TRANSLATED BY ADALAH FROM THE ORIGINAL HEBREW

In the Supreme Court **HCJ 5866/18**

Sitting as the High Court of Justice

1. The High Follow-up Committee for Arab Citizens in Israel

2. The National Committee of Arab Mayors

3. The Joint List in the Knesset

4. Adalah – The Legal Center for Arab Minority Rights in Israel

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Petitioners

Versus

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Respondents

Petition for an Order Nisi

A petition is hereby filed in which the Honorable Court is requested to issue an *order nisi* directed at the Respondents ordering them to show cause as to why the Basic Law: Israel – The Nation-State of the Jewish People should not be nullified.

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I. INTRODUCTION

1. On 19 July 2018, the Knesset passed the Basic Law: Israel – The Nation-State of the Jewish People (hereinafter: **the Nation-State Basic Law** or **the Basic Law**).

2. The Basic Law states that the "Land of Israel" is the historical homeland of the Jewish people; the State of Israel is the nation-state of the Jewish people, and the realization of national self-determination in the State of Israel will be exclusive to the Jewish people; immigration leading to automatic citizenship is exclusive to Jews; "Greater and united Jerusalem is the capital of Israel"; Hebrew is the official language of the state, and Arabic will have special status; the State will act to encourage, consolidate and promote Jewish settlement; the national anthem is "Hatikvah"; the flag is the Israeli flag [a prayer shawl]; Independence Day is a national holiday; the Hebrew calendar is an official calendar of the state; the official memorial days and holidays are Zionist-Jewish holidays; and the state will work to foster ties with Diaspora Jewry.

3. This Basic Law sets forth and comprises the constitutional identity of the regime. It determines the identity of the sovereign, its will and its goals. Therefore, the effect of this Basic Law on the constitutional regime will be broad and comprehensive. A comparative survey of national constitutions reveals that today there is no democratic constitution in the world that designates the regime as serving only one ethnic group. The historical-legal review shows that states that have grounded the meaning of "We, the People" in ethnic and exclusionary terms, have turned the dispossession, oppression and degradation of the natives into policy.

4. The Basic Law's overriding objective is to violate both the right to equality and the right to dignity. It is no coincidence that proposals to ground the principle of equality in the Basic Law were rejected. In essence, the principle of non-discrimination is irrelevant, because, from the outset, Arabs and Jews are not equal under the Basic Law's constitutional regime. Therefore, discrimination on the grounds of Jewish separation and supremacy is reflected in all articles of the Law. For example, although the Basic Law applies to a very large Arab population within the Green Line, it states that only Jews are citizens or potential citizens; and the Basic Law assigns exclusive collective rights to the Jewish majority as if it were a minority in danger of assimilation. And, contrary to international law, it completely ignores Arab citizens' collective rights as a homeland minority, and it also nullifies the status of Arabic as an official language. Indeed, the principles articulated in this Basic Law are among the most extreme since the end of the apartheid regime [in South Africa].

5. The petitioners will argue that the Knesset, as a constituent authority, exceeded its powers in the most extreme manner by enacting the Basic Law, since the Basic Law negates basic democratic principles to the point of damaging the constitutional structure [of the state]. The Basic Law severely violates human rights, especially the prohibition on discrimination and the right to human dignity. It also violates the norms of international law, and especially those that prohibit, *inter alia*, the existence of laws that create a constitutional identity on racial grounds. In addition, the petitioners will argue that the Knesset abused its constituent authority in that the Basic Law was legislated for improper purposes; and it was passed with coercive motivations and without seeking a broad, cross-national consensus. Further, the law's implications for non-Jewish populations were not taken into consideration during the legislative process.

6. The petition is organized as follows: First, the petition will present the basic assumptions upon which the constitutional discussion will be based. Second, it will discuss the articles of the Basic Law, according to the following divisions: Article 1 of the Basic Law; citizenship; language and collective rights; and Article 7 of the Basic Law. Third, the petition will discuss the constituent authority's deviation from its authority and the abusive exercise of its power according to the doctrine of the unconstitutional constitutional amendment.

The Petitioners

7. Petitioner No. 1 is the High Follow-up Committee for Arab Citizens of Israel, the highest Arab political body in Israel, which is comprised of Arab Members of Knesset belonging to the Joint List (comprised of the following political parties: Hadash, Ra'am, Balad and Ta'al), extra-parliamentary Arab political movements, and Arab mayors and heads of the Arab local authorities in Israel. This body is represented here by its chairman, former Knesset Member Mr. Muhammad Barakeh. Petitioner No. 2 is the Joint List in the Knesset. Petitioner No. 3 is the National Committee of Arab Mayors in Israel, an association in Israel. Petitioner No. 4 is a registered NGO in Israel.

= = A copy of Petitioner 1's statement regarding the Basic Law is attached and marked as Appendix P/1.

= = A copy of Petitioner No. 4's position paper on the Basic Law is attached and marked as Appendix P / 2.

II. THE BASIC PREMISES OF THE PETITION

In order to discuss the constitutionality of the Nation-State Basic Law, and for the sake of efficiency and avoiding repetition, the Petitioners will herein present the points of departure upon which the argument in the petition will be based.

8. **The Nation-State Basic Law determines the constitutional identity of the regime**: The Nation-State Basic Law is not an ordinary basic law. It is a law that purports to determine the constitutional identity of the regime. The Basic Law and its provisions comprise the constitution that precedes the constitutional order that includes the rest of the laws, including the Basic Laws. Given the perception of the Basic Laws as chapters in the nascent constitution of the State of Israel, the Nation-state Basic Law, as such a chapter, meets the main characteristics that determine the identity of the constitution. These characteristics include, first and foremost, the determination of the identity of the sovereign or the political community that constitutes the locus of sovereignty; second, the determination of the aspirations and visions of that political community (the sovereign); and third, the determination of the cultural identity of this political community (languages, religions, symbols).[1]

9. In order to assess the legitimacy of constitutions in accordance with basic democratic values, the petition will examine the aspect of subordination that the Nation-State Basic Law creates: Who is a citizen? Who is subject to the constitutional regime? What is the main purpose and objective of the constitutional text? As Prof. Michel Rosenfeld puts these questions:

> "Who are those who are legitimately subjected to the constitution? Those within the actual reach of the newly minted powers derived from the constitution? Those who actually, or ought to, accept the new constitutional order? Citizens of the nation-state or other political unit that has adopted the constitution? Finally, what is the subject matter of the constitution? That which the constitutional text states? Its evolving

[1] On constitutional identity and its characteristics, see the writings of Professor Michel Rosenfeld, who is one of the leading experts on the subject: MICHEL ROSENFELD, ED., CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY (hereinafter: ROSENFELD, CONSTITUTIONALISM); MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT (Routledge, 2010) (hereinafter: ROSENFELD, IDENTITY).

> interpretations throughout its history (the 'living constitution' as opposed to the constitution frozen at the time of its drafting)? The constitution's prescriptions only to the extent that they are compatible with the normative ideals of modern constitutionalism?"[2]

10. **Limiting Sovereignty (including in the making of a constitution) in international law:** Upon the lessons of the Second World War, the international community developed the conception that a state's sovereignty is not unlimited in its internal affairs, especially in matters concerning control over non-dominant groups. Therefore, issues relating to a constitution's legitimacy, which is considered to be the realization of the sovereignty of citizens as a constituent power, are examined according to the extent of its compliance with the principles of international human rights law. This tendency was strengthened and took root in the third wave of democratization that began in the 1990s, and with the enactment of new constitutions. This international corpus of law includes the Universal Declaration of Human Rights and all international human rights treaties to which the State of Israel is a party. These principles state that all human beings are equal; that the prohibition on discrimination on the basis of a collective affiliation (nationality, race, religion, sex, gender and language) is an absolute principle that is not subject to any compromise; that every nation has the right to self-determination; that there is no people whose rights are superior to those of another people; that minorities have collective rights (national, cultural, religious and linguistic); and that every individual's the right to dignity, equality and personal liberty, and economic and social rights is ensured.

11. In the light of recent developments in international human rights law, it is presumed that drafting a constitution or amending an existing constitution will give serious consideration to international law and human rights law.[3] These developments reinforce Hans Kelsen's theory that a state's basic norms must comply with international law and not contradict it, and therefore the constituent assembly must give weight to international law when it comes to establishing a constitution or amending a constitution.[4]

12. **The status of the Arab population living within the Green Line as a homeland minority:** A central, critically important question in examining the legitimacy of the process of producing a constitutional identity, as was done in the Nation-State Basic Law, is the treatment of non-dominant national and ethnic groups. Examining the status of these groups according to international norms is crucial. Non-dominant groups are minority groups – national, religious or ethnic minorities – but the group with special legal status is the "homeland minority". A homeland minority is not only a national

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[2] *Id*., at 19.

[3] Regarding the status of international law in domestic law, including its effect on constitutions, see: YANIV ROZNAI**,** UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS 82-102 (2017) (hereinafter: ROZNAI**,** UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS); Rosalind Dixon and Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 38 WAKE FOREST L. REV. 149 (2013); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (Oxford University Press, 2013); John Dugard, *International Law and the South African Constitution*, 8 EUR. J. INT'L L. 77-93 (1997) ; Thomas M. Franck, Arun K. Thiruvengadam, *International Law and Constitution-Making,* 2(2) CHINESE JOURNAL OF INTERNATIONAL LAW 467-518 (2003); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (Oxford University Press, 2002); Eyal Benvinisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AMERICAN J. INT'L L. 295 (2013); Samantha Besson, *Sovereignty, International Law and Democracy*, 22(2) EJIL 373 (2011); Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5(1) GLOBAL CONSTITUTIONALISM 109 (2016); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22(2) EJIL 315 (2011); Harold Koh, *Why Do Nations Obey International Law?*, FACULTY SCHOLARSHIP SERIES, YALE LAW SCHOOL, PAPER 2101 (1997), *available at*: http://digitalcommons.law.yale.edu/fss_papers/2101.

[4] HANS KELSEN, THE PURE THEORY OF LAW 320, 330-331 (1967).

minority group that has emerged within the state and over time has become a minority; it is a group that belonged to the majority in its homeland and became – unwillingly and forcibly – a homeland minority in its historical homeland. The philosophy of rights in international literature and norms is based on the possibility of imagining as much as possible the realization of the self-determination of these groups within the state, and this is expressed in the recognition of their collective rights, including the recognition of historical injustice and the guarantee of their special rights to the land.[5]

13. Whereas the political status of the Arab-Palestinian citizens has changed to a minority in their homeland, involuntarily, and since their adherence to their national identity has not weakened; and whereas the rights of a homeland minority include, *inter alia*, those that would have been preserved and developed, to the extent possible, had it not been transformed into a minority in its own homeland, the legal starting point of this petition is that the Arab citizens of the State of Israel are a homeland minority, and an integral part of the Palestinian people and of the Arab nation.[6]

14. The report of the State Commission of Inquiry headed by Justice Theodore Or referred to this special status of the Arabs in Israel as follows:

> "5. First, the Arab minority in Israel is an indigenous population, which views itself under the hegemony of a majority that is essentially not as such. In the traditional distinction between "indigenous minorities" and "immigration minorities", the Arab minority in Israel clearly belongs to the first category. Generally, the indigenous character of a minority strengthens its self-awareness and the validity of its claims to a large extent beyond those of minorities that are emerging, for example, from the integration of immigrants into welfare societies in order to improve their situation. This is the case for the Arab minority in Israel. The value of 'Sumoud', i.e. the resolute attachment to the homeland in the face of the challenges posed by the Jewish majority, which they in turn perceive as an immigrant society, is prominent in the Arabs' worldview. This equation of a "native" minority versus an "immigrant" majority has the potential to increase tension.
>
> 6. Second, the Arab minority in Israel is a reincarnation of a majority population. Unlike other minorities in the region, who have held the status of minority for hundreds of years, the Arabs in Israel have become a minority only recently. They carry with them the legacy, attitudes, and expectations of those who have always been partners in a majority community (at least the Muslims amongst them), and who even

[5] See: United Nations Declaration on the Rights of Indigenous Peoples. The leading book on this subject and which relates the developments in international law on the issue of homeland minority is the book by prominent political philosopher Will Kymlicka: WILL KYMLICKA, MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY (2007).

[6] For this special status in the legal literature, see, for example: Oren Yiftachel, *Ethnocracy, Geography and Democracy: Comments on the Politics of Judaizing the Land*, 19 ALPAYIM 78 (2000) [Hebrew]; Yousef Jabareen, *On the Constitutional Status of the Arab Minority in Israel: Proposal for a New Order*, 7 STATE AND SOCIETY 105 (2010) [Hebrew]; Ilan Saban *The Collective Rights of the Arab-Palestinian Minority: The Reality, the Nothing and the Taboo Area*, 26 IYUNEI MISHPAT 241 2002 [Hebrew]; Eyal Benvenisti, *Protection of Minority Communities in the Courts*, 3(2) ALI MISHPAT 463 (2003) [Hebrew]; Hassan Jabareen, *The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place With No Palestinian Memory in* CHALLENGING ETHNIC CITIZENSHIP 196 (Daniel Levy and Yfaat Weiss eds., 2002) and 6 MISHPAT UMIMSHAL 53 (2001) [Hebrew]; Gila Stopler, *The Arab Minority, the Ultra-Orthodox Minority*, *in* LAW, MINORITY AND NATIONAL CONFLICT 11 (Raef Zerik and Ilan Saban eds., 2017) [Hebrew]; MAZEN MASRI, THE DYNAMICS OF EXCLUSIONARY CONSTITUTIONALISM, ISRAEL AS A JEWISH AND DEMOCRATIC STATE (2009).

with the expansion of the Hebrew *Yishuv* during the Mandate period, numbered twice as many as the Jews. The transformation that turned them into a minority of less than 20% of the country's population was not easy to internalize. Their revolt against it was expressed, among other things, in the refusal to accept being labeled as "minority members" by the state's institutions, as well as their awareness that they are an extension of a larger human grouping, which constitutes a majority in the Middle East, and fueled their displeasure with their definition as a minority.

7. Third, this transformation was the result of a resounding defeat suffered by the Arabs in their war against the Jewish *Yishuv*. The state within which they found themselves a minority constitutes, by its very existence, a constant reminder of their stinging defeat; or, as one of their leaders put it, "The state was founded on the ruins of the Palestinian community." The establishment of the State of Israel, celebrated by the Jewish people as the fulfillment of the dream of generations, involves their historical memory of the most difficult collective trauma in their history – the *Nakba*. Even if they do not speak of it day and night, the birth of the state is inextricably linked to the conflict between two national movements, which led to a prolonged, bloody conflict. The substance and symbols of the state, which are also anchored in the law and which highlight the victories in this conflict, point to the Arab minority's defeat, and it is doubtful whether they have a way of truly identifying with them. Time can perhaps reduce the pain, but the stronger the national consciousness, the greater the awareness of this problem, which accompanies the state's very establishment."[7]

15. Then-Chief Justice Barak also discussed the Arab community's uniqueness as native Arabic speakers in a case involving the use of the Arabic language on municipal signs in the mixed cities. As he puts it, the Arab minority is a minority that has lived in Israel "from time immemorial", and which differs fundamentally from an immigrant minority. The Arabic language "is a language that is related to the cultural, historical and religious characteristics of the Arab minority group in Israel."[8]

16. **The Principle of Non-domination:** In the present petition, terms such as the control and coercion of one group over another will be used frequently and we will therefore clarify these concepts. In the pluralistic political reality of many societies, there are ethno-national and native minorities who demand self-determination within the state, the main aspect of which is the recognition of collective rights. The exclusive realization of the principles of sovereignty and self-determination [by the majority] are perceived by these minorities as external control and as the negation of their collective autonomy.[9] As elaborated below, the International Covenant on Civil and Political Rights emphasizes the element of lack of control as an important part of the realization of the self-definition of all national groups, according to which people can be free only when conditions exist that enable human beings to exercise their civil, social, economic and cultural rights.[10]

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[7] Report of the State Commission of Inquiry to Clarify the Clashes between the Security Forces and Israeli Civilians in October 2000 – Volume I 27-26 (2003).

[8] HCJ 4112/99 Adalah v. The Municipality of Tel Aviv-Jaffa, 50(5) PD 393, 419-418 (2002) (Isr.) (hereinafter: Adalah v. Tel Aviv-Jaffa Municipality).

[9] For discussion of concepts of limited sovereignty, see: IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 255-65 (Oxford University Press, 2000) (hereinafter: YOUNG, INCLUSION AND DEMOCRACY).

[10] Iris Young's definition, which contributed clarifying the idea of freedom from domination and which is consistent with the International Covenant on Civil and Political Rights, can also be used here. See: *Id.*, at 259.

17. **The connection between practice and the Nation-State Basic Law:** During the discussions that took place before and after enactment of the Basic Law, it was argued that most of its provisions effectively ground daily practice and politics, including laws and rulings, and that the Law is therefore only declaratory. The petitioners will argue herein that there is a substantial difference between [problematic policies based on] practice and "ordinary politics", which are in themselves invalid, and a basic law that makes them constitutional. As a result of the process of constitutionalization, the practice becomes a permanent matter, one which is no longer subject to contemporary political trends. The grounding of [these practices] in the current Basic Law gives the practice a meta-constitutional status that sends out a clear, unequivocal message to all the authorities and obliges them by law to discriminate against Arab citizens, thereby turning discrimination into an official, systematic and institutional matter, and a constitutional value within the Israeli legal system.

18. In addition to the constitutional grounding, given the Basic Law's educational function, there is also an educational aspect that applies to educational institutions. It becomes a constitutive element in the constitutional and political socialization of the population and in its values, and it also has the ability to demand and instill loyalty to its constitutional values.[11] Constitutional grounding is tantamount to a decisive determination declaring the intent to achieve certain goals, and its implementation will now be carried out in the name of the rule of constitutional law. The Israeli constitution is not, therefore, the same as it was prior to the enactment of the Nation-State Basic Law. For these reasons, the Nation-State Basic Law is a "constitutional moment", in the sense articulated by the legal scholar Bruce Ackerman, which seeks to change the existing constitution.[12]

19. Therefore, grounding practices that are the product of the processes of "ordinary politics", which include common law declarations, in a constitutional (and even meta-constitutional) norm constitutes a "new beginning" (in its constitutional sense) that is irreversible and of decisive influence, and which necessitates a principled discussion on it and on its implications. The discussion will raise various questions relating to constitution-making, legitimacy, citizenship and cohesion, coercion, consent, etc.

20. In this context, the petitioners concur with the Gavison Report, which drew a conceptual distinction between questions relating to the constitutional grounding and the constitutional determinations made within the Nation-State Basic Law, and between ordinary politics, including, *inter alia*, the Supreme Court's rulings.[13] The [then] Justice Minister appointed Prof. Ruth Gavison to examine issues concerning the constitutional enactment of Nation State Basic Law, and recommended that the state's vision should not be constitutionally enshrined in light of the decisive weight of constitutional determinations in issues that are still at the heart of national and religious discord, including the issue of borders. The report concluded that constitutional grounding [in this case] raised new questions and complex issues more relevant to legitimacy, consensus, and civil cohesion.[14]

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[11] The educational dimension of the law has occupied political philosophers since the time of Plato, and it is a major element in the sociology of law. See Brian Burge-Hendrix, *The Educative Function of Law*, in LAW AND PHILOSOPHY 243 (Michael Freeman and Ross Harrison eds., 2007).

[12] BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS (Harvard University Press, 1991).

[13] Ruth Gavison, Constitutional Anchoring of the State Vision? Recommendations by virtue of the appointment by the Minister of Justice from August 2013 and background documents and their formulation (2015) (hereinafter: the Gavison Report or the Report). The report is available here [Hebrew]:
http://media.wix.com/ugd/ebbe78_44305ffd44d34f77a40db8623be25a89.pdf

[14] On page 30, the Gavison report states: "Today, Israeli society does not have sufficient agreement on a common framework in which a discussion and a decision on the basic arrangements could be held. The parties to the various disputes prefer a relatively flexible reality in which they can make achievements in matters that are close to their hearts within the framework of "ordinary politics". It is this reality that weighs not only on the completion of the

21. On the basis of these premises, the Petitioners now turn to the Basic Law.

III. ARTICLE 1: ETHNIC SUPREMACY AND CONTROL

22. Article 1 of the Basic Law provides that:

> "(a) The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established;
>
> (b) The State of Israel is the nation-state of the Jewish people, in which it realizes its natural, cultural, religious and historical right to self-determination;
>
> (c) The realization of the right to national self-determination in the State of Israel is unique to the Jewish people."

23. The Basic Law does not explicitly define the territory of the Constitution, since Article 1 (a) also refers to territory that is occupied territory under international law (under the designation "*Eretz Israel*") and to "the State of Israel". It does not distinguish between the two and does not specify the boundaries of the "State of Israel" for the purposes of the law, and blurs the distinction between "inside" and "outside", as will be explained below. In any case, it should be noted that Article 1 is effectively applied to areas defined as occupied territories under international law (East Jerusalem and the Golan Heights) and opens the door to the application of Israeli law to the Occupied Territories, in an act of annexation that violates international humanitarian law.[15]

24. The stipulation in Article 1 of the Basic Law that self-determination is "unique to the Jewish people" means that the Jewish population has the collective right to govern and control the territory and its inhabitants; it alone holds the right to decide on the allocation and distribution of rights to all non-Jewish residents; it is for [this group] alone to decide on the manner of the Constitution's application in the parts of *Eretz Israel*; and that the entire territory of Mandatory Palestine is the "historical homeland" of the Jewish people, and only theirs, and they hold the exclusive right to the realization of self-determination in this territory; and that the indigenous Palestinian people, who have lived in this territory "from time immemorial", have no right to national self-determination in their historical homeland.

25. Even with respect to the territory of the State of Israel within its recognized borders under international law, this article contradicts fundamental principles of international human rights law. Firstly, it establishes a constitutional order based on supremacy and ethnic domination that clashes head-on with the basic principle of democratic regimes. This is the principle of 'demos', also known as popular sovereignty, which is based on the view that all residents of the territory subject to the constitutional order

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constitution, but also on the enactment of a Basic Law for anchoring the State's Vision." On page 34, Gavison makes it clear that: "I explained above why I do not support the constitutional anchoring of the vision in general and the enactment of a Nation-State Law, which contains a separate anchoring of the Jewish element in the vision of the state, in particular. [...] But in the countries that have chosen to anchor their vision, this is done in a declarative preamble of a complete constitution, in the framework of constitutional politics, and when such a move enjoys broad cross-party political support, after a process in which all sectors [in society] were invited to participate. The vision articles also [usually] combine particularistic elements with clear civil, democratic, and universal commitments. This is not the situation in Israel today, and these are not the proposals placed on the Knesset table."

[15] On this issue, see the ICJ Advisory Opinion on 9 July 2004 regarding the separation wall that was built by the Israeli government in the West Bank: ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004. (The ICJ emphasized the status of all the territories occupied by Israel in 1967 as occupied territories; hereinafter: ICJ Advisory Opinion on the Wall).

are equal, and together constitute the sovereign collective, and together they realize the principle of self-rule/self-governance. The principle of equality in this spirit is enshrined in Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR), which states:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[16]

26. Secondly, Article 1 contravenes the principles of equality under Articles 26 and 27 of the ICCPR, which guarantee both the principle of non-discrimination and the collective rights of minorities.[17]

27. Thirdly, ethnic supremacy also violates human dignity, and particularly so in relation to indigenous groups or to non-dominant minorities, since it projects principles of domination, inferiority, exclusion, and humiliation. In a previous judgment, this Honorable Court addressed the situation of blacks in the United States during the period of segregation on the basis of the principle of "separate but not equal", as an illustration of the violation of the core aspects of human dignity, wherein the right is absolute.[18]

28. Fourthly, ethnic domination and supremacy are contrary to the principles of the United Nations Charter, according to which no people has the right to rule over another people, and that every nation has the right to self-determination. The importance of this principle in international human rights law is clear from the fact that it appears in Article 1 of the ICCPR.[19] The rationale for the right to self-determination rests on freedom in the sense of "non-domination", based on the provisions enshrined in the preamble to the ICCPR, according to which people can be free only under conditions that allow them to realize their civil and political as well as economic, social, and cultural rights equally.[20]

29. There is currently no constitution in the world that is perceived as democratic that has a clause similar to Article 1 of the Nation-State Basic Law, wherein the purpose of the regime is to serve a single ethnic group and the state belongs exclusively to this group. The provisions of Article 1 are the most extreme since the end of the Apartheid regime [in South Africa]. Even the research carried out by the Respondent through the Legal Bureau – Legislation and Legal Research submitted to the Joint Committee of the

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[16] International Covenant on Civil and Political Rights (opened for signature in 1966.) The State of Israel signed the Convention on December 19, 1966, and ratified it on August 18, 1991. It entered into force in Israel on January 3, 1992.

[17] Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[18] Justice Dorner was the first illustrate this in HCJ 4541/94 Miller v. Minister of Defense 49(4) PD 94, 133-132 (1994), and referred to the racist principle of "separate but equal," and so did then-President Barak, in HCJ 6698/95 Qa'adan v. The Israel Land Administration 51(1) PD 258 (2000) (hereinafter: *Qa'adan*).

[19] Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[20] "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

Knesset Committee and the Constitution, Law and Justice Committee (hereinafter: the Joint Committee), which drafted the Basic Law, explicitly states that there is no constitution in the world that appropriates the state or the regime exclusively for one ethnic group. It also states that the sovereign in the sense of the constitutional principle of "We, the People" is always based on the inclusion of all residents of the territory on an equal basis. The study concludes, based on the comparative survey conducted, that constitutions generally adopt one of two ways of dealing with different ethnic groups: the first is to include the identity of the constituent political community that constitutes the sovereign as containing the main national groups whom are specifically recognized, and the second relies on the "Citizens' Nation State" concept understood in terms of the traditional view of the territorially-based "nation-state", which is conceived by the concept of the sovereign as encompassing all citizens and residents who comprise the nation of civilians.

= = A copy of the study of the Knesset Legal Department regarding constitutional preambles is attached and marked as Appendix P/3.

30. Furthermore, the aforementioned Knesset study provides insights into the mention of the "Land of Israel" as the historical homeland of the Jewish people in Article 1 of the Basic Law. Notwithstanding historical narratives, giving a constitutional expression to parts of an "external" and/or occupied territory is extremely problematic in light of its implications for the potential scope of the right of self-determination of the Palestinian people living in this territory, as well as for the growing gap between Israel's obligations under international law and the subjective perception within the state of the scope of these obligations. The Knesset study notes that, according to its comparative analysis, "non-territorial definitions or formulations that could lead to hostility from neighboring countries should be avoided."[21] In this context, it states that in the preamble to Hungary's constitution, citizens of neighboring states were also included as Hungarian citizens. Here, the following remarks made by the Venice Commission (The European Commission for Democracy through Law) are relevant:

> "Such values, as well as their legislative implications, should be left to the ethical debates within society and ordinary democratic procedures, respecting at the same time the country's human rights and international commitments…It is also of particular importance that the constitutional legislator pays proper attention to the principle of friendly neighbourly relations and avoids inclusion of extra-territorial elements and formulations that may give rise to resentment among neighbouring states."[22]

31. The Legal Advisor of the Joint Committee proposed an alternative proposal during the deliberations on the Basic Law, which would have included the principle of equality and a provision that the state belonged to all its citizens. The proposal was not accepted. As the Knesset's Legal Advisor explained, "We also recommended during the discussions in the committee that it would have been appropriate, as has been done in other constitutions, alongside the mention of the Jewish nation there be a mention of the issue of equality and the issue of the state belonging to all citizens, [but] the committee chose not to make this into a law".[23]

32. In addition, the Gavison Report noted the critical importance of the issue of inclusion to the existence of democracy, stating that the Nation-State Basic Law should express the concept of civic cohesion in the context of the Arab minority in Israel:

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[21] The study of the Knesset's legal department regarding the introduction clauses in the constitutions, at p. 16.
[22] Ibid.
[23] Session 19 of the Joint Committee, the 20th Knesset (16.7.2018, at 02:06).

> "The challenge of civic cohesion is to strengthen the state's political framework that enables meaningful partnership in the state's enterprise for all its citizens, regardless of religion or nationality, and to strengthen the sense of partnership and belonging of all citizens to their country – even though the state is not completely neutral and civil in full sense of the word. Strengthening civic cohesion is a clear result of the democratic component of the vision, which is based on equal and inclusive citizenship. It is also required by the perception of the state's role as promoting the public living within it and its welfare."[24]

33. Historical experience and the evolution of human rights law make clear that a constitution which forces a constitutional identity on other groups living under the regime without their consent, or excludes them on the basis of nationality, religion or race, and establishes the supremacy and domination of one ethnic group over other groups is illegitimate since it contains racist characteristics. A global custom has evolved since the 1990s in the field of constitution-making that opposes such coercive aspects and ensures that the identity of the constitution reflects, first and foremost, democratic values, based on an inclusionary conception of the principle of 'demos', which encompasses all groups, citizens and residents equally. An approach that seeks to perpetuate the past or impose a constitutional identity on the basis of the military victory of one group over a defeated group stands out in this context as colonialist. For these reasons, new democratic constitutions seek to create a new constitutional identity that negates the said effect, while attempting to reach compromises and agreements that look beyond contemporary political power relations.[25] The South African Constitution is the representative model of this wave:

> "We, the people of South Africa, recognize the injustices of our past; honour those who suffered for justice and freedom in our land […]. Believe that South Africa belongs to all who live in it, united in our diversity […]."

34. Thus, for example, the report of the International Institute for Democracy and Electoral Assistance (IDEA), which reviewed the issue and remarked on the imposition of constitutional identity on other groups living under in same constitutional territory:

> "Unlike older, classic constitutions, perhaps, constitutions today do not necessarily reflect existing national polities or power relationships, consolidating the victory and dominance of a particular class or ethnic group. Instead, they are instruments to enhance national unity and territorial integrity, defining or sharpening a national ideology, and developing a collective agenda for social and political change—negotiated rather than imposed."[26]

35. According to a study by Prof. Liav Orgad, who compares the formulation of the "We The People" component in constitutions, constitutional identity around the world is not based on the imposition of a constitutional identity that excludes other groups through the appropriation of the constitutional identity by one ethnic group. In the Israeli context, he notes that the attempt to establish a constitutional identity in

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[24] The Gavison Report, *supra note* 13, at 20.

[25] There are many examples of inclusion and we mention only a few. For example, Canada included both French-speaking natives and Native Americans within the political community in the Constitution and recognized not only their individual rights but also their collective rights, including the right to autonomy. This is also the case in Belgium where the Constitution defines in section 2 who the citizen is as follows: "Belgium consists of three communities: the French community, the Flemish community and the German-speaking community."

[26] INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION 13 (Yash Ghai and Guido Galli Contributors, 2006), *available at*: https://www.idea.int/sites/default/files/publications/constitution-building-processes-and-democratization.pdf.

the sense of "We The People", which appropriates the state exclusively to the Jewish people, is exceptional in the global landscape, as it entrenches and perpetuates the national rift and the current conflict.[27]

36. Notably in certain cases, when there was an attempt to forcibly determine the identity of the sovereign as belonging exclusively to one ethnic group, this move led to violence among the citizenry. One such example is the case of Macedonia. In the early 1990s, the majority in Macedonia sought to declare in the preamble to the constitution that, "Macedonia is the state of the Macedonian people", despite the fact that 20 percent of the country's population is comprised of indigenous Albanians. Extreme violence broke out as a result, leading to the killing of dozens of civilians. Finally, the Ohrid Agreement was signed, leading to amendments to the preamble to the constitution. The identity of the political community was defined in the following manner:

> "Taking as the points of departure… the historical fact that Macedonia is established as a national state of the Macedonian people, in which full equality as citizens and permanent co-existence with the Macedonian people is provided for Albanians, Turks, Vlachs, Romanies and other nationalities living in the Republic of Macedonia…"[28]

37. The American, European, and South African historical experiences show that the exclusion of groups from the political community of the constitution leads to persecution and racism. Although the American "We The People" is phrased in neutral language – in contrast to Article 1 of the Basic Law: Nation-State – it was nevertheless interpreted by the US Supreme Court in the 19th century as referring exclusively to the country's white population. On this basis, one of the most notorious judgments in human history, in the case of *Dred Scott*, was that blacks were not part of the nation and therefore were not subjects of constitutional protections, thereby reaffirming the continuation of slavery.[29] The influence of this judgment was decisive in American history, and only through civil war did the nation succeed to extricate itself from its ramifications, even though the concept of ethnic supremacy continued to apply via the segregationist principle of "separate but equal" until its gradual abolition from the second half of the 20th century onwards. The same applies to the Native Americans in the United States, whose designation by the US Supreme Court as not falling within the constitutional principle of "We The People" made them foreigners in their own homeland. Their designation as "foreigners" excluded them from the constitution's protections, paving the way in the 19th century for their removal from their land for the sake of promoting white settlement.[30]

38. The colonialist aspect of the US Constitution also applies to territories that the US has occupied or annexed. Exclusion from constitutional protections was not limited to the internal (black and native) population, but also to the populations of territories that the US annexed or conquered at the end of the 19th century (including Puerto Rico, Guam, and the Philippines). In a group of cases during the early 20th

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[27] Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CON L. 714, 716-7 (2010).

[28] The introduction of the Constitution of the Republic of Macedonia. For the Macedonian case and a review of the various constitutions, see Amnon Rubinstein and Liav Orgad, *The Preamble to the Constitution and its Legal Status: The Case of Israel*, 11 HAMISHPAT 79 (2007) [Hebrew].

[29] *Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1857), *superseded* (1868).

[30] As for the use of 'We The People' as a reason not to apply the Constitution to blacks, Indians, immigrants, and the territories annexed or occupied by the United States, see: Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002). On the issue of the dispossession of Mexican landowners from their assets after the US-Mexico War and the annexation of the territory of the State of Texas and others with their inhabitants, through a biased application of legal doctrines by the courts based on race considerations, see Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife"*, 4 MICH. J. RACE & L. 39 (1998).

century, known as the “insular cases”, the US Supreme Court was required to decide on questions relating to the status of these territories and their residents, and dealt, *inter alia*, with issues of taxation and trade, the scope of the application of the US Constitution, and the scope of their residents’ entitlements to its protections. In one of these cases,[31] the status of Puerto Rico was discussed for the purpose of ruling on questions relating to taxation on exports to and imports from the territory, but additional questions arose about the automatic application of the constitution to US-controlled territories. The American administration and the industries involved in this process supported a colonialist, extra-constitutional regime. While the industries’ position was based on the cultural characteristics of the Puerto Rican population as a “semi-civilized population”, the government’s position turned on principles of “social contract”, in support of the view contra the inclusion of the new populations in the American political community. It argued that the principle of sovereignty allowed for the exercise of control over populations as subjects, and that the decision to grant rights and citizenship status to new populations was at the exclusive discretion of Congress. According to Justice Brown, one of the majority judges:

> “There seems to be no middle ground between this position and the doctrine that, if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.”[32]

Accordingly, Puerto Rico was determined to have the status of a territory belonging to the United States but not part thereof:

> “We are therefore of opinion that the Island of Porto Rico [Puerto Rico] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution…”[33]

39. This ruling, together with other rulings that dealt with US-controlled territories, should be read against the perception of American citizenship as entailing colonialist elements based on white supremacy. “Social contract” conceptions that constitute the American demos underlying the constitution, justified a distinction between territories belonging to the US and those that are part thereof (and in this respect, the comparison with the terminology in the Nation-State Basic Law concerning “Eretz Israel” and the “State of Israel” becomes clearer).

40. This was also the case in Europe with the fall of the civil state (or [the civic] nation-state) and the rise of the ethnic state in the period between the First and Second World Wars. The philosopher Hannah Arendt explains that the European colonial model in Africa, in which the European white race was deemed superior to the local population, was transferred into the European countries that transformed from national states (in which the citizen was equal in relation to the state regardless of his/her ethnic affiliation) into ethnic states. As a result, Jews and other groups who were perceived as not belonging to the dominant ethnic group became foreigners in their home countries. When the principle of equality of the national state, built on the premise that “humans can act in a shared world, change it and build it together with their equals and only with their equals”, was struck down, the ethnic state appeared, and

[31] *Downes v. Bidwell*, 182 U.S. 244 (1901).
[32] *Id*., at 279-80.
[33] *Id*., at 287.

principles of difference assumed new political significance. Diversity has now become a question of ethnic classification for the purpose of exclusion: between those belonging to the ethno-nationalism and those that fell outside of it, regardless of civil status. It was in this manner that anti-Semitism gained tremendous power, as the Jews came to be perceived as a different nation, not for the purpose of recognizing differences and acknowledging social diversity, but for the purpose of excluding them from the hegemonic ethnic collective. This was the internal colonialism that was applied against all groups that have been removed from the collective.[34]

41. Another example is the "New Constitution" of South Africa of 1983, which established, *inter alia*, the duty to respect the equality and dignity of every person. Regarding languages, Article 89 stipulated that the official languages were English and Afrikaans, and that the languages of the various Black tribes could be used as additional official languages in Black territories. However, Article 100 of the Constitution stated that the political community (population groups) is comprised of "White persons", "Coloured persons" and "Indians".[35] In condemnation of the "new constitution", the UN Security Council issued Resolution 554, of 17 August 1984, in which it:

> "*Declares* that the so-called 'new constitution' is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the 'new constitution' will further aggravate the already explosive situation prevailing inside *apartheid* South Africa;
>
> *Convinced* that the so-called 'new constitution' endorsed on 2 November 1983 by the exclusively white electorate in South Africa would continue the process of denationalization of the indigenous African majority, depriving it of all fundamental rights, and further entrench *apartheid*, transforming South Africa into a country for 'whites only'."

42. Article 1 of the Nation-State Basic Law establishes the principle of discrimination as a constitutional value. It is clear from history that exclusion from the political community constitutes a violation of the principle of the prohibition of discrimination, and that the determination of constitutional identity is of decisive importance in determining who is "politically included" and who is deemed an "outsider", who is an equal and who is "the other" or "the foreigner."[36] It is therefore unsurprising that the Basic Law does not explicitly include the principle of equality. The right to equality by its very nature clashes with Article 1 of the Basic Law, which enshrines Jewish ethnic supremacy in the state. The principle of non-discrimination based on the concept of "equal treatment of equals" is rendered irrelevant in light of the law, since the legislator does not view the two groups, Jewish and Arab, as equal. Just as France is the state of the French and anyone who is not French is outside the group of equals, so in the State of Israel, the state of the Jewish people, it is possible to exclude non-Jews (even those who hold citizenship) as foreign and unequal. This becomes all the more significant when the concept of "ethnic self-determination" is an all-encompassing principle.

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[34] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 448 (Idith Zertal trans., 2010) [Hebrew trans.].
[35] Republic of South Africa Constitution Act 110 of 1983 ACT, *available at*: https://law.wisc.edu/gls/cbsa2.pdf. See also: Xia Jisheng, *Evolution of South Africa's Racist Constitutions and the 1983 Constitution*, 16(1) ISSUE: A JOURNAL OF OPINION 18-23 (1987).
[36] Laurence H. Tribe and Thomas K. Landry, *Reflections on Constitution Making*, 8 AM. U. J. INT'L L. & POL'Y 627, 630 (1992-1993).

43. To the extent that there ever was any space for the application of the principles of non-discrimination and equality, upon the enactment of the Nation-State Basic Law, this space has been reduced to a "residual space", the scope of which will be determined only after the interests of the Jewish population have been defined, and in accordance with them. The Basic Law actually moves on an axis, one side of which is the racist principle expressed in the concept of "separate but equal", and the other the more racist principle inherent to the concept of "separate but unequal," which directly and un-apologetically privileges the Jewish population. The different versions of Article 7 of the Nation-State Basic Law that appeared in the drafting stages during the preparations of the bill for the second and third readings reflect the normative position of these principles in the legislator's consciousness. In its earlier version, Article 7 granted the authority to establish "communities on the basis of religion or nationality" (which could be interpreted as an expression of the "separate but equal" principle). However, the final wording of Article 7 made "Jewish settlement" a national value of constitutional status, which mandates the encouragement, promotion and consolidation of Jewish settlement ([tantamount to] separate but unequal), as will be detailed below.

44. The Jewish regime, based on the aforementioned Article 1, will act primarily for the benefit of the Jewish population everywhere, since the regime belongs to it and is intended only to serve it. Thus, external [Jewish] settlements [in the Occupied Territories] are preferable to the Arab communities in Israel that are on the "inside" and the rights of the protected population in the West Bank (in a manner similar to the logic underlying the Insular cases discussed above). In the words of philosopher Seyla Benhabib, "Democracies have borders and empires have frontiers."[37]

45. The lessons from the legal history of nations, as well as the principles of international human rights law, including fundamental democratic principles, necessitate the invalidation of the Nation-State Basic Law. The colonialist and racist characteristics of Article 1 violate the fundamental precepts of human rights, as enshrined in the aforementioned international conventions, including the United Nations Charter. The Nation-State Basic Law, including Article 1, allows for the establishment of a constitutional order that is deleterious to the Arab population as an indigenous group, both within the Green Line and outside it. It sets out an ethnic criterion for the purpose of defining the relevant political community in the Israeli constitutional order, as an exclusive and exclusionary expression of the demos principle, while nullifying the application of neutral, universal criteria based on the territorial and legal status of the individual, whether a citizen, a permanent resident, or a "protected resident" under the laws of occupation. At the same time, it attributes to every Jewish individual, *qua* Jewish, membership in the political community, and grants him or her, by virtue of the Basic Law, a superior status, both conceptually and practically, within the hierarchical constitutional order.

46. The principles of exclusion, discrimination, separation and Jewish supremacy do not arise only from Article 1. On the contrary, they are woven into all the other articles, each of which is based on and reflects these invalid principles. Article 1, is, so to speak, the "rationale clause", and provides the basis on which the provisions of the other articles are justified. In the next section, the Petitioners discuss the separate tracks promoted by the Basic Law in the realm of the "source of all rights": the right to citizenship.

IV. WHO IS A CITIZEN? SEPARATE TRACKS TO CITIZENSHIP

47. The Nation-State Basic Law states that only the citizenship of Jews has constitutional status. The Basic Law does not define who is a citizen; however, Article 5 of the law states that, "The state will be open for Jewish immigration and the ingathering of exiles." Therefore, every Jewish person [in the world]

[37] SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 33 (Oxford University Press, 2006).

is a potential citizen with a constitutional status, while non-Jews are not accorded equal status or treatment. This arrangement is reinforced by the fact that there is no basic law in the State of Israel that defines the Arabs in Israel as citizens, and no basic law that includes equality on the basis of nationality as a codified constitutional right.

48. It is important to emphasize that there is a significant difference between grounding citizenship in a written constitutional document and grounding it in laws or caselaw. A basic law that determines the constitutional identity of the state must address the question of who is a citizen, and cannot, democratically speaking, address only a single group unless it rejects the basic principle of democracy on which it claims to rely. As Professor Michel Rosenfeld stated:

> "The citizen is the core unit of the constitutional order and of constitutional identity. Both the imagined community that defines the nation and the one that projects an identity on the constitutional order are grounded in the citizen. The citizen is the constituent unit of the constitutional subject in all its multiple identities, chief among them, the *who* that makes the constitution, the *for whom* it is made, and the *to whom* it is addressed. The citizen is at the heart of modern constitutionalism and is the principle actor in birth, deployment and continuing life. Most dramatically the French Revolution transformed the king's subjects into citizens and equated, in theory if not in fact, being human to being a citizen as attested by the 1789 Declaration of the Rights of Man and the Citizen. Similarly, though less explicitly because of the profound incompatibility between the spirit of the Enlightenment and slavery, the 'We the People' that gave itself the American Constitution in 1787 was made up of 'We the Citizens'."[38]

49. In addition, the Nation-State Basic Law makes two moves against Palestinian residents of Jerusalem. First, it applies the constitutional identity [of the state] on them in violation of international law, which explicitly refers to their territory as occupied[39] and prohibits the occupying power from demanding loyalty to its constitutional identity.[40] The second, colonial move, is to apply the Israeli constitution directly to them without making any mention of their status, thus leaving them completely absent. This absenting is compounded by the fact that they are natives, as stated above. [Supreme Court] Justice Mazuz ruled in the case of *Abd al-Haq*[41] that, "considering the special status of East Jerusalemites as indigenous residents – as opposed to those who won the right to permanent residency by license after immigrating to Israel ...".[42] On this matter, Justice Vogelman noted:

> "When the Minister is required to examine a request to restore a permanent residency permit to a resident of East Jerusalem, he must take into account the unique situation of these residents who – unlike those who immigrated to Israel and wish to receive status there – have a strong affinity to their place of residence, And the parents of their parents were born there – and they have been maintaining family and community life for years."[43]

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[38] ROSENFELD, IDENTITY, *supra note* 1, at 211.
[39] ICJ Advisory Opinion on the Wall, *supra note* 15, at pp. 98-99.
[40] Article 45 of the Hague Regulations of 1907 states: "It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power." See also: HCJ 7803/06 Abu Arafa v. Minister of the Interior (Published in the Databases, 13 September 2017).
[41] AdminA 3286/14 Abd el-Haq v. Minister of the Interior (published in the Databases, 14 March, 2007).
[42] *Id.*, at para. 28 of the opinion of Justice Mazuz.
[43] *Id.*, at para. 19 of the opinion of Justice Vogelman.

50. International human rights conventions prohibit discrimination in citizenship and emphasize the importance of equal citizenship. Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, to which the State of Israel is a party, states that:

> "Nothing in this Convention shall be construed as prejudice in any way to the provisions of the law of the States Parties concerning nationality, nationality or naturalization, provided that such provisions do not discriminate against any particular nationality."

51. More specifically, Article 5(4) of the same Covenant provides that individuals shall not be discriminated against on grounds of nationality or religion in the context of the right to citizenship.

52. Article 5 of the European Convention on Nationality establishes the prohibition of discrimination in citizenship, as follows:

> "The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. 2 Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently."

53. Article 27 of the American Convention on Human Rights states that while a Member State may take measures to restrict the rights enumerated in the Covenant in times of war or emergency, it may not discriminate on ethnic grounds, and in any case such limitation may not apply to the right to citizenship. In the language of the article:

> "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
>
> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), **Article 20 (Right to Nationality)**, and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights." (Emphasis added.)

54. In this context, notably, the Inter-American Court of Human Rights has stated that:

> "It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that

it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the State in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights. The classical doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the State as well as human rights issues."[44]

55. According to [Israeli] Supreme Court rulings, citizenship is a basic right. Indeed, the exclusive grounding of the Nation-State Basic Law, in constitutional terms, of the citizenship of the Jewish population (including the manner of its acquisition), without regard in identical constitutional terms, for the citizenship of the Arab population (including the manner of its acquisition), is indicative of its exclusive character. This creates an invalid distinction in citizenship based on ethnic belonging. Such partial and discriminatory grounding shows that the constitutional norm in question is inappropriate, in that it violates the function that is supposed to be achieved via the constitution. [A constitution should be] designed to regulate the status of equal citizenship as a supreme democratic value. In the *Al-Rai* case,[45] the [Israeli] Supreme Court ruled that:

"Citizenship is a fundamental right. This is the customary view in international law. For example, Article 15 of the Universal Declaration of Human Rights of 1948 states that every person is entitled to citizenship. Furthermore, the United Nations Convention on the Reduction of Statelessness, of 1961, sets forth in section 8 a prohibition, subject to a few exceptions, on depriving persons of citizenship if they will be rendered stateless. The same is also the case in many countries that have established citizenship as a constitutional right. See, for example, article 1 of the 14th Amendment (from 1868) to the US Constitution. And despite the fact that in Israel citizenship did not receive a place of honor in a Basic Law, it is doubtless one of the basic rights, because, *inter alia*, it is the basis for the right to vote to the Knesset, from which democracy arises. Of course, every administrative authority must refrain from violating a basic right, including citizenship, other than for a proper purpose and to an appropriate degree, and even more so in the revocation of citizenship, as opposed to other violations, and doubly so in the revocation of citizenship that renders a natural-born citizen stateless. The distinguished status of citizenship is also articulated in the law of nations."[46]

56. While there were separate tracks in citizenship based on the ethnic supremacy of the Jewish population prior to the Nation-State Basic Law, there is a huge difference between rooting this [difference] in the constitution, and its invalid grounding in mere practice, as stated above. In addition to the constitution having supreme status within the legal sphere, it also refines the social and political messages of society and is a source of education within society. Scholar Margaret Somers emphasizes that the social aspect of citizenship, which determines in the constitution the relationship between individuals within society and the creation of the expectation within the individual that he/she will receive a share of the collective resources allocated by the state, is an integral and independent part of the political aspect of

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[44] Inter-American Court on Human Rights, Advisory Opinion, 'Amendments to the Naturalisation Provision of the Constitution of Costa Rica', paras. 32-5; text in 5 HRLJ 1984

[45] HCJ 2757/96 Alrai v. Minister of the Interior 50(2) PD 18 (1996).

[46] *Id.*, at 22-21.

citizenship. According to Somers, one of the main purposes of citizenship is the creation of attachment and inclusion amongst individuals defined as the collective of citizens to whom the constitution applies.[47] The historical importance of the right to citizenship developed as the right to have rights within a defined and clear territory.

57. There is an inherent connection between Article 1 of the Basic Law and the issue of citizenship. The erasure of the Arabs from the democratic principle of demos by restricting the right to self-determination in the state solely on the basis of the ethnic characteristics of the Jewish population directly results in a hierarchical conception of the right to citizenship. It establishes the citizenship status of the Arab population as inferior, as it lacks formal expression in the written constitution, while, this right, by its very nature, is a right with clear constitutional characteristics. In a similar vein, the European Commission for Democracy through Law (the Venice Commission) noted the following in an opinion on the Constitution of Hungary:

> "…The Preamble has been written in the name of 'we the members of the Hungarian nation', intimating that members of the 'nationalities living with us' are not part of the people behind the enactment of the Constitution. The Constitution should be seen as the result of the democratic will-formation of the country's citizens as a whole, and not only of the dominant ethnic group. Therefore, the language used could/should have been more inclusive (such as, for example 'We, citizens of Hungary...'). It is, again essential, that a comprehensive approach is favoured in the context of the interpretation of the constitutional provisions."[48]

58. As will be clarified below, constitutional separation in citizenship tracks, as provided for in the Nation-State Basic Law, is absolutely prohibited under international law.

59. Thus, the Nation-State Basic Law does not define who is a citizen other than Jewish persons, and thus it constitutionally perpetuates ethnically-segregated tracks of citizenship based on a hierarchical-ethnic approach informed by the supremacy of the Jewish population.

V. SEPARATE LANGUAGE TRACKS AND EXCLUSIONARY COLLECTIVE RIGHTS ARRANGEMENTS

60. The Nation-State Basic Law provides for collective rights for Jews only. The Basic Law does not promote an equal rights system for the Arab population, and completely ignores Israel's obligation under international law to guarantee their collective rights, given their status as a homeland minority. Indeed, the only reference to the Arab population in the Nation-State Basic Law appears in Article 4, which demotes the status of the Arabic language.

61. Article 1 of the Basic Law guarantees the realization of the religious, cultural and historical rights of the Jewish people in Israel. Article 2 contains provisions governing the symbols of the state as Jewish: the name of the state, the state's flag, the seven-branched menorah as the symbol of the state, "Hatikva" as its national anthem. Article 4 establishes the status of the Hebrew language as the official language of the state, while granting the Arabic language a "special" status. Article 8 states that the Hebrew calendar is an official calendar in the country. Article 9 proclaims Independence Day and memorial days as official days

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[47] MARGARET SOMERS, GENEALOGIES OF CITIZENSHIP: MARKETS, STATELESSNESS, AND THE RIGHT TO HAVE RIGHTS 6-7 (Cambridge University Press, 2008).

[48] The European Commission for Democracy through Law (Venice Commission*), Opinion no. 621/2011: On the New Constitution of Hungary – Adopted by the Venice Commission at its 87th Plenary Session* 9 (20 June, 2011), *available at*: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e.

in the state. Article 10 stipulates that, "The Sabbath and holidays of Israel" are the days of rest in the State. In addition, Article 6(c) of the Basic Law establishes the State's duty to act "to preserve the cultural, historical and religious heritage of the Jewish people among Diaspora Jews."

62. The extent to which the Nation-State Basic Law is a racist and exclusionary law is clear from the sum of these provisions. It is reflected not only in the fact that the Basic Law does not recognize any collective right of the Arab population and only grounds and recognizes broad and exclusive collective rights for the Jewish population, as if the Jews in the country were a minority in need of special protections, but also in the fact that the Basic Law goes a step further and demotes the status of the Arabic language *de jure*. It consolidates the practice of not respecting its official status that existed prior to the Basic Law's passage. Consequently, the provisions relating to language and collective rights in the new Basic Law, as will be explained below, conflict with both international human rights law and Israeli domestic law.

63. Recognition of the language and collective rights of a homeland minority amounts to a recognition of its legitimate existence as a national group with unique characteristics, which also includes three different religions (Muslims, Christians and Druze). It also recognizes the diversity of this group and its right to preserve its culture, language and religions, including its holy places.

64. Notably, for the purposes of the discussion herein, the Arabs in Israel as a homeland minority are among the largest national minorities in the world. Therefore, the State of Israel has a heightened obligation to respect its status.

65. The Basic Law now seeks to grant the Arabic language a "special status", which is inferior to an "official status". It thereby creates and consolidates the tracks of ethnic separation by enforcing an additional, linguistic exclusion. This "special status" offers the possibility of using Arabic only in practice and at the individual level, but does not recognize it at the collective level as the language of the minority. The damage to the status of the Arabic language contradicts the legal situation that pertained before the enactment of the Basic Law, in which the Arabic language had official status. Article 82 of the Palestine Order in Council [which remains valid today] designates Hebrew and Arabic as official languages.

66. No judicial decision has ever denied the equal official status of the Arabic language under Article 82 of the Palestine Order in Council. Thus, for example, in the case of *Adalah v. The Tel Aviv-Jaffa Municipality*,[49] which dealt with the addition of Arabic to municipal signage in mixed municipal authorities, the petition was accepted by a majority of [Supreme Court] Justices Barak and Dorner, against Justice Cheshin's minority opinion. Then-[Supreme Court] President Barak chose to reach his decision on the basis of the principle of equality, regardless of the status of Arabic under Article 82 of the Palestine Order in Council. Rather than derogating from the official status as equal under the law, President Barak accepted the petition on the basis of the principle of equality between Jews and Arabs living in the mixed cities, and gave weight to the status of the Arab minority as a minority living in Israel "from time immemorial", emphasizing that the Arabic language is "a language related to the cultural, historical and religious characteristics of the Arab minority group in Israel", thereby distinguishing the latter from an immigrant minority. Justice Dorner also accepted the petition, by virtue of the official status of the Arabic language under Article 82 of the Palestine Order in Council.

67. Thus, the Nation-State Basic Law undermines the status of the Arabic language, and, for the first time, demotes its *de jure* status from that of an official language in Israel. In practice, the authorities did not respect the law and treated the Arabic language in a manner inconsistent with its official status. However,

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[49] *Supra note* 8.

as noted above, there is a huge gap between this unacceptable practice, and its constitutional entrenchment. The determination in Article 4(c) of the Basic Law that, "The provisions of this article shall not derogate from the status actually granted to the Arabic language prior to the coming into force of this Basic Law" is an attempt to perpetuate the prior practice which itself breached the rule of law.

68. With regard to constitutional identity and recognition of cultural, historical and religious characteristics, including symbols and rest days, Rosenfeld notes that the failure to recognize days of rest, holidays, and other symbols that identify national or religious minority groups within the constitutional identity is tantamount to not recognizing them, and conveys a message to the entire group that they are secondary, undesirable, and inferior. In his words:

> "In other cases the exclusion may not be total, but the identitarian problem remains, even if in a somewhat attenuated form. Thus, for example, in a multinational state divided along religious lines, there may be ample room for coexistence among the majority and minority religions. There may even be extensive religious tolerance enshrined in the constitutions and permeating the social and political ethos. Nevertheless, certain indicia of dominance linked to the majority religion may be inevitable, thus causing members of minority religions to be lacking in significant aspects of differentiated citizenship. For instance, if national holidays, the weekly day of rest, prominent public symbols and dominant, officially promoted standards of public symbols morality all derive from the majority religion, then the citizen belonging to a minority religion may well feel somewhat alienated from self-image projected by the polity as the whole. It would not be surprising, therefore, for that citizen to conclude that she does not enjoy the full citizenship that is endowed upon the members of the majority religion."[50]

69. In the spirit of the developments in international human rights law, many democratic states have established their constitutions in a way that explicitly recognized the rights of national, ethnic and indigenous minorities residing in them. We shall mention here the constitutions of only a few of these countries. The South African Constitution that was enacted in 1996 after the end of apartheid recognizes 11 official languages, in acknowledgement of both the ever-decreasing usage of these languages, their increasing risk of extinction, and the status of indigenous minorities in the country.[51] The Canadian Constitution of 1982 states that official languages are English and French, in acknowledgement of the French-speaking minority in the Québec region, which accounts for about 20% of Canada's population.[52] The Macedonian Constitution that was enacted in 1991, after the end of the civil war, determined that the Macedonian language was the official language, but was subsequently amended to add additional official languages of minorities living within the state.[53] The Belgian Constitution of 1994 recognizes four linguistic groups: Dutch, French, multilingual, and German speakers.[54] The Swiss Constitution of 1999 recognizes German, French, Italian and Romansh as official languages, representing all communities and minorities there.[55]

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[50] ROSENFELD, IDENTITY, *supra note* 1, at 228.
[51] Article 6 of the Constitution: S. AFR. CONST., 1996, ch. 1, § 6.
[52] Canadian Charter of Rights and Freedoms §16, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.)
[53] УСТАВ НА РЕПУБЛИКА МАКЕДОНИЈА [CONSTITUTION] Nov. 17, 1991, amend. V, §§ 1-2 (Maced.)
[54] 1994 CONST. art. 1-5 (Belg.)
[55] BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 4, 20, Switz.

70. The exclusion of the Arab minority from the public sphere, and the non-recognition of its language as an official language and of its cultural and religious rights, violates the collective right to dignity, since the collective identity of a native minority is related not only to individual identity and existence, but also to the recognition of its right to realize itself at the collective level, the group. In this context, it is important to note that Israeli case law has made reference to the connection between Arab language and culture and the right to dignity.[56]

71. The philosopher Jeremy Waldron has written about the right to collective dignity of groups that are communities with unique characteristics in terms of culture, identity, and [common] destiny. The violation of the right to dignity of this kind goes beyond the violation of the right to dignity of the individual:

> "It is possible that everything we want to say about the dignity of a people could by some heroic effort of analysis be reduced in the end to an account of the massive contribution that a given community makes to sustaining the dignity of its individual members. But it is also possible a people qua community has a human importance in terms of culture, identity, destiny that goes beyond what is severally or cumulatively good for the human individuals in that it comprises an importance that cannot be characterized except in communal terms. It is possible that even though groups are in the end nothing but composites of individuals, yet there is something in the group as such that has importance in itself. We should be ready to give the best account we can of this something, if it exists, and it may be impossible to do so without characterizing it in dignitary terms."[57]

72. By virtue of the recognition of the right to dignity in international law, the recognition of the rights of ethnic, national, and linguistic minorities has also developed. First, the protection of these minorities was recognized in Article 27 of the International Covenant on Civil and Political Rights, which Israel has ratified:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

73. The positive duty incumbent on Member States to provide equal protection and to ensure the prohibition of discrimination against minorities as provided in Article 27 is derived from Article 26 of that Convention, which states:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[58]

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[56] See: the ruling of Justice Cheshin in HCJ 12/99 Mar'i v. Sabak 53(2) PD 128 (1999); See also *Adalah v. The Tel Aviv-Jaffa Municipality*, *supra note* 8, para. 25 of Chief Justice Barak's opinion.
[57] Jeremy Waldron, *The Dignity of Groups*, 2008 ACTA JURIDICA 66, 83 (2008).
[58] See in this context also article 15 of the International Covenant on Economic, Social and Cultural Rights which was ratified by the State of Israel.

74. Further to and based upon Article 27 of the aforementioned Convention, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, that was adopted in 1992, provides in Article 2(5) the right of national minorities to preserve and develop their culture, language, religion, including the right to maintain cultural relations with its people and nation beyond the borders of the state.

75. The Declaration also states that minorities are entitled to exercise their rights without discrimination both at the individual and community level (art. 3), sets forth the duty of the State to ensure that they are not discriminated against, and imposes additional positive obligations on the State in order to enable them to maintain their culture and language (arts. 4 and 5). In addition, Article 8 of the Declaration states that states cannot act contrary to the provisions of international law in this regard and that they must implement them in good faith.

76. Shortly thereafter, in 1995, the Council of Europe adopted the Framework Convention for the Protection of National Minorities, which states (Article 17) that:

> "The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage."

77. In 2007, the UN adopted the Declaration on the Rights of Indigenous Peoples, which affirms the right to self-determination within the state, including cultural rights, historical rights, recognition of historical injustice, and rights to land, including restitution. Article 5 of the Declaration imposes an obligation on the state to cultivate, preserve and strengthen their political, economic, social and cultural institutions, without derogating from their right to participate in state institutions in these areas.[59] Article 8 of the Declaration also prohibits states from forcing indigenous minorities to assimilate within the dominant majority group. This article also imposes on the State a positive obligation to provide effective measures to prevent the denial of the cultural values and identity of these minorities. In addition, Article 13 of the Declaration establishes the right of indigenous minorities to develop their language and transmit it to future generations, and obliges the state to ensure the fulfillment of this right.

78. Thus, the absence of the collective rights of the Arabs in Israel as a homeland minority [in the Basic Law] is tantamount to a very extreme exclusion and attests solely to the exclusionary view of the constituent authority, which sees them as absentees. It seeks to radically emphasize the supremacy of one national group and place the other in a lower position within the public sphere.

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[59] "1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."
2. States shall provide effective mechanisms for prevention of, and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their right;
(d) Any form off forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."

VI. ARTICLE 7: RACIAL DISCRIMINATION IN THE ALLOCATION OF LAND, HOUSING, PLANNING AND BUDGETING

79. Article 7 of the Basic Law constitutionally entrenches racial discrimination in connection to matters of the promotion, encouragement and consolidation of Jewish settlement. As we explain below, this provision will justify racial discrimination in the allocation of land, in housing policy, in planning and construction, in the budgeting for local authorities, and in [financial] incentives. In addition, Article 7, [read] in conjunction with Article 1 of the Basic Law, will expand the illegal settlement enterprise in the [occupied] West Bank, in violation of international humanitarian law.

80. Article 7 states:

> "The State views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation."

81. Under this article, the State of Israel transforms itself, at a constitutional level, into a settler organization or settlement movement similar to the Zionist settlement organizations (the Jewish Agency, the World Zionist Organization and the Jewish National Fund) in terms of its conduct and the principles that bind it, in contradiction to established [Israeli Supreme Court] case law, including the *Qa'adan*[60] decision. This decision holds that the state must treat its citizens on the basis of the principle of equality, prohibition of discrimination and neutrality in all matters relating to the issue of settlement, land allocation and housing, as detailed below. Now, Article 7 provides, at the constitutional level, that the state is permitted to discriminate on the basis of national affiliation in matters relating to settlement, whether directly or indirectly.

82. The desire to allow the state to act as a Zionist settlement body and to give free and explicit range of action to public authorities, or to those acting on their behalf, to act to 'Judaize' the space while adopting discriminatory and exclusionary principles was evident throughout the discussions in the [Knesset] Joint Committee. For example, MK Smotrich, one of the law's promoters, noted during one of the discussions:

> "[...] We definitely want to make it possible to implement a Zionist policy that would allow Jewish settlement, yes, to Judaize the Negev, Judaize the Galilee?
>
> [...] In this vein of Zionist settlement in the Negev and in the Galilee, we face a challenge, not to say a very serious threat, to the realization of the Zionist vision in this context of a majority in the territory in very large areas, with strategic, including security, implications..."[61]

83. Beyond the operational aspects, Article 7 also sends out racist messages which immediately give rise to notion of the 'other' and the different. It places the Arab citizens of Israel as a spatial and demographic threat not worthy of equal treatment, and as a problem that undermines the realization of a superior national and constitutional value of the 'Judaization' of space. The legitimate individual (and collective), according to this article, is the Jewish citizen, and the Arab citizen is an obstacle to the national goal. This

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[60] *Qa'adan*, *supra note* 18, para. 30 of Justice Barak's opinion.
[61] The recording of session no. 16 of the Joint Committee, the 20th Knesset (10.7.2018, at 12), beginning at 2:30 pm. The recording is available at the following link: http://main.knesset.gov.il/Activity/committees/Pages/AllCommitteesBroadcast.aspx?TopicID=18792. (Hereinafter: the 16th session of the Joint Committee.)

purpose is invalid regardless of the article's actual implementation. Eyal Zandberg, the Attorney General's representative during the deliberations in the [Joint] Committee, noted that:

> "The Basic Law will essentially make it legitimate at a constitutional level, to infringe the rights and discriminate between citizens of the state on the basis of national and ethnic belonging, and again someone will be preferred simply because this person belongs to the majority group, meaning – Jewish. If that is the Article's outcome, to our understanding, it reflects blatant and unacceptable discrimination."

He further noted that:

> "If the text really allows, as the committee's legal advisor stated at the beginning, to establish a new settlement under this law, to say: I have public land, a public resource, and now I assign it and hang a sign at the entrance to the settlement: entrance for Jews only. This is what the committee needs to deal with. Excuse the bluntness with which I am presenting this, maybe just to illustrate. Does this situation seem okay to anyone? No conditions, no limitations. That is what the Article states. [...] But the question needs to be asked, and that is the question that the Committee has to resolve: […] Does it want a text that allows us to say that there will be settlements where people will be disqualified only because of their group affiliation, even if they belong to the minority group? To our understanding – the way in which this appears now – no. This does not fit the constitutional structure of the State of Israel."

= = A copy of the relevant pages of the minutes of Session 8 of the Joint Committee dated 28 November 2017 is attached hereto as <u>Appendix P / 4</u>.

84. The aforementioned remarks were made in the context of a discussion about a previous version of the article (Article 7(b) at the time), according to which: "The State may allow a community, including members of one religion or of one nationality, to maintain separate communal settlement", but these remarks are even more relevant in relation to Article 7 in its present form. That is, whereas the article's previous version referred to the establishment of settlements on a national basis for all groups (in the potential form of 'separate but equal', which is problematic both in principle and legally), its current version is considerably more racist as it is based on the logic of 'separate and unequal'. It grants preference to one group on the basis of its ethno-national affiliation, while excluding and discriminating against other groups, and it spreads over many other areas related in one way or another to the subject of settlement, but not only to the issue of the establishment of settlements. Prof. Mordechai Kremnitzer correctly points out that:

> "The previous version tried to garb the provision in the appearance of neutrality towards the group. It was only in appearance, because a day-old babe in arms would realize that the whole point of the provision is to enable the establishment of purely Jewish settlements through the constitution, not just through the law. The new version raises the overt, blunt discrimination to the constitutional level. After all, how could Jewish settlement be advanced without confining it to Jews? And that isn't necessarily in tiny existing communities but in new ones established in order to manifest the

> national value of Jewish settlement. And why confine this Judaification to small rural communities, instead of letting this racism flourish everywhere – in the cities too?"[62]

85. Similar opinions regarding the more severe wording of the article in its final form were expressed by MK Aida Toma-Suleiman, MK Dov Hanin, MK Jamal Zahalka, MK Yousef Jabareen and MK Nachman Shai at the joint committee meeting held on 16 July 2018, which was intended to discuss a change in the wording of the article.[63]

86. Notably, a bill to include a commitment in the Basic Law to develop the state for the benefit of all its inhabitants was rejected, and this fact is telling. In the words of the Knesset's Legal Advisor, Adv. Gur Blay, "In this context, we recommended that reference be made to the obligation to develop the land for the benefit of all its residents, as in the Declaration of Independence."[64]

87. Indeed, some of the discussions on the text of the article focused on its potential to create a normative framework that would allow for exclusion, as evident in the following words by MK Smotrich:

> "The question is not what the wording will be. I want to reach an outcome that will ultimately enable the state to adopt the same Zionist policy that I consider positive. If in the end some vague version reaches the court and for the first time is interpreted to mean that it is true that the state should encourage Jewish settlement, but on condition that it is not unequal, I would have done nothing. I have no interest in declarations. There is a very central element of declaration in this law. Article 7(b) is not intended to produce a declaration, but is intended to produce a clear practical ability."[65]

1. The Scope of Article 7's Implications in Israel

88. Article 7 will have implications in several spheres of rights violations that concern basic principles: A. Separation and exclusion in housing; B. Discrimination in benefits and [financial] incentives in order to encourage settlement and population distribution at the levels of the individual, of localities, and of geographical area; C. Unequal allocation of land at both the locality and the group levels; D. Discrimination in land planning. These violations will be reflected in a policy of explicit racial segregation in these areas, which will also include a policy of demographic engineering, population dispersion, a policy of Judaization of the space and encouragement of Jewish immigration to various areas in the country by granting a variety of benefits, designating areas as predominantly Jewish, and discrimination in planning at a geographical or local level.

89. The implications of this article were voiced by Attorney Raz Nizri, the Deputy Attorney General, who remarked that the article would lead to discrimination at the level of towns and areas, and at the level of discriminatory planning, the goal of which is to 'Judaize' the space.[66]

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[62] Mordechai Kremnitzer, *Analysis // Jewish Nation-state Law Makes Discrimination in Israel Constitutional*, HAARETZ, 20 July 2018 *available at:* https://www.haaretz.com/israel-news/.premium-nation-state-law-makes-discrimination-in-israel-constitutional-1.6291906 (hereinafter: Kremnitzer).

[63] Session 19 of the Joint Committee, 20th Knesset (16.7.2018, 9:00). The recording is available at the following link: http://main.knesset.gov.il/Activity/committees/Pages/AllCommitteesBroadcast.aspx?TopicID=18860.

[64] *Id*., starting at 2:06:30.

[65] Session 16 of the Joint Committee, *supra note* 61, starting at 2:33:37.

[66] Session No. 19 of the Joint Committee, *supra note* 63, starting at 1:54:10

90. The legal advisor to the committee also criticized the previous article (Article 7(b)) because it violated the rights of the individual. His criticism is all the more relevant to [the version of] Article 7 that was approved:

> "... The proposed provision differs from the other articles of the Basic Law, which give preference **at the national level** to the different characteristics that distinguish the Jewish nation (symbols, rest days, language, etc.), **but they do not directly affect the personal status of the citizen, a member of the Arab minority, and the rights granted to him as an individual in the State**. This is all the more so considering that in the State of Israel most of the land is owned by the state, and therefore the proposed article may not only legitimize discrimination on the basis of religion or nationality by individuals, but also discrimination by the state itself in the allocation of land."[67] (Emphases in the original.)

= = A copy of the preparatory document for the meeting of the Committee dated 27 November 2017, attached and marked as <u>Appendix P / 5</u>.

The Attorney General's representative also made it clear:

> "Article 8(b) [which has become Article 7(b)] permits individual discrimination between citizens of the state, discrimination based on the group affiliation of that individual – be it religious affiliation or a national affiliation – with respect to the allocation of public land."[68]

2. <u>The implications of Article 7 for the West Bank</u>

91. Article 7 may be used by state authorities to justify the expansion and deepening of the illegal settlements in the 1967 Occupied Territories, including East Jerusalem and the Golan Heights, which have been illegally annexed to Israel, in violation of international humanitarian law (IHL).[69]

92. While our position is that the Basic Law should be territorial and therefore should not apply in the 1967 Occupied Territories, in its response to petitions against the Law for the Regularization of Settlement in Judea and Samaria, 5727-2017 (hereinafter: Settlements Regularization Law)[70] the Government clarified its position that:

> A. The Knesset has the authority to legislate in the West Bank: "From the perspective of Israeli domestic law, there is no restriction on the Knesset that prohibits it from legislating in the [West Bank] region [...] **<u>The basic principles</u>** of our system recognize the unlimited authority of the Knesset, subject to one limitation: the Basic Laws. The chief legislator, unlike the secondary legislator, has no limitations of territorial authority."[71] (Emphases in the original text.)

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[67] The Legal Advisor to the Joint Committee *The Preliminary Document for Discussion on 28.11.2017 – Proposed Basic Law: Israel - the Nation State of the Jewish People* (27.11.2017). The document is available at the following link: http://fs.knesset.gov.il/20/Committees/20_cs_bg_394390.pdf [Hebrew].
[68] The relevant pages appear in Appendix A/4 above [Hebrew].
[69] On this matter, see the ICJ Advisory Opinion on the Wall, *supra note* 15, at pp. 98-99.
[70] Government Response in HCJ 1308/17 Silwad Municipality v. Knesset (pending); The response is available at the following link: https://www.adalah.org/uploads/uploads/Settlement_regulation_law_state_reply_23082017.pdf [Hebrew] (hereinafter: the Government's response in the *Silwad* case).
[71] *Id*., at 188-186.

B. The settlements fulfill a basic Zionist value in "Eretz Israel": "[...] Jewish settlement throughout the **Land of Israel**, from time immemorial, and especially in the history of the people of Israel in the modern era, is a Zionist value of the first order [...]. The fact that the people of Israel have deep links to these regions of the Land of Israel is uncontroversial. The right of Israeli citizens to realize this link by determining their center of life in the region [i.e. the West Bank] is naturally derived, like many others, from this value. Indeed, settling in the **Land of Israel** is a national value of the first order, which sometimes even justifies the expropriation of private land."[72] (Emphasis added).

= = A copy of the relevant pages of the Government of Israel's response to HCJ 1308/17 is attached hereto as Appendix P / 6.

93. If this position, which contravenes IHL, continues to direct Israel's settlement policy in the 1967 Occupied Territories, then Article 7, combined with Article 1 of the Law, will certainly have far-reaching ramifications.

94. In this context, Eyal Benvenisti and Doreen Lustig wrote:

> "For the proponents of this Basic Law it offers a legitimating principle for the subordination of another people, with which they hope the majority of the Jewish voters would identify. The new law is therefore also part of a series of statutes that have extended the authority of the Knesset to the occupied territories (as exemplified by the 'Regularization Law') and thereby attempts to 'regulate' the formally temporary and exceptional military rule over the occupied West Bank."[73]

95. Notably, former Justice Edmond Levy, who held a minority opinion in a panel of nine justices that ruled on the issue of the Israeli disengagement from the Gaza Strip, based his position on his view that Gaza is part of the Land of Israel, the homeland of the Jewish people. Among other things, he also based his position on the Balfour Declaration and the aspirations of the Zionist movement.[74] Article 7, in combination with Article 1, now gives this position constitutional grounding.

96. In this context, too, we note that on the practical level, the term "Land of Israel" was used to plunder the assets of Palestinians – refugees, displaced persons and residents of the West Bank – in accordance with the Absentees' Property Law – 1950. Thus, for example, it was only recently established, in the *Hussein* case,[75] that since residents of the West Bank reside in "part of the Land of Israel that is outside of the territory of Israel", that they are considered absentees under the Absentee Property Law.

3. Reinstating Discrimination and Nullifying the *Qa'adan* Ruling

97. The *Qa'adan* ruling[76] is considered extremely important because it ostensibly established a "new beginning" in the matter of land and housing allocation, and rejected the policy of excluding the Arabs for the purpose of "promoting Jewish settlement". Article 7 clashes with the *Qa'adan* ruling in principle and nullifies it. In *Qa'adan* the Court held that the criterion of national belonging is discriminatory and that

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[72] *Id*., at 97.

[73] Eyal Benvenisti & Doreen Lustig, *We the Jewish People – A deep Look into Israel's new law,* JUST SECURITY (July 24, 2018), *available at:* https://www.justsecurity.org/59632/israel-nationality-jewish-state-law/.

[74] HCJ 1661/05 Gaza Coast Regional Council v. Knesset 59(2) PD 481 (2005), para. 14 and para.16 of Justice Levy's dissenting opinion.

[75] CA 5931/06 Hussein v. Cohen (published in the databases, April 15, 2015).

[76] *Supra note* 18.

the state must not act as if it were the Jewish Agency. In this context, Chief Justice Barak rejected the principle of "Jewish settlement" as a justification for discrimination. Indeed, Article 7's explanatory remarks correspond with the explanations given in the *Qa'adan* case that were rejected, on the basis of their discriminatory nature. In his ruling, then-Chief Justice Barak stated that:

> "The Jewish Agency clarifies that it has set itself the goal to settle Jews all over the country in general, and in border areas and areas with sparse Jewish population in particular. This goal, the Agency asserts, is along with the other goals it has set itself a legitimate goal, anchored in the Status of the [Jewish] Agency Law and the provisions of the Covenant, and is consistent with the State of Israel's very existence as a Jewish and democratic state. As such, it argues, granting the present petition would effectively signal the end of the extensive settlement enterprise operated by the Agency since the turn of the century."[77]

98. The Supreme Court, time and again, rejected the principle of "Jewish settlement", which appeared in various disguises as a justification for discrimination.[78]

99. Article 7 also directly conflicts with Article 6C(c) of the Law for the Amendment of the Cooperative Societies Ordinance No. 8), 5771-2011, known as the "Admissions Committees Law" [regarding the prohibition of discrimination], which was enacted after the *Qa'adan* ruling. Contrary to the Petitioners' position, the majority of justices who discussed the matter [the Admissions Committees Law] considered that it prohibited discrimination and guaranteed equality, and therefore refrained from declaring the law null and void.[79]

100. Article 7 is also in direct conflict with legal developments regarding the sale and administration of JNF land, as well as land transferred to the management of the Settlement Division in Israel. It was determined that these lands will be administered in accordance with the principles of equality, given that they are administered by the state, which is obliged to operate in accordance with the principle of non-discrimination. Consequent to the *Abu Raya* case, for example, the Israel Land Authority undertook to market JNF lands in accordance with the principle of equality, subject to an land exchange agreement between the state and the JNF (the Petitioners expressed reservations about this exchange).[80] Similar principles were put forward in the ruling in the *National Committee of the Heads of Arab Localities* case.[81] In the *Harel* case, the operation of the Settlement Division in the territories of the State of Israel was also subordinated in principle, to the principle of equality.[82]

= = A copy of the response of the Israel Land Authority in the *Abu Raya* case is attached hereto as <u>Appendix P / 7</u>.

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[77] *Id*., at para. 10 of Chief Justice Barak's judgment.
[78] HCJ 8036/07 Ibrik-Zubeidat v. The Israel Lands Administration (published in the Databases, September 13, 2011).
[79] HCJ 2322/11 Sabah v. The Knesset (published in the Databases, September 17, 2014).
[80] HCJ 7452/04 Abu Raya v. The Israel Land Administration (published in the Databases, January 28, 2001).
[81] HCJ 6411/16 National Committee of the Heads of Arab Local Authorities v. Knesset (published in the Databases, June 19, 2018).
[82] HCJ 9518/16 Harel v. Knesset (published in the Databases, Sep. 5, 2007).

101. Article 7 also contradicts the principles of equality in the administration of public land,[83] as well as the principles of just distribution of public resources, as established in the case of *Kibbutz Sde Nahum*.[84]

102. Article 7 adopts and underpins the principle of discrimination in budgeting and [financial] incentives at the levels of localities and geographical regions. In the case of *The High Follow-up Committee for the Arab Citizens in Israel*, which dealt with the designation of National Priority Areas, the Supreme Court, in an expanded panel of justices, overturned a policy of classification that discriminated against Arab towns, and rejected the privileging of Jewish towns on such grounds as "absorption of immigrants" or "population dispersion", as explanations that merely aim to justify discrimination in the name of encouraging and strengthening Jewish settlement.[85]

103. Although the above-noted legal developments have not yet led to a significant change on the ground, as the data presented below show, these developments are of importance in terms of expanding the scope of legal activity regarding discrimination in land allocation. Article 7 now seeks to reduce, and even extinguish altogether this limited scope of possible legal activity, in order to preserve and entrench the existing regime of segregation, exclusion and discrimination.

104. UN human rights committees have repeatedly expressed their concerns about exclusion on the basis of nationality, carried out in the name of promoting Jewish settlement, which took place in practice in community towns, and they demanded that the *Qa'adan* ruling be observed. Thus, for example, the UN Committee on the Elimination of Racial Discrimination (CERD) stated:

> "The Committee welcomes the decisions of the Supreme Court in *Ka'adan v. The Israel Lands Administration* (2000) and *Kibbutz Sde-Nahum et al v. Israel Land Administration et al* (2002), in which it ruled that State land should not be allocated on the basis of any discriminatory criteria or to a specific sector. It notes that the Israel Land Administration, as a result, has adopted new admission criteria for all applicants. It remains concerned, however, that the condition that applicants must be "suitable to a small communal regime" may allow, in practice, for the exclusion of Arab Israeli citizens from some State-controlled land. (Articles 2, 3 and 5 (d) and (e) of the Convention.)
>
> **The Committee recommends that the State party take all measures to ensure that State land is allocated without discrimination, direct or indirect, based on race, colour, descent, or national or ethnic origin. The State party should assess the significance and impact of the social suitability criterion in this regard.**"[86]

[83] HCJ 5023/91 Poraz v. Minister of Construction and Housing 46(2) PD 793, 801 (1992); AdminA1789/10 Saba v. Israel Lands Administration, para. 7 (published in the Databases, Nov. 11, 2010).
[84] HCJ 3939/99 Kibbutz Sde Nahum v. The Israel Land Administration 56(6) PD 25, 64 (2002).
[85] HCJ 11163/03 High Follow-up Committee for Arab Citizens in Israel v. Prime Minister (published in the Databases, Feb. 27, 2006) (hereinafter: *High Follow-up Committee for Arab Citizens in Israel*).
[86] UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, para. 23, 14 June 2007, CERD/C/ISR/CO/13, *available at*: http://www.refworld.org/docid/467bc5902.html.
Also see the Committee's concluding observation of April 3, 2012:
UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, para. 11 and 15, 3 April 2012, CERD/C/ISR/CO/14-16, *available at*: http://www.refworld.org/docid/506189622.html.

105. The UN Committee on Economic, Social and Cultural Rights also criticized and expressed concern over the relationship between state authorities and Zionist organizations such as the Jewish National Fund and the Jewish Agency, because these bodies discriminate for the purpose of "encouraging and promoting Jewish settlement":

> "(11) The Committee notes with grave concern that the Status Law of 1952 authorizes the World Zionist Organization/Jewish Agency and its subsidiaries, including the Jewish National Fund, to control most of the land in Israel, since these institutions are chartered to benefit Jews exclusively. Despite the fact that the institutions are chartered under private law, the State of Israel nevertheless has a decisive influence on their policies and thus remains responsible for their activities. A State party cannot divest itself of its obligations under the Covenant by privatizing governmental functions. **The Committee takes the view that large-scale and systematic confiscation of Palestinian land and property by the State and the transfer of that property to these agencies constitute an institutionalized form of discrimination because these agencies by definition would deny the use of these properties to non-Jews. Thus, these practices constitute a breach of Israel's obligations under the Covenant.**
>
> […]
>
> (35) The Committee urges the State party to review the status of its relationship with the World Zionist Organization/Jewish Agency and its subsidiaries, including the Jewish National Fund, with a view to remedying the problems identified in paragraph 11 above."[87]

4. "Jewish Settlement" in Practice

106. For a deeper understanding of the significance and implications of Article 7, in this section we examine the concept of "encouraging and promoting Jewish settlement" in practice. The purpose of this section is to show the danger posed by Article 7 of the Basic Law, which turns invalid practices that contradict the rule of law into a constitutional principle.

107. The term "Jewish settlement" has not been included in any legislative text in Israel to date, although the consistent policy of state institutions on land and planning has been, and still is, dispossessing, discriminatory, racist, exclusionary, and essentially segregationist, all in the name of promoting the conception of "Jewish settlement". This policy was manifested, *inter alia*, in the massive expropriation of land from Arab citizens of Israel for the use of the Jewish population [only], the policy of segregation in housing, the reduction of the living and development areas available to the Arab population and of Arab towns, and in discriminatory planning.

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[87] UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Israel*, 4 December 1998, E/C.12/1/Add.27, *available at*: http://www.refworld.org/docid/3f6cb4367.html.
As well as the conclusions of the UN Human Rights Committee of Aug. 18, 1998: UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93, *available at*: http://www.refworld.org/docid/3ae6b0284.html.

108. The process of land expropriation on the basis of extremely arbitrary laws led to the expropriation of 40 to 60 percent of the land held by Arab citizens of the state.[88] In this context, the Official Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000 (hereinafter: The Or Commission) concluded that:

> "The expropriation activities were clearly and explicitly harnessed to the interests of the Jewish majority, and the land was transferred to entities such as the Jewish National Fund, which according to its own definition serves Jewish settlement, or the Israel Land Administration, which, judging from its administration patterns, served a similar objective."[89]

109. **Segregation:** The "Judaization" project also resulted in the development of a segregated residential space, with the state acting to establish hundreds of settlements designated only for the Jewish population over the course of decades. The sole exception was the state's establishment of seven Bedouin towns, and the 11 Bedouin villages that were recognized a little over a decade ago, in order to concentrate the entire Bedouin population in the Negev [Naqab] into them. This policy has created a situation in which most towns and villages in Israel are segregated on the basis of nationality, and most of them have a Jewish population. According to Table 2.17 of the "Statistical Abstract of Israel – 2017", there are 928 localities defined as Jewish and 132 as Arab.[90] Of these Jewish communities, 715 are *kibbutzim*, *moshavim* and community towns, which were run for decades in accordance with the mechanism of admissions committees, until the enactment of the Admissions Committees Law,[91] which restricted the application of admissions committees to community towns in the north and south.

110. The result of this long-term policy is that, in practice, Arab citizens of the state cannot lease or purchase land in the over 80% of the state's territory that falls within the jurisdictional borders of regional councils. Arab regional councils control very limited areas that include only land within existing towns.

111. **Reduction of Jurisdictional Areas of the Arab towns and villages:** In the early years of the State of Israel, the Interior Minister made extensive use of powers granted by [British] Mandatory directives. These directives provided the normative framework for the declaration of local municipalities, such as the Local Councils Order – 1941 cancelling decrees that established municipalities that were issued during the Mandate period, and issuing new decrees. In this manner, a new map of the division of space between the Arab and Jewish local authorities was sketched.

112. The redrawing of jurisdictional maps resulted in a reduction of the average jurisdictional area of the existing Arab towns and villages by around 64 percent when compared to the combined area of the "village land" recorded in the Mandate period.[92] Today, the jurisdictional areas of Arab towns and villages cover less than three percent of the country's total land area,[93] while Arab citizens constitute

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[88] Oren Yiftachel and Alexander (Sandy) Kedar, *On Power and Land: The Israeli Land Regime*, 16 THEORY AND CRITICISM 67, 79 (2000) (hereinafter: Yiftachel and Kedar)

[89] The State Commission of Inquiry into the Clashes between the Security Forces and Israeli Civilians in October 2000, Report, Volume A 42 (2003) (hereinafter: the Or Commission Report).

[90] Central Bureau of Statistics Statistical, Abstract of Israel 68 (2017). Table 17 of Chapter 2 is available at the following link: http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_17&CYear=2017.

[91] *Id*. Table 18 of Chapter 2 is available at the following link: http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_18x&CYear=2017.

[92] Bimkom – Planners for Planning Rights, *Expansion of Jurisdictions in the Arab Sector: Position Paper* (2002), available at the following link: https://bit.ly/2OPm9jl.

[93] The Authority for Economic Development of the Arab, Druze and Circassian Sector in the Prime Minister's Office, *Proposal by the Economic Development Authority of the Minority Sector in the Prime Minister's Office for a*

around one-fifth of the country's total population. As a result, population density in Arab localities has increased eleven-fold.

113. The Or Commission addressed this important issue, noting:

> "One of the actions taken in the context of land was a drastic reduction in the jurisdictional areas of the Arab towns. For example, in [the Arab village of] Sakhnin, the area of village land during the Mandate period and up until the late 1970s was 70,000 dunams. The area of jurisdiction at the end of the [twentieth] century was 9,700 dunams, and the area within the master plan was 4,450 dunams, only around 191 square meters per capita, while in [Jewish] Karmiel there were 524 square meters per capita. Many Arab towns and villages were surrounded by land designated for purposes such as security zones, Jewish regional councils, national parks and nature reserves, or highways, which prevent or impede the possibility of their expansion in the future. Population growth in Arab towns increased the need for land designated for industry, commerce and public establishments. In many towns there existed no land reserves to satisfy this need.
>
> During the first fifty years of the state, the Arab population grew by a factor of about seven. At the same time, the area allowed for residential building remained almost unchanged. As a result, the population density in Arab towns and villages increased considerably. The shortage of land for construction severely harmed young couples seeking housing. Public construction did not help them in any significant way. New towns were not established (except for the [seven] Bedouin towns), and ILA land was not usually made available for construction in Arab towns. In addition, Arab citizens did not receive equal terms in obtaining mortgages, since most of them were not military veterans. Residents of Arab towns who wished to build on land that they owned, but which was placed within the jurisdictions of neighboring Jewish regional authorities, were blocked by the laws of these authorities."[94]

114. Further to the above, the 35 villages in the Naqab (Negev) that are not recognized by the state authorities must be added. Most of these villages were established before 1948, with the remainder being established during the Military Regime [1948-1966] following the expulsion of the Bedouin tribes from their land and their concentration in the Siyag area. Approximately 80,000 citizens live in these villages, their homes are threatened with demolition due to the refusal of the state authorities to plan them. The state seeks to evacuate these villages in order to, *inter alia*, establish Jewish settlements, as in the case of Umm al-Hiran; plant forests, as is the case in Al-Araqib; and create pastureland, as is the case in Atir.[95]

Solution to Planning and Housing in the Arab Sector: Presented to the Sub-Committee on Housing in the Committee for Economic and Social Change, headed by Prof. Manuel Trajtenberg (2011). Available at the following link: https://bit.ly/2dFd5tT.

[94] Or Commission Report, *supra note* 89, at pp. 44-43.

[95] For the land regime in Israel, its development and attitude toward Arab citizens of Israel, see Yiftachel and Kedar, *supra note* 88; CHAIM SANDBERG, ISRAEL LANDS – ZIONISM AND POST-ZIONISM (2007); Sandy Kedar, *Majority Time, Minority Time: Land, Nation, and the Law of Adverse Possession in Israel*, 21(3) IYUNEI MISHPAT 665 (1998); Alexandre Kedar, *The Jewish State and the Arab Possessor: 1948-1967*, *in* The HISTORY OF LAW IN A MULTICULTURAL SOCIETY: ISRAEL 1917-1967 (R. Harris, S. Kedar, P. Lahav & A. Likhovski eds., 2002); Alexandre Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33(4) NYU J. OF INT'L L. AND POL., 923-1000 (2001); Ronen Shamir, *Suspended in Space: Bedouins under the Law of Israel*, 30 LAW & SOCIETY REV. 231-258 (1996).

115. Further understanding of the concept of "encouraging and promoting Jewish settlement" can be gleaned from Jewish settlement policy in the 1967 Occupied Territories, where the State of Israel applies the same concept, in contravention of IHL and international human rights law. This concept is reflected in the confiscation of Palestinian public and private land for the purpose of establishing Jewish settlements in the West Bank. It is manifest in the recently-enacted Settlements Regularization Law, which is intended to expropriate land from the Palestinians who own it and allocate it to Israeli settlers, thereby "regularizing" – in terms of Israeli domestic law – settlements in the West Bank that were built on private Palestinian land. In response to petitions filed against the law, the government relied on the concept of "Judaizing" the West Bank and made it clear that "Jewish settlement" in the West Bank fulfilled the values of Zionism, and that it was the "natural right" of many [Jewish] Israelis to live in the area.[96]

116. In this context, Prof. Kremnitzer rightly argued that, "Here, there is an additional move towards the complete annexation of the territories, but this time the direction is reversed, and the territories are annexing the State. The Jewish settlement principle, by virtue of which the settlement project in the [Occupied] Territories exists as exclusively Jewish, has entered now into the territories of the State. Just as the Palestinian residents [in the West Bank] do not count, similarly, the Arab citizens of the State of Israel do not count. There is no escaping the conclusion that a policy of the kind that is fitting of an apartheid regime (based on ethnicity) that exists in the Territories, has now proudly entered into Israel."[97]

117. Indeed, MK Smotrich, one of the Basic Law's proponents, drew this parallel. As he explained:

> "[…] look at the Partition Plan and look at the current map of the distribution of Arab settlement and compare the two. We are not too far from a situation, with all the attendant implications, of territorial contiguity in Judea and Samaria, with Wadi Ara with the Arabs of the north and then with Syria and Lebanon. What will this cause, even technically, in terms of our ability to close the Wadi Ara as an east-west channel for the transfer of orders of battle... The five-star plan created at the time by Arik [Ariel] Sharon to create this buffer between the Arabs of Samaria and the Arabs of Wadi Ara… [sic] and again, there's nothing to do. I cannot relate to them, to the collective, as enemies, I cannot ignore the fact that there is a national conflict and the national struggle unfortunately is no… [sic] We are here in the Knesset and we hear the representatives of the Joint List, and the national struggle has not stopped. There is no internalization here that this is a Jewish state, and people are [not] only asking for equal civil rights. And again, from my deep knowledge of the reality on the ground I think that we are facing a great challenge, I think that the toolbox that the State of Israel possesses without this Article in the law is a very, very limited toolbox because, in my eyes, [of] the very expansive interpretation that the court gave to the right to equality against other rights, and this needs to be balanced, [and] the State should be given tools. And here I say to Tzvika and others, the disagreement [over Article 7] is not semantic."[98]

118. Thus, if the aforesaid practices were carried out in part via arbitrary laws, and some were contrary to the principles of the rule of law and the prohibition on discrimination in the allocation of land, and especially in conflict with case law, Article 7 of the Basic Law now seeks to turn the invalid practice into a meta-constitutional value.

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[96] The Government's response in the *Silwad* case, *supra note* 70. A copy of the relevant pages was attached as Appendix P / 7.
[97] Kremnitzer, *supra note* 62.
[98] Session 16 of the Joint Committee, *supra note* 61, beginning at 2.32:15.

5. Chapter Summary

119. Article 7 of the Basic Law is in keeping, in its conception and its implications, with racist and colonial periods of other countries in the world. For example, among the most striking laws in South Africa prior to the abolition of Apartheid were The Natives Land Act (1913 and 1936), which prevented the black population from buying land outside their designated areas; The Urban Areas Act (1923), aimed at creating separate residential areas for blacks and to transfer them from mixed residential areas to areas located in the urban periphery; and The Group Areas Act of 1950, according to which blacks were transferred to their designated areas and blacks' towns located in proximity to the expanding white areas were moved.[99]

120. Such was the case, too, in the US. In addition to the aforementioned exclusion of Native Americans from their land, the rationale behind Article 7 is similar to the municipal planning laws concerning the notion of "zoning", enacted in the early 20th century in the United States, for the purpose of boosting segregation. The first regulation in urban planning based on racial zoning was implemented in Baltimore in 1910 and was subsequently implemented in some Californian cities. According to this regulation, residential areas were established in the city on the basis of racial segregation: neighborhoods or buildings for whites only,[100] and neighborhoods or buildings for blacks only. It was only in the *Buchanan* judgment of 1917[101] that the US Supreme Court criticized the laws and regulations governing these racial zones, and remarked that states could not restrict the African-American population to specific residential areas.

121. Article 7 clearly breaches absolute prohibitions in international law, including those enumerated in the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter: the Apartheid Convention) and the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD). Article 2(c) of the Apartheid Convention states that "the crime of apartheid" includes all means, including legislation, that prevent freedom of choice regarding residence on a racial basis. Article (2)d states that "the crime of apartheid" includes any means, including legislative, that divide the population on a racial basis by creating separate zones for racial groups.

122. There is no constitution in the world today that contains a similar provision to Article 7, in which the dominant group appropriates public resources, in particular land, by excluding other groups. As we detail below, provisions similar in substance existed in the Apartheid era in South Africa, and were the target of international condemnation. Similar provisions were given various justifications in the United States during the period of the colonization of Native Americans under names such as "White Settlement," "White pioneering," Civilization" and "Discovery", and all on the basis of the racist meaning of "We The People".[102]

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[99] See in this regard: SCOTT BOLLENS, URBAN PEACE-BUILDING IN DIVIDED SOCIETIES: BELFAST AND JOHANNESBURG (Westview Press, 1999); Grant Saff, *Residential Segregation in Postapartheid South Africa: What Can be Learned from the United States Experience*, 30(6) Urban Affairs Review 782-808 (1995).

[100] Marsha Ritzdorf, *Locked Out of Paradise: Contemporary Exclusionary Zoning, the Supreme Court, and African Americans, 1970 to the present*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY IN THE SHADOWS 43-57 (Thomas Manning and Marsha Ritzdorf eds., 1997); Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY IN THE SHADOWS 23-42 (Thomas Manning and Marsha Ritzdorf eds., 1997).

[101] *Buchanan v. Warley*, 245 U.S 60 (1917).

[102] See the chapter on indigenous Indians in the article: Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (*hereinafter*: Cleveland, *Powers Inherent in Sovereignty*).

VII. THE DOCTRINE OF "UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT"

123. The legal question raised by this petition is whether the Nation-State Basic Law can be subjected to judicial review and declared null and void through the application of the doctrine of the unconstitutional constitutional amendment. The Petitioners will argue that the Knesset, as a constituent assembly, has exceeded its authority in enacting the Basic Law, for the law constitutes an affront to basic democratic principles to the point of inflicting damage on the constitutional structure. It constitutes a gross violation of core components of human rights, in particular the principles of the prohibition of discrimination and human dignity, as well the prohibition on racism. It violates provisions of international law that form part of customary law, and in particular those that prohibit, *inter alia*, the promulgation of laws that create a constitutional identity based on racist grounds.

124. The Petitioners will also provide comparative case law of judicial intervention in constitutional amendments, where the amendments violate the constitutional structure, basic principles of democracy, and the protection of civil rights.

125. However, prior to the discussion of the application of the doctrine of the unconstitutional constitutional amendment, the Petitioners will summarize the harm caused by the Basic Law.

1. Summary of Violations Caused by the Basic Law

126. In the previous sections, the Petitioners discussed in detail the violations and injuries caused by the Basic Law. First, the Petitioners demonstrated that Article 1 of the Nation-State Basic Law violates the supreme principle of the democratic regime, namely the *demos* principle, according to which all groups and residents living under the territorial influence of the constitution together form and constitute the sovereignty that is supposed to be expressed through the process of constitution making. There is no democratic state in the world whose constitutional identity is determined along the lines of Article 1 of the Basic Law as regards the identity of the sovereign. Secondly, Article 1 violates the right to equality by excluding Arab citizens. Thirdly, it violates the right to dignity by degrading, humiliating, humiliating, and by virtue of the social and political message it projects that the Arab population in Israel, a homeland minority, does not count, as if it had been completely absent from the constitutional space.

127. It has also been demonstrated that the Basic Law denies the right that constitutes the citizen: equal citizenship, including by refusing to grant constitutional status to the citizenship of Arabs. Here, too, the element of ethnic supremacy is particularly prominent since only Jews are entitled to constitutionally-recognized citizenship.

128. In addition, the Basic Law erases the collective rights of the Arabs as a homeland minority and refuses to acknowledge them. The only reference to these collective rights is made through defining the status of the Arabic language, which was done with the aim of downgrading its status *de jure* and at the constitutional level. In this context, the element of ethnic supremacy in the sphere of cultural and collective rights is clear and unqualified.

129. Article 7 of the Basic Law is the most obvious example in terms of the consequences of exclusion and discrimination in almost every area of life. It turns Jewish settlement [only] into a constitutional value, one that all state authorities are obliged to act in accordance with, and it contradicts the guiding logic of the *Qa'adan* ruling and subsequent judgments. The insertion of the ethnic component directly into Article 7 turns Arab citizens everywhere in the region into the "other" whose mere presence impedes the realization of this supreme value Article 7 aims to fulfil through the "Judaization" of every single region. As explained above, the Israeli legal experience proves that this norm, which aims to "promote",

"consolidate", and "encourage" Jewish settlement, will directly violate the right to equality in land allocation, housing, budgets and [financial] incentives, and spatial planning.

130. Beyond this, and as explained in depth, the Basic Law completely negates the possibility of recognizing the right of the Palestinian people to self-determination, and seeks to promote "Jewish settlement" in areas defined by international law as occupied territory, thereby violating the principles of the UN Charter and absolute prohibitions under international humanitarian law.

131. The violations caused by the Basic Law clearly make it a racist law.

132. The violations fall under Article 1 of the ICERD, which defines "racial discrimination" as follows:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

133. Equally relevant here is the principle of the prohibition of discrimination, as defined in Article 26 of the ICCPR:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

134. Furthermore, the massive accumulation of harm caused to Arab citizens rises to the level of oppression, as manifested in violations of the rights to dignity and prohibition of discrimination in the most basic areas of life, which, together with the element of clear ethnic supremacy, constitute domination. The Petitioners have relayed the historical and legal experience of many countries throughout the world that perceived their constitutional identity in a manner similar to that embraced in the Basic Law, whose constitutional past is perceived as dark today.

135. The extensive use of ethnicity in the state's identity as grounds for discrimination and exclusion against Arab citizens of the state has not escaped the attention of the various UN committees, which have frequently criticized and expressed their concern about it. Although the following quotation is from 1998, it is even more pertinent today after the enactment of the Nation-State Basic Law. The Committee on Economic, Social and Cultural Rights wrote in its 1998 Concluding Observations that:

> "The Committee expresses concern that excessive **emphasis upon the State as a 'Jewish State' encourages** discrimination **and accords a second-class status to its non-Jewish citizens. The Committee notes with concern that the Government of Israel does not accord equal rights to its Arab citizens, although they comprise over 19 per cent of the total population.** This discriminatory attitude is apparent in the lower standard of living of Israeli Arabs as a result, inter alia, of lack of access to housing, water, electricity and health care and their lower level of education. The Committee also notes with concern that despite the fact that the Arabic language has

official status in law, it is not given equal importance in practice."[103]

136. Moreover, the accumulation of human rights violations caused by the Basic Law also raises serious suspicions of a violation of Article 2 of the Apartheid Convention, which prohibits, *inter alia*, acts, including through legislation, that establish and maintain one group's domination over another on ethnic grounds, that create racial discrimination (as stated also in Article 2 of ICERD), and that inherently violate rights in order to establish ethnic supremacy in the most basic areas of life.

2. <u>Applying the Doctrine to the Nation-State Basic Law</u>

137. The Petitioners will first discuss Supreme Court case law that addresses situations in which the doctrine of the unconstitutional constitutional amendment could be invoked. When the Honorable Court determined the constitutional status of the Basic Laws in the case of *Mizrahi Bank*, it briefly referred to the applicability of the doctrine. As then-[Supreme Court] Chief Justuce Barak stated:

> "Indeed it may be necessary to test the constitutionality of the use of the term 'Basic Law.' I sought to leave this matter for further consideration and I maintain this position. I will note, however, that it is well accepted for courts to test the constitutionality of amendments. More than one such amendment has been invalidated as unconstitutional, and this has been not only for 'formal' reasons (such as a failure to meet majority requirements) but for substantive reasons as well."[104]

138. In the *Bar-On* case,[105] which dealt with the bi-annual [state] budget amendment, Justice Naor ruled that, since the amendment to the Basic Law in question did not concern issues of human rights, there was no room for intervention. Then-Chief Justice Beinisch noted that in exceptional cases where fundamental elements of democracy are violated, it would be justified to examine whether or not the Knesset had exceeded its constituent authority:

> "Indeed, I too believe that there are basic principles standing at the very basis of our existence as a society and a state, the breach of which would raise difficult questions of authority, including doubts as to whether at issue is a change in the constitution or the establishment of a new constitution. In such a case – and it would be best were it never to occur – the Court will be called upon to decide whether the Knesset has overstepped its constituent authority and violated the basic foundations of the state as a Jewish and democratic state."[106]

139. Justice Vogelman in the *Bi-Annual Budget* case[107] stated that, "The application of the doctrine of the unconstitutional constitutional amendment in Israeli law should not be rejected."[108] Similar remarks were

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[103] UN Committee on Economic, Social and Cultural Rights (CESCR), *UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Israel*, 4 December 1998, E/C.12/1/Add.27, *available at*: http://www.refworld.org/docid/3f6cb4367.html.

[104] CA 6821/93 Bank Mizrahi Meuhad Ltd. v. Migdal Cooperative Village 49(4) PD 221, 394 (1995) (hereinafter: *the Mizrahi Bank* case).

[105] HCJ 4908/10 Bar-On v. The Knesset 64(3) PD 275 (2011) (hereinafter: *Bar-On* case).

[106] Id., para. 34 of Chief Justice Beinisch's opinion.

[107] HCJ 8260/16 The Academic Center for Law and Business v. The Knesset (published in Databases, Sep. 6, 2017).

[108] *Id*., para. 15 of Justice Vogelman's opinion.

made by Justice Barak at the time in the *Movement for Quality Government* case[109] concerning the issue of military service for *yeshiva* students, as follows:

> "It is conceivable that a law or a Basic Law that would negate the character of Israel as a Jewish or democratic state is unconstitutional. The People, the sovereign, did not empower our Knesset to do so. It was empowered to act within the framework of the basic principles of the regime, not to nullify them."[110]

140. In addition, then-Chief Justice Barak stated that there are core, minimal meta-constitutional characteristics that make a society democratic and constitute the foundations of the regime, which are: "Recognition of the sovereignty of the people, expressed in free and equal elections; recognition of a core of human rights, including dignity and equality, the separation of powers, the rule of law, and an independent judiciary."[111]

141. Thus in principle court rulings recognized the judiciary's authority to exercise judicial review of constitutional norms in cases involving serious violations of basic democratic principles or the core of human rights.

142. Before detailing the justifications for judicial intervention in the case in question, it is important to note recent developments in Supreme Court case law relating to this matter. In the *Expulsion Law* case,[112] wherein the constitutionality of an amendment to the Basic Law: The Knesset was examined, the Court ruled that, while a violation of the basic rights to vote and be elected had occurred, it did not see a justification for applying the doctrine [of the unconstitutional constitutional amendment] and revoking the amendment to the Basic Law in question. As Supreme Court Chief Justice Hayut noted:

> "To conclude – for the reasons detailed above, I have come to the conclusion that although the Expulsion Law inflicts real harm to basic rights that are the most important in our system, there is a big difference between this violation and the negation of the supreme principles of the regime. Therefore, the case before us does not fall within the narrow scope of the unconstitutional constitutional amendment doctrine, even if we were to adopt this doctrine, and as it has been already stated, we need not make any determinations regarding this issue. Moreover, given the purpose of the Expulsion Law and the system of checks and balances provided therein, it cannot be said to negate the core of the state's democratic identity or to shake the 'foundations of the constitutional structure'."[113]

143. However, the Chief Justice determined that the Expulsion Law contains checks and balances that allow for its use only in very exceptional cases, given the complex procedure involved, which requires a special majority of Knesset members to vote in the plenum for members' exclusion, while granting the right to a hearing and the right to submit an appeal before the Supreme Court, before the exclusion comes into force.

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[109] HCJ 6427/02 The Movement for Quality Government in Israel v. The Knesset 61(1) PD 619 (2006).
[110] *Id*., para. 76 of Chief Justice Barak's opinion.
[111] EA 11280/02 The Central Elections Committee for the Sixteenth Knesset v. Tibi 57(4) PD 1, 24 (2003).
[112] HCJ 5744/16 Shahar Ben-Meir v. The Knesset (published in the Databases, May 27, 2018) (hereinafter: *Expulsion Law* case).
[113] *Id*., para. 36 of Chief Justice Hayut's opinion.

144. Despite the Petitioners' reservations regarding the outcome reached by the Honorable Court in the *Expulsion Law* case, they nonetheless argue that there is a significant difference between the Expulsion Law and other Basic Law amendments, and the Nation-State Basic Law. The latter is not a Basic Law that deals with the individual, personal matter of one MK or another, and is not similar to the case of the *Bi-Annual Budget*, which, as Justice Naor noted, does not concern human rights' issues. The Nation-State Basic Law is a Basic Law with extremely broad influence on the core of both human rights and democratic principles.

145. Therefore, the reasons for which the Honorable Court refused to apply the doctrine of unconstitutional constitutional amendment in the matter of the Expulsion Law, and the general view that a decision about its applicability should be postponed until the completion of the constitutional enterprise in Israel, are irrelevant in this case. The Nation-State Basic Law is a law that defines the constitutional identity of all sections of the constitution, and seeks to create the basis for the constitutional order in the state from which other Basic Laws derive their meaning and the regime forms its basic characteristics. The Nation-State Basic Law will determine the scope of the right to equality by justifying discrimination in various areas. It will negate the very existence of the right to human dignity, and its very existence as a supreme law emits social and political signals of exclusion and humiliation on national grounds against a large population group, and stands to justify ethnic supremacy both at the moral and educational levels. The Nation-State Basic Law provides the background setting for the entire regime in a manner that creates a normative hierarchy capable of deepening and intensifying the anti-democratic characteristics underlying the entire constitutional enterprise.

146. As will be explained below in relation to the abuse of the constituent authority of the Knesset, the Basic Law cannot stand as the basis for a consensus among the citizens in Israel. In the eyes of large population groups, among them Petitioners 1-3, who comprise the elected representatives of the Arab population in Israel and all its political factions, the Basic Law lacks legitimacy. The Nation-State Basic Law, as a fundamental constitutional norm, does not satisfy the necessary conditions upon which constitutions are created. It is intended to achieve invalid purposes, is not intended to create a cross-public consensus, and was enacted with no regard to the "veil of ignorance" principle (in the sense of John Rawls), leading to the conclusion that it lacks legitimacy in the eyes of every person who envisions herself as a free and equal citizen in the State of Israel.

147. Nevertheless, a close examination of the ruling in the *Expulsion Law* case provides support for the application of the doctrine to the case at hand. Chief Justice Hayut refers to the "democratic paradox" with which, in her view, the Expulsion Law is intended to deal; in her words:

> "The need for this balance, which is called in our ruling the 'democratic paradox'... reflects the understanding that 'in order to prove its vitality, democracy should not lead to its own abdication' (Tibi, p. 14). This balance embodies not only the purpose underlying the provisions of Article 7A of the Basic Law, but also the purpose of the Expulsion Law. These two provisions are interwoven and complete one another. That is to say, that incitement to racism and support for an armed struggle against Israel that are illegitimate before a candidate is elected, are equally illegitimate even after his election."[114]

148. According to the Honorable Court's approach to the *Expulsion Law* case, the elimination of racism constitutes a fundamental principle and is part of the system's normative infrastructure, which is capable of superseding the right to be elected, which is itself a basic democratic principle. Indeed, Justice

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[114] *Id*, para. 28 of Chief Justice Hayut's opinion.

Shamgar previously discussed the disqualification of the Kach movement, as a racist movement, from elections to the Knesset, and referred to the democratic paradox. The Court, which relies, among other things, on the definition of racism in ICERD, has substantiated the view that the elimination of racism is a strong and profound foundation in system that justifies infringements on both the voter's right [to elect representatives] and the right of citizens to be elected.[115]

149. Thus, racist legislation, even in the form of a Basic Law, cannot supersede these basic principles. Exclusion on the basis of national affiliation inherently violates the principle of the prohibition of discrimination, the principle of equality, and the right to dignity. These basic rights constitute the basis for the existence of a democratic society and the core of human rights.

150. The value of human dignity has an independent constitutional status and its protection in itself is a value and a basic right. In the words of the Court, "The right exists as an essential part of basic human and social conceptions ... Its formation was not conditional upon the enactment of a Basic Law that guarantees its protection and the guarantees the compliance with it."[116] Hence, human dignity is part of the basic principles of the system and is perceived as part of the "natural law-based liberties."[117]

151. Recognition of the value of the human being, and of his or her right to dignity are the anchor and foundation of all other human rights; it is "the rationale for all rights." It is the justification for the existence of rights. According to Endres, it is the constitutional value which provides that "every person has the right to have rights."[118] Thus the value of human dignity "is perceived as a founding value that expresses the basic idea and the rationale underlying constitutional rights. It is understood as a value that attests to the fact that human rights are not afforded by the government and therefore cannot be taken by it. Dworkin's statement that, 'because we honor dignity, we demand democracy'" is well known.[119]

152. Further support for these remarks is provided by the fact that the constitutional principle of human dignity was expressed as a constitutional norm even before the right to dignity was enshrined in a basic law, when it was recognized in the case law as a judically-recognized basic right.[120]

153. The contents of the meta-constitutional principle of human dignity can also be gleaned from the interpretation of the constitutional right to human dignity. The prevailing position in the literature is that

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[115] EA 1/88 Neiman v. Chairman of the Central Elections Committee for the Twelfth Knesset 42(4) PD 177, 190 (1988).
[116] CA 5942/92 John Doe v. John Doe 48(3) PD 837, 841 (1994).
[117] CA 3077/90 Jane Doe. v. John Doe 49(2) PD 578 (1995). See also ACrimA 7048/97 John Does v. Minister of Defense 54(1) PD 721 (2000).
[118] AHARON BARAK, HUMAN DIGNITY 216 (2014) (hereinafter: BARAK, HUMAN DIGNITY).
[119] *Id*., at 220. See also Judith Karp, *Some Questions on Human Dignity under the Basic Law: Human Dignity and Liberty*, 25 MISHPATIM 129, 136 (1995).
[120] On the development of the status of the right to human dignity prior to the Basic Laws, see BARAK, HUMAN DIGNITY, *supra* note 118, at 110-3. Regarding the status of the right to human dignity after the Basic Law: Human Dignity and Liberty, see ACA 7325/95 Yedioth Ahronoth Ltd. v. Kraus 52(3) PD 1, 61 (1998); HCJ 6126/94 Szenes v. Broadcasting Authority 53(3) PD817, 864-5 (1999); HCJ 6427/02 The Movement for Quality Government in Israel v. The Knesset 61(1) PD 619, 681 (2006); On the role of human dignity as a value that permeates and balances other interests in Israeli legal system, see CA 6871/99 Rinat v. Romm 56(4) PD 72, 91 (2002). For a more comprehensive review of human dignity as a constitutional value in Israeli law, see BARAK, HUMAN DIGNITY, *supra note* 118, at pp. 223-223.

the meta-constitutional principle of human dignity and the constitutional right to human dignity are identical.[121]

154. Most importantly, the violation of human dignity caused by the Nation-State Basic Law occurs in the core aspects of the right, which are connected to racism, in view of its humiliating, degrading and exclusionary effects. The protection of these core aspects is absolute. Thus, in some constitutions, such as the German Basic Law, the protection of the right to dignity is enshrined as an eternal, unamendable provision. The judgments of this Honorable Court have also dealt specifically with harm caused by segregation, separation and exclusion on the basis of one's collective affiliation.[122]

155. The principle of equality and the prohibition of discrimination also form the basis of the concept of human rights in general, and are part of the core of human rights that enjoys meta-constitutional status. This principle, which constitutes "the soul of the constitutional regime",[123] "the beginning of all beginnings,"[124] and which "rises in and permeates every aspect of the law, constitutes an inseparable part of the genetic makeup of all the rules of law", "it is one of the basic values of the state. Underpinning social existence. It is one of the pillars of the democratic regime."[125]

156. The principle of the prohibition of discrimination is a fundamental condition for the existence of any democratic regime, and thus a violation of the principle of equality "violates the values of justice and fairness and the recognition that equality protects the government from arbitrariness; violating the right to equality harms society and the social arrangements that unify its components ..."[126]

157. Without the principle of the prohibition of discrimination, there is no equality before the law. The principle of 'all equal before the law' is a cornerstone of the rule of law, and its essence is comprised of the equal treatment of all human beings without regard to their differing characteristics, such as their social status, familial affiliation, gender, age, the color of their skin, and the like."[127]

158. Thus, the violation created by the Basic Law: Nation-State of the principles of the prohibition of discrimination and dignity in the context of one's collective affiliation, when this violation meets the definition of racial discrimination, justifies the intervention of the Honorable Court as the basis and nucleus of the system. This matter is underpinned by the great violation of rights in daily life to which the Basic Law leads. The alternative of non-intervention is the inaction of the basic principles.

159. Therefore, the Petitioners argue that the constituent authority overstepped its authority when it enacted the Nation-State Basic Law by negating the basic principles of the system, first and foremost the principles of eliminating racism, the prohibition of discrimination, and the safeguarding of the right to dignity. Thus, the present case justifies the application of the aforementioned doctrine, since it meets the

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[121] On this matter, see BARAK, HUMAN DIGNITY, *supra* note 118, at p. 261.
[122] HCJ 4541/94 Miller v. Minister of Defense 49(4) PD 94, 131 (1995); HCJ 6824/07 Manna' v. The Tax Authority 64(2) PD 479, 31-31 (2010); Danny Statman, *Two Concepts of Honor*, 24(3) Iyunei Mishpat 541, 559, 564 (2000).
[123] HCJ 98/69 *Bergman v. Minister of Finance* 23(1) PD 693, 698 (1969).
[124] HCJ 7111/95 Local Government Center v. The Knesset 50(3) PD 485, 501 (1996).
[125] *High Follow-up Committee for Arab Citizens in Israel*, *supra note* 85, para. 13 of President Barak's opinion.
[126] HCJ 441/97 Yosef Tznevirt v. The Mayor of Jerusalem 53(2) PD 798 (1999). See also: HCJ 1843/93 Raphael Pinhasi, Deputy Minister and Member of Knesset v. The Knesset 49(1) PD 661 (1995); HCJ 10203/03 "The National Census" Ltd. v. The Attorney *General*, 62(4) PD 715 (2008).
[127] AMNON RUBINSTEIN AND BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 271 (Fifth Edition, 1996). See also HCJ 721/94 El Al Israel Airlines Ltd. v. Danilowitz 48(5) PD 749 (1994).

test specified by Chief Justice Hayut as, "negating the core of the state's democratic identity or shaking the foundations of the constitutional structure."[128]

160. Moreover, developments in international human rights law (IHRL) affect the powers of the constituent authority. In the *Mizrahi Bank* case, then-Chief Justice Barak referred to developments in IHRL as a having an impact on the very existence of the Knesset's authority to enact basic laws, in its capacity as a constituent authority. Indeed, the starting point of Justice Barak's historic discussion on this subject was developments in IHRL, including comparative law:

> "Israel is a constitutional democracy. We have now joined the community of democratic countries (among them the United States, Canada, Germany, Italy and South Africa) with constitutional bills of rights. We have become part of the human rights revolution that characterizes the second half of the twentieth century. The lessons of the Second World War, and at their center the Holocaust of the Jewish people, as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda. International accords on human rights have been reached. Israel has acceded to them. International tribunals have been established to address issues of human rights. The new constitutions include extensive sections treating of human rights – particularly at the head of those constitutions and in their unique entrenchment provisions. Judicial review of the constitutionality of laws infringing human rights has become the norm in most countries. This revolution has not passed us by. We joined it in March 1992."[129]

161. Furthermore, according to the internal logic of Israeli law, the basic norm that granted the Knesset its position as a constituent authority is in itself not the result of an election by the people, as pointed out by [former] Chief Justice Barak, but is related to fulfilling obligations to the international community. The most significant of these is the UN resolution of November 1947, mandating the adoption a democratic constitution that first and foremost upholds the principle of the prohibition of discrimination among all citizens, regardless of nationality, religion, gender or race. As stated by Chief Justice Barak:

> "The Provisional Council of State decreed in the Declaration of Independence that a constitution would be enacted by the Constituent Assembly, which in turn would be elected no later than October 1, 1948. **It thus gave expression to the Resolution of the General Assembly of the United Nations of 28 November 1947, according to which 'the constituent assembly of each State will enact a democratic constitution for its respective State'**."[130] (Emphasis added.)

162. It therefore follows that the Knesset as a constituent authority exceeded its authority when it enacted the Nation-State Basic Law, since it is at odds with its obligation to "draft a democratic constitution", according to the basic norm which gives expression to the UN Resolution of November 1947, which is to be based on the principle of non-discrimination between all citizens and residents.

163. The Petitioners further argue that the violation of core aspects of international law, which constitute a part of customary international law, justifies the application of the doctrine of the unconstitutional

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[128] *Expulsion Law* case, *supra note* 112, para. 36 of Chief Justice Hayut's opinion.
[129] *Mizrahi Bank* case, *supra note* 104, para. 2 of the Chief Justice Barak's opinion.
[130] *Id*., at para. 10 of Chief Justice Barak's opinion.

constitutional amendment. A constitutional identity that is racist and in breach of the ICERD is liable to cause the constitutional regime to devolve into a racist regime, which itself is absolutely prohibited.[131]

164. Constitutional courts are indeed required to act to repeal laws, regardless of their normative type [i.e. regular law, constitutional law, etc.], if they contradict Article 2 of ICERD, which states:

> "(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

3. Comparative Law

165. Comparative law demonstrates that the doctrine of unconstitutional constitutional amendment can be applied when a constitutional provision violates the rights of minorities or the basic principles of the regime or its constitutional structure.

European Court of Human Rights (ECHR)

166. The ECHR has recognized certain supra-national principles or laws as superior to national constitutions, and which can supersede unconstitutional constitutional amendments. For example, in the case of *Sejdie*,[132] the ECHR ruled that a provision in the Constitution of Bosnia and Herzegovina restricting the right to be elected to the House of Peoples and to serve on the tripartite presidency of the State to the members of the three national groups defined in the Constitution as the constituent peoples, Bosniaks, Croats and Serbs, was discriminatory given the exclusion of citizens belonging to the Jewish and Roma minorities, and was in violation of the European Convention on Human Rights.

167. According to the constitutional order in Bosnia and Herzegovina, for the purposes of elections and serving in public posts intended for the three recognized groups, the designation procedure for individuals' and their division into different identities is not based on a fixed, primordial conception dictated from above; rather, any individual can declare him or herself as belonging to a certain group and register as such for the purposes of the election law. Thus, formally, members of the Roma and the Jewish minority who wished to serve in positions limited to the recognized groups could register as members of these groups. However, the petitioners argued that they were not interested in declaring affiliation to any of the recognized groups, and that as a result of the state's constitutional order, they were excluded and discriminated against. Indeed, the ECHR elaborated on the background that led to these specific constitutional arrangements which were attached as an addendum to the 1995 Dayton Peace Agreement, with the purpose of maintaining peace in a country that had experienced a bloody and destructive conflict. However, in view of the violation of petitioners' rights, and of the existence of alternatives able to achieve the proper purpose without excluding the petitioners or infringing their rights, it was determined that the said constitutional arrangements were in violation of the European Convention on Human Rights.

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[131] On this subject, see: ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS, *supra note* 3, at 82-89; John Dugard, *Introductory Note: Convention on the Suppression and Punishment of the Crime of Apartheid* 1973 (2008), *available at*: http://legal.un.org/avl/ha/cspca/cspca.html; John Dugard and John Reynolds, *Apartheid, International Law and the Occupied Palestinian Territory*, 24(3) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 867-913 (2013). In addition, see the previous chapter on section 1 of the Basic Law regarding Security Council resolution 554 of 1984, which condemned the 1983 "new constitution" of South Africa, *inter alia*, because it discriminates against indigenous people. In this regard, see also the references in the previous section on the basic premises of this petition, which refer to the influence of international law on constitution-making processes.

[132] *Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06 ECtHR Judgment of 22 December 2009.

168. This ruling emphasizes the duty to protect minorities from exclusion and the prohibition on discrimination, regardless of the actual possibility of implementing it from a practical political standpoint.

169. The following is a review of cases in which the doctrine of the unconstitutional constitutional amendment was used in the absence of an express, authoritative provision, and where democratic principles and human rights received broader constitutional protection by limiting the authority to amend them. This review is based on the illuminating book by the scholar Yaniv Roznai.[133]

India

170. The classical and pioneering case of the doctrine of the unconstitutional constitutional amendment comes from India. There, the "basic structure doctrine" was developed in the 1960s and 1970s against a background of a series of far-reaching steps taken by Prime Minister Indira Gandhi to amend the constitution. According to this doctrine, the power of constitutional amendment is limited by a series of implicit principles that prevent a change in the identity or basic characteristics of the constitution. While changing previous rulings that rejected the idea that the power to amend the constitution is limited (in the case of *Shankari Prasad v. India* of 1951 and *Sajjan Singh v. The State of Rajasthan* of 1965), in 1967 the Court stated in an *obiter dictum* in *Golaknath v. The State of Punjab*, with a 6-5 majority, that the parliament's authority to amend the constitution cannot be used as a tool for the violation of basic rights. This assertion was based on Article 13 of the Constitution, which prevents parliament from passing any law that infringes fundamental rights, while pointing out that an amendment to a constitution is considered a 'law' for the purpose of the said article. However, in this case, the court did not overturn the challenged amendment in question.

171. In 1973, in the case of *Kesavananda Bharati v. The State of Kerala*, the Indian Supreme Court reversed the *Golaknath* ruling and held that a constitutional amendment is not 'law' for the purposes of Article 13 of the Constitution, and that the Parliament may amend any part of the Constitution. However, a majority of seven justices (of 13) ruled that the power to amend does not include the authority to change the basic structure or framework of the constitution in a way that alters its identity, and thus introducing into Indian constitutional law the "Basic Structure" doctrine.

172. The basic structure doctrine did not include an exhaustive list of subjects to which it might apply, but one of the judges pointed to examples of characteristics that constitutional amendments could not change: the supremacy of the constitution, the democratic structure of government, the federal structure of the state, the separation of powers, and secularism.

173. In 1975, the court annulled Gandhi's election in 1971 on charges of fraud and prevented her from participating in elections for six years. In response, Gandhi declared a state of emergency in the country, and through a parliamentary majority passed a wide range of constitutional amendments. Article 38 of the Constitution stipulated that the president's decision to declare a state of emergency and all subsequent legislation would be immune to judicial review; and Amendment 39 retroactively revoked the laws on which Gandhi was convicted and limited the courts' jurisdiction to adjudicate issues relating to the election of a series of political officials, including the president, vice president and prime minister. Immediately thereafter, Gandhi's appeal reached the Supreme Court (*Indira Nehru Gandhi v. Raj Narain*) in a process the end of which saw the basic structure doctrine ratified by a majority of five justices. The court approved Gandhi's election in 1971 but declared Amendment 39 null and void because it violated three fundamental characteristics of the constitutional system: fair elections, equality, and the separation of powers.

[133] ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS, *supra note* 3, at 15-38, 197-225.

174. In 1976, in response to the court's ruling, Parliament passed Amendment 42 to the Constitution, which contained 59 articles, and within its framework (Article 55) it was determined that the Parliament's authority to amend the Constitution was unlimited. In 1980, in the *Minerva Mills Ltd. v. Union of India* case, the Court held that this amendment was null and void since it removed all checks on the Parliament's power to amend the Constitution, thereby effectively allowing it to damage the fundamental characteristics and basic structure of the Constitution. Parliamentary authority derives from the constitution itself, and therefore, the court ruled, the power to amend the constitution was not unlimited. Any conclusion to the contrary, the court continued, would position Parliament above the constitution. This judgment consolidated the status of the basic structure doctrine in India, which has since become a constitutional basic norm. The basic structure doctrine incorporates the characteristics of liberal democracy, including the supremacy of the constitution, the rule of law, the separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and equal elections, federal structure, and secularism.

175. The basic structure doctrine developed and implemented in India has made its way beyond the borders of the country and influenced the constitutional jurisprudence of other countries.

Colombia

176. The "constitutional replacement doctrine" emerged in Colombia, and recognized the existence of implicit limitations on the power to amend the Constitution.

177. In 1987, the Colombian Supreme Court held that the People possessed the primary constituent authority, and that the Congress enjoyed derivative authority, which cannot authorize a total and comprehensive change in the constitutional arrangement. According to the Court, the judiciary has the authority to ensure the integrity of the Constitution (Supreme Court of Colombia, Decision of 5 May 1978, G.J., No. 2397, 104.).

178. The Colombian Constitution of 1991 does not contain explicit provisions that impose substantial limitations on the power of amendment (which may be exercised by the Constituent Assembly, the Congress or by referendum; see Articles 378-374 of the Constitution). On the contrary, the Constitution authorizes the judiciary to hear constitutional amendments only on grounds of procedural errors (articles 241 and 379). However, the Court interpreted the term "procedural error" broadly. In decision C-551/03, the Court noted that the power of amendment did not include the replacement of the Constitution with another. Thus, when the amending body replaces the constitution, it acts without authority, and only constituent power that acts by unconventional means, such as a constituent assembly, can formulate a new constitution.

179. The Court reiterated its position in decision C-1040/05, in which an amendment that granted legislative powers to the unelected Council of State, which were not subject to judicial review, was declared unconstitutional. According to the Court, the amendment violated the principle of the separation of powers and the principle of the supremacy of the constitution in a way that led to the adoption of a new constitution:

> "There is a difference, then, between the amendment of the Constitution and its replacement. Indeed, the reform that is incumbent upon Congress may contradict the content of constitutional norms, even drastically, since any reform implies transformation. However, the change should not be so radical as to replace the constitutional model currently in force or lead to the replacement of a 'defining axis of the identity of the Constitution,' with another which is 'opposite or completely different.'"

180. In decision C-588/2009, the Court overturned a constitutional amendment that granted tenure to public service officials without having passed the required qualifying examinations. The court held that the amendment had replaced the principle of equality and the principle of competence, which are basic elements of the constitution.

181. Again, in 2010, in its decision C-141/2010, the Court abrogated a law that established a referendum to amend the constitution so as to allow the President to run for a third term. According to the Court, the reform violated the basic principle of democracy and affected the constitutional order as a whole.

182. The Colombian doctrine of constitutional replacement even reached Costa Rica, where the Court held in *obiter* that constitutional amendments cannot violate the essence of human rights (see Res 2010-1331 Supreme Court of Justice of Costa Rica (Constitutional Chamber)).

Austria

183. The Austrian Constitution does not explicitly include substantive limitations on the power to amend. However, there, too, a distinction is made between the procedure required for a partial change in the constitution, which requires legislation by parliament, and the procedure to be followed when introducing a comprehensive change, which requires parliamentary legislation and a referendum. The Constitutional Court held that a comprehensive change is a change made to leading principles (*Leitender Grundsatz*). These latter principles include: democracy, the separation of powers, the rule of law, fundamental freedoms, and the federal structure. Thus, the Constitutional Court created a hierarchy of constitutional norms by broadening the term "comprehensive change" in order to exercise judicial review that imposes substantial limitations on the power to amend the constitution.

184. In 2001, for instance, the Austrian Constitutional Court discussed a constitutional amendment that granted immunity to the laws of states previously declared unconstitutional. The Constitutional Court ruled that the denial of the normative power of the Constitution violated the principle of the rule of law, and that the amendment was comprehensive and thus had been erroneously adopted by the Parliament without the required referendum (10, 2001, G 12/00, G 48- 51/00).

185. **Summary:** This review indicates the existence of a growing trend in global constitutional theory, which recognizes that the authority to draft and amend the constitution is not unlimited, and that this authority itself derives from the existing constitutional order. Above all, the uniting theme in this review is the rejection of the use of the power of constitutional amendment to harm democratic values and human and civil rights, through conceiving of the constitutional order as a whole with basic characteristics that cannot altered with ease.

VIII. ABUSIVE EXERCISE OF KNESSET'S CONSTITUENT AUTHORITY

186. The Petitioners will argue that the Basic Law is a product of abusive exercise of the constitutive authority of the Knesset, for a number of reasons. The first reason is that the Nation-State Basic Law was legislated in pursuit of improper objectives, as detailed above. The second reason is based on the illegitimacy of the Basic Law. The Basic Law, as a constitutional norm, and in particular as a basic law that defines the constitutional identity of the state, was legislated on partisan/contrarian grounds based on coercion, without seeking a broad, cross-national consensus that reflects the composition of society as a whole, and is therefore it is the result of a defective constitution-making process. The third reason stems from the manner in which the Basic Law was enacted. [This process] supports the conclusion that the law's implications for the Palestinian population were not considered, as evidenced by the declarations made by some Members of Knesset who supported the law prior to its enactment and following the protests that erupted afterwards.

187. Indeed, the Knesset's constituent authority should not be exercised behind a "veil of ignorance" and not on the basis of narrow political considerations, or in order to harm a particular public or the representation of a particular population. Thus, for example, former Justice Dorner noted that, "It is not desirable that basic laws – which constitute chapters of the constitution of the state – be adopted or amended in order to satisfy current coalition needs."[134] Prof. Amnon Rubinstein and Prof. Barak Medina note that even a motivation on the part of the coalition aimed to mar the effectiveness of the representation of "a certain group in society – for example, "the Arab sector", may lead to the conclusion that the Knesset abused its authority, thereby justifying judicial review.[135] In the case of *Bar-On*,[136] former Chief Justice Beinisch noted that a coalition motive alone is not enough to repeal an amendment to the Basic Law; however, this case dealt with amending a Basic Law by means of a temporary provision related to the biannual budget and did not concern the core subject of majority-minority relations. And as Justice Naor noted there, "this is not a violation of human rights, nor is it in my opinion a violation of basic governmental principles."[137] In *The Academic Center for Law and Business* case, then-Deputy Chief Justice Rubinstein emphasized that, "Where the abuse of majority power in a constitutional text is identified, the political need should be superseded by a 'constitutional core' and its 'sanctity', its legal and moral importance."[138]

188. Indeed, the ease with which the Basic Laws can be amended, and the strong temptation of the powerful majority to use its constituent authority for the sake of [their] political interests and in order to impose arrangements on minorities, requires the Court to remain vigilant against attempts to exploit the great power inherent in constituent authority. In examining abusive exercises of constituent authority, there is room for rigorous judicial review. In this regard, the fact that the constitution is still in the making necessitates increasing the scope of judicial review, for there exists a real and clear danger that, in the absence of explicit arrangements governing constitutional amendment, and in the absence of rigid majority requirements for constitutional amendment, a random majority, even a small plurality, could exercise the Knesset's constituent authority in order to weaken the opposition, the gatekeepers, the minority, and to entrench controversial positions and to exercise its authority in an excessive fashion. Majority rule may easily turn into the tyranny of the majority. In the context of the Nation-State Basic Law, we will recall that it was passed by a majority of 62 Knesset members against 55.[139] Indeed, this constitutes a majority of Knesset members, but when we are dealing with a Basic Law that seeks to ground the constitutional identity of the State, the law of laws, there is reason to expect that the basis of consent on such a fundamental matter would be broader.

189. The exercise of constituent authority to pass narrow political and partisan decisions constitutes such abuse; the same applies to the passing of a constitutional norm that lacks broad legitimacy and disregards the rights and status of the Arab population.

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[134] HCJ 5160/99 The Movement for Quality Government in Israel v. The Constitution, Law and Justice Committee of the Knesset 53(4) PD 92, 96 (1999).

[135] AMNON RUBINSTEIN AND BARAK MEDINA CONSTITUTIONAL LAW OF THE STATE OF ISRAEL: BASIC PRINCIPLES 113 (2005), and especially footnote 215.

[136] *Bar-On* case, *supra note* 105.

[137] *Id*., para. 4 of Justice Naor's opinion.

[138] HCJ 8260/16 The Academic Center for Law and Business v. Knesset (published in the Databases, Sep. 6, 2017), para. 30 of Deputy Chief Justice Rubenstein's opinion.

[139] See Prof. Yitzhak Zamir's remarks on the danger inherent in majority tyranny in his article, Yitzhak Zamir, *Judicial Review of the Legality of Laws*, 1 MISHPAT U'MIMSHAL 395, 397 (1993).

1. <u>Illegitimate Purposes</u>

190. As for the purposes of the Basic Law and their relationship to the doctrine of the abusive exercise of constituent authority, it shall be argued that the term "illegitimate purpose" includes, *inter alia*, a purpose intended to violate human rights.[140] Such purposes, as stated by Prof. Aharon Barak, "Do not promote human rights, nor do they contribute to a general social purpose. These purposes are not proper, and legislation intended to fulfill them does not pass the constitutional test. These situations cannot be accepted. It cannot be presumed that an enlightened democratic legislator would enact such laws. This legislation will certainly fail at a previous stage of the constitutional test, since it does not conform to the values of the State of Israel. This situation can be illustrated by colonial legislation designed to ensure colonial rule, which continues to be valid with the transition to a democratic regime."[141]

191. When we are dealing with the establishment of a constitutional norm, the desire to create new purposes that seek to justify infringement of rights and promote anti-democratic values constitutes an abusive exercise of constituent authority. Thus, there is a close connection between the manner in which the Knesset wields its constituent authority and the purposes it promotes through it, and the values on the basis of which the constitutionality of "regular" legislation will be examined in the future, including with regard to the examination of the legitimacy of its purpose.

192. In this context, it will be argued that the Knesset's exercise of its constituent authority in order to undermine democratic values, by using the democratic process itself to create a constitutional norm, is flawed and constitutes a defect that goes to the core of the constitution making process. It is a practice that scholar David Landau has referred to as "abusive constitutionalism", defined as:

> "[T]he use of the mechanisms of constitutional change – constitutional amendment and constitutional replacement – to undermine democracy."[142]

193. In his view, the concept of abusing processes of constitution making or constitutional amendment can inform our application of the 'unconstitutional constitutional amendment' doctrine. In this context, Landau discusses the arguments against the doctrine that emphasize its anti-democratic nature [or its counter-majoritarian difficulty], which are brought up by critics against judicial review of legislation in general, and judicial review of constitutional norms in particular:

> "The fact that the doctrine may be used to protect basic principles of the democratic order may help to alleviate or at least problematize concerns about it being the ultimate undemocratic or counter-majoritarian act that a court can carry out. First, as noted in detail in Part I, constitutional amendment processes can easily be used to carry out the agendas of particular actors or political groups; they do not necessarily represent the will of the 'people' in an uncontestable sense…"[143]

194. As stated above, the Basic Law establishes 'the people' and constructs it in exclusive and exclusionary terms that include only the Jewish population as its subject who enjoys the right to exclusive self-determination. The exercise of the Knesset's constituent authority in order to promote this primary

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[140] See and Compare: AHARON BARAK, PURPOSIVE INTERPRETATION, vol. III, 521 (2001).
[141] *Id*., at 521.
[142] David Landau, *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189, 191 (2013) (hereinafter: Landau, *Abusive Constitutionalism*)
[143] *Id*., at 236.

purpose amounts to abuse of its authority, and it is therefore invalid. This purpose also contravenes international human rights law, as detailed above, including the denial of the right to self-determination of the Arab minority in the state, which is a homeland minority entitled under international law to the realization of its political autonomy and the right to self-determination.

195. The other articles of the Basic Law reflect this primary purpose. [It is seen] first in the establishment of separate tracks for the purposes of naturalization, which in itself amounts to a violation of the right to equality and which is based on the racist logic of the "separate and unequal" principle. Secondly, [it is apparent] in the complete disregard for Arab citizens' collective rights, as reflected, *inter alia*, in the demoted status of the Arabic language, in violation of international law, which recognizes the importance of the collective rights of minorities, as well as of the logic that guided the Supreme Court in its rulings on the status of Arabic, as has been demonstrated above. Thirdly, it can be seen in the alignment of the interests of the state exclusively with the interests of its Jewish population in issues of land and housing, in contradiction of principles of prohibiting discrimination on ethnic/national (and other) grounds, and the principle of equality, which have been recognized by the Supreme Court, including in the context of land and housing. Fourthly this purpose is seen in restricting representation in the state's symbols and official holidays to the Jewish population.

196. On the basis of the foregoing, and in view of the illegitimate purposes of the Nation-State Basic Law, the Court is requested to determine that the Knesset abused its constituent authority and to declare the Basic Law void.

2. <u>Lack of Legitimacy</u>

197. One of the main functions of the constitution developed in the normative theory on constitutions and constitution-making are the functions of *legitimacy* and *justification*. A constitution provides justification, both politically and legally, for the state's monopoly on the use of coercive power *vis-à-vis* its citizens. This role is reflected, among other things, in the demand made [on citizens] to show respect for the outcomes of political decision-making reached through democratic processes, and to abide by them. It further provides legitimacy for enforcement measures against those who violate them. According to the legal scholar Frank Michelman:

> "Systems of legal ordering always invite a question of justification and legitimacy. We want to understand how to justify the demands we make on each other in the name of the law. Demands, I mean, that we back with threats of force; demands we make for everyone's regular compliance with the laws of the country, and of course that includes compliance by those who might not like or approve of all the laws that get made. One answer to this sort of question, which has apparently proved appealing in many contemporary societies, is that demands for legal compliance are justified as long as the laws in question issue from a general system for lawmaking and legal administration – a constitutional regime – that everyone can fairly be called on to accept."[144]

198. The idea of the constitution, and especially the element that establishes constitutional identity, as a source of legitimacy for the outcomes of the political process, particularly for those opposed to certain policies or laws, is based on the "social contract" school of thought in political theory. The latter presupposes the existence of social diversity and pluralism in a given political space, and stems from the

[144] Frank I. Michelman, *2009 Edward A. Seegers Lecture – Legitimation by Constitution (and the News from South Africa)*, 44 VAL. U. L. REV. 1015, 1016-7 (2010).

need to design fair terms for social cooperation amongst citizens who hold diverse worldviews, on the basis of equality and freedom. One of the most important thinkers on this matter is John Rawls, who developed the concept of "political liberalism" (in contrast to essentialist-moral liberalism), seeking to provide fair and just conditions for achieving political stability within a social setting composed of individuals and groups holding different, and sometimes even contradictory, religious, moral and philosophical "comprehensive doctrines.". The purpose of the theory is to justify the demand from one citizen towards another to respect the outcomes of the political process, despite potential disagreements on particular outcomes. For Rawls and many others, one can justify the expectation to abide by political outcomes in a politically controversial matter as long as they are based on a basic norm, or what Rawls' calls "constitutional essentials," which the "losers" in certain decisions also accept as a legitimate and appropriate norm. In other words, despite the concrete disagreement, the broad consensus over the regime's foundations can justify an expectation of respect for the outcomes to which there is opposition. Frank Michelman briefly explains the idea:

> "Political action inevitably is linked to coercion or the threat of it.[145] For liberals like John Rawls and countless others, coercion is morally supportable, hence politics possibly can be legitimate, only if its authors and perpetrators can justify what they do by appeal to principles and rules that ought – or so it is maintained – to be found acceptable by any clear-sighted person seeking fair terms of social cooperation for a population of presumptively free and equal persons holding diverse and conflicting conceptions of the good."[146]

199. The Constitution, then, cannot in itself be the product of an expression of the hegemony and coercion of one group over another, as the Nation-State Basic Law is. Rather, the constitution must create a normative infrastructure that seeks broad and cross-group support in order to support the demand made of all citizens, and to serve as a justification for this demand, to act in accordance with all laws, including laws and other political outcomes that are potentially controversial.[147]

200. As noted above, many societies contain ethno-national schisms that are based, by their very nature, on demands for recognition of the right to self-determination. Recognition of pluralism also appears in international law, which contains provisions concerning collective rights and formal recognition of indigenous national minorities. In such societies, the state's identity becomes a subject for dispute, and the legitimacy of the constitutional system itself will depend on the types of decisions that are made in the realm of identity. Indeed, scholar Hanna Lerner explained the centrality of constitutional identity, in terms of legitimacy, in the process of constitution-making in divided societies:

> "The difficulty of making a legitimate constitution is especially evident in cases of deeply divided societies, which are characterized on the one hand by lacking the preconditions of national homogeneity that facilitate unified action and enable the manifestation of sovereignty through the realization of constituent power. On the other hand, segmented polities, which are still struggling over their shared identity, lack the capability of individualistic societies to act together on the basis of their civil commonalities and to write a liberal identity-neutral constitution. The question of conflict resolution in sharply fragmented societies is amplified under the task of

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[145] JOHN RAWLS, POLITICAL LIBERALISM 217 (Columbia University Press, 1996).

[146] Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66(1) THE MODERN LAW REVIEW 1, 1 (2003).

[147] With regard to the lack of sufficient agreement on a common framework for such decisions and their consequences, see Gavison Report, *supra note* 13, at 32.

> constitution-making, since the formalization process required for drafting a constitution raises the most fundamental issues in their most elemental form. 'Both in the declaratory objectives and in its more specific fleshing out of the state's parameter, the drafting of a constitution forces the issues. It does not allow explosive questions to remain ambiguous and obscure'."[148]

201. Therefore, the question of constitutional identity promoted by the exercise of constituent authority is critical to the legitimacy of the constitutional regime overall, and certainly in divided societies. Broadly speaking, three choices stand before the constituent authority in settling the question of constitutional identity. The first choice is to define the state as neutral in relation to questions of national identity and to define sovereignty in civil-liberal terms; the second is to align the state's identity with the identities of all the component national-ethnic-cultural groups which form society, while promoting an inclusive conception of sovereignty based on the recognition of all groups in the shared political space for the realization of their rights to self-determination; and third, the creation of a constitutional identity based on exclusive recognition of the right of one, dominant group to self-determination, while denying such rights to the other groups in society.

202. The Nation-State Basic Law follows the latter approach by grounding the constitutional identity of the regime in the identity of the Jewish population, while denying representation to the indigenous Palestinian population in the country. This act of grounding the constitutional identity of the state in exclusionary principles negates the legitimacy of the entire constitutional and political regime.

203. Thus, while the legitimacy of the Knesset's constituent authority rests on the sovereign power of the civil collective as a whole, i.e. the People, the Knesset has exercised its authority in order to enact a basic law that seeks to define the relevant civil society in an exclusionary manner that does not include all elements of that sovereign collective. Such use of the constituent authority granted to the Knesset by the civil sovereign, as argued, constitutes abuse and is therefore void.

204. A constitution with the purpose of establishing a system of control and oppression by a certain ethnic group over another, according to a partial and exclusive concept of the right to self-determination, is illegitimate. In societies that contain ethnic, national and cultural diversity, the concept of sovereign self-determination, which originated in the liberal ideas of the Enlightenment about the freedom of peoples from domination, cannot promote, justify and rely on domination, coercion, negation and exclusion. All groups in a democratic society are entitled to realize their right to self-definition, while championing a conception of self-determination as an expression of non-domination over exclusive, majoritarian and colonial conceptions of this term.[149]

205. As a side note, we mention that Harari's historic decision, which determined that the constitution of the state would be created in chapters, contrary to the mandate conferred to the First Knesset to enact a comprehensive constitution, stemmed precisely from the notion that it was impossible to decide basic questions regarding the constitutional identity of the state and impose it on the Jewish religious minority. Preference was given to the incremental approach based on the hope of creating a future consensus on these fundamental questions, despite the fact that at the time, of the 120 members of the Knesset, the representation of religious population amounted to only 16 Knesset members. Hanna Lerner clarifies the background to the decision as follows:

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[148] Hanna Lerner, *The People of the Constitution: Constitution-Making, Legitimacy, Identity – Paper to be presented at the mini-APSA Department of Political Science, Columbia University* 2-3 (April 30, 2004).

[149] For the idea of the right to self-determination as an expression of non-control, see: YOUNG, INCLUSION AND DEMOCRACY, *supra note* 9, at 255-65.

> "Despite the large majority of the secular camp in the Knesset (only 16 members, out of 120 Knesset members, represented the religious parties – see Table 3.1), in June 1950, eighteen months after it was elected as a Constituent Assembly, the Knesset decided not to draft a constitution in a single document. Following a heated debate, a compromise resolution was passed, named after its sponsor, Haim Harari, the chair of the Knesset Committee.
>
> What is clear is that underlying this debate over the future of the constitution was the recognition, shared by the representatives of all political parties, of the profound ideological rift in Israeli society between the secular and the religious visions of the state."[150]

206. Exercising the constituent authority to promote the purpose of Jewish domination and supremacy in a political space that also includes Arab-Palestinian citizens, amounts to abusing the authority delegated to the Knesset by all citizens, including those whom the Basic Law excludes from the definition of sovereignty.

3. Procedural Flaws: Lack of Proper Deliberation

207. Flaws in the process of enacting the Basic Law were brought to light by statements made by members of the ruling coalition after its passage, which indicate that it was carried out in haste and without assessing its social and political impact on the status of various groups in the country. Following the public protests that took place after the law's enactment, a number of MKs who voted in favor of the Basic Law made statements indicating that when they voted, they had not considered the potential effects of the law on population groups that are excluded from it. For example, Finance Minister MK Moshe Kahlon stated that, "The nation-state law was hastily enacted."[151] Minister of Education Naftali Bennett stated that, "After discussions with many of our Druze brethren, it is clear that the manner in which the Nation-State Law was enacted seriously harmed them and those who have linked their destiny with that of the Jewish state. This, of course, is not the intention of the Israeli Government."[152] MK Hamad Amar, who was a signatory to the Nation-State Basic bill, also spoke against it following its enactment and even joined one of the petitions challenging its constitutionality.[153]

208. Such remarks demonstrate the hasty manner in which the Basic Law was passed and the absence of any serious discussion about its potential effects on the constitutional order in the country. The attempts by the coalition to quell the protests by proposing to include the Arab-Druze population in the Basic Law, or in separate legislation, point to the emerging perception of the exclusionary effects of the Basic Law, one which contradicts earlier statements [by the Government]. Most of all, however, it indicates the disregard or indifference of MKs during the discussions of and voting on the Basic Law in the plenum on it, towards its implications. This disregard contrasts sharply with the expectation that the legislative processes, and certainly constitution-making processes, will be carried out with full, effective and informed participation.[154] It is clear that, despite the prolonged period of deliberations in the Joint

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[150] HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 57-8 (Cambridge University Press, 2011).
[151] Yaki Adamaker and Yoav Etiel, *Kahlon: 'We Were Reckless, We Were Wrong in Drafting the Nation-State Law, We Have to Fix It*,' WALLA! NEWS (July 26, 2018) [Hebrew].
[152] *Id*.
[153] Alexandra Lukash and Nir (Shoko) Cohen, *Petitioned against Nation-State law: 'Divide the Country*', YNET NEWS (July 23, 2018) [Hebrew].
[154] See and compare: HCJ 10042/16 Kwantsky v. Knesset of Israel (published in the Databases, August 6, 2017).

Committee that drafted and discussed the Nation-State Basic Law, MKs voted on a chapter of the constitution without fully understanding its implications and the extent of the harm it entails.

209. This defect goes to the root of the lawmaking process; the public outcry and protests against the Basic Law, as well as the expressions of regret voiced by some of its proponents attests to the haste and negligence that underlie its enactment.

210. The Court is therefore requested to order the annulment of the Basic Law, in view of the flaws that occurred during in its legislation.

In light of the above, the Honorable Court is requested to issue an *order nisi*, as requested at the beginning of the petition, to accept the petition, and to charge the respondents with legal expenses.

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Hassan Jabareen, Advocate Suhad Bishara, Advocate

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Myssana Morany, Advocate Fady Khoury, Advocate

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Sawsan Zaher, Advocate

Haifa, 7 August 2018