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The Ramifications of the Nation State Law:
Is Israeli Democracy at Risk?
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The discussion surrounding the Nation State Law has sparked a heated debate in Israeli society. One side claims that the law is a proper and necessary legislative anchor for the national character of the State of Israel as the state of the Jewish people, against those who seek to deny the Jewish people's right to a national home in its homeland. The other side argues that this is discriminatory legislation, which undermines the democratic nature of the State of Israel. In reviewing the Nation State Law, it is important to consider additional processes at the political and legal levels. An examination of the Law in the context of these processes indicates that it is too early to eulogize Israeli democracy. However, it is crucial to guard against processes that might erode democratic values. In addition, it is vital to ensure that the national dimension does not become a nationalist dimension and that the balance between the national dimension and the democratic dimension is retained, since both together express the essence of the State of Israel according to the founding fathers. It is therefore regrettable that the Nation State Law does not include the balanced formula included in Israel's Declaration of Independence.

The discussion surrounding the Basic Law: Israel as the Nation State of the Jewish People (hereafter: the Nation State Law) has sparked a heated debate in Israeli society. One side claims that this is a proper and necessary legislative anchor for the national character of the State of Israel as the state of the Jewish people, against those who seek to deny the Jewish people's right to a national home in its homeland. The other side argues that this is discriminatory legislation, which undermines the democratic nature of the State of Israel and sends a nationalistic message. The truth apparently lies between these two extremes. However, a full understanding of the Law and its ramifications must include reference to more general processes underway - in both directions - within Israel's political and legal systems. It is also important to examine the implications of the legislation for national security in the domestic and international spheres.

On the one hand it is argued that the law is simply a means of anchoring the essence of Israel as the state of the Jewish people in a Basic Law. The anchor is necessary as a counterweight to the various human rights enshrined in other Basic Laws. According to this approach, the Basic Laws are intended to form chapters in a state constitution.

However, given the difficulty of formulating a comprehensive constitution, it is important “to add to the body of constitutional legislation provisions referring to the basic characteristics of the country as a Jewish state” (as stated in the explanatory notes to the draft legislation). The lack of such provisions creates an imbalance in favor of the democratic element of the State, which is reflected, for example, in Supreme Court rulings that, it is argued, give precedence to the State’s democratic element over its national-Jewish element.

On the other hand, it is argued that the character of the State as the State of the Jewish people is already enshrined in the Declaration of Independence and is not under any tenable threat. The existing Basic Laws refer to Israel as “Jewish and democratic” and the Supreme Court also refers to this dimension in its rulings. Therefore, the Law is not required for this purpose. At the same time, the repeated emphasis in the Law on the Jewish character of the State, the status of the Jewish people, and the importance of Jewish settlement, together with the lowering of the status of the Arabic language, create the impression that anyone who is not Jewish is in fact removed from the collective, and presented as someone who is not a full partner in the State.

An examination of the Law’s provisions shows that there is nothing explicit in the Law that permits discrimination against those who are not Jewish. The problematic provisions, such as the authorization for the State to approve separate settlements for different communities, including certain religions or nationalities, were removed from the version that became law. The provision reducing the status of the Arabic language compared to the Hebrew language remained. The main difficulty with the Law is the focus on the State as the “national home of the Jewish people, in which it fulfills its natural, cultural, religious and historical right to self-determination,” without including the complementary element, set out in the Declaration of Independence, on the equality of all citizens, and without referring to the democratic nature of the State. This raises the concern that the Law’s emphasis on the national identity of the State comes at the expense of its non-Jewish citizens.

This concern has been reinforced by the debate following the adoption of the law. There have been impassioned responses from the Druze community, which expressed their sense of betrayal, exclusion from Israeli society, and demotion to second class citizens in their own country. In response, supporters of the Law expressed regret at these feelings and even hinted at a possibility of amending the Law to include Druze citizens, and other “loyal citizens” such as the Bedouin, the Circassians, and others, that is, those who enlist in the army and participate in the national effort. This discussion, paradoxically, highlights the most profound difficulty of the Law as expressed by these reactions, namely, the idea that it indeed relegates all non-Jews to a lower status. While there seems

to be agreement, even among supporters of the Law, that there could be grounds for rectifying the distortion with regard to those “good citizens” who participate in the national effort, the implication is that for others, namely Arab citizens of the State, there is no such need. The creation of different classes of citizen – some worth more, some worth less – undermines one of the most basic elements of any democratic regime – equality for all citizens, and infringes on another essential component of a democratic system, namely, expressing the rule of the majority while granting essential protections to minorities.

In reviewing the Nation State Law, it is important to consider additional processes at the political and legal levels. One of these trends is expressed by the efforts to weaken the power of jurists in the public service and the Supreme Court. There can of course be legitimate criticism of over-“judicialization” and judicial intervention in matters involving political decisions. However, some of the criticism directed at jurists and the Supreme Court seeks to undermine the legitimacy of the judicial system and also opposes judicial decisions that relate to genuine legal questions, in which the Court seeks to fulfill its designated role as the gatekeeper of democracy, through criticism of the executive and the legislature and the guarantee of individual rights. An erosion of this role could undermine the requisite checks and balances, one of the most important elements of a democratic regime.

A relevant benchmark concerns the attitudes toward critics of the government. On one side, it is common wisdom that freedom of expression is the lifeblood of democracy, and one need only look at non-democratic regimes, such as those of Erdogan in Turkey and Putin in Russia, that stifle domestic political criticism. On the other hand, there is a question regarding abuse of free speech in a way that justifies imposing limits. For example, there is a dispute over whether it is legitimate to impose restrictions on elements that tarnish Israel’s image in the world and call for international action against it. There have recently been some legislative amendments seeking to restrict such elements, for example, regarding their activity in educational institutions or their entry into Israel. Some argue that such restrictions constitute an unreasonable blow to freedom of expression. Others argue that such elements participate in the campaign against Israel and it is legitimate to take steps against them. Here the proper approach is to find the right balance. However, defining anyone who, for example, criticizes IDF actions as a traitor, or attempts to suppress such remarks, crosses the line of what is acceptable and does not comport with a democratic regime.

As for the ramifications of the Nation State Law and these processes: at the domestic level, it is too early to eulogize Israeli democracy. The very fact of the lively debate surrounding the Nation State Law is evidence that Israel is a democracy that allows open

critical debate. Various legislative moves that attempted to impinge on individual rights have been blocked during the legislative process or by the Supreme Court. However, the increasing attempts to introduce legislation and various administrative decisions that breach the balance demand vigilance to guard against future possible erosion of democratic values. It is also troubling to see the public debate, fed by statements from politicians, expressing support for nationalistic sentiments and for restrictions on the freedom of minorities or of those who think differently. There is also the fear that if such ideologies take root, they will sow the ground for the creation of one unequal state throughout the Land of Israel.

More concretely, the Nation State Law and the ensuing debates arouse fears as to the possible implications for Israel's Arab sector. This is a loyal public, the majority of whom wish to integrate into Israeli society. There is concern that this public will be drawn into adopting more extreme positions, feeling they are being pushed out. Such an outcome is clearly not in the interests of the State of Israel, and could adversely affect national security.

In the international arena, the Nation State Law, like the other steps described here, particularly those targeting civil society elements widen the rift between the State of Israel and Jewish community in the United States, who are for the most part liberals, and between Israel and other important Western allies. These moves also lend valuable ammunition to those who try to censure Israel and erode its international standing, such as BDS activists and others who seek to undermine the existence of the State.

In conclusion, reinforcing the national dimension of the State is not wrong in and of itself. However, it is vital to ensure that the national dimension does not become a nationalist dimension, and that the balance between the national dimension and the democratic dimension is retained, since both together express the essence of the State of Israel according to the founding fathers. It is therefore regrettable that the Nation State Law does not include the detailed formula in the Declaration of Independence, whereby "The State of Israel will be open for Jewish immigration and for the ingathering of the Exiles; 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 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 will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations." Such a formula would be acceptable to nearly everyone in the State, and the Nation State Law as such would have been a unifying rather than a divisive law.