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30th Anniversary of Enactment of Basic Law: Human Dignity and Liberty

This position paper is submitted to the Knesset Constitution, Law, and Justice Committee by Zulat for Equality and Human Rights, ahead of the hearing to be held on 22 February 2022 to mark the 30th anniversary of the enactment of Basic Law: Human Dignity and Liberty. Adopted by the Knesset on 17 March 1992, this is one of the most important laws in the Israeli law book, but also one of the most controversial, both publicly and politically.

Article 1 of the law, "Basic Principles," states: "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."

Ambitiously, the explanatory notes attached to the bill submitted for first reading by the Knesset Constitution, Law, and Justice Committee stated that the bill was intended to preserve a list of rights (dignity, liberty, property, leaving and entering Israel, privacy, life, and bodily wellness) "customary in democratic and civilized countries."

While the law accorded constitutional status to some rights recognized in "democratic and civilized" countries, painful compromises were made in order to get it approved by the Knesset, such as deleting the clauses on equality, judicial review, internal freedom of movement, and rigidity of the law that appeared in the original proposals, and adding the clause on the validity of laws in force prior to its enactment, a precondition set by MKs from the religious parties. Among other things, the validity clause allows for the continued discrimination against women in marital law.

Since the legislation resulted in a deficient and flawed product, certainly compared to similar chapters in the constitutions and laws of other "democratic and civilized" countries, the Supreme Court in its capacity as the High Court of Justice was called upon to interpret its implications in response to petitions submitted to it.

Some of the rights that the Supreme Court had recognized as basic rights prior to the enactment of the Basic Law subsequently received constitutional status, but the extent to which these rights enjoyed protection remained subject to legal interpretation (compared to the constitutions of other countries, in the Israeli law book they mostly appear as a "shopping list").

Also left subject to interpretation were the status and extent of protection of other rights that had been previously recognized as basic rights in case law but were omitted from

the short list of rights contained in the Basic Law, such as the rights to freedom of expression and to equality. In an interpretive decision, the Supreme Court decided to recognize the constitutional status of the rights omitted from the Basic Law insofar as they are in essence related to the violation of human dignity. This system primarily impedes recognition of the status of socio-economic rights and triggers public and political criticism of the Supreme Court, which also impairs recognition and implementation of political and civil rights.

Following the restriction set forth in Article 8, in some exceptional cases the Supreme Court repealed laws or law provisions that failed to meet its test, but also approved laws violating human rights that are unacceptable in "democratic and civilized" countries, such as the Boycott Law-2011 and the Citizenship and Entry into Israel Law-2003 (Temporary Order). Thus, instead of enacting a comprehensive and robust Basic Law that includes all the fundamental individual and civic rights recognized in a "democratic and civilized" country, recognition of the constitutional status of rights in Israel continues to be legislative and interpretive patchwork.

This patchwork system creates legal and political instability: legal, since the Basic Law can be amended or repealed with any random majority, while the status of human rights and the extent of their protection remain dependent on the Supreme Court's interpretation, which may change from time to time or be applied in different ways in specific cases depending on the random panel of justices hearing them; political, since the reliance on legal interpretation is used to politically slam the Supreme Court on the grounds that it is waging an "activist revolution" that bypasses the Knesset and violates the principle of separation of powers. In this context, it is hard to accept the criticism of some MKs against the Supreme Court, seeing that even though 30 years have passed since its enactment, the Knesset has yet to enact a Basic Law: Legislation, which is why the Supreme Court has had to deal with the failures of the legislature, nor has it approved proposals to curtail it.

Moreover, citizens and residents who have seen the violation of rights not explicitly mentioned in the short list contained in the Basic Law are required to bear the burden of proving a double infringement: that a right (say, equality) was directly violated and that it essentially violated their constitutional right to dignity. The subordination to the right to dignity means that the other rights are also affected by the limitations of the Basic Law, and in particular by the validity clause.

Despite the aforementioned difficulties and problems, there is no doubt whatsoever that Basic Law: Human Dignity and Liberty is one of the most important laws enacted since the establishment of the state, and that at very least it anchored Israel's aspiration to be counted among the "democratic and civilized" states. The impact of the law transcends the courtrooms, given the role it plays in educating Israelis to respect human rights, fundamental freedoms, and democratic values.

Both the executive and the legislature are forced to take into consideration the provisions of Basic Law: Human Dignity and Liberty, which are supposed to "hold in check"

legislation and administrative decision-making procedures. When the balances undertaken by the executive and the legislature inspired by the provisions of the Basic Law are insufficient, the Supreme Court is liable to intervene. While only in exceptional cases does it intervene in rulings on petitions, in many more cases the justices use the Basic Law as a tool in their "dialogue" with the legislature and the executive in order to persuade them of the need for improvements or "adjustments" of the balances already made, and thus dispense with the need for a ruling.

A recent example pertains to Basic Law: Israel-The Nation State of the Jewish People. Although the Supreme Court rejected all the petitions seeking a full or partial repeal of the so-called Nationality Law, the filing of petitions and the very fact that a hearing was set led the Attorney General to submit a response to the effect that the law has no operative implications and should be given an interpretation compatible with the principle of equality, which is derived from the right to dignity in the Basic Law. Although some politicians lashed out at the Supreme Court's alleged activist interference with a Basic Law, the nine-judge panel merely accepted the position presented by the Attorney General.

Thirty years on and in view of the strengths and weaknesses of Basic Law: Human Dignity and Liberty, Zulat believes that continuing to lump together all aspects of "human dignity" in a single law is no longer legally and politically sustainable.

Just as the Justice Ministry has been seeking to anchor the rights of criminal interrogation and prosecution in a separate basic law, so too must other basic civil and human rights omitted from the short list contained in Basic Law: Human Dignity and Liberty be anchored in their own separate laws. Particularly urgent is the enactment of separate Basic Laws that recognize the rights to equality, freedom of religion and conscience, and freedom of expression, as well as a basic law that anchors judicial review of ordinary and basic laws, which will ease the political and public criticism against the Supreme Court. It is important that Basic Law: Human Dignity and Liberty should be a stand-alone law, as this will do away with the subordination to the validity clause. Furthermore, we believe that the separate basic laws to be enacted in the future should require enshrinement by a two-thirds majority. In addition, Zulat is of the opinion that Basic Law: Human Dignity and Liberty should be amended and a rigidity clause added to it, in order to strengthen its stability and public status.

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