

**Basic Law:  
Israel-  
Nation-state  
of the Jewish  
People**



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# Basic Law: Israel – Nation-State of the Jewish People

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## Executive Summary:

“Basic Law: Israel, Nation-State of the Jewish People” is a law both illegitimate and dangerous. It is illegitimate because its formulators and backers are attempting to do what law and legislation cannot and need not do — i.e. decide on issues of profound controversy regarding identity, culture, and society. It is dangerous because it is a fiat—an attempt to bypass the democratic public debate on issues at the heart of the Israeli polity and establish facts that would frame any future constitution.

The law’s formulators and backers present it as a natural continuation of Israel’s Declaration of Independence. However, as demonstrated in the analysis below, its aim is in fact diametrically opposed to that document: it seeks to change Israel’s substantive definition from a state that is the national home of the Jewish people and simultaneously home to the rest of its citizens, to a state where all the Jews of the world are potential citizens while its non-Jewish citizens are discriminated against. The purpose of this law is to shunt the civic vision of the state’s founders in favor of an alternative, explicitly sectarian vision that, for all intents and purposes, undermines the values of Zionism and its original goals.

Laws, including Basic Laws, are not meant to deal with issues of identity and substance in the first place: their purpose is to delineate the rules of the game by which the debate over such matters should proceed, nothing more. The proposed law not only fails to reflect this understanding of law and its nature, it goes so far as to seek to change the rules of the game themselves. In doing so, it functions as a constitution without any serious debate on its suitability to this end, or consideration of the conditions necessary for adopting one.

The very attempt to decide questions that touch on deeply controversial issues of identity, culture, religion, and heritage through legislation — all the more so through a Basic Law — is unfair and therefore inappropriate. It reflects the attempt by a group that temporarily enjoys the advantage of political power to impose its will and narrow worldview on the entirety of society. Given the disputes that abound within Israeli society surrounding notions of Judaism and citizenship, and given the complex nature of the society itself, the proposed law clearly cannot be based on broad civic agreement. And yet, such agreement is a prerequisite for the establishment of a constitution and no constitution should be legislated without it, however formulated. Therefore, those who support the rule of law in Israel and acknowledge the need to arrive at a broadly agreed-upon constitution must act to shelve this law.

## Basic Law: Israel – Nation-State of the Jewish People

On August 3, 2011 a bill titled “Basic Law: Israel — Nation-State of the Jewish People” was submitted before the Knesset. The bill had been formulated and backed by The Institute for Zionist Strategies, and submitted by then-MK Avi Dichter (Kadima) and MK Ze’ev Elkin (Likud) along with the signatures of 35 other Knesset members. Harsh public criticism of the proposal and its program followed immediately. In the wake of this criticism, a number of signatories withdrew their names, and Kadima Party chairperson Tzipi Livni instructed MK Dichter to shelve the bill, imposing party discipline.<sup>1</sup> Even Knesset legal council, attorney Eyal Yinon, “called, in a rare move, for a public and parliamentary discussion” regarding the proposal, emphasizing its problematic implications.<sup>2</sup> With the withdrawal of the proposal and the dissolving of the Knesset, public debate on the issue faded. However, the proposed law reemerged in the coalition agreement between Likud-Yisrael Beiteinu and the Jewish Home parties.<sup>3</sup> As such, it is to receive government backing, thereby greatly increasing its chances for approval into law. On May 2, 2013 it was reported that the proposed bill had been reformulated and would soon be submitted once again to the Knesset. According to these reports, some of the bill’s more controversial sections would be omitted from the new version.<sup>4</sup> Still, the coalition’s intent to advance such a bill, and the public’s recognition of the problems inherent in it, justify further examination of its goals and consequences.

This position paper analyzes the proposed “Basic Law: Israel — Nation-State of the Jewish People”, showing that it is designed to smuggle into Israeli legal code a law that would frame any future constitution. The proposal invalidates much of the constitutional content of the Declaration of Independence, and seeks to disrupt the balance between the legislative and judicial branches in Israel’s government structure.

As demonstrated in the analysis below, the intent of the proposed law is to change the substantive definition of the State of Israel. It is a fiat, whose purpose is to pass a constitution for Israel under the guise of law, attempting to bypass the requisite processes of clarification and debate: it therefore reflects an understanding that these processes can take a long time, and further, that their ultimate outcome is still far from clear. The motivation behind the proposed law is to tie any future debate to its exceptionally narrow, reductive worldview of Judaism and the idea of a Jewish state.

The legal fiat that this Basic Law represents sets out to subvert the fundamental definitions themselves — it turns Israel from a state that is the national home of the Jewish people and simultaneously home to the rest of its citizens, into a state where all the Jews of the world are potential citizens while its non-Jewish citizens are discriminated against in terms of both their status and the resources allocated to them by the state. Although presented as a natural

continuation of Israel's Declaration of Independence, these features disclose the proposal's true nature: to replace the civic vision of the state's founders with an alternative, explicitly sectarian vision that for all intents and purposes, undermines both the values of Zionism and its original goals.

## 1. The Proposed Law and the Declaration of Independence

The proposed "Basic Law: Israel — Nation-State of the Jewish People" was conceived and formulated by The Institute for Zionist Strategies (IZS), responsible *inter alia* for the advancement of the "Citizenship Law", the "Loyalty Oath", and the "Law requiring transparency by those supported by foreign state entities," a law that would probe Israeli human rights groups and NGOs.<sup>5</sup> The Institute also stands behind organizations such as "Im Tirzu" NGO Monitor, BlueWhite Human Rights and others on the extreme right. Indeed, the proposal under discussion is a direct decedent of yet another IZS initiative: a draft constitution brought before the 17<sup>th</sup> Knesset on July 10<sup>th</sup>, 2006, under the title "Constitution of the State of Israel."

The bill's formulators and backers present it as though its spirit is that of Israel's Declaration of Independence. However, careful examination of its references to the Declaration reveal more difference than similarity. Thus, the section dealing with the proposed law's 'fundamental principles' opens by asserting that "The State of Israel is a Jewish State and the National Home of the Jewish People, wherein the Jewish People fulfills its yearning for self-determination in accordance with its historical and cultural heritage." At the end of this sentence, a footnote references the Declaration of Independence.<sup>6</sup> But the reference is misleading: the words "in accordance with its historical and cultural heritage" appear nowhere in the Declaration. It could be argued that the association is intended to orient the reader towards the Declaration's opening lines: "The Land of Israel was the birthplace of the Jewish people, etc."<sup>7</sup> But the difference is substantive: In the Declaration, the right to self-determination is grounded in the natural, universal right of national groups to be self-determinative<sup>8</sup> — not on the historical connection of the Jewish people to the land of Israel, mentioned in its opening lines. By contrast, in the law before us, Jewish self-determination in the land of Israel is contingent on its fulfillment according to the Jewish people's cultural and historical heritage. Furthermore, item 1B in the proposed bill states that the right to self-determination in the state is "exclusive to the Jewish people", which is to say that it is contingent on the people's alleged historical right to this land. It follows that no non-Jewish group has the same right—or for that matter, *any* right (even non-sovereign) to self-determination in the State of Israel.<sup>9</sup>

Another example of the gap between the proposed law and the Declaration of Independence appears in section 6 of the law, where it asserts that "The State shall act to ingather the Diaspora of Israel and to establish Jewish settlement in Israel, and it will allocate resources for these

purposes.” This, too, is footnoted [Hebrew] to the Declaration. But this, too, is misleading: the directive to allocate state resources — levied, *inter alia*, on Israeli’s non-Jewish citizenry, a full fifth of its population — in order to boost Jewish immigration to Israel and settlement of the land, stands in stark contrast to the Declaration of Independence and exposes, once again, the difference between the two documents. The Declaration does indeed assert that “the State of Israel will be open for Jewish immigration and for the ingathering of the Exiles,” but immediately — in the very same breath — follows with “it 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 rights to all its inhabitants irrespective of religion, race or sex.”<sup>10</sup> The comparison between the proposed law and the Declaration of Independence thus demonstrates not only how distant these two documents are from one another, but also the depth of disparity in their worldviews: the proposed law seeks to shunt the value of “fostering the development of the country for the benefit of all its inhabitants” while enshrining the country’s Jewishness and Judaization, as “all its inhabitants” are required to allocate their resources to encourage and fund further Jewish immigration and settlement in it.

## 2. The Proposed Law as a Substitute Constitution

A comparative reading of the proposed law and the 2006 proposed constitution from the Institute for Zionist Strategies — “Constitution of the State of Israel”<sup>11</sup> — reveals that the former is nothing more than a camouflaged version of the latter: a nearly perfect copy of the third chapter of the IZS proposed constitution.<sup>12</sup>

Indeed, the main difference between the documents is that the formulations in the proposed law are much clearer and more detailed than those in the proposed constitution, especially with respect to the Jewishness of the state.<sup>13</sup> A close reading of the two reveals the real purpose of the law: to bypass the decades-long deadlock over the writing of a constitution for Israel. In particular, it is to tie any future constitution to a specific, pre-determined understanding of the state. In this way, the proposed law seeks to skirt the debate concerning the state’s character, favoring IZS’s view on the matter and further encumbering the possibility of holding an open discussion towards the formulation of a future constitution.<sup>14</sup>

A consideration of the proposed law — effectively, the IZS’s proposed constitution from whence it is drawn — alongside two other proposed constitutions discussed by the 17<sup>th</sup> Knesset,<sup>15</sup> exposes not only how controversial the formulation before us is, but also how decisive it is on fundamental questions concerning the character of the state. For example, the section on ‘fundamentals’ in the Israel Democracy Institute’s (IDI) proposed constitution states: “(a) The State shall be called ‘Israel’; (b) Israel is a Jewish and democratic state; (c) The State shall act with equality towards all its citizens; (d) The system of government shall be parliamentary democracy.” Conversely, the constitution proposed by Adalah — The Legal Center for Arab Minority Rights in Israel — defines

Israel as a “democratic, bilingual, multicultural state” and explains: “A democratic state: The State of Israel is a democratic state, based on the values of human dignity, liberty, and equality.”<sup>16</sup> Recall that the IZS’s proposed constitution and Basic Law currently up for debate assert: “The state of Israel is the National Home of the Jewish People, wherein it fulfills its yearning for self-determination in accordance with its historical and cultural heritage.” Hence, the state is no longer “Jewish and democratic” as in the Declaration of Independence or the IDI’s “Constitution by Consensus” which follows in its footsteps;<sup>17</sup> nor is it “democratic” alone, as in Adalah’s proposal. Instead, it is Jewish first and democratic only subsequently and conditionally.<sup>18</sup>

This preliminary comparison of these three central proposals for a constitution demonstrates the deep controversy surrounding these core questions. Therein lies the rub: the promotion of the bill before us, so closely derived from the IZS proposed constitution, is bound to effect any constitutional discussion. Approving the proposed Basic Law before such a discussion is undertaken and exhausted can only harm, if not outright thwart, the very possibility of holding meaningful and serious such discussions in the future.<sup>19</sup>

### 3. Basic Law or Package of Provisions?

The similarities between the IZS proposed constitution and the proposed Basic Law underline the differences between the latter and the Basic Laws already set in the Israeli legal code. As the reader may recall, the first Knesset established that the Basic Laws legislated in Israel will be assembled at some future date and spun into the state’s constitution.<sup>20</sup> The reasons that the conditions to establish such a constitution have not yet ripened are well known: Israeli society is young and dynamic, made up of various groups, some immigrant and some indigenous. These groups come from different worlds and hold different values, some of which are even contradictory. The purpose of a constitution is to overcome differences and bridge gaps. However, to accomplish this, it is necessary to identify a ready common denominator between these groups. To do so requires a formulation of principles that is sufficiently inclusive to allow for consensus, yet sufficiently practical and concrete to allow for action.

This goal is clearly evident in the only two normative Basic Laws (“Basic Law: Human Dignity and Liberty” and “Basic Law: Freedom of Occupation”) to which the proposed Basic Law offers a response and complement.<sup>21</sup> Both open by identifying the fundamental principles upon which they were founded, proceed to defining their purpose,<sup>22</sup> and then devote several sections to specifying the most general and abstract bounds of the right they each address. Both avoid entirely practical questions of “how” and “what”.<sup>23</sup>

The proposed law is far more detailed and concrete. There can be little doubt that a Basic Law dealing with the identity of a state need not — and indeed, cannot — remain on the level of

generality and abstraction of normative Basic Laws. However, the conceptual distance from this to the level of detail in the proposed law is still quite vast. This is particularly evident in the sections that impose concrete state actions. For example, in section 6 (in Hebrew) entitled “the Ingathering of Exiles and Jewish Settlement”, the proposal states that “The State shall act”, as well as “allocate resources for these purposes.” A similar degree of specificity and insistence on anchoring the proposal’s principles on a tactical level can be found in section 7, “The bond with the Jews of the Diaspora”; section 8, “Jewish Heritage”; and section 9, “The right to preserve heritage”.<sup>24</sup>

The proposed bill is not content with adopting the IZS draft constitution and attempting to smuggle it into Israel’s legal code; concurrently, it seeks to pass a series of additional, distinct laws and provisions. Rather than provide a general framework of principles and values reflecting the state’s Jewishness, the bill mirrors a particular, extremely narrow view of the Jewish State and attempts to fix it in law. However, neither law nor constitution is meant to deal with issues of identity in the first place: their purpose is to delineate the rules by which the debate over such matters should proceed, nothing more. By striving to change the rules of the game themselves, both the proposed law and the proposed constitution on which it relies endanger the lively constitutional debate in Israel today.

#### **4. Anchor, Majority, and Supermajority**

Section 1C of the proposed bill states: “the Provisions of this Basic Law or of any other legislation shall be interpreted in light of this section.” Article 15 states: “This Basic Law is not to be modified except by a Basic Law passed by a majority vote of the Knesset.” Together, therefore, these two sections furnish the tools for imposing the State’s Judaism as embodied in the proposed law upon the state’s entire legal code — past, present and future.<sup>25</sup>

As the bill’s backers at the IZS explain, the purpose of the proposed law is to restore the balance between Israel’s Jewish and democratic aspects — a balance allegedly disrupted with the 1992 adoption of the two normative Basic Laws.<sup>26</sup> The argument — that there was a disruption in the constitutional balance that now demands mending — will be discussed presently. But first, it is important to clarify that the majority required to amend the proposed law is not characteristic of Basic Laws as such, nor even applies to the two existing normative Basic Laws — Basic Law: Human Dignity and Liberty” and “Basic Law: Freedom of Occupation” — which this proposal seeks to join. Of the two, only the latter enjoys immunity to change.<sup>27</sup> However, as the proposed bill’s language — in particular that of section 1C mentioned above — suggests, and as evidenced by statements of the bill’s formulators and backers, the law’s aim is not merely to “complement” or “balance” the current constitutional framework: it is to ensure the supremacy of this law over standard laws and other Basic Laws alike.

Indeed, had the balance between Israel's Jewish and democratic aspects been first in the backers' minds, they would have sought to build immunity, through special or supermajority, into all Basic Laws, or at the very least, into the normative law that does not already enjoy it ("Basic Law: Human Dignity and Liberty"). That they do not do so implies that their priorities are different than they would have us believe.

## 5. The Need for a Law: Legislation versus Adjudication

As stated, the IZS formulators claim that the proposed law is necessary in order to repair an accidental disruption, which led to a legislative and judicial imbalance. According to them, the legislation of the two normative Basic Laws in 1992 sparked a "constitutional revolution" in Israeli law that, for various — primarily political — reasons, was then nipped in the bud. Had it not been, the "revolution" would have produced a full set of normative Basic Laws that could have anchored Israel's Jewish character on the one hand, and its democratic character on the other. As it turned out, however, Israel's legal code was left one sided: with two Basic Laws anchoring its democratic aspect, but none securing its Jewish-national aspect. This imbalance, they argue, led to the ever-increasing dismissal of the Jewish element in adjudication.

The purpose of the proposed law, then, is to narrow the courts' freedom and, in particular — as Jewish Home party members standing behind the bill's current promotion in the Knesset have clearly stated — to "force the Supreme Court" to change its ways, which is to say, "to strengthen the state's nationalism."<sup>28</sup> This desire is given explicit and detailed expression in section 4 of the law, dealing with language: The demotion of Arabic from an official language of the state to a language granted "special status" is designed not only to justify the state's failure to effectively enforce equality between Hebrew and Arabic in the public sphere but also "to force the Supreme Court" not to discuss the matter when called to do so in the future.<sup>29</sup> More striking still is the formulation of section 6 of the law, which directs the state to foster and fund the "Ingathering of the Exiles and Jewish settlement" and is a direct response to the court's decision in the Kaaden case prohibiting preferential allocation of land to Jews.<sup>30</sup> Section 8 reiterates section 6, holding forth on the legality and status of admissions committees in that context.<sup>31</sup>

## 6. The Proposed Law: Israel, A Jewish and Democratic State?

The questions concerning the character and identity of Judaism in the State of Israel and the character and identity of "the cultural and historical heritage" of the Jewish people are interpretive at their core. Accordingly, they have been steeped in controversy since the dawn of Zionism. Furthermore, with the passing years such disputes seem to have only multiplied and intensified.

Indeed, the intervention of the state and courts has not contributed to a solution but rather led to the transformation of these institutions into battlefields where Jewish citizens fight among themselves and with their non-Jewish compatriots, and where the state itself fights with Diaspora Jews and other states, some of whose citizens are (or were) Jewish. Experience has shown that legislation in general, and judicial intervention more specifically, are unlikely to be helpful in this context. Indeed, they often make matters worse, pushing the state into issues over which its power, authority and tools are inadequate.<sup>32</sup>

In attempting to anchor its initiators' and drafters' highly specific, narrow and reductive interpretation of Judaism and the Jewish State in Basic law — particularly a Basic Law requiring special majority — the bill before us is bound to deepen the involvement of the state and its courts in the disputes that its passing will inevitably provoke, whether anew or for the first time. For example, as we've seen, in Section 8 (in Hebrew), the bill instructs the state to work for the preservation and fostering of the cultural and historical heritage of the Jewish people "in Israel and the Diaspora" and to ensure that "in every educational institution serving a Jewish public in Israel the history of the Jewish People, its heritage and tradition will be taught." Clearly, the first provision will involve the state in issues relating to the proprietorship of Diaspora Jews, their communities and states over their history, objects of their heritage, and even their identity,<sup>33</sup> while the second will force it to intervene in deciding the correct or proper interpretation of "the history of the Jewish people, its heritage and tradition". Sooner or later the court will be dragged into the dispute as well.<sup>34</sup> This section of the law and others like it (particularly section 7) reinforce the impression that the proposed law does not seek only to distance Israel's non-Jewish citizens and alienate them from it: simultaneously, it seeks to appropriate Judaism and the entirety of world Jewry as well.

## Conclusion

As underscored by legal council to the Knesset, Attorney Eyal Yinon :

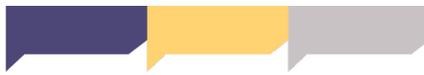
The importance of [the proposed "Basic Law: Israel — Nation-State of the Jewish people"] cannot be overstated given its consequences and implications on Israeli constitutional law and the delicate balances within its structure [...] the horizontal balance between the two parts of the formula [Jewish and democratic] will cease, and a vertical balance will be formed, so that after the proposal is approved, the top constitutional rank will be held by the principle of Israel as the nation-state of the Jewish people, and the principle of a democratic state only afterwards, below it.<sup>35</sup>

Attorney Yinon accurately recognized that the proposed law, in its original wording (adjusted and non-adjusted<sup>36</sup>) does not restore the balance allegedly disrupted by the two normative Basic Laws of the early 90s. Instead, it creates a new, distinct hierarchy between Israel's Jewish and democratic

aspects, whereby the former assumes primacy over the latter. The current coalition's resolve to eliminate this hierarchy through a reformulation of the law is fitting; however, as shown, it is insufficient given the kinds of problems inherent in this law. Indeed, from the above analysis it is clear that the proposed bill is inappropriate for a number of reasons:

- A. The proposed law seeks to ground the Jewish right to self-determination in Israel in the historic, and therefore exclusively Jewish, right to the land rather than in the natural, and therefore universal, right of national groups to self-determination. In doing so, the proposal seeks to deny the right of the state's minorities to enjoy any type of self-determination in it.
- B. Discrimination against non-Jewish minorities in Israel is given concrete expression in the proposed law in the following ways: Preference given to Jews in Israel and abroad over the state's own citizens; allocation of state resources for the fostering of Jewish heritage in Israel and abroad, alongside mere permission for the fostering of the heritage of the state's other citizen communities; annulment of the status of Arabic as an official language of the state alongside Hebrew.
- C. The proposed law adopts a controversial view of the state's character and the meaning of citizenship in it. This is one of the questions at the heart of any future Israeli constitution, yet the proposal before us seeks to address it via constitutional fiat, thereby radically narrowing the status of the Declaration of Independence on the one hand, and impeding ongoing open, constructive discussion on the other.
- D. As opposed to other Basic Laws, the proposed law is not satisfied with drawing general fundamental principles that will serve as guidelines for further legislation and adjudication; it details a set of instructions for shaping the state's Jewishness and actively imparting it. A Basic Law is not the place for such instructions.
- E. The formulation of the Basic Law before us seeks to privilege it not only over standard laws in the Israeli legal code but also, and perhaps primarily, over other existing Basic Laws. It thus places itself above "Basic Law: Human Dignity and Liberty" which does not require a supermajority and is therefore not immune to modification or even annulment.
- F. The law contains sections whose purpose is to alter the existing balance between the judicial and the legislative branches in Israel's governmental structure. It seeks to reduce the freedom of the judiciary on questions hitherto interpreted and governed by the normative Basic Laws and on the basis of the Declaration of Independence.

In its current formulation, then, the proposed Basic Law is an extremely dangerous law. There are reasonable grounds to assume that some of the dangers will be rescinded in its reformulation, but there are solid grounds to assume also that no such reformulation could overcome the fundamental problems associated with this type of bill. The attempt to decide deeply controversial questions related to identity, culture, religion, etc. through legislation is inappropriate. Given the extensive divisions in Israeli society when it comes to the interpretation of Judaism and citizenship,



it is plain that the type of legislation represented by the proposed bill does not reflect the kind of broad civic agreement that a constitution requires. It is an offensive attempt of a group that temporarily enjoys the advantage of political power to impose its will on the entirety of society. Therefore, those who support the rule of the law in Israel and acknowledge the need to arrive at a broadly agreed-upon constitution are duty-bound to act to shelve this law.

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<sup>1</sup> Jonathan Lis, "Under pressure from Livni, Dichter shelves the nation-state law," *Haaretz* [Hebrew] 14.11.2011, available at <http://www.haaretz.co.il/news/politics/1.1566232>

<sup>2</sup> Ibid.

<sup>3</sup> Section 50 of the agreement declares that "the parties will work to promote 'Basic Law: Israel — nation-State of the Jewish People,' Document: The full coalition agreement of the Jewish Home," *Kippa* [Hebrew], 17.03.2013, available at <http://www.kipa.co.il/now/51241.html>

<sup>4</sup> Jonathan Lis, "The Jewish Home and Yesh Atid together advance a softened version of the nation-state Law," *Haaretz* [Hebrew] 02.05.2013, available at <http://www.haaretz.co.il/news/politi/1.2010318>. Since the publication of the Hebrew version of this report, it has become known that the original proposal now branched into two different forms — one formulated by MK Ruth Kalderon (Yesh Atid) and submitted to the Knesset on 25.06.2013, and another, very close to the one under discussion below, formulated by MKs Ayelet Shaked (Bait Yehudi) and Yariv Levin (Likud), submitted to the Knesset on 26.06.2013. Subsequent to this development, MK Tzipi Livni and MK Yair Lapid (party chairpersons of Ha'Tnuah and Yesh Atid, respectively) announced that they would veto the latter if and when brought before the government. Lis, Jonathan. "Lapid and Livni Decided to Exercise Veto Power on the new 'Nation-State bill'," 26.06.2013, *Haaretz* [Heb], available at [www.haaretz.co.il/news/politi/1.2056599](http://www.haaretz.co.il/news/politi/1.2056599).

<sup>5</sup> Lis, Jonathan. "Livni: Bill to probe NGOs is anti-democratic, hurts Israel," *Haaretz*, 20.07.2011, available at <http://www.haaretz.com/news/national/livni-bill-to-probe-ngos-is-anti-democratic-hurts-israel-1.374264>

<sup>6</sup> See footnote 3 in the proposed law.

<sup>7</sup> "Eretz-Israel [(Hebrew) – the Land of Israel] was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave the world the eternal Book of Books...Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. Pioneers, *ma'apilim* [(Hebrew) – immigrants coming to Eretz-Israel in defiance of British Mandate restrictive legislation] and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community controlling its own economy and culture, loving peace but knowing how to defend itself, bringing the blessings of progress to all the country's inhabitants, and aspiring towards independent nationhood." Israel's Declaration of Independence, "The Declaration of the Establishment of the State of Israel", Israel Ministry of Foreign Affairs, 14.05.1948, available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>; In this context it is worth noting that the historical connection between a people and a land is insufficient to ground that people's right to exercise self-definition in that same land: the recognition of a right, and the place where the right is to be exercised, are two separate issues, in both principle and substance. See Chaim Gans. *A Just Zionism*, Oxford University Press, 2008, chapter 2.

<sup>8</sup> "This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State," Israel's Declaration of Independence.

<sup>9</sup> As stated in the formal opinion of the Israel Democracy Institute on this issue: "Even in relation to the actualization of the aspiration of self-definition for the Jewish people [...] the reference is only internal, to the cultural and historical heritage, and mentions no natural right, a right that all other nations have to self-determination, according to international law, expressed through declaring of independence. In specifically defining the state itself as Jewish, there is an exclusion of non-Jews [...] [due to its Jewishness and democracy,] Israel is obligated to redouble its effort to treat the minorities within its borders in fairness and equality [an obligation] stemming from the Jewishness of the state and its democracy,]" Mordechai Kremnitzer and Amir Fuchs, "Basic Law: State of Israel — National State for the Jewish People," Jerusalem: Israel Democracy Institute

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[Hebrew], 06.11.2011, available at <http://tinyurl.com/odzuczdz>; section 2 (the second part of the quotation above is taken from an updated version of the opinion, prepared in reference to the “adjusted” formulation of the proposed bill [see below, footnote 16], dated 21.12.2011, but not yet released. We are grateful to attorney Fuchs for sharing it with us.) In this context it is worth quoting Ze’ev Jabotinsky, the great teacher and spiritual forefather of the present law’s formulators: “I am proud of belonging to that group which once formulated the... Helsingfors Programme, the programme of national rights for all nationalities living in the same State. In drawing up this programme, we had in mind not only the Jews but all nations everywhere; and the foundation of this programme is absolute equality of rights. I am prepared to take an oath binding ourselves and our descendants that we shall never do anything to contravene such equality, nor try to eject anyone.” Mordehai Kremnitzer and Amir Fuchs. “Ze’ev Jabotinsky on Democracy, Equality, and Individual Rights,” also available in English via Israel Democracy Institute, 2013 at <http://en.idi.org.il/media/2384931/Jabotinsky-IDI-2013.pdf>

- <sup>10</sup> Compare to Jabotinsky’s proposed constitution drafted with other senior Revisionist Party officials: “After improvement at the expense of the State, reclaimed areas of the Land Reserve shall be divided into allotments to be granted, at fair prices and easy terms of credit, to individual applicants and groups. Allotment shall be distributed under the Land Court’s supervision to Jewish and Arab applicants and groups indiscriminately.” For English see above footnote 8 Kremnitzer and Fuchs, “Ze’ev Jabotinsky”. [For the full “Constitution of the State of Israel, see Ze’ev Jabotinsky, “The Arab Problem, Without the Drama,” Guiding principles to current problems, Tel Aviv: Jabotinsky Institute, 1982, pp. 104-105.]
- <sup>11</sup> “Constitution of the State of Israel,” Jerusalem: Institute for Zionist Strategies, 2006, <http://tinyurl.com/pe6nzy9> [Hebrew. For English see <http://www.izs.org.il/userfiles/izs/file/Constitution.pdf>]
- <sup>12</sup> Almost every difference between the two can be explained by reference to either context or the relevant object — not to issues of substance. Thus, for example, the difference between the first sections of the law and the first sections of the third chapter of the draft constitution, explained in footnote 1 of the law itself: “sections ‘basic principles’ and ‘objectives’ [of the law] suits the structure of the ‘Basic Law: Human Dignity and Liberty’ and ‘Basic Law: Freedom of Occupation’.” The formulation of the sections of the proposed law were modified from considerations of “suitability” alone, in order that the wording correspond to that of the first sections of the two existing normative Basic Laws. The change is designed not only to facilitate reading the new law as though it were of a piece with already-existing laws, but also to bestow upon it the sort of prestige and respectability that the latter enjoy. Either way, in the following sections, the difference between the proposed law and the existing Basic Laws is so great that the attempted assimilation disappears, leaving it close to identical to the original draft constitution — if not in wording, certainly in content: Section 3 of the law (symbols) is section 26 of the constitution; section 4 (language) — section 22; section 5 (return)—section 28; section 6 (ingathering of exiles) — section 27; section 8 (Jewish heritage) — section 29; section 9—section 30, etc.
- <sup>13</sup> In the proposed law, the section that establishes Israeli Independence Day as the state’s national holiday also establishes official Memorial Days (Memorial Day for the Fallen of Israel and Holocaust [and Heroism]). In the section related to Jewish heritage, the law adds a demand of the state — that it work to promote and foster Jewish heritage not only in Israel, but in the Diaspora as well. Other differences, if they exist, are insignificant.
- <sup>14</sup> In the words of Knesset legal council, Attorney Yinon: “after the law is passed, the top constitutional rank will be held by the principle of Israel as the nation-state of the Jewish people, and the principle of a democratic state will be positioned only afterwards, below it...I believe that the significance of this proposal cannot be overstated.” Eyal Yinon, “Legislative Trends in the 18<sup>th</sup> Knesset: Interim Assessment” *Din v’Dvarim* [Law Journal] #7, 2012, pp. 23-29, 29, available at [http://weblaw.haifa.ac.il/he/Journals/din\\_udvarim/gilionG/%D7%90%D7%99%D7%9C%20%D7%99%D7%A0%D7%95%D7%9F.pdf](http://weblaw.haifa.ac.il/he/Journals/din_udvarim/gilionG/%D7%90%D7%99%D7%9C%20%D7%99%D7%A0%D7%95%D7%9F.pdf)
- <sup>15</sup> In October 2006, then-Prime Minister Ehud Olmert set out to complete the process of establishing a constitution for Israel by the state’s 60<sup>th</sup> birthday, read: May, 2008. In this framework, there was a concerted effort by the 17<sup>th</sup> Knesset to explore the relevant issues, enlisting tens of researchers, legal experts, and public figures to various discussions upheld to this end. Among the many documents presented to the Constitution, Law and Justice Committee of the Knesset at that time, the three draft constitutions mentioned above—namely, those of the Institute for Zionist Strategies, the Israel Democracy Institute, and Adalah – The Legal Center for Arab Minority Rights in Israel—took center stage. As we know, that effort yielded no fruit, then

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or since, through today: July 2013.

- <sup>16</sup> For the Adalah proposed constitution in English, see [http://adalah.org/Public/files/democratic\\_constitution-english.pdf](http://adalah.org/Public/files/democratic_constitution-english.pdf)
- <sup>17</sup> In this context, the IZS created a meticulous table that compares — section by section — their proposed constitution to that of the Israel Democracy Institute. There they argue that, for instance, in their version, the Declaration of Independence is used as an “introduction to a constitution and is an inextricable part of the constitution,” while in the “consensual constitution” (of the IDI) the original Declaration is nothing but a “nonbinding introduction”; Or, in the their draft, “the definition of the state” is “a Jewish state and the Jewish Home of the Jewish people; there it fulfills its yearning for self-determination in accordance with its historical and cultural heritage”, while in the IDI’s draft it is only “Jewish and democratic” (a meaningless phrase according to the ruling of Chief Justice Barak). But as seen, the IZS’s reliance on the Declaration of Independence and its formulations, is both partial, and extremely selective. See the Institute for Zionist Strategies, “Proposed Law” at <http://tinyurl.com/odt3rp7>
- <sup>18</sup> As explained immediately following section 1 quoted above: “2. The State of Israel is a democratic state which honors human rights in the spirit of the principles of freedom, justice, righteousness, and peace according to the heritage of Israel.” This section does not appear in the proposed Basic Law. Democracy appears only in the ‘Purpose’ section as a part of the formula “to defend Israel as a Jewish and democratic state”. In this regard it is worth quoting the opening words of an article defending the law recently published by Joel Golovensky, president of the Institute for Zionist Strategies: “Israel was envisioned and founded as the nation-state of the Jewish people” – nothing more; Joel Golovensky. “A law whose time has come,” *Haaretz*, 06.04.2013, available at <http://www.haaretz.co.il/opinions/premium-1.1985174>. Israel Harel, then-chairman of the Institute for Zionist Strategies, was still clearer when he said in a debate over the constitution at the 18<sup>th</sup> Knesset: “The separation between ‘Jewish’ and ‘democratic state’ is fundamental. Democracy is a mode of government while the definition of the state as Jewish is a principle and identity. The combination phrase of ‘Jewish and democratic’ served as a stunt for Aharon Barak in his day, so that he could say in many situations that that which was more democratic was also more Jewish [...] it doesn’t make sense, is not educational, and is also incorrect to put ‘democratic’, which is to say a mode of government, and ‘Jewish’, which is a principle, on the same level.” Elisha Reichner, *Nekuda* #309 (March, 2008), pp. 34-9, 36 available for download at <http://www.izsvideo.org/videos/full/israel1.doc>. Finally, recall also Yinson’s previously cited statement (above, footnote 13), with this qualification: Yinson’s words relate to the initial formulation of the proposed law, which drew fierce criticism and was therefore changed in a number of sections — *inter alia*, in relation to democracy; the original text included it in the section entitled “Form of Government” — in the new, “adjusted” version, the term democracy was moved to the “Purpose” section where it appeared as part of the formula “Jewish and democratic”. Hence the change, of course, is only formal: Democracy is not recognized as a fundamental principle of the state, only the structure of the law and its formulation are altered in accordance with the two existing normative Basic Laws; see section 4. Lastly, it is important to note, once again, the vast conceptual distance between the worldview expressed in the proposed bill and that of Ze’ev Jabotinsky, “the constitution to be established [...] will be fundamentally liberal and democratic. It will create a ‘minimalistic’ state, interfering with the individual’s freedom only where an essential defense has to be enacted and avoiding all interference beyond that point”; Ze’ev Jabotinsky, *On State and Social Problems*, (above, footnote 9), p. 70, also available at <http://en.idi.org.il/media/2384931/Jabotinsky-IDI-2013.pdf>
- <sup>19</sup> According to Harel at the time of the discussions over the constitution in the 18<sup>th</sup> Knesset: “On the issue of a constitution, like other issues, time works to the disadvantage of Jewish and Zionist identity in the State of Israel. To all those who say, ‘Who needs a constitution that’s not a constitution of the Torah?’ I say, ‘What we could have achieved three years ago we can no longer achieve today, and what are able to achieve today we will not be able to achieve in three years’ time. Everything is going in the opposite direction.” Reichner (above, footnote 16), p. 137.
- <sup>20</sup> Harari Decision, 1950: “The first Knesset tasks the Constitution, Law and Justice Committee with bringing a draft constitution for the state. The constitution will be divided into chapters in such that each of them will constitute a standalone Basic Law. Chapters will be brought before the Knesset when the Committee completes its work, and all chapters will be assembled into a State Constitution.”
- <sup>21</sup> See below, section 5.

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- <sup>22</sup> The section titled “Basic Principles” is identical (from the Hebrew): “the basic rights in Israel are predicated on the recognition of the value of man, the sanctity of life [...] and are honored in the spirit of the principles upon which Israel was founded.” The ‘Purpose’ section is also identical, though it excludes the object: The first’s goal is to safeguard “human dignity and liberty”, and the other’s “freedom of occupation”. The language that follows contains further differences, but a close reading shows that these derive directly from the substance of the relevant right, nothing more.
- <sup>23</sup> For example, “Basic Law: Human Dignity and Liberty”, contains no detail on how or what counts as ‘safeguarding’, ‘defending’ or ‘harming’ “the life, body or dignity of a person”, and nowhere does it state how or what will be done to encourage or prevent these acts. These and similar issues are reserved for standard laws and provisions, based on the clear understanding that their place is not in a Basic Law and that particulars demand a broader tent and less abstract and principled language.
- <sup>24</sup> Section 7B states the following (from the Hebrew): “The State will reach out to members of the Jewish people in distress and captivity because of their Jewishness”; Section 8A — “The State will act to safeguard the heritage [...] of the Jewish people and foster it in Israel and the Diaspora”; Section 8B — “in every educational institution serving a Jewish public in Israel the history of the Jewish people, its heritage and tradition will be taught”; Section 9B — “the State may allow a distinct community [...] to maintain separate communal settlements.” For additional discussion of section 8 in the proposed bill see below, section 6. Regarding section 9 in the proposed bill, see below, section 5.
- <sup>25</sup> “When the question is asked, whether the proposal does not contradict the existing Basic Laws and other legislative works where the term ‘Jewish and democratic state’ holds, the [law’s] proposers come to clarify that any legislative work, implying existing Basic Laws as well, will be explicated in light of the hierarchy established in the new Basic Law. Additionally, the proposers seek to entrench the Basic Law in a way that can only be changed by a majority of 61 Knesset votes.” Yinon (above, footnote 13), p. 29.
- <sup>26</sup> “The partial constitutional revolution therefore broke the historic partnership of values between the value of Israel as a Jewish state and [...] and its values as a state committed to universal human rights [...] it dropped its resolute defenses that characterized its common law in relation to the character of Israel as a Jewish state. Israel therefore not only underwent a constitutional revolution in terms of judicial authority to repeal laws, but a revolution in terms of its normative roadmap: Israel went from being a state whose constitutional law expresses the values of human rights and of a Jewish state alike to a state whose constitutional law expresses the values of human rights and not those of a Jewish state [...] the truncated charter of values posed by the Knesset before the court, creates a legal situation in which the values of Israel as a Jewish state suffer a serious disadvantage, contrary to prevailing normative stances in the Israeli public, legislature and courts. As will be argued below, the proposed ‘Basic Law: Israel — nation-state’ is designed to bring constitutional law in Israel back into this normative Zionist consensus,” Aviad Bakshi, “Basic Law: Israel — nation-state of the Jewish people: the Legal Necessity” Jerusalem: Institute for Zionist Strategies, 2013, p. 15, available at <http://izs.org.il/papers/aviadbakshifinal4.pdf>; and compare to Golovensky (above, footnote 16).
- <sup>27</sup> The reasons that “Basic Law: Human Dignity and Liberty” does not require a special majority [to undergo any change] are much discussed. See for example, Claude Klein, “Basic Law: Human Dignity and Liberty”, *HaMishpat*, 2 (1992), pp. 14-15, available at <http://tinyurl.com/q67l4ww>; Yehudit Karp, “Basic Law: Human Dignity and Liberty: biography of legal battles”, *Law and Government*, A (1992), pp. 323-384, available at <http://tinyurl.com/ot9283l>; for a more involved and personal perspective, see Amnon Rubenstein, “Stories of the Basic Laws”, *Law and Business*, 14 (2011-12), pp. 79-109, available at [http://idclawreview.wordpress.com/2012/10/31/volume14\\_rubinstein/](http://idclawreview.wordpress.com/2012/10/31/volume14_rubinstein/). Whatever the precise explanation, it is widely agreed that the reason is what the formulators and backers of the proposed bill would call a “disruption”. For what this entails, see the discussion below.
- <sup>28</sup> See above, footnote 4. See also Israel Harel’s more concrete comments on the subject of the constitution, reflected in this law: “Without such qualifications as these, Supreme Court judges might be overwise — as they have been until now — on and through the issue of equal rights, to empty the contents of the state’s identity as a Jewish state”; “One day we will have a constitution and the Supreme Court judges — who today still have some kind of “self respect” when it comes to emptying the State of Israel of its residual Jewish-Zionist content — will have a free hand — through a, God forbid, post-Zionist constitution,

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to fundamentally change the Jewish-Zionist identity of the state," see Reicher (above, footnote 16), pp. 36, 37 (adjusted version).

- <sup>29</sup> From the IZS document: "Beginning in the early 1990s, the trend has shifted, and in a series of legal rulings, the court has eroded the status of the Hebrew language." (see Bakshi above, footnote 24), p. 27. It is almost superfluous to point out the vast distance between this claim and the current reality.
- <sup>30</sup> Supreme Court Decision 95/6698, Adel Kaaden and others v. Israel Lands Authority, Verdict #54(1), 258 (2000). For the context itself, see Harel's statements in Reicher (above, footnote 16), p. 37; Bakshi, above. (Translator's note: For more on the Kaaden case, see report by Joel Greenberg in the *New York Times* from March, 9, 2000, available here <http://www.nytimes.com/2000/03/09/world/israeli-court-rules-arab-couple-can-live-in-jewish-area.html>)
- <sup>31</sup> This matter is still pending today in the Supreme Court (Translator's note: "admissions committees" select candidates for acceptance into small villages and rural development towns throughout Israel, especially the Galilee and the Negev regions.)
- <sup>32</sup> In this context it is worth noting the legal rulings on Kaaden; acceptance committees (see above, footnote 30); Women of the Wall (and the right to pray at the Western Wall plaza in general); conversion and the Law of Return; civil marriage and divorce, and others.
- <sup>33</sup> "In the last few years, a campaign has been managed [by Mrs. Carmen Weinstein, President of the Jewish community of Cairo] against the initiative to remove items of Judaica from Egypt—holy implements and books—some extremely rare. The initiative's argument is that since no Jews remained there, there is a concern for the future of these items, and it would be better to keep them in a safe place. Without belittling this argument, Carmen managed a determined battle against the initiative and its organizers. Her stance was based on historical and cultural grounds. Her claim was that Jewish sites, Judaica items, and the community's archives, are [each] an inextricable part of the history and culture of Egyptian society [...] attempts by representatives of the State of Israel to "spread their wings" over the Jews of Egypt often led to controversy with the community leaders in Cairo and Alexandria [...] Carmen saw the cultural and historical assets of the community she headed as an inextricable part of the heritage of Egyptian society and fought vigorously against any attempt by this or that external actor to appropriate them," Yoram Meital, "Carmen Weinstein: 'Iron Lady' from Cairo," *Haaretz*, 25.04.2013, available at <http://www.haaretz.co.il/literature/study/premium-1.2001491>. See also criticism of Yehezkel Dror: "What implications are there for relating to the State of Israel as a state for the Jewish people in formal, legal terms? [...] This legislation should be at least accompanied by an advisory council of representatives of the Jewish people, who will work alongside the Knesset. I support the establishment of this type of body, but it must be ascertained that a Knesset majority and a majority of Diaspora leaders support the establishment in tandem with the legislation of the Basic Law"; Yehezkel Dror, "Basic Law: state of the Jewish people", *Haaretz*, 15.04.2013, available at <http://www.haaretz.co.il/opinions/premium-1.1994029>. The premise of Dror's notion is especially challenging: how can it be that the state of Israel sees itself as the representative of the entire Jewish people without giving its members a place in determining its future (and hence, the future of its citizens — Jews and non-Jews)? This also recalls Jabotinsky's words to the Peel Commission "I do not believe that the constitution of any state ought to include special paragraphs explicitly guaranteeing its 'national' character. Rather, I believe that it would be better [lit: a good sign] for the constitution if there were fewer of those kinds of paragraphs. The best and most natural way is for the 'national' character of the state to be guaranteed by the fact of its having a certain majority." "Fulfill Your Promise or Abandon the Mandate," in *Speeches* (Jerusalem: Eri Jabotinsky, 1958), vol. 2, pp. 224 [Hebrew], excerpt available in translation at <http://en.idi.org.il/media/2384931/Jabotinsky-IDI-2013.pdf>
- <sup>34</sup> In the words of Shlomo Avineri: "This also applies to the statement in section 8A that in every 'educational institution serving a Jewish public in Israel the history of the Jewish people, its heritage and tradition will be taught.' Since these concepts are far from being taken for granted or accepted by all, almost certainly what will happen is that the Supreme Court, in its capacity as High Court, will determine the curriculum." Avineri, Shlomo. "Dichter's Populism," *Haaretz*, 21.11.2011, available at <http://www.haaretz.co.il/opinions/1.1571139>
- <sup>35</sup> Eyal Yinon (footnote 13, above), p. 29.
- <sup>36</sup> See footnote 16.