

The Triumph of Majoritarianism, and the Decline of Democracy

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At the end of March 1919, Jewish leaders from Europe and the United States assembled in Paris in advance of the peace talks that would bring a formal end to the First World War. Gathered together as the Comité des Délégations Juives (Committee of Jewish Delegations), this group sought to gain assurances from the Allied Powers for the protection of the rights of Jews, as individuals and as a collective. The collapse of the old imperial order had placed Jews in eastern Europe in a profoundly vulnerable condition; many were threatened, displaced, and murdered in the midst of the Great War and immediately after. Along with the Allies and other representative groups, the Comité sought to ensure that the new nation-states taking rise out of the ashes of empire guarantee the linguistic, cultural, educational, and physical well-being of large minorities in their midst, including the Jews.

The resulting Minorities Treaties that accompanied the establishment of these new states did indeed contain clauses protecting the right of national minorities to use their own language, create their own educational institutions, and preserve their own religious traditions. But enforcement of these clauses fell by the wayside soon after the creation of the new states, rendering the “Versailles system,” as it was known, largely impotent. What might have been an hour of grand triumph for the principle of collective rights for national, ethnic, and religious minority groups instead became a missed opportunity with stark consequences for the future.

Notwithstanding the failed implementation of the Minorities Treaties, it is helpful to juxtapose that moment of possibility with

the current moment in which we again find Jews seeking to enshrine their linguistic, cultural, and educational rights, this time in the new spate of nationality, or nation-state, bills, one version of which finally passed in the Israeli Knesset in July 2018. The major difference, of course, is that a century ago, Jews were a tattered minority attempting to gain protection from European powers, whereas those seeking such rights today belong to a national majority in their own sovereign state. It is easy to understand why Jewish representatives were so concerned to memorialize protections for their co-religionists in 1919. It is a bit more difficult to understand why Israeli Jews seek it today.

I

The intense flurry of legislative activity around a new nationality bill began in 2011 with a proposal by thirty-seven right-wing parliamentarians to draft a Basic Law that defined Israel as “the Nation-State of the Jewish People.”¹ Many regard Basic Laws, or at least some of them, as building blocks of an Israeli constitution that has not yet been written, in no small part because of the fractious divisions in that country’s political culture. The proposed 2011 Basic Law declared, among other provisions, that Israel was “the national home of the Jewish people,” that Hebrew was the sole official state language, that the state should “preserve the cultural and historical heritage of the Jewish People,” and that this heritage should be taught in Jewish schools. The draft also proposed that Israel be recognized as “a democratic state” and that all its residents “are entitled to the right to work to preserve their culture, heritage, language, and identity.” The versions of the bill that finally passed in the Knesset seven years later eliminated any reference to democracy or a democratic state and added a clause calling for the promotion of Jewish settlement in the state. There can be little doubt that the sponsors of the various drafts, especially the final version that passed, aimed to codify the

¹ See document A. (2011, P/18/3541).

supremacy of Jewish law, norms, and values over all others, including democracy.

Why such widespread insecurity from a usually – in fact, unusually – self-confident, technologically advanced, and militarily powerful state? The declared reason, as the drafters have argued, is that there are forces in the world seeking to deny the right of the Jews to their homeland and to a state. Among them, one might surmise, are advocates of global BDS (boycott, divestment, and sanctions), who have argued for the right of return of Palestinian refugees – an act that many Israelis fear would spell the demise of Israel as a Jewish state.

In fact, as important as those supposedly sinister, albeit unnamed, forces are, deep internal divides have riven Israel for decades. The nation-state bills are the latest iteration of Israel's *Kulturkampf*. I refer not to the simmering tensions between Israel's Jewish majority and Palestinian Arab minority, but rather to competing camps and visions within the Israeli Jewish population. For nearly a quarter century, there has been a swing of the pendulum back and forth between the poles of democracy and Judaism as the guiding light of the Israeli polity. In 1992, the Knesset passed the Basic Law whose opening clause declared the law's aim "to protect human dignity and liberty." An amendment to this law two years later displaced the earlier opening clause with: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free." It was in this sense that Israel could be, as former Supreme Court Chief Justice Aharon Barak – a key architect of this language – imagined, both Jewish and democratic. That vision of an Israel at peace with itself held sway, at least briefly, in the 1990s, the era of the Oslo peace process when it seemed possible for the century-long enmity between Jews and Arabs in historic Palestine to come to an end.

With the collapse of that vision – commencing with the assassination of Prime Minister Yitzhak Rabin in 1995 and leading up to the outbreak of the Second Intifada in 2000 – the pendulum swung away from the pole of a self-declared democratic Israel toward a more insular, fearful, and insecure Israel intent on foregrounding its

Jewish identity. The effort to legislate the primacy of Jewish values over democratic values is evident in the negligible mention of the latter in the various draft bills.

These bills read like a defensive response – as if Jews and their identity are beleaguered in their own state. Efforts to protect their language, heritage, and education would make more sense if the Jews were a minority in a state controlled by a non-Jewish majority. But in fact, they represent 80 percent of the population and are in control of all levels of governance. And the effect – and a key intent – of these laws is not merely to shift the balance of power away from democracy as part of the ongoing culture war, but, even more grimly, to signal to the Palestinian Arab population of Israel that it is and will remain practically and legally subordinate to the Jews in the State of Israel.

The scourge of majoritarianism has reared its head before. This motif was somewhat muted in Israel's founding Declaration of Independence from May 14, 1948, which described Palestine “as the birthplace of the Jewish people,” but also included powerful language promising “complete equality of social and political rights to all inhabitants irrespective of religion, race or sex.” Some of the first legislative steps by the Knesset, however, gave pause to this ecumenical promise. For example, the first Nationality Law (also known as the Citizenship Law) passed by the Knesset in 1952 set out differential paths for Jews and Arabs to acquire citizenship, privileging the former over the latter (and setting up obstacles for Arabs who had been displaced from their homes to return to them). An Israeli legal scholar writing at the time, Yehoshua Freudenheim, affirmed that “those who claim that the law remands the minority to the mercy of the authorities and does not grant it any rights are correct.”² This law operationalized the majoritarian logic of mainstream Zionism and of incipient Israeli statehood. Now, more than six decades later, the Knesset has passed a new “nationality” law that provides definitional cover to Jewish majoritarianism with little regard for the substantial ethnic and national minority within the state's borders.

² Yehoshua Freudenheim, *Ha-shilton bi-medinat Yisrael* (Jerusalem: Rubin Mass, 1950), 190.

II

The question of why Israeli politicians would feel compelled to draft these recent laws – laws that issue from a majority acting like an oppressed minority – is, at one level, vexing, but at another, understandable. As noted above, there is a palpable fear that enemies from within and without are trying to strip away Israel’s Jewish character. That fear produces, in turn, a profound and paralyzing blindness with a set of glaring symptoms.

The first symptom of this blindness is the persistent neglect of Palestinian citizens within Israel’s borders. One might have expected that with the passage of time, as Israel has grown in strength and confidence, it would choose to devote more attention to the interests of its economically disadvantaged and politically disaffected minority population. Despite the promising language of the Declaration of Independence and repeated statements of an intent to do so, Israel has not devoted much attention or resources to its Palestinian citizens, prompting the state-appointed Or Commission to proclaim in 2003 that “government handling of the Arab sector has been primarily neglectful and discriminatory.”³ Now, the new nation-state bill passed in 2018 came along to shore up the language, symbols, heritage, holidays and day of rest, and religious law of the *Jewish majority*. In the final version, all of the eleven clauses perform that task. By contrast, only two clauses make mention of the rights of minorities. One of them refers vaguely to the “special status” of Arabic, though only when Hebrew is declared to be the single “state language” of Israel. The other refers to the right of non-Jews to “maintain days of rest on their Sabbaths and festivals,” the details of which will be further determined by law.

When reading the bill, one recalls the probing mid-century Jewish thinker, Simon Rawidowicz, who expressed concern in the 1950s that the new Israeli state was ignoring the historical, political, and moral

3 “Israeli Arabs: The Official Summation of the Or Commission Report,” Jewish Virtual Library, http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/OrCommissionReport.html.

lessons of centuries of Diaspora life, during which time Jews were a small minority attempting to preserve their culture in the midst of often hostile hosts. Rather than apply those lessons to the new minority in their midst, they were replicating, Rawidowicz warned, the patterns of their erstwhile oppressors.⁴ His admonition remains apposite today.

A second symptom of the blindness at work in the nation-state bills is the refusal to acknowledge that the gravest threat to Israel's existence as a Jewish state is the ongoing occupation of the West Bank since 1967. This is not even a matter of the legality of Israeli settlements, though most of the world seems convinced that settlements are in violation of the 49th article of the Fourth Geneva Convention that prohibits an occupying power from "transfer[ing] parts of its own civilian population into the territory it occupies."⁵ It is simply a matter of demography. Should Israel retain control over large parts of the West Bank (Areas B and C under the Oslo plan), and should the Palestinian Authority collapse as a result of failed negotiations, then Israel will be faced with the prospect of controlling the entire West Bank, whose Arab population is estimated as more than 2.5 million people. At that point, Israel will either have to extend full rights to this population, an act that, as a result of demographic change, will likely spell the demise of Israel as a Jewish state. Or it will *not* extend full rights to Palestinians in the West Bank, in which case it can lay no claim whatsoever to being a democracy. The new nation-state law, which reinforces the Jewish symbols and self-definition of the state, will not save Israel from the suicidal consequences of the occupation. On the contrary, it will make return from the brink even more difficult.

A third and final symptom of the blindness is the apparent belief that Israel can get away with this kind of definitional act and still call itself a democracy. Amnon Rubinstein and Alexander Yakobson have

4 See David N. Myers, *Between Jew and Arab: The Lost Voice of Simon Rawidowicz* (Waltham, MA: Brandeis University Press, 2008).

5 "Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Article 49," International Committee of the Red Cross, Geneva 1949, <https://www.icrc.org/ihl/WebART/380-600056>.

argued in *Israel and the Family of Nations* that Israel's self-definition as a Jewish and democratic state is not exceptional among nation-states.⁶ Whether or not one accepts that claim, it seems clear that the current proposals move Israel well beyond a sustainable balance and accepted constitutional practice. Let us recall the recurrent language in the bills that the State of Israel is “the nation-state of the Jewish people” and “the national home of the Jewish people” in which it and it alone “exercise[s] national self-determination.”

A good source of comparison is India, created a year before Israel as part of a partition carved out of territory that had been under British control. India's constitution, drafted in 1949, defined the new country as a “Sovereign Socialist Secular Democratic Republic” that rests on four pillars: justice, liberty, equality, and fraternity. It went on in article 29 to assure the protection of minorities by guaranteeing them the right to their own language and culture and freedom from discrimination.⁷

Perhaps a more suitable comparison is the constitution of the Republic of Armenia, which was approved in 1995. Insofar as the Armenians are a group with a large diaspora community that had sought to return to its ancestral homeland, this example bears resemblance to the Zionist movement. And insofar as the Armenians experienced a genocide during the years 1915 to 1923, they felt a similar need to create a place of refuge where their physical and cultural well-being could be preserved. In fact, Armenians looked quite consciously to Zionism and the State of Israel as models from which to learn in transforming a dispersed people into a sovereign state. Interestingly though, the Armenian constitution begins quite differently from the Israeli Declaration of Independence; there is no lengthy historical preamble narrating the passage from exile to homeland. Nor is there any attempt to trumpet the Armenian-ness of the Republic, as in the Israeli nation-state bills. It commences in

6 Amnon Rubinstein and Alexander Yakobson, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights*, trans. Ruth Morris and Ruchie Avital (London; New York: Routledge, 2009).

7 “The Constitution of India,” <https://india.gov.in/my-government/constitution-india/constitution-india-full-text>.

Article 1 simply by referring to the new polity as a “sovereign, democratic, social state governed by rule of law.”⁸ The constitution of the Armenian Republic goes on to state in article 3 that “the human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value.” This language is much closer in letter and spirit to Israel’s Basic Law on Human Dignity and Justice from 1992, against which the nation-state law is directed.

A final source of comparison is the constitution of a nearby country to Israel’s north, Turkey. Similar to Israel, Turkey is in the throes of rethinking and recalibrating the balance between its democratic roots and cultural-religious sensibilities, as its authoritarian president, Recep Erdoğan, moves the country away from the secularist orientation introduced by the modern state’s founder, Mustafa Kemal Atatürk, in 1923. Erdoğan has taken steps to alter the old constitutional system, engineering an April 2017 referendum that transformed Turkey’s government from a parliamentary system with a prime minister to a strong presidential system. And yet, despite all his threatening gestures, Erdoğan has not yet discarded wholesale the 1982 constitution that defines the country as “a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, (and) loyal to the nationalism of Atatürk” (Article 2). To be sure, the text is replete with expressions of Turkish nationalist fervor and pride, but it does not privilege one ethnic group over another in legal terms. In fact, an amendment to the constitution in 2010 (Article 10) clarified that “all individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations.”⁹ (That said, it must be noted that the Preamble to the Constitution strips away protection from anyone who impugns “Turkishness,” as does the notorious clause 301 of the Turkish Penal

8 “The Constitution of the Armenian Republic,” National Assembly of the Republic of Armenia, <http://www.parliament.am/parliament.php?id=constitution&lang=eng#1>.

9 “Constitution of the Republic of Turkey,” https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Code from 2005 that makes punishable by imprisonment anyone who “publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey.” It was under that clause that Nobel laureate Orhan Pamuk was charged in 2005 for his references to the Armenian genocide and the murder of 30,000 Kurds.)¹⁰

What does this comparative glance offer us? First, while hardly exhaustive, it suggests that the nation-state law that Israeli parliamentarians drafted and eventually passed places Israel beyond the pale of countries with similar or less robust democratic cultures. The Knesset bill places overwhelming weight on assuring the supremacy of Jewish identity and culture while making only fleeting reference to the presence or rights of the large Arab minority. Second, the comparison reminds us of the troubling absence of a constitution in Israel that could build on the Declaration of Independence from 1948. And yet, the use of Basic Laws to fill the constitutional void not only risks memorializing the political sentiment du jour; it has the potential, as the nation-state law surely does, to erode further the democratic foundations of Israel, whose stability ought to be measured not by defense of the majority, but rather of the minority.

The protection of the minority is one of the key lessons to be learned from Jewish history, of which the Israel of today is proving, ironically enough, to be an indifferent student. Sadly, Israel’s embrace of an unabashed majoritarianism belongs to a wider retreat from democracy afflicting much of the world in 2018. At both local and global levels, urgent action is needed to prevent democratic values from being further eroded – and perhaps even consigned to the dustbin of history.

¹⁰ “Article 301 of Turkish Penal Code,” World Law Direct, <http://www.worldlawdirect.com/forum/law-wiki/13828-article-301-turkish-penal-code.html>.