



June 4, 2014

To: Members of the Ministerial Committee on Legislation, the Government of Israel

Re: The Proposed Basic Law: Israel as the Nation State of the Jewish People

I do not believe that the constitution of any state should contain special clauses explicitly guaranteeing its "national" character. I believe it is a good sign if a constitution contains few such clauses. The natural and best way is for the "national" character of a state to be ensured by the very fact that it has a particular majority.

Zeev Jabotinsky, "Fulfill your Promise or Give Up the Mandate!"
Speeches (Jerusalem, 1958), vol. 2, p. 224 (Hebrew).

In advance of the discussion to be held on Sunday, June 8, 2014, we would like to express our firm opposition to this bill. It goes without saying that we agree that Israel is the nation-state of the Jewish people. However, **we believe the proposal is unnecessary, dangerous, and liable to destroy the delicate balance between the two fundamental characteristics of the State of Israel as a "Jewish and democratic" state.**

This would not be a standard piece of legislation but a Basic Law that could be amended only by an absolute majority of the Knesset (an "entrenched" law). Furthermore, it would not be just be an entrenched Basic Law, but one that defines the identity of the state.

The bill fails to strike a balance between the State of Israel as the nation-state of the Jewish people and its status as a democracy. **It shifts the democratic element from the center to the far margins. In other words, it would amount to a veritable revolution that would alter fundamentally the constitutional regime that has existed in the State of Israel since its founding.**

Should the bill be enacted into law, Israel's democratic character would be severely compromised. The bill addresses the state's core identity and focuses on its Jewish character, while minimizing its democratic character and ignoring the substance of its democratic character. In our eyes, this would undermine the foundations of Zionism itself. The founding fathers of Zionism, including Herzl and Jabotinsky, and Israel's leaders, such as Ben-Gurion and Begin, aimed at more than the establishment of a Jewish nation-state. They wanted to create an Israel that would be a model polity in the best tradition of liberal democracy (one

that, in the words of Israel's Declaration of Independence, “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex”).

What is more, the **proposal sends a message of exclusion and alienation to Israel's Arab citizens**—who are not mentioned in the bill at all—in utter contrast to the values of the Declaration of Independence. The bill openly seeks to deny collective rights to minorities in Israel.

The proposed Basic Law would also **permit and encourage unequal policies with regard to the development and maintenance of the cultural heritage of Jews and non-Jews**. This means that discrimination in favor of Jews would be enshrined in Israel's de facto constitution.

This proposal would cause **irreparable damage to the relationship between Arabs and Jews in Israel** and to Israel's image abroad. Most of all, it would make Israel an intolerable place for all those who adhere to a Jewish and liberal worldview.

If the Knesset wishes to pursue the process of drafting a constitution—which we fully support—the process must fully address Israel's identity and must address both characters of its definition as a "Jewish and democratic state." It must **include an expression of the Jewish character of the State of Israel (which, at its core, means defining Israel as the nation-state of the Jewish people) while at the same time defining the state as democratic, and endowing its democratic character with content, including recognition of human rights and, above all, equality for non-Jews**.

An Infringement of the Balance between Jewish and Democratic

1. The central problem with the bill is that it would bestow elevated and entrenched constitutional status upon Israel's identity as a Jewish state without according the same status to its democratic identity. The bill's vague mention that the country “has a democratic regime” (Article II) is meaningless and demonstrates precisely the opposite of a commitment to a substantive democracy. Even a formal democracy that enshrines majority rule without recognizing human rights and equality can easily be covered by this minimalistic phrase. The proposed bill does not include fundamental rights that are not guaranteed explicitly in our current constitutional regime (there is no mention of equality, freedom of expression, freedom of religion, social rights, or legal rights). The result is that human rights in general (except for freedom of employment) remain subject to the whim of a parliamentary majority (the Basic Law: Human Freedom and Dignity is not entrenched by a special majority). The delicate balance between Jewish and democratic tilts towards nationalistic particularism that is not appropriately balanced by universal and civic principles. And the role of the Supreme Court and its obligation to defend human rights is not entrenched by a special majority.
2. It was with good reason that the authors of Israel's Declaration of Independence made a conscious effort to include civic values and an explicit reference to the country's Arab minority alongside Israel's status as the Jewish nation-state. This is also why the dual and balanced definition “Jewish and democratic” appears in the 1992 Basic Laws and why the Declaration of Independence was accorded official status. By contrast, any reference to the universalistic right to self-determination is omitted from the bill in question. Article I of the proposed bill, concerning the Jewish people's realization of their aspiration to self-determination, refers inwardly to cultural and historical heritage

and ignores the natural right to self-determination enjoyed by every people under international law, as expressed in Israel's Declaration of Independence.

It is precisely because of the State's self-identification as the Jewish nation state, which by definition excludes non-Jews who cannot affiliate with the Jewish nation, that the State has a special obligation to treat its minorities fairly and equally. This is a moral obligation of the first order and an unparalleled test of its cultural and spiritual image. This obligation derives from the state's Jewishness as well as from its democratic character.

By way of example, here is the opening section of the Croatian constitution, which defines Croatia as a nation-state without ignoring the other nationalities that live within its territory and their right to full equality.

Proceeding from the above presented historical facts and from the generally accepted principles in the modern world and the inalienable, indivisible, nontransferable and inexpendable right of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association, as the basic preconditions for peace and stability of the international order, the Republic of Croatia is hereby established as the national state of the Croatian people and a state of members of other nations and minorities who are its citizens: Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Hungarians, Jews and others, who are guaranteed equality with citizens of Croatian nationality and the realization of ethnic rights in accordance with the democratic norms of the United Nations and countries of free world.¹

The Reference to "Individual" Rights As Stated in Every Basic Law

3. The bill states that "Israel will be based on the principles of freedom, justice, and peace, as envisaged by the Prophets of Israel, and will be committed to the **individual** rights of all its citizens, as stipulated in every Basic Law" (Article 3(b)). In a proposed legislation that emphasizes the state's national character, recognition of the **collective** rights of minorities is conspicuous in its absence. This is important for two reasons: First, an important facet of the right to human dignity is the right to one's culture, and this cannot be realized in any meaningful fashion without a group dimension. Second, it is difficult for a minority that is the victim of discrimination to defend the individual rights of its members if its collective rights are not recognized. Thus collective rights are essential for guaranteeing the individual rights of the members of a group.
4. Due to the fact that this law would follow chronologically after Basic Law: Human Freedom and Dignity, it may become possible to make the case that since the bill only recognizes personal rights, collective rights of minorities can no longer be recognized under the Basic Law: Human Freedom and Dignity. Hence, even though the proposed text refers to the other Basic Laws and ostensibly accepts their provisions, the bill could in practice lead to a drastic curtailment of the Basic Law: Human Freedom and Dignity.
5. Moreover, the bill's reference to the existing Basic Laws highlights the imbalance this bill would actually create: the Basic Laws are not entrenched and do not include an explicit and complete enumeration of rights, such as the right to equality and the right to

¹ Constitution of Croatia, <http://www.constitution.org/cons/croatia.htm>.

freedom of expression. By contrast, the text of this proposal stipulates that its provisions can be amended only with the support of an absolute majority of the Knesset.

6. The extreme bias of this bill is demonstrated by the fact that its authors quoted the national component of the Declaration of Independence but omitted the declaration's reference to the democratic rights of all its inhabitants:

The State of Israel... will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.

It would seem that the bill's sponsors reject the basic commitment of the Zionist state and its founders to full and equal social and political rights for all its citizens.

Exclusion of Arabs and Detriment to the Status of Minority Cultures

7. The bill strikes a harsh blow to the Arab citizens of the State. Its passage into law could cause a majority of Israeli Arabs to refrain from participation in the country's democratic procedures. This development—at which some might rejoice—would put an end to Israeli democracy. A democracy in which a particular twenty percent of the citizens do not go to the polls, as a matter of principle, because they are the victims of discrimination, is not worthy of being called a democracy.
8. The bill utterly ignores the existence of a large national minority in Israel—the Arab minority. What should an Arab citizen think when he reads this text, which aspires to be a basic building block, or even the cornerstone, of a constitution? He will read that Israel is the national home of the Jewish people, that is, the home of every Jew in the world—but not the home of the Arab citizens who live in the country. He will read Article 8, which refers to the Jewish heritage and defines its cultivation in Israel and the Diaspora as one of the State's missions. By contrast, as an Arab he is entitled to act to preserve his culture and heritage only as an individual (Article 9)—as if that were possible.² The bill fails to mention the right to take action in order to preserve one's culture in conjunction with others, even though that is a principle of international law to which Israel is obligated.

Increasing the Influence of Jewish Law on Israeli Law

9. The bill would reinforce the influence of Jewish religious law in two ways. First, Article 14(a) stipulates that “Jewish religious law will serve as a source of inspiration for legislators and judges in Israel.” Note that the word “judges” is an addition that did not appear in an earlier version of the bill sponsored by Knesset Member Avi Dichter. Moreover, we are hard pressed to understand why the authors seek a constitutional provision that requires legislators and judges in Israel to take their “inspiration” from Jewish religious law. It goes without saying that there are areas in which Israeli law does indeed draw on such inspiration, but there are other domains (such as criminal law) in

² See *Constitution by Consensus, Proposed by the Israel Democracy Institute, under the leadership of Justice Meir Shamgar*, Article XII: “The State shall guarantee the preservation and development of the historical and cultural heritage of the land and its residents.”

which Jewish law has no impact on Israeli legislation—and rightly so. Why generalize and call for such “inspiration” in every field? Moreover, are non-Jewish legislators and judges, too, expected to “draw inspiration” from Jewish law?

10. Article 14(a) might be interpreted as merely continuing the status quo established by the Foundations of Jurisprudence Law. However, it conceals a small change that could have significant consequences. Through the addition of the word “clear,” the authors seek to restrict the courts’ ability to find a solution in the legal system itself before turning to the Jewish heritage. The “principles of freedom, justice, honesty, and peace found in the Jewish tradition” is too broad, vague, and multifaceted a phrase to refer to any particular source of inspiration. Somewhere in this broad thicket the judge will always be able to find a peg on which to hang his interpretation. Therefore, it is not a true normative solution. It would be better to find one based on analogy, directing toward a more solid anchor, which would provide a solution that is faithful to and compatible with our legal system and does not detract from its unity and consistency.

The Law’s Objective

11. With all due respect, we do not agree with the bill’s objective, as stated in the explanatory text that accompanies it. According to the Democracy Index (published by the Israel Democracy Institute), it is clear that the Jewish citizens of the State identify with its definition as a Jewish state. Yet the sponsors assert that the law is necessary because “there are some who would deny the Jewish people’s right to a national home in its land and recognition of the State of Israel as the nation-state of the Jewish people.” Is Israeli legislation the appropriate response to the thoughts and aspirations of other peoples and nations? Can it be argued seriously that such a need has arisen lately, since the peoples of the region have up until now recognized the right of the Jewish People to a state and recognized Israel as the Jewish State? Would the passage of such a law cause those who hold the view in question to change their minds? Furthermore, we need an honest answer to the question of whether enactment of such a law would enhance Israel’s international standing as the nation-state of the Jewish people—or, in fact, weaken it. In our opinion, forces inimical to Israel would exploit such legislation to deny the country’s legitimacy as a Jewish state. The proposed Basic Law ascribes a problematic meaning to the Jewishness of the state. Its implication is that the Jewishness of the state requires curtailing its democratic character and discriminating against those who are not Jews. Rather than safeguarding the Jewish character of Israel, the bill would expose its Jewish essence to severe criticism. Given the foreseeable results, the proposal actually subverts and imperils the Jewishness of the state. While failing to strengthen the Jewish nature of the State, it transmits a clear message of insecurity, extremism, and fundamentalism. Constitutional entrenchment of the obvious only calls into question those constitutional foundations and serves to undermine them.
12. The proposal ignores the political, social, economic, and cultural power wielded by the majority in a democracy, by virtue of its majority status. In the face of this power—as constitutional logic goes—the minority actually needs special protection, as a matter of justice and equity, so that it is not trampled underfoot by a tyrannical and oppressive majority. The bill turns this constitutional logic on its head and relates to the Jewish majority in Israel as if it were a minority.

Considerations of the Impact on Israel's Standing in the World

13. In addition to the arguments advanced above, one must take into account that such legislation would have a negative impact on Israel's standing in the world. Although one can agree or disagree as to whether or not several of the laws passed by the last Knesset infringe upon its democracy, there is no doubt that they have harmed Israel's standing in the world and contributed to its international isolation. So too, the proposed law, especially as a Basic Law that addresses the identity of the State, would certainly spark protests and denunciations of Israel for abandoning its democratic character and forgoing equal treatment of its minorities.
14. The substantive quality of Israeli democracy, and not merely its formal aspects, is a strategic asset of the first order. There is good reason why Israeli leaders, including the prime minister in his speeches to the US Congress and the UN General Assembly, highlight and take pride in the country's democratic nature and its equal treatment of minorities. This asset must not be taken for granted, and the proposed bill would jeopardize the validity of similar claims in the future. This aspect of Israel is also important for the close relationship between Israel and the Jewish diaspora.
15. In this context, we should note the well-known ruling by the Canadian Supreme Court (1998) with regard to Quebec's unilateral attempt to secede from the country. The Court analyzed international law regarding secession by an ethnic minority. It held that a minority may in certain cases acquire the right to secede from its mother country if said minority is victimized by discrimination and harshly unequal treatment, and to the extent that its right to self-determination within the said country is not realized. It is utterly clear that some would exploit the proposed law, in conjunction with other assaults on the Arab population of Israel, to advance such an argument here. The mere presentation of such a claim would have severe implications for Israel's international status, both in the political and legal spheres.

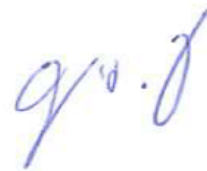
In conclusion, we reiterate our main concern—the attempt to destabilize the balance between Israel's democratic character and its Jewish character. The bill would knock down one of the two pillars on which the State rests and could end up undermining the Zionist enterprise.

We respectfully ask that you oppose the bill.

Sincerely,



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