

Constitutionalizing Sophisticated Racism: Israel's Proposed Nationality Law



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This essay analyzes the political motivations behind the Jewish Nation-State Bill introduced in the Knesset in November 2014, shedding light on the ascendancy of the Israeli political establishment's radical right wing. It argues that there were both internal and external factors at work and that it is only by examining these thoroughly that the magnitude of the racist agenda currently being promoted can be grasped. The essay also discusses the proposed legislation's long history and the implications of this effort to constitutionalize what amounts to majoritarian despotism in present-day Israel.

DURING ISRAEL'S MOST RECENT PARLIAMENTARY ELECTIONS, held in March 2015, the vast majority of the public voted in favor of the conservative nationalist bloc.¹ While the state has gone to great lengths to convince the international community that it is a bastion of democracy, the majoritarian bloc that came to power in the elections promotes blatantly anti-democratic laws, among them the proposed legislation known as the Jewish Nation-State Bill. This bill, which was a precipitating cause of the call to early elections,² in effect strips Israel's defining constitutional "Jewish and democratic" formula of any substantial meaning.³ The Jewish-and-democratic equation, first officially spelled out in the 1985 amendment to the Knesset Basic Law, has become the dominant expression of the state's identity.⁴ Ever since it ratified the amendment, the state's supreme court has espoused a liberal interpretation of the amendment, favoring the equation's democratic values—equality for all individuals, freedom of expression and organization, women's rights, as well as personal status issues among others—and so long as that did not undermine national security strategies or concerns, Israeli governments were bound by their interpretation.

The court's liberal interpretation, allowing political and legal apparatuses to cultivate some form of equilibrium between Israel's ethnic political orientation and its democratic procedures, has been widely upheld by most constitutional experts and state institutions. For example, judicial reviews of governmental decisions have compelled the state to allocate public lands for housing and to include Arab towns on the list of cities receiving special governmental funds.⁵ It is as a result of this partial ability to reconcile the formula's inherent contradiction that the state has been able to boast that it is the only operative democracy in the Middle East in spite of blatantly discriminatory policies. However, with the introduction of the Jewish Nation-State Bill, the precarious balance in the

Journal of Palestine Studies Vol. XLV, No. 3 (Spring 2016), p. 40, ISSN: 0377-919X; electronic ISSN: 1533-8614. © 2016 by the Institute for Palestine Studies. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, <http://www.ucpress.edu/journals.php?p=reprints>. DOI: 10.1525/jps.2016.45.3.40.

original formula has been tilted in favor of the state's Jewish ethnic identity at the expense of its constitutional democratic designation.

Analysts who have delved into the legal and juridical ramifications of the bill have left the political motivations behind it largely unexplored. Even though the current governmental coalition has not rushed to promote it, the bill remains of utmost importance for a number of reasons, the most important of which can be summarized as follows: It reveals the aggressive racist proclivities of Israeli institutions; it aims to entrench the national and religious Jewish ideology of the state; it limits the ability of political and legal institutions to support democratic and civic interpretations of its constitutional precepts; and it dispenses with non-Jewish citizens as a politically insignificant class.⁶

Both internal (domestic) and external (foreign) political factors have led conservative legislators to propose the bill. This essay sets out to identify the political motivations behind the measure and to explore how it may contribute to Israel's willingness to sacrifice the formula that has maintained its legitimacy in the international arena for decades. By exploring the history of the bill, we can also better understand the transformations currently taking place in Israeli society. Among these is the surfacing of a pugnacious racial discourse that may have always been part of Israeli political culture but has never been expressed as belligerently as it is today by Israel's legislative, judicial, and executive officials.

Designs and Details of the Proposed Bill

To this day, the Jewish Nation-State Bill has gone through three iterations. Avi Dichter, the former head of the Israel Security Agency (Shin Bet), and a member of the Kadima Party, proposed the first formulation of the bill in August 2011,⁷ based on a proposal by the right-wing Institute for Zionist Strategies.⁸ The second formulation was put forward by Ze'ev Elkin of the Likud Party, and the third by Ayelet Shaked of the Jewish Home Party and Yariv Levin of the Likud Party during the nineteenth Knesset in 2013.⁹ Despite superficial differences, all three proposals emphasize Israel as the state of the Jewish people in which self-determination belongs solely to Jews and where the Jewish character of the state overrules the democratic arrangement.

Many of the discussions surrounding these proposals had been taking place in the hallways of the Knesset long before they were formally presented to the Ministerial Committee for Legislation in November 2014.¹⁰ The then-head of the committee, Tzipi Livni, who was also the justice minister at the time, had raised political and ideological objections to the proposal all along, arguing that it contradicted the Declaration of Independence, which highlights the salience of Israel's liberal and democratic values and defines its national identity in terms of the balance between its Jewish and democratic character.¹¹ Livni's objections created considerable political controversy, adding to the tension between the extreme right, headed by Prime Minister Benjamin Netanyahu, and the more moderate faction, led by Yair Lapid. Although Netanyahu had proposed a revised version of the bill in order to surmount Livni's objections, the proposal that eventually won the approval of the cabinet did not make it through the legislative process as a result of the collapse of the ruling coalition in autumn 2014, which precipitated the early elections.¹²

Netanyahu's proposed compromise included fourteen principles. I will not elaborate on each of them here, but it is worth addressing the main ones, as they embody the prime minister's intentions.

The first part of the document approved by the cabinet sets the foundation for the proposed law and defines Israel as the "national state of the Jewish people" that is both Jewish and democratic.¹³ The second part contains four different but complementary provisions and lays out the basic principles of the proposed law.

The first principle identifies the land of Israel as the historic home of the Jewish people and the territory on which the state is established, notwithstanding the absence of clearly or legally defined borders.¹⁴ This principle legitimizes the purpose of the state and is categorical about the importance of the land of Israel to the Jewish people. The second basic principle, which reiterates that Israel is the national home of the Jewish people, stipulates that it is the state where they can practice self-determination based on their culture and history. Elaborating on this, the third basic principle maintains that this right to self-determination is *exclusive* to the Jewish people and that no other people(s) may argue for self-determination within the territory of the state. And since that territory is not clearly defined, as alluded to above, it could include everything within the Green Line (so-called Israel proper) as well as the Palestinian territories occupied in 1967. This stipulation effectively means that civic sovereignty is not possible since any demand to transform Israel into a state of all its citizens, *all* of whom would be considered sovereign and could express their right to self-determination, is declared illegal.

Only after the bill makes clear the exclusive Jewish character of the state does the fourth basic principle assert that Israel is a democratic state founded on "freedom, justice and peace . . . and respects the individual rights of *all citizens* [my emphasis] of the state according to the law."¹⁵ This fourth basic principle establishes a bill of rights in which all citizens are individuals, and while the highlighted phrase evokes the idea of a state of all its citizens, the proposed law effectively empties this formula of any substantial meaning as this principle surrenders the liberal rights it carries to the previous principle's collective right of the Jewish people to define the identity of the state and thereby materialize its right to self-determination.

Since every Jewish individual is protected and granted special status as a member of the Jewish people—the only sovereign people in the state—the rights of Palestinian citizens are secondary, and limited to the individual level. In comparing the citizenship rights of Jews and Palestinians, we find that the former have collective and individual rights that complement each other while the civic status of Palestinian citizens is restricted and cannot contradict or challenge the priority given to Jews. The fact that every Jew around the world has the individual right to immigrate to Israel and automatically receive citizenship exemplifies how the state defines itself as exclusively Jewish. By establishing the superiority of the Jewish people in and over the state, the bill creates a despotic majoritarian regime under the guise of majoritarian democracy.

Principles five and six define the bond between Israel and the Jewish people living outside its borders as well as the state's commitment to protect Jews no matter where they live. The seventh principle is divided into three parts. The first part defines the state's pledge to protecting, developing, and providing education on Jewish historical and cultural traditions, both inside Israel and in the diaspora; the second emphasizes the role of the state in educating the youth and constructing their consciousness of the Jewish people's legacy and traditions; and the third

stipulates that the state will enable all citizens to protect their cultures and traditions, regardless of religion, race, or nationality. Consequently, the state has an active role vis-à-vis its Jewish citizens and the promotion of their culture but a passive one toward its other citizens, whom it expects to take that responsibility upon themselves. According to this principle, the state is not committed to supporting and developing the culture, tradition, language, and identity of non-Jews, namely the Palestinian citizens of the state. Therefore, not only does the state discriminate against non-Jews in terms of its identity and symbols, but it is also entitled to exclude them from the allocation of public resources to develop and maintain their cultural identity.¹⁶

Other principles of the law deal with the official calendar of the state (which is fully Jewish) and with Jewish jurisprudence, proposed as a source of inspiration for the Knesset when it creates laws.¹⁷ The latter idea, expressed in principle eleven of the bill, mirrors the growing influence of religious ideology in state affairs and in Israel's legal and judicial systems.

While the framing of Netanyahu's proposal may be less extreme than the original version that was drafted in the Knesset, it includes the same conceptual values and excludes the precept of equality. It also further demotes the state's democratic procedures in favor of its Jewish identity. Netanyahu's amended proposal formally secures the divorce between the national rights of the Jewish people and the civil rights of the citizens of the state, practically resulting in ongoing duress and coercion in terms of the civil and national status of the Palestinian citizens of Israel (PCI). The proposed Netanyahu bill makes the Jewish people the sole custodians of the State of Israel and characterizes the PCI as a sometime and subordinate group of individuals who are not guaranteed national or collective expression. Put simply, the entirety of the world's Jews have sovereignty over the state, even those who do not reside in Israel and are citizens of other countries—flouting the practice in every other modern nation-state, as originally articulated by the sixteenth-century French philosopher Jean Bodin.¹⁸

Given that the Declaration of Independence—which has special constitutional standing in the Israeli juridical tradition¹⁹—defined Israel as a Jewish state ever since its establishment, questions must be raised about the justification for the proposed Jewish Nation-State Bill. Israel has fully exercised its Jewishness in all areas of politics. It has established a moral and material system that favors the Jewish historical narrative throughout the entirety of Israel's jurisdiction, including the lands occupied in 1967. Yet it maintains a democratic veneer via institutions that are administered according to democratic principles. For example, Israel has a transfer of power by elections; a separation of powers; and a wide arena for freedom of expression in matters relating to the Jewish community's social, economic, and cultural life.²⁰ These practices allow the Jewish majority to exercise ethnically oriented and blatantly discriminatory policies while simultaneously framing them as expressions of democratic majorities, and thereby to present Israel as an exemplar of modern democratic states.

The bill, however, exposes the intentions of the Israeli political system, which no longer feels the need to justify its racist policies and exploits international opinion and the situation of Arab states since the popular upheavals that started in 2011 (the so-called Arab Spring) in order to enact policies in the name of "defensive democracy."²¹ These policies in fact exploit the subordinate status of the Palestinian minority and fly in the face of democracy's very essence. Netanyahu's draft bill proposal was drawn up against a background of major constitutional changes that had

been taking place in Israel for over a decade, including the 2003 amendment to the Citizenship Act.²² This amendment impedes the reunion of Palestinian families in which one of the spouses originates from the occupied Palestinian territories or from what are regarded as enemy states according to Israeli criminal law and the Trading with the Enemy Ordinance.²³ At the same time, it allows Israel to welcome Jewish immigrants without having to prove their religious affiliation.²⁴

Paving the Way to Promote the Bill

A number of external and internal factors account for the prominence of this bill in the Israeli political arena. The first external factor relates to the Palestinians and the question of an agreement leading to Palestinian independence in accordance with international law and UN resolutions. Netanyahu has now made recognizing Israel as a Jewish state a demand in the negotiations with the Palestinians. The Palestinian leadership emphatically objected to this request, stating that while they may be willing to concede the point that Israel is a sovereign state, they would not go into details about its identity.²⁵ Israel wants to equate international recognition with recognition as a *Jewish* state, which is how it has always defined itself. This roundabout way of gaining recognition empties the Palestinian right of return of all essence and practical applicability.

Were Palestinians to recognize Israel as the state of the Jewish people, they would in fact be recognizing that the only people who have a “right of return” there are Jews. Such an acknowledgment on the part of the Palestinians would achieve two goals: first, it would provide retroactive recognition, legitimizing Israel’s past treatment of the Palestinians and its establishment as a state of the Jewish people, even when its policies violated the basic rights of Palestinians in general and of the PCI in particular; and second, it would prevent the return of any Palestinians to territories defined as Israeli, limiting the practice of the internationally recognized Palestinian refugees’ right of return to a future Palestinian state, if such a state were established.

In this regard, it is important to note that as proposed by the Netanyahu cabinet, the Jewish Nation-State Bill obstructs any solution of the Israeli-Palestinian conflict in the near future as it makes future Israeli concessions contingent upon the recognition of the state’s exclusive identity. Dichter, Elkin, and Shaked, who drafted the original bill, clearly and explicitly object to any Israeli withdrawal from Palestinian territories occupied in 1967.²⁶ Their proposal is part of a larger effort to compel moderate legislators into either supporting the bill, thereby promoting their right-wing agenda, or being exposed as traitors, given the narrowly defined national character of the state. The bill is also integral to the extreme right’s strategy to reconfigure the demographic composition of Jerusalem and its surrounding areas so that the number of Jewish settlers there exceeds the number of Palestinians, thereby facilitating the annexation of the settlements to the Jewish state (see Daniel Seidemann’s “East Jerusalem: The Myth of Benign Occupation Disintegrates,” www.palestine-studies.org/jps).

The second external factor relates to the international legitimacy of Israel and the state’s need to assert itself as the expression of the state envisaged by the 1947 United Nations Partition Plan and subsequent recognition by the United Nations in 1949. This comes at a time when Israel’s

international standing is being steadily eroded as boycotts of the state are gradually taking root in a variety of economic sectors in different parts of the world.²⁷ This change in public opinion overwhelmingly reflects growing recognition of the State of Palestine despite Israel's best efforts to block such a development, claiming that it sabotages direct peace negotiations between the two sides. It is these kinds of changes in the international climate that have led Israeli right-wing politicians, Netanyahu among them, to propose the Jewish Nation-State Bill. In its attempt to reformulate the rules for Israel's legitimacy and to ground the Jewishness of the state in international law, the bill upholds the dominant Israeli interpretation of the Partition Plan's call for establishing two states in Palestine, one Jewish and one Arab.²⁸

The third external factor involves redefining the relationship between the Israeli state and Jewish communities abroad, especially as liberals from those communities have expressed increasing exasperation with official Israeli government policies in the last decade.²⁹ In addition, the bill seeks to address younger generations of Jews across the world by recharacterizing Jewish identity politics as transcending the various civic affiliations of diaspora Jews, with Israel at their center. The redefinition of Israel as the state of the Jewish people serves to remind the global Jewish community that not only is Israel their home but that even in the presence of ideological differences, the premise remains unshakeable. Thus the bill promotes a definition of the state that requires a clear commitment on the part of Jewish communities not only to accept the state as their own but also to defend it at any cost, since it is the embodiment of their identity and security. This type of expression manifests a tribal aspect of Jewish nationality, according to which Jewish ethnic affiliation is an essential indication of political loyalty, regardless of one's residence or citizenship. Netanyahu's call for French Jews after the January 2015 terrorist attacks in Paris to "come home," for instance, falls within this perception of Israel as an organic entity and safe haven for the entirety of the Jewish people worldwide.³⁰

The ideological viewpoint just described reflects Israel's concern with countering the effects of the Boycott, Divestment and Sanctions (BDS) movement and the efforts it is deploying to recruit Jewish communities everywhere to join in that campaign. Netanyahu's June 2015 statement that "attacks against Jews have always been preceded by the slander of Jews," attempts to equate BDS with Nazi and other anti-Semitic rhetoric and to preempt any discussion of BDS and its relationship to official government policies.³¹ In other words, the official discourse depicts BDS as aiming to delegitimize Israel as the state of the Jewish people rather than to liberate Palestinians from Israeli occupation. Accordingly, Israeli legislators expect Jewish communities in Europe, the United States, Australia, and beyond to commit to helping Israel, regardless of its conduct.

In addition to the above external factors, there are two major internal factors that inform the bill. The first deals with the current institutional struggle within the Israeli political system between the legislative and the judicial authorities. The legislative authority, embodied in the Knesset, represents the "will of the people" and is responsible for passing laws. Today, most legislators are nationalist, religious, and conservative political actors whose view of Israel is predominantly messianic and absolutist. They view the moral and ideological values of the state in absolute terms, arguing that it is the legislative authority that determines the character of the state and its policies.³² These legislators claim that the civil and liberal political figures that make up the judicial authority, represented by the High Court of Justice (HCJ), consider Israel to be a state with a Jewish

majority but without committing to the superiority of Jewish national or cultural values. This tension between the legislative and judicial authorities stems from what prominent scholar of Israeli constitutional law Menachem Mautner identifies as the decline of formalism and the rise of values in the Israeli judicial system.³³ Right-wing legislators argue that the judicial authority, which is constitutionally responsible for interpreting the law according to the spirit in which it was intended, is encroaching on the authority of the legislator by promoting liberal interpretations of the law.³⁴ Thus, in their view, by positioning itself above the elected representatives of the people, who happen to be conservative nationalists, the judicial authority is usurping its role.

In light of the intensification of this conflict between the two sides in recent years, the proposed bill is an attempt by legislators to impose a new constitutional formula that would in their view represent the will of the majority and its support for a conservative ideology as expressed at the ballot box. This formula would thus limit the maneuvering room of the HCJ to defy the will of the people either by interpreting nationalistic laws liberally or by striking down legislation that does not meet what the judiciary considers to be minimum threshold of rights. The institutional conflict has been reflected in right-wing promotion of certain types of legislation and allegations against the judiciary system, in general, and the HCJ, in particular, with the nationalist and religious right both threatening and attempting to pass laws that limit the ability of the HCJ to exploit legal ambiguities.³⁵ Thus, the Jewish Nation-State Bill seeks to settle the ambiguity that the Declaration of Independence allows, which Israel's highest court has thus far considered as a primary document determining the state's liberal values, especially those of equality and freedom. By enforcing the Jewish identity of the state, the bill would restore authority to the legislature.

The second internal factor that led legislators to propose this bill concerns Israel's Palestinian citizens and their repeated challenges to the political and judicial systems in recent decades. In its effort to establish "loyalty" and "allegiance" as determinant factors in Israeli political culture (and thereby define citizenship according to the fulfillment of certain duties such as army service or civic service) rather than through the exercise of equal civic rights, the bill is part of a strategy to impose new rules of the political game on the PCI. If successful, it would subject the community to absolute Jewish hegemony hollowing their political struggle for collective rights of any substantive meaning.

In the early 1990s, the National Democratic Assembly (NDA or Balad), led by Azmi Bishara and Jamal Zahalka, proposed "a state of all its citizens" as an alternative constitutional formula. The proposal called on the state to respect basic democratic principles despite the demographic asymmetry between the Jewish majority and the Palestinian minority. This alternative challenged Israel's hegemonic, exclusive, and antagonistic political model and introduced a more inclusive political vision that upheld genuine democratic values—especially, equality, dignity, and freedom. Moreover, the NDA proposal demonstrated that the Jewish-and-democratic formula was incompatible with a genuine democratic polity that consists in openness, diversity, and magnanimity.³⁶ It further demonstrated that the state could not legitimately implement such a formula, thereby unmasking the absurdity of the Jewish and democratic equation since the definition of the privileged national group in exclusive ethnic terms renders meaningless any political aspiration to civility and equality between the minority and majority groups.³⁷ Finally,

the proposed alternative formulation exposed legislators' purported state practices of democracy as counteracting basic democratic principles.

More than a decade after the NDA presented its state-of-all-its-citizens vision, in three separate but related initiatives, Palestinian intellectuals, academics, and activists in Israel issued another set of documents demanding total civil and national equality. Appearing in 2006–7, the three documents—Mada al-Carmel's Haifa Declaration; Future Vision, developed under the auspices of the Committee of Arab Mayors in Israel; and the Democratic Constitution, issued by Adalah, the Legal Center for Arab Minority Rights in Israel—challenged the Jewish hegemony of the state once again and demanded full democratization based on liberal and collective rights embedded in international law.³⁸ By calling for the transformation of Israel into a fully democratic state and effectively establishing a difference between Jewish citizens' right to self-determination and Israel as the state of the Jewish people everywhere, these initiatives dealt an additional blow to the Jewish-and-democratic constitutional equation. These documents make the point that Israel's existence as the expression of the Jewish right for self-determination does not necessarily entitle all Jews everywhere to immediate rights in the state or make them the only stakeholders in such a state, arguing that such a policy effectively degrades the status of the PCI to second-class citizens. In the eyes of many Israelis, the formulation of such demands was tantamount to a declaration of war against the Jewish state and they have consequently regarded Arab citizens as enemies of the state.³⁹

Could There Be a Silver Lining to the Jewish Nation-State Bill?

In his presentation of the bill in the Knesset on 26 November 2014, Netanyahu asserted, "Israel will always preserve full equal rights, both personal and civil, of all citizens of the State of Israel, Jews and non-Jews as one, in the Jewish and democratic state. . . . Indeed, in Israel, individual rights and civil rights are guaranteed to all—something that makes us unique in the Middle East and beyond it."⁴⁰ Thus the proposed Jewish Nation-State Bill reiterates that Palestinians have to be satisfied with only individual rights in the Jewish state. Emphasizing individual and civil rights and comparing Israel with other Middle Eastern countries is a way of stressing that the PCI have no better alternatives and should be content with their status; after all, citizens of Arab states do not even enjoy civil democratic rights. This argument maintains the traditional Israeli position that Israel is a so-called democratic villa in the jungle and that as the sole "moral" state in the region, it is entitled to determine the measure and character of the rights accruing to its Palestinian citizens.⁴¹ Those who do not like it or are unwilling to act accordingly will be either outlawed or crushed as evinced in the recent declaration of the Northern Wing of the Islamic Movement as an "unauthorized assembly."⁴²

The results of the March 2015 Israeli elections leave open the possibility that this nationality law, as well as other bills proposed by nationalist Knesset members, will remain a fixture of the political agenda in Israel. While one of the central parties in the current coalition, Kulanu, opposed the bill, legislators will continue promoting nationalist policies to differentiate between those who belong to the majority and accept their nationalistic values and those who do not.⁴³ Dichter, the bill's original

initiator, sought to revitalize the legislation process in October 2015 but his attempt was blocked by Netanyahu's request to leave it off the legislative agenda.⁴⁴ The latter's request was not related to his otherwise favorable stance on the law but to the currently tense political climate in Israel.

The PCI have been protesting Israeli police violence against those in the community suspected of attacking Jewish citizens. Although the government took the serious step of outlawing one of the PCIs' major political movements (the northern branch of the Islamic Movement), it has avoided engaging in too many controversial battles simultaneously. That notwithstanding, Netanyahu instructed one of his most loyal members of the Knesset and the chairman of his coalition, Tzachi Hanegbi, to promote a nationality bill that could garner the support of all (meaning the Jewish majority). In opening remarks to the cabinet meeting on 29 November 2015, Netanyahu stated,

I hear the voices from various publics in Israel against our decision to outlaw the Northern Wing of the Islamic Movement. . . . This will not change our mind. We are firm with this decision, as much as we are determined to promote the nationality bill, which aims to clearly regulate Israel's identity as Jewish and democratic, as the national state of the Jewish people. In this regard, the promised discussions will start this week, headed by the head of the coalition, Knesset member Tzachi Hanegbi. We are starting to promote the nationality bill.⁴⁵

Should this trend of radical right-wing politics continue to shape the state's constitutional and legal climate, the assumption that the Jewish-and-democratic equation is a tenable one possibly may finally come undone. The legislative trend may finally expose one of the central veiling mechanisms enabling the state to promote exclusive ethnic and discriminatory policies while at the same time maintaining its image as democratic. Once the Knesset promotes the proposed Jewish Nation-State Bill and other supportive legislation, the discrepancy between the reality of the Jewish state and its image will become glaring. Such a development holds the promise of a more genuine debate about the nature of Israel's political formula that, only if democratized, can facilitate peaceful and democratic relations between Jews and Palestinians.

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- 32 Shai Bermanis, Daphna Canetti-Nisim, and Ami Pedahzur, "Religious Fundamentalism and the Extreme Right-Wing Camp in Israel," *Patterns of Prejudice* 38, no. 2 (2004): pp. 159–76.
- 33 Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press, 2011). See especially chap. 4, "The Decline of Formalism and the Rise of Values."
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- 36 See Giambattista Vico, *The New Science of Giambattista Vico*, trans. Thomas Goddard Bergin and Max Harold Fisch (Ithaca, NY: Cornell University Press, 1984) and Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago: University of Chicago Press, 1989).
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- 45 Jonathan Lis and Barak Ravid, "Netanyahu Promotes Bills in the Field of Governability" [in Hebrew], *Haaretz*, 29 November 2015, <http://www.haaretz.co.il/news/politi/.premium-1.2787066>.