

The Right Context of the Knesset's Laws

By Hassan Jabareen, Advocate^{*}

The government frequently tries to justify its anti-democratic bills by comparing them to laws in democratic states. For example, it contends that the newly proposed bills regarding the nomination procedures for Supreme Court justices reflect the process followed in the United States. When the government coalition passes anti-Arab legislation like the "Nakba Law," which authorizes the finance minister to cut the budgets of publicly-funded institutions that commemorate the Nakba, it argues that we have to defend Israel's values as a "Jewish and democratic" state by citing the German legal principle of "militant democracy." The government has also made similar comparisons to justify bills that would severely limit foreign funding to local human rights organizations.

It is important for governments to compare themselves to other nations. Given the current state of affairs, it is perhaps even a good sign that the Netanyahu coalition still believes that it needs international legitimacy to justify these bills. However, when a comparison does not consider the social, political and historical circumstances of the other nations, it is inaccurate and misleading. It is true that some of the worst crimes against humanity have been committed by "Western" democracies: the Holocaust, slavery, apartheid and segregation. But today, regimes such as those in Germany, South Africa and the U.S., whatever their defects, are based on fundamental civil rights and respect for separation of powers.

The U.S. Supreme Court has a long and distinguished history of constitutional review; it has intervened in numerous laws passed by Congress, as well as in executive political decisions. A decade ago, in *Bush v. Gore*, it even decided who would be the next president based on a majority vote of just one justice. No political leader called for limiting the court's power in response to this decision, which was implemented in full.

While U.S. citizens elected an African-American president, in Israel the Knesset tries to disqualify the Arab minority's political parties from every round of elections because they advocate for full equality and inclusion, for "a state for all of its citizens." When Germans use the term "militant democracy", they are referring to defending the rights of ethnic minorities from racist politicians, not the reverse. While the EU wants to promote human rights abroad, the Netanyahu government seems far less committed to these values than it does to limiting the EU's ability to promulgate them in Israel, by its repeated attempts to restrict NGO funding.

The disingenuousness of the government's international comparisons is evident when one compares the rhetoric of politicians for audiences within Israel to the diplomatic discourse they employ abroad. At home, this government harshly criticizes the country's Supreme Court; abroad, however, the Foreign Ministry proudly boasts that Israel has the world's most powerful high court. While officials criticize former Supreme Court President Aharon Barak's rulings in Palestinian cases, the Foreign Ministry hands out a booklet at conferences abroad listing these cases as evidence that Israel is committed to the rule of law and democratic values. While right-wing lawmakers incite against Arab Knesset members on a

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daily basis, Israeli officials back up their argument that Israel is not an apartheid state by raising the fact that Arabs are represented in the Knesset.

An American friend reported happily to me how he had heard an Israeli right-wing diplomat praising the NGO I direct, Adalah – The Legal Center for Arab Minority Rights in Israel, as an example of Israel's commitment to the rights of its Arab citizens. What my friend did not know is that at home the Foreign Minister launches daily attacks on Adalah and other human rights organizations.

In the past, we human rights litigators tended to cite progressive rulings by the national courts of Western countries when arguing before the Israeli Supreme Court. Lately, we have found that the most effective comparisons are to Western nations during their darker days. Even during segregation and apartheid, these countries' national courts sometimes succeeded in defending human rights. For example, in order to challenge the new anti-boycott law, which prohibits publicly promoting boycotts of Israeli institutions and West Bank settlements, a good comparison to make would be to the U.S. during segregation, when the Supreme Court defended the freedom of expression of black institutions such as the NAACP when they boycotted racist white companies and state services.

In the case against the Israeli citizenship law, which banned family unification in Israel between Palestinian citizens of Israel and their Palestinian spouses who live in the West Bank and Gaza, the best comparison would be a landmark decision by a South African court that struck down the apartheid-era policy that banned family unification between blacks in urban cities. During the Supreme Court hearing on the Nakba Law last month, the state argued that no country would allow citizens to mark its Independence Day as a day of mourning. We responded that not only do many indigenous peoples in settler countries such as the U.S., Canada, Australia and New Zealand still perceive the national Independence Day as a tragedy, but those states have in many cases apologized and recognized their historical injustice, and even fund some commemorations by the indigenous population.

Regarding the NGO funding laws, the conduct of apartheid South Africa was entirely different from that of the Israeli government now. There, the regime did not prohibit the U.S. and European countries from funding human rights organizations; on the contrary, it was the human rights organizations which threatened the donor states that they would stop taking funds from them if they did not boycott the apartheid regime.

Maybe it would be better, therefore, when making comparisons about this government's legislation, to do so in the right context.