

Concerned Jews of America, Here Are Answers to Your Pledge

BY [EMMANUEL NAVON](#) | PUBLISHED SEP 2, 2018 | [COLUMNISTS & CONTRIBUTORS](#)

A “pledge” against Israel’s new nation-state law was recently published by eight organizations: T’ruah, the New Israel Fund, J Street, Ameinu, American for Peace Now, the National Council of Jewish Women, Partners for Progressive Israel, and the Union for Reform Judaism. The pledge states: “If any of the 62 Members of Knesset who voted for the Nation-State Law speak in my community, or at a conference I am attending, or on a delegation I participate in, I will ask these questions.” The questions are listed below, together with my answers.

Even though I am not a member of Knesset, the following questions are also addressed to me since I am a senior fellow at the Kohelet Policy Forum (the think-tank that initiated and promoted the nation-state law) as well a member of the Likud party. Had I been a member of Knesset, I would have voted in favor of the nation-state law. Below are my answers to the questions asked by the above organizations. Those questions and

answers address key disagreements between the Israeli government and liberal American Jews.

1. Israel's Declaration of Independence states that Israel will "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex and "guarantee freedom of religion, conscience, language, education and culture."

• Do you believe that non-Jewish citizens of Israel deserve all of the same rights as Jewish citizens of Israel?

Yes, except for the right to national self-determination within the territory of the state. Israel's Declaration of Independence grants the right to national self-determination within the State of Israel only to the Jewish people, but it also grants equal civic rights to all citizens regardless of their ethnic or religious identity. The Declaration of Independence says: "We hereby declare the establishment of a Jewish state in the Land of Israel" but also that the Jewish state shall "guarantee completely equal political and social rights to all its citizens regardless of their religion, race, or sex."

"In 1897, the Zionist Congress convened by Theodore Herzl proclaimed the right of the Jewish people to national self-determination in its land."

"The Jewish people has a natural right to national self-determination, like any other people."

"We hereby declare the establishment of a Jewish state in the Land of Israel."

“The State of Israel shall be open to Jewish immigration and to the ingathering of the exiles.”

“We call upon the Jewish people throughout the Diaspora to unite around Israel, via immigration and construction, and to stand by Israel to achieve the age-old vision of Israel’s redemption.”

“Placing our trust in the Rock of Israel, we hereby sign the present declaration ... in the homeland.”

While the Declaration of Independence reserves the right to national self-determination, within Israel, to the Jewish people, it also grants equal civic rights to all citizens regardless of their identity. The Declaration states that Israel shall “guarantee completely equal political and social rights to all its citizens regardless of their religion, race, or sex.”

The principles of exclusive national self-determination and of equal civic rights are not incompatible. Israel is not alone in being a nation-state and a democracy. No fewer than 17 members of the European Union (EU) have a constitution that proclaims sovereignty in the name of their country’s majority (Austria, Bulgaria, Croatia, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and Spain). Americans and Canadians are generally unaware of the fact that their country is the exception and not the rule in not being a nation-state. To most Europeans, by contrast, being a nation-state and a democracy is self-evident.

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The nation-state law preserves and enshrines the rights of minorities. It officializes the "special status" of the Arabic language (Article 4) and it recognizes to Israel's minorities the right to rest and to take off on their religious and/or national holidays and days of rest (Article 10).

• If so, why did you vote for the nation-state bill, which pointedly disenfranchises Israel's minorities — and never once uses the words "equality" or "democracy"?

The nation-state law does not disenfranchise Israel's minorities. Reserving the right to national self-determination to the state's majority nation was recognized as a legitimate and universal right by the League of Nations after World War I. It is based on this right that the Austro-Hungarian Empire was replaced by nation-states, and that the Ottoman Empire was replaced by mandates in which nations (including the Jews) were to eventually achieve their independence.

The nation-state law completes Israel's constitutional order. Israel does not have a written constitution but only "Basic laws" that were granted

constitutional status by the Supreme Court. Constitutions generally codify three principles: 1) The purpose and identity of the state; 2) The separation of powers; 3) The fundamental rights of citizens. Israel already has Basic Laws that define the separation of powers (such as Basic Law: The Knesset) and that protect fundamental rights (such as Basic Law: Human Dignity and Freedom). Israel did not have a Basic Law on the purpose and identity of the state. Now it does.

Israel's nation-state law does what most European constitutions do: It specifies that the right to self-determination belongs to the majority nation; it describes the flag; and it codifies the country's official language, national anthem and national holidays. The new nation-state law is the equivalent of a few articles in European constitutions. The new Basic Law does not replace other Basic Laws but completes them. It is not a constitution but an addition to an incomplete constitutional order.

The new Basic Law is no different in content from the articles of European constitutions related to the state's identity.

Twenty European constitutions describe the country's flag (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain). Twelve European countries have a cross on their flag (Denmark, Finland, Greece, Iceland, Malta, Moldova, Norway, Serbia, Slovakia, Sweden, Switzerland and the United Kingdom).

Sixteen European constitutions specify that the country has one (and only one) official language (Austria, Bulgaria, Croatia, Cyprus, Estonia, France, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia,

Slovenia and Spain). Thirteen European constitutions codify their national anthem (Bulgaria, Croatia, Czech Republic, Estonia, France, Hungary, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia).

Israel's nation-state law also does what most European constitutions do: it specifies that the right to national sovereignty belongs to the majority nation; it describes the flag; and it codifies the country's official language, national anthem, and national holidays. The new nation-state law is the equivalent of a few articles in European constitutions. The new basic law does not replace other basic laws but completes them. It is not a constitution but an addition to an incomplete constitutional arrangement.

Accusing Israel's nation-state law of not dealing with the rights of minorities is like accusing Article II of the French constitution (which codifies the official language, the flag and the national anthem) of not dealing with the separation of powers. Different articles of a constitution relate to separate issues. So, too, Israel's Basic Laws. Equality, democracy and the separation of powers are already codified by other Basic Laws. Basic Law: The Knesset deals with the separation of powers, not with the state's identity. Basic Law: Human Dignity and Freedom deals with freedom, not with separation of powers. Basic Law: Nation-State deals with the state's identity, not with rights or with the separation of powers. All of Israel's Basic Laws have an equal constitutional status. None is replaced or superseded by others.

Israel's Declaration of Independence never once uses the word "democracy." Basic Law: Human Dignity and Freedom never once uses the word "equality." Why does the absence of those words arouse concern only when it comes to Basic Law: Nation-State? The principle of equality before

the law is enshrined in the jurisprudence of Israel's High Court of Justice, and it is neither undermined nor diminished by the nation-state law. The nation-state law grants constitutional status to the Jewish right to national self-determination proclaimed by Israel's Declaration of Independence. Doing so was necessary because the High Court of Justice ruled in 1948 that the Declaration of Independence does not have the status of a law or of a constitution.

2. Defenders of the nation-state law say it provides a necessary legal defense of Israel's Jewish character.

- *Can you explain what you perceive to be the threat to Israel's Jewish character that necessitated this new law?*

Passing the nation-state Basic Law was necessary because of the judicial activism of Israel's High Court of Justice during the past two decades.

In 1992 and 1994, the Knesset passed two Basic Laws: one on "human dignity and freedom" and one on "freedom of occupation." Justice Aharon Barak (who presided the Supreme Court from 1995 to 2006) proclaimed a "constitutional revolution" after the passing of those two Basic Laws. What Barak meant was that the High Court of Justice could now strike down laws passed by the Knesset if deemed "unconstitutional" (i.e., incompatible with the two new Basic Laws). Nowhere in the Basic Law does it say that the court is entitled to use them to strike down regular legislation. Yet Barak unilaterally granted that power to the court in a 1995 ruling.

The "constitutional revolution" has affected Israel's identity as a nation-state. The Basic Law on "human dignity and freedom" states that Israel is a

“Jewish and democratic state.” But what happens when Jewish and democratic values conflict? No problem, Barak wrote in 1992: In case of a conflict, the word “Jewish” shall be interpreted by the court “with the highest level of abstraction.” In other words, it shall be ignored. Theoretically, the court could use in its rulings Israel’s Declaration of Independence, which defines Israel is a Jewish state. Yet, as explained before, the court ruled in 1948 that the Declaration of Independence has no constitutional value.

The High Court’s activism, combined with the “highest level of abstraction” with which Barak interpreted Israel’s Jewishness, were soon to be felt. The court ruled that a Jew cannot purchase a plot of land in a Bedouin village (Avitan case, 1989), but that an Arab can build a house in a village established by the Jewish Agency (Ka’adan case, 2000). The court was petitioned twice by nongovernmental organizations (NGOs) in 2006 and in 2012, to cancel Israel’s citizenship law so as to impose on Israel the Palestinian “right of return” through the back door via fictitious marriages. Though the court rejected both petitions, it did so with a razor-thin majority of 6 to 5.

- *Can you name any way in which this law actually accomplishes this stated goal?*

Part of Aharon Barak’s “constitutional revolution” was to repeal the standing (or locus standi) principle (i.e. the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party’s participation in the case), and to declare that the court may be petitioned on any issue and not only on legal ones (“anything is justiciable” was Barak’s formula). As a result, political NGOs petition the court to challenge laws and government decisions that they deem unfit to

their agendas. This phenomenon undermines the principle of national sovereignty and it constitutes a threat to laws, decisions and symbols that make Israel a nation-state.

Laws and symbols related to Israel's Jewish identity are not immune from petitions at the High Court of Justice. The "Law of Return" (which grants automatic immigration rights only to Jews) might one day be struck down for being discriminatory; Israel's national anthem (which expresses the Jews' two-millennia faithfulness to their land) and flag (which only has a Jewish symbol) could be challenged in court for ignoring the feelings of the Arab minority; and taxpayers could petition the court against the spending of their money on the preservation of Jewish identity in the Diaspora. Until the passing of nation-state Basic Law, the court had no constitutional basis to reject such petitions and to protect Israel's Jewishness. Now it does.

3. One of the consequences of the nation-state law was to create a needless crisis with Israel's Druze citizens.

• Despite their generations of service and sacrifice for Israel, do you not see the Druze as equal citizens and partners in Israel's society and future?

The Druze *are* equal citizens and partners in Israel's society and future like other Israeli citizens. They enjoy all the civic rights granted by the state. But they do not have a right to national and territorial self-determination within the borders of the State of Israel. They cannot, for example, declare an independent state in the Golan Heights. The same restrictions exist in other democratic nation-states. The Catalans and the Basques are equal citizens of the Spanish kingdom, but they are constitutionally barred from declaring their national independence (as the Catalans can testify). Likewise, the

Corsicans are equal citizens of the French Republic, but they do not have a right to national self-determination under the French Constitution. The list goes on.

Ayoob Kara, Israel's Telecommunications Minister, is Druze. He voted in favor of the law because, he said, "If there were no Jewish state, we Druze would be massacred just like in Syria. The Jewish state of Israel is the only Middle East country where the Druze and the Arabs are free." The Druze are not the only minority in Israel to feel that way. Shaki Khalloul, chairman of the Israeli Christian Aramaic Association, is a vocal supporter of the nation-state Basic Law: "It is only because it is Jewish that Israel is democratic and that we Aramaic Christians are free," he explained. These people feel that they are equal citizens and partners in Israel's society and future precisely because Israel is a Jewish state.

It would be misleading to describe the demonstration (on August 4, 2018) of Druze leaders and citizens against the nation-state law as a spontaneous and a-political one. The demonstration was organized by NGOs such as "ANU." ANU, which receives funding from the New Israel Fund and from the European Union, wrote on its websites two lies about the nation-state basic laws: a. That it cancels the principle of civic equality (it doesn't); b. That it justifies the unequal distribution of national resources (it doesn't either). ANU also wrote on its website that "The Israeli government purposely undermines the international right of minorities to national self-determination." As explained before, there is no such "international right" and it is explicitly rejected by most European constitutions. But ANU's endgame is clear: it advocates the national self-determination of minorities in Israel, which would enable the Druze to claim

sovereignty in the Golan, the Bedouins in the Negev, and the Arabs in the Galilee. This would spell the territorial disintegration of the State of Israel.

So the crisis with the Druze community was not created by the law, but by political NGOs that spread lies about the law

- *If you do, why did you vote for the Nation State Law and what will you now do to repair this damage?*

The government has addressed the concerns expressed by certain Druze leaders. After meeting with leaders of the Druze community, the Prime Minister Benjamin Netanyahu has agreed to promote legislation that shall anchor the status of the Druze and Circassian communities, and that shall will provide benefits to members of minority groups who serve in the security forces. The law also will institutionalize financial support for Druze education and culture. It was also agreed that existing Basic Laws shall be amended so as to recognize the contribution made by all minorities and communities that participate in the defense of the country.

4. The provisions of the nation-state law, which you supported, also discriminate against Israel's non-Orthodox Jews.

- *Do you understand that this alienates the majority of American Jews, damages their connection to Israel and weakens overall support for Israel in the United States?*

Does this concern you?

The nation-state law does not discriminate against Israel's non-Orthodox Jews. It officializes Israel's responsibilities toward Diaspora

Jews *regardless* of their religious affiliation (or lack thereof). Far from driving a wedge between Israel and Diaspora Jewry, the nation-state Basic Law institutionalizes the link and mutual responsibility between Israel and Diaspora Jews. Article 6 of the law says the following: a. The State shall strive to ensure the safety of members of the Jewish People and of its citizens, who are in trouble and in captivity, due to their Jewishness or due to their citizenship; b. The State shall act, in the Diaspora, to preserve the ties 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.

Israel's ultra-Orthodox legislators had strong reservations about Article 6 *precisely* because it includes all Jews. Article 6(c) implies that the State of Israel shall share the cost of Jewish education in the Diaspora, with no distinction between Orthodox, Conservative and Reform. Ultra-Orthodox members of the Knesset opposed that clause because they did not want their taxpayer money to go to Reform or Conservative Jews in America.

Yet the article was approved despite their opposition.

5. Many critics feel that the nation-state law — and others the current Knesset has passed — move Israel further from the family of Western liberal democracies, and closer to so-called “illiberal democracies” like Hungary and Poland. That view is reinforced by Israeli leaders’ rhetorical attacks on Arab citizens of Israel, the judiciary, the media and civil society organizations. Many American Jews feel Israel is becoming less and less recognizable to them as the country they thought they knew and long supported.

- *Does this concern you? If so, what do you propose to do about it?*

The Knesset has not passed laws that “move Israel further from the family of Western liberal democracies.” Unlike Poland, Israel has not passed a law that restricts the independence of the Supreme Court and of its judges. Unlike Hungary, Israel has not passed a law that criminalizes assistance to illegal immigrants.

Legislation and public debate on issues such as the handling of illegal work migrants, the separation of powers or the funding of political NGOs, are not “rhetorical attacks.” On those three issues, the following clarifications are called for.

Like many European countries, Israel has a large number (in proportion to its total population) of illegal work migrants, mostly from Eritrea and Sudan. Courts in Switzerland and in the United Kingdom have recently ruled that most Eritreans are not political refugees and can therefore be sent back to their country. But when Israel considered a similar move, it was harshly criticized for “deporting refugees.”

The separation of powers in Israel was never clearly defined by a written constitution (which Israel lacks) and was profoundly reshaped by Aharon Barak’s “constitutional revolution.” Many experts are of the opinion that the constitutional revolution has gone too far by replacing the separation of powers with a hierarchy of powers in which judges, not the Knesset, have the last word. Some have suggested to remedy this imbalance by introducing reforms inspired by Canada (where parliament can re-legislate bills struck down by the Supreme Court) or by the United Kingdom (where the Supreme Court cannot strike down laws but can only recommend their

amendment). Debating issues of constitutional law and proposing reforms inspired from Britain and Canada (neither of which can be accused of being an “illiberal democracy”) do not constitute “rhetorical attacks” on the judiciary and does not move Israel away from the family of Western liberal democracies.

Many constitutional experts claim that the constitutional revolution has gone too far by replacing the separation of powers with a hierarchy of powers in which judges, not the Knesset, have the last word. Some have suggested to remedy this imbalance by introducing reforms inspired from Canada (where parliament can re-legislate bills struck down by the Supreme Court) or from the United Kingdom (where the Supreme Court cannot strike down laws but can only recommend their amendment). Debating issues of constitutional law and proposing reforms inspired from Britain and Canada (none of which can be accused of being “illiberal democracies”) do not constitute “rhetorical attacks” on the judiciary.

As for NGOs, they have in recent years made full use of the “constitutional revolution” (which, as explained before, has repealed the standing principle and has declared that no issue is beyond the Supreme Court’s jurisdiction). When such NGOs get most of their funding from foreign governments, they undermine the principle of national sovereignty. In 2016, Israel passed a law that makes it mandatory for NGOs that receive more than 50 percent of their funding from foreign governments to make that information public. It is precisely to protect itself from such foreign interference that the U.S. Congress passed the Foreign Agents Registration Act (FARA), which make it mandatory for lobbyists with non-U.S. funding to register as foreign agents with the Department of Justice. In January 2015, Congress

introduced a new directive making it mandatory for NGOs to specify what percentage of their funding comes from foreign governments.

The measures taken or considered by Israel to face its many challenges are similar to the ones adopted by the United States, Canada, the United Kingdom or Switzerland. Israel should be judged by the same standards as other Western democracies, not by higher ones. Criticism of Israel should be grounded in facts, not in narratives. So should the dialogue between Israel and American Jewry.

Emmanuel Navon is a political scientist and foreign policy expert who lectures at Tel Aviv University and at the Herzliya Interdisciplinary Center. His upcoming book is *“The Star and the Scepter: A Diplomatic History of Israel.”*