

# Israeli High Court's Pursuit of a Constitutional 'Gospel'

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During its early days, the Israeli Supreme Court acknowledged that in view of the Weimar lessons, there are foundational principles that are above the law and that may override legislation, and even constitutional provisions. One of the lessons of the collapse of the first German democracy was that in extreme situations, it is vital that courts will be able to rely on foundational principles to override provisions of a state's constitution. But the first generation of Israeli judges did not seek to confront thorny constitutional issues. The judges denied the idea—raised in petitions submitted shortly after the state's inception—that Israel's declaration of independence is the state's constitution, and that based on it the Court may strike down Knesset legislation. The judges wanted to escape this constitutional “gospel.” Yet in recent decades, a shift has occurred in the Court's decision-making. This shift, unnoticed by most commentators, was demonstrated recently in the oral discussion in the petitions challenging Basic Law: Israel - the Nation-State of the Jewish People.

Until recent decades, the Supreme Court adjudicated cases according to a model akin to the Aristotelian decision-making model of practical wisdom. The gist of this model is that the Court determines the law based on a concrete case, so that the facts of the case pave the path to the Court's normative conclusion. According to this model, judges detect the relevant facts of the case; identify the relevant legal doctrine; weigh the various normative considerations; resolve conflicts between clashing normative considerations; and examine the overall consequences of their normative determination. This model of adjudication is one of the defining features of Anglo-American legal systems that Israel's legal system is part of.

In recent decades, a shift occurred in the Court's model of adjudication: the Court adopted an abstract decision-making model. This model is identified with Plato, and its core is a theoretical normative discussion that is unrelated to the facts of any concrete case. Several constitutional courts in Europe apply this model when they are asked to conduct an abstract review of the constitutionality of legislation, with no connection to a particular controversy.

Following the enactment of the two 1992 Basic Laws that created a partial bill of rights, the Supreme Court adopted this abstract-thinking model. The Court read these two Basic Laws as

endowing it with the power of judicial review over Knesset legislation. Soon after this development, petitions asking the Court to examine the constitutionality of Knesset legislation began to reach the Court. Many of these petitions lacked any concrete factual grounding or referred to facts that were marginal for establishing the legal arguments.

The petitions challenging Basic Law: Nation State represent the culmination of this process. The petitioners argue that the Basic Law infringes the right to equality and the right to dignity. However, as the response by the Attorney General makes clear, “these claims are speculative in nature and lack factual grounding as they relate to future scenarios predicted by the petitioners.” In absence of factual grounding for concrete infringements of rights, in the oral discussion the petitioners’ attorneys offered various scenarios of future potential infringements. But one thing was missing from the oral arguments: legal arguments. At various stages of the televised discussion, the judges urged the lawyers to focus on legal issues, and at one point the Court’s President—Esther Hayut—told one of the lawyers: “Sir, you are in a court of law; you must offer a legal proposition.” At another occasion, she admonished a lawyer: “what does this argument has to do with legal matters? God!”

However, in its search for blame for oral arguments having little to do with legal arguments, the judges should point their blaming finger at themselves. This style of oral discussion, full of rhetoric and constitutional hype, is a direct result of the adoption of the abstract-thinking model in a legal system that was previously based on the practical wisdom model. We can now listen to the oral discussions from the US Supreme Court and watch the ones from its UK counterpart, and these are not at all similar to what transpired in the oral discussion on the constitutionality of Basic Law: Nation State. The setting, ceremonies and gestures are similar, but a legal discussion in the Anglo-American courts is focused on concrete, rather than theoretical, infringements of rights or interests.

In the absence of a concrete case with concrete facts to focus on, the judges made some inappropriate remarks. One judge said that contrary to what was said in the Knesset, the Nation State: Basic Law was not “Israel’s I.D”. Another judge noted that it would be appropriate to limit the time available to the Knesset to complete the enactment of the Basic Laws that would eventually compose Israel’s constitution. Later the same judge added that had Basic Law: Nation State existed without the earlier basic laws that define Israel as a democratic state, the Court would have struck it down. We find it hard to think of another national high court in the

world in which judges make similar remarks from the bench. It seems that such remarks are the negative outcome of an unfocused and theoretical oral hearing in which the judges are contemplating the constitutionality of an entire basic law. Such form of discussion pushes the Court to behave as if it is a Platonic Philosopher-King tasked to determine the appropriate regime for a state, rather than a court of law examining a particular infringement of a right or violation of a protected interest.

Basic Law: Nation State is a bad law, but the oral discussion at the Supreme Court did not advance us a single step towards its amendment. More likely, that it took us further away from that goal. The judges' comments made it clear that they do not intend to strike down the Basic Law, and yet in their judgments they are planning to discuss their authority to strike down Basic Laws which are chapters in the Israeli Constitution. The judges asked the attorney representing the Knesset —Adv. Avital Sompolinsky—to address the hypothetical case of a Basic Law that negates women's right to vote. When the attorney refused to address this hypothetical example, the judges did not hide their annoyance that she refused to follow their abstract model of adjudication.

In recent decades, the judges planted clues in their judgements that in future cases they may invoke the authority to strike down Basic Laws. These clues were raised as assertions that were not necessary for deciding these cases. Now it seems that the judges are going to officially announce that the Court holds this unprecedented authority to strike down chapters of the Israeli constitution. While endowing themselves with this authority, they would, in all likelihood, deny the petitions challenging Basic Law: Nation State, thus endowing the Basic Law with their stamp of approval.

A few years ago, our friend Ruth Gavison—who recently passed away—wrote that we need to remember that Israel had legal giants among its first-generation Supreme Court judges. “We can remember them and learn from them,” wrote Gavison, “and we should not try to invent new wheels and then present them as having been with us right from the start.” Rather than chase after foundational, abstract constitutional decisions, which attract media interest and incite strong opposition, the Court should wait for concrete cases to develop Israel's constitutional law. By discussing concrete facts of concrete cases, step by step, far-away from the drama of “momentous cases”, the Court may further advance the liberal tradition it created over the years. This was the manner in which the justices of the first generation of the Court functioned. We believe this is the path the Court should take with regards to Basic Law: Nation State.

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