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המכללה למינהל בראשון לציון (לא בוגרים - 20222					

Yoram Rabin

Striving not to decide

On Thursday, the High Court of Justice unanimously rejected a petition by the Association for Civil Rights in Israel and the Adalah advocacy group against the so-called Nakba Law. The law authorizes the finance minister to withhold state funding from organizations that observe Israeli Independence Day as a day of mourning or whose activities deny the state's Jewish and democratic character, dishonor its symbols, incite racism or support terror.

The court did not explicitly rule on the constitutionality of the law; it only rejected the petition categorically on the grounds that it was premature to object to the law before seeing whether and how the finance minister's authority was exercised. The petitioners could return to the court to challenge the law's constitutionality after it was applied.

One can sympathize with the justices for wanting to avoid a decisive ruling. In their verdict, justices Miriam Naor and Eliezer Rivlin mention the need to set priorities regarding the allocation of judicial resources and to sort out the petition before evaluating the constitutionality of the law.

The court must be aware of the recent problematic bills that have been proposed, and it may be wary of being called in too frequently to discuss them. Perhaps it chooses to conserve its judicial ammunition to avoid being caught in the crossfire.

It's easy to come up with serious legal arguments against the petition. The Nakba Law has changed a great deal since it was first proposed. Today it could certainly be argued that its damage to civil rights is limited and proportionate and does not justify judicial intervention. The court should have made a clear ruling in this direction. But that would have led other parties into a discussion of questions that drill down "to the root of the problems dividing Israeli society," as Supreme Court President Dorit Beinisch put it.

Instead, the ruling is based on a questionable legal argument. For the first time, the High Court put the issue of "the maturity of the petition" at the center of the discussion; that is, rather than ruling based on the language of the law, the court must wait to see if and how it is applied.

The justices are well aware that what they are trying to characterize as a delayed verdict is in effect an unequivocal ruling. If the law can be applied constitutionally, then any future discussion of the finance minister's application of the law will concern not its constitutionality but rather the minister's unconstitutional application of it. It will instruct him to apply it in a way that does not unduly infringe constitutional rights. If the law is unconstitutional, doing disproportionate harm to constitutional rights regardless of its application, the court should say this now rather than leaving the Knesset, the government and the public in a state of uncertainty.

Justice Yitzhak Zamir, now retired, defined judicial activism as "deciding to decide." The panel that issued this ruling comprised Beinisch, the chief justice; Rivlin, the deputy chief justice; and Naor – three of the most senior justices, at least two of whom are considered activist judges.

Still, what stands out most about this ruling is the desire not to decide. This new move may signal an undesirable change in the court's willingness to brave the waves and issue clear statements about the constitutionality of laws based on their language. Some will claim that this makes redundant the efforts of Knesset members who oppose judicial activism to get Justice Asher Dan Grunis appointed Supreme Court president instead of Naor, who wrote the ruling on the Nakba Law.

The writer is the dean of the law school at the College of Management.