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Arab Center for Research & Policy Studies

CASE ANALYSIS

What does the “Jewish Nation” basic law mean?

Azmi Bishara | Jul 2018

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Introduction

The basic law titled "Israel the nation state of the Jewish People" first presented on July 22nd 2013, was passed by the Knesset in its third reading on July 18th, 2018, following five years of parliamentary debate and non-substantial amendments. The bill was discussed by the Israeli media, human rights institutions, law professors, as well as MKs several times during this period. The initial proposal came from a Kadima MK, Avi Dichter, previously director of the Shin Bet (Israeli Security Agency - Shabak), and was supported by a group of right-wing parties. Ultimately however, the law passed after Benjamin Netanyahu personally adopted it, in his alliance with Naftali Bennett, head of the Jewish Home Party, which represents the extremist nationalist religious trend in the Knesset and Israeli society. At the top of the Home Party's agenda are "national missions" such as the new legislation, other legislations concerning the "Jewishness" of the state, and the renewal of the Zionist settler project by encouraging unrestrained building of settlements in the occupied territories. The party is also home to right wing extremist and justice minister, Ayelet Shaked, who submitted her own proposal for the new legislation. The final bill is thus an amalgamation of the various proposals and amendments.

This paper¹ looks to the final draft and the background of the law, without delving into all the proposals that have been "softened" to camouflage the racism ingrained in the final version. This was mostly done for the sake of Israel's international reputation, in order to circumvent legal challenges, and the satisfaction of the Israeli judiciary and Attorney General. Although the style and structure of the bill has seen minor changes over time, the background and motives of the main proponents, as well as the law's sponsors, no doubt remain the same.

General Remarks

A first glance of the law suffices to reveal that — unlike the rest of Israeli basic laws (the constitutional laws) — it does not include the expression "Israel as a Jewish and *democratic* state". In fact, "democratic" does not appear once in the text, with the drafters having focused solely on the "Jewishness" of the state, abandoning the composite "Jewish and democratic". This absence is a deliberate and clear attempt to override what they consider to be the Supreme Court's inclination towards democracy, a

¹The majority of sources will be in Hebrew.

preference which they claim tips the balance between the Jewish and democratic components. According to the authors and proponents of the law, in many cases democratic principles, especially the individual rights of citizens, were afforded precedence over the Jewishness of the state, especially in certain Supreme Court decisions that allowed, for example, an Arab citizen to buy a house in a closed Jewish settlement or for Arab parties to run for elections, even though these parties claim that Israel should be a state for all its citizens. The court's interpretation of violating the "Jewishness of the state" was a narrow interpretation, and was limited to committing a concrete act against its existence. The court, for example, was not convinced that those who demand a citizen-state are essentially violating the basic law. In several statements, as well as in their justifications for the law, the proponents emphasized that they wanted to narrow the playing field for the judiciary, so that democracy would be subordinated to Judaism, and not vice versa.

In reality, they wanted to enshrine the already unbalanced and problematic composite (Jewish and democratic), and the discrimination that empties democracy of its content which exists in the political, social, and economic spheres, into law. Thus, the law reflects, and entrenches, the distorted reality of democracy; it establishes it in a law and seeks to prevent any judicial intervention. Therefore, the word "democracy" is not mentioned in the text of this law. In my opinion, all the supporters of this law believe that the State of Israel is essentially a Jewish state at its core, and it is only democratic in name — as a label. A label is certainly very different from what they consider the substance, the core, or the essence of existence, and must thus the democratic form must be subject to this core, or rather, the "eternal Zionist message" of the State of Israel, and the very purpose of its establishment.²

Some right-wing Israeli press accused Netanyahu of hesitation, or indecisiveness in enacting the law, in fear of damaging the image of Israel in the West³. Many

² Liberals were found to support the idea of a Jewish state and its enhancement, a state of the Jewish people; these include liberals such as philosophy professor Asa Kasher and law professor Ruth Gavison. Both slipped in recent years into nationalist positions that support the law. See for example Asa Kasher's position on the Maariv news site on 22 July 2018. Accessed on 24 July 2018, <https://goo.gl/8F9z7U>. See [Ruth Gavison, who became a Zionist activist and supported the law but then withdrew her support on her Facebook page, claiming that the authors of the law deceived her. She opposed the seventh clause of the law, but supported the Nation-State law as a whole so long as it was not used as a tool for discrimination or circumvention of previous decisions of the Supreme Court of Justice. Accessed on 24 July 2018 at: https://goo.gl/4YL63H.](https://goo.gl/4YL63H)

³ Israel Harel, "Why is the Nation State Law Vital?" Haaretz, 24 November 2014.

arguments claimed that Jewish communities in the West, which the law was supposed to serve, expressed reservations about the law in their communications with the Israeli leadership. They feared that the state that they support and deeply sympathise with would appear racist and discriminatory against what they call "minorities". It seems to me that if it is true that Netanyahu and others on the pragmatic right were indeed hesitant, they were only able to overcome that hesitation because of the regional and international climate. I am referring to the remarkable rise of right-wing populist nationalism in Europe, and the similar (yet with more weight and significance) rhetoric of the Donald Trump administration. These have brought about a shift in Western attitudes by turning refugees, immigrants, Muslims etc. into "the other", and has strengthened isolation and xenophobia. Netanyahu seems to believe that the new law is not a blatant exception in the current international atmosphere. A second factor relates to the timing of the legislation, five years after the law was initially proposed. The current regional climate represents an erosion of the Arab position, particularly of main elements of the Palestinian cause and the conflict with Zionism, along with the negligence of Arab countries towards such legislation and Israeli practices.

Both opponents and supporters of the law stressed that the main elements of the law exist in the so-called independence document, noting that the affirmation of equality for Arab citizens is based on the document and is not found in law. If the law is declarative in the majority of its articles, how many times will Israel be declared? ⁴ Why did the law that is similar to the Declaration of Independence invalidate the principle of equality contained therein (a principle which was at the time a condition for Israel's acceptance to the United Nations and was therefore asserted in the document, verbally, yet without application - the same document that the Zionist left "loves" to cite)? Israel has the habit of growling about the threats to its existence while putting the existence of others at risk. It cries weakness whenever it grows stronger, and legally affirms the need to preserve its Jewishness because it is in danger, all the while extremist Jewish currents dominate and intensify the Zionist practices of state institutions. Self-victimization has become a structural component of Israeli political culture. The enactment of this law cannot be separated from the

⁴ See: Kremnitzer, Mordechai, and Amir Fuchs. "Proposing a Basic Law 'Israel as the Nation State for the Jewish People': Should the State of Israel be reestablished again?", *Geloy Daat*, 7 (Spring 2015), pp. 133-141.

rise of nationalist and nationalist-religious currents in Israel and parliamentary populism in particular, and the decline of the role of liberal and labour elites.

Avi Dichter, writing in defence of the law he presented to the Knesset on 22 July 2013, states that to define Israel as a nation state of the Jewish people everywhere gives it a greater “margin for manoeuvre” in negotiations. That is, there will be no need to ask the parties negotiating with them to recognize the Jewishness of the Israeli State as a precondition. Netanyahu may not take him up on this recommendation, because the demand that the Arab parties to the negotiations recognize Israel as the state of the Jewish people means automatically denying the Palestinian Right of Return, and signal Arab acquiescence to Israel’s refusal to be a state for all its citizens. Therefore, Netanyahu will try, to the greatest extent possible, to maintain this upward escalation in imposing demands and conditions on the parties negotiating with him; blackmailing and impeding any progress in the negotiations. He does not demand this because he lacks confidence regarding the Jewishness of the state, but rather for negotiating power.

What Do The Declarative Provisions Mean?

It is important to remember from the outset that the Israel nation state law does not talk about an Israeli nation but rather a Jewish nation which overlaps with the Jewish religion and not with the citizens who reside in the state itself.

The law is for the most part declarative and purely ideological. Naturally, advocates of the law, and a large group of its opponents, insist on that from a legal aspect and in an attempt to lessen its impact; this declarative character has no practical implications, and any Israeli liberal which accepts that Israel is a Jewish state would accept it.⁵

The first clause, for example, and its title, “basic principles”, stipulates:

⁵ Indeed, the definitions of Aharon Barak, one of the symbols of Israeli Liberalism, defined the meaning of the “Jewishness” of the Israeli state similarly to this law (including symbols, culture, sources of legislation, collection of diaspora, promotion of immigration and settlement). For a translation and analysis of these in Arabic, see: *From the Jewishness of the State to Sharon* (Cairo: Dar Al Shorouq, 2005), p. 36; See also:

“Aharon Barak is also in favor of the national law” *Makor Rishon*. Accessed 12 July 2018: <https://goo.gl/AoWd8d>

A. The land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established.

B. The State of Israel is the national home of the Jewish people, in which it fulfills its natural, cultural, religious and historical right to self-determination.

C. The right to exercise national self-determination in the State of Israel is unique to the Jewish people.

The second clause, entitled "The symbols of the state", determines the name of the state, the state flag, emblem, and anthem. The third clause states that Jerusalem, "complete and united", is the capital of Israel. The fifth clause stipulates that the state will be open for Jewish immigration and the ingathering of exiles. The sixth clause stipulates:

A. The state will strive to ensure the safety of the members of the Jewish people in trouble or in captivity due to the fact of their Jewishness or their citizenship.

B. The state shall act within the Diaspora to strengthen the affinity between the state and members of the Jewish people.

C. The state shall act to preserve the cultural, historical and religious heritage of the Jewish people among Jews in the Diaspora.

The ninth clause stipulates:

A. Independence Day is the official national holiday of the state.

B. Memorial Day for the Fallen in Israel's Wars and Holocaust and Heroism Remembrance Day are official memorial days of the State.

The tenth clause states that "The Sabbath and the feasts of Israel [that of Judaism] are the established days of rest in the state; Non-Jews have a right to maintain days of rest on their Sabbaths and feasts; Details of this issue will be determined by law."

There is no doubt that these articles are declarative of the identity of the Jewish state and its historical mission, overly emphasizing national and religious values and Jewish heritage. This style does not characterize a democratic state, because solid democracies transcend these assertions in their laws. They consider the foundations of their identity to have been established with the state. Democratic states are concerned with the inclusion of these values in the curricula, and emphasize legislation on citizenship, rights

and duties, civil rights, and the balance of powers. States emphasize the promotion of so-called "national values" and the roots of the nation and its heritage in the foundational stages, or in the case of democracy descending into fascism, religious fundamentalism or other transitions, or when mobilizing for war. However, it is necessary to add that it is not true that these "basic principles" have no practical dimensions. These articles define practical objectives for the functioning of state institutions and form a guide to serve the Jewish nation-state, encouraging Jewish immigration and settlement and working to strengthen the link with Jewish heritage. They even enshrine issues negotiated with other parties according to international resolutions, like the status of Jerusalem, as constitutional principles. This is certainly much more a declarative act.

By restricting the right of self-determination to the Jewish people alone, as justified by the authors of the law, it strips non-Jewish citizens of the right to demand or be acknowledged as a national group, which could lead to a bi-national state. The law provides for "the right of self-determination of the Jewish people" alone in this state. The previous clause defined the location of this self-determination as the "Land of Israel" — and it is well-known that the Israeli definition, which is also the biblical definition, of the land of Israel exceeds the state's territory and includes also "Judea and Samaria" at least.

The second reason for restricting this right is to establish a constitutional legal response to any political talk of "a state for all its citizens". The state, in terms of definition, is the state of the Jewish people, who are citizens of many other countries, and not a state for all citizens residing in this state itself. According to the interpretations of this law and according to right-wing writers and even their liberal supporters, the Jewish people have national rights. The non-Jewish citizens on the other hand are granted individually equal civil rights and no collective rights, certainly not national rights. Thus, the law seeks to close a central political debate with an answer that aspires to block the road legally and constitutionally.

The Palestinian Arab citizens of Israel have experienced a civil and national advancement since the mid-1990s, after the Oslo Accords, which limited the Palestinian cause to the territories occupied in 1967. This was represented by the proposals of the National Democratic assembly (Balad), which has become a consensus between political and intellectual elites and active associations. That equality can only be achieved in a State for all its citizens, and that the Arabs - as a national group and indigenous people - must enjoy collective rights, not just individual ones. The official Israeli reaction and the Zionist one in general coincided with the deterioration of the Israeli political system in Palestine into a manifest colonial apartheid regime. This included a sovereign "Jewish nation",

where the state works as its goal and tool at the same time, and a Palestinian authority that lacked sovereignty and worked outside the framework of citizenship to manage the affairs of the population and maintain security (specifically the security of Israel), and second-class Arab citizens within the Green Line.

Explanations accompanying the law on the national and individual rights of the Jews, and the individual rights of Arabs, are not new. They are repeated in a large segment of Israeli research and perspectives on the subject. In fact, the issue of civil equality for Arabs is not documented in any law; there is no law in Israel that provides for equality of citizens. It is true that this principle is contained in the so-called Declaration of Independence, but it has not been translated into law.⁶ The authors of the law have pointed out that one of its objectives is to repel the growing demands of the Arabs inside Israel to be a state for all its citizens and to have collective rights as a national minority.⁷

The promise of the enactors of the law that individual equal civil rights for "non-Jewish citizens" will be guaranteed despite the enactment of this law, did not have expressions in the law itself. Those who chant about the civic equality of citizens do not dare to put the word "equality" in this, or any other law. They fear that this could be a starting point and a legal basis for unlimited demands from their perspective, and because the consistent interpretation of equality means inevitably becoming a state for all citizens. They developed an "equality phobia". Indeed, the definition of Israel as a Jewish state, defined in a basic law as not only a Jewish state, but the state of the Jewish people everywhere, first and foremost, and not the state of its citizens, means that equality for Arabs is not possible, neither in national nor civil forms.

The Israeli legislator affirms through this law that there is no collective right for Arabs in the state, and that these rights are for Jews only. This also means that some individual rights cannot be fully exercised. Individual rights to culture and identity are exercised only collectively; therefore the denial of collective rights necessarily implies the negation of some individual rights.

It is worth noting that the authors found it appropriate to use the declarative provisions of the law in order to confirm the non-separation of religion and nationalism. The first Clause (b), speaks of "the natural, cultural, religious and historical right to self-

⁶ At the time, I tried to present the Basic Law for Equality to the Knesset, which was rejected before the first reading.

⁷ See Avi Dichter's explanations of the law submitted to the Knesset, on 22/7/2013.

determination." The word "religious" was not included in the original text -- it was added in the parliamentary committee prior to the second and third readings, as a result of the influence of the religious parties. ⁸ Here the law became honest; on the one hand, Israel is a nation-state that defines its nation by a religious definition, and it has no other definition, despite the use of the law and its repetition of the word "national" derived from modern secularist nationalism (that is, in 19th Century Europe). Yet the definition of nation is no different from the definition of religion. The religious right to self-determination is such an invention that the legislators deserve to register it as their patent.

Practical and Direct Provisions

In practice, the law abolishes prior legal definitions of Arabic as the second official language in Israel after Hebrew. The fourth clause stipulates that "(A) The state's language is Hebrew." This clearly means there is no room for two official languages. However, it is followed by these clauses to soften it:

B. The Arabic language has a special status in the state; Regulating the use of Arabic in state institutions or by them will be set in law.

C. This clause does not harm the status given to the Arabic language before this law came into effect.

If we accept the validity of this, it should be recalled that Arabic did not receive a real status until Arabs demanded the use of Arabic in correspondence with state institutions and for street signs etc. They used the legal status of Arabic as a second official language as the justification for their demands, actually they asked to implement the law. With the revocation of this official status, the legal mechanisms that were used to improve the real status of the Arabic language have disappeared. The new law promises to preserve what was before. That is, there is no longer any legal basis for further demands.

The seventh clause⁹ explicitly indicates that: "The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment

⁸ "Various Forms of Law," *the Association for Civil Rights in Israel*. Accessed 24/7/2018 at: <https://www.acri.org.il/en/33369>. The association itself opposes the law.

⁹ This particular provision appears to be the subject of one or more appeals against the law in the High Court of Justice. I believe that the appeal against the law in general will not work, and the Supreme Court will not serve as an instrument against a basic law in general, especially as it was formulated in a

and consolidation.” At face value, there is nothing new about this provision. Zionism, since even before 1948, has followed a policy of settlement in all of Palestine, through institutions such as the Jewish National Fund, the Jewish Agency, and the Israeli State itself. This, however, was not enshrined in a basic law, despite the enactment of land confiscation laws, so settlements did not become a constitutionally fortified value, subject to other considerations.

For example, settlement was often undertaken on miri (state) lands (which the Israeli state saw itself to have inherited from the former ruling powers); by purchasing land (even if fraudulently); or by confiscation in the name of the "public good" (for closed military zones, streets, facilities, etc.), before diverting the land for settlements at a later date. In the new national law, settlement itself has become the public good by definition; land can be confiscated for this purpose directly. Moreover, this not only entrenches the informal Zionist institutions, but also the State — a state that works to establish cities and towns exclusively for Jews. The legislation does not consider the idea of developing Arab communities from villages and cities and strengthening or expanding them in the same law. The task of promoting settlement, establishing housing complexes, allocating resources and budgets, and planning for this is a national task. Nationalism is limited to Jews, and there is no mention of existing Arab villages and cities.

It is also notable that this provision does not talk about settlement within the state borders. While it is true that the demands of the extreme right, which proposed the law to encourage settlement in the "Land of Israel", were not met; yet rather than restricting settlement to the "State of Israel" (which according to Israeli law includes Jerusalem and the Golan Heights anyway), the boundaries were left open. Thus settlement is encouraged without specifying any limits, of place or border. I do not believe that this is a coincidence; the basic law does not define the borders of the State of Israel either, as Professor Mordechai Kremnitzer, a liberal law professor who vehemently opposed this law, has pointed out.

Finally, this law offers nothing new when looking at the practices of the Zionist movement in Palestine, which is not to say that it is not significant. There is a difference between practices resulting from the policies of the government, its existing Zionist institutions, or the convictions of the majority of the Israeli public - and practices that have been

way that could be bypassed. See Arab 48 interview with Adalah Director Hassan Jabareen, accessed 7 April 2018: <https://goo.gl/Gh6Ld6>.

consolidated by the constitution. The state is consequently arming itself against the Israeli judiciary in order to carry out such practices. This result is important; the conversion of these policies and values into a basic law impacts the culture and function of the authorities, as well as on the expectations of the Israeli public. A dynamic is emerging that encourages the intensification and escalation of these practices. They have become a national and constitutional duty, and officially admissible.

The law also creates a new constitutional base for the Israeli right to push laws in the service of its extreme ideology. This interactive process has started and no one knows where it will end. The right will not give up pushing for the enactment of Zionist legislation characterized by racism, but will consider the law a base to enhance nationalist-religious objectives, that consider the indigenous Arab people to be merely accidentally in the country, and therefore must be contended with any gestures granted to them. This is because the state, in their opinion serves any Jewish citizen in other states before it serves an indigenous Palestinian. What is usually reserved for the media, parliamentary speeches, and in populist rallies, has become a constitutional law, and this is a fundamental difference.