet, taking into account its prominence in the Israeli public setting it deserves a serious analytical consideration. The article will proceed as follows. Part one below will explore the constitutional political context of this legislation. Part two will analyze the internal deficiencies of the Law within the larger context of its legal setting. Part three will delve into the constitutional difficulties it entails.

THE POLITICAL CONSTITUTIONAL CONTEXT

Perceptions of state law as a strictly legalistic and "neutral" means of enforcing order and obedience miss the point. Law shapes consciousness and modes of behavior above issues of simple obedience.[3] It may generate and propel the images and interests of ruling elites, of prevailing cultures, reinforcing the symbols of national narratives with substantial implications in the way society systematizes the civic loyalties of its members.[4]

The Israeli legislative system of Basic Laws was adapted by the Israeli Knesset in 1950 in the famous *Harari Resolution* as a parliamentary compromise between political parties (especially *Mapai* and the Orthodox religious political parties) that were unable to agree on the content of a written constitution above what was phrased and embedded in the Declaration of Independence.[5] Furthermore, for David Ben-Gurion who served as prime minister 1948–1954, a cohesive written constitution seemed likely to become a constitutional hurdle he preferred to avoid.[6] Accordingly, Basic Laws have

had a special symbolic status as chapters in Israel's future written constitution. Since then, by means of an incremental legal process, beginning in 1958, Israel has enacted 13 Basic Laws, which can be altered under special legal conditions detailed in each of the Basic Laws.[7]

Thus, Clause 11 of the BSJN states that the Law cannot be abolished except through another Basic Law enacted by a majority of at least 61 MKs: "This Basic Law shall not be modified except by a Basic Law, passed by a majority of the members of the Knesset".

But while BSJN may not necessarily hold tangible and immediate constitutional implications, as my analysis will show, it holds definite symbolic implications and possible trajectories vital to the future of Israeli society which is why the Knesset has underscored special conditions for its nullification, if need be. All the same, unlike written constitutions, the Law may be abolished by means of a relatively smooth process requiring only 50%+1 votes in the Knesset, which is the usual procedure for altering Basic Laws, unlike the written constitutions of the United States and European countries that usually require a more complex and challenging legal political procedure.[8]

Basic Laws are crucial to the hierarchical pyramid of Israel's rule of law and are viewed by the High Court as foundational to it. Nevertheless, they have been constitutionally subjected to the same methods of legal interpretation and judicial review as any other piece of legislation. Namely, they must be implemented in a reasonable and proportional way, based on consistent court rulings by the High Court of Justice—the essence of Israel as a "Jewish and Democratic State".[9] Furthermore, all Basic Laws are subject to the constitutional judicial review of the High Court of Justice which may offer a legal interpretation of any Basic Law based on the 1992 Basic Law: Human Dignity and Freedom. Furthermore, the Supreme Court may also abolish Basic legislation as null and void, although such a drastic constitutional move has never yet been taken by the HCJ and would be considered an unprecedented judicial intervention under the principle of parliamentary sovereignty that has been considered fundamental to the Israeli political regime since 1948. Following its rulings in 1995, the HCJ may abolish or declare null and void any piece of legislation including a Basic Law if the Law cannot be reconciled with Israel's values as a Jewish and Democratic State, as stated in Clause 8 of Basic Law: Human Dignity and Freedom

> "8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required".

In our analysis of BSJN we must bear in mind that its interpretation has been based on this guiding constitutional principle since the 1995 Mizrachi ruling,[10] namely, that the HCJ may in future rule that the BSJN is unconstitutional. To summarize: BSJN was enacted in the context of increasing polarization amid political attacks on Israel's Palestinian-Arab minority and remains subject to a constitutional judicial review by the HCJ.

INTERNAL DEFICIENCIES OF THE BSJN

SELF DETERMINATION: THE LEGAL ERADICATION OF PALESTINIZATION IN ISRAEL

The law is relatively very brief, with only 11 clauses, but its legal usefulness is highly doubtful. The first clause is declarative and in its current phrasing, might be read as standing in possible contradiction to the principle of equality. It underscores the right of the Jewish people to self–determination (subsections 1a and 1b), while negating the existence of another people (1c);

> "Basic Principles 1. (a) The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established. (b) The State of Israel is the nation-state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination. (c) The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People."

Note that clause 1, subsections (a) as well as (b) above, reiterate the 1948 Declaration of Independence which states:

> "The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity were shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books."[11]

The Declaration of Independence (1948) has been recognized by the HCJ as the guiding constitutional meta-narrative of Israel's fundamental national ideology. While the Declaration is not viewed as a written constitution, it guides the HCJ in its interpretations so long as it does not expressly contradict legal legislation.[12] Hence, legally speaking, subsections (a) and (b) could not be viewed as highly problematic from the doctrinal perspective of Israeli law.

However, the third section in Clause 1 above might be more controversial politically and historically. Albeit, it is doubtful whether there is a robust constitutional case for arguing against the constitutional validity of the Law. Whether Judaism constitutes a religion or a nationality is a question debated in both sectors of Israeli society, Jewish[13]and Palestinian-Arab.[14] Most public opinion surveys demonstrate that Israeli Jews make no distinction between their religion (Judaism) and nationality (Israeli).[15] The judicial ideology embedded in the High Court ruling that Israel is 'Jewish and Democratic' has effectively shaped public consciousness. Ideological movements like Canaanism which aspired to create a "Hebrew" nation disengaged from Judaism, had few adherents. At one point, a notable Israeli author, Yoram Kaniuk (1930–2013) petitioned the HCJ to permit a distinction between nationality (Israeli) and religion (Judaism), in the sense that he as an Israeli could be registered as having no religious affiliation, but his petition was denied on the grounds that the Court could not address such an abstract issue of ideological policy. Furthermore, the Court ruled that since the Tel-Aviv District Court had already recognized Kaniuk's right to be registered as having no religious affiliation, any further legal remedy by the HCJ was unnecessary.[16]

A comparative legal study of the Israeli law regarding nationality and religion would be problematic. Some written constitutions lack such a legalistic distinction. Thus, the Spanish Constitution of 1978 prioritizes the Catholic Church (Clause 16.3)[17], and the Irish Constitution of 1937 clearly designates Ireland as a Catholic state (Clause 44.1): "The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens"[18]

The Slovak Constitution of 1992 separates religion and state at the institutional level but in its preamble the Constitution defines Slovakia as a Christian nation.[19] The Brazilian Constitution embeds freedom of religion, but the Catholic Church plays a prominent role in the politics of Brazil and Latin America as a whole.[20] In a somewhat similar vein, the Church of England has since the mid-16th century enjoyed a special national status above all other religious institutions. These are some of the more prominent examples of constitutional policies which blur the legal distinctions or lack thereof between nation, state, and religion.

Hence, in the Israeli case, Clause 1.c is not necessarily unconstitutional as it stands. Yet, unlike the constitutions of European democracies, the BSJN does not include an equality clause and Israel is not subject to the EU law which defines equality as a constitutional right. Hence, I shall argue later that the absence of an equality clause in the BSJN is highly

problematic from a constitutional perspective and calls up doubts as to its constitutional validity. The omission of an equality clause in the BSJN ignores and discriminating against roughly 25% of the Israeli public who are not Jewish, but affiliated with Muslim, Christian, Druze, and other religious communities.

The BSJN has declarative sections which are symbolic but lack any substantive legal meaning and which are nevertheless meant to address the Jewish-Palestinian divide by grafting the Zionist narrative to the Law while eradicating any possibility of a Palestinian challenge to it.

NATIONAL SYMBOLS: WHOSE?

Thus, Clause 2 of the BSJN refers purely to national symbols—the name of the nation-state, (Israel), its national flag with the Star of David and the national anthem (Hatikvah)—and reiterates the legal status which has in any case existed since 1948.

Similarly, Clause 8 declares the Hebrew calendar to be the official of calendar of the state alongside the Gregorian calendar (which is in any case the practice in Israel). Such declaratives and symbolic sections of the BSJN are rather typical and are meant to articulate the national ideology to the neglect of a perceived need for the inclusion of the Palestinian-Arab minority to shape and obtain the collective good. As noted above, Israel's legal setting as a component of the national political structure excludes the Palestinian-Arab minority from any possibility of power-sharing with the Jewish majority.[21]

THE RIGHT OF RETURN: FOR JEWS ALONE? JERUSALEM WHOLLY JEWISH?

Clause 5 is one of the most significant parts of the BSJN in this regard, since it constitutionally transforms the 1950 Law of Return (a regular law) into an essential element of the Israeli constitutional structure (i.e., Basic Law). Clause 5 states that Israel shall be open to Jewish immigration. It does not formally disavow the possibility of a 'right of return' for Palestinians abroad but since there is no mention of it, the legal presumption is that only Jewish immigration to Israel is permitted by law. This concept of immigration to Israel preserved in principle exclusively for Jews had already been recognized as legal and constitutional by the HCJ.

The Court had ruled in March 2000 that while equality among and between Jews and Arabs citizens of Israel regarding the allocation of some goods and the equality of individual opportunities should be preserved as an important pillar in Israel's rule of law (hence the Court upheld the appeal of Dr. Kaadan to the Court to buy a house and live in a Jewish community in the Galilee), the Law of Return is fundamental to the state of Israel and accordingly immigration to Israel may de facto and de jure distinguish between the respective rights of Jews and Palestinians to return to their country of origin.[22]

The BSJN is similarly silent regarding the immigration of non-Arab non-Jews to Israel. A hostile and suspicious public policy towards undocumented foreign workers may be an outgrowth of this.

Clause 3 of the BSJN declares both East and West Jerusalem the capital of Israel. This is in fact legally redundant since East Jerusalem (*Al-Kuds*) was unilaterally annexed and declared the capital of Israel in the Basic Law: Jerusalem (1980). In fact, Clause 1 of the Basic Law: Jerusalem is identical in its phrasing with Clause 3 of the BSJN. Hence, Clause 3 has no legal meaning except in a rhetorical sense. Furthermore, Clauses 6 and 7 of the Basic Law: Jerusalem legally thwart any territorial compromise over East Jerusalem or Jerusalem unless largely agreed upon and legislated in a Basic Law by at least 80 members of the Knesset (which is a 67% majority of Knesset members).[23] It is similarly embedded constitutionally in the Basic Law: Referendum of 2014.[24]

Thus, again, the BSJN precludes any power-sharing in the shaping of Israel with Palestinian Arabs. The BSJN thus deprives the nation- state of 21% of its population.

LAND AND SETTLEMENTS: STRUGGLES OVER LAND RESOURCES

There is a constitutional emphasis in the Law on the issue of national land settlements as part of the Zionist vision. By and large Nation-states view control of land as crucial to their ruling.[25] Thus, Clause 7 of the BSJN declares that Israeli lands and settlements shall be under the exclusive control of the Jewish majority. While the Jewish nation–state's ruling over the control of land has been framed through previous legislation, primarily in Basic Law: Israel Lands from 1960,[26] the BSJN purpose is mainly declarative, to demonstrate that territorial control is exclusively in the hands of the Jewish majority while ignoring the predicament of the Palestinian-Arab

minority both in terms of land resources and the absence of adequate building permits.[27]

Although Israeli Palestinian-Arab lawyers have legally challenged discriminatory land allocations and building permits vis-à-vis the minority,[28] the BSJN has underscored the need to maintain exclusive Jewish control over Israeli lands. In reaction, the leadership of the Israeli Arab minority for its part underscored the issue of discrimination, with an appeal to the HCJ, arguing that Clause 7 of the BSJN, engenders the transformation of the minority into a collective 'other' and institutionalizes unlawful discrimination against the minority even more.[29]

It should also be noted that a clause in the early drafts of the BSJN advocating the legal segregation of communities for Jews and Arabs was excised from the final and formal version of the BSJN. This was done to evade possible judicial intervention by the HCJ. Indeed, in 1995 the HCJ ruled in the aforementioned Kaadan case that depriving an Israeli Arab citizen of his right to purchase a house in a Jewish community, constituted discrimination and should be legally considered null and void due to its unconstitutionality.[30]

Yet, in reaction to the Kaadan case Israeli law was altered in 2011 (amendment no. 8) to let communities exclude potential members (not necessarily Arabs) and to refuse membership in a communal settlement on the grounds of an alleged "lack of social adaptability" in accordance with the spirit of the settlement. That alteration to the Order of Shared Associations[31] was challenged in the HCJ and the appeal against the constitutionality of that amendment was denied as being too vague and premature to justify judicial intervention via Knesset legislation.[32] Hence, Likud members assumed that following the Kaadan case and the alteration made to the Israeli Law of Shared Associations in 2011, the BSJN should not refer to the same issue again. The presumption was that while the value of such a clause is redundant (both practically and legally) its presence in the BSJN might be judged discriminatory by the HCJ (following the precedence set by the Kaadan case) and therefore null and void.

WHAT LANGUAGE DO YOU SPEAK? HEBREW (עברית) AND ARABIC (اَلْعَرَبِيَّةُ)

The formal legal status of the two national language, namely Hebrew and Arabic, holds a major place in the BSJN. Languages have a special significance in national movements as carriers of history, collective memory,

communal and national symbolism, myth, ethos, and collective aspirations. From a comparative perspective, constitutions and political regimes relate differently to languages and there are significant variations in the linguistic hierarchies of modern nation-states.

Israel is one of the few unitary political regimes in the world to recognize two constitutionally protected languages: Hebrew and Arabic. Some federal states legally and formally recognize several constitutionally embedded national languages, *inter alia*: India, Switzerland, and Canada. Some unitary countries also recognize several languages, among them, Belgium and Israel (Kymlicka 1995; Barzilai 2000; Harel-Shalev 2006).[33] But Israel is one of the few formally and constitutionally multilingual countries in the world. It is also relatively unique among countries with endogenous communities, whereas Australia, New Zealand and the US have imposed a monolingual regime.

In Israel, Arabic was recognized both practically and legally as the first language of the Arab minority, and all Arab education in Israeli elementary and high schools (though not universities) is based on Arabic as a first language (Al-Haj 2012).[34] Notwithstanding, a legal controversy still surrounds the constitutional protection of Arabic in Israel. In some prominent legal cases, appeals by *Adhala*, the most important NGO of the Israeli Palestinian-Arab lawyers, the HCJ has upheld appeals ordering municipalities in Israel to display all road and traffic signs in Hebrew, Arabic and English, and municipalities with an Arab population to display all signs in Arabic as well.[35] Yet, in the *Reem* case, a civil appeal from an engineering company that was prevented from using Arabic in commercial announcements, the Court ruled that while censorship of the public usage of Arabic is unlawful (the appeal was upheld) the protection of Arabic is entrenched not in collective rights but in the principle of freedom of expression.[36]

At this point a distinction was embedded in Israel's legal system according to which, in Clause 4, the BSJN defines Hebrew as the only state language while Arabic, having an official status as a "special language in the state" and further, according to Clause 4 (b,) having special statutory arrangements to define the usage of Arabic in state institutions. In this way the Law presumes to end the dilemma about the status of Arabic vis-à-vis Hebrew in Israel. The Jewish majority has excluded Arabic as a state national language, but unlike most other multicultural societies, even societies with endogenous communities, the language of the minority is formally recognized as a legal collective language with a special legal status beyond the principle of freedom of expression.

CONCLUSION

The article has analyzed some significant portions of the BSJN in a broad Israeli and comparative context. Although the Law's main purpose is symbolic and rhetoric it monopolizes Jewish hegemony through a narrow perspective of Israel as a Jewish state that "belongs" exclusively to the Jewish people. The BSJN likewise monopolizes Jews over the world by the legally ill-advised assumption that Israel is the exclusive representative of the Jewish people and responsible for the well-being of Jews everywhere. Worst of all, the BSJN reiterates legal and practical discrimination against the Palestinian–Arab minority in Israel.

Yet, the law also reflects a certain legal counter-revolution. Although after the 1995 Supreme Court ruling in the *Mizrahi* case, a legal process began taken place gradually in Israel as a whole, subjecting Basic Laws to the principles of human dignity and proportionality, the BSJN has clearly changed that. It is doubtful whether a Basic Law that fails to mention the existence of an endogenous population of 21% will meet such constitutional criteria unless the principle of equality between the majority and the minority populations is expressly added to the Law.

Obviously, what the High Court of Justice will decide with respect to the constitutionality of the BSJN is indeterminate. The personal attitudes and judicial conceptions of judges, new nominations to the Supreme Court, the judicial composition and size of the bench that will decide an appeal against the constitutionality of the BSJN, and further interactions between the branches of government may affect the HCJ ruling. Let us remember that the Court has been part of the constitutional adaptability of Israel's legal setting to the reality of the 1967 military occupation. Hence, while the BSJN is constitutionally very problematic, how the HCJ will rule on it remains uncertain.

Notes

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6. *Ibid.*

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12. For several court rulings see: HCJ 153/87 Shakdiel v. The Minister of Religion, PD (42) 121; HCJ, 4514/94 Miller v. The Minister of Defense, PD 49 (4) 94; The Women Network v. The Minister of Labor PD 52 (3) 630.

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29. https://www.mako.co.il/news-law/legal-q3_2018/Article-e25ec7629e3156 1004.htm (accessed: April 10, 2020).

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31. Clause 6B to the Order of Shared Associations an amendment no. 8 from 2011.

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