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Nation-State Law – Is it Really a Well Thought-Out Law? Is It a Party Manifesto or a Parliamentary Act?²

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Abstract

The author offers an analysis of the controversial Israeli Nation-State Law of 2018 and B. Netanyahu's involvement in its adoption. He claims that its ideas manifest Netanyahu's desire to depart from the state-centred, social democratic, and liberal views advocated by Ben Gurion. This desire stems from his strong disagreement with Israel's founder's claim and belief that secularism is a guarantee that Israel does not fall into the same trap as the leaders of the bicentennial Crusades – which ultimately failed. The author of the paper makes an insightful comparison of this law with the contents of Point 13 of Thomas Woodrow Wilson's 1918 plan – a document from exactly 100 years before, designed to shape Europe after victory in the war against Russia, Prussia, and Austria-Hungary, on whose lands an independent Polish state was to be established.

Keywords: Israel, 2018 Nation-State Law, Benjamin Netanyahu, secular State of Israel, point 13 of President Woodrow Wilson's 1918 plan, ignoring minorities.

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The draft Nation-State Law was drawn up by a team close to the then Prime Minister Benjamin Netanyahu, and showcased to the public with great pride as an expression of the new Jewish national reality. It is one of the pillars upon which the world view of B. Netanyahu and of the ideological right rests. Its significance should not be downgraded, in terms of neither its content nor the fact that it is among the 'Basic Laws' considered to be a legal act of state – unlike the Declaration of Independence, whose nature is non-binding and merely declaratory.

I. Is article 1 of the Nation-State Law lawful?

The title of this article is a striking example of an expression used often in Israeli history: the Land of Israel ('erec Israel' in Hebrew). Religious people, both Christians and Jews, refer to this land as the 'Holy Land'. The British Army, which held a League of Nations mandate there, called it 'Palestine'. Today, this territorially vague piece of land is divided into three parts. Its western part, reaching the Mediterranean Sea, is the State of Israel. The area between it and the Jordan River is the Palestinian Authority, which is also defined as an area of 'Israeli occupation'. Finally, on the other side of the Jordan River, which used to be part of Palestine, there is the sizeable State of the Hashemite Kingdom of Jordan.

In 1993, Israel and the Palestine Liberation Organization signed the Oslo Accords, which made this piece of land gain the name of the Palestinian Authority. Beyond the border of the Authority, there is a recognised country, a member state of the United Nations, called the Kingdom of Jordan. The Prime Minister of Israel of the time, Yitzhak Rabin, signed peace agreements with Hussein of Jordan, Jordan's king of the time, thus establishing the international border between the two countries.

I will pose a simple legal question: what did Netanyahu mean by putting such a strong emphasis on the term 'Land of Israel' in the first article of the Nation-State Law? What did he intend to suggest regarding the part of Palestine, or 'the Land of Israel', which is now a sovereign state, with an established border, with which Israel has signed peace agreements at the White House in Washington?

Let me ask a rhetorical question here: did Netanyahu perhaps mean the Palestinian Authority when using the said term in the first article of the law in question? Or Jordan? Can it actually occur to anyone that one member state in the UN may

suggest anything regarding its rights to a neighbouring state – also a member of the UN? This matter certainly deserves a response.

The opening article of the law reads as follows:

“I(a) The Land of Israel is the historic homeland of the Jewish people, in which the State of Israel was established.”³

Surely many will notice that the law begins with the following sentence: “The Land of Israel is the historic homeland of the Jewish people.”

Many understand that the term ‘Land of Israel’ (‘*eretz Israel*’ in Hebrew) – Palestine in languages other than Hebrew – does not encompass only the state of Israel. It also includes the ‘occupied’ territories where the Palestinian Authority was created under an agreement concluded with the State of Israel. Another of its components is also the Hashemite Kingdom of Jordan, a sovereign state, a member state of the United Nations, with whose ruler, King Hussein, the then Prime Minister Yitzhak Rabin signed peace treaties, determining clearly that Israel recognized the independence of the Kingdom of Jordan, even though at the time of World War I Jordan was, in British terms, ‘Palestine’.⁴

This broad understanding, which brings us to the term used in the content of the Nation-State Law, contradicts not only international agreements but also the agreements with the Palestinian Authority, signed in Oslo on 20 August 1993. But there is one more question that should be asked: what does the expression ‘historical homeland of the Jewish people’ really mean? Is the ‘Jew’ mentioned therein a ‘Jew-Israelite’ or also a Jew who is not a citizen of the State of Israel? Does this understanding undermine the property rights represented by members of minorities living in the state in question? If we acknowledge that any given Jew has certain historical rights, what is the fate of representatives of minorities – Arabs, Druze, Circassians – and Jews born of non-Jewish mothers?

In a separate section, I address the problem arising from the fact that Jews in the national sense, as defined by David Ben Gurion in his historic Knesset speech, may feel offended when they are considered non-Jews under the new law. During the debate preceding the adoption of the Immigration Act in 1950, David Ben

³ Article 1(a) of the Basic Law: *Izrael – państwem narodowym narodu żydowskiego*, bill passed by Knesset on 19 July 2018, www.haaretz.com/israel-news/israel-passes-cotroversial-natio-state-bill-1.6291048 (accessed: 20.11.2021).

⁴ The peace agreement between Israel and the Hashemite Kingdom of Jordan was signed on 26 October 1994 in Washington, D.C. (USA).

Gurion argued that it should aim to make ‘*aliyah*’ (immigration to Israel) possible to every Jew:

“Whether because they are deprived of their rights as foreigners, have no guarantees of security, they are marginalised, have to deal with hatred and contempt, or because they cannot live a traditional Jewish life according to their will, or for the sake of their love for the age-old tradition, Hebrew culture, and statehood of Israel.”⁵

On the other hand, the Knesset – Israel’s parliament – managed to pass the Nation-State Law with a slim majority of 62 votes in opposition to 55 votes against and two abstentions. The bill was thus formally approved by the Knesset. Not surprisingly, it immediately garnered the highest level of attention – both among the public and in the legal environment. On 22 December 2020, the Israeli Supreme Court, acting as the body adjudicating the compatibility of legal acts with the Basic Laws (the Supreme Court of Justice as a department of the Supreme Court), was flooded with a myriad of complaints. The Supreme Court, well aware that its judgement would make both a legal and a historical impact, ordered the case to be heard by an expanded panel of eleven judges. The opposing party was the government’s legal counsel, superior of the government’s prosecutor’s office. He presented the view of the government headed by the then Prime Minister Benjamin Netanyahu. By default, the prosecutor sided with the government of the time. The Supreme Court went to great lengths to review the complaints, and the statement of reasons for the judgement spans two hundred and one pages. A situation where the Supreme Court invests so much time and effort to thoroughly consider the opinions and arguments of both the plaintiffs and the responding parties – in this case the government’s counsel – is by no means a routine course of action.

The Nation-State Law did not surprise the public. The sentiments of the various segments of society were obvious. A strong response was particularly seen among members of minorities, i.e. those members of Israeli society who have no Jewish ethnicity but make up over twenty percent of the total population. Concerns were expressed by Muslim and Christian Arabs, Armenians, Druze, and Circassians, for whom the introduction of the law was a ‘red flag’ and a warning sign, heralding that the ground under their feet might soon tremble.

⁵ Excerpt from David Ben Gurion’s speech in the Knesset and other speeches in: “*Divrei Haknesset*” 1950, Vol. 4, pp. 2107–2035.

II. What about the property rights of members of minorities?

Another embarrassing issue has to do with the numerous minorities living within the State of Israel, whose members hold Israeli citizenship and have not lost their ethnic, national, or tribal identity. If we follow the messianic – simultaneously Christian and Jewish – idea that absolutely all the land of Israel belongs to Jews, what will the court's ruling be regarding the land, the property, the real estate that should now legally belong to their purchasers? Can we assume that a whole range of laws governing the ownership of property of members of minorities will be violated, God forbid, by virtue of the Bible and the 'rights' bestowed upon the Jewish people as a whole (including those who do not have an Israeli citizenship)? Could it be that someone decides in the future that if the land that is inhabited by minority members who have property rights to it belongs, in fact, to all Jews, the Jewish 'ownership' puts minority 'ownership' into question? Can anyone ever potentially acknowledge that the land itself belongs to any Jews, and the minority members who own it actually lease it? The Nation-State Law reveals unprecedented tendencies, and while there are no definite arrangements in its content, it may be that the very fact of its existence will make it possible for the yet-unknown solutions to be adopted in the future.

I fear that an additional factor which fuelled Benjamin Netanyahu's efforts he has put into making the Nation-State Law come true is his marked right-wing attitude toward minorities living in Israel as the country's citizens. I believe that this law as approved by the Knesset is based on a religious position that gives Israel the ability to rule over all regions of the biblical land of Israel. The law in question interpreted as above does not recognise modern borders but gives Jews, the Jewish people, full rights to the Holy Land. Moreover, this is the first time an attempt has been made to grant a nation rights on the grounds of a sacred text.

Let us not forget that part of the former British Palestine is modern day territory occupied by the State of Israel. Is it really the purpose of the new law to grant Israel ownership over the occupied territories? As for historical context: on 26 October 1994, an agreement was signed between Israel, represented by the then Prime Minister Yitzhak Rabin, and King Hussein of Jordan. It is considered a binding international agreement that establishes a permanent border between the two countries on the Jordan River and confirms Jordan's exclusive sovereignty over the eastern part of Jordan. Could it be that Benjamin Netanyahu intended to suggest that the territories of Jordan, previously acknowledged as autonomous by the State of Israel, are nevertheless part of Israel?

III. Main arguments of opponents

The Supreme Court saw fit to summarise the arguments of the plaintiffs regarding the law in question:

“The plaintiffs’ main argument, as we have said, is that they believe that the Basic Law of the Nation, or at least some of the specific guidelines contained therein, undermine the core values of our legislation. They claim that the legislative is not unlimited in its capacity. On the contrary, that it is subject to significant constraints when it enacts basic – fundamental – laws. In a great many legal systems around the world, this approach is expressed in the form of a doctrine called ‘unconstitutional constitutional amendment’, according to which an adopted constitutional amendment has limited legal force (when the new legislation is deemed unconstitutional)”⁶.

According to the summary issued by the Supreme Court, the plaintiffs pointed to two main models of application of this doctrine. One is based on the existence of fixed, lasting, clearly formulated paragraphs of the constitution, which determine that certain aspects of the constitution cannot be amended or changed. The plaintiffs argued that the case in question involved the use of legal methods which should not violate the core structure. This arises from the interpretation of the text of the constitution, according to which new legislation must not violate the fundamental elements of the constitution – such as the principle of separation of powers or the organisation of democratic elections. To prove their case, the plaintiffs even cited decisions issued by Indian courts.

In the end, an overwhelming majority of judges rejected the arguments against the bill to be passed – except for one judge, an Israeli citizen of Arab nationality, who issued a dissenting ruling, one opposing the majority of opinions. One of the judges of the Supreme Court made his opposition to the arguments of the opponents of the bill dependent on the opinion of two Orthodox rabbis, who used to hold the positions of chief rabbis, and whose views have now become an additional argument for the dismissal of the complaints. Only one judge, who was a minority and who, as I wrote, is an Arab holding an Israeli citizenship, put forward an opposing view. This judge is George Karra. It is reasonable to refer to his views in

⁶ Aharon Barak, “Tikun szel chuka sheeejno chukati”, in Gabriel Bacha, 361, 363–372 (David Hahn, 2011), hereinafter referred to as Barak “Tikun szel chuka” (from the Israeli Supreme Court’s Judgement in Case 5555/18, “The Doctrine of Unconstitutional Constitutional Amendment”, article 13, p. 12).

these circumstances, both as a judge and as a citizen of the State of Israel and a representative of a large minority.

In contrast, none of the plaintiffs challenging the act stood up for ‘Jews’ who were not Jewish (see section VI, where I deal with Article 5 of the Nation-State Law).

IV. A dissenting opinion of Judge George Karra.

Judge George Karr’s position certainly didn’t surprise his compatriots, but his objections to the Nation-State Law stem from his unquestionable knowledge of the law and the powers he possesses by virtue of his office. Supreme Court Justice Karra offered the following explanation for his decision (pages 164 – 165):

“After reviewing all arguments of both parties and the materials I have received, and after much deliberation, I have come to the conclusion that articles 1(3), 4, and 7 of the Nation-State Law introduce unconstitutional solutions for they violate and fundamentally undermine the democratic identity of the state and the foundations of its legal construction. If my opinion was taken into account, we would issue a conditional order on the complaints and have the respondents appear and present arguments as to why articles 1(3), 4, and 7 of the Nation-State Law will not be removed.”

Further (p. 165, The Process of Legislation of Basic Laws, article 1):

“It is the responsibility of the Knesset as a legislative authority to pass laws. In Israel, the ‘constitution’ is ‘modular’, so to speak, as the constitution drafting work is still not finished. When this work is complete, the ‘constitution’ will be composed of Basic Laws in such a way that each of these laws will be a chapter of it.”

Next section (p. 166, The Process of Legislation of Basic Laws, article 2):

“Any legislative process, much less the process of establishing a constitution, is not merely a reconciliation of various interests or a trading arena for various political forces (here, Judge Karra cites the words of other judges reinforcing his opinion)... Contrary to these ideas and principles, there is no separation between the application of constitutional authority and legislative authority in Israel. In Israel, there is no fixed or separate procedure designed for the passage of Basic Laws. Since the procedure used for Basic Laws is not more

complicated, laborious or demanding, there is no guarantee that it will not be abused if necessary, especially in one situation – it is easy to amend Basic Laws when most of them are not protected in any way.”

Further (p. 167, *The Process of Legislation of Basic Laws*, article 3):

“In recent terms, the Knesset has set new records when it comes to amendments introduced to the Basic Laws, arising out of political whims... All this comes from the principle that in Israel, a simple majority (or a majority of 61 deputies) is enough to adopt an amendment to a Basic Law, which means it can be done with three readings in just one day. This is an unprecedented situation that constantly puts the entire legal system and all fundamental rights at risk as it poses the threat that any momentary and random majority of 61 MKs could decide to turn the system upside down.”

Further (p. 168, *The Process of Legislation of Basic Laws*):

“The way the Nation-State Law has been passed is typical of faction-based politics. All factions of the opposition opposed the Nation-State Law, while factions of the coalition supported it. The government and the coalition did not try to reach a compromise with the opposition regarding the content of the bill. There was no cooperation between the coalition and the opposition. Amendments to the text of Nation-State Law were adopted within the constraints arising mainly from the fear of serious legal defects, which were pointed out by legal counsels to the government and the Knesset in their opinion and during the debates... This is how the Nation-State Law was enacted, taking advantage of a temporary political situation, connected with a certain part of society, through a political ‘deal’ (c.f. e.g. Professor Amichai Kohen, ‘Tikun chukati lo chukati Beldan szel politika populistit’, after: Yaniv Roznai “Unconstitutional Constitutional Amendments”, *Mishpat Umimshal* 21, 335, 347 (2020) (hereinafter referred to as: Kohen, “Populist Politics”). The procedure and the language of the Nation-State Law is marked by ‘oppositionism’, coupled with a complete, deliberate, and clear disregard for basic democratic principles, which I shall cover further on.”

V. Declaration of Independence

Those not familiar with the Israeli legal system should bear in mind that the State of Israel was created following its Declaration of Independence, formulated by its founder, David Ben Gurion. It should be noted here that the Declaration of Independence, formally referred to as the Declaration of the Establishment of the State of Israel, was taken for granted both by the majority and by representatives of the most diverse minorities. To picture it better, let me cite the relevant passages from the Declaration of Independence:

“[It is] another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the comity of nations.”⁷

On a particularly festive day, on 5 July 1950, a very important date which marked the death of the founder of national Zionism, Theodore Herzl, during a debate in parliament, the first prime minister of the reborn State of Israel argued for the need for the Law of Return. David Ben Gurion specified who exactly he had in mind, defining those people who were to be the future citizens of the nation, who at that time did not fully mature to be part of their promised homeland. This is how Ben Gurion spoke of these potential immigrant citizens: “Whether they are those who have been deprived of their rights, suffer from existential insecurity, are unable to freely and openly sustain the Israeli way of life, or nurture the love of ancient tradition, Hebrew culture, and the sovereignty of Israel.” Let us focus to the issue I outline in article 5 of Netanyahu’s Nation-State Law – how these two politicians see their nation and their identity.

It can actually be summarised in one sentence: for Ben Gurion, this nation will be a secular nation, following the European concepts, while Netanyahu, as I understand it, wants to restore the character of the nation to that based on the religious-Talmudic concept, established 2000 years ago by the ancient sages of the time, who claimed that only those who have a Jewish mother belong to the nation. This difference has a special political, theological, and national significance. Ben Gurion wanted to see his citizens as those who save themselves from anti-Semitism, Hitle-rism, the Holocaust, and who died in the crematoriums of Auschwitz, the sons

⁷ From the Declaration of Independence, signed by members of the National Council, 5 ijar 5708, 14 May 1948.

and victims of Jewish grandparents – and sometimes even of those who did not formally fall under the religious definition.

This is where we can see the contrast between the national concept and the theological-Talmudic concept.

Netanyahu formulated his concept as a profound antithesis against the founder of the state, giving vent to religious concepts, which meant national unhappiness to Ben Gurion. Ben Gurion, in forming his national concept, warned that the new state was to take a path that would not take us back to the tragic mistakes of the Crusaders, who created a Catholic kingdom in Jerusalem, which clashed religiously with Islam and disappeared from history after 200 years of existence. We can see here Ben Gurion's tragic vision and warning regarding Netanyahu's actions, who, in my opinion, tried to erase Ben Gurion from history and from his political remarks.

The Declaration does not address the problem of the existence of minorities, but neither does it mention Jewish superiority, nor does it ever imply the possibility of violating the property rights of members of minorities. Perhaps this is what the greatness of David Ben Gurion – born in Poland – was about. Perhaps his personal experiences in his first homeland served as a warning signal and made him able to consider minority rights as well.

In my opinion, it is possible to distinguish here the emotional differences between the founder of the State of Israel – David Ben Gurion – and Benjamin Netanyahu and his father Bencijon – a historian by education. I am referring here to the concern that Netanyahu wished – while still in the grip of power – to separate himself from Ben Gurion's legacy and heritage. What is even more paradoxical is that there is a book written by Professor Bencijon Netanyahu, the father of the then Prime Minister of Israel, written in English, titled "The Founding Fathers of Zionism" (published by the Mishkal publishing house founded by the newspaper 'Yediyot Acharonot' and Sifrei Chemed in 2003).

Flicking through it, I discovered – to my amazement – that Professor Netanyahu did not speak of David Ben Gurion, the founder of the State of Israel. For some unfathomable reason, he did not mention him among the other prominent politicians of the period. Perhaps Netanyahu's attitude toward the Declaration of Independence and David Ben Gurion has something to do with the Nation-State Law he initiated during his term of office.

Perhaps these circumstances also affect the special – privileged – status that Netanyahu wanted his Nation-State Law to enjoy by making it one of Israel's Basic Laws. In terms of law, the Declaration of Independence has historically been referred to by legal scholars as a directive, but it has never been given the status of a Basic Law of Israel. This also deepens the concern that the new constitution was actually designed to erase the Declaration of Independence from Israel's set of directives.

VI. The disturbing article 5 – the question of who is a Jew

Throughout the fairly long existence of the State of Israel, the Supreme Court has had the opportunity to address the issue of ‘who is a Jew?’. Let us recall the case of Brother Daniel (Rufeisen); he immigrated to Israel in the habit of a monk, being Jewish, but because he was also a Catholic clergyman, he was not recognised as a member of the Jewish people. Or the case of Eileen Dorflinger, whose Jewishness was not acknowledged because she claimed to believe in Christ. Or that of Ilana Shatran, a young girl whose mother was not Jewish, and who immigrated to Israel with her Jewish father – and also had her request to be recognised as a Jew rejected. There was also the case of an Israeli naval officer, Major Beni Shalit, married to a Scottish woman – a Christian. Following his trial, an amendment to the ‘Law of Return’ was introduced in 1970, following mass demonstrations outside the Knesset seat in Jerusalem (the controversy involved the couple’s third child; the two older children had previously been recognised as Jews).⁸

We learn from article 5 of the Nation-State Law that ‘Jews’ have the right to ‘aliyah’ – to immigration to Israel. This can mean that these historic rights granted to Jews under the law in question cover only Jews. Thus, there is a clash between the Jewish religious approach and the secular approach. This is the clash which David Ben Gurion warned about in the speech quoted above, as well as in his other speeches where he stressed that modern Israel should be as far away as possible from a religious approach, and adopt a national approach instead. He referred, among others, to the history of the Middle East, recalling the rise and fall of the Christian kingdom of Jerusalem in the age of the Crusaders. Moreover, in a declaration preceding the passage of the first Law of Return in 1950, Ben Gurion viewed the term ‘Jewish’ in a broad context, and his words proved to be prophetic.⁹

This has to do, of course, with the issue of the Holocaust. The Jewish community murdered in the Holocaust, on behalf of which Israel received reparations from Germany for losses caused in World War II, included everyone who was Jewish according to the Nazi Nuremberg Laws, a definition created by the Nazis. Jews thus included all those who were considered Jews during the Holocaust, as well as those whom Ben Gurion referred to in the speech quoted above. Article 5 of Netanyahu’s Nation-State Law can be interpreted as if it deleted another significant article from Israeli law, introduced in 1970. The article reads as follows:

⁸ Cf. the footnote in my book “Are we to stop at the slope”, published in Hebrew in 1999, pages 183, 186, 190, 203 and “Izrael w cieniu fundamentalizmu” [“Israel in the shadow of fundamentalisms”] published in Polish, pages 65–221.

⁹ Article 5 of the Nation-State Law: “Israel is the nation state of the Jewish people”, 5778 2018, 8989.

“4. (A) The rights of a Jew under this Law and the rights of an *oleh* [Hebrew for ‘immigrant’] under the Nationality Law, 5712/1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.”¹⁰

The above words can be interpreted as implying that article 5 of the Basic Law in question may downgrade the significance of the modification of the Law of Return, extending the possibility of immigration beyond the religious definition, limited only to those whose mother is Jewish.¹¹

It seems reasonable to mention here that the Jewish religious law, *halakha*, originated from the initiative of two great religious authorities, active two thousand years ago, at the time when the Jews liberated themselves from Babylonian captivity. These authorities were Ezra and Nehemiah, who then stated that a Jew was a man born of a Jewish mother. There is one more additional aspect of importance here, familiar to anyone who knows the Bible. This aspect is the fact, without going into too much detail, that many famous Jewish figures, from Moses to the ancient kings of Israel, mostly married non-Jewish women. Let us recall Moses, who married Zipporah. She was not Jewish, so according to rabbinic law, her children and their descendants were definitely not Jewish. The formula of the bill as initiated by Benjamin Netanyahu reveals the gap between his view and the national approach, especially on the issue to the victims of the Holocaust.¹²

In this context, I would like to draw the reader’s attention to an excellent book by Isaac Deutscher, a Polish-born Jew who was a sworn communist in his youth. Deutscher was invited to the Soviet Union by Stalin, who offered him a teaching

¹⁰ From the First Amendment to the Reich Citizenship Act, adopted on 14 November 1935:

4 (1) A Jew cannot be a Reich citizen. He has no voting rights in political matters; he cannot occupy a public office.

5 (1) A Jew is a person descended from at least three grandparents who are full Jews by race. (2) A *Mischling* who is a subject of the state is also considered a Jew if he is descended from two full Jewish grandparents (a) who was a member of the Jewish Religious Community at the time of the promulgation of this Law, or was admitted to it subsequently. (b) who was married to a Jew at the time of the promulgation of this Law, or subsequently married to a Jew. (c) who was born from a marriage with a Jew in accordance with paragraph 1, contracted subsequently to the promulgation of the law for the Protection of German Blood and German Honor of September 15, 1935.

who was born as the result of extramarital intercourse with a Jew in accordance with Paragraph 1, and was born illegitimately after July 31, 1936.

¹¹ The amendment to the Law of Return (Amendment no. 2) was passed by the Knesset on 10 March 1970; the contents of the proposed law and explanations are published in Bill No. 866, 5730, p. 36).

¹² Cf. Zob. L. Kolb, *Moses, the Near Easterner*, Carlisle and Co., San Francisco 1956.

position at a Soviet university. But Deutscher managed to see through the dictator's intentions and left Russia after the meeting. He taught for many years at British universities, where he wrote his famous biography of Stalin. After his death, his wife published his wonderful book titled "The Non Jewish Jew", in which he depicts a number of prominent Jewish figures in history, who are not considered Jews according to rabbinic Judaism.¹³

Netanyahu's obvious disregard for article 4a of the Law of Return and the 'harmless' conversion thereof to article 5 of the Nation-State Law is a disturbing act that calls for legal measures and solutions. So far, in a massive trial with 201 pages on file, none of the plaintiffs have cited article 5, which highlights the inclination to reject Ben Gurion's perspective, to depart from the perception of who is Jewish as resulting from the Holocaust and anti-Semitism which has been harmful to people of Jewish descent regardless of the rabbis' limited and narrow definition. There is room to wage a legal battle to keep article 4a relevant and even extend it to make it encompass all those who were victims of the Holocaust and anti-Semitism.

VII. Zionism – the idea of nationality according to Ben Gurion

According to Zionism as formulated by Ben Gurion, the state of Israel – unlike the religious kingdom of the Crusaders – is a secular state. A liberal newspaper called Haaretz addressed this issue in a 1970 article entitled "There is no serious opposition to religious influences", somewhat anticipating the developments to come. We can learn from it as follows:

"For many years, David Ben Gurion had been trying to build the foundations of the State of Israel to make it a state of law and not a state of halakha (religious law). All the compromises that he made with the religious Jews – compromises which we all made – did not violate this principle in the least. However, under the new law... the most fundamental matters – religion and nation – are governed by halakha. As of today, the question is: if halakha is to regulate such fundamental issues, why should it not regulate all other – less fundamental – matters?"

The verbally sparse critique by His Excellency Supreme Court Justice George Karr depicts the Nation-State Law as a political 'exercise' in which Benjamin

¹³ I. Deutscher, *The Non Jewish Jew and other essays*, Oxford University Press, New York 1968.

Netanyahu managed to win random votes and thus arrive at a solution that contrasts extremely sharply and dramatically with David Ben Gurion's perspective.

None of us has so far asked the question of why such an apparently elementary law did not occur to the founder of the state, David Ben Gurion, who, in formulating the Declaration of Independence, overcame the obstacles posed by the Nation-State Law with the most commendable wisdom. The Declaration of Independence, after all, addresses also the issues of the rights of Jews, of Jewish origins, of prophets. Why then did Ben Gurion avoid raising the issues included in the current Nation-State Law, which, as we know, has become the subject of a great many complaints filed with the Supreme Court and of its ruling? Let us make one thing absolutely clear, though: the Declaration of Independence, a document of great historical significance, never gained the status of an official law but remained acknowledged for its value by the general public. Therefore, the Nation-State Law and its legal implications should be analysed and critiqued from a legal perspective as well.

VIII. Woodrow Wilson's Point 13

"13. An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant."

It seems reasonable to mention here the interesting events that took place in 1919, after the collapse of the infamous powers of Czarist Russia, Prussia, and the Austro-Hungarian monarchy. Those who have forgotten the historical context may benefit from a brief revision. U.S. President Woodrow Wilson, who had a background in political science, suggested a set of solutions that were to regulate – for better or for worse – the course of action for states resurrected in Europe after the end of World War I and the breakup of the three powers that had failed. The spotlight at the time was taken by Poland, which had been absent from the map of Europe for 200 years, and the decisions regarding its borders and rights depended on the states that were sketching a new picture of the postwar continent.

In 1918, President Woodrow Wilson presented his famous plan, called 'the Fourteen Points'.¹⁴ Point 13 is especially interesting because it included the U.S.

¹⁴ A statement of principles for peace, announced on 08.01.1918 by U.S. President Thomas Woodrow Wilson in an address to Congress; <https://encyklopedia.pwn.pl/haslo/Wilsons-14-punktow;3996427>.

President's proposal for the establishment of the borders of Poland, which – as we remember – was reborn after 200 years of absence on the map of Central and Eastern Europe:

“An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.”

President Wilson's 13th point proclaimed – probably largely owing to the increased efforts by prominent Polish figures of the time – that Poland would occupy the same territories as it did originally at its emergence as a state. The Poles, especially those of national persuasion, welcomed these words with great joy and satisfaction. However, this 'Polish achievement' brought at the same time a catastrophe the implications of which reached the period of World War II, and which also affected the fate of the Jews – leading even their extermination. A relatively small group with strongly nationalistic beliefs concluded that Poland as envisioned by Woodrow Wilson would be Polish, national, and nationalistic. Following far-reaching interpretations, the Polish nationalists assumed that there would be no room for minorities in the new Poland according to Point 13 – no room for Ukrainians, Lithuanians, Germans, and definitely not for Jews. After all, in light of the content of Point 13, Jews do not have their roots in Poland, but in the Land of Israel. This means that according to the view of the educated American president, there is no place for Jews in Poland – not necessarily for purely anti-Semitic reasons. This is to imply that Jews have their own homeland, and this fact conflicts with the notion of a national homeland as understood by Polish nationalists.

Let us remind all those who do not have a good memory for history: Point 13 laid the foundations for Polish anti-Semitism, and the attitude of Poles in the reborn state towards minorities living there for generations was the main subject of complaints submitted to the League of Nations based then in Geneva.

html (accessed: 20.12.2021).

IX. Point 13 of Wilson's plan, referring to Europe after victory in the war against Russia, Prussia, and Austria-Hungary – on whose lands an independent Polish state was to be established

It is not surprising that President Woodrow Wilson, though guided by different intentions, granted Poland the entirety of historical rights it had lost two hundred years earlier but neglected the issue of minorities at the same time. They, in turn, did not suffer in silence, but rebelled. The Ukrainians took advantage of Wilson's silence and managed to gain partial national autonomy within the Soviet federation. Even the Jews received a region in Azerbaijan from Stalin – to be the home of the Jewish people in the East.

Perhaps few of us remember President Wilson's special concern for the fate of Poland, which was to be reborn after two hundred years of non-existence. As a side note, there are two Polish servicemen who fought for American independence against Great Britain and who are particularly prominent in American history. They are General Tadeusz Kościuszko and Kazimierz Pułaski. Both of these names are written down in the Golden Book of American History. There are even bridges and mountains named after them. However, President Wilson's concern for Poland came also from something else. The vast, empty territories that remained after the defeat of Germany and Russia were handed to Poland as if on a silver platter. This was by no means an isolated situation. After World War II, President Truman, pressured by American Jews, was one of the main proponents of the establishment of the State of Israel under Ben Gurion. Perhaps President Wilson took into account other aspects, such as the large Polish diaspora living in the United States, with a particularly large population in Chicago – which included the Polish intelligentsia. Indeed, a broad variety of documents and studies seem to tell the extent to which Woodrow Wilson displayed his pro-Polish sympathies.¹⁵

Readers may notice the similarities between the Nation-State Law and President Woodrow Wilson's Point 13. Both of these acts grant far-reaching rights – one grants them to Israel, the other grants them Poles, and it is impossible not to compare the two. As the case of the Nation-State Law shows, both of these acts have significant political and ideological implications. Let us not forget that Prime Minister Benjamin Netanyahu gave up his ties with the global Jewish community in favour of a deep ideological and theological alliance with evangelical Christians

¹⁵ S.K. Basu, *The Question of Polish freedom and Wilson's fourteen points*, Proceedings of the Indian History Congress, t. 39, 1978, s. 941–945, www.jstor.org/stable/44139443 (accessed: 3.09.2021).

in the U.S., who were strongly influenced by the Republican party in power – and certainly by the then President Donald Trump. This allowed Netanyahu to confront Ben Gurion's legacy – which had been used years ago by President Wilson, who had considerable standing in Europe of the time, to draw the borders of the Republic of Poland. Both of these decisions are deeply flawed – demographically and politically alike.

X. Conclusion

Both the Israeli Nation-State Law and Point 13 of President Woodrow Wilson's statement ignore the existence of minorities. In his vision, Woodrow Wilson, whose background in political science was significantly detached from the European reality of the time, allowed himself to leave out the minorities living within the boundaries of the map he had drawn. He forgot about Ukrainians, Belarusians, and Jews. He tore Lithuania apart. A brief glance through the volumes of the League of Nations protocols is enough to understand how deeply the trauma affected all the minorities there. History will judge the extent to which Wilson's disregard for the existence of three and a half million Jews living within Poland's borders according to his plan led eventually to an awakening of Jewish national aspirations, and the extent to which the hostility, rivalry, and sense of injustice experienced by the Ukrainians made them join the cynical game played by Stalin, who offered them a hope for autonomy.

An important thing to stress here, by the way, is that Ben Gurion, the founding father of modern Israel, was content with such a diplomatic – purely declarative – formula, so as not to upset and trouble the minorities living in Israel. Ben Gurion, the main architect of the Declaration of Independence, a politician of great insight and historical awareness, was wary of similarities between Israel's Declaration of Independence and President Wilson's Point 13. In fact, he tried to stay as far away from the latter as possible, emphasising the equality of all citizens – regardless of race, religion, nationality, or gender – in his Declaration of Independence.

This is where the greatness of the Declaration of Independence and, of course, of its authors is particularly visible. I am certain that David Ben Gurion, as an extraordinarily reasonable leader, spared no effort to prevent the situation of minorities living among another people – a highly unfavourable situation, to which President Wilson obviously contributed – from repeating in the new reality of Israel, an emerging Jewish, Zionist state.

The Nation-State Law is an almost perfect attempt to follow in the footsteps of Wilson's plan of granting rights to Poles in the new Poland. It is also certainly

the reason why Ben Gurion did not even hint at it at all. Benjamin Netanyahu, one of the main proponents of the Nation-State Law, was surely aware of how problematic Wilson's statement was. He is, after all, the son of an acknowledged historian. It is hard to imagine that he had no knowledge of the many minority issues that required addressing. At the same time, also as his father's son, he disregarded and disparaged Ben Gurion and, according to critics, wished to take control of the relations between the Jewish people and minorities and take them into a direction that Ben Gurion managed to avoid.

The overwhelming – and blind – support which Benjamin Netanyahu enjoyed among fundamentalist evangelical Christians in the United States stunned him and reinforced his desire to put forward a proposal similar to the Wilson Plan. Their backing – combined with Netanyahu's strategy toward the end of his ruling – enabled him to launch a head-on attack on the Declaration of Independence.

Netanyahu did not follow this course of action by mistake. He intended to make a fully conscious reference to the rights which – as I wrote – were granted to the Poles after World War I. From my perspective as a lawyer, the Nation-State Law creates a legal situation whereby all Jews, whether citizens of Israel or Jews in the Diaspora, and those who are acknowledged as Jews following conversion, will be recognised as native-born residents – in the sense which President Wilson defined in his proposal. The article in question speaks of the Land of Israel. This wording extends that domain to make it encompass lands which are not part of the sovereign State of Israel today. This means to me that any Jews, including those in the Diaspora, who are not citizens of the State of Israel, will be considered native residents, while Arab minorities, Druze, Circassians, and Jews descended only from a Jewish father will not be recognised as such. The Nation-State Law makes it possible to claim, at any time and under favourable political circumstances, that a person who is not Jewish does not own the land on which they live and which they own as confirmed by a relevant deed of land ownership.

The attitude of Polish nationalists toward Jews has proven that such an interpretation is by all means possible and that it can take a brutal form. It turns out that three documents – President Wilson's Points, Ben Gurion's Declaration of Independence, and Benjamin Netanyahu's Nation-State Law – have something in common. The issues they address require careful consideration, and perhaps even oblige the court to reconsider the compatibility of the Nation-State's Law with Israel's Basic Laws in the future.

Ben Gurion was aware of the activity of the League of Nations (which lasted until the outbreak of World War II) and knew of the violations of minority rights that occurred as a result of the unfair interpretation of the law in the states that emerged after the breakup of the powers of Prussia, Czarist Russia, and Austro-

-Hungary. He understood very well that the world which established the United Nations after World War II would be much more sensitive to respecting these rights – and the UN committed itself to protect and uphold the rights of minorities indeed.

In 2019, Benjamin Netanyahu was aware of the guidelines set forth in the UN declaration. The very fact that the State of Israel is the state of the Jewish people, the homeland of the minority slaughtered in the Holocaust, makes the eyes of the world look at us closely, makes the world expect us to be more sensitive, thoughtful, attentive. The Nation-State Law walks us into a minefield and sounds the alarm signalling the violation of minority rights. It is hard to resist the the impression that this blind support offered by American evangelical Christians has strengthened Netanyahu in his attempt to weaken the position of minorities.

Let us also not ignore the article that defines the right of Jews to immigrate to Israel. It is quite puzzling that none of the people working on the bill noticed that what was to become the Nation-State Law could actually erase Article 4a of the Law of Return, the 1970 amendment. To recall: Major Beni Shalit, married to a Scottish woman, won his case before the Supreme Court, proving that his child born of a non-Jewish mother was Jewish. The very next day, the leaders of the religious parties and Prime Minister Golda Meir attempted to cancel the 'disastrous' ruling. The new Law of Return, passed in 1970, established that immigration to Israel was a right granted only to Jews born to Jewish mothers. The purpose of the demonstration in front of the Knesset that same year was for the voice of the victims of the Holocaust to be heard. After all, among the Jewish victims of the Nazi regime, there were many people who were not Jews according to halakha. It was enough for them to have a Jew in their family, up to the third generation back. Israel's Minister of Justice at the time, Ya'akov Shimshon Shapira, understood that it was inconceivable not to allow Holocaust survivors who were not Jewish in light of the standards of orthodox rabbinic Judaism to immigrate to Israel. Thus, article 4a was added to the 1970 Law of Return, which made it possible for thousands of Jews from the Soviet Union to arrive in Israel a decade later.

In my opinion, the Nation-State Law cancels said article 4a because, as a Basic Law, it takes precedence over the Law of Return, which is an 'ordinary' law. This issue deserves to be reconsidered the Knesset and the Supreme Court as well. Let us not forget that the originators of the Nation-State Law 'forgot' to ensure the equality of all citizens of the state. On the contrary, the law puts a strong emphasis on Jewish settlement only. The authors of the bill also forgot about the Druze community, whose members are in an inferior position in terms of their rights – even though they shed their blood for the State of Israel. I am convinced that what I am writing about here has been deliberately silenced by those who should make every effort to promote civic principles among Israeli students.

The fall of Benjamin Netanyahu in 2021 is now a fact¹⁶. The fall of evangelical Christians in the United States, coupled with the defeat of Republicans, will perhaps lighten up the darkness that afflicted the authors of the Nation-State Law and made our learned legislators completely ignore the disaster brought on by President Wilson's support for the rebirth of Poland in line with its historical borders.

The Nation-State Law will perhaps be reconsidered by the Supreme Court – and rightly so. Perhaps the plaintiffs' arguments will include those covered above. Let us hope this law disappears from the pages of law books lest it should lead to a situation where minorities are harassed by extreme Jewish nationalists in Israel. These minorities naturally include the Druze, who shed blood for our state and for whom – like for members of other minorities – the Nation-State Act is a slap in the face, an event fraught with painful consequences.

Side notes

1. It is highly doubtful that the Nation-State Law was a one-off incident, it is certainly not a random occurrence, but a wilful expression of Benjamin Netanyahu's desire. A desire which is in line his father's views – to break with the state-centred, social democratic, and liberal views endorsed by Ben Gurion. This desire stems from Benjamin Netanyahu's strong disagreement with Israel's founder's claim and belief that secularism is a guarantee that we do not fall into the same trap as the leaders of the bicentennial Crusades – which ultimately failed.

B. Netanyahu party's hymn refers, after all, to the fact that the homeland stretches across two banks: "There are two banks to the Jordan, this one is ours, and so is that one!" Breaking away from Ben Gurion's views was necessary not only to break with his legacy but to construct a new concept, one contrary to the Declaration of Independence, which the founder of the state intended to leave us as his legacy – like a monument at the end of his rule.

¹⁶ On 13 June 2021, after 12 years in power, Netanyahu lost his position as the prime minister after the government of Naftali Bennett and Ja'ir Lapid won the vote of confidence. Cf. e.g. <https://www.gazeta-prawna.pl/wiadomosci/swiat/artykuly/8335651,binjamin-netanjahu-kariera-polityczna-prokuratura.html>, retrieved 20.12.2021; cf. also: "Prestiżowa porażka rządu Bennetta i Lapid. Bezpośredni cios w bezpieczeństwo narodowe", 06.07.2021. The Israeli Parliament did not extend the validity of a controversial law that prohibited granting citizenship or residency rights to Palestinians from the West Bank or Gaza married to Israeli citizens. It was a failure of the new coalition government. The voting in the 120-member Knesset was tied 59-59, which was one vote short of the simple majority needed to extend the 2003 law; <https://tvn24.pl/swiat/izrael-glosowanie-w-sprawie-prawa-do-obywatelstwa-dla-palestynczykow-przegrana-koalicji-rzadzacej-5141628> (accessed: 20.12.2021).

Currently Netanyahu: <https://main.knesset.gov.il/en/MK/APPS/mk/mk-personal-details/90> (accessed: 20.12.2021).

The break with secularism enabled Netanyahu to get closer to Jewish and evangelical Christian messianism. The article of the law in question, which breaks with Ben Gurion's national idea of who is a Jew, means that Netanyahu joined the camp of Jewish, anti-Zionist orthodoxy, and – naturally – also the Christian messianic right wing. He may have known that relying on evangelists was not a long-term solution, but he took advantage of it as a temporary tactic that enabled him to strengthen his position. He made use of the break with liberal American Jews and the American Democratic party and aligned himself with the far right, Republican party leaders, and evangelical Christians. Who would have thought that the multi-farious, diverse coalition which is now standing against Netanyahu would bear such a striking resemblance to the seemingly unrealistic Polish Solidarity-led coalition that upset the grip of the Soviet Union.

2. As for President Woodrow Wilson, he was firmly convinced of Poland being right and of its right to liberate itself from the bondage of its enemies, but he drew the boundaries of the new Poland in a manner favourable to Poland only, ignoring the existence of minorities. To his despair, World War II put an end to those plans.

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Bibliography

- Barak A., *Tikun szel chuka szeejno chukati* (from the Israeli Supreme Court's Judgement in Case 5555/18, "The Doctrine of Unconstitutional Constitutional Amendment", article 13).
- Basu S.K., *The Question of Polish freedom and Wilson's fourteen points*, Proceedings of the Indian History Congress, t. 39, 1978, www.jstor.org/stable/44139443 (accessed: 3.09.2021).
- Deutscher I., *The Non Jewish Jew and other essays*, Oxford University Press, New York 1968.
- Huppert U., *Are we to stop at the slope*, Ma'areket Qiybw-Dalyah, 1999.
- Huppert U., *Izrael w cieniu fundamentalizmów*, Wydawnictwo Adam Marszałek, Warszawa 2016.
- Kohen, A., *Tikun chukati lo chukati Beldan szel politika populistit*, za: Yaniw Roznai „Unconstitutional Constitutional Amendments”, Miszpat Umimszal, 2020.
- Kolb L., *Moses, the Near Easterner*, Carlisle and Co., San Francisco 1956.
- Israel Passes Controversial Jewish Nation-state Bill After Stormy Debate*, www.haaretz.com/israel-news/israel-passes-cotroversial-natio-state-bill-1.6291048 (accessed: 20.11.2021).