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An Equal Constitution for All? On a Constitution and Collective Rights for Arab Citizens in Israel

Position Paper



مركز مساواة

Mossawa Center

מרכז מוסאוא

May 2007

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An Equal Constitution for All?

On a Constitution and Collective Rights for Arab Citizens in Israel

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Graphic Design: "Majd" Arts & Graphic Design

Translation: "Roaa" Translation and Publishing

We would like to thank the following private and public foundations for their financial assistance in the production of this document.

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With sincere gratitude towards:

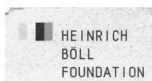


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Preface

Since its establishment as an official state in 1948, Israel has not had a written constitution legally outlining the mechanisms of government, the rights of its citizens, or the responsibilities of the State. Rather the 1948 Declaration of Independence defines Israel as a Jewish and democratic state and declares:

The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations. [The Declaration of the Establishment of the State of Israel (May 14, 1948) available at http://www.knesset.gov.il/docs/eng/megilat_eng.htm.]

To date, debates over the Jewish versus democratic nature of the state of Israel, mainly between secular and religious parties, have arguably prevented the adoption of a comprehensive constitution. Yet nowhere in these debates were the concerns of the Arab minority a serious priority. Over the years, the Knesset has adopted 11 Basic Laws which the High Court uses as its basis for “constitutional law” in the absence of a legal constitution. The Basic Laws do not specifically outline the needs or status of the state’s Arab citizens.

The Mossawa Center advocates for both minority status recognition in Israel and indigenous rights. The Palestinian Arab community strives to be integrated into the larger public sphere and civil society in Israel as active, equal citizens, while seeking to maintain its unique national, cultural, linguistic and religious identity. Nonetheless, Palestinian Arab citizens demand to be treated as equals regardless of their official identification by the state, and for their national institutions to be recognized by the state.

As part of the advocacy on the issue of collective rights, the Mossawa Center organized a roundtable discussion on June 30, 2005, inviting the head of the High Follow-Up Committee for Arab Citizens in Israel, Mr. Shawki Khateeb, Palestinian Arab scholars, lawyers, NGOs and MKs to discuss the provisions necessary to guarantee rights for the Palestinian Arab community. The discussion of this roundtable provided

recommendations for and cumulated later in a position paper, authored by law lecturer Dr. Yousef Jabareen outlining the stipulations and recommendations for the development of a fully-inclusive Israeli constitution.

On July 21, 2005, the updated position paper was presented by Mossawa staff in the Knesset at the Constitution, Law, and Justice Committee, and also in the presence of the Minister of Justice. Mossawa staff highlighted the essentiality of equality for the Arab citizens in any future constitution and requested that the recommendations made in the position paper be included in any future constitutional arrangements.

The following paper provides rationale for the inclusion of the Palestinian-Arabs' constitutional protections and collective rights as a national minority into any discussion or proposal for an Israeli constitution. The document examines the current legal status of the Arab community in Israel and advocates for full equality, participation and partnership between the Arab minority and Jewish majority based on due respect for both parties' needs, historical rights, and universal human rights standards.

Jafar Farah

Director, Mossawa Center

1.

Foreword¹

The status of the Palestinian Arab citizens in Israel is one of the most intense and highly-complicated issues in Israeli society. One of the most critical challenges faced by Israeli society is how to encompass the complexity of this minority's status within a fair and balanced constitution. This challenge comes into focus when one considers the multifaceted reciprocities between the Arab Palestinian minority and the Jewish majority and the reciprocities between the Arab minority and the region. The question

1. The author is a law lecturer at Tel Aviv University and the University of Haifa. He is also a legal consultant for the Mossawa Center. This document developed as a result of discussions initiated by the Mossawa Center and two main presentations the author gave at the sessions of the Knesset's Constitution, Law and Justice Committee held on November 8, 2004, and June 21, 2004, on the subject of the collective rights of the Arab minority, pursuant to the future constitution of Israel. The first session was held due to the initiative of the Mossawa Advocacy Center for Arab Citizens in Israel. For a full protocol of the session see: <http://www.knesset.gov.il/protocols/data/htm/huka/2004-11-29.html>. The second session was held on the initiative of the Civil Consensus Forum. For a full protocol of the session see: <http://www.knesset.gov.il/protocols/data/rtf/huka/2005-06-21-01.rtf>

becomes: What kind of constitutional arrangement will be able to fairly establish this relationship for future generations?

From the point of view of the Arab minority in Israel, seeking to protect its human and civil rights, it is necessary to examine any future constitution according to the manner in which it outlines the character of such relationship. And if we are dealing with such a highly-charged situation, it is natural that the discussion concerning it should be most fundamental. Those participating in shaping the Israeli constitution are required, therefore, to give it full and careful consideration, out of a historic and moral responsibility.

The aspiration to a democratic constitution, based on the sincere social consent of the citizens of the State, requires first of all true and full participation by all citizens of the State in the process of establishing the constitution. From the perspective of the Arab minority, just like any minority group at such a historic moment, the first question in the process of establishing the constitution is - whether the discussion on the issue is by nature an inclusive and equal one. The aspiration to a democratic constitution requires public discussion which will be able to overcome the power differentials presently existing in Israeli society between the Jewish majority and the Arab minority. The normative socio-political situation shows that the power gaps between

the two groups are enormous, and failure to neutralize them at the stage of formulating the constitution will mean negating the basis for any attempt to reach a true consensus reflecting the minority position as well. A constitutional process that preserves the profound inequality existing between the two populations, will of necessity lead to a constitution subjecting the will of the Arab minority to the interests of the Jewish majority. To put it mildly, such a constitution would not be based on the consent of that minority. The voice of the minority in such a case is neither accepted nor heard.²

Until now there has been no real participation by the Arab minority in the process of establishing the future constitution. The collective interests of the Arab citizens in Israel are presently represented by an umbrella organization overseeing the overall Arab elected leadership - The High Follow-up Committee for Arab Citizens in Israel. All elected representatives of the Arab population, including the heads of the local authorities, Knesset Members and representatives of Arab movements and

2. Obviously in such a situation the legitimacy required to establish the constitution is undermined, both at the local Israeli level and at the international level. For an in-depth comparative discussion of the important insights arising from the South African experience in establishing a new democratic constitution see: Aeyal Gross, "The Constitution Reconciliation and Transitional Justice: Lessons from South Africa and Israel," *Stanford Journal of International Law* 20:47 (2004).

parties outside the Knesset, are presently incorporated under this representative framework. The Follow-Up Committee is, therefore, the natural public address to which it is necessary to turn in order to conduct a serious dialogue with the Arab minority on determining its position in the future constitution. Such dialogue has never yet been held.

There should be no distinction between the process of establishing the constitution and its content. From the perspective of the Arab minority, the issue of content raises the following ontological questions: Does the discussion of the constitutional status of the Arab minority aspire to neutralize the power gaps between Jews and Arabs in the State, or only to reduce them? Will there be a free and open debate, endeavoring to outline a way to achieve true equality for the Arab minority in Israeli society, or will it be a limited, pre-defined dialogue, dealing only with improving the status of the Arab minority in Israeli law? In other words, is the purpose of the anticipated constitution to substantially equalize the status of Arab citizens with that of Jewish citizens, or will the constitution settle only for improving the position of Arab citizens? Will it be a constitution of full equality, or only of “improvement”?

The appropriate schematic for a substantive constitutional discussion must be first and foremost, in which everything is open to deliberation and appeal. And indeed, a

philosophy of social consensus requires that all aspects of the constitution, all its headings and principles, shall be open to debate. A logic of true social consensus requires a free and mutual “flow” of thoughts and ideas. Such an open discussion precludes issues considered “taboo” or based on axioms. No single group or individual can have a monopoly on truth or justice or on the social good which we, as citizens of the State, aspire to formulate in the constitution.

2.

Introduction: Majority, Minority and Legal Protection

It is the minority group in society that is in need of constitutional protection of its rights and status in order to assure for its members the rights enjoyed by the majority. Human history shows that the minority group is usually exposed to constant pressure from the majority - with respect to assimilation and cultural erosion, which gnaws away over time at the cultural-national identity of the minority, endangering its unique collective identity and the rights of its members. These pressures come mainly from the labor market, from the public bureaucratic system, political system, consumer forces and the language of mass media.

From this background, international discourse has developed the concept that the minority requires special legal protection for its status in society in order to enable its members to resist the pressures exerted on it by the majority. According to this concept, the socio-political status of the majority is almost inherently superior to that of the minority by virtue of its social and historical status as the

dominant group in society, and therefore it is necessary for the establishment to initiate special action in order to assure substantial equality for the minority.

The minority's mother tongue is considered, in this context, the central object of pressure on the part of the majority group.³ Thus, for instance, Hebrew is the official language of Israel, but its socio-political status in Israeli society does not derive only from its formal status (noting that Arabic is also an official language), but from its dominance in daily life. The demand has never been heard, and there has certainly been no legal litigation, concerning the need to enforce the use of Hebrew on the State authorities, because the right of the Jewish majority to use its mother tongue is already given full expression in Israeli society. The reason for the absolute protection actually granted to this right is rooted in the fact that it is the will of the majority, and it is fulfilled automatically. The State, controlled by the majority group, routinely fulfills an active role in the preservation and development of the Hebrew language and culture and the national Zionist legacy. The conclusion is that the minority group is in need of formal legal protection *de jure* in order to equalize its status to that enjoyed by the majority group *de facto*.

3. Kymlicka, *Multicultural Citizenship* (Oxford Univ.Press, 1995) at 51-52 ("The religious oath in court may be substituted by a civil oath, but English [or any other language in which the hearing is conducted] cannot be replaced by 'no language'").

It must be emphasized that cultural pressures exerted by the majority that are directed at the minority group occur naturally in any society, and it is reasonable to assume that the provisions of a law - however equal it may be - has no power to neutralize them totally, and even more so when the majority in the society is a decisive one. Eighty percent of the population of a state is a decisive majority, and therefore it cannot be expected that the legal norms in themselves will succeed in totally neutralizing the socio-political dominance of the majority group. At the same time, it is possible to rely on the law in order to achieve optimal normative protection for the minority group and to reduce to the extent possible the pressures exerted by the majority.⁴ The legal system is required to employ its full creative potential in order to establish, and to safeguard protective mechanisms within the normative framework of society. A mandatory condition for appropriate compliance with this task is to cleanse the law of all bias that favors the majority. Any formal bias of the legal norms in favor of the majority group means exacerbation of the “natural” pressure mechanisms exerted, as explained above, on the minority group, which leads to the perpetuation of the minority’s

4. See, A. Margalit and M. Halbertal, “Liberalism and the Right to Culture”, *Multi-Culturalism in a Democratic Jewish State - Book in Memory of the Late Ariel Rosen-Zvi*, Eds. M. Mautner et al. (Ramat, 1998), 93, 94 (Hebrew): “A liberal state cannot afford to be neutral vis-à-vis the cultures of its minorities, especially when they are in danger of decline or even extinction. The state is obligated to renounce its neutrality not out of concern for the general good, but in order to enable the members of the minority to retain their identity.”

inferior status under the auspices and with the encouragement of the law. This actually blocks any chance of achieving substantial equality between the two groups in society.⁵

The Arab-Palestinian Minority as an Indigenous Population

A major argument in any discussion on the status and rights of the Arab minority is its uniqueness in the Israeli context. The Arab minority is not just another weakened minority in Israeli society.⁶ This is the indigenous, original Arab-Palestinian population, living in its homeland even before

5. Yousef T. Jabareen, "Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States," 130-153 (Doctoral Dissertation, Georgetown University Law Center, 2003).

6. See the alternatives proposed in the opening section, headed "The Character of the State," in the proposed constitution prepared by the Constitution, Law and Justice Committee, "in Session as the Committee for the Preparation of a Broad Consensus Constitution" (hereinafter - the "Proposed Constitution"). For the full text of the Constitution, Law and Justice Committee Concerning Proposals for the Constitution of the State of Israel see: <http://huka.gov.il/wiki/index.php/English>

In parallel to the discussions of the Constitution, Law and Justice Committee of the Knesset, the Israel Democracy Institute, led by the President of the Supreme Court (Ret.), Justice Meir Shamgar, recently formulated a proposal for a "Constitution by Consensus." The full text of the proposed constitution appears on the Institute's site, <http://www.idi.org.il>. The opening section in the constitution proposed by the Israel Democracy Institute states that "Israel is a Jewish Democratic State." For a critique on this proposal see articles appearing in the *Adalah Newsletter*, volumes 7, 8, 9 and 12. See especially Nadim Ruhana, "Constitution by Consensus: By Whose consensus?," volume No. 7. Section 10 of the proposed constitution, the only section that mentions the Arab minority, states that "the State of Israel shall assure the status of the Arab, Druze and other minorities within it." The section gives no expression whatsoever to the unique status of the Arab minority compared with "other minorities" in Israel. Nor does the section even say how the State will assure the status of the Arab minority, and there is no reference to the nature of that status.

the State was established, when it was the majority group together with the rest of its people. The State of Israel was established on the ruins of the Palestinian people, for whom this event was a national tragedy - the Nakba.⁷ The indigeneity of the Arab population, therefore, is an integral part of the way in which it experiences its situation in Israel. The Arab Palestinian minority is an indigenous minority, with national, linguistic, cultural and religious characteristics distinguishing it from the majority group, and its lifestyle in the State is a direct result of the most central rift in Israeli society - the national-ethnic divide.⁸

Despite all this, the indigeneity of the Arab minority is hardly given expression in the Jewish-public discourse on a formal constitution in Israel. This disregard is in absolute contradiction to the presently accepted insight in the comparative and international legal discourse whereby the original-indigenous character of a minority group (in contrast to an immigrant minority group) should make the collective rights of the group doubly valid and should justify them

7. Baruch Kimmerling and Joel Migdal, *The Palestinians: The Making of a People* (Cambridge W: Harvard University Press, 1941); Walid Khalidi (Ed.), *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, DC: Institute for Palestine Studies, 1992).

8. Asa'd Ghanem, *The Palestinian-Arab Minority in Israel 1948-2000* (Albany: State University of New York Press 2001); Alexander (Sandy) Keidar and Oren Yiftahel, "On Power and Land: Space and Layers in the Israeli 'Ethnocracy'", *Theory and Critique* 16 (2000): 67-100 (Hebrew).

both legally and morally.⁹ The following two paragraphs are taken from a report by the official State investigative committee which investigated the events of October 2000 (the “Or Commission”). The first paragraph is quoted from the opening part of the report (Chapter 1, Section 3), and the second from the end (Chapter 6, Section 42):¹⁰

The Arab minority in Israel is an indigenous population, which views itself as being subject to the hegemony of a non-native majority. In the customary distinction in the professional literature between “indigenous minorities” and “immigrant minorities,” the Arab minority in Israel clearly belongs to the first category. Usually, the indigenous character of a minority intensifies its self-awareness and the validity of its demands to a greater extent than do minorities consisting of immigrants who integrate themselves into welfare societies in order to improve their situation.

9. S. James Anaya, *Indigenous Peoples in International Law* 95-215 (New York, Oxford University Press, 2d ed. 2004); Amal Jamal, “Group Rights for Original Minorities - Theoretical and Normative Aspects,” *The Arab Minority in the Jewish State* Eli Reches and Sarah Osatzki-Lazar, Eds. (Tel Aviv: Dayan Center, 2005) (Hebrew); Amal Jamal, “On the Morality of Arab Collective Rights in Israel,” *Adalah Newsletter* vol.12 (2005). Contrary to indigenous minorities, immigrant minorities are generated by the transition of individual immigrants from their native land to another country. It is customary to view this voluntary transfer as a kind of consent by the individual immigrants to integrate and be absorbed into the new society.

10. Report of “The State Investigative Committee for the Clashes between the Security Forces and Israeli Citizens in October 2000” (2003).

That is also the case with the Arab minority in Israel. The meaning of *Sumud*, i.e. determinedly holding on to their ancestral land in light of challenges set by the Jewish majority, which is perceived as an immigrant society [by the minority], is located high in the Arab citizens' perspective. This formula, of an "indigenous" minority facing an "immigrant" majority provides potential for growing tension.... The Arab minority in Israel developed out of a majority population.

The Jewish majority must remember that the State is not only Jewish but also democratic, that, as aforesaid, equality is one of the central layers in the constitutional structure of the State, and that the prohibition against discrimination applies to all its citizens. The Jewish majority must understand that the events that created the Arabs as a minority in the State were a national disaster for them, and that their integration into the State of Israel entailed painful sacrifices for them. The Jewish majority must respect the identity, culture and language of its Arab citizens. Perhaps the time has come to give expression in public life, as well, to the common denominator of the population as a whole, through the inclusion of State events and symbols with which all citizens can identify. It would be appropriate

to find ways to reinforce the Arab citizens' sense of belonging to the State, without detracting from their sense of culture and community.

Between an Inclusive and an Exclusive Constitution

The principal question facing Israeli society when establishing a constitution is whether it intends to formulate a constitutional document that is unifying, collaborative and mutual in nature - a constitution that can pave the way before the two national groups in the society for a future joint life, with all citizens enjoying true equality and mutual respect. This question requires it to face up to the society's position concerning the establishment of the constitution. A society holding an appropriate position in principle will view the establishment of a constitution as a process seeking to create a basic document with a vision for all its members, as distinct from a document building a foundation for the history of one group within it and excluding the other. In such a society the constitution will be based on a bridging narrative and not on the vision of the majority group alone. A society aspiring to equality will formulate a constitution addressing all citizens of the State, and speaking in the name of all of them.

From the point of view of the Arab-Palestinian minority in Israel, formulating a constitution by social consent can constitute a turning point in the attitude of the State to that

community.¹¹ Will the State relate to the Arab minority as a full partner in the vision of Israeli society or as a junior partner, if at all? Will the Arab minority have an equal place around the decision-making table, or will it again be requested to settle for leftovers? Will the constitutional vision include all Israeli citizens, or will it exclude an entire public? These questions also make one ponder the definition of the State in the constitution. Although this definition is not crucial in a constitutional document, this discussion is required in light of the fact that intensive deliberations are being held around it in broad circles involved in the process of establishing the constitution in Israel, and therefore it cannot remain without an appropriate response. The question is whether the definition of the State will describe an inclusive universal-democratic entity, encompassing all its citizens and residents, or an exclusive one, which does not include an integral part of them.

11. Compare with the statement by Prof. Baruch Kimmerling on the constitution proposed by the Israel Democracy Institute. According to him, "The Israel Democracy Institute, in spite of its good intentions, is making a grave error in attempting to formulate and enact into legislation a 'Constitution by Consensus'." It should be clear to anyone who embarks upon such an endeavor, and is part of the democratic-universalistic stream in Israel's culture war, that the Knesset's current composition and the distribution of political power as it presently stands, make the legislation of an enlightened and truly liberal constitution impossible." (Baruch Kimmerling, "Constitution or Prostitution," *Adalah Newsletter* volume No. 9). See also Hassan Jabarin: "Collective Rights and Reconciliation in the Constitutional Process: the Case of Israel," *Adalah Newsletter* volume No. 12.

3.

Between Formal Discrimination in Law and Socio-economic Discrimination in Practice

The social reality of the Arab minority in Israel exposes two levels in the State's attitude towards it: one formal-symbolic and the other socio-economic, and they are intertwined.¹² The formal discrimination has been secured in the law since the establishment of the State, and the socio-economic discrimination exists in practice due to the living conditions and legal discrimination of Arab citizens. Both create the collective experience of the Arab citizens.

De Jure Discrimination

Israeli law includes laws that openly and expressly create and formalize inequality between Jews and Arabs in Israel. In these circumstances, the legal norms themselves are

12. For a parallel discussion of the legal and social status of the African-American minority in the U.S. and the issue of equality between African-Americans and whites there, see: Kimberle Williams Crenshaw, "Race, Racism and Retrenchment: Transformation and Legislation in Anti-discrimination Law", 101 *Harvard Law Review* 1331 (1988); Yousef T. Jabareen, "Law, Minority and Transformation: A Critique and Rethinking of Civil Rights Doctrines," 46 *Santa Clara Law Review* 513 (2006)

biased in favor of the majority group. The bias is not limited only to symbolic areas. It also exists in areas on which the legal status of every minority in society is based: the definition of the State, State symbols, immigration, citizenship, participation in the political process, land, culture, religion, state budgeting and more. This bias, therefore, creates formal discrimination which erodes the status of the Arab citizens.

The discriminating laws, on which we shall elaborate below, exist alongside a number of specific laws in the Israeli legal system that forbid discrimination based on race and/or nationality, such as in matters of employment,¹³ entry to public places,¹⁴ as well as State allocation of funds to public

13. See: Equality of Opportunities at Work Law, 1988, and Section 42 of the Employment Service Law, 1959. Section 2 of the Equality of Opportunities at Work Law forbids an employer to discriminate among his employees or those seeking employment “due to their race, religion, nationality....” However, Section 2(c) of the Equality of Opportunities at Work Law states that “discrimination under this Section shall not be seen as such where it is required by the character or nature of the function or position”. On December 21, 2005, after a second and third reading, the Knesset approved the draft bill on the establishment of a Commission for Equal Opportunity at Work, the purpose of which is to act to eradicate all discrimination in the work place. Under the law, the Commission is to be established on January 1, 2007.

14. The Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 2000. According to Section 3(a) of the Law, “Anyone engaged in supplying a product or public service, or in operating a public place, shall not discriminate in supplying the product or the public service, allowing entry into the public place or providing service therein, due to race, religion, nationality or country of origin...”

institutions.¹⁵ The discriminatory legal norms are in place despite the obligation of equality created and formulated in the rulings of the Supreme Court, both on issues connected directly to equality between Jews and Arabs,¹⁶ and on other issues.¹⁷ See for instance the statement by

15. Section 3(a) of the Foundations of the Budget Law, 1985, stipulates that allocations to public institutions shall be made on the basis of equal criteria. See also Section 9 of the Higher Education (Recognition of Institutions) Rules, 1964, stipulating that “in the matter of admitting students and appointing academic staff, the higher education institution shall not discriminate among the various candidates due to their race, gender, religion, nationality or social status.” See also Section 4 of the Patient’s Rights Law, 1996.

For a discussion of the status of the principle of equality, see Yitzhak Zamir and Moshe Sobel, “Equality Before the Law,” *Mishpat Umimshal* [Law and Government] (5760 - 2000) 165 (Hebrew). Zamir states that “the principle of equality, requiring an equal law for Jews and non-Jews, applies on the level of individual rights. It does not seem to apply on the level of group rights”: Y. Zamir, *Administrative Authority* (1996) 44 (Hebrew).

16. See, e.g., HCJ 6698/95, *Adel Qaa’dan et. al. v. the Israel Land Administration et. al.*, PD 54(1) 258 (residential discrimination against Arabs in the town of Katzir); HCJ 6924/98, *The Association for Civil-Rights in Israel v. the Government of Israel et. al.*, PD 55(5) 15 (representation for the Arab population on the Israel Land Council); HCJ 1113/99, *Adalah et. al. v. the Minister of Religious Affairs et. al.*, 54(2)164 (discrimination with respect to funds allocated to cemeteries). But compare, HCJ 240/98 *Adalah et. al. v. the Minister of Religious Affairs et. al.*, PD 52(5) 167 (denial of petition concerning discrimination with respect to funds allocated by the Ministry of Religious Affairs); HCJ 840/97 *Aouni Sbeit et. al. v. the Government of Israel et. al.* (the Ikrit case - denial of petition for the return of displaced persons from Ikrit and Bir’am); HCJ 5108/04, *Ismael Mohammad Abu Guda et al. v. Limor Livnat, Sarat Ha-Khinukh, et. al. [Ministry of Education]* (judgment rendered on September 9, 2004) (denial of petition to provide free education frameworks for children aged 3-4 in unrecognized villages in the Nakab); HCJ 7052/03, *Adalah et al. v. The Minister of the Interior and the Attorney General* (judgment dated May 14, 2006) (denial of petition against the amendment of the Citizenship Law, preventing unification of families in Israel for Arab citizens married to residents of the West Bank and Gaza).

17. For instance, equality for women: HCJ 4541/94, *Miller v. the Minister of Defense*, PD 49(4) 94; HCJ 453/94, *Israel Women’s Network v. the Government of Israel*, PD 48(5) 501. See F. Radai, *On Equality - the Status of Women in Society and Law* (1995) (Hebrew).

Justice Zamir in the High Court of Justice decision 6924/98, *The Association for Civil-Rights in Israel v. the Government of Israel et. al.*, PD 55(5) 15, 28:

...In the State of Israel, special significance is given to the question of equality vis-à-vis Arabs. This question involves a complex relationship that developed between Jews and Arabs in Israel over a long period. Nevertheless, and possibly particularly for that reason, there is a need for equality. It is essential for living together. The benefit of society, *and if we calculate truly - the benefit of each member of society*, makes it necessary to cultivate the principle of equality between Jews and Arabs. [emphasis added]

Israeli law relates to Arab citizens with remarkable normative duality: unequal laws, distinguishing between Jews and Arabs in favor of the former, alongside laws forbidding discrimination between Jews and Arabs. Yet, the dominance of the unequal laws in public life in Israel raises the inevitable question: is it at all possible to establish true equality for Arab citizens even in areas where the anti-discrimination laws apply, such as in employment or provision of public services?

In fact, the laws in the Israeli legal system, which in themselves create inequality between Jews and Arabs,

reflect on the entire legal system in Israel. They have a broad peripheral effect, crossing the boundaries of the discriminatory laws, and detracting from the function of the laws establishing the duty of equality. Accordingly, their effect can be seen in almost all areas of life in Israel, including those in which the legal norms are supposedly equal. These unequal laws cloud the entire Israeli normative system, and it is, therefore, difficult to understand the function of the anti-discrimination laws and their application without understanding the dominant effect of these unequal laws.

Below we shall examine the salient assertions of the formal discrimination against the Arab citizens of Israel. We shall relate mainly to those laws which expressly define national (Jewish) extraction as the basis for the benefit derived from that law.

The Legal Definition of the State as a Jewish State

A number of provisions of law expressly define the State as “Jewish and democratic” (in that non-random order), or as the State of the Jewish People.¹⁸ This is specified mainly in

18. Alternative A of the opening Section in the draft constitution states that “Israel is a Jewish and democratic state”. Alternative B states that “Israel is the State of the Jewish people”, or (Version B) “Israel is the State in which the Jewish people realized its right to self-determination”. Alternative C proposes that “the Section will not be included in the constitution”.

Section 7A of the Basic Law: The Knesset,¹⁹ in Section 5 of the Political Parties Law, 1992,²⁰ in the opening sections of the Basic Law: Human Dignity and Liberty, and the Basic Law: Freedom of Occupation,²¹ and in Section 2(2) of the State Education Law 1953.²² In the whole of this legislative system, the Arab citizens of the State are not defined as part of the State, neither expressly, as Arab citizens, nor implied, as “non-Jewish” Israeli citizens. From a democratic perspective, defining the character of the State according to ethnicity is

19. Section 7A (a)(1) of the Law stipulates that a list of candidates shall not participate in the elections to the Knesset and a person shall not be a candidate for election to the Knesset, if the purposes or actions of such list or person, as the case may be, are, expressly or implied, “the denial of the existence of the State of Israel as a Jewish and democratic state.” In the draft constitution it is proposed to cancel the paragraph relating to the definition of the State. See below the discussion on participation in the political process in Israel.

20. Section 5(1) of the Law stipulates that a party shall not be registered if any of its purposes or actions are, expressly or implied, “the denial of the existence of the State of Israel as a Jewish and democratic state.” Section 3 of the Amutot (Nonprofit Societies) Law 1980 stipulates that “a society shall not be registered if any of its purposes denies the existence of the State of Israel or its democratic character.”

21. Sections 1 and 1A of the Basic Law: Human Dignity and Liberty stipulate:

1. Basic human rights in Israel are founded on the recognition of a person’s value, the sanctity of their life and their liberty, and they shall be honored in the spirit of the principles contained in the Declaration of the Establishment of the State of Israel.

1.A The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a basic law the values of the State of Israel as a Jewish and Democratic State. See: Dan Avnon, “The (Potentially) Fatal Flaw of the Israeli Basic Laws,” 32(4) *Israel Law Review* 535 (1998).

22. The Section in question is an amendment made in 2000 to Section 2 of the Law, concerning “the purposes of State education.” Section 2(2) stipulates as follows:

“2. The purposes of State education are to impart the principles contained in the Declaration of the Establishment of the State of Israel and its values as a Jewish and democratic state...”

clearly problematic in a country where one fifth of its citizens hold a different ethnicity.²³ The sense of belonging of the Arab citizens is greatly compromised as a result of this formal definition. They have become citizens in a State that declares in its Basic Laws that it does not belong to them. We shall discuss the significance and implications of the definition of the State in greater detail below.²⁴

The words of Chief Justice Aharon Barak on the core characteristics of the definition of the State as a Jewish State, create a clear normative advantage in the State's attitude to the Jewish majority:

What, then, are the central characteristics shaping the minimum definition of the State of Israel as a Jewish state? These characteristics come from the aspects of both Zionism and heritage. At their center stands the right of every Jew to immigrate to the State of Israel, where the Jews will constitute a majority. Hebrew is the official and principal language of the State and most of its feasts and symbols reflect the national revival of the Jewish People. The heritage of the Jewish people is a central component of its religious and cultural legacy (A.B. 11280/02 *The Central Elections Committee v. Ahmed Tibi*, PD 57(4) 1, p. 22).

23. Nadim Rouhana, *Palestinian Citizens in an Ethnic Jewish State* (New Haven: Yale University Press (1997).

24. See discussion below on the classification of Israeli citizens based on nationality.

The Or Commission also made sure to state in the concluding section of its Report:

The Arab citizens must remember that Israel constitutes the realization of the Jewish people's longing for a state of its own, the only country where the Jews are the majority, a State where the ingathering of the exiles is one of its principles - and that is the essence of the existence of the State for its Jewish citizens. The Jewishness of the State is a constitutional fact which is also expressed, inter alia, in the centrality of the heritage of Israel and the Hebrew language in its public life.²⁵

An outstanding expression of the implications of this definition for the Arab minority can be found in the statement by Prof. Kretzmer in his breakthrough book on the legal status of the Arab citizens of Israel:²⁶

On the decidedly fundamental level of identification and belonging there cannot be total equality between Arab and Jew in Israel. The state is the state of the Jews, both those presently residing in the country as well as those residing abroad. Even if the Arabs have equal rights on all other levels the implication is abundantly clear: Israel is not their state.

25. The Or Commission, Chapter 6, Section 42.

26. David Kretzmer, *The Legal Status of the Arabs in Israel* 13 (Westview Press, 1990).

And indeed, in a discussion held in the plenum of the Knesset in 1985 on Section 7A of the Basic Law: the Knesset, MK Tufik Tubi expressed the feelings of the Arab public concerning the paragraph defining the State as aforesaid, in the following words:

To come today and to establish in law that the State of Israel is that of the Jewish people means saying to 16% of the general citizens of the State of Israel that they have no country at all and determining that they are citizens without a state, that the State of Israel is only the state of its Jewish citizens, and that the Arab citizens living and residing in it do so only by charity without equal rights to those of its Jewish citizens. Do the drafters of that paragraph not feel that they are saying to 700,000 citizens of the State of Israel that they are second class citizens?

The mass of the Arab people living in Israel, citizens of the State of Israel, have no other homeland. This is their homeland, where they live, where they will struggle for equal rights and where they will want to live as equals among equals. They will not agree to definitions signifying the denial of their equal rights, denying the fact that the State of Israel is also theirs. Together with the Jewish democratic forces they will struggle to live in it in dignity and equality. I ask: do

the drafters of this version not understand that in this definition they are stigmatizing the State of Israel as an Apartheid state, a country of racists? [...] My suggestion is ... to leave the language so that the State of Israel will be an honor, **a home and homeland for all of its Jewish and Arab citizens.**²⁷ [emphasis added]

State Symbols: For Jews Only

Formal discrimination in law is also expressed in the normative system of State symbols, which have exclusive links to the Jewish majority.²⁸ This system consists mainly of the Flag and Emblem Law 1949, and the State Seal Law 1949. These laws grant formal legal status to the flag, symbol and anthem of the State, and the State Seal. All these symbols are Jewish national and religious symbols. The State anthem, according to the law, is *Hatikva*, and following is the wording included in the law²⁹:

27. Annals of the Knesset, Vol. 102, pp. 3899-3900.

28. Alternative A in Section 6 ("State Symbols") of the proposed constitution perpetuates the existing situation. Section 6(a) stipulates that the "State flag is white, with light blue stripes along the edges, and a blue Magen David in the middle". Section 6(b) stipulates that the State symbol is a seven-branched candelabrum, with olive leaves along the sides and the word "Israel" [Version B: In Hebrew and Arabic] at the bottom." Section 6(c) stipulates that the "State anthem is *Hatikva*." Version C stipulates in Section 6(d) that "the State has the right to adopt [additional] common civil symbols." Alternative B proposes that "the Section or some of the components thereof shall not be included in the constitution."

29. Following an amendment made in the past year, this text appears under the heading "The State Anthem" in the addendum to the Flag and Emblem Law, 1949.

*As long as deep in the heart, Our hope will not be lost,
The soul of a Jew yearns, The hope of two thousand years,
And forward to the East - To be a free nation in our land,
To Zion , an eye looks, The land of Zion and Jerusalem.*

Needless to say, this is an exclusive Jewish-Zionist anthem, and it is clear to all that it cannot serve as the anthem for Arab citizens. After 59 years of its existence, the State of Israel has not adopted any alternative text that might serve also as the anthem for the Arab citizens of the State, or as the common anthem for all citizens of Israel.³⁰

30. See Shahar Ilan, "The Soul of a Jew Yearns," *Ha'aretz*, July 7, 2005. The article, inter alia, presents the idea of composing a neutral civilian anthem alongside "Hatikva." Although an additional neutral anthem could soften the presently existing civil alienation, it cannot generate substantial equality between Jews and Arabs, since the Jewish-Zionist "Hatikva" will continue to grant a clear formal-symbolic advantage for the Jewish majority group over the "neutral" anthem of the "others," who are not Jewish. During the special session of the Constitution, Law and Justice Committee of the Knesset, held at the end of 2004, on the subject of the collective rights of the Arab minority, I asked the Chairman of the Knesset if he sees no problem in an Arab member of the Israel football team, such as Walid Bdeir, not being able to sing the anthem along with his Jewish colleagues. His reply was: "I see no problem in his having to stand and honor the anthem without singing the words, which are not his two-thousand year old aspiration. I think that Walid Bdeir, or any Arab citizen, of non-Jewish nationality, who does not absolutely empathize with the Zionist ideal, I think he does not have to sing the words, and he is an excellent citizen at the same time. He cannot sing words that do not express his aspiration. At the same time, 'Hatikva' is the anthem of the State of Israel. It is true that it is the anthem of a movement that established the State of Israel, but it is the anthem of the State of Israel." See, the Constitution, Law and Justice Committee of the Knesset, Session of November 29, 2004. For a full protocol of the session, see: <http://www.knesset.gov.il/protocols/data/htm/huka/2004-11-29.html>

Sometimes Israeli law also forces the Arab minority to display these Jewish-National symbols. Thus for instance, the Flag and Emblem Law requires the raising of the State flag, inter alia, “on the building where the office of the head of the local authority is located,” and also “on the main building or at the front of the main building of a recognized educational institution.” Since the Arab educational institutions are governmental institutions, the result is that this amendment requires the sons and daughters of the minority group in Israel to raise the State flag, despite its exclusive link to the majority group. This is also the case with respect to the buildings of the local Arab authorities, actually serving only Arab residents.

The Knesset Law 1994 stipulates inter alia that, at the opening session of the Knesset, “Psalms 122 and sections from the Declaration of the Establishment of the State of Israel shall be read out before the plenum,” and that the session “shall be closed by singing the national anthem, ‘Hatikva’”. The sections of the Declaration presented in the Addendum to the Law emphasize the exclusive link between the State and the Jewish people:

Eretz-Israel [*heb.* the land of Israel] was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained statehood, created cultural values of national

and universal significance and gave to the world the eternal Book of Books.

The State of Israel will be open to Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions.

We extend our hand to all neighboring states and their peoples in an offer of peace and good neighborliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land.³¹

There is another bias in the law dealing with the completion of anything lacking in Israeli law. The law in question is the Foundations of Law, 1980, stipulating in Section 1 that

31. The sections of the Declaration do not include the paragraph addressing the Arab population of the State, calling on it to take its part in building up the country “on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.” It should be noted that the Declaration of Independence, or parts thereof, is proposed as the introduction to the constitution despite the ethnic exclusivity contained therein. See Hassan Jabarin: “Collective Rights and Reconciliation in Establishing the Constitution: The Case of Israel,” Note 11 *supra*.

“should the court see a legal question requiring a decision, but it cannot find a solution in the legislation, through precedent or by way of analogy, it shall make the decision in light of the principles of liberty, justice, integrity and peace found in Jewish heritage.”³² In Addition, Section 13(b)(2) of the Penal Law 1977 also applies the penal laws of Israel to offenses committed outside the State, if they are aimed at Jews or the property of a Jewish institution. There is no parallel application for offenses against Arab citizens.³³

The normative discrimination experienced by the Arab minority is not restricted only to the definition of the State and its symbols, which are important in themselves. It reaches vital levels of the citizens’ daily life, giving a legal-practical expression to the national-religious “Jewishness” of the State at the expense of the civil-democratic concept. That is, the situation with respect to immigration and citizenship, land and residential accommodation, participation in the political process, language and culture, as well as religion and ceremony - as elaborated below.

Immigration and Citizenship

There is formal discrimination in the law with respect to

32. Section 2(a) of the proposed constitution states that: “The State of Israel shall be based on the principles of liberty, justice and peace in the Israeli heritage.”

33. Section 13(b)(1) of the Law applies the penal laws to offenses committed against Israeli citizens or residents, as such.

immigration and citizenship³⁴, as established in the Law of Return, 1950,³⁵ in the Citizenship Law, 1952,³⁶ and in the Entry into Israel Law, 1952.³⁷ Under these laws Jews and their families are granted Israeli citizenship almost automatically upon their arrival in Israel by virtue of the principle of “return.”³⁸ This is a sweeping entitlement,

34. Section 5(a) of the proposed constitution stipulates that “The State of Israel shall encourage the ingathering of the exiles and the settlement of Jews [Jewish settlement] in the country.” Section 11(a) of the proposal stipulates that “The State of Israel shall strive for the welfare of its citizens and the members of the Jewish people wherever they are.” Section 11(b) stipulates that the State of Israel shall act to preserve and cultivate the Jewish heritage in Israel and worldwide. Section 11(c) stipulates that “The State of Israel shall maintain ties with the Jewish communities worldwide.”

35. The opening Section of the Law stipulates that “Every Jew is entitled to immigrate to Israel.” Section 5(b) of the proposed constitution states that “Every Jew is entitled to immigrate to Israel...” The proposed constitution does not establish the geographic boundaries of the State. The question arises as to whether it is possible at all to shape a final constitutional product in Israel without first establishing the country’s geographic boundaries. See Baruch Kimmerling, Note 11: “As long as a state’s borders cannot be fixed, borders which establish its ethnonational composition, it is impossible to enact a constitution and establish the purported ‘final rules of the game.’”

36. See, inter alia, Section 2 of the Law, which discusses “citizenship by virtue of repatriation/‘return.’” Section 2(a) stipulates that “every immigrant under the Law of Return, 1950, shall be an Israeli citizen by virtue of repatriation...” Section 5(d) of the proposed constitution states that “An immigrant is entitled to become a citizen of Israel by virtue of repatriation on the date and terms stipulated in the Law...”

37. The opening Section of the Law states: “Anyone who is not an Israeli citizen, shall enter into the country on an immigrant visa or a visa pursuant to this Law.”

38. In parallel to the enactment of the said immigration and citizenship laws, a number of laws were enacted with the aim of obstructing any possibility of entry/return by Palestinians to Israel, such as the Prevention of Infiltration (Offenses and Jurisdiction) Law 1954, the Absentees’ Property Law, 1950, and the Registration of Inhabitants Ordinance 1949 (which was replaced by the Registration of the Population Law 1965). For a more comprehensive discussion in this context see Ilan Saban: *The Legal Status of Minorities in Split Democratic Countries: The Arab Minority in Israel and the French-Speaking Minority in Canada* (a thesis written in order to obtain a doctorate in law, at the Hebrew University of Jerusalem, 2000), pp 227-250.

which includes Jews and their families up to a certain level of relationship, including non-Jews, regardless of the issue of their being persecuted due to being Jews or relatives of Jews.³⁹ The repatriation (“return”) process also has significant economic aspects, to which only Jewish immigrants are entitled, compared with the Arab citizens of the State, and the established residents in general.⁴⁰ In order to reinforce Jewish immigration into Israel, a special government ministry was established for the absorption of immigration, as well as a special permanent Knesset committee.⁴¹ Moreover, non-Jewish spouses of Israeli citizens may receive Israeli citizenship only after a long and difficult citizenship/residence process. When the non-Jewish spouses are Palestinian Arabs, residents of the Occupied Territories, their residence in Israel - not to mention their citizenship - is almost impossible today, following the last amendment to the Citizenship Law of 2003. This amendment prevents any possibility of legal status in Israel (“unification of families”) for Palestinian residents of the West Bank and the Gaza Strip, who are

39. Section 4A stipulates that the right to immigrate into Israel and the rights deriving therein under any other legislation “are conferred also on the child and grandchild of a Jew, a Jew’s spouse and the spouse of the Jew’s child and grandchild.” It makes no difference whether the Jew, by virtue of which this right is claimed, “is still alive or not, and whether or not he immigrated into Israel.”

40. See, e.g., Section 1(3) of the Encouragement of Capital Investments Law, 1959.

41. Section 13 A of the Knesset Set of Regulations.

married to Israeli citizens.⁴²

Thus the majority group maintains, under the law, exclusive control of the State's immigration and citizenship resource with the declared aim of retaining the numerical superiority of the Jewish citizens.⁴³ The legal system grants the majority group a monopoly over the immigration and citizenship processes in the State, and confers on Jewish immigrants and new citizens rights from which the Arab citizens, the original residents of the country, do not benefit.

Land and Residential Accommodation: The Special Status of Jewish National Institutions

The World Zionist Organization – Jewish Agency (Status) Law, 1952, establishes the special status of the Jewish Agency and the Jewish National Fund (*Keren Kayameth LeIsrael*) in Israel, through which a treaty was signed between these two institutions and the Government of Israel. The two institutions fulfill government functions,

42. The Nationality and Entry into Israel Law (Temporary Order) 5763 - 2003. See also Guy Davidov, Yonatan Yuval, Ilan Saban and Amnon Reichman: "State or Family? The Nationality and Entry into Israel Law (Temporary Order) 5763 - 2003," *Mishpat Umemshal* H. 643 (2005) (Hebrew). The Supreme Court recently ratified this Law in H CJ 7052/03, *Adalah et al. v. Minister of the Interior and the Attorney General* (Judgment dated May 14, 2006). See "Shame on the Supreme Court," *Ha'Aretz* (editorial), May 15, 2006.

43. Davidov, Yuval, Saban & Reichman, *supra*.

including the establishment of new settlements.⁴⁴ The activities of both entities are declared as being solely for the benefit of the Jewish population.⁴⁵ Section 3 of the Law stipulates that “The World Zionist Organization and the Jewish Agency for Israel are still working diligently on immigration and directing absorption and settlement enterprises in the State.” Section 4 of the Law stipulates that “The State of Israel recognizes the World Zionist Organization and the Jewish Agency for Israel as authorized agencies which shall continue to operate in the State of Israel in developing and settling the country, absorbing immigrants from the Diaspora and coordinating the activities of Jewish institutions and associations operating in this field.”

Additional laws reinforced the status of the Jewish Agency by assuring a place for its representatives in general social

44. See: “Treaty between the Government of Israel and the Jewish Agency for Israel” of June 28, 1979 (Publications Gazette 5739 2565, p. 2172). This treaty supersedes a previous one of 1954, and gives expression to the Jewish Agency’s status and special functions. For a discussion of the status of the Jewish Agency and the provisions of the Treaty see: HCJ 4212/91, *The “Beit Rivka” State Religious Education Institution for Girls v. the Jewish Agency for Israel*, PD 47 (2) 661.

45. With respect to government practice, it should be emphasized that the Zionist national institutions were granted a monopoly in the field of planning and erecting new settlements in the State. See Kretzmer, *The Legal Status of Arabs*, 8-94. See also the court’s statement concerning Qa’adan of March 2000: “The Jewish Agency fulfilled the highest role concerning the realization of the Zionist vision, ingathering of the exiles and making the country flourish, and it has not yet completed the function designated for it. It still serves as the emissary of the Jewish people in developing the country as a Jewish democratic state.” (Paragraph 36).

entities in the State, such as the Planning and Construction Law 1965 (composition of the National Planning Council),⁴⁶ and the Broadcasting Authority Law 1965 (composition of the Authority's plenum).⁴⁷ Similar arrangements also exist with respect to the Jewish National Fund,⁴⁸ whose representatives constitute, under the Israel Land Administration Law 1960,⁴⁹ half of the members of the Israel

46. Section 2(b)(11) of the Law: The National Planning and Construction Council shall include "a representative of the settlement institutions to be appointed by the Minister of the Interior on the recommendation of the Jewish Agency for Israel."

47. Section 7(2): The Authority's plenum shall include "one representative from the Jewish Agency who shall be recommended by it."

48. See the Jewish National Fund (JNF) Law, 1953. The Law confers on the JNF the power to expropriate land (similar to the local authority), which is a government power usually reserved for the State and the authorities operating in its name (Section 6). The Law also confers on the JNF specific economic benefits (Sections 7-10 of the Law). See also Section 12 of the World Zionist Organization – Jewish Agency (Status) Law 1952, exempting the JNF from taxes and compulsory government payments. See also Section 107 of the Land Law 1969, defining the JNF lands as "public lands" and, as such, they "benefit" from the application of the special provisions of the law concerning "public lands," such as preventing any claim to easement or ownership therein.

49. The opening Section in the "Basic Law: Israel Lands," stipulates that all land in Israel belongs to the State, the Development Authority or the Jewish National Fund. Ownership thereof shall not be transferred, whether by sale or otherwise. The Israel Land Administration Law specifies the types of land and transactions to which this Section of the Basic Law does not apply. Inter alia, the Law stipulates that the prohibition in the Basic Law against transferring ownership shall not apply to transfer of ownership in "State Lands" among the State, the Development Authority and the Jewish National Fund themselves (Section 2(6) of the Law). In practice, the Law grants the JNF alone the possibility of acquiring ownership of land registered in the name of the State or the Development Authority. See Alternative B in Section 14 of the opening chapter of the proposed constitution ("State Lands"), proposing that "the constitution shall make it possible to include in a regular law the arrangement presently existing in the Basic Law." See especially Section 14(b) in Alternative B, stipulating that "allocations of land might make living conditions difficult for specific communities." Alternative A of Section 14, proposes that "the Section shall not be included in the constitution."

Land Council,⁵⁰ which establishes the land administration in Israel.⁵¹

The Jewish national institutions, as per their definition, operate for the benefit of Jews only, and therefore the legislation dealing with them grants clear advantages to the Jewish majority - the sole beneficiary of their services.⁵² For Arab citizens there are no national institutions in Israel which enjoy a legal status similar to that of the Jewish national institutions. On the contrary: popular-voluntary institutions established in the past by the Arab population in order to promote its interests in the matter of land and residential accommodation, such as the Committee for the Protection of Arab Lands, encountered a hostile attitude on the part of the State authorities.⁵³

50. Section 4A(a)(1) of the Israel Lands Administration Law (1960), stipulates with respect to the composition of the Council that "half the members of the Council shall be on behalf of the government, and the other half shall be on behalf of and as proposed by the JNF."

51. Section 3 of the Law stipulates that the Israel Land council "shall determine the land policy according to which the Administration shall act, shall supervise all the Administration's activities and shall approve the budget proposal to be stipulated in the Law."

52. A. Lustik: *Arabs in the Jewish State* (Mifras, Haifa, 1985) (Hebrew); Kretzmer, *The Legal Status of Arabs in Israel* (Boulder: Westview Press, 1990); Sabry Jiryis, *The Arabs in Israel* (New York: Monthly Review Press, 1976).

53. Emil Toma, *The Path of the Struggle of the Arab Population in Israel* (Acre, 1982) (A).

Conditional Participation in the Political (Parliamentary) Process

The biased legislation did not pass over the mainstay of every democratic society - free participation in the political process. Section 7A of the Basic Law: The Knesset, added for the first time in 1985 an amendment that forbids a political party, list of candidates or a person to participate in the elections to the Knesset if they deny the existence of the State of Israel as a “Jewish democratic state.” Below is the full text of Section 7A, which was the first legislation to establish the definition of the State in Israeli law:

- 7A (a) A list of candidates shall not participate in the elections to the Knesset nor shall any person be a candidate for election to the Knesset, if the purposes or actions of the list or the actions of the person, as the case may be, whether expressly or implied, are any of the following:
1. Denial of the existence of the State of Israel as a Jewish democratic state;
 2. Incitement to racism;
 3. Support for armed struggle by an enemy state or terrorist organization against the State of Israel.

This prohibition means that a party in Israel might be

disqualified from participating in the elections to the Knesset if it aspires to alter the definition of the State as aforesaid, and if it promotes a political agenda calling for absolute equality between Jews and Arabs in the State of Israel as a liberal-civil state or a bi-national state, even if such party wishes to promote this agenda by peaceful and absolutely legal means.⁵⁴ Needless to say, this prohibition is detrimental mainly to parties representing the Arab public, particularly those who espouse a definition of the State based on equality and who aspire to full equality for the Arab public both legally and socially.

Language, Culture and Heritage

Arabic is one of the two official languages in Israel, the other being Hebrew. Section 82 of the Session of the King's Council (Mandate for Palestine) of 1922, stipulates under the sub-heading "Official Languages" that "all ordinances, official notices and official forms of the government and all official notices of the local authorities and municipalities in the areas to be determined by order [of the government], shall be published in English, Arabic, and Hebrew. Taking account of all regulations [enacted by the government], all three languages may be used in the government offices and the courts."

54. The proposed constitution suggests leaving Section 7a as above in its present language. See Section 6(e) in the chapter on the Knesset in the proposal (fourth chapter).

See also the following statement by the Chief Justice Aharon Barak concerning the uniqueness of Arabic compared with other languages used by Israelis, in addition to Hebrew:

What is so special about Arabic, and why should it be deemed different from other languages - apart from Hebrew - spoken by Israelis? Does it not arise from our approach that residents of various cities which have a minority of speakers of various languages will now come with the demand that the signs in their city shall also be in those languages? My answer is negative, since none of those languages are like Arabic. Arabic is doubly unique: First, Arabic is the language of the largest minority in Israel, which has been living in Israel since time immemorial. That language is tied to the cultural, historical and religious characteristics of the Arab minority group in Israel. It is the language of citizens who, despite the Arab-Israeli dispute, seek to live as loyal citizens with equal rights, while respecting their language and culture. The desire to assure the dignified co-existence of the descendents of our forefather Abraham, in mutual tolerance and equality, justifies recognition of Arabic in the municipal signs in those towns where there is a significant Arab minority (between 6% and 19% of the population), alongside its senior sister, Hebrew. Secondly, Arabic is an official language in Israel.

Israelis speak many languages, but only Arabic - alongside Hebrew - is an official language in this country. Arabic, therefore, has a special status in Israel. This status has no direct application in our matter, but it does have indirect application. The “officialness” of Arabic has extra and unique value. HCJ 4112/99 *Adalah et. al. v. The Municipalities of Tel Aviv-Jaffa, et. al.* PD 56(5) 393.

The above distinction between Arabic and other languages is important to this discussion, since it appears that the court gives legal significance to the fact that the Arab minority in Israel is an indigenous population:⁵⁵ the Arab minority is not only the largest minority in Israel numerically, but also a minority “living in Israel since time immemorial” - i.e. a unique minority from a historical perspective.⁵⁶

Despite this special legal status, later legislation granted

55. For a broad discussion of the judgment, see Ilan Saban “Lonely (Dual-Language) Voice in the Dark? Following HCJ 99/4112 *Adalah et. al. v. The Municipalities of Tel Aviv-Jaffa et. al.*,” *Iyunei Mishpat* 27 (2003) 109 (Hebrew). See also Ilan Saban and Muhammad Amara, “On Collective Rights and Reality, the Status of Arabic in Israel,” *Medina Ve-Hevrah* Vol. 4 (2005) 885-909 (Hebrew).

56. It should be stated that, in practice, the proposed constitution worsens the status of Arabic. Hebrew and Arabic are presently official languages in Israel, with equal normative status (Section 82 of the Session of the King’s Council [Mandate for Palestine]). The proposal, on the other hand, grants clear preference to Hebrew: Section 7(a) stipulates that “Hebrew is the language of the State.” As for Arabic, Section 7(b) states that “Arabic has a special status as the language of the Arab residents of Israel.”

public assistance to only the development of the Hebrew language and culture,⁵⁷ with no similar arrangements for developing Arabic, such as in the Supreme Institute of the Hebrew Language Law 1953, approving the establishment of the Supreme Institute for the Science of Hebrew (the “Hebrew Language Academy”).⁵⁸ The law on the Use of the Hebrew Calendar 1998, cultivates the calendar of the majority culture - the Hebrew calendar,⁵⁹ and the Yitzhak Ben-Zvi Memorial Law 1969, establishes a State institution to study the history of Jewish settlement in Israel.⁶⁰ Clear

57. In the session of June 20, 2004, of the Constitution, Law and Justice Committee concerning “The Jewish State and Minority Rights” (a session that was held in the President’s house), a member of the committee, MK Nissim Zeiev, presented an argument the importance of which should not be underestimated, which might shed a little light on the present attitude among parts of the Jewish public concerning the Arabic language. According to him, “.... The majority feels that it belongs less to the State when it sees the writing [on signs, etc.] in Arabic.”

58. The function of this institution, according to Section 2 of the Law, is “to direct the development of the Hebrew language based on the study of the language in all periods and branches thereof.” See also the Regulations of the Hebrew Language Academy, 1954.

59. Section 2 of the Law stipulates that “the Hebrew date shall be stated in every official letter in Hebrew sent by a public authority, and every official notice to the public that it publishes in Hebrew.” Section 5 of the law stipulates that this duty shall not apply to any local authority the majority of whose residents are not Jewish, nor to an official educational institution and a recognized institution of higher learning in which the language of instruction is not Hebrew.” Alternative A of Section 9 of the proposed constitution stipulates that “the Hebrew calendar is the official calendar of the State of Israel.” Alternative B proposes that “this Section shall not be included in the constitution”.

60. The law establishes the Yitzhak Ben-Zvi Memorial as a State institution, the purposes of which are, inter alia, “to lead the people to a deeper awareness of the continuity of the Jewish presence in the Land of Israel, and to cultivate for that purpose the study of the history of the settlement,” as well as “to promote the study of the history of Jewish communities in oriental countries” (Section 2 of the Law).

preference for the Hebrew language also exists in Section 5(a)(4) of the Citizenship Law 1952, requiring a “certain knowledge of the Hebrew language” as a condition for citizenship. This normative system (and others) has created an official unequivocal language hierarchy in favor of Hebrew.⁶¹

Additional legislation granted public assistance to other languages spoken in Israel, but only Arabic which is, as aforesaid, an official language under the law, did not benefit from similar assistance. See the National Authority for Yiddish Culture Law, 1996, under which the National Authority for Yiddish Culture in Israel was established in order to assist and encourage creativity in this language, as well as the National Authority for Ladino Culture Law, 1996, by virtue of which the National Authority for Ladino Culture in Israel was established, and it has the same effect

61. See further Section 24 of the Interpretation Law 1981, stipulating that the binding version for legislation in Israel is the Hebrew version (excluding a law enacted prior to the establishment of the State in English, no new version of which has been published in Hebrew). See also Section 26(3) of the Chamber of Advocates Law 1961, making knowledge of Hebrew a condition for the registration of an articulated clerk by the Bar Association.

as the National Authority for Yiddish Culture.⁶²

Expressions of formal bias in the law in the cultural-heritage context in favor of the majority group also emerge from the sections opening the State Education Law 1953,⁶³ the

62. On the other hand, see Regulation 15(b) of the Mandatory Tenders Regulations 1993, whereby the secondary legislator pursuant to an amendment made in 1995 imposes the duty to publish notices in the press on behalf of government ministries in Arabic as well: "A notice in the press [of a public tender] shall also be published in Arabic in a high-circulation daily newspaper or a newspaper published at least once a week in Israel." Section 46(b) of the Amutot (Nonprofit Societies) Law 1980 imposes the duty to publish a notice of liquidation of a Society in a "daily newspaper appearing in Arabic," "if the majority of the Society's members speak Arabic." See also Section 1A(a)(2) of the Planning and Building Law, 1965. Section 76 of the Knesset Elections Law [Consolidated Version] 1969, stipulates that the voting tickets for the elections shall be in Hebrew and Arabic. However, compare: HJC 521/74, *Khalaf v. Northern District Planning and Construction Committee*, PD 29(2) 319, where the court allowed the omission of the publication in Arabic when it was proved that the Arab petitioner had access to the publication in Hebrew. See also Regulation 54A of the Succession Law [Amendment] 1998, stipulating that a document written in a foreign language (excluding English) shall be submitted to the Registrar of Successions or the court together with a translation "into Hebrew or Arabic."

63. See Section 2 of the Law setting forth the purposes of State education. Section 2(2) stipulates that the purposes of State education are "to impart the principles contained in the Declaration of the Establishment of the State of Israel and the values of the State of Israel as a Jewish and democratic state." In the Jewish society there is also a State religious education system. In the Arab society there is a single State education system. See the arrangements stipulated in Section 13 to 18 of the Law concerning the significant management powers conferred on the religious public in the State religious education system, compared with the very restricted powers of the Arab public stipulated in the State Education Regulations (Advisory Council for Arab Education), 1996. Majed Alhaj, *Education among the Arabs in Israel - Control and Social Change* (1966) 69-82; Yoram Rabin, *The Right to Education* (2002) 464-467. As for higher education, there are seven universities in Israel - all [teaching] in Hebrew.

Broadcasting Authority Law 1965⁶⁴ and the Second Authority for Television and Radio Law 1990.⁶⁵

Religion and Ceremony

In accordance with the Jewish Religious Services Law (Combined Version) 1971, a Religions' Council was set up in each local authority, which is authorized to provide religious services to the Jewish residents. The Council consists of representatives of the Ministry for Religious Affairs, the local authority and the local Rabbinate in the settlement. The law, as its name implies, deals with religious services for Jews alone, and there are no parallel religious

64. Section 3 of the Law sets forth the functions to be fulfilled by the Authority, among them: "To reinforce the link with Jewish heritage and values, and to deepen the knowledge thereof, . . . to reflect the lives and cultural assets of all the people's communities in various countries, . . . to reflect the lives of the Jews in the Diaspora, . . . and to make broadcasts to the Jews in the Diaspora." On the other hand, referring to the Arab population, the Authority's role is "to make broadcasts in Arabic for the needs of the Arabic-speaking population, and broadcasts promoting understanding and peace with neighboring countries in accordance with the basic intentions of the State."

65. Section 5(b) of the Law stipulates that in fulfilling its functions the Authority shall act with the aim, inter alia, "of promoting Hebrew Israeli creativity," and "giving expression to Jewish heritage and values and Zionist values." As for the Arab population, "the Authority shall act with the aim of holding broadcasts in Arabic for the needs of the Arabic-speaking population, and promoting understanding and peace with the neighboring countries in accordance with the basic intentions of the State." See HCJ 375/03, *Mossawa Advocacy Center for Arab Citizens in Israel v. the Prime Minister* (unpublished). For a discussion on the (mainly negative) image of the Arab minority in the general Israeli media, see Isam Abu Raya, "The Arab Minority and the Israeli Communication Media," *Exclusion and Negative Image: Inequality in the Israeli Media* (Ed. Na'ama Yishuvi, 2002) 10) (Hebrew).

councils serving the Arab communities in general and the Muslim community in particular.⁶⁶ See also the Chief Rabbinate Law 1980, establishing the powers and functions of the Chief Rabbinate in Israel. There is no parallel law granting similar official status to the religious institutions of the Arab community.

Furthermore, the Israeli law recognizes the holy places of the Jews, but there is no formal parallel recognition of the holy places of the Arab communities. The Protection of Holy Places Law, 1967, stipulates that “the holy places shall be safeguarded against desecration and any other damage, and against anything that might detract from the freedom of access of the members of a religion to their holy places or that might offend their feelings towards such places.” Section 4 of the Law authorizes the Minister of Religious Affairs, “after consulting with representatives of the religions concerned” to enact regulations with respect to execution of the Law. Although the Law relates to all holy places, the Minister of Religious Affairs used his powers by virtue of Section 4 as aforesaid in favor of the Jewish community only. In 1981, after consulting with the Chief Rabbinate, the Minister enacted regulations for

66. It should be stated that while the State grants significant assistance to studies in Yeshivot, it does not grant similar assistance for religious studies among the Arab communities. See HCJ 200/83, *Watad v. the Ministry of Finance*, PD 38(3) 113. Financial support for Yeshivot constitutes approximately 55% of the budget of the Ministry for Religious Affairs (see: HCJ 240/98, *Adalah et. al. v. the Minister for Religious Affairs et. al.*, *supra*, p. 5).

preserving only the Jewish holy places (Protection of the Jewish Holy Sites Regulations, 1981), and until now no parallel regulations have been enacted for the other communities in the country.⁶⁷

The regulations concerning Jews expressly list the holy places for Jews and set forth, inter alia, the acts prohibited within the confines of the holy places. The holy places of all other communities in general, of the Muslims in particular, remain with no parallel legal normative recognition, despite their great religious, cultural and historic importance. The Muslim holy sites suffer from ongoing neglect and desecration and, in many cases, mosques and holy sites have been converted into cowsheds and nightclubs.⁶⁸

There is also official discrimination in the legal norms dealing with days of rest in Israel. Section 18A of the Administration of Rule and Justice Ordinance 1948 stipulates that “Saturdays and Jewish religious holidays - the two days of Rosh Hashana, Yom Kippur, the first and last days of Succot, the first and last days of Pesach and the Shavuot feast - are regular days of rest in the State of Israel. Non-Jews have the right to hold rest days on their Sabbath day and their religious holidays...”

67. See: HCJ 10532/04, *Sheikh Abdalla Nimr Darwoish et al v. the Minister of Religious Affairs et. al.*, (petition requiring the Minister of Religious Affairs to enact regulations for the preservation of the holy places of the Muslims in Israel - the petition is still pending).

68. See: *Sanctity Denied: The Destruction and Abuse of Muslim and Christian Holy Places in Israel* The Arab Association for Human Rights, Nazareth, 2004.

However, unlike their colleagues, non-Jews are required to use vacation or take a leave of absence from their jobs to observe their holidays. "... These days shall be established for each community in accordance with a government resolution to be published in the records."⁶⁹

Interim Summary

The range of laws listed above expresses in both official and practical terms a one-way normative classification in Israeli law, in favor of the majority group alone. This classification also reflects the conceptual duality presently existing in the attitude of Israeli law to the two ethnic groups in the State: an obvious collective approach in its attitude to the Jewish majority, compared with an individual approach in its attitude to Arab ("non-Jewish") citizens.⁷⁰

69. Section 8(a) of the proposed constitution stipulates that "the regular days of rest in the State of Israel are Saturdays and Jewish religious holidays. Non-Jews have the right to rest on their own religious holidays".

70. The only exception is perhaps the normative arrangement concerning the Arabic language, which we discussed above. See Paragraph 64 in the Or Committee report: "The various demands by the Arab sector in the fields of education, language, culture and religion incorporate demands for equality on a collective basis. To the extent these demands are based on the claim for equality in the said sense, they were not obtained. The basic right to equality in Israeli law is recognized on the basis of the individual's right to equality. It has not been recognized, either in legislation or in the courts, as a collective right, granted to one group or another, with the exception of certain individuals in it." The reference to Arab citizens as a group - the "Arab population" - first appeared in the Israeli book of laws in 2000, when the amendment to the State Education Law (Section 2(22)) and two amendments concerning appropriate representation for the Arab population in government corporations and the public service were adopted: Section 18A of the Corporation Law and Section 15 of the Civil Service Law.

The words of Professor Ruth Gabison, on the exclusion of the Arab citizens in Israel, speak for themselves:

Where the State of Israel exists, the Arabs are denied the possibility of controlling their public-cultural life. The language and symbols of the State are foreign to them. They constitute a minority in a State that has a strong link to the aspirations and purposes of another people. They have no control over the immigration into it, and therefore they have no control over their relative part of the population. Their personal and cultural security depends on the goodwill and efficiency of a government which, from their point of view, is a foreign one, and language and symbols are enforced on them although they continue to reside on their land. The State is running an enterprise in which the Arab minority are not full partners, and its laws prejudice their interests in order to serve those of others, among them some who are not yet actual citizens."⁷¹

71. Ruth Gabison: "The Jewish State: Justification in Principle and its Desired Image," *Techelet* 13 (5762 - 2002) 50, 58 (Hebrew). See: Hasan Jabarin, "Israeliness 'looking to the future' of the Arabs according to Jewish-Zionist time, in a space without Palestinian time." *Mishpat Umimshal* 6 (5761 - 2001), p. 53 (Hebrew); Eyal Gross: "Democracy, Ethnicity and Constitutionalism in Israel: Between the 'Jewish State' and the 'Democratic State,'" *Israeli Sociology* 2 (5760 - 2000) 647 (Hebrew).

Socio-economic Discrimination in Practice

Alongside the normative discrimination we discussed above, the socio-economic reality of Arab citizens in Israel also shows ongoing historic discrimination in the living conditions of this group, including areas where the relative legal norm is apparently based on equality. The inferiority of the status of the Arab minority is accompanied, therefore, by socio-economic inferiority in its living conditions. Many official documents on behalf of the State authorities have clearly formalized and documented the ongoing discrimination against the Arab public, as well as the failure to fulfill repeated government promises to improve their situation. These documents include, inter alia, the Or Committee report, the reports of the State Comptroller, various data of the Central Statistics Bureau and the National Insurance Institute, as well as judgments of the Supreme Court.⁷² This administrative discrimination is accompanied by discrimination and a racist and offensive attitude in civilian social life in Israel.⁷³

72. See Sections 1-67 in Chapter A of the Or Commission Report, Footnote 8 *supra*. See, for instance, Section 19: "The Arab citizens of the State live in a reality where they are discriminated against as Arabs. The inequality has been documented in a great number of studies and professional research, it has been confirmed in judgments and in government resolutions, and has also found expression in the reports of the State Controller and in other official documents. Although the level of awareness of this discrimination among the Jewish majority is often quite low, in the feelings and positions of the Arab citizens, it takes a central place." See also: *Or Testimonies - 7 Professional Opinions Submitted to the Or Committee*. Sarah Osatzky-Lazar and As'ad Ganem, eds. (Jewish Arab Center for Peace, Giv'at Haviva, 2003) (Hebrew).

73. *Racism in Israel 2004*, The Mossawa Advocacy Center for Arab Citizens in Israel (2004).

This discrimination is prominent with respect to distribution of government funds. The absence of budgetary investments suited to the needs of the Arab population over approximately six decades has led to the creation of abysmal gaps between Jews and Arabs in almost all areas of life, including at the level of income, the rate of poverty, the extent of infrastructure, the standard of environmental conditions, municipal jurisdictional areas, crowded accommodation, life expectancy, infant mortality rates, drop-out rates from State educational institutions, success rates in the matriculation examinations, etc.⁷⁴ “Unequal allocation of resources”, in the words of the Or Commission, “has changed from a question of quantity to a material question of status and rights.”⁷⁵ Obviously, these gaps cannot be bridged today without enormous economic investment, to be made as part of comprehensive affirmative

74. For extensive documentation see: The Association for Civil Rights in Israel, *Comments on the Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights (ICCPR)* (1998); Adalah: the Legal Center for Arab Minority Rights in Israel, *Legal Violations of Arab Minority Rights in Israel: A Report on Israel's Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination* (1998); International Crisis Group Report (ICG), *Identity Crisis: Israel and Its Arab Citizens* (2004); Human Rights Watch, *Second Class: Discrimination against Palestinian Arab Children in Israel's Schools* (New York, 2001); Ghanem, Asa'd, “State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority:” *21 Ethnic and Racial Studies* 428 (1998). For an up-to-date status report see: Amin Faris, *State Budget and Arab Citizens/Social Economic Report [Hebrew]*, Mossawa Advocacy Center for Arab Citizens in Israel (2004); Sikkuy - the Society for the Promotion of Civil Equality, *Gaps between Jewish and Arab Citizens in Israel in Schooling and Education, Health, Income, Employment and Poverty* (2004).

75. Or Commission Report, Chapter 1, Section 16. The Commission emphasized that this question has become “a profound and critical problem” which contributed to “an atmosphere of resentment and unrest.”

action programs and compensation for past discrimination.

One of the major signs of material discrimination suffered by the Arab public is the obviously poor socio-economic situation of the Arab towns and villages. This emerges clearly from consistent data of the Central Statistics Bureau. Each year the Bureau grades the local authorities in Israel in ten groups (Clusters) according to their socio-economic level. Cluster 1 is ranked in the lowest place, and Cluster 10 is ranked in the highest place. This grading reflects the condition of the local authority according to an extensive group of variables, including demographic data, data on education and schooling, standard of living and income, features of the work force and pensions. The data for 2004 show that the condition of the Arab towns and villages is especially serious: approximately 45% of them are located in the two lowest clusters, 97% of them in the four lowest clusters, and they constitute more than 80% of the total towns and villages in each of the three lowest clusters. The concentration of the Arab villages and towns at the bottom of the socio-economic ranking means that in these places the negative characteristics of the index are revealing, and their residents suffer from severe socio-economic distress relative to all other residents of the State.⁷⁶

76. Amin Faris, *State Budget and Arab Citizens/Social Economic Report [Hebrew]*, Mossawa Advocacy Center for Arab Citizens in Israel (2004), p. 52.

Other data testifying to the troubles of the Arab towns and villages are those relating to the dimensions of poverty among the Arab citizens. The report on poverty published by the National Insurance Institute in 2006 shows that the extent of poverty among Arab families is 3.28 times that of Jewish families: the percentage of poor Arab families is about 52.1% of the total Arab families, compared with 15.9% among Jewish families. The extent of poverty among Arab children - the next generation in the Arab population - is particularly severe. According to the findings of the Mossawa Center, poor Arab children constitute about 50% of the total poor children in the country, although they number less than 30% of the total child population of the State. The percentage of poor Arab children amounts to 63% of all Arab children, while the total number of poor children among all children in the country amounts to 35.2%. Only 5 years ago, only 50% of Arab children lived below the poverty line.⁷⁷

77. Amin Fares, *The Arab Citizens' Share in the 2007 State Budget: According to the Approved Budget [Hebrew]*, Mossawa Advocacy Center for Arab Citizens in Israel (2007), p. 6.

4.

Classification of Citizens on a National-Ethnic Basis

The question of the legal-formal definition of the State is central to any discussion of the legal status of the Arab minority in Israel, and it is doubly important today, in light of the debates concerning the wording of the future constitution in Israel. The dominant approach today in the public Jewish-liberal dialogue on the subject of the constitution appears to be the one that seeks to establish the definition of the State as “Jewish and democratic” and to improve in parallel the socio-political status of the Arab citizens by securing their collective rights in one way or another. This approach might have improved the present status of the Arab minority in Israel to some extent, but it cannot achieve full equality between Jews and Arabs in Israel.

Even those supporting in principle the definition of the State as a Jewish state may express reservations about including this definition in the constitution or in any official legislation of the State. Thus, for instance, Prof. Ruth Gabison believes that:

A mistake was made by the legislator when it included this description in the Israeli laws, on both the material and the institutional level. At the material level - it is not justified to give the State an excluding description,

which immediately creates a problem of identity and belonging for all non-Jewish citizens of the State. At the institutional level - including this description in the laws could lead to fundamental ideological issues being decided by the courts, instead of being part of the broader political dialogue.⁷⁸

Likewise, Prof. Baruch Kimmerling, supporting in principle the definition of the State as “a Jewish State and the state of all its citizens,” also believes that such a clause appears to be absolutely superfluous, and that “if an addition to this definition disturbs many Jews for some reason, then the simplest solution is to omit this limited and *a priori* discriminating definition altogether from the laws and the constitution.”⁷⁹

Indeed, any legal-formal definition of the character of the State, whether in the constitution or in any other law expressly biased in favor of the majority group, creates in itself a fundamental and ideological obstruction to achieving material equality for the minority group. The definition biased in favor of the majority group is a discriminating one, paving the way to creating discrimination in other areas of life.⁸⁰ It enables the creation of a social, economic, cultural and political hegemony

78. Ruth Gabison, “Legislative Changes,” the Website of the Israel Democracy Institute, document dated September 14, 1999, <http://www.idi.org.il/hebrew/conflict.asp?id=1633>

79. Baruch Kimmerling, “Constitution or Prostitution,” *Adalah Newsletter* vol. 9 (2005)

80. Yousef Jabareen, “Undesirable Neighbors - The Story of Three Palestinian Women,” *Adalah's Review* No. 3, 2002. For a comprehensive discussion on the issues of the collective rights of the Arab minority within the framework of the Jewish State see: Ilan Saban, “The Option of the Boundary of the Zionist Paradigm,” *7 Ways - Theoretical Options for the Status of Arabs in Israel* (Sarah Ossatzky-Lazar et al. eds., 5759-1999) (Hebrew).

of the majority group over the minority group, thus actually perpetuating the inferior status of the Arab citizens, with all the severe social implications accompanying such a status.⁸¹

81. Formal egalitarian definitions proposed by parts of the Arab public include: "The Multi-Cultural and Democratic State"; "The State of All its Citizens"; "The State of all its Nationalities"; "The Jewish, Arab, and Democratic State"; "The State of the Jewish People and its Arab Citizens." With respect to the expression "the State of All its Citizens," see Prof. Heshin's statement in Leave for Civil Appeal 2316/96, *Issacson v. The Registrar of Parties*, P D 50(2) 529, in which the court denied Izakson's appeal on the decision by the Registrar of Parties to register the "Arab Movement for Changing":

Could the statement that the State of Israel is "the State of All its Citizens" be commensurate with its being the "Jewish State," or could that statement immediately deny the existence of the State of Israel as a Jewish State? In our opinion, the statement that the State of Israel is the "State of All its Citizens" does not deny the existence of the state of Israel as a Jewish State. Could anyone present the argument that the State of Israel is not the state of all its citizens? Is it possible to argue that the State of Israel is the state of only some of its citizens? It is a basic principle of democracy: equality of the citizens among themselves [...] Indeed, all citizens of Israel - both Jews and non-Jews - are "shareholders" of the State, and the statement that the State is the "State of All its Citizens" does not detract from the State's being a Jewish state, and if you will: the State of the Jewish People. We shall remember and know - how could we forget - that the Jewish People never had and does not have - any other state except the State of Israel, the Jewish State. However, within the state, all citizens of the state have equal rights, and in our opinion it will not be right to stipulate that whoever says that the State of Israel is the "State of All its Citizens" immediately denies the existence of the State as a Jewish state. [ibid. Paragraph 23 of Judge Heshin's judgment].

Compare with the introduction to the South African Freedom Charter of 1955, stating:

We, the people of South Africa, declare for all our country and the world to know: That South Africa belongs to all who live in it, black and white.... And that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities.

See: Nelson Mandela, *Long Walk to Freedom* 150 (Boston: Little, Brown, 1994) The Freedom Charter is one of the most important historic documents in the struggle against Apartheid in South Africa. The Charter was adopted in 1955 by the People's Congress (a coalition which united all the black groups in the country, as well as the progressive white forces), and outlined the principles on which the struggle for the new South Africa was based, which also outlined the constitution of the new state. See: Albie Sachs, "Towards a Bill of Rights in a Democratic South Africa" 6 *South African Journal on Human Rights* 9-10 (1990); Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995).

Defining the State as a Jewish State and/or as the State of the Jewish People officially classifies Israeli citizenship under two groupings: first class citizenship, applicable to the citizens to whom the State belongs, compared with second or third class citizenship, applicable to citizens excluded from the definition of the State. This classification places the “non-Jewish” citizens in an inferior position compared with their Jewish colleagues in principle, not only in practice.⁸² This classification is even sharper in light of the extensive legislation we described above, giving real expression to the definition of the State as a Jewish State by granting many privileges in central areas of life to the Jewish citizens and only to them.⁸³

In this light, it would appear that the damage to Arab pupils

82. For a broad discussion on the argument concerning the normative classification in Israel and its implications for the Arab minority, see:

Yousef T. Jabareen, “Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States,” 141-153 (Doctoral Dissertation, Georgetown University Law Center, 2003).

83. A similar discussion took place in the U.S. on the status of the African-American minority in the period that preceded the Civil Rights Movement, in the 1950s and 1960s. Many laws enacted in the racial segregation period in the U.S., mainly in the southern states, expressed formal racial classification, which separated whites from blacks. This classification excluded in practice the African-American minority from the centers of social, economic and cultural power in American society. Today there is consensus among all members of the legal profession in the U.S. that formal classification in law in favor of the majority group is not only unconstitutional, but is also morally repugnant. Their principal argument is that official classification in the legislation establishes a racist ideology, according to which blacks are inferior to whites and are not part of the American vision of an egalitarian society. It appears to us that this argument is also valid, *mutatis mutandis*, for the Arab minority in Israel. See: Kenneth Karst, *Belonging to America: Equal Citizenship and the Constitution* 151 (Yale University Press: New Haven, 1989); Kimberle Williams Crenshaw, “Race, Racism and Retrenchment: Transformation and Legislation in Antidiscrimination Law,” 100 *Harvard Law Review* 1331, 1377 (1988).

and students, for instance, does not derive only from the fact that the State invests in their education less funds than in the education of their Jewish colleagues, or because the State denies their right to cultivate their identity and national heritage in the educational system,⁸⁴ but due to the fact that they learn in an educational framework that sees them as citizens inferior to their Jewish colleagues.⁸⁵ Equality means first and foremost that the Arab pupils and students can look their Jewish colleagues straight in the eye, and say that the State is theirs no less that it is that of their colleagues. The Arab pupils and students can say that today about their homeland but certainly not about their State.

It is impossible to ignore the fact that a considerable portion of the Jewish public uses the definition of the State as the Jewish State in order to justify an attitude of discrimination and exclusion against the Arab citizens. In the well-known Qa'adan affair, the State backed the position of the town of Katzir, which forbade the lease of land in the town to the Qa'adan family due to its national extraction, when the family was told expressly that the town was designated for Jews only. The respondents in that affair construed the term "the Jewish State" in a manner that justified pushing the Arab citizens out of the town. Although the court rejected this construction at the end of the legal proceeding, it does not mean that one should take

84. Yousef Jabareen: "Education with Identity," *Adalah's Review* 1 (1999) 26.

85. Yousef T. Jabareen, "Law and Education: Critical Perspectives on Arab Education in Israel," *American Behavioral Scientist* 49(8): 1052-1074.

lightly the problem inherent in the State's position. The fact is that until today, more than six years after the judgment was rendered, the Qa'adan family has not managed to benefit from its result in practice. Various interpretations, therefore, can be placed on the term "the Jewish State," which will vary with the position of the interpreting entity. Even the interpretation of the court today could change tomorrow.

Accordingly, it could be argued that even the definition proposed for Israel as a "Jewish and democratic state" or as "the State of the Jewish People,"⁸⁶ in which "all are equal before the law," and "nobody is discriminated against for reasons of religion, country of origin, nationality and race,"⁸⁷ does not add much to the existing state of affairs. Are not these the official definitions even today with respect to the Arab minority? Compare in this matter the words of Justice Barak in the Qa'adan case.⁸⁸

86. See Alternatives A and B in the section opening the first chapter (Basic Principles) of the proposed constitution. See also Section 6(e)(1)(a) in the fourth chapter.

87. See Alternatives A and B in the section opening the first chapter (Basic Principles) of the proposed constitution. See also Section 6(e)(1)(a) in the fourth chapter.

88. The HCJ 6698/95, *Qa'adan v. the Israel Land Administration*, PD 54(1) 258. The case of Qa'adan very quickly became the symbol of the weakness of the egalitarian legal rule against political and social pressures exerted by the majority group. More than six years have passed since the judgment was rendered, and more than 11 years since Iman and Adel Qa'adan and their four daughters applied to live in the town of Katzir, and they have not yet succeeded in exercising their right, in accordance with the legal decision on paper, to go and live in the town. The insight emerging from this affair is not simple: the conduct of the State authorities in the matter of Qa'adan makes a laughing-stock of the court's declarations concerning equality for Arab citizens. All the more so when the court takes the trouble to limit its decision to the specific circumstances of the case before us, and even that specific relief has not yet been put into effect. For a more comprehensive discussion on the judgment, see: Alexander (Sandy) Kedar, "The Realms of Weakness: Israeli Law and the Ethno-National Space in Israel," *Medina Ve-Hevra* 4 (5764 - 2004) 845 (Hebrew).

Jews and non-Jews are citizens with equal rights and duties in the State of Israel. [...] As soon as the State was established, it instituted equality among its citizens. The State of Israel is a Jewish State in which minorities also live, among them the Arab minority. Each of the members of the minority living in Israel enjoys absolutely equal rights. True, a special key for entering the house was given to the Jewish People (see the Law of Return, 1950). But when a person is in the house as a lawful citizen, *they enjoy the same equal rights as do all other members of the household* [emphasis added].

The result is that these constitutional definitions perpetuate the ethnic classification described above, and fixate the conceptual duality in the attitude of the Israeli law to the two nations in the State: a collective approach in its attitude to the Jewish majority compared to an individual approach in its attitude toward its Arab citizens.

5.

The Collective Rights of the Arab Minority

Before commencing a discussion on the subject of collective rights, we should emphasize that the Arab minority in Israel has a vital interest in attaining full constitutional protection of individual rights (equal citizenship rights). Individual rights are the universal rights to which every person is entitled by virtue of their citizenship in the state, and they are divided into two types. The first type consists of freedoms, also known as civil and political rights,⁸⁹ i.e. the civilian's liberty to perform any acts or deeds without intervention or disturbance on the part of the State; freedom of expression, freedom of association, freedom of movement, religion and conscience, and so on. The other type is claim rights, assuring the citizen decent conditions of existence: the right to living accommodation, education, occupation and the like. Claim rights require the State to enable the citizen to enjoy their rights, the majority of which

89. See: International Covenant on Civil and Political Rights, 1966.

belong to the category known as “social, economic and cultural rights.”⁹⁰ Needless to say, citizens’ rights must be implemented equally, and when the criteria for granting these rights are based on belonging to a particular group - that is invalid.⁹¹

Collective rights, as distinct from individual rights, derive from group differentiation, distinguishing the minority group from the majority group. Collective rights require initiating special measures to be applied on a permanent basis in order to assure appropriate protection of the unique - and fragile - group identity of the minority group and its collective interests.⁹² These rights depend on the group - they are a kind of inherent right conferred on the minority group due to its uniqueness as a group.⁹³ Their aim is to

90. See: International Covenant on Economic, Social and Cultural Rights, 1966. For a discussion on the status of these rights in Israel see: *Economic, Social and Cultural Rights*, Yoram Rabin and Yuval Shani (eds.), Ramot Publishing House, Tel Aviv. (Hebrew).

91. Equal application of rights will sometimes require initiation of a temporary policy of affirmative (preferential) action, the aim of which is to benefit those suffering from discrimination (in a manner that appears to detract from equality) in order to achieve substantial equality and to close gaps created as a result of such discrimination.

92. See Ilan Saban, “The Collective Rights of the Arab-Palestinian Minority: What they are, What they are not, and the Taboo Area,” *Iyunei Mishpat* 26 (5762), 241 (Hebrew).

93. See Chapters 6-7 in the breakthrough book by Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995).

See also: Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001).

But compare: Susan M. Okin (with respondents), “Is Multiculturalism Bad for Women?” (Joshua Cohen, Matthew Howard and Martha Nussbaum - eds., Princeton University Press, 1999), discussing the profound conflict that might be created between women’s rights and collective rights of conservative groups who discriminate against them.

achieve material equality for the group's members and to grant them appropriate legal protection, both on the individual level and the collective level. These rights are the condition for achieving overall equality.

What, therefore, are the collective rights to which the Arab minority is entitled, which must be considered in the process of establishing an overall constitutional arrangement in the State? When examining these rights it is necessary to re-emphasize the principle we opened with: The principal value-based grounds on which the claim for granting comprehensive collective rights to the Arab-Palestinian minority is founded in the fact that the Palestinian population is indigenous, and its special historic relationship with its native land - an emotional, national, religious and cultural relationship. In other words, the "nativity" of this population is foundational in formulating the status and rights of the Palestinian minority in Israel, from both the moral and international legal aspects.

This chapter seeks to indicate ten primary levels on which it is necessary to take action in order to formulate norms for collective rights. These levels are inter-related, but also overlap to a certain extent. For the sake of clarity, we shall relate below to each level separately:

1. Official recognition of the Arab minority as a national minority and as an indigenous population. A constitution must recognize the Arab-Palestinian minority as a national minority whose distinct collective identity should be protected through historic, linguistic, religious, and cultural rights. A constitution must also expressly recognize the indigeneity of the Palestinian population in Israel and its special relationship with its native land and the historical rights therein.⁹⁴

2. Civil and national equality. A constitution must expressly recognize the right of the Arab-Palestinian collective in Israel to full equality of rights, on both the civil-individual and the national-collective basis.

3. Substantial bilingualism. Arabic is a constitutive component in the national and cultural identity of the Arab minority. The importance of language is doubly important when it comes to the language of an indigenous population. True bilingualism requires equality between Hebrew and the status of Arabic as an official language in all areas of the public sector including, but not limited to governmental documents and forms, educational material, naming of road signs and buildings, recognition of cultural icons, etc. It is necessary to ensure access to Arabic in all public authorities just as is the case for Hebrew, and in the same quality. The

94. Amal Jamal, Note 9, *supra*.

bilingual situation existing today in Canada under the Canadian constitution (English and French) could be a source of inspiration for the desirable situation in Israel.⁹⁵

4. Self-Administration in educational, religious and cultural institutions. The Arab-Palestinian minority must be granted the right to self-steering (self-government) of the Arabic educational, cultural, and religious institutions, similar to the current status of the Hebrew culture, Orthodox education system, and Christian and Jewish religious institutions. Granting self-government rights to the minority group will assure comprehensive and unlimited development of the unique identity and collective experience of the members of the minority group, including in matters of education, religion, culture, communication, planning and welfare. Educational self-administration must also assure the possibility of higher education in Arabic in Israel, while the right to cultural self-administration will

95. See Articles 16-23 in the Canadian Charter of Rights and Freedoms. Article 16(1) stipulates generally that “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the parliament and government of Canada”.

In the 1970s and 1980s, Canada made a comprehensive conversion to bilingualism, including all governmental and public service authorities. See Ilan Saban: *The Legal Status of Minorities in Split Democratic Countries: The Arab Minority in Israel and the French-Speaking Minority in Canada*. Chapter 5 (Theses for obtaining a doctorate in law, the Hebrew University, Jerusalem, 2000); Saban A and Amara M.: “On Collective Rights and Reality: The Status of the Arab Language in Israel,” *State and Society*, Vol. 4 (2005) 885-909 (Hebrew). Magnet, J.E., *The Official Languages of Canada* (Cowansville: Editions Y. Blais, 1995).

include the assurance of public funding for Arab cultural institutions, media, museums, and the like, and will make it possible to cultivate and enhance the richness of Arab culture in Israel. Needless to say, the Jewish majority in Israel enjoys these rights in practice due to their being an integral part of the political self-determination that the Jewish majority enjoys in the State.

5. Appropriate group representation in governmental institutions and decision-making bodies. The purpose of appropriate representation of a minority group is to assure full democratic participation of this minority group as a whole in the administration of the State and in determining the content and principles of social justice implemented in it, both in the present and the future. Such appropriate representation must prevail over any establishment exclusion.

Appropriate and fair representation will exist only when the following requirements are fulfilled:

- (a) It is necessary to assure that the number of Arab representatives in any public institution will be no less than the general ratio of the Arab population in Israel in general or in a relevant region in particular.

- (b) In the majority of the aforementioned institutions - especially those providing senior management

positions - institutionalized mechanisms of consultation with the Arab public leadership must be implemented in order to assure that the Arab representatives in the institutions will truly represent the interests of the Arab public (authentic representation rather than token representation).

(c) Real influence must be assured for the Arab representatives on resolutions adopted in public institutions; otherwise they may find themselves always on the losing side, being a numerical minority. Such real influence can be enabled by means of granting a veto right to the Arab representatives as part of the decision-making process on those matters that have a profound effect on the Arab population.⁹⁶

As part of the normative protection of the right to appropriate representation for the Arab minority, it is necessary to guarantee official recognition of the special status of the representative entities of this minority and its collective institutions, presently headed by the High Follow-up Committee for Arab Citizens in Israel.

96. For an interesting comparative discussion on what has been done in this field in Canada, see Ilan Saban and Scot Streiner: "On Two Types of 'Appropriate representation': Theoretical Framework, the Canadian Example and an Initial Comparison with Israel," *Avoda, He'erah Umishpat* 11: 247-273 (2005) (Hebrew).

6. Special allocation of material resources on a collective basis. Arab citizens constitute approximately 20 percent of the State's population, but due to extended historical discrimination, their socio-economic needs have increased, and exceed their ratio of the population. Special allocation of material resources should give an appropriate response to these needs, i.e. it should be based on a policy of affirmative action, which will compensate the Arab population for extended discrimination. This also applies to allocation of funds and budgets, as well as land and housing. This special material allocation should significantly improve the living conditions of the Arab citizens. In other words, the State must change the system of allocating its material resources in a manner that responds to the requirements of both distributive justice and corrective justice.⁹⁷

7. Appropriate expression in the State's system of symbols. The state's symbols, flag and anthem are emotionally charged public resources, and have a special effect on the status of the minority community. Therefore, it is necessary to take strict care of the principles of partnership and fairness in the framework of the State's system of symbols, as well. The State must give appropriate expression to the presence of Arab citizens in Israel and

97. Yousef T. Jabareen, "Law, Minority and Transformation: A Critique and Rethinking of Civil Rights Doctrines," 46 *Santa Clara Law Review* 513, 513-534 (2006).

their historic place in the country. The system of symbols adopted by the State should reflect the equality of its attitude towards both its Jewish and Arab citizens.

8. Equality and fairness in immigration and citizenship.

Granting rights to immigrate into the State and obtain citizenship in it are part of the State's major resources, and they have a significant effect on the status of the Arab minority in Israel. Allocating immigration and citizenship quotas expresses the State's strength, and it must exercise this strength fairly, justly and equally.

9. Historic rights. The principles of corrective justice require that a response be given to the policy of disinheritance from land instituted against the Arab population since the establishment of the State, the results of which weaken it to this day. Disinheriting the Arab residents of their land is an open wound for the Arab minority in Israel. Therefore, the State must formulate a move that will include official recognition of the Arab-Palestinian disaster of 1948, as well as an official historical apology in the name of all past governments for the injustice and discrimination.

In this context, the State must respect the rights of some 25% of the Arab citizens that became internal refugees in their country after 1948 including their right to return to their original communities, as well as guarantee Arab

citizens of the Negev ownership over their lands. Moreover, an appropriate deliberation of the historic rights of the Arab minority must also include the issue of the Palestinian refugees who were expelled from their ruined homes and villages and disinherited from their property - an issue that will be finally settled by a peace agreement or permanent arrangement between the two parties of the conflict.

10. Protection of the special relationship between the Palestinian people and the Arab nation. A constitution should guarantee the right of the Palestinian population in Israel to maintain and cultivate, voluntarily and freely, special relationships - familial, cultural, social, economic and the like - with the other members of the Palestinian people, as well as with the whole Arab nation.

6.

Conclusion

The collective rights outlined above are founded on the basic principle of full and equal participation of the Arab citizens in the State's public resources, both as individuals and as a group. The exercise of these rights requires a process of rebuilding the political and social institutions in the State, which will assure a sense of belonging for the Arab minority and will provide equal opportunity for all.

Public resources belong to all citizens of the State, and therefore they should be allocated equally and fairly. True participation in public resources must apply to all the State's resources, whether symbolic (flag, symbol, anthem), political (appropriate and effective representation in the decision-making centers) or economic (land and budgets). True partnership must also be expressed in the fields of language, culture and education in Israel; for example, the

language in which the State addresses its citizens (government ministries, public signs), and the way the academy and research is produced and carried out. Only material and comprehensive partnership that can pave the way to true equality, will constitute the cornerstone for building an equal and just society, and will be the basis for the inclusive constitution to which we should all aspire.

Equality is not just a basic, legal or democratic principle, but a social-moral value of the highest order. The aspiration to equality as a basic social value cannot be exhausted by the assurance of equality-based rules. It should guarantee equal living conditions on a practical basis as well. Accordingly, an in-depth understanding of the status of the Arab minority in the Israeli legal system requires critical reference not only to the rules of law affecting it, but also the socio-political reality, as well as the interaction between those rules of law and that reality.

Substantial equality should begin from the basic legal norms in the State. Equal legal norms are certainly not a sufficient condition, but it is a necessary one. This condition cannot yet be seen in the basic legal norms in Israel.