An idiot’s guide to the nation-state controversy

A bird’s-eye view of the facts, arguments and motivations behind the proposed legislation that is roiling Israeli politics

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So much has been written about the nation-state bills, and so much of it has been wrong on the basic facts, that a straightforward primer on the existing versions and a brief sketch of the arguments around them may provide readers with basic tools to grapple with the issue.

A government-sponsored bill is currently being written at the direction of Prime Minister Benjamin Netanyahu and under the supervision of Attorney General Yehudah Weinstein. Contrary to reports in both Israeli and foreign media, from a New York Times editorial to the world’s largest wire services, the cabinet did not pass a nation-state bill two weeks ago. Rather, it passed a 13-page decision that committed the government to supporting two right-wing versions of the nation-state bill in a preliminary vote in the Knesset, “but only,” the cabinet decision reads, “on condition that the proponents [of the two bills] agree that their bills will be attached [Israeli legislative terminology for ’subsumed’] in a government-sponsored bill that will be proposed by the prime minister on the matter, which will be drafted on the basis of the principles contained in the appendix to this decision, and which will be adapted to it [the government bill].”

Much of what has been said about the nation-state bill — that it “narrows” Israel’s democracy, that it changes the formal legal standing of Israel’s minorities — referred to the right-wing bills superseded by the government decision.

Meanwhile, many of the deeper issues raised by the bills — why no Israeli legislation, not even the Basic Law: Human Dignity and Freedom, mentions “equality”; the bills’ role in the generation-old battle between Israel’s activist judiciary and its resentful legislature; and Israel’s lack of a formal constitution, which has seen it unable to settle the most fundamental questions of its identity in the 66 years since its establishment — have largely been missed in the media debate.

Many of the key facts of the issue have been lost in these gaps, and the crises and culture wars into which the bills were written have been badly misrepresented. For example, there is the fact that the most controversial right-wing versions of the bill were born in the political center and have enjoyed the support of even many left-wing MKs, or the fact that the rightist bills — often cited by the media as simply “the bill” — were only a starting position: Many of their proponents had already conceded on most of their most
controversial articles before the cabinet voted to effectively cancel them, and long before the media noticed the issue.

What follows is the full translation of the most recent publicly available draft of the most current version of the bill: the “14 principles” passed on November 19 in the cabinet as a starting-point for the Netanyahu-Weinstein version of the bill expected to be presented to the Knesset in the coming weeks.

After that, we’ll present a comparison of key differences between the government bill, the superseded right-wing bills, and the Declaration of Independence, which a handful of left-wing MKs want passed as a Basic Law in its own right.

The prime minister’s 14 principles for the drafting of the government bill

Principle 1 — Purpose:
Defining the identity of the State of Israel as the nation state of the Jewish people, and anchoring the values of the State of Israel as a Jewish and democratic state, in the spirit of the principles contained in the Declaration of the Establishment of the State of Israel.

Principle 2 — Founding principles:

A. The land of Israel is the historic homeland of the Jewish people and the birthplace of the State of Israel.

B. The State of Israel is the national home of the Jewish people, in which it fulfills its right to self-determination according to its cultural and historic heritage.

C. The right to the fulfillment of national self-determination within the State of Israel is unique to the Jewish people.

D. The State of Israel is a democratic state, established on the foundations of liberty, justice and peace in light of the vision of the prophets of Israel, and realizes the individual rights of all its citizens under law.

Principle 3 — The symbols of the state:

A. The anthem of the State is “Hatikvah.”

B. The flag of the State is white, with two light-blue stripes near its edges and a light-blue Star of David in its center.

C. The symbol of the State is the seven-armed candelabra, with olive branches on both its sides and the word “Israel” beneath.

Principle 4 — Return:
Every Jew has the right to immigrate to the land [Israel] and to receive the citizenship of the State of Israel under law.

Principle 5 — Ingathering of the exiles and strengthening the ties to the Jewish people in the Diaspora:
The State shall act to gather in the exiles of Israel and to strengthen the affinity between Israel and the Jewish communities of the Diaspora.

**Principle 6 — Aid to the Jewish people in distress:**

The State shall act to give aid to members of the Jewish people who are in distress and captivity because of their Jewishness.

**Principle 7 — Heritage:**

A. The State shall act to preserve the cultural and historic heritage and tradition of the Jewish people, and to cultivate and foster them in Israel and the Diaspora.

B. In all educational institutions serving the Jewish public in Israel the annals of the Jewish people, its heritage and tradition, shall be studied.

C. The State shall act to enable all residents of Israel, without regard to religion, race or nationality, to act to preserve their culture, heritage, language and identity.

**Principle 8 — Official calendar:**

The Hebrew calendar is the official calendar of the State.

**Principle 9 — Independence Day and memorial days:**

A. Independence Day is the national holiday of the State.

B. Memorial Day for the Fallen in Israel’s Wars and Holocaust and Heroism Remembrance Day are the official memorial days of the State.

**Principle 10 — Days of rest:**

The established days of rest in the State of Israel are the Sabbath and the holidays of Israel, in which no employee shall be employed except under conditions set in law. Members of recognized [religious] groups shall be allowed to rest on their rest days and holidays.

**Principle 11 — Hebrew law:**

A. Jewish law shall serve as a source of inspiration for the Knesset.

B. If a court faces a legal question that must be decided, and cannot find an answer in legislation, precedent or clear deduction, it shall decide the matter in light of the principles of liberty, justice, integrity and peace in the heritage of Israel.

**Principle 12 — Protection of holy places:**

The holy places shall be secure from desecration, from any other harm, and from anything that may hinder free access of the religious to the places holy to them, or offend their sentiments toward those places.

**Principle 13 — Denial of rights:**

The rights in the Basic Law shall not be denied except in a law that accords with the values of the State of Israel, that is intended for a fitting purpose and to an extent no greater than necessary, or according to such a law under the explicit authority contained within it.
Principle 14 — Rigidity

This Basic Law shall not be changed except by a Basic Law passed by a majority of members of Knesset.

The right-wing bills

There are two right-wing bills. One was proposed by Likud MK Ze’ev Elkin, and the second by three MKs from the three right-wing coalition parties: Yariv Levin (Likud), Ayelet Shaked (Jewish Home) and Robert Ilatov (Yisrael Beytenu).

The most noticeable difference between the right-wing bills and the government bill is the rhetorical standing of the word “democracy.” Democracy is mentioned as part of the identity or definition of the state (“Jewish and democratic state”) in the prime minister’s principles. In both right-wing bills, the democratic identity of the state is reduced rhetorically to the more specific and (critics argue) limited: “The State of Israel has a democratic form of government.”

Jewish Home MK Ayelet Shaked, March 11, 2013 (photo credit: Miriam Alster/Flash90)

The authors of the two bills say this is a response to what they feel is the overly aggressive activism of the judiciary over the past 22 years, since the passing of the Basic Law: Human Dignity and Freedom. Israel’s Supreme Court may be the most activist and powerful in the democratic world. Beyond their role as the nation’s highest appeals court, the justices also sit as the High Court of Justice, a court of equity to which anyone affected by any state institution may appeal in real time. The High Court, known by the acronym “Bagatz” in Hebrew, has stopped military battles in mid-stride. It has not only struck down entire laws, but in a famous ruling by former chief justice Aharon Barak, decreed the “blue pencil” principle according to which judges possess a line-item veto over legislation, and can strike down individual articles or words contained in legislation. And the High Court has ventured, albeit often grudgingly, into very controversial questions of national identity, such as the recognition of conversions of liberal Jewish streams for the purposes of immigration, or the right of small communities to limit their membership to their own narrowly defined ethnic or religious subgroups.

To be sure, the High Court was often forced to rule on such matters only after the Knesset, fractured along the lines of Israeli society itself, refused for decades to articulate them in a constitution.

Now many right-wing lawmakers intend to do just that. Indeed, after over a generation of such questions being settled by the justices of the Supreme Court, the lawmakers have come to view the term “democracy” itself, at least when it is used by the left, as a euphemism for the intention that the judiciary continues to trump the elected legislature on fundamental questions that face Israeli society.

So when foreigners listen in on the Israeli debate, they must understand that for the Israeli legislators engaged in the issue, the fight is not over the objective substance of the bills, but over how MKs believe the
Supreme Court will read them. A significant part of Israel’s piecemeal constitution is being written by a legislature in search of language that limits the interpretive flexibility of the judiciary.

And so, unlike in the prime minister’s version, we find in Elkin’s bill specific limits to judicial interpretation. In Elkin’s Article 1, which defines the Israeli state as the nation-state of the Jews and gives the Jewish people alone the right to national self-determination within the state, the bill states: “What is stated in this Basic Law, or in any other legislation, shall be interpreted in light of what is established in this article.”

And elsewhere in the Elkin bill we find: “The State may allow a community, including members of a single religion or nationality, to establish a separate communal settlement.” This is an attempt to reverse the High Court of Justice ruling in the “Kaadan decision” that ended in law and severely limited in practice the ability of various groups, Jews or Arabs, religious or secular, to prevent other groups from moving into their respective towns and villages.

The right-wing bills also include references to the Hebrew language and “Jewish settlement” that is absent from the prime minister’s principles.

The Hebrew language is formally defined as “the official language of the State,” while Arabic is explicitly given a “special standing, and to its speakers the right to linguistic access to state services, as shall be determined by law.” Opponents argue that this formula lowers the status of Arabic from a de facto official language to something less. Arabic is currently on Israel’s currency, alongside English and Hebrew, and is found on many other symbols of state sovereignty. To complicate matters, some liberal opponents of the right-wing bills actually support defining Hebrew as the sole official language — and argue that this alone may be enough to establish Israel as a Jewish state, without the need for any ethnic or national element in the constitution.

The Elkin bill goes further: “The State shall act... for Jewish settlement within its boundaries, and shall allot resources for these purposes.” This article harks back to an earlier period in Zionism that saw Jewish settlement as key to securing a state in the first place. It is intended to express the state’s commitment to Jewish settlements in the Negev and Galilee — and in the West Bank.

It has been criticized vociferously by centrists and leftists, who argue that expressly pushing for uniquely Jewish settlement would amount to state-sanctioned racism. Others note that the “boundaries” of the state are amorphous, unlike “borders.” The West Bank might be included within the “boundaries” of the state even if much of it lies outside what Israeli law formally recognizes as the borders of the state. And so the article amounts to an attempt to give a constitutional imprimatur to the West Bank settlement project.
The Levin-Shaked-Ilatov bill is closer to the government’s principles. For example, it doesn’t have the articles on Jewish settlement or Hebrew as an official language that the Elkin bill has. But there are differences. For instance, it still specifies that democracy is a “form of government” rather than part of the state’s basic identity.

The Declaration of Independence

While the prime minister’s principles and the Levin-Shaked-Ilatov bill pay homage to the “values” of the Declaration of Independence, none of the three bills explicitly mentions the word “equality.” Indeed, the term is missing even in the 1992 Basic Law: Human Dignity and Freedom.

This omission is deeply rooted in the judiciary question. For three decades, ultra-Orthodox parties have feared that using the term in a constitutional Basic Law could give courts the grounds to cancel Israel’s state religious institutions, sweeping away the rabbinic and sharia courts, a vestige of Ottoman rule in the region that control a large part of Israel’s family law, and where religious judges rule according to traditional Jewish and Muslim religious law. If the state were explicitly required to advance “equality,” the ultra-Orthodox fear, then a secular judiciary would override religious legal rulings that do not take into account gender equality or other principles of modernity missing in religious legal systems.

The High Court has established equality as a basic tenet of Israeli law by finding that it is a presumption contained in the promise of “dignity” in the Basic Law: Human Dignity and Freedom, which stipulates that “none may harm the life, body or dignity of a person inasmuch as they are a person.” No need, say some on the right and in ultra-Orthodox parties, to add to the court’s linguistic arsenal by explicitly adding the word “equality” in the section of the constitution that deals with Jewish nationhood.

Israel’s Declaration of Independence

It is here that the left appears to be entering the constitutional debate.

Labor MK Hilik Bar submitted a bill this week that would enshrine Israel’s Declaration of Independence, the only founding document that explicitly and in some detail ensures equality for Israel’s minorities, as a constitutional Basic Law.

“The State of Israel shall… realize absolute equality in social and political rights for all its citizens without regard to religion, race or sex,” the Declaration promises, and, it continues, “will ensure freedom of religion, conscience, language, education and culture; will protect the holy places of all religions; and will be loyal to the principles of the United Nations Charter.”

It goes further, speaking directly to Arab residents of the land in words eerily reminiscent of today’s situation: “We call — even from the midst of this bloody assault that is conducted against us these past months — to the children of the Arab nation, residents
of the State of Israel, to keep the peace and take their part in the building of the state, on the foundation of complete and equal citizenship, and on the basis of matching representation in all its [the state’s] institutions, be they temporary or permanent.”

Bar’s bill, which has already garnered the support of several opposition MKs and at least one from the coalition (Hatnua’s Amram Mitzna), is brief, consisting of a single article. It is not written in legal language, but as a simple declaration. It reads, in full:

Bill: Declaration of Independence

1. This law is intended to secure the role and values of the Declaration of Independence in the laws of Israel, and to confer on the document for the first time the force of law, which will apply to the foundational values of the State of Israel as detailed in the Declaration of Independence (as read at the time of the declaration of the state’s establishment, appended herein).

The bill then incorporates, in full, the text of the May 1948 declaration, as it was read by the state’s first prime minister, David Ben-Gurion.

The proposal is explicitly framed as the left’s response to the nation-state bills of the right, as the explanatory preface makes clear.

“In these days, when various ‘nationality’ bills are being proposed which have awakened nationalist, extreme voices who propose, or hint, at exclusion or discrimination of groups within Israel’s civil society, it is very important to give, at long last, legal force to the Declaration of Independence, to sanctify the principles and values of equality on which it is based, and to remind us all of the path to which we committed ourselves as the cornerstone on which the State of Israel was established,” the preface reads.

And it adds: “This bill will formally place the Declaration of Independence in the law books of the State of Israel, validate [the state’s] values and give the Declaration and its values legal standing. The law is also intended to ensure equal rights to all the citizens of the State, and to address in legislation both the Jewish character and the democratic character of the State of Israel, and to give this important moral document, for the first time, legal standing.”

Lest a reader miss the point, the five-sentence-long preface uses the word equality three times.

Israel’s constitution is still being written. The nation-state bills are only the latest round in a generations-long debate to finally decide the fundamental questions at the heart of Jewish nationhood and Israeli identity. They should not, indeed cannot, be read without paying heed to this larger context and purpose. At the same time, simply by advancing the bills, the right has launched a more intensive debate over the very questions it tried to summarily answer. With the most controversial elements of the right-wing bills already excised from the government’s 14 principles, and a new left-wing initiative that ignores parliamentary obstacles and unabashedly clings to the explicit promise of equality, the right may not like the Knesset’s answers.