

The Nation-State Law - reaction and impact

July 2018

On 19 July, the Israeli Knesset passed the Nation-State Bill into law with 62 votes for, 55 against and two abstentions. The Bill, a Basic Law that will be interpreted alongside existing Basic Laws, was first proposed in August 2011 by Avi Dichter (then of the centrist Kadima party and now in the Likud) and Zeev Elkin (of the Likud) and has seen numerous rewrites and parallel proposals over the years.

The status of Basic Laws in Israel

Israel has no written constitution, a situation it inherited from British law. Instead, Israel has passed a series of Basic Laws that together were intended as a blueprint for an eventual constitution. Basic Laws take precedence over other Israeli legislation, guide judicial interpretation and shape future legislation in the absence of a constitution. Basic Laws can only be amended by a majority of 61 votes in the 120 member Knesset.

In this context, the existing 'Basic Law of the Knesset' enshrines Israel's democratic character, the 'Basic Law of the Judiciary' enshrines the separation of the courts and the 'Basic Law of Human Dignity and Liberty', as well as 'Basic Law of Freedom of Occupation' enshrine human rights, freedom and democracy. These latter two laws include the statement that "the fundamental human rights in Israel will be honoured (...) in the spirit of the principles included in the declaration of the establishment of the State of Israel".

The reasons behind the law

The impetus for the legislation came against the backdrop of a series of measures that were perceived as rejecting or undermining the Jewish people's connection with the Land of Israel and Israel's existence as the nation state of the Jewish people.

In 2007, The Higher Arab Monitoring Committee, an independent political organisation based in Israel comprised of Palestinian-Arab MKs, local council heads and representatives of different streams in the Arab sector, published a "Vision Document". In addition to their demand for socio-economic equality, the Vision Document described Israel as "the result of a colonialist action initiated by Jewish-Zionist elites in Europe and the West", called for annulling its definition as a Jewish state, and for establishing a government based on "Consensual Democracy" that would allow Arabs citizens of Israel to have a veto on national decisions. This model of "Consensual Democracy" was considered a way for the national, historic, civic, individual and collective rights of the Arab minority to be ensured, although it was overwhelmingly rejected by both the government and majority of opposition parties. As Dichter said when explaining the bill: "We live in a reality in which the Palestinian aspiration to elide the Jewish people's nation-state is no longer concealed," adding that "this bill will fortify Israel's status and its values as Jewish and democratic against all those who try to undermine it".

Other supporters emphasised the series of resolutions passed by international organisations such as the UN Educational, Scientific and Cultural Organization (UNESCO), which has dismissed or denied Jewish roots in Israel. They also pointed to speeches by Palestinian Authority (PA) President Mahmoud Abbas in which he denied the historical connection between the Jewish people and the Land of Israel.

The bill also came as a response to profound debate within the Israeli right wing about the powers of the Supreme Court and its rulings. Supporters of the legislation argued that the judicial interpretation of previous Basic Laws had resulted in the prioritisation of universalist principles and the "democratic" component of Israel over that of the "Jewish" component. One

of the authors of the law, Yariv Levin, said that the principle of Israel as a Jewish state, which he described as “the consensus that is at the basis of this state’s existence” had been “blurred in recent years by several high court rulings”.

Supporters of the law thus believed that just as a Basic Law anchors individual rights, the Knesset should legislate a Basic Law that defined the identity and purpose of the state to provide a normative counterweight, arguing that the Nation State law restored what they saw as the correct balance between the Jewish and democratic components of Israel’s identity. In explaining his own support for the legislation in 2014, Prime Minister Benjamin Netanyahu said that “Israel grants rights to every citizen – regardless of religion, ethnicity or gender” due to them being anchored in Israel’s Basic Law: Human Dignity and Liberty. He added: “However, the issue of Israel as a Jewish and democratic state is not anchored in the law.”

Groups such as the Kohelet Forum, a right-wing think tank which supported the law, argued that “Israel’s Basic Law would not be out of place among the liberal democratic constitutions of Europe,” adding that “among European states, seven have similar ‘nationhood’ constitutional provisions, and most multi-ethnic, multilingual EU states such as Spain give official status only to the majority language. Ireland has codified the right of its people as a nation to sovereignty, the character of its flag and the primacy of the Irish language, listing English as a ‘second official language’.” The group also compared the law to those in Baltic States, all of which have substantial Russian minorities, but who legislated that the Estonian, Lithuanian, and Latvian languages and cultures are the keystones of national identity.

Opposition to the Bill

The legislation has been criticised in Israel and abroad. Jonathan Greenblatt and Carole Nuriel of the Anti-Defamation League (ADL) said: “We are troubled by the fact that the law, which celebrates the fundamental Jewish nature of the state, raises significant questions about the government’s long-term commitment to its pluralistic identity and democratic nature.” They added that “Israel has an obligation to ensure that, in practice, this Basic Law is not used to discriminate against minorities, particularly its Arab citizens, and that the state maintains its commitment to improve relations between Jews in Israel and those around

the world”. The American Jewish Committee said that the clause on Arabic language “not only directly affects the 21 per cent of Israel’s citizens who comprise the country’s largest minority, but it also would appear to work against the government’s ongoing efforts to encourage the use of Arabic, given Israel’s location in the Middle East”. The Board of Deputies of British Jews warned that “whilst we celebrate Israel’s Jewishness, there is concern that some of the measures in this law are regressive steps”.

The EU said the law “would complicate a two-state solution to the Israel-Palestinian conflict” although it did not say how.

Within Israel, opposition to the law can generally be divided into two camps: One group, which includes many of the Arab MKs and the Palestinian legal centre Adalah, view the law as “illegitimate” and “colonial”. Joint List MP Ahmed Tibi said: “I declare with astonishment and sorrow the death of democracy. The funeral will take place today in the plenum.” However, this group generally opposes the principle of the Jewish people anchoring its right to self-determination in its homeland under any circumstances.

The second group, which comprises many within the Zionist Left, Centre and even some on the liberal Right– such as Benny Begin and Moshe Arens – support the principle of Israel as a nation state of the Jewish people but believe that the specific wording in the legislation undermines equality between Israel’s citizens, is needlessly provocative, and should have been formulated through consensus.

Organisations such as the Israeli Democracy Institute (IDI) and the Association for Civil Rights (ACRI) complained that the law omitted key words such as democracy and equality and protested that a previous iteration of the law – which sought to “anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state in the spirit of the principles of the Declaration of Independence of the State of Israel” – had been removed.

ACRI argued that the absence of these key words “grossly violates the balance established in the accepted designation of the state as Jewish and democratic,” while IDI said that “if the value of equality is not anchored in the legislation alongside the other enumerated national characteristics of the state, the law may eventually erode Israel’s democratic character”.

HOW SUBSTANTIVE IS THE BASIC LAW?

Israel's name, symbols & calendar. Several sections of the Basic Law – the name of the state, its symbols such as the flag and anthem, the calendar, national holidays and the Sabbath as well as the Law of Return - already exist in other legislation and have had their status upgraded to that of a Basic Law.

Jerusalem. similarly, the declaration that “Jerusalem, complete and united, is the capital of Israel” also already existed in legislation and has had its status upgraded.

Israel as the nation state of the Jewish people that has the right to self-determination. this is written in the Declaration of Independence – which doesn't in and of itself have legal status – but now appears as a Basic Law.

The Status of Arabic

The controversial clause that downgrades the status of Arabic from an ‘official language’ to a “special language” is confusing. The law states that this clause will “not harm the status given to the Arabic language before this law came into effect”. Dr Amir Fuchs, at the Israel Democracy Institute (IDI), says that the new law “does not have an immediate practical effect on the Arab population in Israel”. But he believes there is large symbolic damage because the “declaration is poisonous to the state's relationship with 20 per cent of its population”.

Israel's relationship with world Jewry

Clause 6 says “the state shall act within the Diaspora to strengthen the affinity between the state and members of the Jewish people”. The words ‘within the diaspora’ were added by ultra-Orthodox parties concerned that strengthening the affinity between Israel and the Jewish world within Israel as well might legitimise progressive Judaism in their battles with the Orthodox rabbinate. Symbolically the clause demonstrates the continued divergence between the State of Israel and American Jewry. While American Jewry have historically seen great openness and liberalism in a society as a way to ensure the safety of Jews, Israel is perceived by them to be moving in the opposite direction – with the perception that strengthening the national component of the state is the best way to ensure its survival.

Jewish settlement as a ‘national value’

Supporters of the law hope that the declaration that “the state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation” will boost resources to Jewish communities in the Galilee and Negev and to potentially prevent the evacuation of settlements built on private Palestinian land. Others argue that the dilution of this clause following criticism – led by President Reuven Rivlin – means its impact is more symbolic than practical. Ultimately, any ruling will depend on how the Supreme Court justices interpret this specific clause in relation to other already existing Basic Laws.

How will the Supreme Court interpret the Nation State Basic Law?

Fuchs explains that there are no practical implications from the law in the short term, and every Israeli citizen remains equal in front of the law.

Other legal experts BICOM spoke to argued that any debate over its practical significance at this stage is speculative. Those who want to recalibrate the Jewish and democratic components of Israel might use it as a legal tool. But ultimately the Basic Law will likely be used in future deliberations by the Supreme Court as a reference.

These future rulings will depend on the specific case, the composition of the court and the legal approach / ideology of the judges, and the interpretation they give to this specific Basic Law vis-à-vis other Basic Laws such as on Human Dignity and Liberty and Freedom of Occupation.

Others focused their criticism on specific clauses, such as Clause 4 which defines Arabic as possessing a special status rather than as an official language; or Clause 6 which says that “the state shall act within the Diaspora [but pointedly not within Israel – which might have been used by non-Orthodox streams of Judaism to strengthen their status] to strengthen the affinity between the state and members of the Jewish people”.

Other criticism related to the way in which the bill was passed. Yesh Atid leader Yair Lapid told his party (after the first reading of the bill) that that version was “trying to create chasms within Israel and it’s unnecessary”. Leading academic and legal scholar Ruth Gavison, who in 2013 was appointed by then Justice Minister Tzipi Livni to formulate a “constitutional provision” that would “anchor and balance” the Jewish and democratic components of Israel’s identity, warned that legislating on such a controversial issue without seeking wide societal consensus between the different sectors within Israel, and also including the Jewish world, would be polarising and damage the principle the law was trying to strengthen.

The domestic-political context

The law cannot be understood without analysing the domestic-political context. With elections expected in early 2019, many saw this as an attempt by Israeli Prime Minister Benjamin Netanyahu to firm up his “nationalist” credentials. MK Yael German of Yesh Atid called it “a tool of petty politics, another law with which the Likud can show its ultra-nationalism while the scent of an election is in the air”.

Several Israeli writers share this view. In Yediot Ahronot, Sima Kadmon writes that the Nation State law primarily passed because Netanyahu wanted it to pass. She describes a scenario in which elections are called in October and “this is the law Netanyahu wants the public to remember him for – him and not Bennett or Shaked [from the Jewish Home]. The battle for Knesset seats on the right has begun”. According to polls and analysis from the last election, the Likud and right-wing rival Jewish Home compete over at least 4 Knesset seats.

In his weekly column in Maariv, Ben Caspit questions why such a Basic Law, which he described as “nonsense” and “changing nothing”, was even necessary, ultimately concluding that it was primarily about politics. Caspit argues that “politically speaking, the nation-state law is

genius ... this law will allow [Netanyahu], again, to ‘prove’ to his captive audience of fans in the next election that only he loves Israel and that all his competitors are post-Zionist traitorous leftists... the only thing we’ll remember in the next election campaign... is that Bibi fought for us to define Israel as the Jewish state at last, and all the leftists collaborated with the Arabs to thwart his vision”.

What happens next?

While the Israeli government has remained resolute against much of the criticism following the Law’s passing, criticism it has received from the Druze community may be making headway. On Wednesday 25 July, Education Minister Naftali Bennett said that “after discussions with many of our Druze brothers, it appears that the way the nation-state law was legislated deeply hurt the very people who have linked their fate to the Jewish state,” adding that “it is our responsibility, as the government of Israel, to find a way to heal this wound”.

There are likely to be several petitions to the Supreme Court by different groups challenging the Basic Law. On Sunday 22 July, three Druze MKs – Hamad Amar of the right-wing Yisrael Beitenu party, Akram Hasson of the centrist Kulanu party, and Salah Sa’ad of the Labour party – petitioned the Court arguing that the law constituted “an extremist move by the government against Arabic speakers, and continues the discrimination against Druze settlements and minorities, which is now anchored in a Basic Law”. They added: “For the Druze public, which gives of its blood and its sons for the State of Israel, the nation-state law is spitting in our face.”

The Supreme Court has previously discussed the possibility of judicial review of Basic Laws, although it has never ruled on whether it possesses the authority to strike down an amendment to a Basic Law due to unconstitutionality.

However, legal experts suggest that the chances of the Supreme Court striking down the Basic Law are slim and suggest the petitions will likely be denied. At the same time, future rulings by the Supreme Court will be determined by the relative weight it chooses to give the values reflected in the Nation State Basic Law vis-à-vis those appearing in the Basic Laws on Human Dignity and Liberty which seeks to “uphold and protect human dignity and liberty, in order to stipulate the values of the State of Israel as a Jewish and democratic state.”

1. Basic principles

1a. 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 fulfils 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.

2. The symbols of the state

2a. The name of the state is "Israel." b. The state flag is white with two blue stripes near the edges and a blue Star of David in the center. c. The state emblem is a seven-branched menorah with olive leaves on both sides and the word "Israel" beneath it. d. The state anthem is "Hatikvah." Details regarding state symbols will be determined by the law.

3. The capital of the state: Jerusalem, complete and united, is the capital of Israel

4. Language

4a. The state's language is Hebrew. 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.

5. Ingathering of the exiles: The state will be open for Jewish immigration and the ingathering of exiles

6. Connection to the Jewish people

6a. 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.

7. Jewish settlement: The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation.

8. Official calendar: The Hebrew calendar is the official calendar of the state and alongside it the Gregorian calendar will be used as an official calendar. Use of the Hebrew calendar and the Gregorian calendar will be determined by law.

9. Independence Day and memorial days

9a. 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.

10. Days of rest and Sabbath: The Sabbath and the festivals of Israel are the established days of rest in the state; Non-Jews have a right to maintain days of rest on their Sabbaths and festivals; Details of this issue will be determined by law.

11. Immutability: This Basic Law shall not be amended, unless by another Basic Law passed by a majority of Knesset members.

ANNEX 2 - BASIC LAW: HUMAN DIGNITY AND LIBERTY (1992)

Basic principles

1. The basic human rights in Israel are based on the recognition of the value of the human being, the sanctity of his life, and his being a free person, and they shall be upheld in the spirit of the principles set forth in the Proclamation of the Establishment of the State of Israel.

Purpose

1a. The purpose of this Basic Law is to protect human dignity and liberty, in order to stipulate the values of the State of Israel as a Jewish and democratic state, in a Basic Law.
Preservation of life, body and dignity

2. One should not violate the life, body, or dignity of a human being as such.

Protection of property

3. The property of a human being shall not be violated.

Protection of life, body and dignity

4. Every human being is entitled to protection of his life, body and dignity.

Personal liberty

5. The liberty of a human being shall not be taken or restricted, by means of imprisonment, detention, extradition, or in any other manner.

Departure from and entry into the State of Israel

6. (a) Every person is free to exit Israel. entry to it (b) Every Israeli citizen who is abroad is entitled to enter Israel.

Privacy and intimacy

7. (a) Every person has a right to privacy and to intimacy in his life.

(b) There shall be no entry into the private premises of a person, without his permission.

(c) No search shall be held on the private premises of a person, upon his body, in his body, or among his private effects.

(d) The confidentiality of conversation of a person, his writings or his records shall not be violated.

Violation of rights (Amendment No. 1)

8. One is not to violate the rights accordance by this Basic Law save by means of a law that corresponds to the values of the State of Israel, which serves an appropriate purpose, and to an extent that does not exceed what is required , or on the basis of a law, as aforementioned, by force of an explicit authorization therein.

Reservation regarding the security forces

9. One is not to limit rights in accordance with this Basic Law, of those serving in the Israel Defence Forces, the Israel Police, the Prisons Service, and the other security organizations of the State, and these rights shall not be conditioned, save by law, and to an extent that does not exceed what is required with regards with the essence and nature of the service.

Preservation of laws

10. This Basic Law shall not affect the validity of any law that existed before prior to the inception of the Basic Law.

Applicability

11. Each and every government authority is obliged to respect the rights in accordance with this Basic Law.

Stability of the law

12. Emergency regulations do not have the power to change this Basic Law, to temporarily suspend it, or to lay down conditions to it. However, when a state of emergency exists in the State, by virtue of a declaration under article 9 of the law and Administration Ordinance 5708-1948, emergency regulations may be enacted on the basis of the said article, that will involve denial or limitation of rights under this Basic Law, provided that the denial or limitation shall be for a worthy purpose, and for a period and an extent that do not exceed the required.

ANNEX 3 - BASIC LAW: FREEDOM OF OCCUPATION (1994)

Basic principles

1. 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.

Purpose

2. The purpose of this Basic Law is to protect freedom of occupation, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

Freedom of occupation

3. Every Israel national or resident has the right to engage in any occupation, profession or trade.

Violation of freedom of occupation

4. There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such law.

Application

5. All governmental authorities are bound to respect the freedom of occupation of all Israel nationals and residents.

Stability

6. This Basic Law shall not be varied, suspended or made subject to conditions by emergency regulations.

Entrenchment

7. This Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knesset.

Effect of nonconforming law

8. A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.

Repeal

9. Basic Law: Freedom of Occupation is hereby repealed.

Provisional

10. The provisions of any enactment which, immediately prior to this Basic Law would have been of effect but for this Basic Law or the Basic Law repealed in section 9, shall remain in effect two years from the commencement of this Basic Law, unless repealed earlier; however, such provisions shall be construed in the spirit of the provisions of this Basic Law.

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For more information please contact:
Charlotte Henry, Senior Press Officer
020 3745 3348
07879 644099
charlotteh@bicom.org.uk