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**Research Report**

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# SWP Comment

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## Israel's Nation-State Law

Netanyahu Government Lays the Foundations for a Majoritarian System

*Peter Lintl and Stefan Wolfrum*

On 19 July 2018, the Israeli parliament passed legislation known as the nation-state law. It is highly controversial in Israel as well as internationally, although strictly speaking there is little new contained in it. Its advocates emphasise that it merely gives expression to existing realities. Critics argue that the law discriminates against minorities, runs counter to democratic values and, in particular, undermines the principle of equality. The debate reveals the social tension in Israel between its 'Jewish' and 'democratic' identity. In addition, it becomes clear that the main supporters of the law on the government side have more far-reaching intentions than its wording suggests. Their aim is to place Jewish collective rights above individual rights and freedoms. The law is, therefore, also a manifestation of current government policy aimed at leading Israel away from a more liberal democracy and towards a majoritarian democracy. In particular, this policy affects the Supreme Court as a defender of liberal principles.

Israel does not have a constitution, instead it has a set of basic laws that have constitutional status. This is because since the state was founded in 1948, there has never been any agreement on what precisely the "Jewish" in the Jewish state is supposed to be and how the state's Jewishness relates to its democratic character. The newly adopted 14th law entitled, "Basic Law: Israel – The Nation State of the Jewish People" claims to codify the Jewish element of the state. It declares – with constitutional status – Israel to be a Jewish state. Given that the law is supposed to define the character of the state, it must be accorded high status, comparable to the preamble of a constitution.

The law has been a long time coming. Since 2011, a variety of different drafts have been discussed in the Knesset. There was widespread support among the Zionist parties for the need to establish the Jewish nation-state character in Israel's Basic Law. The motivation for this is mainly fuelled by three developments. Firstly, stagnation in the peace process with the Palestinians has meant that, for the majority of Israelis, the most important social goal is no longer a peace agreement, but the preservation of Israel as a Jewish state. Secondly, to reject the demands of post-Zionists and the Arab minority in the country who want to define Israel as a neutral rather than a Jewish state. Thirdly, the nation-state law serves



as a proactive statement against attempts to de-legitimise Israel, in particular by the Boycott, Divestment and Sanctions (BDS) movement, which is campaigning internationally for economic, political and cultural sanctions against Israel.

Nevertheless, the recently passed version of the law was heavily debated in Israel. Amir Ohana (Likud), chairman of the joint committee that legislated the nation-state law, described it as the “most important law in the history of the state of Israel”. For Prime Minister Benjamin Netanyahu, the law takes Israel to its historical destiny – fulfilling the tenets of Zionism. Some Arab Members of the Knesset, on the other hand, ripped up copies of the law as it was adopted and repeatedly shouted “apartheid” at its supporters. In addition, the Jewish opposition, many civil society organisations and even President Reuven Rivlin have denounced the law as being discriminatory, unnecessary and flawed. It has also received strong criticism internationally – from the EU to representatives of Reform Judaism in the US and internationally renowned Israeli lobbyists, such as Alan Dershowitz, who said the law made it harder to defend Israel.

In contrast, its supporters argue that the law only articulates what is already a reality: Israel is a Jewish state. In their view, former legislation adopted by a liberal Israeli elite has created an imbalance in which the Jewish element of the state is no longer sufficiently asserted. They claim the nation-state law has redressed this imbalance.

### Key contentious issues

Although some stipulations in the law are new, many of the regulations can already be found in existing laws. However, these regulations now have constitutional status. Many aspects have a purely declarative character. For example, the law regulates state symbols (flag, national anthem, coats of arms), calendars (Hebrew and Gregorian) as well as public holidays and rest days. In addition, it confirms current practice, such as immigration opportunities for all Jews and

the state’s strong connection to the Jewish diaspora in general. It also affirms the status of the whole of Jerusalem as the state’s capital, although this was already enshrined in a separate Basic Law in 1980. That the law continues to court fierce controversy, is essentially due to four contentious issues.

### Codification of Israel as a Jewish state

The sharpest criticism is reserved for Section 1 of the law, which defines Israel as the historical homeland of the Jewish people and exclusively grants the Jewish people the right to national self-determination in the country. The understanding of ‘Jewishness’ refers above all to the character of Judaism as a nation, as formulated by Zionism. This does not mean that the religious and ethnic elements of Judaism are ignored, but the purpose of the law is to stress the legitimacy for independent statehood, which is inherent in any national self-understanding.

Against the backdrop of this self-understanding, the creation of a Jewish state is the *raison d’être* that underpins Israel, and a fact that has been expressed in many of the country’s other laws and jurisprudence. Israel declared itself an independent Jewish state as early as 1948 and was recognised by the majority of the international community. Nevertheless, the question of whether Israel should be a Jewish state is highly controversial among Arab and Jewish Israelis. Large parts of the Arab-Palestinian population categorically reject this section of the law. From their point of view, such a definition has a discriminatory component since the further legalization of the Jewish character of the state cements the division between Arab and Jewish citizens. For, unlike in many western states, citizenship in Israel is not identical to the identity of the state. While you can be an Israeli citizen, there is no Israeli nationality – as the Supreme Court has declared in a ruling. For example, Israeli birth certificates differentiate between Jewish and Arab citizens.

As a result, the character of the state is determined by the national majority, which automatically gives the non-Jewish minorities secondary status, at least in any fundamental issues where state identity is concerned. Whether a state that links its identity to the nationality of the majority, defined along ethnic and religious lines, is *sui generis* discriminatory is a matter of heated debate in Israel – in politics as well as in civil society and academia. It is a question that touches fundamentally divergent concepts of the state. Opponents of the idea of the Jewish state call for a neutral state based on a liberal notion of popular sovereignty that does not permit the representation of majorities or minorities in state legislation. The other side argues that such flawless liberalism only exists on paper. References are made to examples such as Spain, Latvia or Croatia – countries that constitutionally define nation-state identity through the majority society. Even the Parliamentary Assembly of the Council of Europe attests that nationality is not necessarily to be equated with citizenship (given that its Member States follow different concepts of ‘nation’ that are not compatible with each other).

Arab-Palestinian politicians are, therefore, calling for a “state for all citizens”, sometimes also postulating the right to question the Jewish character of Israel. In contrast, many Jewish Israelis see the “state for all citizens” formula as a denial of Israel’s right to exist. Consequently, the Knesset has tried several times to pass a bill that would disqualify parties with such intentions from participating in parliamentary elections – but the Supreme Court has so far prevented this.

The historical genesis of the state of Israel further exacerbates this dispute. It is inextricably linked to the flight of the Jews from European anti-Semitism and also the Israeli-Palestinian conflict, in which both sides – Zionists and Palestinians – make a historic claim to the same piece of land. The discussion about the nation-state law is, therefore, also an expression of the Arab-Israeli conflict which remains unresolved to this day.

## Importance of democratic principles

Unlike the question of Israel’s Jewish character, Jewish and Arab critics of the law agree on the principle of “equality”. They unanimously complain that this principle, which had not been enshrined in any Israeli Basic Law before, was not included in the nation-state law and that this would undermine basic democratic principles. Jewish opposition politicians had suggested that the Declaration of Independence from 1948 be passed as a Basic Law. It declared Israel a Jewish state, but assured all citizens social and political equality. Israeli historian, Alexander Yakobson, pointed out that while there are a number of countries in which state identity is the nationality of the majority, the principle of equality is present in all these countries.

However, it is no coincidence that the principle of equality is not mentioned in the law. In the previous legislative period, attempts were made to reach a compromise between the Jewish parties in order to include this principle into the bill. But this failed because of resistance from Likud and the Jewish Home. Representatives of these parties argued that the principle of equality could be interpreted by the Supreme Court as a collective rather than an individual principle. It would therefore be better to omit the principle altogether than to take the risk that Palestinian Israelis would ultimately be granted collective rights through the Supreme Court. Yariv Levin (Likud), one of the architects of the law, explicitly stated that the inclusion of a general principle of equality is “the exact opposite of what I want”.

The relationship of the state to the principle of democracy has not been addressed in the text of the law, although the latter was anchored in most of the bills. However, in these versions, the principle of democracy was subordinated to the Jewish character of the state, which found no majority within the governing coalition. The Kulanu party, in particular, was against such a hierarchisation, fearing the democratic character of Israel would be compromised. This

ultimately meant that any definition for the relationship between Jewish and democratic was omitted. When representatives of the government point out that the relationship between democracy and Judaism is already contained in the Basic Law: Human Dignity and Freedom from 17 March 1992, this sounds contradictory because, according to Justice Minister Ayelet Shaked (Jewish Home), the nation-state law should “protect the Jewish character of the state, even if that means sacrificing human rights”.

### **Regulations on minorities**

Article 7 of the law says that Jewish settlement of the land represents a national value and should, therefore, be promoted. This formulation actually represents a compromise by the government. An earlier draft even mentioned communities segregated by religion and nationality. After sharp protests, even from within the government, this passage was changed — also because Israel Beitenu, the party of the Russian-speaking minority, which, in part, is not even recognised as being Jewish, feared being discriminated against.

The opposition is critical of any explicit promotion of Jewish and not Arab settlements, especially considering the infrastructure in Arab cities has thus far been sorely neglected. In the past, such regulations were prohibited by the Supreme Court. It is a long-pursued project of the Israeli right to give (also legal) preference to Jewish settlement. The central idea is that there should be no regional Arab majority anywhere in Israel. In particular, this applies to areas with a lower Jewish share of population, such as Galilee or the Negev. The passage adopted now does not exclude further settlements in the West Bank. It was introduced by Naftali Bennett, chairman of the Jewish Home Party which is in favour of at least partially annexing the area. In general, a large number of parliamentarians who approved the nation-state law have also demanded an annexation or partial annexation of the West Bank.

Section 4 of the law is even more controversial. It states that the Arabic language should retain its special status in Israel and that this clause does not change the status given to the Arabic language before the basic law was created. However, Arabic has, in fact, been downgraded by the law because it will no longer be an official state language. How this will affect the position of Arabic in the country is unclear. In any case, the regulation has clear symbolic power in the context of the already tense relationship between the Arab Israelis — especially those of Palestinian origin — and the Jewish majority. Even veteran Likud politicians like Benny Begin or Moshe Arens doubt the necessity of this paragraph. They warn that it may contribute to an unnecessary worsening of the relationship between Jews and Arabs in the state.

### **Redefining the relationship with the Jewish diaspora**

Many progressive Jewish voices in the US share these criticisms. However, one paragraph in the law is explicitly directed against Reform Judaism itself, which makes up the bulk of the US diaspora. At the last minute, the original formulation that the state works “everywhere” to strengthen the relationship between the Jewish diaspora and Israel was changed and now stipulates that the state is only active “among the Jewish diaspora” in order to achieve this (Section 6b). This passage, reformulated at the insistence of the ultra-Orthodox, is designed to rule out Reform Judaism being able to influence Israeli jurisprudence in respect of conversions and the status of non-Orthodox Jewish denominations. This is intended to consolidate the hegemonic status that Orthodoxy has in Israel with regard to outside interference in religious matters. Moreover, the passage paves the way for state-subsidised influence of Orthodoxy on the Jewish diaspora. This is also made clear in Section 6c which states that Israel will “act to preserve the cultural, historical and religious heritage of the Jewish people among Jews in the Diaspora”. Here,

Israel is implicitly asserting interpretive sovereignty over essential issues of Jewish identity worldwide.

The nation-state law also explicitly stipulates, for the first time, that the Jewish people's religious right to self-determination is fulfilled in the state of Israel. A lot of the meaning is lost in translation because the Hebrew word 'dati' not only means religious, but is also synonymous with 'orthodox'. The confessional pluralism of American Judaism does effectively not exist in Israel so when it talks about religion, it means the orthodox interpretation of Judaism. The inclusion of this formulation reflects changing demographic realities. Meanwhile, the Orthodox population accounts for just under one quarter of the total Jewish population. Therefore, these passages in the law are also indicators of a growing gap between Israel and the American-Jewish diaspora, as seen in recent years in questions of conversion, restrictions on non-Orthodox denominations at the Wailing Wall and even general religious practice in Israel.

### **The political intention behind the law**

Beyond the specific passages discussed, the law has a deeper thrust that goes further than the wording of the text. In essence, it is about whether the state should be characterised by a civil nationalism that emphasises universal principles, such as equality or individual values and freedoms, or by a nationalism that emphasises particular collective rights that are ethnically, nationalistically or religiously justified. Proponents of the law adhere to the latter. In their eyes, the law is a tool to move the state in that direction.

In doing so, the nation-state law is directed, in particular, against the "Basic Law: Human Dignity and Liberty" from 1992. It codified, for the first time, individual basic rights, human rights and freedoms into basic law and also stipulated that the state of Israel was Jewish and democratic. This had far-reaching consequences because

this law allowed judicial review complaints against legislative decisions made by the Knesset to be put before the Supreme Court. This is why this unprecedented amendment is commonly referred to as the 'constitutional revolution' in Israel.

However, these far-reaching developments on the part of the judiciary are controversial for various reasons. Firstly, the possibility of a judicial review was only brought about by a ruling from the Supreme Court, similar to what happened historically in the US. However, since this was not intended by the Knesset legislation, opponents see this as an illegitimate infiltration of popular sovereignty by the judiciary. Secondly, President of the Supreme Court, Aharon Barak, argued that the word "Jewish" in the phrase 'Jewish and democratic' by no means refers to religious tradition. Rather, it merely emphasises the universal values of the Jewish Enlightenment. Barak had, therefore, at a stroke defined the Jewish character of the state without any social consensus. Thirdly, Barak is accused of having established judicial actionism in the wake of the constitutional revolution, under the premise that everything is justiciable, which interferes too much with the interests of the executive and legislative branches. In so doing, the Court is alleged to have established case law that is too liberal and too targeted at individual rights. As a result, minority interests would be given preference over majority interests.

The real intention of proponents of the nation-state law is probably to reverse these developments. The main protagonists here are the Likud and Jewish Home parties who have managed to assert themselves against critics of the law within their own government — in particular, the ultra-Orthodox parties and Kulanu. As Ayelet Shaked explained, "the constitutional revolution has emptied the idea of a Jewish state of its content" and "radically sanctioned individual rights". The Minister of Justice called for a moral and political revolution to reverse the problematic trend that had destroyed the achievements of Zionism. Similarly, Likud politician Yariv Levin argued that the

law would reverse the consequences of the constitutional revolution and establish new legal foundations and a new state identity.

Specifically, this is directed against Supreme Court rulings over the last two decades which have given precedence to individual rights and freedoms over majority rights. These include repeatedly overturning Knesset-imposed disqualifications of Arab parties calling for a “state for all citizens”; the ruling on maintaining family reunification of Palestinians in the West Bank and Israel; the ban on detaining refugees; the evacuation of ‘outposts’ of Jewish settlers in the West Bank; as well as the priority given to freedom of expression and art in relation to public outrage over, for example, the film “Jenin, Jenin” and prohibiting the prioritisation of expanding and maintaining exclusively Jewish over non-Jewish settlements (as in the Kaadan case). According to right-wing politicians, all these — and other — judgments were based on an incorrect evaluation of norms; in their view, the Supreme Court should have ruled in an opposite manner in all these cases.

It is clear to the initiators of the nation-state law that this can only be a first step towards fully implementing desired changes in the state — which are already evident in education, the military and cultural policy, because how the law is interpreted depends on the respective judges at the Supreme Court. Yariv Levin said, “Its major test will be in its application”; a change in the legal system will only ultimately be possible if the composition of the court is also changed. The government has already reformed the election of judges and awarded four of the six judicial posts to be filled in this legislative period to decidedly conservative candidates. This is flanked by political initiatives, such as the adoption of an “Override Clause” (Piskat HaHitgabrut), through which the Knesset can overturn judgments made by the Supreme Court. A similar clause was included in a previous draft of the nation-state law, but was ultimately removed due to lack of majority support: It would have meant that any jurisprudence in Israel — including other Basic Laws —

would have to be interpreted through the prism of the nation-state law and therefore be subordinate to the Jewish character.

However, the right-wing conservative thinkers in Likud and the Jewish Home are not just concerned with the end of ‘liberal supremacy’ in the legal system. In the long term, they are aiming to develop a new understanding of the state, according to which the common good is determined in favour of the collective (albeit with liberal economic influences). The protagonists see themselves as having the responsibility to define the constitutional foundations of the common good according to national, ethnic and/or religious principles. This vision explicitly contradicts both secular-socialist Worker Zionism from the first decades of the state as well as the liberal-universalist legal interpretation from the 1990s and even the national-liberal principles of the ideological founding fathers of Likud, such as Zeev Jabotinsky and Menachem Begin.

Adopting the nation-state law is clearly an attempt to lead the political system of Israel in a majoritarian direction. Individual minority rights, protected by constitutional paragraphs and separation of powers, are to be restricted by Jewish majorities in the Knesset. Israel’s current government is joining political currents similar to those in Hungary, Poland, Slovakia and elsewhere, where illiberal and ethno-national politics are practiced on behalf of the majority. This policy is justified as being a fight against an elitist liberal minority that is imposing its universalist view of the world on the majority. Netanyahu’s recent statement that “the majority have rights too, and the majority rules” is typical of such a populist approach. According to this logic, these advances by the political right are also passed off as a commitment to more democracy.

Initiatives aimed at weakening the legal status of minorities are accompanied by a rhetoric that increasingly portrays the Arab-Palestinian community, as well as leftist Israelis, as an unwanted part of society. Netanyahu has insinuated that the country’s Arab population is a fifth column, an internal enemy. This is again emphasized

in the campaigns for the municipal elections of October 2018, where the Likud advertises it is either “us or them”; insinuating voting for left or Arab parties will lead to Islamic terrorism. In a similar mind set, Minister of Culture, Miri Regev, has called for loyalty tests and Israel Beitenu for oaths of allegiance from members of non-Jewish minorities. Simultaneously, there are efforts to limit the visibility of Arab-Palestinian culture. Minister of Education, Naftali Bennet, removed a short story called *Borderlife* from the education syllabus because it contains a Jewish-Arab romance. Defense Minister, Avigdor Lieberman, demanded that poems by award-winning Palestinian national poet, Mahmoud Darwish, be banned from Army Radio. Several members of the government have introduced bills to restrict or prohibit the use of loudspeakers for Muslim calls to prayer.

At the same time, the nation-state law has not only been adopted for ideological reasons, but also as an election tactic. Prime Minister Netanyahu is clearly benefiting from the increased social polarisation this law is causing. Firstly, he can portray his own opponents as unpatriotic, highlighting the contrast between right and left. Secondly, the law has weakened the opposition because it has accentuated the differences between its Jewish and Arab critics. In this respect, launching the law was also a political move by Netanyahu along the lines of divide and rule.

## Outlook

To what extent the law will be upheld by the Supreme Court remains to be seen. In Israel, the question as to whether there can be a so-called “unconstitutional constitutional amendment” i.e. whether the Supreme Court can also rule on a constitutional amendment, remains unresolved. A judgment on this issue would create a prece-

dent. The Supreme Court has already filed lawsuits against the nation-state law. In this context, Ayelet Shaked has said that repealing the law would amount to an “earthquake” and would lead to a “war” between the institutions. The Supreme Court has yet to comment on this case. However, in previous judgments, president Esther Hayut has suggested that a constitutional review could also be carried out on a basic law where it undermines Israel’s democratic identity and the foundations of its constitutional structure.

From a German and European point of view, it is important to note that, despite all the national and international criticism, the law does not mean the end of Israeli democracy. However, the current government’s efforts to transform Israel from a liberal democracy (which was limited anyway) to a majoritarian democracy are clearly visible.

The decisive factor will be how the law is implemented in legal practice. Three requirements are particularly important here: maintaining the separation of powers, entitlement of all citizens to equality before the law and protecting minorities against discrimination. Should — as critics of the law fear — minorities become second-class citizens in legal practice, the “Jewish and democratic state” project threatens to run into even greater difficulties. It is, therefore, more important than ever to maintain a permanent dialogue with Israel, referencing the various agreements the country has with the EU, on the basis of which the observance of human rights and democratic standards were established. Indeed, by adopting this law, Israel is joining the ranks of states that are increasingly turning away from the principles of liberal democracy established in the post-war West. However, supporters of the law — including Netanyahu — often argue that the law lies within the framework of the principles of ‘Western democracies’. In this respect, it is also important to them that Israel is internationally perceived as a democratic state belonging to the West.

*Peter Lintl is Head of the project “Israel and its regional and global conflicts: Domestic developments, security issues and foreign affairs”. Stefan Wolfrum is Research Assistant for this project. The project is located within SWP’s Middle East and Africa Division and is funded by the German Foreign Office.*

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