Basic Law: The Emperor’s New Clothes

On Basic Law: Israel – The Nation State of the Jewish People

On 19 July 2018, the Knesset adopted Basic Law: Israel – The Nation State of the Jewish People (an imprecise unofficial translation can be read here). The new law, which was hailed as “historic” by Prime Minister Netanyahu, has been lauded and denounced by various Knesset members and commentators. Below, I will address the operative effects of the new Basic Law, section by section. My conclusion, however, should be clear from the title of this note. My comments are based upon the official Hebrew text (available here).

In the first provision of the new law, sec. 1(a) establishes that the Land of Israel is the historical homeland of the Jewish People, upon which the State of Israel was created. Section 1(b) states that Israel is the nation state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination. Section 1(c) declares that the right of national self-determination in the State of Israel is exclusive to the Jewish People. The section essentially restates what was already expressed in the Balfour Declaration, the San Remo Declaration, and Israel’s Declaration of Independence, which speaks, inter alia, of “the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State”, and declares the establishment of “a Jewish state in Eretz-Israel”. To this one might add that sec. 1(b) of Basic Law: Human Dignity and Liberty states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state” (emphasis added – A.S.).

Moreover, as Supreme Court President Aharon Barak wrote in EDA 11280/02 Central Elections Committee v. MK Ahmed Tibi and MK Azmi Bishara, IsrSC 57(4) 1:

There are many democratic states. Only one of them is a Jewish state. Indeed, the reason for the existence of the State of Israel is in its being a Jewish state. This character is central to its existence, and constitutes – as Justice M. Cheshin stated before the Central Elections Committee – an “axiom” of the state. It should be viewed as a “basic principle of our law and system” (LCA 7504/95 Yassin v. Registrar of Parties, IsrSC 50(2) 45, 63). The denial of the State of Israel as a Jewish state precludes the participation of a list of candidates or a candidate from participating in the elections.

It might also be recalled that the Jewish character of the state was reemphasized earlier this year with the amendment of Foundations of Law, 1980, to include the words “Jewish law”. The law now states: “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Jewish law [hamishpat ha’ivri] and Israel's heritage [moreshet yisrael]”. 
However, there is a possible ambiguity in sec. 1(c) that may be of concern particularly to Israel’s non-Jewish citizens. It may be understandable that the legislature wished to make clear that the right of “self-determination” in Israel is exclusive to the Jewish people (as seems to be implicit in the language of the Mandate and the Declaration of Independence), and thus establish that citizens who self-define as members of other nationalities or ethnicities do not enjoy a right to collectively secede from the state and form a sovereign or autonomous political entity on the territory of Israel. But the Hebrew term employed by the sec. 1(c) is “hagdara atzmit le’umit”. That term is generally understood to refer to “national self-determination”. However, the word “hagdara” also means “definition”, and “le’umit” (or “le’om”) can be understood as referring to ethnicity, or nationality as opposed to citizenship. Thus, for example, the Israeli Ministry of the Interior has published guidelines (Guideline 2.8.0001) for the registration of a citizen’s religion and “le’om”. The matter of “le’om” has been contentious throughout Israel’s history. While a person’s “le’om” can be registered as Jewish, Druze, Arab, or Aramean, it cannot be “Israeli” (see: HCJ 8573/08 Orman v. Ministry of the Interior, (Oct. 2, 2013) [English: http://versa.cardozo.yu.edu/opinions/ornan-v-ministry-interior], and see: Jay Ruderman & Yedidia Stern, Is “Israeli” a Nationality?). Arguably, due to the ambiguity of the terms, “hagdara atzmit le’umit” might be understood as referring to national or ethnic self-identification. It should not be surprising if many Israelis, particularly minorities, may be offended by a provision of a Basic Law that appears to deny them their right to self-identify, and may see the provision as violation of their basic right to dignity.

Section 2(a) establishes that the name of the state shall be “Israel”. This would appear to resolve a possible ambiguity in the Declaration of Independence. The Declaration declares the establishment of a Jewish State “to be known as the State of Israel”. However, the immediately following paragraph states “the People’s Administration, shall be the Provisional Government of the Jewish State, to be called ‘Israel’”. Arguably, the Declaration is unclear as to whether the name of the state is “the State of Israel” or “Israel”. However, one might also contend that this has never been more than a distinction without a difference. In any case, it is now clear that the name of the state is “Israel”.

Section 2(b) establishes the flag of Israel, sec. 2(c) establishes the official state emblem, and sec. 2(d) establishes the national anthem. All three of these provisions merely restate what was enacted under the Flag, Emblem, and National Anthem Law, 5709-1949 (as amended to include the anthem in 2004).

Section 3 determines that “Jerusalem, complete and united, is the capital of Israel”. This is a verbatim repetition of sec. 1 of Basic Law: Jerusalem, Capital of Israel. It is unclear what purpose is served by restating what is established in one Basic Law in another Basic Law, especially bearing in mind that under the Harari Resolution of June 13, 1950 (original Hebrew text here), the Basic Laws are intended to serve as chapters of the Constitution, and “when the [Constitution, Law and Justice] Committee completes its work, all the chapters will be merged as the State’s Constitution”.

Section 4(a) declares that Hebrew is the “language of the state”. Section 4(b) establishes that Arabic has “a special status in the state”, while sec. 4(c) explains that “nothing in the aforesaid shall derogate from the actual status of the Arabic language as it was prior to the enactment of
the Basic Law”. The new law does not define the term “special status”, and the term is not defined in the Interpretation Law, 5741-1981. Moreover, subsec. (c) would appear to deprive subsec. (b) of any practical effect. Indeed, the Explanatory Notes to the bill expressly state that the section is intended “to emphasize that nothing in the Basic Law detracts from the actual status currently granted to the Arabic language”.

This is not to say that sec. 4 is utterly meaningless or without effect. Actually, it has a surprising consequence of which the Knesset members may have been unaware.

Article 22 of the San Remo Declaration and of the Mandate for Palestine established that “English, Arabic and Hebrew shall be the official languages of Palestine”. Accordingly, art. 82 of the Palestine Order-in-Council, 1922 (as amended in 1939), established:

**Official Languages**

82. All Ordinances, official notices and official forms of the Government and all official notices by local authorities and municipalities in areas to be prescribed by order of the High Commissioner, shall be published in English, Arabic and Hebrew. The three languages may be used, subject to any regulations to be made by the High Commissioner, in the government offices and the Law Courts. In the case of any discrepancy between the English text of the Ordinance, official notice or official form and the Arabic or Hebrew text thereof, the English text shall prevail.

As Supreme Court President Aharon Barak observed in HCJ 4112/99 *Adalah v. Tel Aviv - Jaffa*, *IsrSC 56(5) 393*, this provision in regard to English was changed by sec. 15(b) of the Law and Administration Ordinance, 5708-1948, which rescinded any provision of law “requiring the use of the English language” (emphasis added – A.S.). As President Barak further noted, and as is also stated in the Explanatory Notes to the bill, art. 82 of the Order-in-Council otherwise remains in force. Yet, President Barak wrote: “Just as French is the language of the French and is a defining element of France as a sovereign state, and just as English is the language of the English and is a defining element of England as a sovereign state, so Hebrew is the language of the Israelis and is a defining element of Israel as a sovereign state.”

In that same decision, Justice Cheshin (dissenting) noted that the meaning of the term “official language” in Israeli law is not entirely clear, and went on to note that “the term ‘official language’ alone, does not provide us any operative legal conclusions. While the title ‘official’ grants a language an elevated status, other than what the law specifies, we cannot draw any operative legal conclusions other than in the circumstances delineated by the law”.

The upshot of all the above would appear to be that prior to the adoption of sec. 4 of the new Basic Law, it was unclear what precisely was meant by the term “official language”. Hebrew was the defining national language, Arabic had a privileged status, and English remained an “official”, although not obligatory, language of Israel. Section 4 impliedly repeals art. 82, and thereby also eliminates the vague term “official language”. It has also, once and for all, unequivocally rescinded the “official” status of English in Israeli law (nevertheless, in accordance with sec. 24 of the Interpretation Law, 5741-1981, the English version of Mandatory
legislation continues to prevail where a New Version has not been published by virtue of sec. 16 of the Law and Administration Ordinance). Other than the resolution of the latter bit of legal trivia, everything else would seem to remain essentially unchanged.

Section 5 of the new law states that Israel will be open to Jewish immigration and for the “ingathering of the exiles”, which is a verbatim quote of the identical statement in the Declaration of Independence, and adds nothing operative to what is already enshrined in the Law of Return, 5710-1950.

Section 6 states Israel’s commitment to ensuring the safety of Jews throughout the world, protecting and maintaining a relationship with world Jewry and to contributing to the preservation of Jewish cultural, historical and religious heritage among Diaspora Jewry. These declarations would seem to add little if anything to what is already stated in the Status of the World Zionist Organization and the Jewish Agency Law, 5713-1952. Nevertheless, Jews who are not citizens of Israel may take exception to what may be perceived as paternalistic overreach.

Section 7 declares Jewish settlement to be a value, and commits to encouraging it. This, too, would seem to add little if anything to the Status of the World Zionist Organization and the Jewish Agency Law, 5713-1952.

Section 8 declares the Jewish calendar as an official calendar along with the Gregorian calendar, but leaves the manner of the use of these calendars to be established by law. The section merely reaffirms what is already established in the Use of the Hebrew Date Law, 5758-1998. Of course, one might note that in stating “an official calendar” rather than “the official calendar”, the new law also recognizes the validity of the use of the Gregorian calendar, but the use of the Gregorian date is expressly required under sec. 3 of the Hebrew Date Law. Thus, for example, the official publication of the Hebrew Date Law itself states that it was “enacted by the Knesset on the 5th day of Av 5758 (28 July 1998)”.

Section 9(a) declares Independence Day to be the official national holiday of the state. This reiterates what is stated in the Independence Day Law, 5709-1949. Section 9(b) declares that Memorial Day and Holocaust Remembrance Day are official days of remembrance, thus restating what is more comprehensively addressed under the Memorial Day Law, 5723-1963, and the Holocaust and Heroism Remembrance Day Law, 5719-1959.

Section 10 of the new law establishes the Sabbath and Jewish holidays as official days of rest for Jews, and that non-Jews have the right to days of rest in accordance with their sabbaths and holidays. These matters are comprehensively arranged in several other laws, among them sec. 18A of the Law and Administration Ordinance, 5708-1948, and the Hours of Work and Rest Law, 5711-1951.

Section 11 entrenches the new Basic Law by establishing that it can be amended only by a majority of the members of Knesset. In this regard, it should be borne in mind that in Israel’s parliamentary system, the Government is composed of a coalition of parties representing an absolute Knesset majority, and that “party discipline” can be invoked in support of a
Government bill. Thus, a law entrenched in this manner is not necessarily more entrenched than any other law that the Government may seek to amend or repeal.

In concluding this review of the provisions of the new Basic Law, it is worth noting that the foundational principles of Israel’s Declaration of Independence were given quasi-constitutional status in 1953, in the Supreme Court’s landmark decision in HCJ 73/53 Kol Ha’am v. Minster of the Interior, IsrSC 7, 871. In that case, the Court (per Agranat, J.) adopted those principles as standards for judicial review:

> It is true that the Declaration “does not consist of any constitutional law laying down in first any rule regarding the maintaining or repeal of any ordinances or laws” (Zeev v. Gubernik), but insofar as it “expresses the vision of the people and its faith” (ibid.), we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State…”

In 1992, the Knesset amended Basic Law: Human Dignity and Liberty, adding the following preamble:

> Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

This preamble to Basic Law: Human Dignity and Liberty grants formal constitutional status to the principles of Israel’s Declaration of Independence.

**Conclusions**

The above review would seem to show that the new Basic Law does a lot of nothing to great fanfare. The new Basic Law does grant constitutional status to certain principles already set out in other laws (on the supra-legal constitutional status of Basic Laws see: CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village, IsrSC 49(4) 221). However, with the exception of the Calendar Law, these principles derive either from the Declaration of Independence, which has already been granted constitutional status, as aforesaid, or from other Basic Laws, or from statutes of very long standing. To the extent that these principles concern statutory provisions that have been addressed by the courts over the many years since their enactment, the “upgrade” of constitutional status may add little to the already significant weight of decided law.

Nevertheless, while the new Basic Law may add little if anything to existing law, a possible area of concern is that the new law’s selective restatement of principles of the Declaration of Independence may present a source of potential claims of conflict with the preamble to Basic Law: Human Dignity and Liberty. Moreover, regardless of the intentions of the drafters, it may be argued that the new law’s apparent repetitions should not be viewed as mere redundancies, and that as a rule, “it is presumed that the legislature does not waste words” (see, eg: CA 422/78 Salomon v. Corporation under the Road Accident Victims Compensation Law, IsrSC 33(2) 701; CA 9111/08 Jewish Agency Pension Fund v. Director of Capital Gains Tax, (19 May 2011); but
cf: CA 7937/04 Director of Capital Gains Tax v. Aviv, (25 Sept. 2006)), and therefore identical statements are open to different interpretations when they appear in different contexts. The Knesset Constitution, Law and Justice Committee has itself pointed out (in its presentation of the constitutional process on the Knesset website) that adopting only selected parts of the Declaration of Independence “could raise questions in regard to the sections omitted or changed” (here (in Hebrew)).

But perhaps the more trenchant questions concern why this declaratory Basic Law was passed outside the planned framework for Basic Laws. That framework is presented in some detail (in Hebrew) on the Knesset’s own website (here). Although this new Basic Law appears to comprise some elements that have been proposed for inclusion in some versions of a contemplated constitutional preamble or in an introductory declaration of fundamental principles, it is clearly not intended to constitute either of these final legislative steps that will one day culminate the ongoing program to enact a constitution. Indeed, if the purpose were to enact a preamble comprising principles from the Declaration of Independence, that purpose could have been achieved more felicitously and less controversially by adopting the entire Declaration of Independence as a constitutional preamble, as has been proposed by the Israel Democracy Institute (see the Knesset website here (in Hebrew)). One might further ask why this new Basic Law, presented for a first reading as a private member’s bill on April 30, 2018, jumped the line ahead of Basic Law: Legal Rights, Basic Law: Social Rights, and Basic Law: Freedom of Expression and Association, all official government bills that passed first readings and have been languishing in the Knesset Constitution, Law and Justice Committee since March 1996? What in this new Basic Law was of such singular importance to the constitutional project to warrant railroad ing it through the legislative process while planned and pending Basic Laws treating of fundamental civil rights remain in legislative limbo? Lastly, it is worth noting that one particular word is glaringly absent from Basic Law: Israel – The Nation State of the Jewish People. That word is “democracy”.

Avinoam Sharon