



### **Summary of Supreme Court Ruling on Nation-State Law**

On Thursday, July 8th, 2021, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), delivered its ruling on the constitutionality of the “Israel - the Nation-State of the Jewish People” Basic Law, colloquially known as the Nation-State Law. The judgement, delivered in response to 15 separate petitions against the law, was decided 10-1 in favour of the law’s constitutionality.

The Nation-State law was formally adopted in July 2018 and gives constitutional status to various aspects of Israel’s Jewish identity. The full text of the law can be found [here](#). Although the law’s legislative history shows support from both coalition and opposition parties, it has been criticized by many, both inside and outside of Israel, for supposedly harming the rights of Israel’s non-Jewish citizens. The HCJ dealt with the various constitutional challenges to the law in its decision.

**Background on Israel’s constitutional framework:** The Israeli Declaration of Independence called upon elected officials to establish a constitutional assembly that would draft a constitution no later than October 1st, 1948. This constitutional assembly, which also served as the first Knesset (parliament), decided not to adopt a complete constitution due to political disagreements. The Knesset came to a compromise known as the “Harari decision”, whereby Israel’s constitution would be constructed section by section over time. In the ensuing seven decades, the Knesset has passed a dozen Basic Laws that serve as the basis for a future complete constitution.

Basic Laws have supra-legal status and all regular laws must conform with the Basic Laws. The Basic Laws form the basis of the HCJ’s authority to conduct judicial review of Knesset legislation. The Nation-State Law was intended to fill in the lacuna left in the Israeli constitutional system regarding the meaning of Israel’s Jewish character.

The applicants opposing the Nation-State Law argued that the law upset the balance between Israel’s Jewish and democratic nature and should therefore be struck as unconstitutional

#### **1. The Unconstitutional Constitutional Amendment**

As mentioned above, the Basic Laws form the basis of the HCJ’s ability to conduct judicial review of regular laws and therefore, Basic Laws themselves must be exempt from judicial review. The applicants argued that according to the doctrine of the “Unconstitutional Constitutional Amendment”, the Court is authorized to strike down Basic Laws that violate the country’s very constitutional system. This doctrine holds that there are certain constitutional amendments that are so extreme that they challenge a system’s basic constitutional norms and should therefore be deemed unconstitutional.

The Court began by surveying the application of this doctrine in other countries. In some countries, the constitution explicitly forbids certain constitutional arrangements. For example, the German constitution states that amendments that violate human dignity or change the social democratic nature of the state are unconstitutional. In other countries such as India,





courts have understood the system to contain meta-constitutional principles that prevent changing the basic political system.

The Court drew a distinction between these cases and Israel as the various countries that have adopted the “unconstitutional constitutional doctrine” have complete constitutions and therefore can easily discern the system’s overriding principles. This, however, is not the case in Israel, where the drafting of the constitution is still in progress and the “unconstitutional constitutional doctrine” has yet to be adopted.

Without ruling on the application of such a doctrine, the HCJ stated that the only potential constitutional limit on the Knesset as a constitutional body would be to deny the Jewish or democratic principles of the state.

The HCJ proceeded to demonstrate that the Jewish and democratic principles are the only basic principles of the current constitutional structure. The state’s Jewish identity is expressed in the Declaration of Independence, numerous laws and court decisions and is the state’s very *raison d’être*.

That means that the Knesset is barred from changing the *core* meaning of Israel’s Jewish and democratic principles. This means that a basic law divorcing the state of Israel from the Jewish nation, language and heritage would be unconstitutional. Similarly, a basic law that would remove the right to vote would violate Israel’s democratic nature and be unconstitutional. However, the Knesset has the right to set the contours and content to the democratic and Jewish nature of the state. In any case, the Nation-State law certainly does not detract from the core meaning of democracy.

## 2. Claim that Nation State Law causes mortal damage to democratic nature of state

The Court then proceeded to examine, and subsequently reject various claims that the Nation-State law violate the core nature of Israeli democracy.

### a. Nation-State law gives preference to Jewish nature:

The applicants argued that law is unconstitutional, because it gives preference to the state’s Jewish character. This claim was rejected.

The Nation-State law is intended to give content to Jewish nature of state. For example, its articles state that Jerusalem is Israel’s united capital, anchor national days of commemoration (Independence Day, Holocaust and Memorial Remembrance Days), define Israel’s flag, anthem, emblem and its national day of rest (Saturday, the Jewish sabbath). These clauses do not change the existing legal system, but rather come to express and give constitutional status to these existing aspects. The law’s preamble states that its purpose is to grant *equal* status to Jewish identity along with human rights and democratic character of the state, as opposed to preferential status.

Chief Justice Esther Hayut wrote:





*“The Nation-State Basic Law is the expression that ‘the state’s Judaism is its essence, its uniqueness, its sign of recognition amongst all nations and states. If you remove its Jewish characteristics, you have removed its soul; you have made it into a state without a people, without a past and without a face.’”*

b. The law omits the principle of equality:

The applicants argued that the drafters’ express refusal to anchor equality in the law demonstrates that the law is intended to discriminate against non-Jewish citizens.

The Court ruled that regardless of whether the decision to exclude “equality” was a wise political decision, it is irrelevant for the discussion of the law’s constitutionality. In any case, the lack of the term “equality” does not detract from the principle in Israeli law. The equality of citizens is at the core of the state’s identity, mentioned explicitly in the Declaration of Independence and stressed repeatedly by both pre-state and sovereign Israeli leaders.

The principle of equality has been repeatedly recognized in Israeli case law. As such, it was never explicitly included in the 1992 Human Dignity and Liberty Basic Law, which provides the constitutional basis for much of Israel human rights law. The Hansard from the Knesset committee debates over the Nation-State Law show that all sides took for granted that equality was a basic principle. The only disagreement was whether to *explicitly* include equality. Therefore, there is no basis to the claim that the omission of the term “equality” means the reversal of the principle as a binding aspect of Israeli jurisprudence.

c. Practical applications of law -

The applicants pointed to a series of lower court judgements that supposedly granted preferential rights to Jews based on the law. The HCJ reposed that these decisions were of lower courts, are not considered to be binding rules and that many of them have already been overturned.

Furthermore, the notion that the Nation-State Law provides any sort of individual rights to any citizens is contrary to its own wording, its legislative history and its purpose. The law is drafted in a declarative nature and does not contain any operative clauses to provide (or detract) personal rights based on national affiliation. The Nation-State Law is not intended to resolve any tensions between democratic and Jewish nature - each case must be judged on its own, that will be resolved in the legislative and not the constitutional realms.

**In conclusion:** the Nation-State Law does not change the balance between various aspects of the state’s identity. All laws must be interpreted in synthesis and harmony with the various legal and constitutional guiding principles . Therefore, the Court rejected the argument that the law changes Israel’s constitutional structure.

3. Claims that law violates international law

The applicants pointed to various state conventions that Israel is party to (the Convention on Elimination of All Forms of Racial Discrimination, the Convention on Economic, Social and Cultural Rights, etc.) and argued that the law violates these international treaties.





The Court ruled that in the Israeli legal system, international conventions are not automatically adopted as part of Israeli domestic law. However, domestic law must be interpreted as much as possible in harmony with international law. However, when an irreconcilable contradiction emerges, Israeli domestic law prevails.

The Court has yet to rule whether this principle applies to constitutional norms as well. However, the Court sees no reason why the Nation-State Law should not be interpreted in harmony with international legal norms.

#### 4. Ex-territorial application of the law

The applicants argued that the use of the term “land of Israel” in the law as opposed to the “state of Israel” implies that the law is meant to apply outside of the territory of the sovereign state of Israel. Furthermore, the Nation-State Law states that Israel will maintain and strengthen ties with the Jewish Diaspora. Therefore, the law’s ex-territorial application renders it unconstitutional.

The Court dismissed this argument. Certain Israeli laws do indeed apply outside the territory of the State of Israel, such as criminal offenses carried out against Jews or Israeli citizens abroad. The Law in no way determines Israel’s territorial boundaries and stays out of the political state regarding territorial partition. Regarding the clause calling on strengthening ties with Diaspora Jewry, the state already has various government agencies tasked with that role. In any case, the law does not impose operative obligations on the state to act outside of its borders.

In conclusion, Chief Justice Hayut summed up:

*“The Nation-State Basic Law does not violate the state of Israel’s nature as a democratic state. It does not give preferential status to the Jewish identity of the state over its democratic identity. It does not detract from the principle of equality’s status in our legal system. Its practical implications do not lead to a radical change in Israel’s constitutional system. It does not contradict international law and it is not intended to apply outside the borders of the state of Israel.”*

#### 5. Challenges to specific clauses:

- a. Article 1: Israel is the nation-state of the Jewish people. The right of self-determination in Israel is exclusive to the Jewish people.

The applicants claimed that this clause harms the cultural and collective rights of Israel’s non-Jewish communities.

The HCJ determined that the law is declarative and does not set out individual civil rights. Equality remains central to the Israeli legal system and discrimination based on national or ethnic origin is illegal under Israeli law.





As per self-determination under international law, a distinction is made between external and internal self-determination. External self-determination refers to a group actualizing its national aspirations in a sovereign state of its own. Naturally, not every group can have their own state. However, self-determination can also be expressed internally, through the development of a group's unique identity and culture within existing borders.

The Nation-State Law refers to external self-determination in the form of national sovereignty, which is exclusive to the Jewish people in Israel. While Israeli law has never explicitly recognized collective group rights, Israeli law recognizes the cultural uniqueness of its minority communities and grants various cultural rights to minority communities such as the right to rest on holidays and sabbaths, the funding of a public Arabic educational system and the determination of personal status issues based on religious and cultural law.

- b. Article 4: Hebrew is Israel's official language; the Arabic language has a special status.

The applicants argued that this section demoted the status of the Arab language.

The Court ruled that Arabic has been recognized as an official language since the Mandatory period, the full meaning of its official status has yet to be clarified. In any case, Israeli law gives preferential treatment to Hebrew as Hebrew is one of the core expressions of Israel's Jewish nature.

Hebrew is Israel's primary official language, while Arabic is a secondary official language. The Nation-State Law recognizes the existing situation and does not change it. The main contribution of the law is the anchoring of Hebrew's legal status. In any case, the clause must be interpreted in a way that does not harm Arabic language's current status.

- c. Article 7: Jewish settlement is a national value and the state will work to promote and advance it.

According to the applicants, this section will legitimize discriminatory housing practices such as the construction of communities for Jews only.

This section's legislative history demonstrates that the original language of the "settlement clause" was softened several times to prevent the justification for discrimination. The Court ruled that this clause must be interpreted in harmony with other constitutional principles such as equality. The Court had previously ruled that the construction of communities solely for Jews was discriminatory and illegal. Therefore, the law does not allow building communities solely for Jews and excluding non-Jews, nor for incentivizing Jewish migration to the specific geographic areas while withholding equal incentives to non-Jews.

**In conclusion:** Detractors of Israeli democracy have pointed to the Nation-State Law as a prime example Israel's supposed discrimination against its non-Jewish population. The HCJ has overwhelmingly ruled that the law does not change the balance between Israel's Jewish and democratic nature, does not harm the equality of non-Jewish Israeli citizens and is in concordance with constitutional and international law principles.





## THE INTERNATIONAL LEGAL FORUM

The effects of the Nation-State Law on Israeli case law and jurisprudence will take years to be seen. However, this HCJ ruling thoroughly rejects the harmful canard that the Nation-State Law is a discriminatory or racist legislation. Rather, it comes to reinstate the state of Israel's core identity: the national homeland of the Jewish people, *and* a democratic state that guarantees equal rights for all of its citizens.

