



Adalah's Position Paper:

Proposed Basic Law: Israel - The Nation State of the Jewish People

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This position paper discusses the implications of the Basic Law: Israel – The Nation State of the Jewish People (hereinafter: *the Nation-State Basic Law* or *the Basic Law*) on the legal status of all Arabs living under the Israeli constitutional regime, which includes Palestinian citizens of Israel, Palestinian residents of Jerusalem, and Syrians residing in the Golan Heights. In this paper, Adalah argues that this Basic Law falls within the bounds of absolute prohibitions under international law, and is therefore illegitimate as a colonial law with characteristics of apartheid.

The Basic Law states that "the State of Israel is the nation-state of the Jewish people" and that the realization of national self-determination in the State of Israel will be exclusively for the Jewish people; immigration to Israel leading to automatic citizenship is exclusive to Jews (from around the world) under the Law of Return; "Greater and united Jerusalem is the capital of Israel"; Hebrew is the official language of the state, while Arabic would lose its status as an official language and would have a special status to be determined by a separate law; the State shall encourage, promote and establish Jewish settlements;¹ the national anthem is "Hatikvah"; the flag is Israeli (a prayer shawl); Independence Day is a national holiday; the Hebrew calendar is the official calendar of the state; the official holidays are Jewish holidays; and the State will work to foster ties with Diaspora Jewry.

If the Basic Law is approved, its provisions will have the status of a constitutional norm. The Basic Law will have far-reaching consequences by virtue of its specific provisions, and implications on the interpretation of existing legislation, including the narrowing of the scope of legal challenges to discriminatory and racist policies.

The Nation-State Basic Law will apply to areas classified as occupied territories according to International Law: The Nation-State Basic Law will explicitly be implemented in areas known as the "Green Line" territories, where nearly twenty percent of the Palestinian population is Palestinian (citizens of Israel), as well as territories occupied in 1967 such as

¹ This new provision replaced an earlier article which allowed for the establishment of separate towns on the grounds of religious or national affiliations. The previous version reflected the racist principle of "separate but equal," while the current version is based on the even more racist principle of "separate but unequal." The new provision stands to justify discrimination in land and housing, as well as in economic incentives and benefits in order to encourage Jewish Israelis to settle in specific areas.

Jerusalem and the Golan Heights, which were annexed to the territory of the State of Israel by law. This annexation is considered illegal under international law.²

The Nation-State Basic Law determines who is the sovereign who stands above the rule of law: If passed, this Basic Law will be the “law of laws” capable of overriding any ordinary legislation. It will also affect the interpretation of the other Basic Laws, because it anchors the constitutional identity of the regime, which determines who is the sovereign granting legitimacy to all laws. Indeed, it is customary to treat the constitutional identity of a state as a principle that overrides the will of the parliament.

Article 1 of the Basic Law states that the identity of the sovereign is determined as follows: "The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established" and that "the State of Israel is the nation-state of the Jewish people". The "people" here are not limited to "Israeli Jews" nor is it defined in terms of the “state of all citizens”, but rather it includes the "Jewish people" wherever they are in the world. The will of this sovereign that the Basic Law seeks to enshrine takes precedence over Israeli citizenship.³

The Nation-State Basic Law is anti-democratic: It negates the main purpose behind the introduction of a democratic constitution, namely, to anchor and determine the political community according to the “Demos” principle, according to which residents living in that territory are equal citizens and constitute the sovereign. Most of the constitutions adopted by states during the third wave of democratization since the 1990s enshrine in their preamble the political community of the constitution, which includes various ethnic groups living in the same territory. The Constitution of South Africa, which provides that the state is the state of all its black and white inhabitants, is the exemplary model of this kind of constitutional design. No country in the world today is defined as a democratic state where the constitutional identity is determined by ethnic affiliation that overrides the principle of equal citizenship. The extreme anti-democratic features of this proposed Basic Law are also revealed in the fact that it does not even define "who is the citizen" and in the fact that it includes no reference to the Arab population as a legitimate political and social community.

What are the implications of ethnic and exclusive self-determination?: The Basic Law provides that self-determination will be exclusive to Jews, and thus, it stands to justify the distinction between the realization of basic rights between Jews and non-Jews as a legitimate distinction and not as an invalid discrimination. The norms of international human rights law recognize the realization of self-determination within the framework of the "nation state" under two conditions: equal treatment for all citizens, and in the case of different ethnic groups, equal recognition of their collective rights alongside civil equality. This national self-determination ensures the prohibition of discrimination between

² International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.

³ The Supreme Court expressed this view on many occasions, and it was no coincidence, for example, that the court rejected the very existence of an "Israeli nation" based on the citizenship of citizens in the legal sense. In this case, Israeli citizens registered as different nationalities (Jewish Arab, Druze, Buddhist, etc.) in the Population Registry asked that they be considered as "Israeli" under the “nationality” marker on their identity papers, and the court rejected their request. CA 8573/08, *Ornan v. Minister of the Interior* (decided 2 October 2013).

citizens/residents, and differentiates them mainly from those who are "outside" the territory (the foreigners). This Basic Law, however, delineates the "internal" and "external" spheres of sovereignty on a racist, ethnic basis: equality must apply to all Jews *qua* Jews for they constitute the sovereign, and non-Jews are excluded regardless of their territorial affiliation, and their discrimination is thus justified. It is no coincidence that the principle of equality is absent from the Nation-State Basic Law. Thus, according to the law, the Palestinians are foreigners in their own homeland.

The Nation-State Basic Law establishes discrimination as a constitutional value: The Basic Law determines the national interest in accordance with the collective Zionist interests, which serve to justify the exclusion of the rights of the Arab population. Despite the bi-national reality, the law promotes exclusive, ethnic discrimination. National projects that seek to Judaize spaces, encourage Jewish settlement, and create demographic balances become worthy causes that justify discrimination against Arabs on the level of individual and collective rights. Civic equality thus becomes a *residual* principle, the application of which is determined in accordance with ethnic spaces that have been drawn in advance according to the interests of the Jewish population. It is not a coincidence that the racist principle of "separate but not equal" applies to the most significant areas of life for the Palestinians. For example, under the guise of self-determination, the Basic Law affirms the principle of apartheid in housing, land, and citizenship: separate legal tracks are introduced based on the principles of encouraging, promoting and establishing Jewish settlement in the areas where Arabs and Jews live and the principles of the Law of Return for citizenship and naturalization. Therefore, this law constitutionally sanctions institutionalized discrimination.

The Nation-State Basic Law creates a situation of oppression and control: Oppression and control are expressed in two main aspects of the law. First, the law imposes a constitutional identity on the Arabs without their consent. Second, the law creates a situation in which the Arabs participate, under coercion, in promoting the discrimination against them. Regarding the imposition of identity, a universal custom has developed whereby the legitimacy of a constitution, and especially the constitutional identity, is predicated on consensual and cooperative constitution-making processes involving representatives of all ethnic and national groups in the territory. This is so in order to negate the coercive aspect of majority-minority relations, according to which the majority will dictate identity according to the existing balance of power. These principles have been set forth in UN documents and constitute the litmus test for the legitimacy of the constitution.⁴

The paradigmatic examples of exclusionary constitution-making processes are in the United States during the era of slavery and segregation, and in South Africa, during the apartheid era. The Nation-State Basic Law, once approved, will have been predicated on intra-Jewish consensus and the exclusion of Arabs, while its dominant purpose is to discriminate against Arabs and enshrine the ethnic supremacy of Jews in the country.

The second aspect of the oppression and control promoted by the Nation-State Basic Law is that it will essentially have the Arabs participating in the promotion and funding of the

⁴ Guidance Note of The Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009). Available at: https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf

discrimination against them. While they bear equal tax obligations as citizens/residents, who must carry the social burden on the basis of mutual trust among all citizens/residents, the Basic Law's alignment of national interests with the exclusive interests of the Jewish population, results in forcing the Arab population to contribute, subsidize and promote those national projects that negate their identity and status. These projects include fostering contact with Diaspora Jewry, absorbing Jewish immigration, Judaizing the space, and the like.

What is new in the Basic Law that differs from existing practice? The policy of discrimination and oppression against Palestinians has existed since 1948, according to principles based on the supremacy of the Jewish population that support the Judaization of the space and the demographic dilution of the Palestinian population. However, there is a difference between racism and racist practices and a Basic Law that requires, as a constitutional mandate, racist acts. If the Basic Law is enacted, the practice will be anchored in the constitution, which stands to pass clear messages to all the branches of government and obligates them, by law, to discriminate against the Arab population. In so doing, it transforms discrimination into a constitutional, systematic and institutional principle, and into a basic element of the foundations of Israeli law. Unlike daily practice, where one can argue against the validity of discrimination because it is committed in violation of the principle of the rule of law, a law clearly articulates its intention for the realization of its objectives, and it turns illegitimate practices in and of themselves into an expression of the rule of law.⁵

In this context, it is important to note the connection between the Nakba and the Nation-State Basic Law. The immediate repercussions of the Nakba, which are mainly related to the loss of the homeland and the destruction of the Palestinian society, with all that this entails, were realized mostly through extra-legal governmental policies. Now, the Nation-State Basic Law seeks to anchor them in a clear and explicit manner, first and foremost, by the denial of the rights of the Palestinian people to self-determination in their own homeland.⁶

In Conclusion – The Nation-State Law violates absolute prohibitions under international law: The Basic Law suspends the two systems of law that are perceived as legitimate under international law. The first system is the state's domestic legal system, which should be based on equality before the law and the rule of law. The second system is that of international humanitarian law (IHL), which is applicable to an occupied territory. IHL prohibits the annexation of occupied territories, discrimination against the inhabitants, and the imposition of the occupying power's constitutional identity on protected persons,

⁵ A good example is the status of the Arabic language. According to Israeli law, it is an official language, but in reality, it has a lower status. Yet, there is still a strong argument that can be made before the authorities that its status should be respected as an official language under the law. Under the proposed Basic Law, this argument loses its legitimacy. The law justifies the argument that it is necessary to diminish the status of Arabic in order to realize the definition of the state as Jewish.

⁶ Indeed, the Nation-State Basic Law is primarily anti-Palestinian, since it seeks to entrench the immediate implications of the Nakba: the denial of the right to self-determination of the Palestinian people in its homeland (Article 1 of the Law); the denial of the Palestinian refugees' Right of Return (Article 6 concerning "Aliyah"); the Palestinians who remained in their homeland become second-class citizens (Article 6 concerning the Law of Return); and the loss of Arabic as an official language in the homeland (Article 4 of the Law).

including the attempt to create, without the latter's consent, allegiance to this identity and its laws.

This suspension also leads to the denial of the Palestinian People's right to self-determination in contravention of the United Nations' Charter and ushers the Israeli regime into the prohibited sphere of colonialism.

A colonial regime is expressed in this Basic Law by the imposition of a constitutional identity of Jewish ethnic supremacy and control, without consent and cooperation, which denies the connection between the Palestinian natives (citizens and residents) with their homeland.⁷ This colonial regime is the kind that falls within the bounds of absolute prohibitions under the International Convention on the Suppression and Punishment of the Crime of Apartheid ("the Apartheid Convention"), which proclaims practices of apartheid, including legislation, as a crime against humanity.

The Apartheid Convention declares apartheid as a crime against humanity by reference to the definition of racial discrimination in the International Convention for the Elimination of All Forms of Racial Discrimination (CERD). Article 1 of the CERD Convention defines "racial discrimination" as "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." Article 2 of the Apartheid Convention defines the crime of apartheid as policies and practices, the purpose of which are domination and systemic oppression by one group against another, as well as through the creation of systemic exclusion and oppression in the realization of human rights and in the participation in the political, social, economic and cultural life of the country.

The Nation-State Law declares the intention to discriminate against Arabs in the most important aspects, those which make the citizen, a citizen and the resident, a resident, and those that make the population under occupation, a protected population. It discriminates against the Arabs in the fields of citizenship, property and land, language and culture, and justifies their inferiority in all spheres of life by excluding them from the political community that constitutes the sovereign in their homeland.

Therefore, the Nation-State Basic Law is illegitimate, as it establishes a colonial regime with distinct apartheid characteristics in that it seeks to maintain a regime in which one ethnic-national group controls an indigenous-national group living in the same territory while advancing ethnic superiority by promoting racist policies in the most basic aspects of life.

⁷ Constitution Building Processes and Democratization (International IDEA: Institute for Democracy and Electoral Assistance, 2006), p. 7. Available at: <https://www.idea.int/publications/catalogue/constitution-building-processes-and-democratization>.